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VIA ELECTRONIC DELIVERY

Debra A. Howland, Executive Director
N.H. Public Utilities Commission
21 South Fruit Street, Suite 10
Concord, NH 03301

Re: DW 19-131 Complaint of Omni Mount Washington Hotel, LLC
Abenaki Reply to Omni Expansion of Record and Scope of Proceeding
Abenaki Reply to Omni Special Contract Argument

Dear Director Howland:

Pursuant to the Commission's temporary electronic filing requirements, Abenaki Water Company, Inc. (Abenaki) is filing this reply to Omni Mount Washington, LLC's (Omni) filing of November 2, 2020 wherein Omni seeks to add evidence to the closed evidentiary record, seeks to expand the scope of the noticed proceeding, and makes additional argument regarding Record Request Exhibit 34. On the latter issue, Abenaki asks leave from the Commission to reply because Abenaki did not understand from its hearing notes that further argument was requested. Rather, Abenaki understood from the October 22, 2020 hearing that Record Request 34 was made to receive copies of any and all past special contracts between the hotel owners and Rosebrook Water Company, Inc. In email correspondence to Omni Mount Washington, LLC and Staff last week to coordinate that filing and seek copies of the contracts, Abenaki posited that one party should file the response to the record request. Staff stated it would research the Commission's files and locate the special contracts, which it did. Staff filed them on October 30, 2020 with no additional argument. Abenaki thanks Staff for its research and prompt filing of the record request.

Although Staff noted in paragraph 1 of its cover letter that multiple exhibit numbers were reserved, Abenaki did not understand that to be the case and Omni did not format its reply as an exhibit which may indicate it also thought that to be the case. This is of *de minimis* concern. What concerns Abenaki is that Abenaki also did not understand and does not agree with Omni that the Commission requested parties "make any comments" regarding Exhibit 34. This is a significant concern because allowing "any comments" invites additional closing argument and is contrary to Abenaki's burden in this proceeding and position of having the last word. Because Omni offered additional argument, Abenaki seeks to exercise its right under RSA 541-A:31 and 33 and respond. Abenaki will also address Omni's production of additional evidence beyond what Abenaki believes was the scope of the record request for Exhibit 34.

The Special Contracts Do Not State Abenaki Owns the Hotel Main

On page two of its cover letter, Omni argues that terms of the special contract do not “relieve Abenaki of its responsibility to repair the water main.” As support for its position that Abenaki owns the hotel line, Omni cites to:

“MWH agrees to permit representatives of the Company upon reasonable notice to enter the Hotel property for the purpose of inspecting and maintaining the Company's plant and equipment and for the monthly reading of meters.” (Omni ref: Para. 6 of Contract No. 1) (See also Exh. 34 at 11, 17, 23, 29, 35, and 41.)

This is not the smoking gun Omni portrays it to be. Under Contract No. 1, the parties split the cost of the meters which is an express change from the tariff. Importantly, the special contracts in Exhibit 34 contain no other express deviations from the ownership obligations of Rosebrook’s tariff and under the Commission rules or Chart of Accounts (such as Account 333). There is no term, express or reasonably implied, in the special contracts that states that Rosebrook owns the hotel line at issue in this proceeding. The term is more akin to the general Right of Access tariff term applicable to all customers so that Abenaki can access meters on private property. For these reasons, Omni’s argument is unsupported and misleading. Assuming for argument’s sake that Rosebrook owned the hotel line under the contract term Omni cites, it would be nonsensical that Rosebrook would have to ask permission from the hotel (under Para. 6 of Contract No. 1) to access a main.

Other terms also disprove Omni’s argument:

“...MWH does not waive and specifically reserves hereby, any rights it may have under the rules, regulations and laws” governing “the rights, duties and obligations between the” utility and customer. (Source: Para. 7, Contract No. 1) (Exh. 34 at 5) (See also Exh. 34 at 11, 17, 23, 29, 35, and 41.)

“Except for agreements contained in this contract, MWH remains subject to the remaining terms and conditions of the Company’s tariff issued....” Para. 11, Contract No. 2 (Exh. 34 at 11) (See also Exh. 34 at 17, 23, 29, 35, and 41); and

“The terms of this Agreement constitute the entire agreement between the parties and no statements, oral or written, made by anyone have been relied upon by any party or shall bind any party unless expressly incorporated herein.” (Source: Para. 8, Contract No. 1) (Exh. 34 at 5)

These terms evidence that the parties expressly agreed that the tariff provisions not modified by the special contract still applied. Also, that if a term was not expressly contained in the agreement, it was not a term of the agreement. For these reasons, paragraph 6 of Contract No. 1 (and as contained in the subsequent special contracts) is not dispositive on ownership. It pales against the weight of the exhibits and testimony of Mr. Vaughan, Mr. Gallo, Mr. St. Cyr, and Ms. Oleson that Rosebrook’s pre-acquisition

operations stopped at the Base Road curb stops (e.g., Exhibit 5 and 20); Rosebrook's present responsibilities cease at the Base Road curb stops (e.g., Exhibit 20); the hotel line was not purchased in the 2016 acquisition docket (e.g., Exhibit 2, 13, and 32); the hotel line was not within the easements purchased in 2016 (e.g., Exhibit 16, page 85); was not a contribution in aid of construction (CIAC) (e.g., Exhibit 13 and 32); not in Rosebrook's plant in its rate case revenue requirement; and not an expense in Rosebrook's rate case revenue requirement by virtue of Rosebrook's maintenance of water lines in common areas in condominium developments (See e.g., Exhibits 11 and 20).

