STATE OF NEW HAMPSHIRE
PUBLIC UTILITIES COMMISSION

DOCKET NO. DW 17-165

ABENAKI WATER COMPANY, INC.
ROSEBROOK WATER SYSTEM

Motion for Rehearing and
Response Regarding Service Company Charges

Omni Mount Washington Hotel, LLC ("Omni"), by and through its attorneys, McLane Middleton, Professional Association, seeks rehearing pursuant to RSA 541:3 of New Hampshire Public Utilities Commission ("PUC" or "Commission") Order No.26, 295, *Order Authorizing Temporary-Permanent Rate Recoupment, Partial Recovery of Rate Case Expenses, and Denying Motion to Bifurcate* ("Surcharge Order"), issued October 1, 2019, in the above-captioned proceeding. As explained below, the Commission has overlooked and mistakenly conceived certain matters, and its decision is unlawful and unreasonable. Omni also responds herein with respect to the open matter of the propriety of $26,369 in charges made by Abenaki Water Company, Inc. ("Abenaki") to its affiliate, New England Service Company ("Service Company"), as rate case expenses. Finally, Omni comments on the Commission's recent Order Affirming and Clarifying Step II Adjustment.

I. BACKGROUND

The Commission's Surcharge Order authorizes Abenaki to charge Omni a monthly rate case surcharge of $3,595.38 over 24 months for a total of $86,289.12. The surcharge comprises $1,352.64 ($32,463.36 in total) for recoupment of the difference between temporary and permanent rates and $2,242.74 ($53,825.76 in total) for recovery of Abenaki's undisputed rate case expenses. Omni does not dispute the recoupment surcharge but it does dispute the Commission's decision, contrary to precedent, to allocate 68% of rate case expenses to Omni.

II. STANDARD

The purpose of rehearing "is to direct attention to matters that have been overlooked or mistakenly conceived in the original decision . . ." *Dumais v. State*, 118 N.H. 309, 311 (1978) (internal quotations omitted). Pursuant to RSA 541:4, a motion for rehearing "shall set forth fully every ground upon which it is claimed that the order or decision complained of is unlawful or unreasonable." A rehearing may be granted when the Commission finds "good reason" or "good cause" has been demonstrated. *See O'Loughlin v. NH Pers. Comm.*, 117 N.H. 999, 1004 (1977); *Appeal of Gas Service, Inc.*, 121 N.H. 797, 801 (1981).

The Surcharge Order is unlawful and unreasonable because the Commission: (1) allocated the fixed costs of rate case expenses as if they were variable costs; (2) arbitrarily disregarded precedent; (3) failed to provide sufficiently detailed findings of fact and rulings of law as required by RSA 541-A:35; and, (4) violated Omni's right to due process.

III. SUMMARY OF RECOMMENDATION AND ORDER

Through a series of filings, on January 30, 2019, May 8, 2019, and July 15, 2019, Abenaki requested recovery of $156, 499, including a recoupment amounting to $39,533 and rate case expenses totaling $116,966. Consistent with past practice for the Rosebrook Water System ("Rosebrook") and precedent for water utilities, Abenaki proposed that a monthly surcharge of $21.05 be applied over 18 months to all metered accounts (consisting of $5.32 for recoupment and $15.73 for rate case expenses). Consequently, Omni, because it has 16 metered accounts, would have paid $6,062.40 for the rate case surcharge or 5.2% of the total.

On August 15, 2019, Commission Staff ("Staff") submitted a recommendation, as part of its routine audit of recoupment and rate case expenses, which concluded that Abenaki had correctly calculated the recoupment amount of $39,533 and identified $10,941 in rate case

expenses that should be disallowed. In addition, contrary to Abenaki's proposed meter-based surcharge, Staff recommended *sua sponte* a usage-based monthly surcharge of $6,640.59. The rate case expense portion of the surcharge for Omni is equal to 82% of the total rate case expense costs. Staff justifies increasing the Omni surcharge by 21 times on the belief that it would be "more equitable" and would be consistent with a decision approving a settlement in a recent gas company proceeding.

In the Surcharge Order, the Commission concluded that the recovery of the temporary-permanent rate recoupment based on historical consumption is more equitable to the customer classes. It also concluded that the rate case expense should be based on a uniform 15% increase in customer bills, stating that this approach is "more equitable because the increase in all customer bills will proportionately be the same relative to rate case expenses." Surcharge Order, p. 8. In essence, the Commission moderates somewhat the full impact of Staff's usage-based allocation by selecting a middle ground between the bill impacts on Omni and the bill impacts on residential and commercial customers found in Staff's approach. The Commission applies an approach sometimes used in rate cases to increase fixed charges without benefit of a cost-of-service study, which has the effect of allocating 68% of rate case expenses to Omni.

