STATE OF NEW HAMPSHIRE

BEFORE THE

PUBLIC UTILITIES COMMISSION

Abenaki Water Company and Aquarion Water Company

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

Docket No. DW 21-090

Response to Joint Petitioners' Amended Filing

NOW COMES the Office of the Consumer Advocate ("OCA"), a party to this docket, and interposes the following reply to the August 20, 2021 filing of the Joint Petitioners in this docket, captioned "Amended Filing in Support of the Verified Joint Petition for Approval of the Acquisition of Abenaki Water Company by Aquarion Company" ("Amended Filing"). The OCA contends that the Joint Petitioners have not satisfied the directive of the Commission in Order No. 26,506 (August 6, 2021). In support of our position, the OCA states as follows:

I. Introduction

This proceeding arises initially under RSA 369:8, II(b) and requires the Commission to determine whether the proposed indirect acquisition of Abenaki Water Company ("Abenaki") by Aquarion Water Company meets the statutory approval standard of "no adverse effect on rates, terms, service or operation of the public utility within the state." On August 6, 2021, the Commission made a

preliminary determination that the proposed transaction would have an "adverse effect on rates" and therefore directed the Joint Petitioners to amend their approval request. Order No. 26,506 at 10-11. On August 20, 2021, the Joint Petitioners made a timely filing in response to the Commission's directive. But, for the reasons discussed *infra*, in the opinion of the OCA the Joint Petitioners did not amend their request but, rather, simply restated it while improperly attempting to object to Order No. 26,506 on legal grounds. Therefore, the Commission cannot approve the proposed transaction at this time and must conduct further proceedings as described in RSA 369:8, II(b)(5) and RSA 374:33.

As the Joint Petitioners noted in their Amended Filing, the OCA has previously taken the position that the "no adverse effect" standard would be satisfied if Abenaki would withdraw its rate case now pending in Docket No. DW 20-112. *See* July 15, 2021 Letter of Consumer Advocate Kreis to PUC Chairwoman and Agency Head Martin (tab 51) (indicating that OCA "strongly support[ed]" such an outcome). The OCA continues to stand behind this conclusion, along with the opinion we stated at that time to the effect that Aquarion Water Company would be a stronger owner from a managerial, technical, and financial capacity standpoint than Abenaki's current parent, New England Service Company ("NESC").

Nevertheless, we urge the Commission not to allow the Joint Petitioners to ignore the directives contained in Order No. 26,506.

II. The Statutory Rubric

RSA 369:8, II(b) is not the statute that governs proposed changes to the ownership of public utilities in New Hampshire. Rather, RSA 374:33 requires a determination that such a transaction is "lawful, proper, and in the public interest."

The legal and practical effect of RSA 369:8, II(b) is to divert certain proposed ownership changes to a more expedited process so that a full-blown, contested "public interest" case under RSA 374:33 is not necessary. Specifically, approval under RSA 374:33 is not required if the petitioners file, and the Commission accepts as adequate, a "detailed written representation . . . that the transaction will not have an adverse effect on rates, terms, service, or operation of the public utility within the state." In other words, certain ownership changes simply substitute one set of ultimate corporate shareholders for another – and, when this occurs without any effect on the actual operation of the public utility in New Hampshire, the General Court determined that swift and essentially automatic approval is appropriate. But, as has become more than clear by now, this is not such a case.

III. The Joint Petitioners' Amended Filing

The Joint Petitioners did not amend their filing; they simply embellished it. Oddly, they did so by submitting prefiled, joint written direct testimony of Donald J. Morrissey, Aquarion's president and chief operating officer, and Donald J.E. Vaughan, who serves as board chairman of NESC and its subsidiaries (including Abenaki). The submission of more prefiled direct testimony amounts to an implicit

acknowledgement that an additional hearing is necessary, inasmuch as it would not be appropriate for the Commission to rely on this testimony without giving the parties an opportunity to conduct discovery on it and, ultimately, to cross-examine the witnesses.

The Morrissey/Vaughan testimony amounts in large part to a legal argument even though neither witness is an attorney. Asked to describe the "critical flaw" in Order No. 26,506, they focus on the determination at page 10 of the order that "the Acquisition will have an adverse effect on rates because the proposed carry forward of existing Abenaki rate base for purposes of the transaction does not take into account the impaired state of the rate base assets." According to messrs. Morrissey and Vaughan, this determination is "problematic" because the "'rate base assets' in question were already reviewed by the Commission and declared eligible for recovery through rates and will 'carry forward' with or without the transaction." Amended Filing at bates page 7, lines 4-7. Conceding they are not attorneys, the two witnesses nevertheless contend that their "experience as regulatory professionals" tells them that "there is no legal or ratemaking principle that exists in any jurisdiction in which Aquarion operates that would allow for a regulatory write-down of assets based on some assessment of the condition of assets at the time of the transaction." *Id.* at bates 13, lines 11-14. Thus they conclude that the Commission's preliminary determination of adverse impacts is both "problematic" and "somewhat perplexing." *Id* at bates 15, line 1.

