

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

DOCKET NO. DW 19-XXX

**ABENAKI WATER COMPANY, INC.
ROSEBROOK WATER SYSTEM**

COMPLAINT REGARDING WATER MAIN BREAK

NOW COMES Omni Mount Washington Hotel, LLC (“Omni”), by and through its attorneys, McLane Middleton, Professional Association, pursuant to RSA 365:1, and asks that the New Hampshire Public Utilities Commission (“PUC” or “Commission”) find that Abenaki Water Company, Inc. (“Abenaki”) is responsible for the repair of the break in the 8-inch water main that occurred on the Rosebrook Water System (“Rosebrook”) on April 21, 2019. In support, Omni states as follows:

1. Early on Easter Sunday morning, April 21, 2019, a break occurred in Abenaki’s 8-inch water main serving the Mount Washington Hotel (“Hotel”) and several surrounding buildings. The 8-inch water main runs approximately 1,600 feet southeasterly from Base Road past the Caretaker’s Residence,¹ the Print Shop, and Stock Room, terminating at the Hotel, where there is an exterior shut-off valve. Moreover, an additional 2,200 feet of smaller diameter pipe branches off the 8-inch water main near the northwest corner of the Hotel and extends behind the Hotel to serve the Outdoor Pool/Cabana, Spa Building, and Nordic/Golf Building.² See Attachment A.

2. Tom Clark and Steve Charron from Omni’s Engineering Department discovered a break in the water main at approximately 6:30 am when they noticed that water was seeping to

¹ The 8-inch water main serves the Caretaker’s Residence, which is separately metered and billed, and has its own shut-off valve.

² All three buildings are separately metered and billed, and have their own shut-off valves.

the surface near the Print Shop. As described in the Incident Report prepared by Omni's Director of Loss Prevention, Peter Eakley, he responded to the scene and found that there was approximately six inches of water in the basement of the Caretaker's Residence. See Attachment B. Phil Sausville from Abenaki arrived to the scene at approximately 8:40 am, and indicated that Abenaki would not be able to repair the main until Tuesday, April 23. After a conference call among Mr. Sausville, Taylor deOgburn from Abenaki, Mr. Eakley, Josh DeBottis, Omni's General Manager, and Jeremy Olson, the Twin Mountain Fire Chief, and with Abenaki's agreement,³ AB Excavating Inc. was dispatched to the site, arriving at approximately 10:45 am. AB Excavating located the broken main at approximately 6:00 pm but neither Abenaki nor AB Excavating had the necessary parts available to complete the repairs. AB Excavating, with Omni's and Chief Olson's assistance, procured the necessary parts from the Towns of Lancaster and Carroll. AB Excavating resumed work at 6:30 am on Monday, April 22, and completed the repair by 12:30 pm.

3. On May 1, 2019, AB Excavating Inc. submitted a bill for \$22,848.74 to Abenaki. Pauline Doucette, Abenaki's Office Manager and Accountant, declined to pay the bill, responding that: "the work was done for Omni and should be billed directly to Omni." Donald Vaughan, Abenaki's Chairman, confirmed Ms. Doucette's position, stating: "Omni is responsible for the repairs to its *service line*. The basis for her position is expressed clearly in the Company's Terms and Conditions." (Emphasis added.) See e-mail chain provided as Attachment C for an account of communications among AB Excavating, Abenaki, and Omni.

4. The basis for Abenaki's position that the 8-inch water main is a "service line" for which Abenaki is not responsible appears to stem from tariff changes made in Docket No. DW

³ Mr. DeBottis asked Messrs. Sausville and deOgburn whether Mr. Vaughan was aware of the situation and they confirmed that he was. They also acknowledged Abenaki's responsibility for the repair.

16-448. See Order No. 25,934 (August 9, 2016) approving Abenaki's acquisition of the Rosebrook Water Company. In that proceeding, Abenaki entered into a settlement agreement that, among other things, included "*minor* tariff amendments as detailed on Revised Exhibit H to the Joint Petition, filed July 22, 2016." (Emphasis supplied.) See Attachments D and E. Notably, Revised Exhibit H, going forward, changes the terms and conditions of service in regard to a "Service Pipe" such that Abenaki would only have maintenance and repair responsibility "from the main to the property line" while from the property line to the premises served "the service pipe shall be installed, owned and maintained by the customer(s)."

