STATE OF NEW HAMPSHIRE

BEFORE THE

PUBLIC UTILITIES COMMISSION

Abenaki Water Company
Rosebrook Water System

Petition for Change in Rates

Docket No. DW 17-165

Opposition of the Office of the Consumer Advocate, the Bretton Woods Property Owners Association, and the Forest Cottages Association to Motion for Rehearing of Omni Mount Washington Hotel, LLC

NOW COME the Office of the Consumer Advocate (OCA), the Bretton Woods Property Owners Association (BWPOA), and the Forest Cottages Association -- all parties in this docket -- and interpose their objection to the motion for rehearing filed on October 31, 2019 by Omni Mount Washington Hotel, LLC (Omni). In support of this opposition the OCA, the BWPOA, and the Forest Cottages Association state as follows:

I. INTRODUCTION

Omni invokes RSA 541:3 to seek rehearing of Order No. 26, 295, issued by the Commission on October 31, 2019. Order No. 26,295 resolved several issues typically considered by the Commission at this phase of a rate proceeding, but Omni focuses chiefly on one determination that is of particular interest to the ratepayer interests represented by the OCA, the BWPOA, and the Forest Cottages

Association: the allocation of rate case expenses among customer classes for purposes of the recovery of these expenses in rates. Omni – by far the largest customer of the subject utility, accounting for well over half of the water sold by the Rosebrook Water System -- objects to the Commission's determination and claims that Omni is paying an unreasonably large share of the recoverable rate case expenses. For the reasons that follow, Omni's rehearing motion uncovers nothing that is "unlawful" or "unreasonable" within the meaning of RSA 541:3 – and the rehearing motion should therefore be denied.

In Order No. 26,295, the Commission determined that Abenaki Water Company (Abenaki) had prudently incurred $76,657 in rate case expenses that should be recovered from customers pursuant to RSA 378:7 and N.H. Code Admin. Rules Puc 1904.02(a)(3). [1] Noting a diversity of recommendations on how these costs should be allocated among customer classes, the Commission determined that it was appropriate for this purpose to (1) divide the customer base into three "customer types" – residential, commercial, and Omni, and (2) base the rate case surcharge "on a uniform percentage increase on existing customer bills, of approximately 15 percent for each customer type, when calculated over an 18-month recoupment period for all customer types." Order No. 26,295 at 7-8. The

[1] An additional $26,369 in rate case expenses remained in dispute among the parties and Commission Staff. The Commission withheld any decision on the recovery of these expenses. Order No. 26,295 at 7.

Commission stated that this method was "more equitable" than other approaches "because the increase in all customer bills will proportionately be the same relative to rate case expenses." *Id.* at 8.

II. FIXED VS. VARIABLE COST AS THE BASIS OF RATE CASE EXPENSE RECOVERY

The first argument for rehearing advanced by Omni is that the Commission erred when it "allocated the fixed costs of rate case expenses as if they were variable costs." Omni Motion at 2. According to Omni, the Commission went astray by "fail[ing] to recognize basic principles of ratemaking regarding the recovery of fixed and variable costs, and assigning costs to those customers who cause them." *Id.* at 3.

This argument deserves recognition by the Commission as the exercise in creative writing that it is. Omni cites no authority for the proposition that rate case expenses should be treated as a fixed cost, for purposes of rate recovery, because there is no such authority. In the context of economic theory, the late Alfred Kahn counseled regulators to focus on marginal cost pricing and noted that the "essential criterion" is "causal responsibility." Alfred E. Kahn, *The Economics of Regulation: Principles and Institutions* (MIT Press, 1988) at I-71. Kahn explained that [a]ll the purchasers of any commodity or service should be made to bear such additional costs – only such, but also all such – as are imposed on the economy by the provision of one additional unit." *Id.* "And second," Kahn added, "it is short-run marginal cost to which price should at any given time – hence always – be equated, because it

is short run marginal cost that reflects the social opportunity cost of providing the additional unit that buyers are at any given time trying to decide whether to buy." *Id.* "Short-run marginal cost is simply the change in total variable cost caused by producing an additional unit." *Id.* at I-71-72.

