

STATE OF NEW HAMPSHIRE
BEFORE THE
PUBLIC UTILITIES COMMISSION

Docket No. DW 19-131

Abenaki Water Company, Inc. – Rosebrook Division
Complaint Regarding Water Main Break

ABENAKI WATER COMPANY, INC.'S REPLY TO OMNI MEMORANDUM OF LAW

Summary of Reply

1. Abenaki Water Company, Inc. (Abenaki or Company or Rosebrook) respectfully files this reply to Omni Mount Washington, LLC (Omni)'s memorandum of law. In order for Omni to succeed in its argument, it has to have both the facts and law on its side; it has neither. Evidence cited by Omni and Abenaki both show that Abenaki's practice and course of conduct is that it does not control the interior valves within Omni's property; it only controls the curb stop valve to the hotel property at Base Road. Under Omni's arguments, all valves, irrespective of their location and purpose, would constitute an exterior shut-off/curb stop. This outcome would be inconsistent with Abenaki's tariff, the Commission's and Department of Environmental Services' rules, and past Commission orders. The litmus test, rather, is whether the exterior shut-off/curb stop it is at the property line (or near the property line, pursuant to Puc 606.04(g) and Puc 602.06) and if Abenaki controls it. Abenaki tariff at Original Pages 1 and 2. These valves are not at or near the hotel's property line and Abenaki does not control the hotel's interior valves. Omni seeks to be treated as an exception, but no exception is authorized in Abenaki's tariff. Also, Omni has not proffered any compelling argument as to why the Commission should reverse public policy set forth in the administrative rules, go against Abenaki's tariff, and force Abenaki to own, operate, and maintain, after the curb stop, the water

infrastructure within the hotel's private property. Finally, Omni's reliance on select records and characterization of the records as "undisputed" is misleading because the records have in fact been disputed multiple times.

Reply

2. Omni makes a number of assertions of fact in its memorandum of law that it has not provided evidence to establish the fact, pursuant to Puc 203.25 and RSA 541-A:30-a, III(d), by a preponderance of the evidence. Abenaki will provide evidence at hearing to prove the incorrectness of Omni's factual assertions and will engage Omni prior to the hearing to develop a stipulation of facts (disputed and undisputed) to aid the resolution of this proceeding.

3. Omni's first legal argument is that the convention of using the curb stop as the demarcation of responsibility does not apply to the hotel because it has exterior shut-offs "well inside the property line and adjacent to the building." Omni muddies the water by calling every valve on its property an exterior shut-off valve/curb stop. It omits from its analysis that there is a shut-off valve at its property line at Base Road which falls squarely within the definition of exterior shut-off in Abenaki's tariff. Abenaki's tariff defines and distinguishes the exterior shut-off as being a "curb stop" and one that is "controlled by the Company". Original Page 1. The hotel's Base Road exterior shut-off is both at the property line as specified by Original Page 2, Section 1(b)(3) and Puc 606.04(g) and it is controlled by Abenaki. The valves on the interior of the hotel property are neither at the property line per Puc 606.04(g) and Original Page 2 or controlled by Abenaki per Original Page 1. At the prehearing, Abenaki repeated that it does not

maintain valves within the hotel property. Prehearing Transcript at 42. Abenaki will testify to this fact again at the hearing.¹

4. The second problem with Omni's exception argument is that it flies in the face of rules, statutes, and Commission precedent. The Commission has required that special exceptions for select customers be made expressly in the filed tariffs. See Pennichuck East Utility, Inc., Docket No. DW 18-090, Order No. 26,213 (January 24, 2019) and Pennichuck Water Works, Inc., Docket No. DW 18-076, Order No. 26,200 (December 17, 2018) (The Commission approved a special exception for small-diameter fire protection customers who were subject to grandfathered tariff terms). It has admonished utilities for treating a customer differently when such special treatment is not provided for in the tariff. Complaint of Robert Mykytiuk, Docket No. DW 16-834, Order No. 26,014 at 8 (May 5, 2017) and Order No. 26,037 at 3 (July 5, 2017). These Commission orders, affirming what is essentially the Filed Rate Doctrine, wholly undermine Omni's request to be treated as an exception because unless and until the Rosebrook filed tariff contains an express exception declaring that Omni's valves beyond the Base Road curb stop are also curb stops, the present tariff and Puc 606.04(g) control and those interior valves are not curb stops.

