

STATE OF NEW HAMPSHIRE
BEFORE THE
PUBLIC UTILITIES COMMISSION

Docket No. DW 17-165

Abenaki Water Company, Inc. – Rosebrook Division
Permanent Rate Proceeding

OBJECTION TO OMNI MOUNT WASHINGTON HOTEL, LLC'S
MOTION FOR HEARING

NOW COMES, Abenaki Water Company, Inc.'s ("Abenaki") pursuant to Puc 203.07(e), and hereby objects to Omni Mount Washington Hotel, LLC's ("Omni") motion for hearing. In support of this objection, Abenaki states as follows:

Abenaki Motion for Rehearing is Moot

1. Earlier in this proceeding, on December 19, 2019, Omni requested leave to respond to Staff's December 11, 2019 letter regarding the \$26,369 in New England Service Company ("NESC") expenses to which Omni objects. On December 23, 2019, the Commission granted the request before considering Abenaki's timely-filed objection and thus Abenaki filed a motion for rehearing on January 3, 2020. Because Omni's requested reply date of January 13, 2020 has come and gone and Omni filed a motion for hearing instead of its reply, Abenaki's motion for rehearing is moot. Omni's motion itself triggers rights to reply under RSA Chapter 541-A and Puc 203.07 and Abenaki is availing itself of those rights. Abenaki incorporates herein its arguments made in its December 23, 2019 objection.

No Facts Are in Dispute and Omni Offers No New Evidence Despite its Many Filings

2. It is important to note that there are no facts in dispute which warrant a hearing. Omni agrees that Abenaki seeks to recover \$26,369 in rate case expenses. Motion at 2. Omni

does not dispute that these expenses are associated with work performed by NESC. See, Motion, generally. Omni does not dispute that NESC performs services for Abenaki pursuant to an affiliate agreement that is on file with the Commission. *Id.* It also does not dispute that NESC also performed work related to the rate case. Omni's argument, instead, is a policy argument which, for reasons stated below, fail to necessitate a hearing in this proceeding.

3. Importantly, Omni also does not dispute that it has objected to the select NESC expenses, relying on the same arguments, in now three filings. Omni raised its arguments in its objection dated September 9, 2019, wherein it argued: (1) the expenses do not qualify under Puc 1907.01(a), (2) NESC is not a "service provider" under Puc 1903.06, and (3) the charges are already contained in Abenaki's revenue requirement. Omni made these same arguments in its October 31, 2019 Motion for Rehearing at page 9. It makes these same arguments in its present motion.

4. Notwithstanding these three articulations, Omni cites to no evidence in the record and offers no new evidence to support its allegations. For example, on page 4 of its motion, Omni posits a factual scenario that "salaries of NESC employees appears [sic] to be already reflected in the rates" and that Abenaki "would be...double recovering" its expenses. Omni offers no evidence for these assertions. This lack of evidence stands in direct contrast to Staff's meticulous, screen-captures of record evidence in its December 11th letter that shows how the NESC rate case expenses are not already in the revenue requirement. See Staff letter dated December 11, 2019. Omni provides no evidence to counter or dispute that Abenaki (who has no employees) billed the subject NESC hourly services to account 186 Miscellaneous Deferred Debits and not to the Commission-approved revenue requirement. Omni's office no direct evidence to dispute that the NESC expenses were audited and reviewed by Staff who opined that

they were prudently incurred, properly charged, and subject to recovery as rate case expenses.

Omni offers no evidence on how NESC's hourly rates are now 'salaries'. There is a fundamental lack of actual evidence challenging the facts and positions of Staff.

5. The failure to cite to existing evidence or offer new evidence is procedurally important because New Hampshire's administrative procedures act requires that parties be afforded an opportunity to cross examine and vet evidence. RSA 541-A:31, III. It is axiomatic that without evidence, there is no need for a hearing.¹

6. Furthermore, these multiple bites at the apple and repeated recitations of prior arguments simply delay the orderly and efficient resolution of this proceeding and waste the Commission's and Abenaki's resources. *State v. Thornton*, 140 N.H. 532, 541 (1995); Puc 203.10, Amendments; RSA 541-A:32, I(c), Intervention. Allowing Omni a hearing and a fourth opportunity to present its evidence is remarkable and would further unnecessarily delay the resolution of this proceeding, cause Abenaki economic harm by delaying recovery, and add to Abenaki's rate case expenses, without benefit. This vociferous advocating for what is turning out to be illusory arguments has got to stop.

