

**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

**RESPONSE OF ABENAKI WATER COMPANY
AND AQUARION COMPANY TO THE MOTION FOR REHEARING, OBJECTION TO
SETTLEMENT, AND MOTION FOR DETERMINATION OF ADVERSE EFFECT
FILED BY OMNI MOUNT WASHINGTON, LLC**

Abenaki Water Company (“Abenaki”) and Aquarion Company (“Aquarion”) (together, the “Joint Petitioners”) submit this response to the Motion for Rehearing, Objection to Settlement, and Motion for Determination of Adverse Effect filed by Omni Mount Washington, LLC (“Omni”) on July 26, 2021 (the “Motion”). The Motion argues that Order No. 26,497 issued by the New Hampshire Public Utilities Commission (“PUC” or “Commission”) on July 9, 2021, extending the deadline under RSA 369:8, II for a preliminary determination on adverse impact of the proposed acquisition of Abenaki by Aquarion by 30 days until August 8, 2021 (the “Order”) was unlawful and that rehearing on this issue is warranted (Motion at 1). The Motion further objects to an alleged “settlement” between the Joint Petitioners and the Office of Consumer Advocate (“OCA”), and requests that the Commission reach a determination that the proposed transaction will result in an adverse effect on rates, terms, services or operations (Motion at 1).

As detailed below, Omni’s Motion is unfounded and should be rejected for several reasons, including that: (i) the Commission’s Order was appropriately issued; (ii) there is no basis for Omni’s objection to the recent filings by the Company and OCA, which do not constitute a settlement; and (iii) the Joint Petitioners have met their burden of proof to support a determination of no adverse effect. In fact, the determination of no adverse effect is supported by the statements

by Omni's counsel at the evidentiary hearing in this proceeding (June 29, 2021 Tr. at 62).¹

I. Background

The Joint Petitioners submitted a verified joint petition to the Commission on April 30, 2021 requesting approval of Aquarion's acquisition of Abenaki pursuant to RSA 369:8, II and RSA 374:33 ("Joint Petition"). Commission Staff,² the OCA, and several Abenaki customers, including Omni, have participated in a contested proceeding including briefing on the applicable standard of review, discovery, technical sessions, and two days of evidentiary hearings before the Commission. Evidentiary hearings concluded on June 29, 2021. The only outstanding step in this proceeding is the issuance of a Commission determination on whether the proposed transaction will have an adverse effect on rates, terms, service, or operation of Abenaki.

On July 1, 2021, the Joint Petitioners submitted a letter to the Commission consenting to a 30-day extension of the 60-day deadline imposed by RSA 369:8, II for a Commission determination in this proceeding. As stated in the July 1, 2021 letter, the Joint Petitioners were consenting to such an extension in response to the concerns raised during evidentiary hearings that a 60-day review period was insufficient for a Commission determination due to the pending Abenaki request for rate relief in Docket No. DW 20-112.

The Commission issued the Order on July 9, 2021, in response to the Joint Petitioners' letter. In the Order, the Commission relied on the State's Administrative Procedures Act, RSA 541-A:29, IV allowing an extension of a timeline upon the written agreement of the applicant.

¹ On July 30, 2021 Paul Mueller, on behalf of the Bretton Woods Property Association, submitted a letter in support of the Motion stating that the Bretton Woods Property Owners agree with the arguments presented by Omni in the Motion. Such letter of support raises no new issues. The Joint Petitioners address the arguments therein in the context of this response to the Motion.

² As of July 1, 2021, Commission Staff became employees of the newly formed New Hampshire Department of Energy ("DOE"). These DOE Staff representatives continue to engage in this proceeding through their newly assigned roles.

Order at 3. Here, the Joint Petitioners are the relevant applicant and submitted such a written agreement in the form of their July 1, 2021, letter. Omni did not communicate any opposition to the Joint Petitioners' July 1, 2021 letter and only raised its concerns with the Order after the filing of a status letter by the Joint Petitioners on July 15, 2021.

The Joint Petitioners' July 15, 2021 status letter advised the Commission that the Joint Petitioners had used the additional time allowed by the extension to determine that it would be in the best interest of all parties if the Abenaki rate request is withdrawn to allow for consideration of the proposed transaction without the complications of a pending rate request. The status letter communicated the Joint Petitioners' decision to withdraw the Abenaki rate case subject to the Commission allowing the transaction to proceed on a finding of no adverse effect, which was a decision supported by OCA. Also on July 15, 2021, the OCA filed a letter in support of the proposed transaction based on the Joint Petitioners' decision to withdraw the Abenaki rate case. OCA explained that withdrawal of the Abenaki rate case resolved its concerns with the proposed transaction. Omni filed its Motion on July 26, 2021.