IV. FIXED V. VARIABLE COSTS

The Surcharge Order is unreasonable because it fails to recognize basic principles of ratemaking regarding the recovery of fixed and variable costs, and assigning costs to those customers who cause them. As Omni indicated in its September 9, 2019 response to Staff's recommendation, it did not oppose allocation of the recoupment surcharge among customers based on usage inasmuch as the recoupment amount is a function of usage and Omni's usage had a proportionate impact on the size of the recoupment that needed to be recovered. In other

words, as a ratemaking principle, it is reasonable for the recoupment of the variable cost of water as a commodity to be recovered through the volumetric rate applied to usage because it aligns cost causers and cost payers. As for the rate case expenses, however, there is no such link between Omni's usage and the size of the rate case expenses, which are hence a fixed cost, not a variable cost. It is not economically rational or reasonable as a matter of ratemaking to collect the fixed costs of rate case expenses through the volumetric rate because rate case expenses do not vary with output or usage.

Both Staff and the Commission mistakenly conceived or overlooked the reality that their bill impact approaches are merely math exercises and just another way of expressing the impact of their bald conclusion that it is "more equitable" to allocate costs based on usage. In other words, since total customer bills are largely driven by usage, if rate case expenses are allocated among classes based on usage then the percentage impacts can be adjusted to make Omni bear the largest portion. Implicit in the conclusion that this approach is more equitable is the unstated premise that Omni can better afford to pay the rate case expenses, but neither Staff nor the Commission puts forth any facts about affordability as to Omni or the residential customers, many of whom are second-home owners.

Both Staff and the Commission, taking slightly different tacks, failed to consider the nature of rate case expenses as fixed costs, when concluding that it is more equitable to allocate them in a different way than proposed by Abenaki, or than the Commission has done in the past for Abenaki and other water companies. In its recommendation, Staff treated rate case expenses as costs that vary dependent on Abenaki's output and Omni's relative usage. The Commission moderated the impact on Omni somewhat by overlaying a rate design approach that increases fixed charges on a uniform basis across all customer classes but nonetheless is usage driven.

Instead of starting from the endpoint conclusion as to what it believes is more equitable, Omni contends that the Commission must consider the "most equitable" result and the best expression of ratemaking principles. Based on the current allocation of fixed costs among residential customers, commercial customers, and Omni, a just and reasonable allocation of the $79,657 in rate case expenses would yield monthly surcharges over 18 months of approximately:

- $6.74 for residential customers (60% of the total, borne by 394 customers);
- $22.13 for commercial customers (1.5% of the total, borne by 3 customers); and
- $1,703.77 for Omni, or $1,277.83 over 24 months (38.5% of the total, borne by Omni).

The fixed cost approach to allocating rate case expenses is a logical refinement of the traditional meter-based approach for water companies. Insofar as fixed charges recover the cost of providing the capacity to serve customers, including rate case expenses, the traditional meter-based surcharge is a reasonable approach, especially for small water companies where meters are for the most part likely to be similarly sized. For Rosebrook, where there are a wider range of meter sizes, with the larger sized meters serving Omni, it reasonably follows that differentiation of the surcharge based on meter sizes as set forth above is the most equitable way to allocate rate case expenses.

V. PRECEDENT

The Surcharge Order is unlawful because the Commission failed to acknowledge and explain its departure from precedent. Staff recommended that the Commission depart from precedent for the collection of rate case expenses, citing to a recent decision approving a settlement agreement in the gas industry, i.e., Order No. 26,129 in Docket No. 17-070, *Northern Utilities, Inc.* (May 2, 2018). In its September 9, 2019 response to Staff's recommendation,

Omni pointed out that the order approving a settlement agreement is ill suited as precedent. Not only are there critical factual distinctions to be drawn between the two utilities, but the Commission never addressed the particular merits or reasonableness of the usage-based allocation of rate case expenses; it merely approved the global settlement of all issues in their entirety finding the overall rates to be just and reasonable.

The Commission does not address Staff's recommendation but adopts instead a third approach, which may yield a somewhat less burdensome result than Staff's approach but is equally an example of circular thinking and lacking in analysis. The Commission, without citing to any evidence or setting forth its reasoning (only its conclusion), recites that it has drawn on suggestions and evidence in the record to find that a uniform percentage increase across customer classes is just and reasonable.

Both Staff and the Commission are prepared to depart from precedent based on the bare conclusion that the new approach is more equitable than the approach taken in prior cases, without explaining how or why. Staff cites to a case from another industry, which Omni distinguishes as inapt, while the Commission relies on the tautology that a uniform increase is more equitable because the increases will be the same.

