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

Brief of the Office of the Consumer Advocate

NOW COMES the Office of the Consumer Advocate ("OCA"), a party in this docket, and provides the following argument in support of its contention that to prevail in this proceeding, the Petitioners must show that the proposed transaction will yield net benefits to customers of the acquired utility:

The Petitioners bear the burden of proof in this proceeding – i.e., the burden of demonstrating pursuant to RSA 369:8, II that "the transaction will not adversely affect rates, terms, service, or operations" of Abenaki and that the transaction is "lawful, proper, and in the public interest" pursuant to RSA 374:33. The petition relies on a 21-year-old decision of the Commission, *New England Electric System*, Order No. 23,308, 84 NHPUC 502 (1999) (*NEES*), for the proposition that in making its determination the Commission must apply a "no net harm" test.

NEES does not establish that a "no net harm" test applies as a matter of law. The New Hampshire Supreme Court has never opined on this subject and it is only decisions of that tribunal that are binding upon the Commission. *See Appeal of Pub. Serv. Co. of N.H.*, 141 N.H. 13, 22 (1996) ("an administrative agency is not

disqualified from changing its mind" and Commission is "not preclude[d] from adopting a new paradigm based on changing concepts of what the public good requires"). Even if the Commissioners were inclined to treat decisions of their predecessors as persuasive if not binding authority, the reality is that the "no net harm" precedent has the shakiest of foundations. Its origin lies with *Eastern Utilities Associates*, Order No. 20-094, 76 NHPUC 236 (1991) (*EUA*), in which the Commission actually rejected a proposed utility acquisition and ruled that "application of either the 'no harm' or 'net benefit' standard leads us to the same conclusion." *Id.* at 253. In other words, "no net harm" as purportedly adopted in *EUA*, is actually *dicta*.

A careful review of the *NEES* opinion reveals that in that proceeding the parties and the Commission simply accepted the "no net harm" standard as a given. Although the OCA, as the only party opposing the utility merger at issue in *NEES*, attempted to draw a distinction between "a lack of proof that the public will be harmed by the proposed merger and a lack of proof that the public will be held harmless," *NEES*, 84 NHPUC at 508, nothing suggests the Consumer Advocate asked the Commission to apply a "net benefits" test. For its part, the Commission found that, apart from rate impacts, the transaction was "likely to provide certain benefits" and rejected arguments about harms. As to rates, the issue was recovery of acquisition premium – an issue the Commission explicitly did not resolve but left to a future rate case. *Id.* at 513. In other words, it is more than plausible to conclude that the Commission actually determined that the *NEES* transaction

would actually yield net benefits to ratepayers.[1] In every other decision ever issued by the Commission since the supposed adoption of the "no net harm" standard in connection with a transaction to which RSA 369:8 and RSA 374:33 applied, the agency either adopted a non-precedential settlement agreement or did not confront any parties arguing that "no net harm" was inconsistent with the statutes.[2]

Interpreting RSA 374:33 and RSA 369:8, II so as to require a showing by the Petitioners of net benefits to customers is consistent with the plain meaning of these statutes and comports with other established canons of statutory interpretation. The former statute requires the Commission to make a "public interest" determination, a phrase that has long been understood (in the context of utility law) as distinguishing between the public and "the private interests of the utilities." *See, e,g., Fed. Power Comm'n v. Sierra Pacific Power Co.*, 350 U.S. 348, 355 (1956) (construing Federal Power Act); *see also Appeal of Conservation Law Found.*, 127 N.H. 606, 654 (1986) (King, C.J., dissenting) ("The PUC is not 'an umpire blandly calling balls and strikes for adversaries appearing before it; the right of the public must receive active and affirmative protection at the hands of the

[1] In a separate opinion, concurring in part but dissenting as to the deferral of the acquisition premium issue, Commissioner Brockway stated that "[t]he plain language of [RSA 369:8] inculcates that a proposed merger need not show net benefits to gain approval." 84 NHPUC at 516. Obvioiusly, this conclusion is not part of the Commission's decision.