In the opinion of the OCA, Order No. 26,506 is neither problematic nor even slightly perplexing. Indeed, the Commission's perspective could not be more plain: Abenaki and its owners (including Mr. Vaughan) wish to flee New Hampshire, huge acquisition premium in hand, leaving behind them a set of water systems that is in such poor shape that were Abenaki to remain it would be necessary for the Commission to take drastic action against the company for having abdicated its responsibilities as the holder of a utility franchise. *See, e.g.*, Order No. 26,300 (October 23, 2019) in Docket No. DW 17-165 at 7 (reminding Abenaki that "it is bound by its statutory obligation" in RSA 374:1 to "furnish such service and facilities as shall be reasonably safe and adequate and in all other respects just and reasonable"). Should Aquarion become the new owner of Abenaki, Aquarion obviously cannot be held responsible for the misdeeds of its predecessor. Thus the adverse effect: a miscreant owner that not only gets out of New Hampshire scot-free but heads into the sunset riding a golden parachute worthy of the Gilded Age. *See* exh. 16 (noting that the purchase price is approximately $40.56 million whereas the book value of NESC at the end of 2020 was $16.79 million – a huge acquisition premium by any standard).

Ironically, it was Mr. Morrissey, in his capacity as chief operating officer of Aquarion, who forthrightly summarized the New Hampshire situation NESC is seeking to leave in the rear-view mirror. He testified:

> I think the challenge for us all, really, and I mean "the collective all," everybody that's party to this conversation right now, is that you're looking at a business, Abenaki, that is effectively a basket case. It is on the borderline non-viable . . . a regulated utility that is losing money. There is a need for rate relief.

Tr. 6/28/2021, afternoon session (tab 56) at 56, lines 15-23. After the fact – i.e., in the wake of Order No. 26,506 -- Mr. Morrissey now places a somewhat different 'spin' on his characterization of Abenaki as a "basket case." According to his testimony in the Amended Filing, his use of the phrase "was not in reference to the condition of the water system assets, or a reflection of the management of those assets" but was rather a description of Abenaki's "financial circumstances . . . resulting from the existing revenue shortfall." Amended Filing at bates 16, lines 7-10.

What this self-serving gloss on Mr. Morrissey's hearing testimony fails to take into account is the reality that dire financial circumstances and a "basket case" of a water utility from a plant-in-service perspective are two sides of the same coin. Beginning at bates page 18, line 16 and ending at bates page 20, line 6, messrs. Morrissey and Vaughan outline quite a roster of problems Abenaki hopes to leave in its wake, including excessive arsenic levels in the Bow system, as well as safety and excessive pressure issues that have nagged the Rosebrook system, *inter alia*. Yes, should Abenaki get its hoped-for ticket to ride (out of New Hampshire) the new owners will need to increase rates – likely drastically so – in order to cure these deficiencies and rescue this "basket case" of a water utility. But writing off the problem as simply a matter of ratemaking is to obscure in deliberate fashion the extent to which the current management and current ownership is responsible.

In their effort to help Abenaki avoid this responsibility, messrs. Morrissey and Vaughan claim that the putative seller is not responsible for its systems being a "basket case" because "[t]he Abenaki plant assets have been properly maintained and accounted for throughout their service lives as reflected in the Commission's

orders and have been found prudent and useful in providing service to customers." Amended Filing at bates 13, lines 4-7. *See also* Amended Filing, cover letter of Attorney Matthew J. Fossum, at 2 ("all of the plant assets in Abenaki's rate base were previously determined by the Commission to be prudent, used and useful and eligible for recovery in rates").

Neither the Joint Petitioners (through counsel) nor their witnesses cite any orders of the Commission in which the agency made any affirmative findings to the effect that Abenaki's assets have been properly maintained and/or met the requisite prudent investment test for inclusion in rates. This is because the history of the Commission's review of this company's rate base items is far more limited and checkered than the Amended Filing admits. In Order No. 26,300, *supra*, the Commission declined to pre-clear an engineering study with respect to addressing the chronic water pressure problems in Abenaki's Rosebrook system, noting that "[t]he evaluation of prudence occurs after the project is completed, costs have been incurred, and the Company seeks recovery of the investment." Order No. 26,300 at 7 (citation omitted). In Order No. 26,223 (February 28, 2019) in Docket No. DW 15-199, the Commission approved an uncontested increase in sewer rates for Abenaki's Lakeland system, without making any findings on prudency or used/usefulness. Order No. 25,509 (June 3, 2016) in Docket No. DW 15-199 likewise approved a settlement agreement on permanent rates for Bow and Belmont, this time without any explicit reference to prudence or used/usefulness.