The First Circuit has recognized that "when an agency fills a quasi-judicial role, it builds a body of precedent which it cannot thereafter lightly disregard." *Com. of Mass., Dep't of Educ. v. U.S. Dep't of Educ.*, 837 F.2d 536, 544 (1st Cir. 1988). That Court also pointed out that "[l]ike courts, agencies 'have an obligation to render consistent opinions and to either follow, distinguish or overrule' their earlier pronouncements." *Id.* citing *Chisholm v. Defense Logistics Agency*, 656 F.2d 42, 47 (3d Cir.1981). An unexplained inconsistency in agency policy is reason for holding an agency's determination to be arbitrary or capricious and is not entitled to

deference. *Nat'l Cable & Telecommunications Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 981 (2005).

Similarly, an Opinion of the New Hampshire Attorney General discusses the obligation of an administrative agency to acknowledge and explain its departure from precedent. As part of its analysis of the application of *stare decisis* by administrative agencies, the Office of the Attorney General recognized the basic and longstanding principle that precedent should not be departed from without explanation. See Office of the Attorney General, Opinion No. 84-172-1 (October 16, 1984).

VI. ADMINISTRATIVE PROCEDURE ACT

The Surcharge Order is unlawful because the Commission failed to provide sufficiently detailed findings of fact and conclusions of law as required by RSA 541-A:35. As the New Hampshire Supreme Court pointed out in *Petition of Support Enforcement Officers I and II,* 147 N.H. 1 (2001): "The purpose of this requirement is to provide this court with an adequate basis upon which to review the decision of the administrative agency." As the Court also held in *Appeal of City of Nashua,* when an agency "structures its decision solely by summarizing evidence presented by the contending parties and describing the parties' opposing views, without making specific factual findings in support of its own conclusions, it fails to meet its statutory obligation." 138 N.H. 261, 263 (1994).

The Commission's conclusion that it would be more equitable to allocate rate case expenses based on a uniform percentage bill increase is not based on any facts. Both Staff and the Commission jumped to the conclusion that Omni should bear the greater part of the burden of rate case expenses but neither explains why the departure from precedent is called for.

VII. DUE PROCESS

The Surcharge Order is unlawful because in adopting a new policy on the allocation of rate case expenses in a water utility rate case, Staff exceeded the boundaries of the audit function and the Commission decided an issue of first impression that increases the surcharge to Omni by orders of magnitude without benefit of notice or a hearing. In the normal course of issuing its *Order Approving Change in Rates* in this proceeding, the Commission directed Abenaki to document the difference between temporary and permanent rates and to file a rate case expense request. Staff audited Abenaki's submissions and, after reviewing its recommendations with Abenaki and the Office of Consumer Advocate, filed its recommendation with the Commission on August 15, 2019. In addition to exercising its audit duties, however, Staff proposed a wholly new and unanticipated approach to allocating rate case expenses for a water company rate case.

It is difficult to understand why Staff notified Abenaki and the OCA in advance of its recommendation and sought their positions, while ignoring Omni, the one participant that would be directly and substantially affected by the profound change in policy. Staff should have filed testimony, which would have been subject to discovery and Mr. Goyette should have been made available for cross-examination. Those failures along with the Commission's decision to take Staff's recommendation a step further without permitting Omni the opportunity to weigh in on the Commission's new policy is a denial of due process. See, e.g., RSA 541-A:31, IV, which provides that all parties shall have the opportunity to respond and present evidence on all issues, and RSA 541-A:33, IV, which provides that a party may conduct cross-examination for a full and true disclosure of the facts.

VIII. SERVICE COMPANY CHARGES

The Surcharge Order invited Abenaki to respond to the position of Omni, the Bretton Woods Property Owners Association, and Forest Cottages that Abenaki may not recover through rate case expenses $26,369 in charges to its affiliate New England Service Company. In its September 9, 2019 response to Staff's recommendation, Omni pointed out that the Service Company is not a "service provider" under Puc 1903.06 and also that Abenaki's charges to its affiliate are not eligible for recovery because they are already included in Rosebrook Water System's revenue requirement. Subsequently, on October 11, 2019, Abenaki argued that Omni overlooks the fact that Rosebrook Water System has no employees and that it has filed its affiliate agreement with the Commission, but those arguments are unavailing because they are incorrect and incomplete.

The affiliate agreement that Abenaki filed with the Commission is a very limited document, setting forth services provided by the Service Company to Abenaki on behalf of the Rosebrook, Lakeland, and White Rock Water Systems, including regulatory and compliance reporting, as well as the charges for such services, including administrative support and accounting. In addition, Staff's Revised Final Audit Report, issued September 6, 2018, makes clear that during the test year Rosebrook paid the Service Company, among other items, $60,604 for Admin and General Services and $655 for Professional Services. Accordingly, these services are included in the revenue requirement.

