

**STATE OF NEW HAMPSHIRE  
PUBLIC UTILITIES COMMISSION**

**DOCKET NO. DW 21-090**

**ABENAKI WATER COMPANY, INC. AND AQUARION COMPANY  
JOINT PETITION FOR APPROVAL OF ACQUISITION**

**MOTION FOR REHEARING,  
OBJECTION TO SETTLEMENT, AND  
MOTION FOR DETERMINATION OF ADVERSE EFFECT**

Omni Mount Washington, LLC (“Omni”) by and through its attorneys, McLane Middleton, Professional Association, submits this Motion for Rehearing, Objection to Settlement, and Motion for Determination of Adverse Effect. Pursuant to RSA 541:3, Omni seeks rehearing on the ground that Order No. 26,497 in the above-captioned proceeding, issued July 9, 2021, (“Extension Order”) is unlawful. In addition, Omni objects that the settlement between Abenaki Water Company (“Abenaki”) and Aquarion Company (“Aquarion”) (together the “Joint Petitioners”) and the Office of Consumer Advocate (“OCA”) does not serve the public interest as required by Puc 203.20. Omni also asks the Commission to determine, in accord with RSA 369:8, II, that the acquisition as proposed will have an adverse effect on rates, terms, services, or operations.

**I. BACKGROUND**

On May 4, 2021, the New Hampshire Public Utilities Commission (“PUC” or “Commission”) issued an Order of Notice (“OON”) in the above-captioned proceeding that, among other things, scheduled a prehearing conference (“PHC”) for May 14, 2021. At the PHC, the OCA argued that the OON was deficient. Subsequently, by Secretarial Letter of May 28, 2021, the Commission determined to issue a supplemental OON, which occurred on June 4, 2021. In addition, the Commission adopted a procedural schedule allowing for briefs and reply

briefs concerning the applicability of RSA 369:8, II and the standard to be applied to the transaction, and it determined that the 60-day timeline under RSA 369:8, II would begin, at the earliest, on May 10, 2021. Hearings were scheduled for June 28 and 29, 2021.

The Joint Petitioners and the OCA each filed briefs on June 19, 2021, and reply briefs on June 26, 2021. The Joint Petitioners argue that the acquisition is governed by RSA 369:8, II and that the Commission should apply a “no net harm” standard. The OCA argues that the Joint Petitioners must make a showing of “net benefits” to customers in order to gain approval.

On July 1, 2021, the Joint Petitioners filed a letter captioned Consent to Toll Statutory Review Period (“Consent Letter”), requesting that the Commission extend by 30 days the time for a determination under RSA 369:8, II. The Joint Petitioners said that the extension would allow them time to (1) evaluate issues associated with Abenaki’s pending rate requests and (2) explore alternatives for resolution of this proceeding.

On July 9, 2021, the Commission issued the Extension Order, relying on RSA 541-A:29, IV as the basis for approving the extension. Furthermore, the Commission noted that the Joint Petitioners did not indicate that they had conferred with customer intervenors before filing their request.

On July 15, 2021, the Joint Petitioners filed another letter, captioned Report on Abenaki Rate Request (“Report Letter”), which is effectively a settlement with just the OCA, pursuant to which Abenaki will withdraw its rate request in Docket No. DW 20-112 contingent upon the Commission issuing a determination of no adverse effect. They assert that withdrawal “will enable the Commission to determine categorically that there will be no adverse effects...” The Joint Petitioners reported that they had consulted with the OCA but they did not report

consultations on this issue, or others, with any other parties, including Department of Energy Staff (“Staff”).<sup>1</sup>

Also on July 15, 2015, the OCA filed a letter confirming its agreement with the Joint Petitioners’ proposed resolution to this proceeding. The OCA said that although the settlement “leaves quite a raft of looming issues unresolved, we are convinced that better outcomes, for both ratepayers and shareholders, will be achievable once the proposed transaction closes later this year.”

Further, on July 15, 2021, Staff filed a request for an extension of time until July 30, 2021, to submit a recommendation to the Commission in Docket No. IR 21-024, Investigation into Water Pressure Issue in the Rosebrook Water System. The Commission granted the extension on July 21, 2021.

On July 16, 2021, Abenaki submitted a letter indicating that it “hereby withdraws its rate request effective upon the Commission issuing a determination of no adverse impact under RSA 369:8, II, on or before August 8, 2021 in Docket No. DW 21-090.”

