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STATE OF NEW HAMPSHIRE

PUBLIC UTILITIES COMMISSION

February 20, 2021 - 1:35 p.m.

[Remote Hearing conducted via Webex]

RE: DE 20-124
VANGUARD GROUP, INC.:
Request for a Limited Exemption
from Approval Requirements of
RSA Section 374:33.
(Prehearing conference)

PRESENT: Chairwoman Dianne H. Martin, Presiding
Cmsr. Kathryn M. Bailey

Jody Carmody, Clerk
Susan Gagne, PUC Remote Hearing Host

APPEARANCES: **Reptg. Vanguard Group, Inc.:**
William S. Harwood, Esq. (*Verrill Law*)
Katherine M. McDonough, Esq. (*Verrill*)
Judy Gaines
Pauline Scelvino
Janine Korpics

Reptg. PUC Staff:
Brian D. Buckley, Esq.
Jay Dudley, Electric Division

Court Reporter: Steven E. Patnaude, LCR No. 52

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P R O C E E D I N G

CHAIRWOMAN MARTIN: We're here this afternoon in Docket DE 20-124 for a prehearing conference regarding the Amended Petition filed by the Vanguard Group, Incorporated.

I need to make the necessary findings for a remote hearing today.

As Chairwoman of the Public Utilities Commission, I find that due to the State of Emergency declared by the Governor as a result of the COVID-19 pandemic, and in accordance with the Governor's Emergency Order Number 12, pursuant to Executive Order 2020-04, this public body is authorized to meet electronically. Please note that there is no physical location to observe and listen contemporaneously to this hearing, which was authorized pursuant to the Governor's Emergency Order.

However, in accordance with the Emergency Order, I am confirming that we are utilizing Webex for this electronic hearing. All members of the Commission have the ability to communicate contemporaneously during the hearing, and the public has access to contemporaneously

1 listen and, if necessary, participate.

2 We previously gave notice to the public
3 of the necessary information for accessing the
4 hearing in the Order of Notice. If anyone has a
5 problem during the hearing, please call (603)
6 271-2431. In the event the public is unable to
7 access the hearing, the hearing will be adjourned
8 and rescheduled.

9 Okay. We have to take a roll call
10 attendance of the Commission. My name is Dianne
11 Martin. I am the Chairwoman of the Public
12 Utilities Commission. And I am alone.

13 Commissioner Bailey.

14 COMMISSIONER BAILEY: Good afternoon.
15 I'm Kathryn Bailey, Commissioner at the Public
16 Utilities Commission. And I am alone.

17 CHAIRWOMAN MARTIN: Okay. And let's
18 take appearances now. For Vanguard, who do we
19 have?

20 MR. HARWOOD: My name is William
21 Harwood, and I'm here with my colleague, Katie
22 McDonough, on behalf of Vanguard. And with me
23 from Vanguard are Judy Gaines, Pauline Scalvino,
24 and Janine Korpics, in case there are any

1 technical questions for them to answer.

2 CHAIRWOMAN MARTIN: Okay. Thank you.

3 And Mr. Buckley, for Commission Staff.

4 MR. BUCKLEY: Thank you, Madam Chair,
5 Commissioner Bailey. Good afternoon.

6 Brian Buckley, appearing on behalf of
7 Commission Staff. And with me today is Jay
8 Dudley, Analyst with the Electric Division at the
9 Commission.

10 CHAIRWOMAN MARTIN: Okay. Thank you.

11 Does anyone else need to appear in this case?

12 *[No verbal response.]*

13 CHAIRWOMAN MARTIN: All right. And do
14 we have any preliminary matters before we hear
15 initial positions from the parties? I think
16 you're on mute, Mr. Harwood.

17 Mr. Harwood, we can't hear you for
18 some reason. It looks like you're on mute.

19 MR. HARWOOD: I apologize. Is that
20 better?

21 CHAIRWOMAN MARTIN: That is.

22 MR. HARWOOD: Ah. My apologies. It
23 must have gone -- are you inviting me to make an
24 opening statement?

1 CHAIRWOMAN MARTIN: If there are no
2 preliminary matters, then, yes, you can go ahead
3 and give your initial position on the case.

