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July 11, 2016

Via E-Mail

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

**RE: DW 15-199 - Abenaki Water Co., Inc.
Staff Opposition to Motion for Confidential Treatment**

Dear Ms. Howland:

Enclosed for filing in the above-captioned matter are one original and six copies of Staff's Opposition to Motion for Confidential Treatment.

Please feel free to contact me with any questions regarding the enclosed.

Sincerely,

A handwritten signature in black ink, appearing to read "John S. Clifford".

John S. Clifford
Staff Attorney

Enclosure

cc: Service List Via E-Mail
(w/encl.)

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 #: 15-199-1 Printed: July 11, 2016

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
EXECUTIVE 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.**

**STATE OF NEW HAMPSHIRE
BEFORE THE
PUBLIC UTILITIES COMMISSION**

Abenaki Water Co., Inc.
Request for Change in Rates

Docket No. DW 15-199

**COMMISSION STAFF
OPPOSITION TO MOTION FOR CONFIDENTIAL TREATMENT**

NOW COMES Commission Staff (“Staff”) and respectfully submits this Opposition to Motion for Confidential Treatment submitted by Abenaki Water Co., Inc. (“Abenaki”) before the New Hampshire Public Utilities Commission (“Commission”).

In support of its Opposition, Staff states as follows:

1. On July 24, 2015, Abenaki filed a petition with the Commission seeking approval of permanent rates.
2. On June 3, 2016, the Commission approved Abenaki’s permanent rate increase and ordered Abenaki to file its “proposed temporary rate reconciliation and proposed surcharges and refund along with its request for rate case expense recovery.” *Abenaki Water Co., Inc.*, Order No. 25,905 (Jun. 3, 2016)
3. On June 22, 2016, Abenaki submitted its proposed temporary rate reconciliation and proposed surcharges along with its request for rate case recovery pursuant to N.H. Code Admin. Rules Puc 1905.03. As part of that submission, Abenaki submitted the invoices of its legal counsel, Upton & Hatfield, LLP, along with a Motion for Confidential Treatment pursuant to RSA 91-A:5 IV and N.H. Code Admin. Rules Puc 203.08. Abenaki submitted unredacted portions of the invoices for Commission staff to review and determine whether the expenses are

properly recoverable under N.H. Admin Rules Puc 1906 *et seq.* The submitted redacted bills remain confidential and shielded from disclosure under RSA 91-A:5 IV and N.H. Admin. Puc 203.08(c) pending the Commission's ruling on this motion.

4. Under the attorney-client privilege, confidential communications made by a client to an attorney to obtain legal services are protected from disclosure, absent limited exceptions. The Supreme Court has recognized the attorney-client privilege as "the oldest of the privileges for confidential communications known to the common law." *Upjohn Co. v. United States*, 449 U.S. 383, 389, 66 L. Ed. 2d 584, 101 S. Ct. 677 (1981). *United States v. Under Seal (In re Grand Jury Proceedings)*, 33 F.3d 342, 1994 U.S. App. LEXIS 23661, 30 Fed. R. Serv. 3d (Callaghan) 115 (4th Cir. Md. 1994). This common-law privilege is codified in Rule 502(B) of the NH Rules of Evidence

(b) General Rule of Privilege. A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client (1) between the client or his or her representative and the client's lawyer or the lawyer's representative, (2) between the client's lawyer and the lawyer's representative, (3) by the client or the client's representative or the client's lawyer or a representative of the lawyer to a lawyer or a representative of a lawyer representing another party in a pending action and concerning a matter of common interest therein, (4) between representatives of the client or between the client and a representative of the client, or (5) among lawyers and their representatives representing the same client.

5. Billing statements that provide only general descriptions of the nature of the services performed and do not reveal the subject of the confidential communications with any specificity are not privileged." *Hampton Police Assoc. v.*

Town of Hampton, 162 NH 7, 15-16 (2011)(citing cases). In *Hampton*, the Town had sought to shield from production to the police association certain legal invoices it considered confidential. The Town had argued that they were *per se* privileged. The court rejected that assertion, and “decline[d] the Town’s invitation to adopt a *per se* rule that *all* descriptive narratives in attorney invoices to clients are subject to the attorney-client privilege.” *Id.* at 16. It remanded the decision back to the Superior Court for an examination of the invoices holding that the “attorney client privilege *may* apply to information that reveals the motive of the client in seeking representation, litigation strategy, or the specific nature of the services provided, such as researching particular areas of law.” *Id.* at 16-17 (emphasis added)(case cites omitted).

6. Other cases cited therein also support this assertion. *In re Grand Jury Proceedings*, 33 F.3d 342 at 353 (attorney-client privilege does not extend to billing records and expense reports), *Clarke v. American Commerce Nat’l Bank*, 974 F.2d 127 (9th Cir. 1992)(“the identity of the client, the amount of the fee, the identification of payment by case file name, and *the general purpose of the work performed* are usually not protected from disclosure”)(emphasis added). The determination of whether the billing statements are privileged hinges on whether the statements reveal something about the advice sought, or advice given. *In re Grand Jury*, 33 F.3d at 354, *Hampton*, 162 N.H.7 at 17 (citing cases), *Chaudhry v. Gallerizzo*, 174 F.3d 394, 402 (4th Cir. 1999)(upholding claim of privilege as to certain portions of statements which revealed particular areas of the law researched.)

