

**STATE OF NEW HAMPSHIRE**

**BEFORE THE**

**PUBLIC UTILITIES COMMISSION**

Docket No. DW 19-131  
Abenaki Water Company, Inc. – Rosebrook Division  
Omni Complaint

Docket No. DW 17-165  
Abenaki-Rosebrook Division Rate Proceeding

**MOTION FOR PROTECTIVE ORDER *NUNC PRO TUNC* AND CONFIDENTIAL  
TREATMENT OF FACILITY PLANS**

NOW COMES, Abenaki Water Company, Inc.’s (“AWC” or “Company”) in accordance with N.H. Admin. Rule Puc 203.08 and RSA Chapter 91-A, and hereby moves the New Hampshire Public Utilities Commission (“Commission”) to grant confidential treatment to certain plans of its water facilities. In support of its motion, AWC states as follows:

1. Pursuant to Puc 203.08(a), the Commission “shall...issue a protective order providing for the confidential treatment of one or more documents upon a finding that the document or documents are entitled to such treatment pursuant to RSA 91-A:5...” Pursuant to RSA 91-A:5, IV, “confidential, commercial, or financial information” and documents disclosure of which would constitute an invasion of privacy may be exempt from public disclosure. See, RSA 91-A:5, IV and *Union Leader Corp. v. New Hampshire Housing Financing Authority*, 142 N.H. 540, 552 (1997) citing *Perras v. Clements*, 127 N.H. 603, 605 (1986). An invasion of privacy analysis, in turn, requires an evaluation of three factors: (1) whether there is a privacy interest at stake that would be invaded by disclosure; (2) whether there is a public interest in disclosure; and (3) a balance of the public’s interest in disclosure and the interests in non-disclosure. *Lamy v. N.H. Pub. Util. Comm’n*, 152 N.H. 106, 113 (2005).

2. Under RSA 91-A:5 VI, “[r]ecords pertaining to matters relating to the preparation for and the carrying out of all emergency functions, including training to carry out such functions, developed by local or state safety officials that are directly intended to thwart a deliberate act that is intended to result in widespread or severe damage to property or widespread injury or loss of life” are exempt from public disclosure. Although AWC’s plans at issue in this motion have not been “developed by local or state safety officials”, they were nonetheless prepared for state safety officials, as noted below.

3. Presidential Policy Directive 21 (“PPD-21”): *Critical Infrastructure Security and Resilience* is a federal directive that aims to strengthen and secure critical infrastructure. AWC’s water system is a critical infrastructure under the Water & Wastewater System Sector of the federal National Infrastructure Protection Plan (“NIPP”). See, <https://www.dhs.gov/cisa/water-and-wastewater-systems-sector>. Goal 2 of the NIPP-Water and Wastewater Systems Sector-Specific Plan is to “recognize and reduce risk”. <https://www.dhs.gov/sites/default/files/publications/nipp-ssp-water-2015-508.pdf>. At the State level, emergency planning for water sector is overseen by the N.H. Department of Environmental Services. N.H. Code Admin. R. Env-Dw 503.21. In particular, drawings of water system assets are part of a utility’s emergency plan. Env-DW 503.21(b)(11).

4. Maps of AWC’s infrastructure have inadvertently made it into the Commission’s public docket books:

In DW 17-165

Tab 63, dated 1/8/19, Abenaki Pressure Report, Attachment 1, page 45 and Attachment 2, pages 6 and 19.

Tab 75, dated 7/15/19, Staff Recommendation at page 046.

In DW 19-131

Tab 1, dated 7/24/19, Omni Mount Washington Hotel, LLC, Complaint

Attachment A pages 2 and 126.

5. AWC seeks to protect the maps from continued public disclosure. The maps at Tab 63 and Tab 1 of the respective dockets shows a greater level of detail than the map at Tab 75, however, AWC has included the Tab 75 map in the instant request because it shows the pressure, size, and location of infrastructure. In addition, AWC requests this protection, notwithstanding that the maps were previously made public through mistake or inadvertence, because unrestricted public access to AWC's Rosebrook infrastructure results in the location of valves, lines, pump stations, and service lines of this critical infrastructure being publicly known. Given that the Rosebrook system has long-standing safety issues that pre-date AWC's ownership of the system, an act of terrorism on these vulnerabilities could result in devastating impacts on residences and businesses served. For that reason, AWC believes the balance of privacy interests of AWC and its customers exceed the public's interest in seeing these maps for purposes of seeing the Commission's conduct of public business under RSA Chapter 91-A. Protecting the maps would also be consistent with Goal 2 of the Sector Specific Plan by removing the public plans as a risk. <https://www.dhs.gov/sites/default/files/publications/nipp-ssp-water-2015-508.pdf>.