4 MR. HARWOOD: Great. Thank you to the
5 New Hampshire Commission, the Chair and the
6 Commissioner, and the Staff.

7 Vanguard appreciates the time here this
8 afternoon, and looks forward to working out to
9 resolve this issue.

10 As a brief bit of background, Vanguard
11 is one of the largest investing companies in the
12 country, has hundreds of funds that are investing
13 on a daily basis. From time to time, they invest
14 in public utility stocks. And, from time to
15 time, they include New Hampshire public utility
16 stocks.

17 Recently, Vanguard has reviewed its
18 situation, and come to the conclusion that it
19 needed to review the rules for public utility
20 commissions on how those rules might operate in
21 its situation. It has reviewed change of control
22 statutes throughout the country, and is in the
23 process of reaching out to the various state
24 commissions where the change of control statute

1 is sufficiently unclear about how it may affect
2 Vanguard's operations.

3 The New Hampshire change of control
4 statute does create some issues for Vanguard, and
5 it has come forward, in the spirit of a good
6 corporate citizen, to reach out to the New
7 Hampshire Commission to help it understand how
8 best to interpret the New Hampshire rules, and
9 how to allow the Vanguard operation to continue
10 in compliance with those rules.

11 The filing raises a couple of basic
12 questions. First, "is Vanguard a public utility
13 holding company under the New Hampshire change of
14 control statute?" That ought to be a fairly
15 straightforward matter, but it complicated
16 because there's a reference to a repealed federal
17 law. We're not sure we are a public utility
18 holding company, as that term is normally
19 interpreted. And, if this Commission agrees,
20 then that would be the end of the matter.

21 Even if we are a public utility holding
22 company, there is a question of the aggregation
23 of the funds. Vanguard treats each of the funds
24 as stand-alone, independent entities. They are

1 not wholly owned subsidiaries of a common parent.
2 They each stand alone and they each make
3 investment decisions on their own. And each of
4 the funds understands that, if it goes over 10
5 percent ownership of a New Hampshire utility, it
6 must get the previous permission of the New
7 Hampshire Commission.

8 The problem comes when the funds when
9 you add them all together exceed 10 percent, and
10 that's where the problem arises. We don't think
11 aggregation is needed, appropriate, or required
12 under the statute. But, ultimately, that's the
13 Commission's call, not ours.

14 And, finally, should the Commission
15 decide that we're a public utility holding
16 company, and should it decide that aggregation
17 should occur among all the funds, then we would
18 respectfully request that the limit be raised
19 from 10 percent to 25 percent. Each fund will
20 continue to be subject to the 10 percent rule
21 that is in the change of control. But that
22 number is -- will interfere with some of our
23 normal operations, from time to time, if you add
24 all the funds. We don't think there's any

1 realistic likelihood of the funds ever getting to
2 25 percent. So, we think that gives us the
3 comfort. It also gives the New Hampshire
4 Commission the comfort that we will not be
5 exercising undue influence or control.

6 We invest as a passive investor, not to
7 control the management of any of the companies
8 with which we invest. And, so, at the core,
9 there isn't a control that was the original
10 concern of the change of control statute. And,
11 so, that is a further indication.

12 Most of the funds that we have are what
13 are known as "index funds". And, essentially,
14 every day they are adjusted to maintain a ratio
15 of certain types of companies and certain
16 companies. If a New Hampshire utility were in
17 the index, then every day those Vanguard funds
18 that are indexed to that New Hampshire utility
19 would be buying and selling small shares of that
20 utility to maintain the index consistent with
21 what they had told the investors.

22 It is possible that, over time, the
23 funds that are indexed could exceed the 10
24 percent. If we have to come to the New Hampshire

1 Commission to get permission for daily trades in
2 securities, you can see the challenge and the
3 problem from an operational point.

4 So, I'll stop there, and happy to let
5 Staff talk or to take questions. But the bottom
6 line is, we don't think we're a holding company.
7 And we would invite you to make that finding. We
8 don't think the funds need to be aggregated.
9 But, if, out of an abundance of caution, you want
10 us to be subject to that, we would respectfully
11 request that the Commission find that it is in
12 the public interest for the funds together, when
13 aggregated, may go as high as 25 percent.

