

STATE OF NEW HAMPSHIRE
BEFORE THE
PUBLIC UTILITIES COMMISSION

Docket No. DW 19-131

Abenaki Water Company, Inc. – Rosebrook Division
Complaint Regarding Water Main Break

ABENAKI WATER COMPANY, INC.’S REPLY TO
COMPLAINT OF OMNI MOUNT WASHINGTON HOTEL, LLC

NOW COMES, Abenaki Water Company, Inc.’s (“Abenaki” or “Company”), and, pursuant to RSA 365:1; RSA 365:2; and N.H. Code Admin. R. Puc 204.02(b) hereby replies to Omni Mount Washington Hotel, LLC’s (“Omni”) complaint. In support of this reply, Abenaki states as follows:

1. Omni seeks the Commission to order Abenaki to pay an invoice from AB Excavating, Inc. in the amount of \$22,848.74. This invoice, contained at Attachment C to Omni’s complaint, contains no description of work, materials, or date of work which would corroborate that the invoice relates to the water line break that occurred on April 21, 2019. Resolution of this fact is secondary because the main issue of the complaint concerns whether Abenaki or Omni is responsible for maintaining the 8-inch water line on Omni’s property.

2. Omni asserts that the water line running from Base Road, on which Omni’s property abuts, to Omni’s hotel is the responsibility of Abenaki to maintain. In support of that assertion, Omni argues that the tariff amendments approved by the Commission three years ago in Docket No. DW 16-448 do not apply. To remind the Commission, Docket No. DW 16-448 involved Abenaki’s acquisition of the Rosebrook system. The Commission approved Abenaki’s acquisition, which included changes to the Rosebrook tariff, by Order No. 25,934. The

Commission also approved Abenaki's changes to Rosebrook's tariff, yet Omni states "Abenaki managed to amend the Rosebrook tariff" as if there was something nefarious about the tariff approval. Complaint at para. 8. Omni argues the delineation of utility and customer responsibility effectuated by the tariff change was "unjustified". Omni Complaint at para. 5. Without legal support for its assertion, Omni argues that the tariff change "only applies prospectively to maintain and repair the 8-inch main that delivers water to the Hotel." Complaint at para. 8. Omni argues that "past practice" and "course of dealings" should prevail over the tariff changes. Complaint at para. 5. Abenaki objects to these arguments and characterizations.

3. New Hampshire law is well settled that the relationship between a utility and its customers is set by the utility's tariff.

"[T]he vehicles by which utility rates are set, the tariffs or rate schedules required to be filed with the [Commission], do not simply define the terms of the contractual relationship between a 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. *Appeal of Pennichuck Water Works*, 120 N.H. 562, 566 (1980) (citations omitted)." See, *Appeal of Lakes Region Water Company, Inc.*, 198 A.3d 898 (N.H. 2018).

Although the N.H. Supreme Court has the authority to review a Commission interpretation of a tariff for reasonableness or rationality, the Court has routinely held that it is "obliged to give effect to the plain language used in the tariff." See, *Appeal of Conservation Law Foundation*, 127 N.H. 606, 616 (1986); *Appeal of Verizon New England, Inc.* 158 N.H. 693, 700 (2009). See also, *Complaint of Robert Mykytiuk*, Order No. 26,037 (July 5, 2017). The current plain language of Abenaki's Commission-approved tariff expressly addresses who is responsible for service lines. See Abenaki tariff Page 2 and 3 on file with the Commission.

