

STATE OF NEW HAMPSHIRE
BEFORE THE
PUBLIC UTILITIES COMMISSION

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Abenaki Water Company
Request for Change in Rates
Docket No. DW 15-199

Opposition of the Office of the Consumer Advocate to Motion for Confidential Treatment

NOW COMES the Office of the Consumer Advocate (“OCA”), a party in this docket, and opposes the motion of the subject utility in this proceeding, Abenaki Water Company (“Abenaki”), for confidential treatment of certain documents filed by Abenaki. In support of this Opposition the OCA states as follows:

1. This is a rate case in which, by Order No. 25,905 entered on June 3, 2016, the Commission approved a settlement agreement granting Abenaki authority to implement new permanent rates pursuant to RSA 378:27. The new rates are effective for service rendered on or after September 8, 2015. In its order, the Commission directed the utility to submit its proposed temporary rate reconciliation amounts and proposed surcharges and refund, along with its request for rate-case expense recovery, to the parties and Commission Staff within 20 days.
2. Consistent with this directive, on June 29, 2016 Abenaki filed various invoices intended to document the utility’s rate case expenses. Among those invoices were those for legal services provided by the law firm Upton & Hatfield, LLP. Appended to this submission was a motion seeking confidential treatment pursuant to RSA 91-A:5, IV and N.H. Code

Admin. Rules Puc 203.08 of extensive portions of the Upton & Hatfield invoices.

Abenaki redacted from the public version of these documents all of the narrative descriptions of the hourly charges billed by the law firm, publicly disclosing only the date of each charge, the attorney involved, the amount of attorney time billed to the client, and the total amount billed by the firm to the utility.¹

3. According to Abenaki, confidential treatment of the narrative descriptions is appropriate under RSA 91-A:5, IV because the non-public information is covered by attorney-client privilege. The OCA is unable to agree with this proposition.
4. As noted by Abenaki, the New Hampshire Supreme Court has made clear in *Professional Fire Fighters of New Hampshire v. New Hampshire Local Government Center*, 163 N.H. 613, 614-15 (2012), that “[c]ommunications protected under the attorney-client privilege fall within the [disclosure] exemption for confidential information” set forth in RSA 91-A:5, IV. The OCA further agrees with Abenaki that “the attorney client privilege *may* apply to information in a billing record 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,” although there is no “*per se* rule that *all* descriptive narratives in attorney invoices to clients are subject to the attorney client privilege.”

Hampton Police Assn. v. Town of Hampton, 162 N.H. 7, 15 (2011) (emphasis in original, citations omitted).

¹ As required by RSA 363:28, Abenaki furnished the OCA with a confidential version of the attorney billing records on June 29, 2016. This version is not completely unredacted; Abenaki opted not to provide either the OCA or Commission Staff a small number of narrative descriptions that, according to counsel for Abenaki, involve undisclosed details of how the utility would have cross-examined one of the OCA witnesses had the case been presented to the Commission on a fully litigated basis. Inasmuch as the non-disclosed material does not appear to be necessary for an evaluation of the utility’s rate case expenses, the OCA does not object to Abenaki having withheld these few details of its attorney billing records. The only possible exception concerns a teleconference conducted on September 23, 2015 with a third party, well before the OCA filed its testimony. The OCA does not object to non-disclosure of this item but reserves the right to challenge the associated cost recovery.

5. The Commission need not parse whether the narrative descriptions at issue here fall within the confidentiality zone delimited by *Hampton Police Association* because the attorney-client privilege simply does not apply in these circumstances. Abenaki waived the privilege when it disclosed the allegedly confidential versions of its attorney billing records to third parties (i.e., Commission Staff and the OCA). See N.H. Rule Evid. 502(b) (making clear that attorney-client privilege applies only to “confidential communications” within the meaning of the rule), Rule 501(a)(5) (specifying that a communication is “confidential” for purposes of the rule “if not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication”) and Reporter’s Notes to N.H. Rule Evid. 501 (“Generally, the presence of an unrelated third party will defeat a finding of confidentiality and thus the privilege”) (citations omitted).
6. In support of its motion, Abenaki cites *Lakes Region Water Company*, Order No. 25,454 (January 17, 2013) in Docket Nos. DW 07-105, DW 10-043, DW 10-141 and DW 11-021. In Order No. 25,454, facing procedural circumstances identical to those at issue here, the Commission granted a motion for confidential treatment of attorney billing records on the ground that hourly billing *rate* information “*could* result in a competitive disadvantage to Lakes Region’s legal counselors.” *Id.* at 4 (emphasis added). This precedent is not persuasive for three distinct reasons. First, Abenaki is here unabashedly *disclosing* the very information (attorney billing rate information) the Commission deemed confidential in Order No. 25,454.² Second, no party appeared in the Lakes

² As Abenaki points out, for reasons that went unexplained the Commission ruled attorney billing rate information to be confidential even though the underlying motion made the same argument that Abenaki is making here – that

Region Water Company rate case to question the claim that attorney billing records should be confidential, so the Commission effectively granted a motion whose result was stipulated to by the parties in that case. Finally, Order No. 25,454 misapplied the balancing test that governs RSA 91-A:5, IV, which requires not a determination that there *could* be competitive harm arising out of disclosure but that such harm is “likely.” *Union Leader Corp. v. New Hampshire Housing Finance Auth.*, 142 N.H. 540, 554-555 (1997) (noting that the test involves balancing such likely harms against public’s interest in “understanding the conduct” of the government agency in question) (citations omitted).

7. Finally, even if Abenaki’s waiver of attorney client privilege did not defeat its claim for confidential treatment here, and thus if there were a cognizable privacy interest of a sort sufficient to justify application of the RSA 91-A:5, IV balancing test described in the *Housing Finance Authority* case and similar New Hampshire Supreme Court precedents, the Commission would still be obliged to deny Abenaki’s motion. The utility’s claimed legal expenses of nearly \$30,000 constitute a significant share of the rate case expenses for which it seeks recovery. In these circumstances, to shield the basis of the utility’s claimed legal expenses from public disclosure would be to shroud too great a share of this phase of the proceeding in secrecy. In other words, the public’s interest in disclosure substantially outweighs any claimed privacy interest here.

attorney billing statements should be deemed confidential under RSA 91-A:5, IV because they “include summaries that, if disclosed, would reveal litigation strategy and the nature of the legal services provided.” See Lakes Region Water. Co. Motion for Confidential Treatment, available at <http://www.puc.nh.gov/Regulatory/CaseFile/2010/10-141/MOTIONS-OBJECTIONS/10-141%202012-08-30%20LRWC%20Motion%20for%20Confidential%20Treatment%20of%20Attorney%20Invoices.PDF>, at 2 (also conceding that “[d]isclosure of privileged information generally waives the privilege”). That the Commission either misunderstood or chose not to address the actual basis of the Lakes Region Water Company motion only serves to undermine further the extent to which the decision is persuasive authority.

WHEREFORE, the OCA respectfully request that this honorable Commission:

- A. Deny the pending motion of Abenaki Water Company for confidential treatment,
and
- B. Grant any other such relief as it deems appropriate.

Respectfully submitted,



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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.



Donald M. Kreis