In fact, the only time the Public Utilities Commission has ever made anything that could be construed as an affirmative finding that Abenaki's plant-in-service was used, useful, and prudent occurred in Docket No. DW 17-165, a rate case limited to Abenaki's Rosebrook system. In that case, most (but not all) parties entered into a settlement agreement that included, among a variety of compromises, language stating that the fixed plant of the Rosebrook system was, as of the end of the test year in that case (which ended on September 30, 2017) "prudent, used, and useful." Settlement Agreement (tab 52) in Docket No. DW 17-165 at 5. In its order approving the DW 17-165, the Commission likewise made an affirmative finding of prudence and used/usefulness although, oddly, the reference was specific to the Step I rate adjustment as distinct from the general rate increase. *See* Order No. 26,206 (December 27, 2018) in Docket No. DW 17-165 at 10. Significantly, page 11 of the DW 17-165 settlement agreement makes clear the signatories' understanding (ultimately approved by the Commission) that "the Commission's acceptance of [the] Agreement does not constitute continuing approval of, or precedent for, any particular issue in this proceeding" other than those specified in the agreement.

Out of this thin bed of straw Abenaki and Aquarion now seek to spin the gold of a permanent finding that the entirety of the plant-in-service the former company seeks to turn over to the latter, hugely marked up for purposes of the transaction, is *now* to be considered prudent, used, and useful. At the very least, it would require a hearing to resolve such a claim inasmuch as the question of whether plant-in-

service is used and useful, unlike a backward-looking prudency inquiry, would involve an assessment of the current state of the Abenaki system. The Commission, via its use of the word "impaired" in Order No. 26,506, has already made its perspective on this question clear.

IV. Procedural Issues

The upshot of the foregoing is that the Commission must now determine what it will do next in light of an Amended Filing from Aquarion and Abenaki that obdurately refused to make any substantive amendments to the Joint Petitioners' previous request for approval under RSA 369:8, II(b).[1] The statute itself provides an unambiguous answer: within 30 days of the Amended Filing, the Commission *must* determine the existence of an adverse effect. *See* RSA 369:8, II(b)(5). It must do so because the Joint Petitioners have done nothing but argue with, as distinct from substantively addressing, the Commission's preliminary determination of such an effect. Therefore, by operation of RSA 369:8, II(b)(5), the Commission must now provide an opportunity for an additional hearing, which must take place within 60

[1] The OCA expresses no opinion as to what a truly amended filing would look like in light of the Commission's preliminary determination of adverse effects. Among the possibilities that occur to the OCA would be for Abenaki to devote a portion of its lavish acquisition premium to curing the current state of asset impairment. Another would be for Aquarion to commit to a write-down of some or all Abenaki assets in connection with the next adjustment to Abenaki's rates. We are aware that the Amended Filing derides such possibilities as "completely unreasonable and improper." Amended Filing at bates 29, lines 17-19. As to the additional claim of messrs. Morrissey and Vaughan that any "discount or forfeiture of *existing* rate base would constitute a confiscatory, improper regulatory action clearly susceptible to court challenge," *id.* at bates 29, line 21 to bates 30, line 1 (emphasis in original), it is noteworthy that the Amended Filing contains no citations to any authority for such a debatable proposition.

days of the Commission's (presumably forthcoming) ultimate "adverse effect" determination."

Given the emphatic disagreement with Order No. 26,506 reflected in the Amended Filing, offering what the OCA concedes to be colorable arguments about the Commission's application of RSA 369:8, II(b) in this situation, the Joint Petitioners have the right to seek rehearing of Order No. 26,506 under RSA 541:3 within 30 days of that order's entry. Such a motion is the prerequisite to the only appropriate avenue for review of the Commission's application of RSA 369:8, II(b) – appeal to the New Hampshire Supreme Court under RSA 541:6. The Commission should not allow the Amended Filing to operate as a *de facto* motion for rehearing.

V. Conclusion

For the foregoing reasons, the Commission should make a final determination of adverse impacts pursuant to RSA 369:8, II(b)(5) and set this matter for hearing to address the question of the proposed transaction's consistency with RSA 374:33.

WHEREFORE, the OCA respectfully request that this honorable Commission:

A. Determine, finally, that the Joint Petitioner's proposed transaction will adversely effect rates, terms, service, and operation of Abenaki Water Company within New Hampshire pursuant to RSA 369:8, II(b)(1) and (5),

B. Schedule this matter for a timely hearing for review of the proposed transaction under RSA 374:33, and

C. Grant such other relief as may be appropriate in the circumstances..

Sincerely,

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Certificate of Service

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

Donald M. Kreis