[2] *See Liberty Utils.*, Order No. 25,736 (2014) in DG 14-155; *Nat'l Grid USA*, Order No. 25,370 (2012) in DG 11-040; *Fairpoint Comm'ns, Inc.*, Order No. 25,129 (2010) in DT 10-025; *Union Tel. Co.*, Order No. 25,045 (2009) in DT 09-136; *Unitil Corp.*, Order No. 24,906 (2008) in DE 08-048; *Verizon New England, Inc.*, Order No. 24,823, 2008 WL 752272 at *2 ("the question of which such standard applies here is not one we need resolve"); *Nat'l Grid, plc*, Order No. 24,777 (2007) in DG 06-107; *Aquarion Water Co. of N.H.*, Order No. 24,691 2006 WL 3326670; *Wilton Tel. Co.*, Order No. 23,979 (2003) in DT 02-033; *Merrimack Cnty. Tel. Co.*, Order No. 23,961 (2002) in DT 02-009; *Hampton Water Works, Inc.*, Order No. 23,924, 2002 WL 976459; *Pub. Serv. Co. of N.H.*, Order No. 23,594 (2000) in DE 00-009; and *Energy North Nat. Gas, Inc.*, Order No. 23,470 (2000) in DG 99-193.

Commission"') (quoting *Scenic Hudson Pres. Conf. v. FPC*, 354 F.2d 608, 620 (CA2 1965)) and *Pub. Serv. Co. of N.H.*,Order No. 23,594, 2000 WL 1930708 at *53 (Brockway, C., dissenting) (characterizing "public interest" as a "higher standard" than "no adverse effect" where "the benefits and burdens of the proposed merger are in equipoise"). However, the requirement that a transaction must be in the public good or in the public interest is a higher standard. In other words, when the General Court instructs the Commission to decide whether something is in the public interest, it is taking the agency out of its usual role as arbiter between the interests of customers and shareholders and requiring an affirmative showing that the proposed result will be affirmatively good for the public – i.e., customers.

The addition of RSA 369:8 does not change the burden or quantum of proof. Rather, the plain meaning of that statute is to allow the Commission to make expedited determinations when there is self-evidently no question that the proposed transaction is in the public interest, e.g., when the acquiring company is clearly financially stronger and more technically competent than the acquired utility and there are no rate impacts, or when New Hampshire customers have no real interest at stake.[3] *See, e.g., Nat'l Grid Grp., plc*, Order No. 23,640 (2001) in DE 00-287 (using "temporary shell" company to complete transaction over which Commission would not otherwise have jurisdiction). When the General Court adopted the present version of RSA 369:8 via 1999 New Hampshire Laws Ch. 289, the

[3] As we noted at the prehearing conference, the pendency of a rate case for Abenaki makes such a determination of no rate impacts impossible in the circumstances of the instant proceeding.

Legislature could have but did not alter the underlying public interest standard, a choice that looms large for purposes the requirement to construe various applicable statutes "harmoniously" so as to effectuate the overall purpose of the statutory scheme and avoid absurd or unjust results. *See Krainewood Shores Ass'n v. Town of Moultonborough*, 2021 WL 787081 (N.H. Supreme Ct.) at *2 (citations omitted).

To decide otherwise would not only contravene the plain meaning of RSA 363:33 while transgressing the requirement to harmonize it with RSA 368:9, II. It would also be to allow ideology to triumph over dispassionate and responsible regulation, as the Commission arguably did in 1991 by invoking the *Lochner*-era concept of "corporate liberty." *See Eastern Utils. Assoc.*, 76 NHPUC at 252 (citing *Grafton Cnty. Elect. Light & Power Co. v. State*, 77 N.H. 539 (1915)).

WHEREFORE, the OCA respectfully request that this honorable Commission:

A. Conclude as a matter of law that the petitioners in this proceeding must make a showing of "net benefits" to customers in order to gain approval of the proposed transaction, and

B. Grant any other such relief as it deems appropriate.

Sincerely,

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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.

Donald M. Kreis