II. Rehearing is Not Necessary

Omni's first argument in the Motion is that the Commission lacked authority to extend the 60-day deadline under RSA 369:8, II (Motion at 4). In support of this argument, Omni asserts that "inasmuch as the Joint Petitioners' proposed acquisition constitutes a contested case governed by RSA 541-A and, pursuant to RSA 363-17-b, the Commission is required to issue a final order in all matters presented to it" and there was no authority to extend the deadline (see Motion at 4). This argument should be rejected for two reasons.

First, the Commission's Order granting an extension of the deadline is not a *final* order. Therefore, the exemption cited by Omni is inapplicable to this situation. See RSA 363:17-b (stating "[m]atters resolved by *final order* of the commission shall be exempt from RSA 541-A:29

and RSA 541-A:29-a) (emphasis added). Thus, the Commission appropriately relied on RSA 541-A:29 in determining that it has authority to extend the deadline for its determination, and there is no basis for granting Omni's request for rehearing. In addition, the Order was consistent with Commission precedent granting a similar extension prior to a determination of no adverse effect. See Docket No. DW 17-114, *Eversource Energy*, Secretarial Letters dated Aug. 23, 2017 and Oct. 13, 2017.

Second, a motion for rehearing may be granted for "good reason." RSA 541:3. Here, no good reason exists. Omni argues that "[b]ecause the Commission lacked the authority to grant the relief requested by the Joint Petitioners, the Extension order is null and void" (Motion at 4), but if this were the case, the proposed transaction would have effectively been authorized by operation of law on July 9, 2021.³ Omni assures the Commission that even if it lacked authority to extend the statutory deadline that the Joint Petitioners' request should be viewed as a "waiver of any rights it might have to assert" that the proposed transaction was approved by operation of law (Motion at 4), but Omni provides no legal support for that proposition. Moreover, in advancing its "waiver" theory, Omni undercuts its own argument for rehearing of the Order because it concedes that the effect of the Joint Petitioners' letter was a de facto extension until August 9, 2021 for the Commission to act on this matter (see Motion at 5). This means that regardless of whether the Commission had authority to grant the extension of time (which it clearly did), Omni agrees there is an extended deadline (August 9, 2021) for the Commission to issue its determination whether the proposed transaction will have an adverse effect. Rehearing of the Order would serve no practical purpose. It is thus unclear what result Omni hopes to achieve through its request for rehearing, and no such rehearing should be granted.

³ RSA 369:8, II(b)(2) states: "If the commission does not issue an order within 60 days of the completed filing, the transaction shall be considered approved as filed."

It is also important to note that the Commission's extension of the deadline for issuing its determination is not a finding of no adverse effect. Omni's Motion appears to conflate the issues of the deadline with the Commission's ultimate decision on adverse effect, but these are two wholly separate issues. The Commission has not issued any substantive determination on the proposed transaction and therefore the Joint Petitioners' request before the Commission remains unchanged by the Order.

III. Omni's Objection to the Recent Filings is Unfounded

The second issue raised by Omni in the Motion is that an alleged "settlement" was reached between the Joint Petitioners and OCA, and that the Joint Petitioners and OCA now seek to impose the terms of such settlement on all other parties to this proceeding (Motion at 5). Omni argues that the alleged settlement is characterized as the withdrawal of Abenaki's pending rate request in Docket No. DW 20-112 in exchange for a favorable resolution of this proceeding (Motion at 5). Omni's interpretation is simply incorrect.

As explained in the Joint Petitioners' July 15, 2021 status letter, the Joint Petitioners made a unilateral decision to withdraw the Abenaki rate request based upon their assessment that the continuation of that case was an impediment to the Commission's preliminary determination on adverse impact under RSA 369:8, II. This decision was made in light of the fact that several parties, including Staff, OCA, and individual intervenors, argued that it was unusual and difficult to evaluate the proposed acquisition due to the pending rate request before the Commission (see, e.g., June 28, 2021 AM Tr. at 72, June 28, 2021 PM Tr. at 53-54). This concern was apparently echoed by the Commission (see June 29, 2021 Tr. at 21). Specifically, these parties argued that it was difficult to discern what the rate impacts of the transaction would be if rates were expected to change in the near-term (see e.g., June 28, 2021 PM Tr. at 55 (where Staff implied that the pending rate request confuses the inquiry in this docket regarding merger impacts)). Based on these lines

of cross-examination, it was apparent to the Joint Petitioners at the conclusion of evidentiary hearings on June 29, 2021, that the pending rate request was a primary concern of these parties.

