

STATE OF NEW HAMPSHIRE
BEFORE THE
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**

RESPONSE OF OMNI MOUNT WASHINGTON, LLC
TO JOINT PETITIONERS' AMENDED FILING

NOW COMES Omni Mount Washington, LLC (“Omni”), by and through its undersigned counsel, and respectfully responds to the Joint Petitioners’ Amended Filing in Support of the Verified Joint Petition for Approval of the Acquisition of Abenaki Water Company by Aquarion Company (“Amended Filing”) by stating as follows:

I. BACKGROUND - COMMISSION’S PRELIMINARY DETERMINATION OF ADVERSE EFFECT ON RATES

1. After evidentiary hearings held on June 28 and 29, 2021 in this docket, the New Hampshire Public Utilities Commission (“the Commission”) made a preliminary written determination pursuant to RSA 369:8, II (b)(3) that, as currently proposed, the acquisition of Abenaki Water Company (“Abenaki”) by Aquarion Company (“Aquarion”) “will have an adverse effect on Abenaki’s rates and would unfairly burden the rate payers.” *Abenaki Water Company and Aquarion Company*, DW 21-090, Order No. 26,506 (Aug. 6, 2021) (“Order”), p. 10.

2. In support of its preliminary determination, the Commission found that the “evidence presented at the hearing made clear that Abenaki’s assets were not in an acceptable

condition in the aggregate” and that, based on the record, “the current state of the assets are below standard and in disrepair.” *Id.*

3. The Commission also found that the proposed acquisition of Abenaki by Aquarion “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”, and that “recovery of rates based upon the pre-acquisition book value of those assets would unfairly burden the rate payers.” *Id.*

4. The Order concludes by emphasizing that “memorializing Abenaki assets appropriately in the acquisition for purposes of rate recovery is at the core of the [adverse effect] finding and must be addressed before the acquisition can be approved.” *Id.* In addition, the Commission encouraged the Joint Petitioners “to amend their detailed statement in order to address the adverse effect on rates.” *Id.*

II. JOINT PETITIONERS’ AMENDED FILING

5. On August 20, 2021, the Joint Petitioners filed a letter captioned “Amended Filing in Support of the Verified Joint Petition for Approval of the Acquisition of Abenaki Water Company by Aquarion Company” (“Amended Filing Letter”) along with Direct Testimony of Donald J. Morrissey and Donald J.E. Vaughan (“Supplemental Testimony”) (together, “Amended Filing”).

6. The Amended Filing Letter states that the “Supplemental Testimony and attachments specifically address the Commission’s concerns regarding potential adverse rate effects and ensuring that Abenaki assets are memorialized appropriately for purposes of rate recovery”. *Amended Filing Letter*, p. 2. However, instead of submitting information that addresses, from a corrective standpoint, the Commission’s concern that the present physical state

and net book value of Abenaki's rate base assets will adversely affect rates if Aquarion assumes/carries forward Abenaki's current rate base valuation, the Amended Filing simply presents arguments as to why the Commission's adverse effect determination is incorrect. For example, the Amended Filing Letter states that the preliminary determination is "inadvertently incorrect for both factual and legal reasons", and that the Commission was incorrect in stating that "the 'proposed carry forward of existing Abenaki rate base for purposes of the transaction do [sic] not take into account the impaired state of rate base assets.'" *Amended Filing Letter*, p. 2, quoting Order, p. 10. Similarly, the Supplemental Testimony argues that "Abenaki's assets are already appropriately memorialized in rates and there is no adverse impact create by the transaction." *Supplemental Testimony*, p. 8, lines 11-13. The Supplemental Testimony's persistent theme is that the proposed transaction will have no adverse effects on rates because the Commission has already approved Abenaki's physical assets for inclusion in rate base, and that once such assets are included rate base, customers' rates must always recover the net book value of the rate base assets, irrespective of whether the transaction occurs. *See Supplemental Testimony*, p. 12, lines 14-15; p. 13, lines 7-10, and lines 14-16; page 15, lines 2-5. Omni respectfully disagrees for the reasons set forth below.

III. ARGUMENT

7. Omni hereby incorporates by reference Section IV ("Determination of Adverse Effect") of its Motion for Determination of Adverse Effect filed July 26, 2021 in this docket.

8. Because the parties to this proceeding have not been provided with an opportunity to conduct discovery on the Supplemental Testimony, and because neither the Commission nor the parties have had the opportunity to cross-examine the witnesses who filed the Supplemental Testimony, the Commission cannot properly rely on it for purposes of making its final

determination under RSA 369:8, II (b)(5). *See* RSA 541-A:33, IV; *see also* N.H. Admin. R. Puc 203.24 (a).