Finally, it makes no difference that the employees of the Service Company are not direct employees of Abenaki or the Rosebrook. The Commission's rules contemplate that utilities shall not recover expenses for matters "that are typically performed by utility management and staff of the utility, based on their experience, expertise, and availability." Puc 1907.01 (a). In this case,

the $29,369 in expenses were in fact for matters handled by management and staff of Rosebrook through an affiliate agreement and the services of those employees are reflected in the test year and resulting revenue requirement.

IX. ORDER CLARIFYING STEP II

On October 23, 2019, the Commission issued Order No. 26,300, *Order Affirming and Clarifying Step II Adjustment* ("Clarification Order"), which, among other things, extended until December 31, 2019, the deadline for Abenaki to file a request for a Step II adjustment. Omni remains unsure as to what the Commission will do with any request that Abenaki may file and what standard it may apply to such a filing.

The Commission agreed with Omni and others that it would be unnecessary and inappropriate for the Commission to authorize Abenaki to contract with Horizons to develop engineering designs. In addition, it appears that the Commission may have determined that it will not review Abenaki's Step II filing in the context of whether it is the best and most cost effective solution to resolve high water pressure and other problems. Citing to Docket No. DW 16-619, *Lakes Region Water Company, Inc. and Dockham Shores Estates Water Company, Inc.*, Order No. 26,272 (July 11, 2019) ("Lakes Region Order"), the Commission says that the "determination of whether the Step II investments are just and reasonable will be made when Abenaki files for recovery" and that only after such a filing may it conduct the required prudence review and determine whether the resulting rates are just and reasonable. Clarification Order, p. 7.

The Commission's discussion of the Step II investments and its reference to a prudence review, among other things, raises questions as to whether the Commission is referring to the expenses that Abenaki will incur for Horizon's engineering work (and whether they are

reasonable) or the investments in plant that Abenaki will eventually make as the outcome of such engineering (and whether they are prudent). The Commission goes on to explain that a prudence review occurs when a project is complete, i.e., used and useful, but leaves unstated what will happen with whatever Abenaki may file on December 31, 2019.

To the extent that the Commission is relying on the Lakes Region Order to permit a step increase for engineering expenses, it would be inconsistent with that order. As the Commission noted: "Step adjustments are a mechanism the Commission has approved for limited use between rate cases to allow a utility to collect additional revenue on investments that are generally non-revenue producing and are made to improve safe and reliable service." Lakes Region Order, p.4. Accordingly, the Commission found that certain plant additions were used and useful and thus approved an increase in the revenue requirement, which are not the facts here. In the event that the Commission, however, intends to review a Step II filing by Abenaki for engineering costs based on whether the expenses are just and reasonable and implement a corresponding rate increase, Omni contends that such a determination must occur through adjudication.

Abenaki is not seeking recovery for investment in plant through Step II, that is, capital additions that will go into service after the final order in the rate case. As Omni pointed out in its July 25, 2019 response, but which the Commission did not recount in its Clarification Order, Abenaki is seeking extraordinary relief, i.e., recovery of expenses by a step increase, which is typically reserved to avoid regulatory lag with respect to the ability to earn a return on large capital projects by including the investments in rate base. Accordingly, Omni believes that the engineering expenses for designs produced by Horizons are not properly the subject of a step increase.

X. CONCLUSION

The Surcharge Order is unlawful and unreasonable. After the closing of the record and as part of its audit function, Staff proposed out of the blue to depart from precedent in the allocation of the rate case surcharge, increasing the costs imposed on Omni from $5,639.04 to $119,530.62, without notice, or an opportunity for discovery, cross-examination and a hearing. Moreover, the Commission, in approving a variation on Staff's recommendation, failed to explain why it was departing from established precedent or set forth facts supporting its conclusion.

The Commission made a decision here to change the rate design for the recovery of rate case expenses contrary to the fundamental principle "that costs be assigned to those who cause them and to avoid one class subsidizing all others." See Docket No. DE 09-035, *Public Service Company of New Hampshire,* Order No. 25,123, p. 35 (June 28, 2010). Instead, it made a decision based on achieving uniform bill impacts without analyzing or explaining why that is a desirable goal in these particular circumstances.

WHEREFORE, Omni respectfully requests that the Commission:

A. Grant rehearing as requested herein; and

B. Grant such further relief as is just, equitable and appropriate.

Respectfully submitted,

By Its Attorneys,

McLANE MIDDLETON,
PROFESSIONAL ASSOCIATION

Dated: October 31, 2019

By: _____

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Certificate of Service

I hereby certify that on the 31st of October, 2019, an original and six copies of the foregoing Motion was hand-delivered to the New Hampshire Public Utilities Commission and an electronic copy was served upon the Distribution List.

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Thomas B. Getz