Similarly, OCA had stated from the outset of this proceeding that it believed the Abenaki rate request was an impediment and should be withdrawn to evaluate the proposed transaction (see, e.g., OCA Initial Brief at 3). Thus, OCA's expression of support in its July 15, 2021 letter was consistent with OCA's position throughout this case. OCA has consistently stated that it does not think it is appropriate to consider the proposed transaction while a pending rate request for Abenaki is also under consideration (Tr. Day 2, at 54). Further, as acknowledged by Omni, OCA's July 15, 2021 letter expressly states that the Joint Petitioners' proposal to withdraw the Abenaki rate request leaves open certain issues for future cases (OCA Letter; see also Motion at 3). These issues relate primarily to the continuing operations of Abenaki and rates for the customers of the Abenaki companies, and are outside the scope of this docket. Reaching a determination that the proposed transaction will result in no adverse effect and allowing the withdrawal of the pending rate request does not impact the Commission's consideration of such issues in a future rate proceeding and does not preclude resolution of this proceeding.

IV. Determination of Adverse Effect

The final issue raised by Omni in its Motion is its contention that "there is a clear basis for the Commission to find that Aquarion's acquisition of Abenaki will have an adverse effect on rates in New Hampshire to the extent that Aquarion has overpaid for the New Hampshire regulated subsidiaries" (Motion at 8). Notwithstanding that Aquarion will not seek recovery of any acquisition premium,⁴ Omni argues that without a state-by-state allocation of the purchase price, there is risk that Aquarion Company "overpaid" for Abenaki (id.). In order to address this concern,

⁴ Exhs. 3 and 14; see also Tr. Day 1, at 40.

Omni suggests that the Commission should either withhold a determination of no adverse effect or condition its approval on burdensome conditions that could include rate freezes, remediation plans, imputing a purchase price at a discount from book to the Abenaki subsidiaries, or requiring Abenaki to pay an exit fee (Motion at 8-9).⁵

The Commission should not be persuaded by these arguments as they are outside the scope of review. The standard of review that is applicable to this transaction is clear and has been briefed by the Joint Petitioners. Specifically, 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).

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.

Omni's Motion is a transparent attempt to expand the scope of this proceeding to extract concessions rooted in its long-standing service quality issues with Abenaki, which is unfortunate because it ignores the reality that the proposed transaction will have no negative impacts on service

⁵ The parties are fully invested in seeing the transaction move forward in all three states in order to bring forth the customer benefits of the transaction. However, in the event Connecticut and Massachusetts were to approve the transaction and New Hampshire does not, the transaction as currently structured could not move forward unless it was restructured to spin off Abenaki. This would require the parties to reexamine key terms of the Merger Agreement. (Exh. 27).

or rates. In fact, Omni acknowledged that its service is likely to improve under Aquarion ownership and will not result in adverse effects for customers. In closing at the evidentiary hearing, counsel for Omni stated as follows: “Omni does not challenge that there will be no adverse effect on services or operation, and in truth, expects that there will be significant improvements in those regards” and that “[t]he dilemma for customers, however, centers on rates.” (Tr. Day 2 at 62). However, it is abundantly clear there is no proposal in the instant proceeding to adjust rates for Abenaki, and Aquarion has confirmed numerous times that rates will not change as a result of the proposed transaction (see, e.g., June 28, 2021 AM Tr. at 84). Any issues regarding changes to Abenaki’s rates in the future would be addressed in a future rate proceeding. In deciding to withdraw the pending Abenaki rate case, the Joint Petitioners are allowing for future consideration of this issue with the benefit of this transaction and any savings that may be achieved through the acquisition by Aquarion. Thus, the proposal before the Commission is consistent with Omni’s concerns and the concerns of other intervenors.

V. Conclusion

The Joint Petitioners respectfully submit that the Commission should deny Omni’s Motion and issue a determination that the proposed transaction will result in no adverse effect, as proposed, without modification.

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**Respectfully submitted as of August 2, 2021, by
AQUARION COMPANY**

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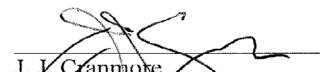


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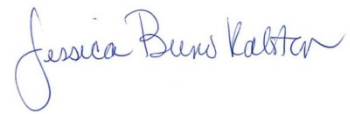
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Certificate of Service

I hereby certify that on August 2, 2021, a copy of this motion has been electronically forwarded to the service list in this docket.

A handwritten signature in blue ink that reads "Jessica Buno Ralston". The signature is written in a cursive style with a large initial 'J'.

Jessica Buno Ralston