Also on July 16, 2021, intervenors from the Bow and Tioga Belmont water systems (“Bow and Tioga Customers”) filed a list of five additional conditions that would make the Joint Petitioners’ settlement proposal agreeable. Among other things, they seek consolidation of the Abenaki New Hampshire utility companies into Aquarion’s New Hampshire subsidiary and deferral of the next rate case filing until one year after completion of the acquisition.

## **II. REHEARING**

The Joint Petitioners’ July 1, 2021 Consent Letter did not cite the Commission’s procedural rules, in particular, the Consent Letter did not identify whether the Joint Petitioners

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<sup>1</sup> The Joint Parties said they would consult with Staff the week of July 19, 2021, i.e., after filing the Report Letter.

were seeking an extension of time pursuant to Puc 202.04, in which case they were required to make a good faith attempt to gain the consent of all the parties for the extension. Nor did the Consent Letter follow the requirements of Puc 203.04 and 203.05, in matters of form or substance. As to the latter, the Joint Petitioners failed to identify clearly the authority under which they were seeking authorization or relief.<sup>2</sup>

On July 9, 2021, the Commission in its Extension Order observed that RSA 369:8 is silent with regard to an applicant's ability to request, or the Commission's authority to grant, an extension of the 60-day statutory deadline. The Commission nevertheless approved the extension request, determining that RSA 541-A: 29, IV provided it the authority to do so.

RSA 363:17-b, however, provides that: "Matters resolved by final order of the commission shall be *exempt from RSA 541-A:29* and RSA 541-A:29-a, but shall be subject to federal and state time limitations applicable to specific matters." (Emphasis supplied.) Inasmuch as the Joint Petitioners' proposed acquisition constitutes a contested case governed by RSA Chapter 541-A and, pursuant to RSA 363:17-b, the Commission is required to issue a final order in all matters presented to it, the Commission does not have the authority to extend the 60-day deadline under RSA 369:8, II.

Because the Commission lacked the authority to grant the relief requested by the Joint Petitioners, the Extension Order is null and void. Although the 60-day deadline under RSA 369:8, II would, in theory, apply, the Joint Petitioners' request for the extension and its consent to toll the statutory review operate as a waiver of any rights it might have to assert that the

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<sup>2</sup> The Joint Petitioners inserted a footnote citing "Secretarial Letters dated Aug. 23, 2017 and Oct. 13, 2017" in Docket No. DW 17-114, apparently as authority for the extension. The August 23, 2017 letter, however, was not a Secretarial Letter but a letter from PUC staff proposing a procedural schedule and reporting that there was a consensus among the parties that the governing statute would be tolled. The October 13, 2017 letter, which was a Secretarial Letter, serves as an example of a case where the parties "agreed to waive the time periods under RSA 369-8, II (b)" but it does not address the Commission's *authority* to extend the time period.

proposed acquisition shall be considered approved by operation of law effective July 9, 2021.

Thus, to the extent the proposed acquisition falls under RSA 369:8, II, the Commission has at least until August 9, 2021, to act.<sup>3</sup>

### III. SETTLEMENT

The Joint Petitioners' July 15, 2021 Report Letter reflects an agreement reached between the Joint Petitioners and the OCA to settle their dispute in this proceeding, and a proposal to apply that settlement to the interests of all the other parties to the proceeding. The *quid pro quo* is withdrawal of Abenaki's rate request in Docket No. DW 20-112.<sup>4</sup> Puc 203.20 governs settlements and stipulations before the PUC and, among other things, provides that the Commission shall approve the disposition of any contested case by stipulation, settlement, etc. if it determines that the result is just and reasonable and serves the public interest.

Aquarion said that the extension of time it requested would enable it to (1) evaluate issues associated with Abenaki's pending rate request and (2) explore alternatives for resolution of this proceeding. The Join Petitioners consulted with the OCA but they did not consult with Staff or customer intervenors about the proposed resolution before filing it with the Commission.<sup>5</sup>

In terms of the Bow and Tioga Customers' counter proposal, Omni is generally supportive, especially in regard to item 4, which calls for the consolidation of the Abenaki water systems into Aquarion New Hampshire, and item 5, which calls for Aquarion to defer a rate case

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<sup>3</sup> The Joint Petitioners assert in their Consent Letter that the 30-day extension would expire on Friday, August 6, 2021, while the Commission simply extends the deadline to Sunday, August 8, 2021. Pursuant to RSA 21:25, governing how time is reckoned, a deadline that falls on a Sunday is extended to the next business day.