6. The Commission has previously balanced the interests of the utility seeking to protect disclosure of utility infrastructure plans against the public's right to disclosure and has granted protective treatment. The Commission found that the privacy interest at stake would be invaded and that the public's interest did not warrant disclosure. In *Aquarion Water Company*,

*Inc.*, Order No. 25,863 (Feb. 1, 2016), the Commission protected “infrastructure information” including maps that identify areas of a water utility’s distribution system. In *Unitil Energy Systems, Inc.*, Order No. 24,677 (Oct. 6, 2006), the Commission granted confidential treatment of information regarding its electric distribution system that “disclose[d] detailed information as to how the distribution system is designed and configured, revealing key components and their locations [, including] ... planning information as to how the system may be configured in the near future.” *Id.* at 14-15, 23. The Commission also protected information locating and identifying “blackstart” units, so-designated, because they are generators capable of starting themselves and producing power to start other generators, and therefore “support essential power supply in New England.” *Public Service Co. of N.H.*, Order No. 24,750 at 18, 25 (May 25, 2007). AWC seeks to protect its system infrastructure information for the same public health, security, and economic reasons as raised in these past Commission orders.

7. The doctrine *nunc pro tunc* is recognized as a means of correcting errors in record keeping. See, *Coulter v. Coulter*, 131 N.H. 98, 100 (1988) “[e]ntries *nunc pro tunc* are made in furtherance of justice....” See also, *Glynne v. Wilmed Healthcare*, <http://www.ca4.uscourts.gov/Opinions/Published/111859.P.pdf> (2012) at page 6, citing *Romero-Rodriguez v. Gonzales*, 488 F.3d 672, 677 (5th Cir. 2007) (“Courts . . . have traditionally applied *nunc pro tunc* to correct limited types of errors, namely clerical or other record keeping errors.”); *Id.* citing *Cent. Laborers’ Pension, Welfare & Annuity Funds v. Griffie*, 198 F.3d 642, 644 (7th Cir. 1999) (“As we have reminded the district courts time and again, the only proper office of a *nunc pro tunc* order is to correct a mistake in the records”). In the instant matter, AWC is not asking the Commission to change the record or remove documents from the record; it is only

asking that the Commission protect from unfettered public disclosure documents that are in the record. For this reason, AWC sees its request as consistent with the doctrine of *nunc pro tunc*.

8. Pursuant to N.H. Admin. R. Puc 203.02 and 203.08, an original and six copies plus one redacted public copy of the motion and affected documents are being filed. Pursuant to the Commission's rules, the Staff and OCA will be able to access the confidential maps; the maps will not be withheld from other parties in this proceeding so long as they sign non-disclosure agreements to ensure the infrastructure maps will be kept from public disclosure. To the extent infrastructure maps are necessary to be filed in the future, AWC will seek protective treatment of the same at that time.

9. AWC has contacted the Commission Staff and intervenors in this docket. The Bretton Woods Property Owners Association and Forest Cottages Association agree with confidential treatment from the public domain as long as the maps are still available to them. As noted above, AWC plans to enter into non-disclosure agreements in conjunction with providing the intervenors with access. Omni assents to the relief requested. The OCA objects to the relief requested. Staff takes no position. Rosebrook Association did not reply by the time of this filing.

WHEREFORE, Abenaki Water Company, Inc. – Rosebrook Division respectfully  
requests the Commission:

- A. Grant this motion; and
- B. Grant such other relief as is just and equitable.

Respectfully submitted,

ABENAKI WATER COMPANY, INC.  
ROSEBROOK DIVISION

By Its Attorney,

Date: September 28, 2019

By: Marcia A. Brown  
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CERTIFICATE OF SERVICE

I hereby certify that a copy of this motion for protective order and confidential treatment has been forwarded this day by electronic transmission to the Docket-Related service lists for DW 19-131 and DW 17-165.

Dated: September 28, 2019

Marcia A. Brown  
Marcia A. Brown