5. Abenaki's attempt to shift responsibility for repair of the existing water main to Omni is unjustified. As explained more fully below, the tariff changes do not alter the fact that Abenaki continues to have the responsibility to maintain and repair the 8-inch water main. To that point, tariffs are prospective documents and the "minor changes" made in Docket No. DW 16-484, while they may affect future customers, do not magically change the physical location of the Omni shut-off valves, do not supersede the deeds and easements evincing Abenaki's obligations, nor do they otherwise retroactively change the obligations of customers.⁴ Finally, past practice and the course of dealings since Abenaki's acquisition demonstrates that it understood its responsibility for the water system infrastructure located on Omni property.

6. First, as part of its acquisition of Rosebrook, Abenaki purchased various assets including easements for pipes and mains, in particular the 8-inch water main that runs from Base Road to the Hotel along an easement granted to Rosebrook. A review of the deeds and

⁴ During Mr. Vaughan's cross-examination in Docket No. DW 16-448, Commissioner Bailey observed that "it looks to me like, under Rosebrook, the utility owned the service from the property line to the customer's house. And you're changing that so now the customer owns the service line from the property line to the house?" Commissioner Bailey had it exactly right. Mr. Vaughan said that "when we have an opportunity, we want to move those curb stops to the property line." Tr. July 28, 2016 at pp. 35-36. This is not such an opportunity, however, and it is disingenuous for Abenaki to take the position that the exterior shut-off valve at the Hotel is no longer the shut-off valve but that the isolation valve in Base Road is.

easements listed in Schedule 1.1, Purchased Assets, Exhibit A to the Asset Purchase Agreement filed by Abenaki in Docket No. DW 16-448, shows that Abenaki has the responsibility for the water mains and pipelines on Omni's property. See Attachment F. Specifically, it was granted: "The perpetual right and easement to construct, reconstruct, install, repair, replace and maintain pipes, mains, manholes, conduits, pumps, pump houses, storage tanks, hydrants, wells, trenches, and such other appurtenances (all collectively referred to as the "Water System") as may be reasonably necessary to provide water service to the residents of the Bretton Woods Resort..." (Easement Deed from GS Phoenix, LLC to Rosebrook Water Company, Inc., dated December 3, 1996.) Accordingly, Abenaki is responsible for the repair of the water main and therefore the payment to AB Excavating Inc.

7. Second, Abenaki would like the 8-inch water main that runs from Base Road to the Hotel to be a "service line" or "service pipe" as currently described in its tariff, but it is not. As shown in Attachment E, prior to Abenaki's acquisition the Rosebrook tariff set forth the terms and conditions for the installation, ownership and maintenance of service pipes for commercial buildings thus: "All service pipes up to and including the premises' exterior shut-off valve shall be owned and maintained by the Company. From the exterior shut-off valve to the premises served, the service pipe shall be installed, owned and maintained by the customer(s)." In the circumstances of the Hotel, the shut-off valve is and has been located at the exterior of the Hotel, and Abenaki has the "perpetual right and easement" to, among other things, maintain and repair the 8-inch water main from Base Road to the shut-off valve. The isolation valve in Base Road is not the "premises' exterior shut-off valve" for the Hotel.

8. As part of its acquisition, Abenaki managed to amend the Rosebrook tariff so that, prospectively, Abenaki will have responsibility from a connection made in the street nearest the

customer's premises to a shut-off valve at the property line, with the customer having responsibility to own, install and maintain the pipe from the shut-off valve to its premises. The problem with Abenaki's rationale for refusing to pay AB Excavating's bill is that, as noted above, the tariff change only applies prospectively to new commercial customers; not the Hotel. Abenaki cannot retroactively evade its responsibility to maintain and repair the 8-inch main that delivers water to the Hotel.

9. Third, Abenaki's position belies the conduct of its employees on Easter Sunday and other occasions. For example, Abenaki has continued to maintain the hydrants located on Hotel property and recently painted hydrants and valve covers near the Hotel and the Bretton Arms Inn.

10. Furthermore, Abenaki chooses to ignore that the 8-inch water main from Base Road to the Hotel is just one part of the extensive network of pipes that comprise the Rosebrook water system. As a consequence of the unique history of this resort community, significant portions of the water system on the west side of Route 302, including the vast majority of the central 16-inch backbone of the system on that side of the highway and the water tank, also lie within Omni property. Omni owns other commercial buildings in this area, including the Base Lodge, the Ski Area Maintenance Building, Rosebrook Recreation Center, the First Aid Building, and the Alpine Club. Carrying Abenaki's argument to its logical conclusion, Omni would suddenly be responsible for all of these mains as well. The same illogic would apply to the 1,000 feet of 6-inch water main that runs from Base Road to the Bretton Arms Inn and feeds the Stables and the Administrative Building. See Attachment A.

