

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

Reply 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 reply to the Brief submitted on June 9, 2021 by the Petitioners:

As expected, the Petitioners contend that the Commission must apply a “no net harm” standard in reviewing the proposed acquisition of Abenaki Water Company by Aquarion Company. This is incorrect.

The Petitioners rely on a series of prior decisions of the Commission in which the agency either assumed that a “no net harm” standard applies, approved a settlement agreement in which the statutory standard was not in dispute, or endorsed a “no net harm” standard in dicta while rejecting a transaction that did not meet even a lesser standard. For the reasons stated in the initial brief of the OCA, reliance on these previous decisions is misplaced and the Commission essentially writes here on a blank slate.

In arguing to the contrary, the Petitioners invoke a Secretarial Letter issued by the Commission on October 13, 2017 in Docket No. DW 17-114, in which the

Commission approved the indirect acquisition of Aquarion Water Company of New Hampshire by Eversource Energy, parent company of the electric distribution utility Public Service Company of New Hampshire (PSNH). Even assuming that the Commission is bound or even guided by its prior orders, reliance on the DW 17-114 Secretarial Letter (or on Order No. 26,079 (2017), denying a motion to rehear the determinations made in the Secretarial Letter), is misplaced.

In DW 17-114, the Commission determined that approval of the Eversource/Aquarion transaction by the agency was *not required* pursuant to RSA 369:8, II. This was precisely the sort of utility acquisition that the General Court deemed worthy of expedited, *pro forma* approval pursuant to the statute.

Essentially, the post-merger Aquarion Water Company of New Hampshire was identical to the one that existed prior to the change in the utility's ultimate owners. Both the OCA and the Staff of the Commission acceded to the transaction. Merger opponents sought, without success, to interpose irrelevant issues (related to a Superfund site in the Aquarion service territory, the electric industry restructuring statute, and the provision of the New Hampshire Constitution disfavoring monopolies). In essence, this was a parent company swap, Aquarion Water Company of New Hampshire migrating from distant ultimate owners in Australia to much more proximate owners in the form of a well-established and reasonably well-regarded utility conglomerate based in New England with extensive electric operations in New Hampshire. By any reasonable measure, the only effect of this transaction from the perspective of customers of Aquarion Water Company of New

Hampshire was positive – a classic “net benefits” scenario. In these circumstances, as the Commission noted in its rehearing order, “the transaction can be deemed approved as filed by operation of statute” without the Commission taking any action. Order No. 26,079, *supra*, at 10-11.

The instant proposal is significantly different from the one that warranted swift and automatic approval in DW 17-114. Abenaki already has a parent company based in New England. Much more significantly, Abenaki is in the middle of a contentious rate case and in these circumstances it cannot be determined on the present and extremely limited record what effect the ownership change will have on the “rates, terms, service, or operation” of Abenaki in New Hampshire, the specific focus of the RSA 369:8, II inquiry. Although the Petitioners claim, at page 2 of their Brief, that they have “demonstrated that the proposed transaction would produce economic and noneconomic benefits for customers” and have therefore “exceeded” the RSA 369:8, II requirements, the contents of the petition themselves belie this claim. Although Paragraph 14 of the Petition (page 8) make certain vague claims about economic benefits, it is notable that unlike its affiliates elsewhere in New England Abenaki Water Company will not be consolidated with the corresponding Aquarion subsidiary.

This contrast between Docket DW 17-114 and Docket DW 21-090 offers a functional lesson in how to interpret and apply RSA 369:8, II. The Petitioners claim that the reference to the lack of “adverse effect” in RSA 369:8, II is the equivalent of a “no net harm” standard. This is a simplistic and, ultimately, an incorrect gloss on

the statute. The guidance about lack of adverse effects applies to the Commission's initial review to screen out proposed transactions that on their face do not implicate any of the public interest considerations that would apply under RSA 374:33, the Aquarion/Eversource transaction being a classic example.

As the Commission most recently reemphasized in Docket No. DG 14-155, approving the transfer of New Hampshire Gas Corp. to Liberty Utilities via its Energy North subsidiary, though RSA 369:8, II "allows for streamlined" review of transactions that will have no impacts to New Hampshire customers, adverse or otherwise, the Commission "usually do[es] not accept at face value a petitioner's representations" of no adverse impacts and will ordinarily consider the transaction in light of the "public good" and "public interest" standards in RSA 374. Order No. 25736 (2014) at 5-6 (citations omitted). This is the correct interpretation of these two statutes, interpreted so as to harmonize them with each other. *See Krainewood Shores Ass'n v. Town of Moultonborough*, 2021 WL 787081 (N.H. Supreme Ct.) at *2 (citations omitted) (statutes should be construed together "harmoniously" so as to effectuate the overall purpose of the statutory scheme and avoid absurd or unjust results); *see also In re Regan*, 164 N.H. 1, 7 (2012 ("repeal by implication is disfavored, [i]f any reasonable construction of the two statues taken together can be found") (citations and internal quotation marks omitted).

In these circumstances, in light of the arguments advanced by the Petitioners in their brief, the Commission should conclude that a "net benefits" test applies to the proposed transaction or, at the very least, that the Commission will develop a

full record and, if necessary, determine whether the transaction would pass muster under a “no net harm” standard but not pursuant to a review for “net benefits.” For present purposes, given the uncertainties, the Commission should assume the transaction would fail under either test and put the Petitioners to their proof.

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