<sup>4</sup> Omni is not a party to or affected directly by that rate case, nor does it question whether the withdrawal would be a benefit to the Bow and Tioga Customers insofar as it defers potential rate increases. Omni does question, however, that the withdrawal will enable the Commission to determine categorically that the acquisition will have no adverse effects. Withdrawal of the rate case may be necessary to that end but it is not sufficient.

<sup>5</sup> Aquarion did consult with Omni about an issue particular to Omni, but it did not consult with Omni about the substance of the agreement with the OCA or any other alternatives for resolution of this proceeding.

for a period of time. Omni, however, would also pursue other issues if it had the opportunity. In particular, as discussed below, Omni is concerned that the acquisition as proposed papers over important rate concerns. To address those concerns, Omni believes that the Commission must look closely at the proposed purchase price and consider as well Abenaki's track record in New Hampshire.<sup>6</sup>

In sum, it does not appear that Aquarion has fully explored alternatives for resolution of this proceeding as intimated in the July 1, 2021 Consent Letter, either in terms of the issues discussed or the parties consulted. Furthermore, as the OCA observed, the settlement "leaves quite a raft of looming issues unresolved." Accordingly, Omni objects to the Commission's approval of the limited settlement with the OCA because it is neither just nor reasonable, and it does not serve the public interest.

#### **IV. DETERMINATION OF ADVERSE EFFECT**

Assuming for the sake of argument that the proposed transaction is subject to RSA 369:8 II, Omni agrees with the positions previously taken by the OCA, in brief and orally before the Commission, that the burden of proof is on the Joint Petitioners to demonstrate that the acquisition will not have an adverse effect on rates, terms, services, or operations. Omni agrees as well that the Commission does not merely accept petitioners' representations at face value, but that it must determine whether the representations are supported by the preponderance of the evidence. Furthermore, Omni contends that the acquisition, as proposed, harms ratepayers in that, among other things, it would absolve Abenaki of years of inadequate service while, as noted

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<sup>6</sup> That track record includes the considerable efforts by Omni and other customers to defend against Abenaki's efforts to shift risk unreasonably on to customers. Of particular note from Omni's perspective is the time and money it expended on Abenaki's attempt to avoid responsibility in Docket No. DW 19-131.

by the OCA, allowing Abenaki to “take the money and run.” See, Tr. June 29, 2021, Day 2, AM Session, p. 60.

An essential term of the Joint Petitioners’ Agreement and Plan of Merger (“Agreement”) is the purchase price of approximately \$40.56 million, which they say reflects a book value of \$16.79 million and a merger premium of \$23.77 million. The Agreement covers Abenaki’s regulated operating subsidiaries in Connecticut, Massachusetts, and New Hampshire, but the purchase price has apparently not been allocated among the states or the regulated subsidiaries in a way that would inform the Commission as to the value or cost assigned to the respective New Hampshire regulated subsidiaries. Such an assignment is critical to determining whether the acquisition would have an adverse effect on rates.

The Joint Petitioners take the position that there is no adverse effect on rates because they will not seek to recover an acquisition premium, but that is only part of the story. The other part of the story concerns whether the book value of the New Hampshire regulated subsidiaries is reasonable as a basis for setting future rates. The Joint Petitioners did not provide any insight into their relative valuations of the various regulated subsidiaries in their petition but during the hearings on June 28 and June 29, 2021, it became apparent that the New Hampshire regulated subsidiaries were impaired. In fact, Mr. Morrissey, Aquarion’s President and Chief Operating Officer, described the regulated subsidiaries as a “basket case” and “borderline non-viable.” See, Tr. June 28, 2021, Day 1, PM Session, p.56. Correspondingly, the history of Abenaki’s operations in New Hampshire as described by customer intervenors show water systems in need of significant investment.<sup>7</sup>

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<sup>7</sup>On a related issue, in Order No.26,426, Docket No. DW 17-165 (November 25, 2020), the Commission admonished Abenaki for its conduct with respect to failing to resolve a water pressure issue identified by the Department of Environmental Services. As a consequence, the Commission opened Docket No. IR-21-024 to investigate whether Abenaki had fulfilled its duties under RSA 374:1 to provide service and facilities that are