11. By the same theory, the relationship between Abenaki and the various homeowners' associations would change in those instances where the shut-off valves are outside

the premises instead of at the property line. For example, it appears that Abenaki could take the similar position for Fairway Village and argue that its responsibilities end at Base Road.

Customers would henceforth be responsible for maintaining any Rosebrook infrastructure located within the boundaries of association property, irrespective of where the shut-off valves to the premises are actually located.

12. Abenaki's new theory also has a ripple effect on its proposed water pressure reduction project in that it raises questions about what it believes with respect to who would own and be responsible for the construction and maintenance of facilities such as looping mains that comprise Phase II as described in its April 8, 2019 Reconciliation filing. See Attachment G.

13. Finally, Abenaki made a number of unfounded assertions about the water main break in its May 10, 2019 Request for Concurrence on Scope of Engineering and Phase II. See Exhibit H. In that letter, Ms. Brown said: "Due to the holiday weekend, Omni urged the Company to delay shutting off the service until Monday when it could effectuate repair of the line. The Company remained on site to monitor the leak and the impact of the leak on its water system until the repair."⁵ As noted in his May 11, 2019 letter, provided as Attachment I, Mr. Eakley reports that Ms. Brown was not on scene and does not correctly portray what occurred. He indicated that: "At no time did any member of the Resort encourage or imply that the repair and shutting off the water should be delayed Until Monday, 22 April 2019, this statement is completely inaccurate."

⁵ Ms. Brown also asserted that the "break illustrates how significantly the extreme high pressure compromises the water system and adversely affects customers." There is no factual support, however, for the conclusion that the break was caused by high water pressure. She also said that during the March technical session "NHDES stated that the service lines are prone to leaking under high pressure." As Mr. Eakley noted: "Nobody on scene, including the Water Company representatives, ever concluded that the cause was from high pressure. The hole in the pipe could have been caused by a multitude of reasons, including ground setline/shifting, fatigued pipe, or the joint that feeds the caretakers house splitting."

14. In conclusion, Abenaki seeks to avoid responsibility for a duty it clearly owes pursuant to RSA 374:1, that is, to “furnish such service and facilities as shall be reasonably safe and adequate and in all other respects just and reasonable.” Through its misapplication of the tariff, its assertion as to tariff changes it would seek to absolve it of responsibility for leaks in high water pressure areas, and the extraordinary relief of collecting costs related to the engineering of a project before it is deemed used and useful,⁶ Abenaki’s transparent goal is to shift risk on to customers at every opportunity. Abenaki’s refusal to pay AB Excavating’s bill is neither just nor reasonable.

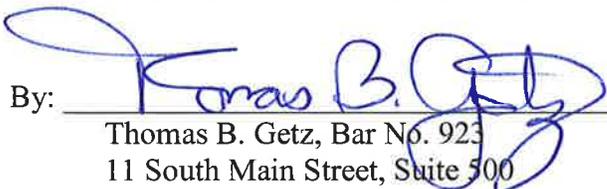
WHEREFORE, Omni respectfully requests that the Commission:

- A. Find that Abenaki is responsible for the repair of the 8-inch water main;
- B. Direct Abenaki to make payment to AB Excavating Inc.; and
- C. Grant such further relief as it deems appropriate.

Respectfully submitted,

Omni Mount Washington Hotel, LLC
By Its Attorneys,
McLANE MIDDLETON,
PROFESSIONAL ASSOCIATION

Dated: July 24, 2019

By: 

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⁶ See, for example, the Commission’s discussion of step increases in Docket DW 01-081, *Pennihcuck Water Works, Inc.*, Order No. 23,923 (March 1, 2002) at p. 13-15. In that case, the Commission found: “We believe the limitation of the items included in the step adjustment in this case, so as to allow recovery only of expenditures of an extraordinary nature for items which are in service and necessary for the provision of safe and adequate service, is consistent with meeting the obligations that rates be just and reasonable.”

Certificate of Service

I hereby certify that on the 24th of July, 2019, an original and six copies of the foregoing Complaint was hand-delivered to the New Hampshire Public Utilities Commission and an electronic copy was served upon the Distribution List.


Thomas B. Getz