Obviously, these principles of microeconomics have no application to the recovery of rate case expenses, which are neither fixed nor variable because no customer or group of customers can be understood to cause the next unit of rate case expenses. Indeed, if such cost causation principles truly applied here it might justify *increasing* the Omni share of rate case expenses given the tenacity and persistence with which the owner of the Mount Washington Hotel has asserted its interests in this proceeding.

Moreover, even assuming that rate case expenses are fixed costs rather than variable costs and should be treated that way for purposes of designing a mechanism for recovery of these expenses, Omni ignores all of the other well-established principles of rate design. "The logic of differentiated pricing based on the differing natures of the underlying costs . . . can only be taken so far." Jim Lazar and Wilson Gonzalez, *Smart Rate Design for a Smart Future* (Regulatory Assistance Project, 2015) at 9. Thus, "[a]ssuring fairness to all customer classes and sub-classes" is among the principles that have guided rate design determinations since Kahn, and before him Professor Alfred Bonbright, wrote their seminal treatises on this subject. *Id.* at 8 and 8 n. 10 (citations omitted). Omni's

argument about fixed versus variable costs is an attempt to divert the Commission's attention from the fairness principles that are the basis of the Commission's decision on how to allocate rate case expenses here.

The very last page of the exhibits attached to the testimony of Abenaki witness Stephen P. St. Cyr (Exhibit 4) shows that one of Omni's 16 meters – its sole six-inch meter – itself accounts for two-thirds of the gallons pumped by the utility. No reasonable notion of cost causation or rate equity would allow the Commission to apportion rate case expenses to Omni as if it were just 16 of the Company's 413 meters as shown in Exhibit 4. Moreover, the utility and its assets exist not just to meet the present needs of customers but their future needs as reasonably projected – and Omni is the only customer of this utility whose needs for water are growing. In these circumstances, to accept Omni's rate design argument would be to sanction a result that would not simply be unjust and reasonable. It would be absurd.

III. COMMISSION ADHERENCE TO PRECEDENT

Next Omni argues that the Commission erred in Order No. 26,295 by "failing to acknowledge and explain its departure from precedent." Omni Motion at 5. By "precedent" Omni means the Commission's own prior determinations, as opposed to the reported case law of the New Hampshire Supreme Court or any other judicial tribunal.

This argument is devoid of merit. No principle of New Hampshire law requires the Commission's fidelity to its own precedents or its explanation of any

departures from prior decisions of the Commission. Indeed, the Commission is free to change its mind *within the same case* and reverse a prior decision as long as the new order "satisfies the requirements of due process" and is "legally correct." *Appeal of Office of the Consumer Advocate*, 134 N.H. 651, 657-58 (1991) (citation omitted).

The two federal cases cited by Omni are inapposite. *National Cable & Telecommunications Ass'n v. Brand X Internet Services*, 545 U.S. 967 (2005), discusses the so-called *Chevron* doctrine of *federal* judicial deference to *federal* agency interpretations of their enabling statutes. *Massachusetts Dep't of Education v. U.S. Dep't of Education*, 837 F.2d 536 (CA1 1988), counsels in *dicta* that agencies "have an obligation to render consistent opinions and to either follow, distinguish or overrule their earlier pronouncements." *Id.* at 544 (citation omitted). This, too, is a principle of *federal* law, concerning the extent and nature of *federal* judicial review of *federal* agency determinations, having no bearing on the question of what the New Hampshire Supreme Court expects of New Hampshire quasi-judicial decisionmakers like the Public Utilities Commission.[2]