14 Thank you for your time.

15 CHAIRWOMAN MARTIN: Thank you.

16 Commissioner Bailey, do you have questions?

17 COMMISSIONER BAILEY: I do. Mr.
18 Harwood, can you point me to a statute that would
19 allow us to permit you to go to 25 percent, if we
20 decided that we had to consider your funds on an
21 aggregated basis?

22 MR. HARWOOD: Well, I think, if I look
23 at 374:33, your change of control statute, it
24 says that you may find acquisitions to be

1 "lawful, proper, and in the public interest" and
2 approve them. So, the question here is "Can you
3 give us blanket approval to go up as high as 25
4 percent?"

5 Certainly, if we were a company that
6 was seeking to acquire one of your utilities, and
7 was about to acquire the entire company 100
8 percent of the voting stock, we would come in and
9 get permission.

10 What Vanguard is saying is, we're
11 coming in, and can you give us permission to go
12 up to as high as 25 percent, as we will not be
13 able -- allowed to go one bit higher than that?

14 COMMISSIONER BAILEY: Okay. Thank you.

15 CHAIRWOMAN MARTIN: Mr. Harwood, can
16 you elaborate a little bit more on what you said
17 about the funds being "independent"?

18 MR. HARWOOD: Yes. I want to be clear
19 that each of the funds is owned by the individual
20 investors that invest in that fund. This is not
21 a scheme in which there is one holding company on
22 top of the funds that is in control of them. So,
23 the funds are really independent and separate.
24 The funds own Vanguard, the company that has

1 brought this Petition, and they provide a number
2 of services to those funds. They assist them.
3 But, at the end of the day, the decisions about
4 buying and selling securities are made within the
5 fund.

6 And, so, the question of aggregation is
7 raised. I don't think it is justified here,
8 because the funds are not in close collaboration.
9 It is not as if the fund managers sit around and
10 say "Let's all get together and buy 9 percent of
11 a New Hampshire public utility. We won't have to
12 go the PUC's permission. But we will effectively
13 control as many 9 percent shares as we can."
14 That isn't the way that it is structured.

15 And I can tell you, as a outside
16 indication of that, under the SEC rule, there are
17 two kinds of filings for investors. There's
18 13(d) and 13(g). Vanguard -- one is for those
19 who file -- who are not interested in controlling
20 the target company, and the other is those who do
21 want to control. Vanguard always files under the
22 SEC rule of no control. And we would stipulate
23 to the Commission that, as long -- that if you
24 grant the relief requested, we will continue to

1 file under the non-control SEC. And, if we
2 should ever change that, we're prepared to come
3 back and revisit this.

4 I think that gives you a very careful
5 and external way of policing the basic
6 proposition that we don't invest for control. We
7 are passive investors.

8 CHAIRWOMAN MARTIN: I just want to make
9 sure I'm understanding you correctly. You said
10 that the entity that filed this Petition is owned
11 by all of the funds, but each of the funds is
12 independent. Did I understand that right?

13 MR. HARWOOD: Yes. And I'm happy to
14 have Pauline or Judy help me. I don't know
15 whether they're owned by all of the funds or most
16 of the funds.

17 CHAIRWOMAN MARTIN: And do they have a
18 parent company?

19 MR. HARWOOD: No. That's the point.
20 That's the interesting thing. They are truly
21 mutual funds. The funds themselves are owned by
22 the individual investors. And then, the funds
23 own the Vanguard company that has brought this
24 Petition.

1 CHAIRWOMAN MARTIN: Okay. No, that
2 answers the question.

3 MR. HARWOOD: Vanguard -- the Vanguard
4 Group, Inc.

5 CHAIRWOMAN MARTIN: Your reference to
6 the -- the reference in the statute to "federal
7 law". So, is your concern really with the
8 requirement of the federal law, and that that
9 might cause these to be considered public utility
10 holding companies?

11 MR. HARWOOD: Yes, Your Honor. The
12 statute says you regulate two kinds of entities
13 under this statute: Public utilities and public
14 utility holding companies. Clearly, Vanguard
15 isn't a public utility under New Hampshire law.
16 So, the only question is, "is it a public utility
17 holding company?" And the reference in the
18 statute is to what us utility lawyers refer to as
19 "PUHCA", the 1935 Act, which gave the U.S.
20 Securities & Exchange Commission authority over
21 public utility holding companies, and some of the
22 issues that were arising back in the 1930s.

