

**STATE OF NEW HAMPSHIRE
PUBLIC UTILITIES COMMISSION**

DW 21-090

ABENAKI WATER COMPANY and AQUARION COMPANY

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

Final Determination of Adverse Effect Under RSA 369:8

O R D E R N O. 26,519

September 17, 2021

In this order the Commission issues a final written determination pursuant to RSA 369:8, II (b)(5) that the acquisition of Abenaki Water Company by Aquarion Company will have an adverse effect on rates. The Commission will now review the proposed acquisition pursuant to RSA 374:33 and, after an opportunity for a public hearing, issue a ruling within 60 days.

I. PROCEDURAL HISTORY

On April 30, 2021, Aquarion Company (Aquarion) and Abenaki Water Company (Abenaki) (together Joint Petitioners) filed a joint petition requesting approval of the acquisition of Abenaki by Aquarion. On May 10, 2021, the Joint Petitioners filed supplemental attachments to their Joint Petition. The Commission issued an Order of Notice, setting a prehearing conference on May 14, 2021.

The Office of Consumer Advocate (OCA) noted its participation by letter filed with the Commission on May 3, 2021. Numerous water customers of Abenaki in the Bow and Tioga Belmont water systems requested intervention (Customer Intervenors).

Omni Mount Washington (Omni) and the Bretton Woods Homeowners Association (Bretton Woods) also requested intervention.

Following the prehearing conference, the Commission granted all interventions, determined that the 60-day deadline for a preliminary finding on adverse effect under RSA 369:8, II (b)(3) and (4) would begin at the earliest on May 10, 2021, and requested that the parties brief legal issues concerning the standard of review to be used under RSA 369:8. The Joint Petitioners and the OCA filed briefs and reply briefs on June 9, and June 16, 2021, respectively.

Evidentiary hearings were held on June 28 and 29, 2021. On July 1, 2021, the Joint Petitioners filed a request to extend the 60-day deadline for a preliminary determination, for 30 days. On July 9, 2021, the Commission issued Order No. 26,497 granting the requested extension for 30 days, until August 8, 2021.

On August 6, 2021, the Commission issued Order No. 26,506 in which it made a preliminary determination that the proposed acquisition would have an adverse effect on rates pursuant to RSA 369:8, II (b)(3). The Joint Petitioners filed an amended statement and accompanying supplemental testimony on August 20, 2021 (Amended Statement). On August 27, 2021, the Customer Intervenors and the Office of Consumer Advocate each filed a reply to the Amended Statement. Omni Mount Washington, Inc. filed a response to the Amended Statement on August 30, 2021, and a supplemental response on September 3, 2021.¹

¹ For more detail on the earlier procedural history in this docket please refer to Order No. 26,506 (August 6, 2021).

II. POSITIONS OF THE PARTIES

A. Joint Petitioners

On April 7, 2021, Abenaki's parent company, New England Service Company (NESC), and Aquarion entered into an Agreement and Plan of Merger by which Aquarion would acquire through a merger all of the issued and outstanding common stock of NESC, with NESC becoming a wholly owned direct subsidiary of Aquarion (Acquisition). The Acquisition would result in Aquarion having ownership and control of NESC and its subsidiaries, including Abenaki, which would become a wholly owned indirect subsidiary of Aquarion.

According to the Joint Petitioners, Aquarion will have a different post-acquisition structure in New Hampshire than in the other states; specifically, Aquarion (AWH-NH) would be a separate legal entity from Abenaki Water Company in New Hampshire, while in Connecticut and Massachusetts the Aquarion and Abenaki legal entities will be combined (AWC-CT and AWC-MA, respectively). The joint petition stated that the Acquisition would not have an adverse effect on rates, terms, service, or operation of Abenaki under RSA 369:8, and would be lawful, proper and in the public interest consistent with RSA 374:33. Further, according to the Joint Petitioners, the Acquisition would result in "no net harm" to Abenaki's customers, and would be beneficial to Abenaki's customers.²

On August 20, 2021, the Joint Petitioners filed an Amended Statement concerning the proposed Acquisition. The Amended Statement included the supplemental written unsworn statements of Donald J. Morrisey and Donald J.E.

