

August 21, 2024

Town of Stockbridge
50 Main Street
PO Box 417
Stockbridge, MA 01262

Re: Housatonic Water Works Company
D.P.U. No. 23-65

To Whom it May Concern,

I write concerning the Department of Public Utilities' ("DPU") recent order ("Final Order") concerning the Housatonic Water Works Company ("Company").¹

As you know, just over a year ago, the Company petitioned the DPU to raise the rates that it charges its customers for service while beginning a capital improvement plan to address ongoing and longstanding water quality issues with service delivery. The Towns of Stockbridge, Great Barrington, and West Stockbridge (the "Towns") intervened in that proceeding, as did the Office of the Massachusetts Attorney General ("AGO"). Several months ago, the Company and the AGO negotiated a settlement of the proceeding, which they presented to the DPU for approval, and to which the Towns objected. That Final Order that proposed settlement over the Towns' objections.

I was asked to memorialize the considerations relevant to Stockbridge's opinion not to appeal the Final Order. This letter sets forth my analysis. In brief:

- An appeal would, in the first instance, be to the Supreme Judicial Court ("SJC") under G.L. c. 25, § 5. There is a good likelihood that the SJC would order the appeal transferred to the Appeals Court. An appeal would likely take a year or longer and would cost in excess of \$10,000.²
- The court's standard of review would be deferential to the DPU's decision-making and confined to the administrative record before the DPU. It would

¹ Order on Joint Motion to Approve Settlement Agreement dated July 31, 2024.

² This number is presented as a floor, and it could be significantly higher. Predicting litigation costs can be difficult and can vary depending on many factors.

be Stockbridge's burden to demonstrate that the DPU erred in a way that was not a reasonable exercise of that discretion. Because of this high burden, the likelihood of succeeding in an appeal would be low.

- The Final Order leaves open alternative avenues for Stockbridge to voice its continuing concerns about the Final Order. In particular, the Company is required under the Final Order to submit future compliance filings to the DPU, which Stockbridge can (and should) review and can comment on, as necessary. Also, should water quality woes persist, Stockbridge (or Company customers) could seek a DPU investigation of the Company.

Each of these considerations is discussed in more detail, below.

Background

The Company provides water service to 757 customers in Stockbridge, Great Barrington, and West Stockbridge. In a petition dated June 23, 2023 ("Petition"), the Company requested DPU approval of a general increase in rates, including to finance the capital costs for certain projects intended to correct ongoing and longstanding water quality issues with the water the Company delivers to its customers. The Petition sought approval of a 112.70% increase in the Company's total revenues and estimated the capital cost for improvements at approximately \$4.5 million.

Following settlement discussions, the AGO (representing ratepayers) and the Company agreed on a proposed settlement. A description of the proposed settlement is included in the Final Order and copies of the same can be found on the DPU's online file room (<https://eeaonline.eea.state.ma.us/DPU/Fileroom/dockets/bynumber>) under docket 23-65.

At a high level, that settlement authorized graduated rate increases tied to 5 "Phases."

Proposed Rate Increases and Associated Capital Projects				
Phase	Date of Increase	Amount of Increase	Increase Over Prior Year	Capital Project
1	August 1, 2024	\$129,153	18.00 %	New Chlorine Intake to Address Haloacetic Acids
2	August 1, 2025	\$336,043	39.68 %	Manganese Filtration System
3	August 1, 2026	\$86,693	7.33 %	Great Barrington Fire District Interconnection
4	August 1, 2027	\$171,050	13.47 %	Water Storage Tank
5	August 1, 2028	\$180,240	12.51 %	Mains Replacements

The first Phase, which includes a new chlorine intake, is intended to stabilize the Company's financials for borrowing purposes, and the four subsequent Phases are meant to support certain capital projects. The Final Order authorizes the Company to move forward on Phases 1 and 2, with the Manganese Filtration System in Phase 2 deemed to be an investment that may address some or all the Company's ongoing water quality issues. The final three Phases are contingent on approval by the Towns at a later date.

For the proposed rate increase in each of the Phases 2 through 5 to take effect, the Company must first complete the proposed capital project and make a compliance filing to the DPU with supporting documentation. Each of those compliance filings is subject to a prudence review by the DPU. Additionally, financing—in the form of long-term borrowing—for capital projects requires a separate petition and approval from the DPU.

Each of the Towns objected to this settlement proposal, with Stockbridge submitting written comments in opposition. Nonetheless, on July 31, 2024, and over the objection of the Towns, the DPU issued its Final Order approving the proposed settlement.

Discussion

Great Barrington and West Stockbridge have elected to appeal the Final Order. Stockbridge, after careful consideration of the relevant factors, declined to do so. That decision resulted from a careful weighing of the length and cost of an appeal, the low probability of succeeding in such an appeal, and other available avenues through which Stockbridge can more effectively continue to voice its concerns with the Company and the settlement.

