

**STATE OF NEW HAMPSHIRE
PUBLIC UTILITIES COMMISSION**

DE 20-124

VANGUARD GROUP, INC.

Request for Limited Exemption from Approval Requirements of RSA 374:33

Order Granting Limited Exemption from RSA 374:33

O R D E R N O. 26,578

February 8, 2022

In this order, the Commission grants the request by The Vanguard Group, Inc. (Vanguard) on behalf of its Vanguard Advised Funds¹ (collectively, Petitioners) for a declaratory ruling that Petitioners are exempt from Commission approval requirements under RSA 374:33, provided no individual Vanguard fund owns more than 10 percent of the securities of a public utility or public utility holding company incorporated in, or doing business in, New Hampshire, and so long as the Vanguard funds in the aggregate do not own more than 25 percent of securities in a public utility or public utility holding company incorporated in, or doing business in, New Hampshire.

I. BACKGROUND AND PROCEDURAL HISTORY

Vanguard is an investment management company jointly owned by 35 investment companies, which offer separate funds, including more than 200 distinct United States-registered mutual funds (collectively, the Vanguard Mutual Funds)² to

¹ “Vanguard Advised Funds” refers to Vanguard’s *internally* managed investment funds as well as internally managed portions of those Vanguard funds that are otherwise externally managed. Vanguard Advised Funds excludes Vanguard funds that are entirely managed *externally* (or the portions of which are managed externally) by independent external advisors, who hold independent voting power and investment discretion over the assets managed by those independent advisors. Vanguard Advised Funds and Vanguard funds that are externally managed are collectively referred to as “Vanguard Mutual Funds.”

² Vanguard Group, Inc. also offers 230 non-US funds and 80 collective investment trusts.

investors, on whose behalf Vanguard makes investments exclusively for investment purposes. Vanguard Advised Funds, in turn, invest in shares of publicly traded companies that may, from time to time, include New Hampshire public utilities or their parent companies. On occasion, Vanguard Advised Funds' collective holdings, when aggregated, may own more than 10 percent of a New Hampshire public utility.

On July 31, 2020, Petitioners filed a petition requesting an exemption from RSA 374:33, which generally prohibits a public utility or public utility holding company from directly or indirectly acquiring more than 10 percent of any New Hampshire public utility or public utility holding company. Petitioners asked the Commission to grant them a limited exemption from the approval requirement of RSA 374:33 so long as the total holdings of all Vanguard Advised Funds did not exceed 25 percent ownership of any New Hampshire public utility or public utility holding company, and no individual Vanguard Advised Fund acquires more than 10 percent ownership of such entities.

On November 2, 2020, Petitioners amended their petition to request two alternative forms of relief: (1) a declaratory ruling that Petitioners are not public utility holding companies under RSA 374:33 and the federal Public Utility Holding Company Act of 1935 (PUHCA 1935); or (2) a finding that Petitioners' acquisition of interests in New Hampshire public utilities, their parent companies, or other affiliates is in the "public interest," as required by RSA 374:33, provided the total holdings in aggregate of all of the Vanguard Advised Funds do not exceed 25 percent ownership or exceed 10 percent ownership by any individual Vanguard fund.

On February 10, 2021, the Commission held a prehearing conference and technical session to discuss preliminary issues relevant to the proceeding. Following

the technical session, the parties participated in discovery, including the issuance of data requests.

On April 8, 2021, Commission Staff (Staff) (now part of the New Hampshire Department of Energy (Energy)) filed a recommendation, in which Staff recommended that the Commission grant Petitioners' amended request for a declaratory ruling that Petitioners are not entities subject to the approval requirements of RSA 374:33. Staff also recommended that, in light of this declaratory ruling, the Commission deem Petitioners' request for an RSA 374:33 public interest finding moot.

On April 14, 2021, the Commission held a remote evidentiary hearing on Petitioners' amended petition. At the hearing, Petitioners stipulated to Staff's proposed resolution of the case and introduced into the evidentiary record several facts to support the requested declaratory ruling.

II. POSITIONS OF THE PARTIES

A. Vanguard

In their amended petition, Petitioners explained that, as of June 30, 2020, 67 of the Vanguard Mutual Funds (as defined in footnote 1) held small interests in Eversource Energy, the parent company of Public Service Company of New Hampshire d/b/a Eversource Energy, a New Hampshire public utility. Petitioners stated that three Vanguard Mutual Funds held 2-3 percent each, and the remaining 64 funds held less than 1 percent each. Nonetheless, when the ownership interests in Eversource Energy held by those 67 individual Vanguard Mutual Funds were aggregated, the total ownership interest in Eversource Energy equaled 13.45 percent.

Petitioners requested the Commission to determine that they are not subject to RSA 374:33, because they are not "public utilities," as defined by RSA 362:2, and should not be considered "public utility holding companies" subject to RSA 374:33.