23 The problem for the New Hampshire
24 statute is Congress, in its wisdom, repealed

1 PUHCA back in 2005. So, --

2 *(Inadvertent audio interruption.)*

3 CHAIRWOMAN MARTIN: Just a moment.

4 Let's go off the record for a minute.

5 *[Brief off-the-record discussion*
6 *ensued.]*

7 CHAIRWOMAN MARTIN: Mr. Patnaude, if we
8 could go back on the record. And I apologize,
9 Mr. Harwood, if you could back up a moment. And
10 you're on mute now.

11 MR. HARWOOD: Thank you, Your Honor.
12 You've moved to the center of the screen from
13 down in the lower corner, so that it looks like
14 it's more the way it was intended.

15 CHAIRWOMAN MARTIN: I have no control
16 over that.

17 MR. HARWOOD: So, here's the problem.
18 The New Hampshire Legislature, in its wisdom,
19 made reference to the federal 1935 Act, and
20 Congress, in its wisdom, repealed the Act. And
21 this is one of those things where law students
22 write *Law Review* articles as to what is supposed
23 to happen, and there are a number of statutory
24 interpretation theories. The "public utility

1 holding company" concept was moved over to FERC
2 under Congress's 2005 Act. So, there is an
3 animal called a "public utility holding company"
4 still under FERC.

5 Is that what the New Hampshire
6 Legislature meant back when it adopted its
7 change of control? Should we assume that?
8 Should we assume that there is no such thing as
9 a "public utility holding company" under New
10 Hampshire law?

11 We could debate that. The lawyers
12 could analyze it. We're not interested in having
13 any debate or issue. We're happy to interpret --
14 defer to your interpretation of that. And, if,
15 in the end, you decide that Vanguard funds are
16 public utility holding companies under New
17 Hampshire law, we will accept that, and then ask
18 for the appropriate relief in our Petition.

19 Now you're muted.

20 CHAIRWOMAN MARTIN: It's my turn.
21 Thank you for that.

22 I missed the part where you said the
23 year it was repealed. Can you just repeat
24 that?

1 MR. HARWOOD: I'm sorry, you missed the
2 part what?

3 CHAIRWOMAN MARTIN: You said the year
4 that it was repealed, the federal law.

5 MR. HARWOOD: Oh. 2005 it was
6 repealed.

7 CHAIRWOMAN MARTIN: Okay.

8 MR. HARWOOD: It's in the -- there's a
9 lengthy footnote, Footnote 5, in our Petition,
10 which describes the Public Utility Holding
11 Company Act and the 2005 Act.

12 CHAIRWOMAN MARTIN: Okay. Thank you
13 for that, Mr. Harwood.

14 Commissioner Bailey, do you have any
15 more questions before we go to Staff?

16 *(Commissioner Bailey indicating in the*
17 *negative.)*

18 CHAIRWOMAN MARTIN: Okay. Mr. Buckley,
19 go ahead.

20 MR. BUCKLEY: Thank you, Madam Chair.

21 Staff is still evaluating the issues
22 presented in the instant Petition, and recommends
23 that the Commission withhold judgment at this
24 time on Vanguard's request for declaratory

1 ruling, as well as Vanguard's request for a
2 "public interest" finding pursuant to RSA 374:33,
3 the provision of the New Hampshire Revised
4 Statutes Annotated which covers merger and
5 acquisition of New Hampshire public utilities and
6 public utility holding companies.

7 With respect to the requested
8 declaratory ruling, RSA 374:33 requires
9 Commission approval before any public utility or
10 public utility holding company may indirectly or
11 directly acquire a more than 10 percent share of
12 the stocks or bonds of any public utility or
13 public utility holding company incorporated in
14 New Hampshire.

15 Staff would suggest that the
16 Petitioners' type of ownership and degree of
17 control of any New Hampshire public utility debt
18 or equity interests do not appear to be the type
19 of ownership and control RSA 374:33 was intended
20 to require Commission approval of. Likewise,
21 Staff agrees that the Petitioners' are not
22 "public utilities", as defined by RSA 362:2.

