THE STATE OF NEW HAMPSHIRE
PUBLIC UTILITIES COMMISSION

DOCKET NO. DW 19–131

OMNI MOUNT WASHINGTON, LLC
COMPLAINT AGAINST ABENAKI WATER COMPANY, INC.

MEMORANDUM OF LAW

I. PROCEDURAL BACKGROUND

On July 24, 2019, Omni Mount Washington, LLC ("Omni") filed a Complaint with the New Hampshire Public Utilities Commission ("PUC" or "Commission"), pursuant to RSA 365:1. In its Complaint, Omni asked the Commission to find that Abenaki Water Company, Inc. ("Abenaki") was responsible for the repair of the break in the 8-inch water main ("Water Main") serving the Mount Washington Hotel ("Hotel") that occurred on April 21, 2019.

On August 16, 2019, Abenaki filed a reply denying responsibility for repairing the Water Main based on certain tariff changes that went into effect as part of the acquisition approved in Docket No. DW 16-448, Order No. 25,934 (August 9, 2016) ("Acquisition Docket"). Abenaki also made a number of extraneous arguments, including, that Omni was asking the Commission to apply the Abenaki tariff in a non-uniform manner, that Omni had not set forth any special circumstances to justify repair of the Water Main, and that Omni was seeking to reopen the Acquisition Docket and modify a prior order.

On August 28, 2019, Omni filed a response, which included the dialogue between Commissioner Bailey and Mr. Vaughan at the hearing on July 28, 2016, in the Acquisition Docket, which undercuts Abenaki's overly expansive claims about the intent and effect of the "minor tariff amendments" approved as part of the Settlement Agreement in the Acquisition Docket. Attachment A.

On December 12, 2019, the Commission issued an Order of Notice in which it determined that there were reasonable grounds for Omni's Complaint.

On January 6, 2020, the Commission held a prehearing conference, at which Abenaki focused on, among other things "who did what prior to Abenaki's acquisition," and how Abenaki intended to "come in, take this Rosebrook Water system and operate it like a traditional water utility should be operated, having clear demarcations of ownership. None of this blending of roles." (Tr. pp. 31-32)

The Commission issued a procedural schedule on January 24, 2020, calling for two rounds of data requests, which PUC Staff propounded on February 3, 2020, and March 9, 2020. In addition, Abenaki was required to file a detailed statement of its position, which it filed on January 24, 2020, and called a supplemental reply to Omni's Complaint, mostly reiterating arguments that muddied the waters during the prehearing conference. Staff propounded additional data requests on April 13, 2020. [1]

II. FACTS

On Easter Sunday morning, April 21, 2019, a break occurred in the Water Main serving the Hotel. The Water Main runs approximately 1,600 feet southeasterly from Base Road past the Caretaker's Residence (which is metered separately and has its own exterior shut-off) and terminates at the Hotel, where there is an exterior shut-off valve. See Attachment B.

At approximately 6:30 am, personnel from Omni's Engineering Department had noticed water seeping to the surface near the Print Shop and approximately six inches of water was found in the basement of the Caretaker's Residence. 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

[1] Omni does not include full copies of its or Abenaki's data responses with this Memorandum but believes that the responses of both parties should be made part of the record inasmuch as they constitute part of the Commission's investigation pursuant to RSA 365:4.

Tuesday, April 23. After a conference call among Mr. Sausville, Taylor deOgburn from Abenaki, Peter Eakley, Omni's Director of Loss Prevention, Josh DeBottis, Omni's General Manager, and Jeremy Olson, the Twin Mountain Fire Chief, and with Abenaki's agreement, AB Excavating Inc. ("AB Excavating") was contacted, which arrived 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 to complete the repairs. AB Excavating procured parts from the Towns of Lancaster and Carroll, resumed work at 6:30 am on Monday, April 22, and completed the repair by 12:30 pm.