Abenaki Objects to Omni's New Evidence

Next, Omni filed cover letters and petitions which, to Abenaki's knowledge, were not requested in the record request. Omni also directs the Commission to hearing transcripts in Abenaki's rate case (Docket No. DW 17-165), which Abenaki also considers to be beyond the scope of the record request. Omni's attempts subvert the requirements of Puc 203.30 and how parties are to properly reopen the record. The problem with the reference to DW 17-165 is that Omni is taking a second bite at its argument that Omni properly informed Abenaki of its latest construction activities. If Omni wanted the Commission to receive or take administrative notice of material in DW 17-165, it could have done so in the hearing by introducing the documents as evidence and allowing Abenaki to cross examine Omni's use of them. Because Omni chose to not introduce the information when it had an opportunity to do so it slept on its rights and the Commission should ignore Omni's new evidence.

Abenaki again objects to Omni's repeat attempt to add a witness, Josh DeBottis, without proffering him for cross examination. Mr. Vaughan and Mr. Gallo both testified that they learned about the new addition late in the hotel's construction process and only as a result of Omni asking New England Service Company (NESC) to locate valves. See Exhibit 33, NESC invoice for locating valves for Omni's new addition. Omni did not alert Rosebrook of the new construction during the design phase and pre-construction phase and has not provided Rosebrook with any plans or specifications. If Omni wanted to rebut Abenaki's testimony with Mr. DeBottis, it could have offered him as a witness, but it didn't. Omni could have used the emails (Attachment E) attached to its memorandum of law in its direct or cross examination opportunities at hearing, but it didn't. Omni again sat on its rights. Adding evidentiary references to Mr. DeBottis in its closing is an attempt to sandbag Abenaki and the Commission and should be rejected under RSA 541-A:31 and 33.

Furthermore, if this evidence had been introduced, it is irrational to conclude that the email exchange (Omni memo Attachment E) constitutes notice of the new construction. Rosebrook, not Omni commenced the conversation. Mr. Gallo contacted Mr. DeBottis about the pressure reduction project, then Mr. DeBottis responded and stated that Abenaki is misinformed about construction at the hotel and suggests a meeting at Omni's lawyer's office. Mr. Gallo responded to Mr. DeBottis and, preferring an informal meeting, declined the formal meeting with lawyers. Mr. Gallo again requested that the parties work collaboratively on the pressure reduction project. At no point was there a substantive discussion about the new construction and how the construction would change Omni's water demands on the Rosebrook system or how the potential negative pressure situation

(Exhibit 9 at 18) would be addressed. Omni provided no plans to Rosebrook and Rosebrook had no knowledge of what infrastructure was around the hotel. Case in point, in Exhibit 32, New England Service Company, Inc. had difficulty locating water lines and valves on the hotel property. See also Rosebrook's plans (Exhibit 14 at page 45 and Exhibit 29 at pages 5-6.) which it relied upon for the acquisition and which show no infrastructure beyond the (compliant) service line entering the hotel. The only plans in the hearing record which show infrastructure extending beyond the hotel are the plans Mr. Doug Brogan testified that he created (Exhibit 18, page 4 and Exhibit 16, page 2) after speaking with Omni. Further, when asked in cross examination to point out where the new construction was, Mr. Brogan himself had no illustrative plans to point to that showed the new construction.

The Commission Should Deny Omni's Request to Add Additional Issues

With respect to Omni's convoluted request that the Commission expand its investigation to "investigate the records in Docket No. DW 12-306", Omni is adding to its complaint without supplying the requisite basis pursuant to RSA 365:1, PART Puc 204, and Puc 203.02. Abenaki objects. This docket has not been noticed on this issue and such a request is duplicative of prior proceedings where Abenaki's plant records were the subject of Commission audit and review.

Omni's nexus between its request for an investigation of records and allegation that Mr. Vaughan had no basis upon which to state that the CPRs were created by hotel-related personnel is unclear. However, Abenaki notes that Hearing Exhibit 7 contains management agreements whereby Rosebrook obtained management and operational staff from the hotel companies to run Rosebrook. Given these management agreements and the testimony that Rosebrook had no employees then, it is axiomatic that hotel-related personnel created the working records (Exhibit 2) which resulted in the present CPRs (Exhibit 32).

Lastly, if Omni wished this issue and documents from Docket No. DW 12-306 to be part of the hearing, it should have entered them as exhibits and raised this issue earlier in the proceeding so that it could be part of the memoranda of law, cross examined at hearing, and addressed in closing. Instead, it sat on its rights and is causing additional expense for Abenaki. The Commission should reject the request to expand the scope of this proceeding. Omni's request is akin to a Hail Mary pass to find evidence to support its complaint.

Thank you in advance for your assistance with this filing.

Very Truly Yours,



Marcia A. Brown

cc: Electronic Service List for Docket No. DW 19-131.