

STATE OF NEW HAMPSHIRE
BEFORE THE
PUBLIC UTILITIES COMMISSION

Abenaki Water Company and Aquarion Company

Petition for Approval of the Acquisition of Abenaki Water Company
by Aquarion Company

Docket No. DW 21-090

Motion for Rehearing

NOW COMES the Office of the Consumer Advocate (“OCA”), a party in this docket, and moves pursuant to RSA 541:3 and N.H. Code Admin. Rules Puc 203.33 for rehearing of certain determinations made by the Commission in its secretarial letter of May 27, 2021. In support of this Motion, the OCA states as follows:

This proceeding arises under RSA 374:33 and RSA 369:8, II. RSA 374:33 requires Commission approval of public utility ownership changes, based upon a determination that the proposed transaction is “lawful, proper, and in the public interest”. Paragraph II of RSA 369:8 provides for expedited approval of RA 374:33 transactions in certain circumstances. Relying on a 1999 Order of the Commission, the Petitioners took the position that the Commission must consider the proposed transaction under RSA 369:8, II by applying a “no net harm” standard – i.e., that the acquisition of Abenaki Water Company by Aquarion Company must be approved if the Petitioners have demonstrated there will be no net harm from the

ownership change to the customers of Abenaki. At the prehearing conference, conducted on May 14, 2021 by Hearings Examiner Wiesner, the OCA took the position that a “net benefits” standard should apply – i.e., that the Petitioners should be required to demonstrate the transaction will result in net benefits to Abenaki customers.

Neither the Petitioners nor the OCA requested an opportunity to brief this issue. Nor did the Hearings Examiner mention such briefing in his report and recommendation of May 18, 2021. Nevertheless, in its May 27 secretarial letter adopting the procedural schedule agreed to by the parties, the Commission determined *sua sponte* that briefs on the “no net harm” vs. “net benefits” issue “would assist the Commission in understanding the OCA’s argument.” Accordingly, the Commission determined that briefs in support of the “net benefits” test should be filed on or before June 4, 2021 and that briefs in opposition to the “net benefits” test should be filed a week later, by June 11, 2020. All briefs were limited to “no more than 5 pages in length.”

N.H. Code Admin. Rules Puc 203.32(a) provides in relevant part that the Commission may, on its own motion, “allow parties to submit briefs at any point in an adjudicative proceeding if the commission determines that such briefing would assist the commission in its determination of the issues presented.” The OCA has no concerns about the Commission’s determination in the secretarial letter that briefs would be helpful in these circumstances; we will be pleased to submit a written argument on this point on behalf of the residential customers of Abenaki.

However, the OCA is concerned about a briefing schedule that confers an advantage on proponents of the “no net harm” standard by requiring “net benefits” proponents to file first and then allowing “no net harm” proponents to respond a week later, without providing a corresponding opportunity for “net benefits” proponents to respond to the “no net harm” parties. It is the respectful suggestion of the OCA that such a briefing schedule contravenes the requirement in Rule Puc 203.32(c) that the Commission allows parties to submit briefs in rebuttal or reply “when such a sequential schedule is necessary to assure due process, fairness or full discussion of the issues presented.”

The OCA respectfully reminds the Commission that pursuant to Rule Puc 203.25 the burden of proof as to whether the transaction warrants approval under either RSA 374:33 or RSA 369:8, II rests with “the party seeking relief through a petition.” Thus it is especially unfair – and potentially inconsistent with due process and fundamental fairness– for the Commission to set up a briefing schedule that effectively confers an advantage on the Petitioners with respect to the key question presented by this docket in its present posture.

“An agency, like a trial court, must follow fair procedures and provide due process.” *Appeal of Morin*, 140 N.H. 515, 518 (1995) (citation omitted). “Further, although administrative agency has discretion with respect to managing its proceedings the agency must follow its own rules and regulations while complying with its enabling statute “in both letter and spirit.” *Id.* at 518-19 (citations

omitted). The asymmetrical briefing rubric adopted by the Commission in this proceeding is inconsistent with these principles.

As a means of avoiding unnecessary appellate proceedings, RSA 541:3 authorizes the Commission to grant rehearing of any “order or decision” when “good reason for the rehearing is stated in the motion.” The OCA believes it has shown good reason here, and requests that the Commission either (1) revise the briefing schedule to provide for simultaneous briefing and reply briefing by all parties wishing to opine on the issue in dispute, or (2) provide the proponents of the “net benefits” standard an opportunity to respond to the “no net harm” pleadings presently scheduled for filing on or before June 11.

WHEREFORE, the OCA respectfully request that this honorable Commission:

- A. Grant rehearing of its May 27, 2021 secretarial letter by revising the briefing schedule specified therein, and
- B. Grant any other such relief as it deems appropriate.

Sincerely,

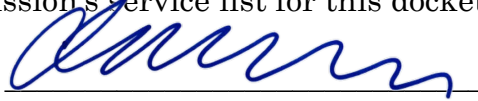


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June 1, 2021

Certificate of Service

I hereby certify that a copy of this Motion was provided via electronic mail to the individuals included on the Commission's service list for this docket.

A handwritten signature in blue ink, appearing to read "DKreis", is written over a horizontal line.

Donald M. Kreis