[2] Neither does the 35-year-old advisory opinion of the New Hampshire Department of Justice cited at page 7 of the Omni Motion, an opinion written by an Assistant Attorney General. *See* Office of the Attorney General, Opinion No. 84-172-1, 1984 WL 248883. Even if this opinion were somehow to provide guidance, it would not be helpful here because of what the Office of the Attorney General actually discussed: not administrative *stare decisis* per se but, rather, the question of whether the appellate division of the Department of Employment Security could lawfully require strict adherence to its prior decisions by lower-level tribunals within the Department. Relying on language from the agency's enabling statute, the Department of Justice concluded that "the failure of a lower-level tribunal to employ the doctrine of *stare decisis* cannot be used as an independent ground for reversal by the appellate division." Thus, if anything, the Department of Justice advisory opinion cited by Omni undermines rather than supports Omni's arguments about the Commission's allegedly improper departure from precedent.

Omni's argument about failure to follow precedent must also fail for the simple reason that the hotel conglomerate fails to cite any actual precedents from which the Commission actually departed. The only decision referenced by Omni in this section of its motion is a precedent the Commission actually *followed*, to Omni's apparent dismay. Specifically, Omni complains that Order No. 26,129, entered on May 2, 2018 in a natural gas rate case (Northern Utilities, Inc., Docket No. DG 17-070) is "ill suited as precedent" here because the Commission approved a settlement agreement in that proceeding rather than resolving disputed issues. Omni Motion at 5-6. It appears that Omni's vision of administrative *stare decisis* is that the Commission is obliged to follow precedents that favor Omni but is obliged to disregard those that do not favor Omni.

IV. ADMINISTRATIVE PROCEDURE ACT

Finally, Omni complains that the Commission transgressed the New Hampshire Administrative Procedure Act by failing to provide sufficiently detailed findings of fact and conclusions of law. *See* RSA 541-A:35 ("[a] final decision shall include findings of fact and conclusions of law, separately stated"). The test, according to the New Hampshire Supreme Court, is not whether the decision is "a paragon of clarity" but, rather, whether the ruling "sets forth specific findings of fact and rulings of law sufficient to permit appellate review." *Appeal of Malo*, 169 N.H. 661, 669 (2017).

By that reasonable standard, the analysis in Order No. 26,295 passes muster. The Commission's analysis admittedly does not explicitly differentiate between findings and conclusions, but the salient portion of the Commission's analysis is clearly an explication of how it views outcome-determinative facts of record: "The rate case expense component shall be based on a uniform percentage increase on existing customer bills, of approximately 15 percent for each customer type, when calculated over an 18-month recoupment period for all customer types. That method is more equitable [than other methods proposed] because the increase in all customer bills will proportionately be the same relative to rate case expenses." Order No. 26,295 at 7-8. Just prior, the Commission made clear (although it used the word "find," perhaps erroneously) that in making this determination it was applying the "just and reasonable" rate standard found in RSA 378:7 – i.e., the Commission was making a conclusion of law.

Should Order No. 26,295 thus be subject to appellate review, the Court would have no difficulty understanding (1) what legal standard the Commission was applying, and (2) what facts – specifically, the proportionality of recoverable rate case expenses in relation to the overall bill increase approved in the rate case – were outcome determinative. Thus Omni's Administrative Procedure Act argument is not persuasive.

V. CONCLUSION

The Commission's decision on how to apportion recoverable rate case expenses in this proceeding was a lawful and laudable application of the requirement in RSA 378:7 that rates be just and reasonable. The arguments to the contrary made by Omni are unpersuasive; the Commission must reject them.

WHEREFORE, the OCA, the BWPOA, and the Forest Cottages Association respectfully request that this honorable Commission:

A. Deny the motion for rehearing filed by Omni Mount Washington Hotel, LLC, and

B. Grant any other such relief as it deems appropriate.

Sincerely,

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Certificate of Service

I hereby certify that a copy of this Objection was provided via electronic mail to the individuals included on the Commission's service list for this docket.

D. Maurice Kreis