

**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 SUPPLEMENTAL 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. At the technical session following the prehearing, Abenaki agreed to supplement its reply to reflect the additional issues it responded to as a result of the Commission’s Order of Notice. To aid the Commission, Staff, and parties, Abenaki has added to its existing reply. Therefore, the instant supplemental reply supersedes Abenaki’s earlier 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 primary issue of the complaint concerns whether Abenaki or Omni is responsible for maintaining the 8-inch water line on the resort property.

2. Issues added by the Order of Notice were: whether the 2016 tariff applied only prospectively and not to existing service pipes; what constitutes Omni’s exterior shut-off valve;

whether Abenaki is providing reasonable safe and adequate service; and whether Abenaki is liable for the cost of repairing the water pipe that broke on Omni's property.

3. Omni asserts that the water line running from Base Road 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 opines "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.

4. As a threshold matter, Omni Mount Washington, LLC, not the hotel, owns the properties at the resort. The Order of Notice references Omni (the hotel) as owning the property, but this is incorrect according to the public tax records for the Town of Carroll. For this reason, the 8-inch line from Base Road to the hotel that Omni wants Abenaki to own is on Omni Mount Washington, LLC's ("OMW") property. OMW is not a party to this proceeding and it is not clear that Omni (the hotel) can speak on behalf of OMW. Therefore, given the relief requested, it is not clear that RSA 365 is the appropriate legal authority to govern this proceeding. The

dispute is between Abenaki and Omni but the relief Omni wants is for Abenaki to own a water line on someone else's property.

5. Omni is not the only entity served on this property. The Omni hotel is served by a 6-inch meter off of the 8-inch water line. Other customers in the resort family also take water off the 8-inch main: Administrative building, Alpine Club, Bretton Arms, Caretaker's House, Fabyans, Ski First Aid building, Nordic Golf building; and another ski building. Because all of these other resort customer accounts will be affected. It further complicates achieving Omni's requested relief.

6. An additional threshold matter is that the Order of Notice states that when the tariffs went into effect in 2016, it "placed more ownership and maintenance responsibility on customers than before". Abenaki disputes this. This statement is only true if it is clear who did what prior to Abenaki's acquisition. It is not clear. Prior to the acquisition, the lines between the hotel and water utility were extremely blurred. For example, Mike Hahaj of Natural Retreats was retained by BW Holdings, LLC. BW Holdings did work on the resort property. Mr. Hahaj, not the water utility, filed the water utility's annual reports and rate case. The resort used the water utility as collateral on the note it defaulted on, thus setting up Abenaki's purchase of the water system from Wells Fargo. The water utility also subsidized the hotel and other resort properties for an unknown period of time. For example, in the 2012 rate case, it came to light that certain resort businesses were taking water without a meter. There were nine meter bypasses. Even at the end of 2013, Mike Hahaj, not the water utility, reported to the Commission that not all of the bypasses had been fixed; the hotel still had 4 to correct. If the water line was the utility's responsibility, the utility, not the hotel, would have been responsible to fix the bypasses. In light of this blending of employee rolls and maintenance of utility assets,

it is not clear that the 2016 tariff “placed more...responsibility on customers.” In the 2016 acquisition, Abenaki sought to wipe the slate clean, start afresh, and operate the Rosebrook system like a professional water utility with terms and conditions common in the industry that specified who was responsible for what.

7. Timing is of concern to Abenaki. The demarcation of responsibilities between the utility and customer was an issue in the 2016 acquisition docket, Docket No. DW 16-448. Abenaki made it clear that it intended to operate the water company like a professional water company, free from any historic blending of roles. For Omni to raise this issue now, well after the acquisition docket has been closed, is prejudicial to Abenaki. Omni should have raised this issue in 2016. Raising it now, and if Omni succeeds, will add a financial burden on Abenaki that is not contemplated in its revenue requirement. Indeed, Abenaki just completed a rate case for its Rosebrook system, Docket No. DW 17-165. Therefore, Abenaki is within its right to raise *res judicata* because there are many issues that would need to be reopened in order to effectuate the relief Omni seeks. Such reopening will not be easy. Abenaki’s revenue requirement would need to change to include the 8-inch water line. This could be a hard sell to Abenaki’s existing customers because the 8-inch water line is used to only serve the resort property; it is not necessary for the provision of service to the rest of Abenaki’s customers. If the line were looped, that would be different, but the line dead-ends in the resort and even goes under the hotel, which impedes access to it. Abenaki would also need to include upgrades to the 8-inch water line in its capital planning. This is because the 8-inch water line will be insufficient to satisfy the upcoming fire flows needed for the approximately 66-unit hotel Omni is constructing.<sup>1</sup>

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<sup>1</sup> It is curious that Omni’s actions are not consistent with its argument that Abenaki owns the 8-inch water line. If Omni believed that Abenaki owned the water line, it would have contacted

Construction is well underway. If Abenaki had known about the construction and that it owned the 8-inch water line, it could have built in a step adjustment for the project into its rate case.

Importantly, the Commission and other customers could have vetted Abenaki paying for such a large capital improvement when the project only benefits the resort.

8. 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.

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Abenaki about its planned hotel expansion. Original Page 8, Section 21 requires a developer to consult Abenaki before proposed developments and pay for the Company's review of the proposal. Omni has not yet contacted Abenaki. It has not provided Abenaki with plans for its new hotel addition. Yet, it has already commenced construction and will expect water soon. Omni can't have it both ways: exercise independence on resort growth, yet stick Abenaki and other customers with the bill for water line upgrades needed to support that growth.

9. Original Page 2, section 1.b(3) states: “[a]ll service pipes from the main to the property line or common area including the premises’ exterior shut-off valve shall be owned and maintained by the Company.” Original Page 1 defines “Exterior shut off” as the “Curb Stop”, “water shut off controlled by the Company.” It is a matter of fact that Abenaki does not control the valves on the resort property. There are exceptions where Abenaki flushes fire hydrants on the resort property but that is because the pressure in the water system is so high, that an inexperienced customer could potentially compromise the whole system. It is also a matter of fact that Abenaki controls the curb stops. Curb stops are not defined in Abenaki’s tariff but it is a term of art commonly used in the water utility industry. It refers to the valve at the property line. In this case, Abenaki controls the valves at Base Road, it does not control the valves within the resort property. The prior Rosebrook owner had an affiliate agreement with the resort to manage infrastructure on the resort property but this agreement is no longer in place.

10. Curb stops are a typical demarcation of the responsibility between a utility and its customer. Abenaki uses this demarcation in its Massachusetts and Connecticut tariffs. Aquarion Water Company uses this curb stop demarcation in its New Hampshire, Massachusetts, and Connecticut tariffs. Pennichuck Water Works, Inc.; Pennichuck East Utility, Inc., and Pittsfield Aqueduct Company, Inc. all use curb stops as the demarcation. So does Forest Edge Water Company, