

**STATE OF NEW HAMPSHIRE
PUBLIC UTILITIES COMMISSION**

DW 17-114

EVERSOURCE ENERGY

**Joint Petition for Approval of the Acquisition of Aquarion Water Company of New
Hampshire, Inc. by Eversource Energy**

Order Denying Rehearing

ORDER NO. 26,079

November 29, 2017

In this order, the Commission denies the motion for rehearing filed by New Hampshire State Representatives Robert Renny Cushing and Mindi Messmer.

I. PROCEDURAL HISTORY

On June 29, 2017, Aquarion Water Company of New Hampshire, Inc. (Aquarion-NH), and Eversource Energy (Eversource), a Massachusetts voluntary association that is the parent company of Public Service Company of New Hampshire d/b/a Eversource Energy (PSNH), filed a joint petition. In that petition, the two companies sought the Commission's approval of Eversource's indirect acquisition of Aquarion-NH through the purchase of the stock of Aquarion-NH's parent company, Macquarie Utilities, Inc. (MUI), from Macquarie Utilities Holdings, GP (MUH).

The Commission issued an order of notice on July 13, 2017. The Office of the Consumer Advocate filed a notice of participation on behalf of residential ratepayers pursuant to RSA 363:28. State Representatives Robert Renny Cushing, Mindi Messmer, Phil Bean, Mike Edgar, Tamara Le, and Jim McConnell; the Town of Hampton (Hampton); the Town of North Hampton (North Hampton); and the North Hampton Water Commission filed petitions to

intervene. Aquarion-NH and Eversource objected to the intervention of Representative Cushing, other than as a customer of Aquarion-NH. The companies objected generally to the intervention of the remaining state legislators.

The Commission held a prehearing conference on August 17, 2017, at which the Commission heard oral argument regarding interventions and the statutory standards to be applied to the companies' filing. On August 28, the Commission issued a secretarial letter reporting the results of the prehearing conference and setting a procedural schedule. The Commission granted intervention to Representatives Cushing, Bean, and Edgar, because they had standing as ratepayers of Aquarion-NH. *Secretarial Letter* at 1 (August 28, 2017). The Commission denied party status to Representative Messmer, because she did not demonstrate a right, duty, privilege, immunity, or legal or substantial interest of her own sufficient to confer standing, or otherwise demonstrate the criteria necessary for intervention pursuant to RSA 541-A:32. *Id.* Because Representatives McConnell and Le did not attend the prehearing conference, the Commission allowed them five additional days to demonstrate that they are customers of Aquarion-NH or otherwise how their personal rights, privileges, or immunities would be affected by the proceeding; otherwise, the Commission would consider their petitions to intervene denied. *Id.* Neither Representative McConnell nor Representative Le made a filing attempting to demonstrate their standing.

With regard to the statutory standard to be applied to the joint petition, the Commission required parties to be prepared at the hearing to demonstrate whether Eversource's acquisition of Aquarion-NH's parent company would have an adverse effect on rates, terms, service, or operation of Aquarion-NH under RSA 369:8, II(b)(3). *Id.* at 2; *see also* RSA 369:8, II(b)(1) (Commission approval not required in transaction involving parent companies where the public

utility files a detailed representation in writing that the transaction will not adversely affect rates, terms, service, or operation of the public utility within the state). In the event that the Commission found an adverse effect, the Commission also required parties to be prepared to demonstrate at the hearing whether the acquisition was “lawful, proper and in the public interest” pursuant to RSA 374:33. *Id.*; see also RSA 369:8, II(b)(5) (if Commission finds an adverse effect, Commission shall review transaction under the statute that would have applied but for RSA 369:8).

On September 6, 7, and 8, 2017, the Commission’s Legal Division’s secretary received email submissions from a number of Representative Messmer’s constituents as well as from Representative Messmer requesting that her petition to represent Aquarion customers be reconsidered and that she be granted standing in the docket. *Secretarial Letter* at 1 (September 20, 2017). The Commission determined that the emails were an improperly filed motion for rehearing, waived its rules for making effective filings to consider them, and denied rehearing. *Id.* at 1-2.

On October 5, 2017, following discovery by the parties, the Commission held an evidentiary hearing. No party presented witness testimony or documentary evidence beyond Eversource’s filing. Eversource argued that (1) its filing met the requirements of RSA 369:8, II(a), by demonstrating that its acquisition of MUI would not have an adverse effect on rates, terms, service, or operation of Aquarion-NH, (2) there was no record evidence to the contrary, (3) the Commission should make a finding of no adverse impact, and (4) the Commission should rule that Commission approval was not required. Hampton and North Hampton stated that although they had reservations initially, they were no longer opposed to the transaction going forward. The Office of the Consumer Advocate took no position with regard

to the adverse impact standard in RSA 369:8, II(a), but stated that it would have no objection to approval of the transaction under RSA 374:33. Commission Staff argued that adverse impact was the relevant standard and opined that the acquisition would have no adverse impact.