Based on the evidence in the record, there is a clear basis for the Commission to find that Aquarion's acquisition of Abenaki will have an adverse effect on rates in New Hampshire to the extent that Aquarion has overpaid for the New Hampshire regulated subsidiaries. Such a finding is bolstered by Aquarion's reluctance to consolidate Abenaki's New Hampshire regulated subsidiaries into Aquarion New Hampshire. Mr. Morrissey's exchange with Attorney Kreis at the hearing on June 28, 2021, concerning Aquarion's decision not to consolidate the Abenaki regulated subsidiaries creates especial concern about the extent of Aquarion's preparation and planning. See, Tr. June 28, 2021, AM Session, pp.73-78.

There are a number of regulatory options available to the Commission if it chooses to resolve this proceeding by doing more than finding that there is an adverse effect on rates. For example, it could condition the acquisition on some combination of a multi-year rate freeze, remediation of outstanding issues, and consolidation of the Abenaki and Aquarion subsidiaries in New Hampshire, which could leave the Joint Petitioners to negotiate between themselves whether to accept the conditions.

In addition, the Commission could design other remedies. For example, it could (1) impute a purchase price at some discount from book to the respective Abenaki subsidiaries, which would serve as their initial rate bases, or (2) require a contribution in aid of construction ("CIAC") from Abenaki as an exit fee.<sup>8</sup> The latter may be a more equitable approach in terms of recognizing that Abenaki as the cost causer should be the cost payer. Such approaches may

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reasonably safe and adequate. Staff is expected to file a recommendation with the PUC by July 30, 2021. Omni asks the Commission to defer any determination in this proceeding until after it has time to review the Staff recommendation.

<sup>8</sup> Omni takes the position that, pursuant to RSA 374:30, the Commission may hold Abenaki accountable for its failures to meet its regulatory obligations, and the representations it made to procure its franchises, by conditioning the transfer of those franchises to Aquarion.



require further inquiry into the record and potentially additional discovery and/or record requests to quantify the appropriate discount or CIAC.

## **V. CONCLUSION**

The Joint Petitioners have failed to demonstrate by a preponderance of the evidence that the acquisition will not have an adverse effect on rates, terms, services or operation. In particular, by failing to identify the purchase price assignable to properties in New Hampshire, the Commission is not in a position to calculate the price Aquarion paid in relation to the book value of the property, which is key to setting rates in the future. The testimony of Mr. Morrissey, meanwhile, supports a conclusion that Aquarion should have paid less than book value, which translates into an adverse effect on rates from the acquisition as proposed.

The proposal agreed to by the Joint Petitioners and the OCA, moreover, does not alter or cure Abenaki's history of failures as a regulated water utility, or put the Commission in a position to determine categorically that the acquisition will not have an adverse effect on rates. Instead, while it would install a competent operator, it would also enshrine adverse rate impacts. Aquarion would just step into Abenaki's shoes and, ineluctably, file for comparable rate increases based on the books and records it inherits from Abenaki. Moreover, Aquarion may be compelled to pursue even greater rate increases to clean up messes left behind by Abenaki.

Omni agrees that Aquarion has the financial, technical and managerial capability required for permission under RSA 374:22 to engage in business in the towns currently served by Abenaki. Omni also believes that Aquarion is disposed to achieve improvements in the areas of terms, services and operation, but Omni simply cannot look past the area of rates. For the Commission to permit the acquisition, Omni is persuaded that it is necessary to condition it on some reasonable combination of the alternatives discussed herein.

WHEREFORE, Omni Mount Washington, LLC respectfully requests that the New Hampshire Public Utilities Commission:

- A. Grant rehearing;
- B. Reject the limited settlement agreement;
- C. Determine that the acquisition will have an adverse effect on rates, terms, operations, or services;
- D. Defer any action until it receives and considers the Department of Energy Staff recommendation in Docket No. IR 21-024; and
- E. Grant such other relief as it determines just and reasonable.

Respectfully Submitted,

Omni Mount Washington, LLC

By its attorneys,

McLANE MIDDLETON,  
PROFESSIONAL ASSOCIATION

Dated: July 26, 2021

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