² For additional detail on the Joint Petitioners positions during the earlier part of the docket please refer to Order No. 26,506 (August 6, 2021).

Vaughan on behalf of the Joint Petitioners (Supplemental Pre-Filed Testimony) and attached a copy of the Abenaki New Hampshire 2020 annual report.

The Joint Petitioners noted that the Commission must, within 30 days (September 19) pursuant to RSA 369:8, II(b)(5), determine whether in light of the Amended Statement the transaction has an adverse effect. The Amended Statement repeated the commitment to withdraw the pending Abenaki rate case, and to delay filing any rate case until 12 months after completion of the Acquisition and operation of the New Hampshire Abenaki companies by Aquarion. The Amended Statement also committed to work with regulators to solve pending service quality issues regarding the New Hampshire Abenaki companies promptly and under current timelines.

The Supplemental Pre-Filed Testimony claimed that the Commission's finding that the transaction "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" was problematic. The witnesses argued that once the costs of assets are included in rate base, there is no point where recovery is retracted due to the condition of the assets, unless and until the assets are deemed to no longer be used and useful to customers. The Supplemental Pre-Filed Testimony asserted that in the absence of the transaction there would be continued recovery of the rate-base assets without the added benefits of the transaction. Under the proposed transaction, the net book value of the assets on the books of the company, simply transfers from the old owner to the new owner without any change. The Supplemental Pre-Filed Testimony asserted that all assets have been properly maintained and managed and that no reduction in rate base is currently allowed or appropriate.

The Amended Statement refused to discount the Abenaki rate base as part of the Acquisition, and made legal and regulatory arguments that such an adjustment would be confiscatory. The Supplemental Pre-Filed Testimony asserted the Commission has already found the Abenaki rate base adequate and used and useful on numerous occasions and referenced a number of Commission dockets. *See* Order No. 26,205 (December 27, 2018) (approving a settlement on permanent rates Rosebrook Water System); Order No. 26,231 (March 28, 2019) (approving a settlement on Abenaki purchase of Tioga River Water Co., Inc.); Order No. 25,322 (January 30, 2012) (approving settlement on permanent rates for Tioga Water Co.); and Order No. 25,905 (June 3, 2016) (approving a settlement on permanent rates for Lakeland Water, Lakeland Sewer, and White Rock).

According to the Supplemental Pre-Filed Testimony, as of December 31, 2020, Abenaki had net utility plant in service of approximately \$1.87 million across its New Hampshire systems as shown on its year end 2020 books and records. A copy of the Abenaki 2020 annual report was attached to the Amended Statement. The Amended Statement concluded that the transaction will not change the valuation of the Abenaki rate base and that no adjustment of that rate base is fair or appropriate. Finally, the Amended Statement reiterated earlier claims that the transaction would not have any adverse effect on rates.

B. OCA

According to the OCA, the Joint Petitioners did not amend their filing; they simply embellished it by submitting pre-filed, joint written direct pre-filed testimony by two company witnesses. OCA argued that 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. Rather than

presenting evidence, OCA asserted that the Morrissey/Vaughan testimony amounts to a legal argument that the Commission's determination of adverse effect of Order No. 26,506 at page 10 was improper.

OCA disagreed with the Joint Petitioners assertion that Commission approval of recovery in rates based on the Abenaki rate base in the past prevented any present adjustment to rate base in the Acquisition. OCA asserted that the Commission's prior findings concerning rate recovery for the Abenaki companies were more limited than the Joint Petitioners claimed. Further, the OCA noted that nothing prevents the Commission from considering the present used and usefulness of the utility's rate base assets regardless of past findings concerning the condition of those assets.

OCA concluded the Joint Petitioners have done nothing but argue with, as distinct from substantively addressing, the Commission's preliminary determination of an adverse effect. Thus, the OCA urged the Commission to make a final adverse effect determination and provide an opportunity for an additional hearing, within 60 days, pursuant to RSA 369:8, II(b)(5).