Representative Cushing took the position that the only applicable statute was RSA 374:33. He argued that RSA 369:8 did not apply because the acquisition was not a *de minimus* transaction. He considered the acquisition significant because, in his view, an electric company was for the first time branching out to acquire a water utility and there was more than a simple acquisition going on in the transaction. He further argued that allowing a company to have a virtual monopoly on electric generation, electric distribution, and water would violate Part II, Article 83 of the New Hampshire Constitution with regard to fictitious capitalization and abuse of monopolies. Representative Cushing argued that the acquisition would not be in the public good because the Legislature did not intend for electric restructuring and the issuance of bonds to lead to acquisition of a water company.¹

With regard to the adverse effect standard under RSA 369:8, Representative Cushing stated his belief that the acquisition would have an adverse effect on Aquarion-NH's rates, terms, service, and operations in the long-term. He argued that capitalization of the acquisition would have to be paid for by someone and suggested that water service may suffer given the fact that Eversource has no experience operating a water company.

At the hearing, Representative Cushing offered no testimony or documentary evidence to support his arguments. After the hearing concluded, Representative Cushing filed a document titled "Information Concerning Eversource's Responsibility for Contamination of Coakley

¹ Representative Cushing appeared then and appears now to have a misunderstanding about the parties to the transaction. The issue is discussed further below in the Commission Analysis section of this order.

Superfund Site and Potential Conflict of Interest as a Polluter in Safeguarding Aquarion Water from Coakley Toxins.” That filing was never moved into evidence.²

The Commission issued a Secretarial Letter on October 13, in which the Commission reported that it had determined that it had no basis to find that the acquisition of Aquarion’s parent company would have an adverse effect on rates, terms, service, or operation of Aquarion. The Secretarial Letter reported further that, pursuant to RSA 369:8, II(b)(1), Commission approval of the acquisition was not required. *Secretarial Letter* at 1 (October 13, 2017).

Representatives Cushing and Messmer filed the instant joint motion for rehearing on November 13, 2017. Eversource and Aquarion-NH filed a joint objection the following day.

II. POSITIONS OF THE PARTIES AND STAFF

A. Representatives Cushing and Messmer

Representatives Cushing and Messmer argue that the Commission erred in denying standing to intervene to Representatives Cushing, Messmer, and McConnell as members of the General Court because their constituents are “directly impacted by the combination of utilities proposed in this docket.” *Motion for Rehearing* at 1-2. In addition, they argue that Representative Messmer should have been granted intervention as “the only captive customer of Eversource who sought ... to protect herself from unlawful taking of property through electric bills by the Eversource monopoly, while granting standing to intervene to the Aquarion customers who sought intervention” *Id.* at 2. According to the Representatives, the Commission relegated Eversource electric customers to a status of second-class consumers, contrary to the constitutional requirements of due process and equal protection of the law. *Id.*

With respect to the acquisition itself, the Representatives allege numerous errors with the Commission’s decision that approval by the Commission was not required. The Representatives

² The filing was described at the hearing and some attendees had copies.

argue that, because the acquisition would combine the largest New Hampshire electric utility with the largest private water utility in New England, either legislative approval or Commission approval pursuant to the “lawful, proper and in the public interest” standard of RSA 374:33 is required. *Id.* They argue that by applying what they call a “Don’t Worry, Be Happy” standard to what they consider to be an unprecedented combination of a New Hampshire electric utility with a New Hampshire water utility, and that by precluding investigation and examination of the costs, the Commission violated Part II, Article 83, of the New Hampshire Constitution. *Id.* at 2-3. The Representatives argue that the Commission ignored the high rates paid by Eversource’s electric customers and the opportunity cost of lower rates for Eversource and Aquarion customers that supposedly would have resulted if the acquisition were not to occur. The Representatives believe that the Commission was required to direct Eversource to focus on improving its core business of providing electricity as envisioned by RSA 374-F and RSA 374-G rather than extracting cash from its electric ratepayers to take over Aquarion. *Id.* at 3. The Representatives fault the Commission for not examining the history of Aquarion-NH rate increases and for not determining the likelihood of future rate increases. According to the Representatives, the Commission had a responsibility to look beyond statements made by Eversource and make findings as to the likely magnitude of future rate increases in order to determine whether the acquisition would be in the interests of Eversource and Aquarion customers, and in the public interest. *Id.* at 4.

