STATE OF NEW HAMPSHIRE
BEFORE THE
NEW HAMPSHIRE PUBLIC UTILITIES COMMISSION

Abenaki Water Company and Aquarion Company
Request for Approval of Acquisition

Docket No. DW 21- 090

INITIAL BRIEF OF ABENAKI WATER COMPANY AND AQUARION COMPANY

Abenaki Water Company ("Abenaki") and Aquarion Company ("Aquarion") (together, the "Joint Petitioners") submit this initial brief in response to the May 28, 2021 secretarial letter issued by the New Hampshire Public Utilities Commission (the "Commission"). The Commission authorized parties to submit legal briefs to assist it in understanding the Office of Consumer Advocate's ("OCA") assertion that the Commission should apply a "net benefits" standard in its assessment of the joint petition.[1] OCA made this assertion at the May 14, 2021 prehearing conference, notwithstanding the fact that the "no net harm" standard is codified in RSA 369:8, II and that the Commission has consistently applied this standard in numerous prior merger transactions.[2] In this brief, the Joint Petitioners explain that there is no basis for the Commission to diverge from the applicable statutory standard or its long-standing precedent.

I. Introduction

The Joint Petitioners submitted a verified joint petition to the Commission on April 30, 2021 ("Joint Petition") requesting approval of Aquarion's acquisition of Abenaki pursuant to RSA

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[1] On June 3, 2020, the Commission issued a revised briefing schedule in response to OCA's motion for rehearing, stating it construed the motion as a request to modify the briefing schedule. This brief is submitted pursuant to the revised schedule.

[2] In its rehearing motion, the OCA contended that the initial briefing schedule with the OCA's brief coming first conferred an advantage to the Joint Petitioners by shifting the "burden of proof" with respect to the applicable standard. The Joint Petitioners respectfully disagree. OCA was the party contending that the Commission should apply a different standard than it has used in essentially every merger transaction for decades and which is specified in the law; therefore it would have been entirely appropriate to require the OCA to justify its position in an initial brief. Regardless, while the Joint Petitioners dispute the OCA's characterization of a burden shift, the Joint Petitioner nonetheless accept the revised briefing schedule.

369:8, II and RSA 374:33. RSA 369:8, II(b)(1) states as follows:

> To the extent that the approval of the commission is required by any other statute for any corporate merger or acquisition involving parent companies of a public utility whose rates, terms, and conditions of service are regulated by the commission, the approval of the commission ***shall not be required*** if the public utility files with the commission a detailed written representation no less than 60 days prior to the anticipated completion of the transaction that the transaction ***will not have an adverse effect on rates, terms, service, or operation of the public utility within the state***.

RSA 369:8, II(b)(1) (emphasis added). Thus, in stating that Commission approval is not required for transactions that "will not have an adverse effect on rates, terms, service, or operation," the statute codifies a "no net harm" standard.

Consistent with RSA 369:8, II, the Joint Petition provided a detailed written representation with supporting facts demonstrating the proposed transaction will have no adverse effect on the rates, terms, service, or operation of Abenaki. The Joint Petition also demonstrated that the proposed transaction would produce economic and noneconomic benefits for customers, thus exceeding the requirements of RSA 369:8, II.

II. No Net Harm Standard

The Commission has previously determined that petitions pursuant to RSA 369:8 are required to demonstrate that a proposed acquisition will "not adversely affect the rates, terms, service, or operation of the public utility within the state." *New England Electric System*, Order No. 23,308, at 16 (Oct. 4, 1999). The Commission explained that this embodies the same standard contained in RSA 374:33,[3] which authorizes the Commission to approve acquisitions that are

[3] RSA 374:33 provides in relevant part: "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 . . . ."

"lawful, proper and in the public interest." *New England Electric* at 16 (*see also Re Eastern Utilities Associates*, 76 NH PUC 236, 252 (1991) rejecting the "net benefits" test under RSA 374:33 on the basis that "it is not rational to prohibit the conveyance of securities if the proposed transaction is otherwise lawful and customers are not harmed thereby"). Specifically, proposed acquisitions must meet a "no net harm" test for a determination by the Commission. *Id*. The Commission stated that, in applying the no net harm test, it must "assess the benefits and risks of the proposed merger and determine what the overall effect on the public interest will be, giving the transaction our approval if the effect is at worst neutral from the public interest perspective." *Id*. The Commission's standard under RSA 369:8 will be met where an applicant for approval of an acquisition demonstrates that customers would be no worse off with the acquisition than without the acquisition.