23 But where this request gets a little
24 more complicated, as suggested by learned counsel

1 for the Company, is in applying the portion of
2 RSA 374:33 which actually defines the term
3 "public utility holding company", which
4 incorporates by reference Section 2(a)(7)(A) of
5 the 1935 Public Utility Holding Company Act,
6 which, in fact, defines the term "public utility
7 holding company".

8 Now, for some background, in 2005,
9 Congress saw fit to repeal and replace the 1935
10 law with a new, slightly less restrictive version
11 of the Act which allowed public utility holding
12 companies to acquire non-contiguous utilities,
13 which, amongst other factors, one might suggest
14 resulted in the substantial uptick in utility
15 mergers our industry has witnessed in the ensuing
16 decade and a half.

17 More relevant to our discussion today,
18 however, the 2005 law also redefined the term
19 "public utility holding company" to include
20 certain exceptions identified at Page 4 of the
21 supplemental Petition, in Footnote 5. Based on
22 the facts and circumstances presented in the
23 Petition, it appears the Petitioners may have a
24 good case that their organizational model fits

1 within one of those exceptions. In fact, I
2 believe that the Federal Energy Regulatory
3 Commission has previously ruled in the Company's
4 favor on that issue. However, the exceptions
5 within the 2005 law, which appear most relevant
6 to the Petitioners' circumstances, were not
7 included in the 1935 law's definition of "public
8 utility holding company".

9 So, where does that leave us on the
10 request for a declaratory order? We have a New
11 Hampshire statute incorporating by reference a
12 definition from a federal law that has been
13 repealed and replaced by a successor statute.
14 The definition and relevant exceptions within the
15 2005 Act would, in fact, lend themselves quite
16 easily to granting of the Petitioners' request
17 for a declaratory order, saving us all the time
18 related to a full adjudicative proceeding on this
19 issue. So, can we apply those -- that definition
20 and those exceptions here? Staff's initial
21 research on the legal issues in the Petition
22 suggest that that answer may be "no."

23 The relevant case law appears to
24 suggest that the non-delegation doctrine, which I

1 believe is, in fact, cited in a footnote maybe of
2 the Petition or supplemental Petition itself, is
3 of particular relevance when a state law
4 incorporates a reference to a federal law,
5 essentially locking in the definition that
6 existed in federal law at the time when the state
7 law was adopted.

8 For those who might be interested in
9 the reasoning behind this understanding, Staff
10 would point to a 2008 article in the *Louisiana*
11 *Law Review* by F. Scott Boyd entitled "Looking
12 Glass Law: Legislation by Reference in the
13 States", as the most comprehensive authority on
14 the matter it was able to locate.

15 Now, to be clear, we agree with the
16 Petitioner that there may be some room to
17 maneuver based on whether you aggregate or do not
18 aggregate the various funds when applying the
19 statute, but based on this and the understanding
20 outlined above, Staff recommends that the
21 Commission withhold a decision today on the
22 Petition for a Declaratory Ruling, and looks
23 forward to further exploring this issue in the
24 technical session that follows this prehearing

1 conference.

2 Now, with respect to RSA 374:33's
3 "public interest" finding, we also suggest that
4 the technical session which follows this hearing
5 would enable Staff to better flesh out certain
6 facts related to the requested "public interest"
7 finding, and look forward to working with
8 Vanguard and its counsel to that end.

9 Thank you.

10 CHAIRWOMAN MARTIN: Thank you for that.
11 Commissioner Bailey, do you have questions?

12 *(Commissioner Bailey indicating in the*
13 *negative.)*

14 CHAIRWOMAN MARTIN: Okay. And I don't
15 have any more questions. I think you both did a
16 nice job of laying out the issue here. It's very
17 interesting.

18 And, so, do we have any other issues we
19 need to cover before the technical session?

20 MR. BUCKLEY: I don't believe so.

21 MR. HARWOOD: All set here.

22 CHAIRWOMAN MARTIN: Okay. Great.

23 Thank you, everyone, for your presentations. And
24 we are adjourned for the day. Please stay on for

1 the technical session.

2 *(Whereupon the prehearing conference*
3 *was adjourned at 2:00 p.m., and a*
4 *technical session was held thereafter.)*

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