Petitioners argued that, if RSA 374:33 is found to apply, then the holdings of individual Vanguard funds should not be aggregated to determine whether the Petitioners exceeded the 10 percent threshold of ownership of any New Hampshire utility under RSA 374:33, because Vanguard does not own its funds, which are separately and independently managed. Alternatively, Petitioners asked the Commission to find that Petitioners' direct or indirect ownership interests in New Hampshire public utilities are in the "public interest" under RSA 374:33, provided that the aggregate holdings of Vanguard Advised Funds do not exceed 25 percent and the holdings of no individual Vanguard fund exceeds 10 percent.

At the prehearing conference, counsel for Vanguard stated that under the Securities and Exchange Commission (SEC) rules, there are two kinds of investor filings; rule 13(d) and rule 13(g). One rule is for those who are not interested in controlling the target company, and the other is for those who want to control the target company. Vanguard always files under the SEC rule of no control.

Vanguard offered to stipulate to the Commission that, if the Commission granted the relief requested, Vanguard would continue to file under the non-control SEC rule. Further, in the event that Vanguard's non-control filing status ever changed, Vanguard would be willing to come back and revisit the issue with the Commission. Transcript Prehearing Conference, February 10, 2021 at 12-13. Vanguard claimed its SEC filing status as support for the proposition that it doesn't invest for control and is, instead, a passive investor.

B. New Hampshire Department of Energy

In its recommendation Energy stated, “[a]lthough Vanguard’s advisory relationship with its funds does not implicate ownership, it is possible that through its advisory relationship Vanguard could be viewed as indirectly controlling the Vanguard Advised Funds through its oversight of the voting power of the individual funds and the public utility shares they hold, which would suggest that those shares should be aggregated for the purposes of interpreting the PUHCA 1935 definition of holding company.” Energy Recommendation at 3. Nonetheless, based on the requirement for ownership contained in RSA 374:33, Energy argues that the individual funds should not be aggregated. Energy continues to argue that RSA 374:33 is not triggered and that no public interest finding is required.

III. COMMISSION ANALYSIS

A. Provisions of Law

RSA 374:33 provides:

No public utility or public utility holding company as defined in section 2(a)(7)(A) of the Public Utility Holding Company Act of 1935 shall directly or indirectly acquire more than 10 percent, or more than the ownership level which triggers reporting requirements under 15 U.S.C. section 78-P, whichever is less, of the stocks or bonds of any other public utility or public utility holding company incorporated in or doing business in this state, unless the commission finds that such acquisition is lawful, proper, and in the public interest. . . .

“Public utility” is defined by RSA 362:2, I, which provides, in pertinent part:

The term “public utility” shall include every corporation, company, association, joint stock association, partnership and person, their lessees, trustees or receivers appointed by any court . . . owning, operating or managing any plant or equipment or any part of the same for the conveyance of telephone or telegraph messages or for the manufacture or furnishing of light, heat, sewage disposal, power or water for the public, or in the generation, transmission or sale of electricity ultimately sold to the public

Section 2(a)(7)(A) of PUHCA 1935 defines “holding company” as:

any company which directly or indirectly owns, controls, or holds with power to vote, 10 per centum or more of the outstanding voting securities of a public-

utility company or of a company which is a holding company by virtue of this clause or clause (B) of this paragraph, unless the Commission, as hereinafter provided, by order declares such company not to be a holding company.

15 U.S.C.A. § 79b (effective August 26, 1935 through February 7, 2006).

B. Analysis

In evaluating whether Petitioners are subject to Commission oversight under RSA 374:33, the Commission must determine: (1) whether Petitioners are “public utilities” under RSA 362:2; and (2) whether Petitioners are “public utility holding companies” under RSA 374:33.

With respect to the definition of “public utility holding company”, RSA 374:33 refers to section 2(a)(7)(A) of PUHCA 1935, which definition has since been repealed. The definition of “holding company” in PUHCA 1935 was repealed and replaced by the Public Utility Holding Company Act of 2005. Nonetheless, when a state law incorporates a federal law by reference, the non-delegation doctrine generally prescribes that the referenced federal provision remains as it existed at the time of the state statute’s passage. See F. Scott Boyd, *Looking Glass Law: Legislation by Reference in the States*, 68 La. L. Rev. 1201, 1254-55 (2008), available at: <https://digitalcommons.law.lsu.edu/lalrev/vol68/iss4/7>. As a result, we apply the definition of “holding company” under PUHCA 1935 as it existed at the time RSA 374:33 was adopted.

Although Petitioners are from time to time in possession of shares of public utilities or public utility holding companies incorporated in or doing business in New Hampshire, they do not directly own, operate, or manage plant or equipment “for the manufacture or furnishing of light, heat, sewage disposal, power or water for the public, or in the generation, transmission or sale of electricity ultimately sold to the

public.” See RSA 362:2, I. Therefore, Petitioners are not “public utilities,” as defined by RSA 362:2, I.