The Commission has also addressed the no net harm standard in the context of RSA 374:30,[4] which applies to transactions involving transfer or lease of a company's franchise, works or system based on a finding that the transaction will be for the public good. The Commission held that the public good standard "is analogous to the 'public interest' standard . . . applied and interpreted by the Commission and by the New Hampshire Supreme Court." *Consumers New Hampshire Water Company*, 82 NH PUC 814, 816 (1977) (citing *Waste Control Systems, Inc. v. State*, 114 N.H. 21, 22-23 (1974)). "Under the public interest or public good standard to be applied by the Commission where an individual or entity seeks to acquire a jurisdictional utility, the Commission must determine that the proposed transaction ***will not harm ratepayers***." Pennichuck Corp., 83 NH PUC 44, 44 (1998) (emphasis added).

[4] RSA 374:30 provides in relevant part: "Any public utility may transfer or lease its franchise, works, or system, or any part of such franchise, works, or system, exercised or located in this state, or contract for the operation of its works and system located in this state, when the commission shall find that it will be for the public good . . . ."

In *Hampton Water Works, Inc.*, Order No. 23,924 (March 1, 2002), the Commission articulated its adherence to the no net harm standard. The Commission held it is "vested with both the power and the obligation to conduct an inquiry to verify the representations" made by petitioners in a filing pursuant to RSA 369:8, II. *Hampton Water Works, Inc.*, at 9. The Commission noted that it has discussed the standard in its previous decisions involving mergers and acquisitions, and that its "inquiry is guided by the directive in RSA 369:8, II that the transaction 'will not adversely affect the rates, terms, service, or operation of the public utility within the state' and the requirement in RSA 374:33 that the result is 'lawful, proper and in the public interest.'" *Hampton Water Works, Inc.*, at 9-10. The Commission concluded that "[m]ergers of a very small company into a larger company may result in customers benefitting from the expertise and access to capital markets which are generally available to the larger entity, with its greater financial and other resources" *Id*. at 13. Though the Commission ultimately concluded that the transaction in issue resulted in net benefits, it made plain that its standard of review in the first instance was whether the transaction would have no adverse effect. *Id*. at 15.

The Commission also applied the no net harm standard in *Aquarion Water Company of New Hampshire*, Order No. 24,691, 91 NHPUC at 513 (Oct. 31, 2006). Noting the provisions of RSA 369:8, RSA 374:33 and RSA 374:30, the Commission explained it evaluates whether the subject transaction would have "no adverse effects, and ***no net harm***, associated with the transaction." *Id*. at 7 (citing *Hampton Water Works, Inc.*, Order No. 23,924 (March 1, 2002); *Consumers New Hampshire Water Co.*, 82 NH PUC 814 (1997); and *Eastern Utilities Associates*, 76 NH PUC 236 (1991)) (emphasis added).

Recently, in Docket No. DW 17-114, the Commission again applied the no net harm standard. In that docket, Eversource Energy requested a determination pursuant to RSA 369:8, II that its proposed acquisition of Aquarion Water Company of New Hampshire ("AWC-NH") would

not adversely affect the rates, terms, service, or operation of AWC-NH. The Commission conducted an adjudicative hearing after which it determined:

> [h]aving heard from the parties and Staff and having independently reviewed the petition and the record herein, the Commission determined that is ***has no basis to find that Eversource's acquisition of Aquarion's parent company will have an adverse effect on rates, terms, service or operation of Aquarion within the state***. Consequently , Commission approval is not required under RSA 369:8, II(b)(1).

Docket No. DW 17-114, Secretarial Letter (Oct. 13, 2017), at 2.

Subsequent to this determination, the Commission rejected a motion for rehearing in Docket No. DW 17-114 that asserted in part that the Commission had applied an improper standard of review. In Order No. 26,079, the Commission stated "[w]e find that there is no good reason to revisit our decision that, pursuant to RSA 369:8, II(b)(1), Commission approval is not required for this transaction." *Eversource Energy*, Order No. 26,079 (Nov. 29, 2017). "The statutory framework is clear, and we are bound to follow it. The Legislature has narrowly circumscribed our authority to review transactions involving the parent companies of New Hampshire-regulated public utilities," and referencing the no net harm standard in RSA 369:8, II(b)(1). *Id*.

III. Conclusion

The Joint Petitioners respectfully submit that the Commission should follow the applicable statutory "no net harm" standard codified in RSA 369:8, II and its long-standing precedent in prior merger transactions and that there is no justification for deviating from the law or precedent in this case.

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Respectfully submitted as of June 9, 2021, by

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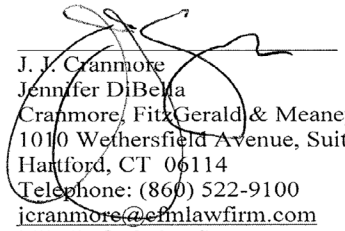

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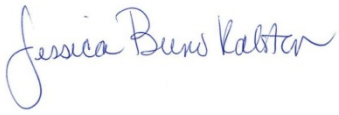
Certificate of Service

I hereby certify that on June 9, 2021, a copy of this motion has been electronically forwarded to the service list in this docket.



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