The DPU's Final Order is appealable to a Single Justice of the Supreme Judicial Court ("SJC"), pursuant to G.L. c. 25, § 5. Over the past several years, the SJC has usually ordered such cases transferred to the Appeals Court and I expect the other Towns' appeal will be handled similarly.

The appeal process, in either court, will likely take more than a year and exceed \$10,000, potentially costing substantially more. In either court, appeals are highly structured and governed by the Massachusetts Rules of Appellate Procedure. Had Stockbridge participated in the appeal it would have been responsible, with the other Towns, to:

1. Prepare a "record appendix" comprised of the DPU's record of its proceedings and submitting the same to the court.
2. Research and write a written "Opening Brief," setting forth its legal arguments with substantial detail and citations to the record appendix.
3. Analyze the DPU's and Company's Briefs in opposition.
4. Prepare a shorter "Reply" Brief responding to the DPU's and Company's arguments; and
5. Prepare for and participate in oral argument before the court.

Appeals are neither short nor inexpensive and appeals from DPU decisions, which are supported by extensive agency records, are more complex than the average appeal.

The appeal also has a low likelihood of succeeding. This is due, in most part, to the highly deferential standards under which courts review DPU decisions.

First, judicial review of the DPU's decision-making is limited to the DPU's administrative record. No new evidence may be submitted to the court and the court does not "rehear" any evidence or witnesses. Thus, the Towns are limited to the evidence and arguments that were previously presented and cannot introduce new ones during the appellate process.

Second, the Towns bear the burden of proof to show that the Final Decision was in error. That burden is a heavy one. The other Towns will have to show that the DPU committed an error of law, acted arbitrarily or capriciously, abused its discretion, or made a decision that is unsupported by substantial evidence in its record. Additionally, the other Towns will have to contend with the principle that courts will defer to the DPU's reasonable exercise of its own judgment and expertise.

It is unlikely that those standards can be met on this record. The Final Order was based on a negotiated settlement between the AGO and the Company. The purpose of this settlement is to create a path forward whereby the Company will invest in certain capital infrastructure to address its longstanding water quality and service delivery issues. While Stockbridge and the other Towns may disagree with many of the provisions of that settlement, as well as the rates charged customers, the Company's rate of return on its own investment, and other items, that bar disagreement is not enough to win on appeal. Rather, the other Towns having taken the appeal will now have to convince a court that the DPU's decision to adopt that proposed settlement was so unreasonable that it failed to meet the standards just discussed. It is unlikely that a court would do so.

Thus, in considering an appeal, Stockbridge needed to balance this low likelihood of success against the cost of pursuing the appeal. An appeal would exceed \$10,000 in cost, factoring in court filing fees, preparation of appellate court briefs (which are lengthy and technical documents), compilation of the court's "record appendix" of supporting materials, legal research, and preparation for and participation in an oral argument before an appellate court. It should also be noted that the Company recoups its own litigation costs as part of its rates (as an expense), meaning that ongoing litigation (including the DPU proceeding that has already occurred) also impacts the rates that the Company's customers must pay. Accordingly, Stockbridge also considered the fact that pursuing an appeal with a low likelihood of success could have further negative impacts on Company customers by increasing the Company's expenses.

As referenced earlier, and notwithstanding its decision not to appeal, Stockbridge still strongly believes that the Final Order is flawed. In addition to those issues identified in the Town's comments on the settlement, prepared by Selectman White on May 30, 2024, Stockbridge is concerned with certain additional aspects of the Final

Order. First, there is no guarantee that the Company's investment in manganese treatment technology will solve some or all of the Company's water quality problems. The Final Order, however, makes no allowance for this contingency. The Fire District Interconnection should be a lower priority than other, later phases, such as pipe replacement, as it does nothing to increase water quality. While the Final Order requires the Company to "work cooperatively" with the Towns to investigate grants, this unfairly puts a burden on the Towns to help identify and secure grant funding, which should be the Company's responsibility. And there are others.

Stockbridge's decision not to appeal the Final Order does not mean that Stockbridge will play no further role in the settlement. To the contrary, the Final Order provides multiple future avenues for participation. Most significantly, after the Company puts a capital project into service in each Phase of the Final Order, it may not increase its rates until after submitting a compliance filing with the DPU and undergoing a prudence review. Each is an opportunity for Stockbridge to carefully scrutinize the Company's actions and to submit to the DPU comments concerning the Company's efforts. Stockbridge can and should review each of those compliance filings and, should it be dissatisfied with the same in any form, lodge its objections with the DPU. Similarly, when the Company files financing petitions with the DPU in support of its projects, Stockbridge should scrutinize and respond to those filings, as appropriate. And should water quality or other service issues fail to improve, despite the Final Order, or other issues arise, Stockbridge may request that the DPU investigate those issues pursuant to its general supervisory authority over water companies.

Additionally, the Final Order also designates that Phases 3, 4, and 5 are subject to the approval of the Towns. Thus, Stockbridge will have further, future opportunity to review and determine whether those three Phases and their associated rate increases are necessary.

Respectfully,



Bryan Bertram