5. Omni's second legal argument is that Abenaki's 2016 tariff revisions in DW 16-448 changed responsibility for who owned the service lines within the hotel property from the "curb

¹ Additional evidence that Abenaki does not control Omni's interior valves is found in Omni's own statement that "nor has Abenaki inquired about moving the exterior shut-off[s] to the property line". Omni Memo at 8. If Abenaki thought Omni's interior shut-offs were curb stops, Abenaki would have contacted Omni about moving them; it has not. Abenaki instead controls the hotel property curb stop at Base Road.

stop” to “property line”. This is incorrect and Omni has not supported this argument with any factual evidence. As noted in Abenaki’s memorandum, there were significant revisions in Docket No. DW 11-117 yet for some reason in its complaint Omni only directed the Commission to DW 16-448. Additionally, Omni’s argument conveniently overlooks that even though Abenaki added the words “property line” in 2016, since at least 2005 both Puc 602.06 and 606.04(g) already incorporated “property line” into the definition of regulated water utilities’ curb stops. Therefore, because the rules already applied, Abenaki’s express inclusion of “property line” only reiterated the term, it did not change ownership obligations. Accordingly, Abenaki did not “create a new obligation in respect to a past transaction” as Omni alleges.

6. Omni next argues that Rosebrook’s records demonstrate responsibility. Omni attaches as Attachment D to its memo select records that it touts as “undisputed” proof that Rosebrook owned the 8-inch water line on the hotel property. This is misleading. Omni fails to disclose to the Commission that the records were indeed disputed, not only by Abenaki but by Audit Staff. See Attachment M, Abenaki’s complete response to Staff 1-1 wherein Abenaki references the Audit Staff’s findings. Abenaki specifically stated that it did not rely on the records when it acquired Rosebrook because the Commission’s Audit Staff had called the records into question. Omni is fully aware that Abenaki disputed the accuracy of the records in response to Staff 2-2, 2-3, and Staff 2-7 (Attachment N). The linear feet, material, and CIAC entries do not support that the 1985 entry Omni cites was for the hotel property. For example, the 1985 entry was for a “ductile iron” but the Easter morning break involved PVC. Further, using 1985 costs, the dollar amounts listed for the 1985 entry would have bought only 667 of linear feet of ductile iron. See Attachment N at page 8. Regardless of these disputed facts, the records are immaterial; the

Commission approved on two occasions, Docket No. DW 16-448 and DW 11-117, tariffs which demarcated utility and customer responsibility to be at the curb stop. Had Rosebrook's records been of consequence, Abenaki would have expected Staff or the Commission to have required exceptions for the hotel in either of those two dockets but no exception was made. Obligations stopped at the curb stop, as noted by Nancy Oleson in response to Staff data request Staff 2-3. (See Attachment D to Abenaki Memo of Law, page 60.) For these reasons, the records Omni cites are not "undisputed" and because the records are fraught with inconsistencies, they do not demonstrate responsibility.

7. Abenaki respectfully looks forward to presenting its evidence at the August 5, 2020 hearing so as to correct the factual inaccuracies and incomplete analyses put forth by Omni.

Respectfully submitted,

Abenaki Water Company, Inc.

By its Attorney,
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Dated: July 28, 2020

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Certificate of Service

I hereby certify that a copy of the foregoing has been emailed this day to the docket-related electronic service list.

Dated: July 28, 2020

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