9. Even if the Commission were to consider the Supplemental Testimony, none of the arguments contained in it or in the Amended Filing Letter warrants a reversal of the Commission's preliminary determination of adverse effect. Without citing to any case law or Commission precedent, the Amended Filing Letter summarily concludes that "there is definitively 'no adverse effect' on rates from the transaction because Abenaki's book value of the assets is unaffected, and the rate base cannot change outside of a rate case and without Commission review and approval." *Amended Filing Letter*, p. 3. This argument is unpersuasive for the following reasons:

a. First, the Commission is not changing the value of Abenaki's rate base outside of a rate case. The Commission's responsibility under RSA 369:8, II (b)(3) and (5) is to determine whether the acquisition of Abenaki by Aquarion will have an adverse effect on rates. This analysis is similar to the Commission's review of utility financings, where its "responsibility is to address the rate implications of a decision approving a utility's financing request" - not to conduct a full rate case. *Appeal of Conservation Law Foundation*, 127 N.H. 606, 640 (1986). In the instant case, the Commission correctly fulfilled its statutory responsibility by considering the rate effects resulting from the transaction, after determining that Aquarion's proposed carry forward of Abenaki's net book value does not account for the impaired state of the rate base assets. *Order*, p. 10. Because these factual determinations are presumed *prima facie* lawful and reasonable, *see Appeal of Union Telephone Company d/b/a Union Communications*, 160 N.H. 309,

313 (2010), they provide proper support for the Commission's adverse effects determination, notwithstanding Joint Petitioners' disagreement with it.

b. Second, the argument ignores that the Commission is authorized to reduce the value of a utility's rate base if assets are no longer used or useful. In fact, the Joint Petitioners themselves acknowledge that rate recovery of the rate base assets can be reduced or retracted if the assets are no longer used and useful to customers.

Supplemental Testimony, p. 7, lines 7-12. "Under the 'used and useful' principle, the commission is not asked to second-guess what was reasonable at some time in the past, but rather to determine what can reasonably be done now with the fruits of investment."

Appeal of Conservation Law Foundation, 127 N.H. at 638. In this case, the Commission essentially found that currently, Abenaki's assets are not totally used and useful. This finding may reasonably be inferred from the Commission's determination that the assets' substandard condition does not justify rates that reflect total recovery of the assets' net book value. As explained in paragraph 9.a., above, this determination need not be made within the context of a rate case. Further, the determination does not constitute confiscation, as the Commission has not disallowed any specific costs or otherwise reduced rates.

10. Because the Amended Filing is devoid of any information regarding corrective action that the Joint Petitioners will take to address the Commission's concerns about the value and physical state of the rate base assets, there is no basis for the Commission to alter its preliminary determination. Accordingly, the Commission should enter a final determination of adverse effect pursuant to RSA 369:8, II (b)(5) and proceed with reviewing the proposed transaction under RSA 374:33.

IV. CONCLUSION

11. Omni hereby incorporates by reference Section V (“Conclusion”) of its Motion for Determination of Adverse Effect filed July 26, 2021 in this docket. For the reasons cited therein and in this Response, 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 operations. The Commission, therefore, should enter a final adverse effects determination under RSA 369:8, II (b)(5) and proceed with reviewing the transaction under RSA 374:33.

12. Omni reserves the right to supplement this Response after it has reviewed the Department of Energy Staff report and recommendations in Docket IR 21-024 which is due on or before August 31, 2021. Being mindful of the deadline imposed on the Commission under RSA 369:8, II (b)(5) for its determination on the Joint Petitioners’ amended filing, Omni will endeavor to file its Supplemental Response on or before September 3, 2021.


WHEREFORE, Omni Mount Washington, LLC respectfully requests that the Commission:

- A. Defer any action in this docket until it receives and considers the forthcoming Department of Energy Staff report and recommendations in Docket No. IR 21-024, and any supplemental responses filed in the instant docket;
- B. Make a final determination pursuant to RSA 369:8, II (b)(5) that the proposed acquisition will have an adverse effect on rates, terms operation, or services;
- C. Proceed with reviewing the proposed transaction under RSA 374:33; and
- D. Grant such further relief as it deems just and reasonable.

Respectfully submitted,

OMNI MOUNT WASHINGTON, LLC


By its Attorneys,
ORR & RENO, P.A.

By: 
Susan S. Geiger (NH Bar # 925)
45 South Main Street
Concord, N.H. 03302-3550
Phone: (603) 223-9154
Email: sgeiger@orr-reno.com

Dated: August 30, 2021

Certificate of Service

I hereby certify that on this 30th day of August, 2021 a copy of this Appearance has been sent by electronic mail to persons listed on the Service List in the above-captioned docket.


Susan S. Geiger