III. ABENAKI EXCUSES FOR FAILURE TO PERFORM

On May 1, 2019, AB Excavating Inc. submitted a bill for $22,848.74 to Abenaki, which it refused to pay. Abenaki disclaimed responsibility for the repair of the water main break based on an interpretation of revisions to the Abenaki tariff in the Acquisition Docket, i.e., that the Water Main was now a service line. See Attachment C.

At the prehearing conference held on January 6, 2020, Abenaki stated that "there was a lot of contributed capital that wasn't recorded when I spoke to the accountant today. The books were a mess…the present owners are cleaning up those continuing property records." Tr. p. 45. Those continuing property records, however, clearly show a main extension to the Hotel in 1985.

In addition, Abenaki casts out a red herring about the Hotel's expansion, saying, incorrectly, that Omni's position on the Water Main is inconsistent with the way the expansion has progressed, that Omni had not contacted Abenaki, and that there may be issues about fire protection. The Hotel expansion does not involve a main extension under the Abenaki tariff, Omni's contractor has worked with Abenaki to obtain a new meter for the expansion, and Mr.

Debottis had proposed a meeting with Abenaki to discuss a number of issues, including the Hotel expansion. See Attachment E. In response to Mr. DeBottis, Robert Gallo indicated that Abenaki was involved in efforts related to the Complaint proceeding, the Step II increase, and rate case expenditures and said: "I will be sure to contact you once we move beyond current issues to schedule a meeting at your convenience."

Abenaki also creates a distraction about common areas, contending that Omni is instilling fear about the potential applicability of Abenaki's refusal to repair the Water Main to homeowners associations. With respect to common areas for homeowners associations, Abenaki made a series of conflicting statements. At the prehearing conference, it asserted that the tariff "says that the service pipes in the common area are going to be maintained by the Company," but what the tariff actually says is:

> All service pipes from the main to the property line or common area including the unit's exterior shut-off valve shall be owned and maintained by the Company. From the property line or common area to the premises served the service pipe shall be installed, owned and maintained by the association or customer(s).

In its January 24, 2020 Supplemental Reply at p. 7, Abenaki says "it remains responsible for assets in common areas" and that when Mr. Vaughan was being examined by Commissioner Bailey in the Acquisition Docket he was talking about "Abenaki's wish to move inconvenient curb stops within common areas to more accessible locations." That was not, however, what Mr. Vaughan said. What Mr. Vaughan actually talked about was curb stops adjacent to houses and moving them to the property line. In actuality, the position that Abenaki is taking is that, irrespective of the language of the tariff, it will recognize the actual location of shut-off valves as the demarcation for homeowners associations but not for the Hotel.

Finally, in its most recent foray, Abenaki filed a so-called supplemental data response on July 9, 2020, five days before memoranda of law were due, which extrapolates wildly on

the issues in Docket No. DW 11-117 ("CIAC Docket"). In Order No. 25,328 (February 3, 2012) the Commission approved on a *nisi* basis certain tariff revisions, noting, at p. 4, that they resulted from Staff's "review of the appropriateness of Rosebrook using the balance of its CIAC funds." Abenaki proceeds from there to conclude, incredibly, that "the Commission resolved the ownership and obligation dispute between the hotel and the water utility" in the CIAC Docket. Of course, the Commission did no such thing as explained more fully below in Section VI, C.

IV. ROSEBROOK HISTORY

There is no dispute that Rosebrook is a one-of-a-kind water system. The relationship between Omni's and Abenaki's predecessors is a complicated one and in decades past the distinction between the Hotel and the utility was, as Abenaki puts it, blurred. The nature of those past affiliated relationships, however, does not alter Abenaki's current obligations.

Most important to the Commission's analysis are the physical facts on the ground. Abenaki repeats the mantra that it wants a clean break from the past and that it wants to run Rosebrook like a traditional utility, but it cannot escape the reality of how the water system actually developed. It would be fair to say that the Rosebrook system did not develop in a conventional way and hence there are situations, as Mr. Vaughan acknowledged, where exterior shut-off valves are just outside a building and not at the property line or curb.