4. By asking this Commission to order Abenaki to pay Omni's contractor, Omni is asking this Commission to apply Abenaki's tariff in a non-uniform manner and to treat Omni differently from the rest of Abenaki's customers. To do so would be a departure from paragraph 3, *Maintenance of Plumbing*, on Page 3 and paragraph 1, *Service Pipe*, on Page 2 of Abenaki's tariff. If the Commission authorized such a departure under the present complaint, that process itself would be a departure from the procedural requirements of RSA 378:18. Deviations from a utility's tariff are only allowed under special circumstances and after the Commission finds "such departure from the general schedules [is] just and consistent with the public interest." The Commission is not in a position to make such a finding given Omni's barren complaint. Omni has not set forth any special circumstances to justify that repair (in the short term) and maintenance (over the long term) of its service line should be borne by Abenaki's remaining customers. Indeed, such an argument would be difficult to make because the expense of repairing and maintaining Omni's service line provides no additional benefit to the remaining customers on the Rosebrook system, thereby undercutting that such an arrangement is consistent with the public interest. This is a substantial disconnect between what Omni has provided to and requested of the Commission in its complaint and what the Commission is required by statute to weigh and find, based on the record. For this reason, Omni's complaint should be dismissed for failure to adequately support its requested relief.

5. Omni's complaint seeks to reopen Docket No. 16-448 and modify a prior order, Order No. 25,934. It does so notwithstanding that there were no requests for reconsideration, pursuant to RSA 541:3 and RSA 541:4, and no appeal of the order to the N.H. Supreme Court, pursuant to RSA 541:6 and 7. Order No. 25,934 is a final order and as such, reopening the order or modifying the order must be done pursuant to RSA 365:28, *Altering Orders*. Omni's

complaint fails to provide the support and argument it needs to obtain this relief and thus falls short of what is required to pursue relief under RSA 365:28. Furthermore, Omni's relief, if approved, would result in an inconsistent application of Abenaki's tariff, which, as stated above, must satisfy RSA 378:18.

6. Omni has included with its complaint articulations of unverified facts as to who arrived on scene or who wasn't on scene of the water line break but these facts are a distraction. See Complaint at para. 13 and Attachment I. They are a distraction because they are not germane to any of the applicable statutes or precedent or to whether it is appropriate to deviate from Abenaki's tariff. Nor are Omni's facts relevant to its argument that when the Commission approved Abenaki's tariff changes, the "past practice" and "course of dealings" Omni and its predecessors may have had with the previous owner of the water utility should prevail over the Abenaki's Commission-approved tariff.

7. Omni's complaint also contains an internal inconsistency. Omni asserts that when Abenaki purchased Rosebrook in Docket No. DW 16-448, Abenaki acquired ownership of the 8-inch water line serving Omni. See, Complaint at para. 7. This assertion is then contradicted by Omni also recognizing that when Abenaki acquired ownership of Rosebrook, it revised Rosebrook's tariff to delineate maintenance responsibilities for customer service lines. See Complaint at para. 4 and Attachment E. Omni's assertions conflict with each other and do not advance Omni's case that Abenaki, notwithstanding its tariff revisions concerning service lines, intended to maintain Omni's service lines. Abenaki would like to note that its intent to not maintain customer service lines is clear even in Omni's own complaint. See footnote 4 wherein Omni cites questioning at hearing between Don Vaughan, President of New England Service

Company-the parent of Abenaki, and Commissioner Bailey concerning the property line serving as the boundary between utility and customer responsibilities.

8. Although the Commission has broad authority to hold hearings on complaints against utilities both by statute, RSA 365:1 *et seq.*, and pursuant to its rules, N.H. Code of Admin. R. Puc 204, Omni's complaint is procedurally and legally flawed. It lacks the necessary arguments and proof to support the relief it requests. Payment by Abenaki of costs to repair and maintain Omni's service line would be contrary to Abenaki's tariff and Omni's complaint lacks the support it needs to establish that a deviation from the tariff is consistent with the public interest or that Order No. 25,934 ought to be altered or amended.

WHEREFORE, Abenaki respectfully requests the Commission:

- A. Dismiss Omni's complaint; and
- B. Grant such other relief as is just and equitable.

Respectfully submitted,

Abenaki Water Company, Inc.

By its Attorney,
NH BROWN LAW, PLLC

Dated: August 16, 2019

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Certificate of Service

I hereby certify that a copy of the foregoing objection has been emailed this 16th day of August, 2019 to the docket-related service list.

Marcia A. Brown
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