**Omni's Argument that NESC's Rate Case Work is in the
Revenue Requirement is Without Merit**

7. Omni argues on page 4, that the "correct focus is on whether the salaries of the employees who perform the rate case related services are reflected in Abenaki's revenue requirement." Motion at 4. This simplistic argument overlooks important dispositive facts.

¹ Although Omni cites that the Commission held a hearing in Docket No. DW 15-209, that case is distinguishable because it was not an evidentiary hearing and the issues argued over were prudence of actual expenses; whereas Omni is not arguing over prudence, it is arguing a policy change.

First, the NESC-Abenaki affiliate agreement is based on hourly rates, not on salary. See Attachment A, Abenaki's affiliate agreement with NESC at pages 3-4 for Rosebrook, which was filed as part of Abenaki's rate case at Tab 3. Second, the work contracted for in the affiliate agreement does not include rate case related work. See Attachment A, Page 1 and 2.

8. The list of work to be performed appears in section a), subsections 1 through 12. It includes: 24/7 emergency work, meter reading, routine system rounds, regulatory and compliance reporting, shut offs, flushing, valve exercising, on-site/field resolution of water quality issues, miscellaneous on-site customer service, cross-connection inspections, inspections of wastewater pumping, and "[o]ther routine, periodic, and related tasks as necessary." It requires minimum qualifications of the chief operator and pump installer. Attachment A, Page 2.

9. Although "regulatory" is in 'compliance reporting', that work pertains to operational reporting-which is separate and distinct from filing a general rate case. "Other routine" tasks also does not support Omni's argument because the whole notion behind a rate case is that expenses are based on an average test year where annual expenses are normalized or *pro formed* so as to depict a representative year. Expenses to conduct a rate case are not annual expenses. See, RSA 378:7 (The commission shall be under no obligation to investigate any rate matter which it has investigated within a period of 2 years). Nor are rate case expenses "routine". It is notable that Omni fails to point to even a scintilla of actual evidence in the affiliate agreement to support its argument that there is double recovery.

10. Absent grounding in the record, Omni's argument is simply a theoretical disagreement over administrative policies. See, e.g., *N.H. Ass'n of Counties v. State*, 158 N.H. 284, 292 (2009) (academic issues are not justiciable controversies). Such issues are for rulemaking, declaratory rulings, or general (noticed) dockets. Policy changes affecting multiple

regulated entities cannot be done in single-entity proceedings lest they run afoul of RSA Chapter 541-A. In Omni's world, it would prefer to prohibit employees from working under both affiliate agreements and for rate cases. Again, this is a general policy argument and departure from precedent that affects more than just Abenaki.

Omni's Argument is Contrary to Precedent

11. Omni's argument departs from the Commission's long-standing recognition that some expenses are recoverable as rate case expenses notwithstanding that an affiliate agreement exists for operational work:

See, Order No. 25,945 (September 26, 2016) in Docket No. DW 15-199 pertaining to Abenaki's use of NESC employees for recoverable rate case related work in its Bow/Belmont rate case.

See, Order No. 25,586 (October 22, 2013) in Docket No. DW 12-085 involving Aquarion Water Company of New Hampshire, Inc.'s ("AWC-NH") recovery of employee expenses as rate case expenses even though those employees worked for affiliates with whom AWC-NH had affiliate agreements (Aquarion Water Company of Connecticut and Aquarion Water Company).

See, Order No. 25,025 (October 9, 2009) in Docket No. DW 08-065 and Hampstead Area Water Company, Inc.'s use of Lewis Builders Development, Inc. ("LBD") for rate case related expenses even though it also had an affiliate agreement with LBD.

As these cases illustrate, the Commission has a history of determining which expenses qualify for recovery as rate case expenses and which expenses are affiliate agreement related. Omni's argument that this is a case of first impression is simply incorrect.

12. Omni's argument in footnote 1 is also without merit. On the one hand, Omni acknowledges that the Commission approved NESC expenses as rate case expenses in Docket No. DW 15-199, yet on the other hand, it states that the Commission didn't address whether such charges should be recovered. This argument doesn't make sense. Given Attachment A and the

precedent cited in paragraph 11, the Commission determined that NESC expenses were either affiliate agreement-related or rate case expense-related. There were just two choices. For the Commission to approve the NESC expenses as rate case expense-related meant the Commission found the expenses were not affiliate agreement related. If the Commission authorized recovery as rate case expenses, it absolutely had to first find that the expenses were recoverable under applicable precedent. *West Swanzey Water Company, Inc.*, Order No. 26,146 (June 14, 2018). See also the cases cited in paragraph 11. For these reasons, it is illogical that the Commission “did not consider the underlying question of whether such charges should be recoverable at all.”