For the Hotel and Rosebrook, developers came and went, and the Commission made various efforts at bringing Rosebrook and related developers into conformance with utility norms. The result that the system acquired by Abenaki does not fit its notion of a conventional system, however, does not mean that inconvenient facts, such as the location of an exterior

shut-off, can just be defined away. To paraphrase Donald Rumsfeld, you operate the water system you have, not the one you want.

V. BURDEN OF PROOF

On December 19, 2019, in accord with RSA 365:4, the Commission "determined that there are reasonable grounds for" Omni's Complaint that Abenaki had failed to fulfill its responsibility to repair the Water Main break. Under the procedural scheme established in RSA Chapter 365 regarding Complaints and Investigations, Omni met its statutory burden of demonstrating reasonable grounds for its complaint against Abenaki. It is hence the Commission's duty to investigate "in such manner and by such means as it shall deem proper."

The posture of the current proceeding, pursuant to RSA 365:5, Independent Inquiry, is an investigation by the Commission of the "act or thing having been done, or having been omitted or proposed" by Abenaki. It is Abenaki's burden, therefore, to prove that it is not responsible for the repair of the water main, akin to a show cause proceeding. The Commission addressed burden of proof issues at some length in Docket No. DE 01-023, *Complaint of Ann and Tim Guillemette,* Order No. 24,070 (October 24, 2002) ("Guillemette").

The Guillemette case involved a complaint that voltage fluctuations on the Public Service Company of New Hampshire ("PSNH") system had caused damage to personal property. The Commission noted, among other things, that: (1) its enabling statutes were silent on the burden of proof as between the complainant and the utility; (2) there is no New Hampshire case directly on point but it is a generally accepted principle of administrative law that petitioners bear the proof of proving their allegations; and, (3) the burden of proof encompasses both the duty of going forward with evidence and the burden of persuasion. Ultimately, the Commission concluded that the service provided by PSNH was safe, reliable

and adequate, stemming in large part from finding that it could not say that the problems were not caused by wiring or usage at the Guillemette premises, facts that were uniquely in their control.

The Guillemette case is complicated and especially fact driven but it suggests basic principles applicable to this case. First, "a utility has a certain responsibility by statute to demonstrate that" it is fulfilling its duty under RSA 374:1 to "furnish such service and facilities as shall be reasonably safe and adequate and in all other respects just and reasonable." Guillemette, p. 10. Second, if a complainant has evidence uniquely in its control, i.e., the conditions of inside wiring, appliances, and their usage over time, then the "sole burden of proof" will not be imposed on the utility. *Id.*

Here there are no facts that are uniquely in Omni's control relative to the issue of Abenaki's obligation to the repair the Water Main. Accordingly, Abenaki has the burden to bring forth evidence and persuade the Commission by a preponderance of that evidence that it is not responsible for repairing the Water Main. In other words, Abenaki must show cause why the Commission should not find Abenaki responsible for the repair.

VI. ARGUMENT

A. The Commission's Approval of the Tariff Changes in the Acquisition Docket Did Not Relieve Abenaki of its Responsibility to Repair the Water Main.

In the Acquisition Docket, the Commission approved a Settlement Agreement among Abenaki, Staff and the Office of Consumer Advocate, which at section IV. E., Tariff Revisions, described a change to monthly billing, installation of radio-read meters, and "minor tariff amendments." The "minor" changes included edits and additions to the Terms and Conditions, section 1. b. (3) concerning the installation, ownership and maintenance of a service pipe for commercial buildings.

In discussing the minor changes at the hearing on July 28, 2016, Commissioner Bailey said that it looked like to her that "under Rosebrook, the utility owned the service line from the property line to the customer's house." She then asked Mr. Vaughan if "you're changing that so that now the customer owns the service line from the property line to the house?" Mr. Vaughan replied, "not quite. Conventionally, the Company owns the water service from the water main to the property line or the curb stop.[2] And, hopefully, the curb stop is located at the property line or within the right-of-way." Mr. Vaughan went on to say that in Rosebrook there were several curb stops right adjacent to the house. He also said that "when we have an opportunity, we want to move those curb stops to the property line."