7. The legal bills submitted by Upton & Hatfield similarly contain nothing more than brief recitations of the services performed and do not disclose litigation strategy or reveal any confidences or the motive for seeking legal advice.¹ In the context of the Right to Know Law, the party seeking nondisclosure bears the burden of proof. *Hampton* at 17. The purpose of the Right to Know Law “is to provide the utmost information to the public about what its “government is up to.”” *Union Leader Corp. v. City of Nashua*, 141 N.H. 473, 476 (1996)(quoting *EPA v. Mink*, 410 U.S. 73, 105 (1973). “To best effectuate the Right to Know Law, whether information is “confidential” must be determined objectively and not based on the subjective expectations of the party generating it.” *Union Leader Corp. v. NH Housing Fin. Auth.*, 142 N.H. 540, 553 (1997). In *Union Leader Corp. v. NH Housing Fin. Auth.* the court employed the test used by the Federal courts: “to show that information is sufficiently “confidential” to justify nondisclosure, the party resisting disclosure must prove that disclosure “is likely: (1) to impair the [State’s] ability to obtain necessary information in the future; or (2) to cause substantial harm to the competitive position of the person from whom the information was obtained.” *Id.* at 554(quoting *Nat’l Parks and Conservation Ass’n v. Kleppe*, 547 F.2d 673, 677-78, (D.C. Cir. 1976)(quotations omitted).
8. In the instant proceeding, Abenaki has not claimed, nor can it, that resisting disclosure is likely to impair the State’s ability to obtain the necessary information in the future. The submission of legal invoices is required under the

¹ Upton Hatfield has alerted Staff that there are limited redactions that should remain relating to the cross-examination strategy of a particular witness and an entry that should have been entered on another ledger. Staff is willing to agree that those entries may be treated as confidential.

Commission's rules for it to establish whether the reimbursement of legal expenses is reasonable and allowable. The submissions are received by the Commission "in furtherance of its official function." N.H. RSA 91-A:1-a III. The Commission must determine for itself whether "recovery of the expense is just, reasonable, and in the public interest." N.H. Admin Code Puc 1904.02(a)(3) In making those determinations the Commission must determine, *inter alia*, whether "the work was relevant and reasonably necessary to the ... proceeding." N.H. Code Admin. Rules Puc 1904.02(b)(4). The only way for the Commission to establish the reasonableness of the work performed and how it relates to the proceeding is for it to evaluate these very invoices which Abenaki now seeks to shield from public scrutiny. The key component of the balancing test is that the "emphasis should be placed on the potential harm that will result from disclosure, rather than simply promises of confidentiality, or whether the information has customarily been regarded as confidential." *Union Leader Corp.*, 142 N.H. 540, 554(citation omitted).

9. In its motion, Abenaki has argued that the description of its legal services if disclosed, would reveal litigation strategy and the nature of the legal services provided. Absent a specific showing of which entries show requests for legal advice or reveal propriety information, the records should be deemed available to public inspection under the New Hampshire Right to Know Law in the future so that citizens can determine for themselves just what their "government is up to." Abenaki states that it requested and the Commission granted confidential treatment of the legal descriptions in an earlier rate case brought by another

client. *See* Lakes Region Water Company, Inc., Order No 25,454 (Jan. 17, 2013). In that order, the Commission balanced the privacy interests of Lakes Region’s legal counselors and rested its decision on previous findings that *hourly billing rate* information should be exempt from disclosure under N.H. RSA 91-A. To the extent that decision could be used to shield from disclosure all descriptions in the legal bills, it should be disregarded as erroneous. In prior matters, Unitil Energy Systems, Order No. 24,746 (Apr. 30, 2007) and EnergyNorth Natural Gas, Order No. 25,280 (Oct. 25, 2011),² the Commission found that the disclosure of billing rates could result in a competitive disadvantage to the company’s legal counsel and it could damage competitive positions to the detriment of ratepayers. Staff agrees with the assertion that billing rate information, if disclosed, could result in a competitive disadvantage to Upton & Hatfield in future rate case proceedings.

10. Absent a showing that the rest of the information could harm Abenaki or its counselors, Staff believes that the descriptive information sheds light on what the Commission is doing and would inform the public of the conduct and activities of its government. The test for disclosure under the right to know law “is whether the documents would be routinely or normally disclosed upon a showing of relevance.” *N.H. Right to Life v. Dir.*, 2016 N.H. Lexis 55, *13 (June 2, 2016). Indeed, the amounts of the fees submitted by the law firm, if approved, are ultimately paid for by the consumers’ of the utility. The public purpose

² In all three Commission orders the Commission made it clear that it reserved the right to reconsider its determination of confidential treatment.

served by disclosure is to increase public knowledge about how the Commission operates. They should be released to the public if requested.

CONCLUSION

Commission staff asserts that the law firm invoices are not protected under the New Hampshire Right to Know Law as they are not confidential nor protected by any recognized privilege. Accordingly, Staff requests that Abenaki's motion be denied.

WHEREFORE, Staff respectfully requests that the Commission:

- A. Deny Abenaki's Motion for Confidentiality; and
- B. Grant such other relief as is just and equitable.

Respectfully submitted,


Dated: July 11, 2016



John S. Clifford, Esq.
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NH Public Utilities Commission
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(603) 271-2431

CERTIFICATE OF SERVICE

I hereby certify that on the date hereinbefore subscribed, I caused a copy of the foregoing to be forwarded to the Commission's service list for this docket via electronic mail.



John S. Clifford