

**THE STATE OF NEW HAMPSHIRE  
PUBLIC UTILITIES COMMISSION**

**DOCKET NO. DW 19-131**

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

**REPLY MEMORANDUM**

**I. BACKGROUND**

Abenaki Water Company, Inc. (“Abenaki”) filed a Memorandum of Law on July 14, 2020, that makes four (4) arguments as to why it should not be held 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. It also makes a fifth argument as to why its tariff changes do not affect condominiums and homeowners associations. Omni Mount Washington, LLC (“Omni”) explains below that Abenaki has failed to demonstrate by a preponderance of the evidence that it is not responsible for the repair of the Water Main.

**II. ABENAKI ARGUMENTS**

Abenaki argues that it is not responsible for the Water Main repair because (1) its continuing property records (“CPRs”) are unreliable, (2) the Commission previously decided the issue, (3) the tariff changes in Docket No. DW 16-448 (“Acquisition Docket”) relieved it of responsibility, and (4) it does not have an ownership interest in the Water Main. Lastly, it argues that the tariff changes in the Acquisition Docket did not affect homeowner associations.

**A. Reliability of Continuing Property Records**

The inconvenient truth for Abenaki is that the Water Main is on its books. It points to Dockets No. DW 06-049 and DW 12-306 as a basis for the Commission to ignore the property records Abenaki provided in response to Staff Data Request 1-1 on February 18, 2020. In

particular, Abenaki refers to Audit Staff's May 14, 2013 Report, finding that Rosebrook had failed to reconstruct its continuing property records as previously required. What Abenaki avoids mentioning, however, is that later in the same proceeding, on December 23, 2013, the Director of the Gas & Water Division, Mark Naylor, filed a report stating that Rosebrook had submitted revised CPRs. Mr. Naylor said that "the bulk of the work has been completed and that only small adjustments may now be required to finalize the CPR's." The Commission acknowledged Mr. Naylor's report in Order No. 25,613, issued December 23, 2013.

In light of the Commission's final decision in Docket No. DW 12-036, there is no basis for considering the CPRs unreliable. To the contrary, given the Commission's final decision, the CPRs should be deemed reliable. In addition, with respect to the 1985 entry relative to the Water Main, Mr. Brogan's responses to Staff data requests, and testimony he is prepared to give, confirm the accuracy of the CPRs.

B. Res Judicata

Abenaki's responsibility to repair the Water Main was not previously litigated. Abenaki, however, makes heroic inferences from a letter filed by a Rosebrook employee in Docket No. DW 11-117 to argue that Omni was a "stakeholder" in that proceeding and that the addition of *Exterior shut off ('Curb Stop')* as a definition, as well as language about service connections for commercial buildings being made in the street, amount to a final judgment on the merits of Abenaki's responsibility to repair the Water Main.

Problems with Abenaki's *res judicata* theory include that Omni was not a party to DW 11-117 and Abenaki's responsibility for the Water Main was not actually litigated in that docket. In fact, the problem with the tariff language then and now remains the same inasmuch

as the general language in the tariff does not correspond to the fact that there are instances, such as Omni's, where the exterior shut-off is, in fact, not at the property line or curb.

As part of its *res judicata* argument, Abenaki also makes the surprising statement that it “relied on Rosebrook’s approved, filed tariff for its acquisition in Docket No. DW 16-448 and did not conduct due diligence on the hotel resorts infrastructure on the belief that it was not acquiring lines on Omni’s private property.” This statement provokes some questions. First, if Abenaki really did rely on the pre-existing tariff language for purposes of its due diligence in acquiring Rosebrook, and the tariff language means what Abenaki says it means, then why did it make additional changes? Second, as part of its due diligence, did Abenaki fail to see that the Water Main was included in Rosebrook’s CPRs?<sup>1</sup>

#### C. Tariffs

Omni and Abenaki agree on one thing, i.e., tariffs govern the relationship between the utility and its customers. Abenaki, however, mistakenly believes that a change in tariff language can also alter reality. Despite Abenaki’s protestations, it was, and it remains, responsible for repairs of the Water Main from Base Road up to and including the exterior shut-off valve of the Hotel. Moreover, just as the Commission may not retroactively change customers’ rates, it cannot retroactively change customers’ responsibilities.

#### D. Easements

Abenaki argues that the easements listed in the schedule of purchased assets filed in the Acquisition Docket do not confer any rights, or impose any obligations, on it relative to the Water Main. (See Complaint, Attachment F.) On their face, however, the Easement Deed from GS Phoenix, LLC to Rosebrook Water Company, Inc, dated December 3, 1996,

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<sup>1</sup> Similarly, how is it that Abenaki operates the hydrants on Omni property, as it admits at footnote 3 of its Memorandum of Law, if it does not have the right and/or responsibility to do so?