Mr. Vaughan's general proposition may be valid as applied to the installation of new service pipes in terms of allocating responsibilities between the utility and the customer going forward. While it is also understandable in the case of frozen services that he would want to pursue the "opportunity" to physically move such problematic curb stops to the property line, it presumably could not do so unilaterally. Most important, however, the water utility convention does not conform to the reality of the Hotel's situation, where the exterior shut-off is located well inside the property line and adjacent to the building. The Hotel, moreover, has not endured a frozen service, nor has Abenaki inquired about moving the exterior shut-off to the property line. Instead, it is trying to apply retroactively a change in the description of a service line to the Hotel, which strategy does not comport with Mr. Vaughan's answers to Commissioner Bailey.

[2] The Abenaki tariff includes as a definition: *Exterior shut off ('Curb stop') – water shut off controlled by the Company.* Exterior shut off and curb stop are often used interchangeably but they are not necessarily the same in that the exterior shut off is not always at the "curb" or property line.

B. The Tariff Changes Made in the Acquisition Docket Apply Only to the Installation of New Service Pipes After the Effective Date of the Tariff.

Just as the Commission may not retroactively change customer rates, it cannot retroactively reallocate responsibilities between the utility and the customer. The seminal case in this regard is *Appeal of Pennichuck Water Works*, 120 NH 562, 566 (1980) in which the Court set forth its reasoning thus:

> Moreover, the vehicles by which utility rates are set, the tariffs or rate schedules required to be filed with the PUC, do not simply define the terms of the contractual relationship between the utility and its customers. They have the force and effect of law and bind both the utility and its customers. As such, the customers of a utility have a right to rely on the rates which are in effect at the time that they consume the services provided by the utility, at least until such time as the utility applies for a change. Once customers consume a unit of those services, they are legally obligated to pay for it and in that sense the transaction is completed and the charges are set in accordance with the rates then in effect and on file with the PUC or with rates later approved by the PUC based on a pending request for a change. If the PUC were to allow a rate increase to take effect applicable to services rendered prior to the date the petition for the rate increase was filed, *it would be retroactively altering the law and the established contractual agreement between the parties*. In essence, such action would be creating a new obligation in respect to a past transaction, in violation of part 1, article 23 of our State Constitution and, due to the retroactive application, would also raise serious questions under the Contract Clause of the Federal Constitution. (Citations omitted. Emphasis added.)

Obviously, the instant case does not involve rates but it does involve the "terms of the contractual relationship between" Abenaki and Omni, namely, the definition of what constitutes a Service Pipe and who is responsible for the repair and maintenance of the Water Main that runs from Base Road to the Hotel. Prior to the 2016 tariff changes, the demarcation between utility and customer responsibility was the shut-off valve, with the utility responsible up to the shut-off valve and the customer responsible from the shut-off valve to the premises served. With the 2016 tariff changes, Abenaki sought to make the demarcation the property line.[3] Under the

[3] Consequently, Abenaki would make the isolation valve or gate valve in Base Road the curb stop or shut-off valve for the Hotel, ignoring the fact that the Water Main serves not only the Hotel, but also the Caretaker's House, the

Court's reasoning in *Appeal of Pennichuck Water Works,* given that the exterior shut-off is next to the Hotel and not on Base Road, application of the tariff change to Omni "would be creating a new obligation in respect to a past transaction," which was the installation of the shut-off valve adjacent to the Hotel.

Plain grammar also supports prospective, as opposed to retroactive, application of the tariff changes made in the Acquisition Docket inasmuch as Section 1, Service Pipe, was written in the future tense. Perforce, service pipe connections made after August 9, 2016, "*will* be made in the street which is nearest to the premises served" (emphasis added) and the service pipe, from the main to the property line or common area, including the premises' exterior shut-off valve, shall be owned by the Company." Because the Water Main and shut-off valve were installed well before August 6, 2016, the tariff change does not apply to the Hotel.