C. Customer Intervenors

The Customer Intervenors in both the Bow and the Tioga Belmont water systems objected to the Amended Statement claiming that the supplemental pre-filed testimony it contained was not subject to discovery or hearing and cross-examination. For those reasons the Customer Intervenors claimed they have not been afforded due process. They also suggested that Aquarion should merge the New Hampshire Abenaki companies with the existing New Hampshire Aquarion water companies. Further, the Customer Intervenors argued that Aquarion should commit to withdrawing the current New Hampshire rate cases and to delaying any further rate cases for the New

Hampshire Abenaki customers until one year after a merger of the Abenaki and Aquarion New Hampshire water companies.

D. Omni

Omni argued the Amended Statement disagreed with the Commission's finding of adverse effect, but did not provide any remedies that would eliminate the adverse effect on rates identified in Order No. 26,506. Omni also raised due process issues to the extent the Commission relies on Supplemental Pre-Filed Testimony without providing the parties an opportunity to cross-examine witnesses.

Further, Omni observed the Joint Petitioner's arguments that the Commission could not require an adjustment to rate base once assets were allowed into rate base, were not correct, because those arguments ignored the principle of used and usefulness. According to Omni, utility rate base may be examined for used and usefulness at any time.

Omni also disagreed with arguments that the Commission's finding of adverse effect was confiscatory, noting that no rate adjustment is being made in this docket. Omni noted that the Commission is entitled to consider rate impacts in the context of this case, in order to examine adverse effect. Finally, according to Omni the Commission's adverse effect finding is factual and thus entitled to deference.

In its supplemental response to the Amended Statement Omni requested that the Commission take administrative notice of the recent Department of Energy Report filed with the Commission on August 31, 2021, following the investigation of the Abenaki-Rosebrook water system assets in Docket IR 21-124 (Rosebrook Report). Omni argued that the findings in the Rosebrook Report support the Commission's determination in this case that the Abenaki assets in New Hampshire are in poor condition and contribute to service quality deficiencies. Omni requested that the

Commission make a final determination that the proposed Acquisition will have an adverse effect.

E. Bretton Woods

Bretton Woods responded to the Amended Statement by letter filed with the Commission on September 10, 2021. In its response Bretton Woods argued that the Joint Petitioners did not respond to the Commission's concerns set out in Order No. 26,506 about the proposed Acquisition. Bretton Woods objected to the Joint Petitioner's presentation of written pre-filed testimony without giving intervenors the opportunity to cross-examine witnesses. Bretton Woods cited findings in the Department of Energy Report (Rosebrook Report) filed on August 31, 2021, in Docket IR 21-024, and argued that the Rosebrook water system was poorly maintained and did not provide adequate water service. Bretton Woods argued that Abenaki should not be allowed to benefit from a significant acquisition premium as the Acquisition is currently structured. Instead, according to Bretton Woods, Abenaki should either write-down rate base or set aside funds from the sale to make needed capital improvements to the Abenaki water systems.

III. COMMISSION ANALYSIS

A. Standard of Review under RSA 369:8

RSA 369:8, II (b) requires the Commission to review detailed written representations of corporate mergers initially under the standard of "no adverse effect on rates, terms, service or operation of the public utility within the state." The Commission only applies the standards applicable under other statutes, if the Commission first determines that there is an adverse effect under RSA 369:8, II(b) (5). Prior to making a determination of adverse effect, the Commission must first make a preliminary determination of adverse effect and permit an amended filing to address

the Commission's preliminary determination. See RSA 369:8, II (b)(3). Having made a preliminary finding of adverse effect in Order No. 26,506, the Commission now considers the Amended Statement filed by the Joint Petitioners to determine whether an adverse effect continues to exist.

B. Effect on Rates

In Order No. 26,506 (August 6, 2021) we found as a preliminary matter, that the Acquisition, as currently proposed, would have an adverse effect on Abenaki's rates and would unfairly burden the rate payers.