Nonetheless, we find that Petitioners are public utility holding companies for purposes of RSA 374:33. Whether Petitioners are “public utility holding companies” within Section 2(a)(7)(A) of PUHCA 1935 turns on the relationship between Vanguard and the mutual funds it advises. Based on the record, Vanguard provides advisory services to each individual fund, but does not actually own such funds. Energy, in its Recommendation, recognized that Vanguard’s advisory relationship with the Vanguard Advised Funds would allow indirect control through Vanguard’s oversight of the voting power of the shares held in Vanguard Advised Funds. Vanguard has not provided the Commission with the specific advisory agreements. Vanguard did not offer testimony at hearing or in its petitions concerning the nature of the voting power Vanguard holds in the shares held by the individual Vanguard Advised Funds. Further, Vanguard did not deny that its advisory arrangements allow it to vote the shares held in the Vanguard Advised Funds. Based on this limited record, we find that Vanguard holds power to vote the shares held in the Vanguard Advised Funds.

The purpose of RSA 374:33 is to limit external control over public utility holding companies operating, or based, in New Hampshire. Therefore, based on Vanguard’s voting control over the shares held in the Vanguard Advised Funds, we find that the shares held by the Vanguard Advised Funds should be aggregated for purposes of determining the ownership threshold under RSA 374:33.

Having determined that RSA 374:33 applies to the Petitioners, we must now determine whether the Petitioners’ requested ownership in the aggregate of up to 25 percent of a New Hampshire public utility or public utility holding company is in the public interest. In their petition and amended petition, the Petitioners claimed that

their business model and investment practices are focused on maximizing profits, and not on developing or exercising control. Petitioners offered as evidence of their passive investment goals their SEC filing status as non-control investors. Given these facts, we find that such limited ownership of Petitioners aggregate holdings of, less than 25 percent, for these limited purposes is in the “public interest” under RSA 374:33. Therefore, we grant Petitioners’ request for a limited exemption from the Commission’s approval requirements under RSA 374:33, so long as the aggregate holdings of Vanguard Advised Funds do not exceed 25 percent ownership of a public utility or public utility holding company that is either incorporated in, or doing business in, New Hampshire, and the holdings of no individual Vanguard fund exceeds 10 percent ownership of a public utility or public utility holding company that is either incorporated in, or doing business in, New Hampshire.

C. Motion for Confidential Treatment

On April 8, 2021, the Petitioners filed a motion for confidential treatment of two discovery responses: first set of data requests #3, “which contain internal voting procedures and policies,” and (2) the question and answer to first set of data requests #6 which contains certain non-public information about Vanguard’s current holdings in New Hampshire.” The issues of ownership and control are central to the Commission’s determination of applicability of RSA 374:33. The Petitioners have not provided the Commission with copies of the material they seek to protect, nor have they described it with sufficient detail for the Commission to rule on the request for confidential treatment.

Pursuant to N.H. Code of Admin. R. Puc § 203.8 (b),

“A motion for confidential treatment submitted pursuant to this rule shall contain:

(1) The documents, specific portions of documents, or a detailed description of the types of information for which confidentiality is sought;

(2) Specific reference to the statutory or common law support for confidentiality; and

(3) A detailed statement of the harm that would result from disclosure and any other facts relevant to the request for confidential treatment.”

As a result, we must deny the motion, but will do so without prejudice, and invite the Petitioners to submit the motion with the documents attached.

Based upon the foregoing, it is hereby

ORDERED, that Petitioners’ amended petition is **DENIED** in part, in that it is declared that Petitioners constitute “public utility holding companies” under RSA 374:33 and, therefore, are subject to the requirements of RSA 374:33; and it is

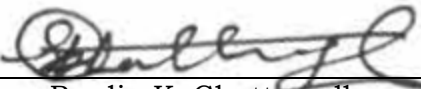
FURTHER ORDERED, that Petitioners’ amended petition is **DENIED** in part, in that the ownership interests of individual Vanguard Advised Funds in public utilities or public utility holding companies that are either incorporated in, or doing business in, New Hampshire should be aggregated for the purpose of determining whether the Petitioners have reached the 10 percent threshold set forth in RSA 374:33; and it is

FURTHER ORDERED, that Petitioners’ amended petition is **GRANTED**, in that Petitioners’ ownership interest in public utilities or public utility holding companies that are either incorporated in, or doing business in, New Hampshire is found to be “lawful, proper, and in the public interest” under RSA 374:33 under the following conditions: (1) the aggregate holdings of Vanguard Advised Funds do not exceed a 25 percent ownership interest; and (2) the holdings of no individual Vanguard Advised Fund exceeds a 10 percent ownership interest; and it is


FURTHER ORDERED, that Petitioners shall file a notice with the Commission within 45 days of any decision by Petitioners’ to change their passive investment goals, or in the event the ownership of New Hampshire public utilities or public utility holding companies by Petitioners exceeds the conditions of this order; and it is

FURTHER ORDERED, that Petitioners motion for confidential treatment is **DENIED** without prejudice.

By order of the Public Utilities Commission of New Hampshire this eighth day of February, 2022.



Pradip K. Chattopadhyay
Commissioner



F. Anne Ross
Special Commissioner

Service List - Docket Related

Docket# : 20-124

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