Omni’s Criticism of Staff’s Analysis Lacks Basis

13. Omni claims, in paragraph three of page 2 of its motion, that Staff “did not explain why such costs should be eligible for recovery under the Commission’s rules.” Although Staff did not cite chapter and verse of the Commission’s rules in its December 11th letter, Staff indeed cited to long-held Commission authority. Staff cited that:

“the Commission has historically treated prudently-incurred rate case expenses as a legitimate cost of service appropriate for recovery through rates. *West Swanzey Water Company, Inc.*, Order No. 26,146 at 2 (June 14, 2018).” Staff letter dated August 15, 2019 at 2.

In that letter, just as it did in Abenaki’s Bow-Belmont rate case² and in prior cases cited in paragraph 11 above, Staff scrutinized Abenaki rate case expenses and recommended disallowance of certain NESC work because that work was not deemed a rate case expense. Staff 8/15/19 letter at 7-8. Staff supported recovery of the remainder of the expenses. *Id.* at 2. Staff meticulously explained which NESC expenses were included in Abenaki’s revenue

² See *Abenaki Water Company, Inc.* (Bow/Belmont Divisions), Docket No. DW 15-199, Staff Recommendation, dated Aug. 18, 2016, at Tab 67.

requirement and which expenses were not. It cited specific accounts and balances in those accounts. It not only cited portions of the record, it actually screen-captured pages from the Audit report and included them in its letter. Staff demonstrated with specificity which NESC costs related to O&M expense and were in Abenaki's revenue requirement. Staff explained the \$26,369 which Omni disputes was not in Abenaki's revenue requirement. Staff opined that Abenaki ought to be allowed to recover those expenses as rate case expenses. Staff letter dated 12/11/19 at 5. For these reasons, Omni's allegation that Staff did not "explain why such costs should be eligible for recovery under the Commission's rules" mischaracterizes the meticulous and detailed analysis done by Staff.

Omni's Argument Re Puc 1905 is Form Over Substance

14. Lastly, Omni's argument that Abenaki should not recover its prudently incurred rate case expenses because it did not include the expenses in PART Puc 1905 reports is a form over substance argument that Abenaki requests this Commission deny. Abenaki is a small water utility and although it did not file reports every 90 days pursuant to Puc 1905.01, it fully complied with Puc 1905.03 and Order No. 26,205 (December 27, 2018) and filed its rate case expense summaries and supporting documentation for the Commission's consideration. Those submissions occurred on January 30, 2019, February 11, 2019, and May 8, 2019. The Commission approved recovery of rate case expenses in Order No. 26,295 (October 1, 2019). To argue that the Commission should now deny recovery of some expenses when it didn't deny others based on the failure to file the 90-day reports begs the Commission to apply its rules differently to similarly filed rate case expenses. Such a differing interpretation would constitute an impermissible rule. See RSA 541-A:1; *Asmussen v. Commissioner*, NH Dept. of Safety, 145

N.H. 578, 595 (2000) (Differing interpretation constituted a “rule” under RSA 541-A).

Accordingly, Omni’s request would be contrary to established law and should be denied.

Conclusion

15. Omni’s argument is a purely legal one that has broader implications than the instant proceeding. Even if the hearing were only oral argument and not evidentiary, it is inappropriate to resolve such a policy issue in an isolated proceeding. Omni has had three chances to provide evidence to support its contention that allowing employees subject to affiliate agreements to also perform rate case related work has the effect of allowing Abenaki to double recover. Double recovery has been meticulously disputed by Staff in its December 11, 2019 letter. Notwithstanding its multiple opportunities, Omni still has not provided actual evidence to dispute Staff’s explanation of how the NESC expenses are not double-recovered. Asking for a hearing and fourth opportunity to provide evidence to support its allegations is contrary to the orderly and efficient conduct of this proceeding which RSA Chapter 541-A and the Commission’s rules require.³

³ See *Hollis Telephone Co., Inc. et als*, Order No. 24894 in Docket No. DT 08-028 (2008) for a similar case where the Commission denied on these grounds an intervenor’s request for a hearing.

WHEREFORE, Abenaki respectfully requests the Commission:

- A. Deny Omni's motion for yet another opportunity to present evidence and argument on its "fundamental question of law and policy";
- B. Deny Omni's attempt to reopen consideration of the terms of Abenaki's affiliate agreement with NESC; and
- C. Grant such other relief as is just and equitable.

Respectfully submitted,

Abenaki Water Company, Inc.

By its Attorney,
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Dated: January 23, 2020

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Certificate of Service

I hereby certify that a copy of the foregoing objection has been emailed this 23rd day of January, 2020 to the docket-related service list.

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