[w]e find 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.Any resulting recovery of rates based upon the pre-acquisition book value of those assets as proposed in this Acquisition will have an adverse effect as the utility's rates would unfairly burden rate payers. Order No. 26,506 at 10.

The preliminary finding of adverse effect in Order No. 26,506 was based upon the record developed, including the initial detailed statement by the Joint Petitioners, multiple rounds of discovery conducted by the parties, and a 2-day evidentiary hearing with witnesses subject to cross-examination.

The Amended Statement does not address the Commission's finding regarding the effect of the Acquisition on rates. The Joint Petitioners made no adjustment to the structure of the transaction to remedy the impaired asset condition identified in Order No. 26,506. Rather, the Amended Statement attempts to rebut the Commission's factual determination that the Abenaki rate base assets are in poor condition and challenges the Commission's authority to require any adjustment to rate base.

The Amended Statement contains uncontroverted supplemental testimony not subject to discovery or cross-examination, as well as copies of the year end 2020 annual reports. We do not find the evidence offered in the Amended Statement

sufficient for us to reverse our earlier determination that the Acquisition, as currently structured, will have an adverse effect on rates. Nor do we find the legal arguments contained in the Amended Statement persuasive. Joint Petitioners claim that the Commission lacks authority to make a determination concerning the condition of the Abenaki rate base. RSA 369:8 requires the Commission to consider both rates and service in the context of a proposed Acquisition. The condition of rate base assets has a direct effect on both service and rates. Further, the Commission has the general supervision of all New Hampshire public utilities as well as a duty to keep informed as to their service and assets. *See* RSA 374:3 and RSA 374:4.

Thus, we have determined the Acquisition, as currently structured, will have an adverse effect on rates. As directed by RSA 369:8, II(b)(5) we will now examine the proposed Acquisition to determine whether, it is “lawful, proper, and in the public interest,” pursuant to RSA 374:33. To conduct that inquiry we will schedule a final hearing in the matter within 60 days of this order and direct the parties to collaborate to propose a procedural schedule to conduct discovery.

For the purposes of our determination of adverse effect under RSA 369:8, II (b)(5), we deny Omni’s request that we take administrative notice, pursuant to Puc 203.27, of the report filed by the Department of Energy Staff on August 31, 2021, in docket IR 21-024 (Rosebrook Report). It would not be appropriate for the Commission to rely upon findings in an investigative report without allowing the company investigated, in this case Abenaki, an opportunity to contest the material noticed. RSA 541-A:33, VI. Accordingly, we have not relied upon the Rosebrook Report or the report references contained in the letter filed by Bretton Woods for our findings in this order.

Based upon the foregoing, it is hereby

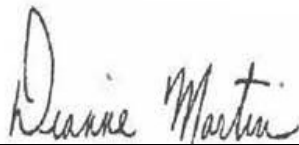
ORDERED, that the Commission finds pursuant to RSA 369:8, that the proposed Acquisition will have an adverse effect on the rates of Abenaki in New Hampshire, and it is;

FURTHER ORDERED, that the Joint Petitioners and the parties should submit any further testimony and evidence required for the Commission's review of the proposed acquisition pursuant to RSA 374:33 and should submit a proposed procedural schedule for discovery and testimony as soon as possible; and it is

FURTHER ORDERED, that a hearing is scheduled for November 10, 2021, beginning at 9:00 am at the Commission offices, 21 South Fruit Street, Suite 10, Concord, New Hampshire, for the Commission to determine whether the proposed acquisition should be approved pursuant to RSA 374:33; and it is

FURTHER ORDERED, Omni's request that the Commission take administrative notice of the report file on August 31, 2021, in Docket IR 21-024 is **DENIED**.

By order of the Public Utilities Commission of New Hampshire this seventeenth day of September, 2021.



Dianne Martin
Chairwoman



Daniel C. Goldner
Commissioner

Service List - Docket Related

Docket#: 21-090

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