(“Easement #3”), along with the Quitclaim Deed from Institutional Investors Trust and Bretton Woods Corporation to Rosebrook Water Company, Inc. dated January 18, 1980, (“Easement #1”), appear to grant Abenaki such rights and interests.

Among other things, Abenaki argues that the language in Easement #3, insofar as it grants the right and easement to construct and maintain pipes and mains, is triggered by conditions subsequent. In addition, it asserts that it has an easement for the water storage tank on the opposite side of Route 302, but it does not mention easements for other infrastructure, such as, the 16-inch backbone water main that runs across Omni property in the Ski Area.

Omni disagrees with Abenaki’s conclusion but acknowledges that the history of the transactions between and among predecessors of Omni and Abenaki are exceedingly complex, including numerous conveyances and varying legal descriptions. Consequently, Omni is of the opinion that a complete title abstract could assist the Commission in definitively answering questions about the extent of the real property rights and interests that Abenaki has acquired.<sup>2</sup> With or without such an effort, however, Omni believes that the burden is on Abenaki to prove that it does not have an ownership interest in the Water Main, or is otherwise not responsible for its repair, which it has not done.

#### E. Common Areas

Lastly, Abenaki argues that its tariff “clearly states in plain language that service pipes within common areas, including the exterior shut-off valve, i.e., curb stop, ‘shall be owned and maintained by the Company.’” What is plain about the language of Abenaki’s tariff is that nowhere does it address shut-off valves or curb stops *within* a common area. The tariff sets up a paradigm where the utility owns from the main to the property line or common area (and

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<sup>2</sup> Omni believes that if the Commission were to determine that a title abstract ought to be performed that Abenaki should be responsible for the costs as an expense of the investigation pursuant to RSA 365:37.

assumes that the exterior shut-off valve is actually at the curb), while the customer owns from the property line or common area to the premises. Putting aside where the shut-off valve actually may be, the paradigm works in theory relative to a property *line* that is an actual boundary, but it falls apart in relation to a common *area* where it is not clear where the boundary line is meant to be, i.e., on which side of the common area.

### **III. PROCEDURE**

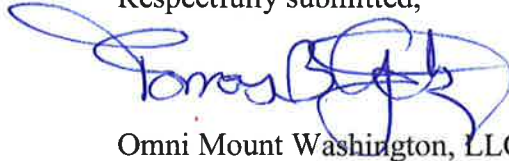
Under the procedural scheme established in RSA Chapter 365 regarding Complaints and Investigations, Omni met its statutory burden of demonstrating reasonable grounds for its complaint. The posture of the current proceeding is hence an investigation by the Commission of the “act or thing having been done, or having been omitted or proposed” by Abenaki.

As the procedural schedule now stands, a hearing is set for August 5, 2020. The Commission has not addressed the mechanics of the hearing, though it may have originally conceived that it would be in the nature of oral argument relative to an interpretation of Abenaki’s tariff. It now seems clear, however, that there are issues of fact in dispute that would require testimony from relevant witnesses, such as Mr. Brogan. Thus, a hearing on the merits would be premature under the circumstances, as would an effort to stipulate to contested facts. Omni therefore proposes that the scheduled hearing be conducted as a pre-hearing conference to address how best to hold a hearing on the merits.

### **IV. CONCLUSION**

Omni has met its burden as a complainant under RSA 365:4. Abenaki, however, has failed to demonstrate that it is fulfilling its duties as a public utility under RSA 374:1. Accordingly, the Commission has an adequate basis to find that Abenaki is responsible for the repair of the Water Main.

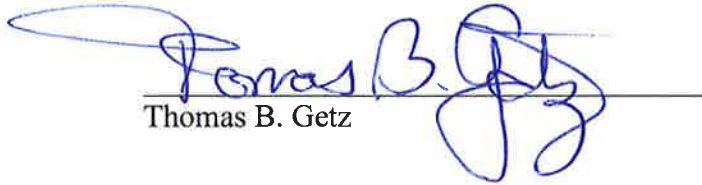
Respectfully submitted,



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Certificate of Service

I hereby certify that on the 28<sup>th</sup> of July, 2020, an electronic copy of the foregoing Reply Memorandum of Law was delivered to the New Hampshire Public Utilities Commission.



Thomas B. Getz