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

REPLY BRIEF OF ABENAKI WATER COMPANY AND AQUARION COMPANY

Abenaki Water Company ("Abenaki") and Aquarion Company ("Aquarion") (together, the "Joint Petitioners") submit this reply brief pursuant to the May 28, 2021 secretarial letter issued by the New Hampshire Public Utilities Commission (the "Commission") and in response to the initial brief of the Office of Consumer Advocate's ("OCA") arguing that the Commission should depart from its established precedent to apply a "net benefits" standard in its assessment of the Joint Petition ("OCA In. Br.").[1] OCA makes the following arguments in support of its argument for the Commission to apply a "net benefits" standard: (1) the Joint Petitioners bear the burden of proof in this proceeding;[2] (2) application of a "no net harm" standard is not supported by Commission precedent; (3) even if there is a Commission precedent to apply a "no net harm" standard, the Commission is not bound by its own precedent; and (4) application of a "net benefits" standard is supported by the plain language of the statute.

As detailed below, none of these arguments has merit. As outlined in the Joint Petitioners' Initial Brief, there is no basis for the Commission to diverge from the applicable statutory no net

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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] The Joint Petitioners do not dispute that they bear the burden of proof in this proceeding; the Joint Petitioners have met this burden by submitting a detailed Verified Petition demonstrating that the acquisition of Abenaki by Aquarion will result in no net harm to ratepayers pursuant to RSA 369:8, II(b)(1). This demonstration of no net harm has been further supported by the discovery process conducted to-date.

harm standard or its long-standing precedent in its evaluation of the Joint Petition.[3] Contrary to OCA's assertions, the plain language of the statute supports the applicability of the no net harm standard and is only bolstered by OCA's own arguments.

I. Discussion

As an initial matter, OCA's Initial Brief ignores the Commission's most recent determination of a transaction where it applied the no net harm standard, which was the 2017 docket on the acquisition of Aquarion Water Company of New Hampshire by Eversource Energy. As detailed in the Joint Petitioners' Initial Brief, in Docket No. DW 17-114, the Commission applied its no net harm standard and determined in that proceeding that the proposed transaction would not adversely affect the rates, terms service or operation of AWC-NH and therefore no Commission approval was necessary. Docket No. DW 17-114, Secretarial Letter (Oct. 13, 2017), at 2. The Aquarion-Eversource transaction was substantially larger than the transaction presently before the Commission.

Also, in the same docket, the Commission issued an order in response to a Motion for Rehearing that was based in part on an assertion that the Commission had not applied a sufficiently stringent standard of review. Docket No. DW 17-114, Motion for Rehearing dated November 13, 2017 (asserting facetiously that the Commission's determination that no approval was necessary was based on a "don't worry, be happy" standard of review). The Commission denied the Motion for Rehearing finding that it was bound by statute to assess the transaction based on whether it would result in adverse effects. Order No. 26,079 (November 29, 2017) at 10. As the Commission stated, "[i]t is only if the Commission holds a hearing and finds that a transaction would result in an adverse effect that the Commission may review an acquisition involving parent companies

[3] The Joint Petition was filed by the Joint Petitioners on April 30, 2021.

under the public interest." Id. at 11.

Thus, the OCA's argument that the Commission has not directly addressed whether the "no net harm" standard should apply is without merit (see OCA In. Br. at 3). The Motion for Rehearing filed in Docket No. DW 17-114 specifically required the Commission to reach a determination on the appropriate standard of review. In denying the Motion for Rehearing, the Commission confirmed its determination that the no net harm standard applied, and that no approval of the proposed transaction was necessary.

In addition, the OCA offers no persuasive argument for the Commission to ignore its precedent in *New England Electric System*, Order No. 23,308 (October 4, 1999) at 16, in which the Commission 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." First, the plain language of the statute provides that the Joint Petition is to be reviewed under the no net harm standard. The statute does not state that a petition must show net benefits (or, indeed, any benefits), but only that it demonstrate no adverse effect. No adverse effect is equivalent to no harm. In fact, the OCA's Initial Brief notes, at page 3, that in every decision issued by the Commission since the earliest applications of the "no net harm" standard in connection with a transaction to which RSA 369:8 has applied, the Commission has not confronted any parties arguing that "no net harm" was inconsistent with the statutes. While the OCA argues that this somehow weakens the conclusion that the "no net harm" standard applies, it actually does the opposite. The Commission has, without challenge or question, repeatedly applied the same standard from the same statute to similarly situated petitioners and the OCA points to nothing showing how the Commission's application of that standard is inconsistent with the plain meaning of the law.