C. The Tariff Changes Made in the CIAC Docket Do Not Relieve Abenaki of Its Responsibility to Repair the Water Main.

As for the CIAC Docket, the Commission's Order did not address, as Abenaki alleges, any "ownership/obligation dispute between the hotel and the water company." Nonetheless, Abenaki chose as a launching point for its argument the anodyne statement of the Rosebrook Controller, Marjorie Taylor, that the "goal was to create a new tariff whose precise language would remedy what the group felt was insufficiently clear language…that left the company requirements and Customer obligations open to interpretation." (August 9, 2011 letter included as Attachment B to Abenaki's supplemental response.) Ms. Taylor, however, made no reference in her letter to an ownership dispute between the hotel and the utility.

Outdoor Pool/Cabana, the Spa Building, and the Golf/Nordic Building. These are five separate accounts, with five separate meters, five separate bills, and five separate exterior shut-offs.

Abenaki also cites to Puc 606.04, which states that "curb stops shall be placed at the customer's property line except in unusual situations" and points to tariff additions for commercial buildings, which provided that:

> 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).

It appears that Abenaki believes it has found a silver bullet in its tortured analysis of the CIAC Docket. The flaw, however, is that although the Definitions section of the tariff seeks to equate exterior shut off and curb stop, and Abenaki wants to have the curb stop at the property line, the facts on the ground do not cooperate. There are existing situations, such as Omni's, where the exterior shut-off is not at the property line or curb, as it were. Consequently, the CIAC Docket did not, and does not, resolve Omni's Complaint in Abenaki's favor.

D. Abenaki's Continuing Property Records Demonstrate its Responsibility to Repair the Water Main.

In discovery, Staff requested that Abenaki provide a copy of its property records detailing ductile iron main footages by size and location. (Request No. Staff 1-1, February 3, 2020) Abenaki provided a copy of its continuing property records, which as noted above is included as Attachment D. Those records clearly show a main extension in 1985 to the Mount Washington Hotel and the Bretton Arms, which includes the approximately 1600' segment of 8" main running southeasterly from Base Road to the Hotel.

In its response, Abenaki sought to diminish the continuing property records by saying that prior to its purchase of Rosebrook it "relied heavily on, among other sources, PUC's Chief Auditor's report dated, March 14, 2013. In that report the audit noted, '…no backup is available for assets placed in service before 2005.'" Abenaki also noted that it was "troubled by the lack of adequate and coherent progression of CPR's." Abenaki's feelings about the continuing

property records, however, do not discredit the evidence that there was a main extension to the Hotel in 1985.

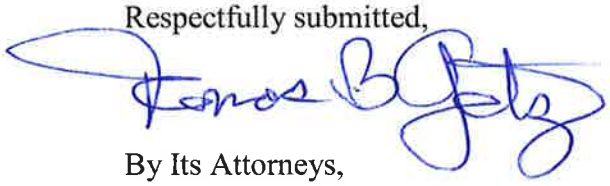
Finally, in response to Staff data requests, Mr. Brogan addressed issues about the continuing property records, reconciled questions about their accuracy, and concluded that there is uncontroverted evidence that Abenaki owns the Water Main. See Attachment F.

VII. CONCLUSION

The Rosebrook system is *sui generis*. The history of the relationship between the Hotel and the Rosebrook system may be unconventional but "it is what it is," meaning that the facts must be dealt with as they exist.

Abenaki refused to pay AB Excavating's bill for repairing the Water Main based on the faulty premise that a tariff amendment in the Acquisition Docket changed the pre-existing contractual relationship between Abenaki and Omni. No matter how much Abenaki wishes the facts were otherwise, no matter how many times it says it wants to operate like a typical water utility, and no matter how many irrelevant claims it introduces, Abenaki has responsibility for the Water Main from the property line to the shut-off valve adjacent to the Hotel.

Respectfully submitted,



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Certificate of Service

I hereby certify that on the 14th of July, 2020, an electronic copy of the foregoing Memorandum of Law was delivered to the New Hampshire Public Utilities Commission.

Thomas B. Getz