They argue that the Commission ignored issues raised by Representative Cushing which they claim demonstrated that the acquisition would not be in the public interest, including: Eversource has no experience operating a water utility and therefore its customers would, in the representative’s words, be “guinea pigs”; Eversource has no experience operating a fire

suppression system; Eversource has the most powerful political lobbying team in the state and will use it to defeat legislation that would eliminate tax loopholes and make utilities pay their fair share of property taxes; and Eversource is pursuing the Northern Pass Project over the objections of residents and businesses. *Id.* at 4-5. The Representatives claim that the Commission did not have a contested adjudicative hearing process and thereby precluded discussion of the implications of the transaction for taxpayers, in particular, that Eversource would not pay its fair share of taxes, because it would not pay any real estate transfer tax as a result of the transaction. *Id.* at 5.

B. Eversource and Aquarion-NH

Eversource and Aquarion-NH assert that the Representatives fail to state a good reason for rehearing and fail to explain why the Commission's decision was unlawful or unreasonable. *Objection* at 2. The Companies point out that the Representatives failed to introduce evidence into the record to support their contentions, and declined to do so when given the opportunity at hearing. *Id.* According to the companies, the Representatives merely reassert old arguments and request a different outcome. *Id.* The companies argue that each of the bases for rehearing raised by the Representatives was previously reviewed and considered by the Commission. They also argue that the Representatives fail to state, for any of their complaints, why the Commission's decision was unjust or unreasonable. Last, the Companies point out that the Commission has already denied rehearing on the arguments that elected officials should have standing to intervene based solely on their status as elected officials, and that Representative Messmer should have standing because she is a retail electric customer.

III. COMMISSION ANALYSIS

The Commission may grant rehearing or reconsideration for “good reason” when the moving party demonstrates that the decision is “unlawful or unreasonable.” RSA 541:3, RSA 541:4; *see Rural Telephone Companies*, Order No. 25,291 at 9 (November 21, 2011). Good reason exists if there are matters that the Commission “overlooked or mistakenly conceived in the original decision,” *Dumais v. State*, 118 N.H. 309, 311 (1978) (quotation and citation omitted), or if the movant presents new evidence not previously available, *Hollis Telephone, Inc.*, Order No. 25,088 at 14 (April 2, 2010). We conclude that Representatives Cushing and Messmer have failed to demonstrate good reason to grant rehearing; therefore, we deny their motion.

At the outset, we must address two fundamental misconceptions held by Representatives Cushing and Messmer: first that the Commission did not hold a contested adjudicative hearing and second that the contemplated transaction is between PSNH and Aquarion-NH. The record is clear that the Commission used adjudicative procedures to resolve the joint petition. The Commission issued an Order of Notice permitting petitions to intervene and scheduling a prehearing conference. The Commission then issued a procedural schedule allowing for a period of discovery through technical sessions and written interrogatories. *Secretarial Letter* at 2 (August 28, 2017). Then the Commission held a hearing on the merits on October 5, 2017. That hearing was Representative Cushing’s opportunity to present witness testimony or documentary evidence to support his arguments, which he declined to do. Representative Cushing’s failure to produce any evidence at hearing did not make the petition any less contested or the hearing any less adjudicative.

Second, as noted above, the contemplated transaction is not between New Hampshire-regulated public utilities, but at the parent-company level, between “Eversource,” which is PSNH’s parent company, and MUH, which is a parent company of Aquarion-NH. Although PSNH does business under the tradename Eversource Energy, it is inaccurate to describe the transaction as a combination of PSNH, the New Hampshire electric utility, and Aquarion-NH, the New Hampshire water utility. It is also inaccurate to state that customers of PSNH will pay any portion of the costs its parent company incurs by acquiring Aquarion-NH, or that PSNH customers will pay any costs that Aquarion-NH will incur in serving its water customers. PSNH is a New Hampshire-regulated utility; PSNH’s rates are carefully scrutinized by the Commission. PSNH must justify its operational and capital expenses as prudent, and used and useful in the provision of electric service before PSNH may recover any of its costs from its customers. PSNH’s customers are therefore unaffected by the transaction.

Representatives Cushing and Messmer complain that the Commission erred in denying them and Representative McConnell “standing to intervene ... as state representatives to appear on behalf of their constituents [who may be] ... directly impacted by the combination of utilities proposed in this docket.” *Motion* at 1-2. We find that there is no good reason to reconsider our decision regarding the intervention of Representative Cushing, as he was granted party status with rights of full participation. Likewise, we find that there is no good reason to reconsider our decision regarding Representative McConnell. Representative McConnell did not appear at the prehearing conference. Although he was extended the opportunity and additional time to demonstrate his standing to intervene, he declined to do so. In addition, Representatives Cushing and Messmer do not have standing to raise claims on rehearing on behalf of Representative McConnell.