Furthermore, as OCA points out in its Initial Brief, "…the plain meaning of the statute is

to allow the Commission to make expedited determination where there is self-evidently no question that the proposed transaction is in the public interest, e.g., where the acquiring company is clearly financially stronger and more technically competent than the acquired utility and there are no rate impacts…" (OCA In. Br. at 4, citing Nat'l Grid Grp. plc., Order No. 23,640 (February 20, 2001)).

The OCA's description of the plain meaning of the statute is directly applicable to the transaction that is the subject of this proceeding. There can be no argument that Aquarion Company is financially stronger and more technically competent than Abenaki. As detailed in the Joint Petition, Aquarion Company is the largest investor-owned water utility in New England and among the seven largest in the United States (Joint Petition at 8). Aquarion has annual operating revenues of $215.4 million and corporate credit ratings of A- and Baa2 (id.). This strong financial position combined with Aquarion's proven track record of environmental stewardship, safety and customer service will clearly result in no net harm, and in fact will provide benefits to Abenaki's customers while allowing for continued local control (id. at 7). Aquarion already has substantial experience in New Hampshire and has committed to maintaining Abenaki's facilities in New Hampshire (id. at 6). It is further undisputed that the Joint Petitioners have proposed no changes to the rates of Abenaki as a result of the transaction (Joint Petition at 6-7).[4] Therefore, consistent with the OCA's own arguments, this transaction is appropriately reviewed under RSA 369:8, II(b)(1) and there is no basis to presume that some other standard could or should apply.

Finally, OCA's assertion that the Commission is not bound by its own precedent appears to be based on the contention that the Commission may change how it views compliance with the "public good" or "public interest" standard. OCA In. Br. at 1-2. Whether that is true – and the

[4] While Abenaki does have a pending rate case filing in Docket No. DW 20-112, the proposed rate changes in that case are driven by the need for investment in the Abenaki water systems and are unrelated to this transaction.

Joint Petitioners do not concede that point – it is irrelevant. Under RSA 369:8, II, the plain standard is whether the proposed transaction will adversely affect rates, terms, service, or operation of the public utility within the state. As discussed above, and in the Joint Petitioners' Initial Brief, the Commission has a long-standing practice of applying a "no net harm" standard to transactions of this nature and has recognized that only when such a determination cannot be made should the Commission move on to a "net benefit" standard.[5] Further, applying different standards of review to the same types of transactions creates a situation where decisions become arbitrary and unpredictable. See, e.g., Union Leader Corp. v. Town of Salem, 173 N.H. 345, at 351-352 (2020).

Here, OCA has provided no reasonable basis to apply a net benefits standard. As noted above, use of a no net harm standard is supported not only by the plain language of the statute but also by the most recent Commission review of a proposed acquisition in line with long-standing Commission precedent.

II. Conclusion

The Joint Petitioners respectfully submit that the Commission should continue to 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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[5] Moreover, to the extent the underlying statute may be deemed ambiguous, which it is not, the Commission's consistent and long-standing interpretation of the statute as applying the "no net harm" standard would have placed an administrative gloss on the statute that the Commission may not change in the absence of legislative action. *See In re Kalar*, 162 N.H. 314, 321 (2011) ("Administrative gloss is placed upon an ambiguous clause when those responsible for its implementation interpret the clause in a consistent manner and apply it to similarly situated applicants over a period of years without legislative interference. If an 'administrative gloss' is found to have been placed upon a clause, the agency may not change its *de facto* policy, in the absence of legislative action, because to do so would, presumably, violate legislative intent." (quotation omitted)).

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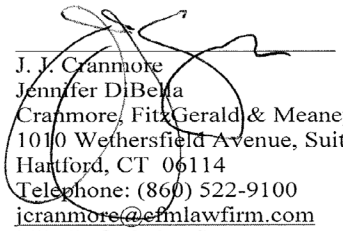

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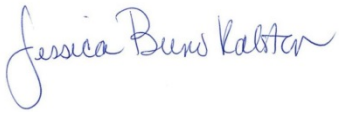
Certificate of Service

I hereby certify that on June 16, 2021, a copy of this motion has been electronically forwarded to the service list in this docket.



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