We also find that there is no good reason to reconsider our decision regarding intervention by Representative Messmer. We have already considered and denied one motion for rehearing regarding her intervention. Nonetheless, we reiterate that neither her status as a legislator nor her status as a PSNH ratepayer entitle her to party status in this litigated proceeding in which no substantial interest of her own will be determined. *See, e.g., Abenaki Water Co.*, Docket No. DW 15-199, *Secretarial Letter* (October 16, 2015) (denying intervention to Senators Boutin and Hosmer); *Clean Power Development, LLC*, Order No. 25,075 (2010) (denying intervention to Representatives Borden, Read, Spang, and McClammer). Further, because PSNH customers cannot be affected by this proceeding and therefore are not similarly situated to Aquarion-NH customers, denying intervention to Representative Messmer based on her status as a PSNH ratepayer does not violate constitutional requirements of due process and equal protection.

We 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. 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:

To the extent that the approval of the commission is required by any other statute for any corporate . . . 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 representation in writing no less than 60 days prior to the anticipated completion of the transaction that the transaction will not adversely affect the rates, terms, service, or operation of the public utility within the state.*

RSA 369:8, II(b)(1) (emphasis added). No hearing is required if the companies involved meet their burden of making a detailed representation; the transaction can be deemed approved as filed

by operation of statute if the Commission declines to take any action. It 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 under the public interest standard found in RSA 374:33. *See* RSA 369:8, II(b)(5) (authorizing Commission review of parent company transactions based upon the statutes that would be applicable but for the operation of RSA 369:8, II(b) upon a finding that the proposed acquisition has an adverse effect).

On June 29, 2017, Eversource filed a detailed representation in writing that the transaction would not adversely affect the rates, terms, service, or operation of Aquarion-NH. We opened a docket to review the filing and allowed parties with standing to intervene and to conduct discovery. We then held an adjudicative hearing so that parties could present evidence demonstrating that the companies' filed representation was inadequate, or somehow untruthful, or that the transaction would have an adverse effect. Thus, we allowed interested parties the opportunity to demonstrate that the companies had failed to meet their burden under RSA 369:8, II(b)(1). Although Representative Cushing argued that capitalization of the acquisition would have to be paid by someone and that Eversource had no prior experience operating a water company, he offered no witness testimony or documentary evidence to support his contentions at the hearing, even when specifically given the opportunity. *See* Transcript of Hearing of October 5, 2017, at pages 31-32. Representative Cushing's presentation was and continues to be insufficient to cause us to find that the transaction will result in an adverse effect on rates, terms, service, or operation of Aquarion. *See* RSA 541-A:31, VIII (findings of fact to be based exclusively on evidence).


Because we held an adjudicative hearing specifically for the purpose of allowing Representative Cushing, the OCA, and the municipal intervenors to demonstrate that the

companies failed to meet their burden under the statute, we reject the Representatives' arguments that we precluded examination into or erred in failing to look beyond statements made by Eversource. The arguments made in the rehearing request are matters that Representative Cushing and other intervenors could have raised and presented evidence on at hearing. They simply declined to do so. To the extent that Representative Cushing raised issues relating to the constitutionality of the transaction and Eversource's experience operating a water utility, we fully considered Representative Cushing's arguments before deciding they were insufficient to cause us to find that the transaction would result in an adverse effect.


Based upon the foregoing, it is hereby

ORDERED, that the Motion of Representative Cushing and Representative Messmer for Rehearing is hereby DENIED.

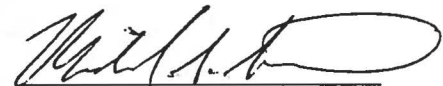
By order of the Public Utilities Commission of New Hampshire this twenty-ninth day of November, 2017.



Martin P. Honigberg
Chairman

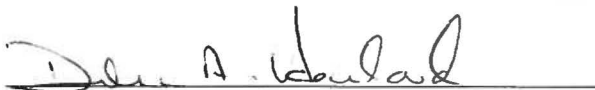


Kathryn M. Bailey
Commissioner



Michael S. Gaimo
Commissioner

Attested by:



Debra A. Howland
Executive Director

SERVICE LIST - EMAIL ADDRESSES - DOCKET RELATED

Pursuant to N.H. Admin Rule Puc 203.11 (a) (1): Serve an electronic copy on each person identified on the service list.

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Docket #: 17-114-1 Printed: November 29, 2017

FILING INSTRUCTIONS:

- a) Pursuant to N.H. Admin Rule Puc 203.02 (a), with the exception of Discovery, file 7 copies, as well as an electronic copy, of all documents including cover letter with:**
- DEBRA A HOWLAND
EXEC DIRECTOR
NHPUC
21 S. FRUIT ST, SUITE 10
CONCORD NH 03301-2429
- b) Serve an electronic copy with each person identified on the Commission's service list and with the Office of Consumer Advocate.**
- c) Serve a written copy on each person on the service list not able to receive electronic mail.**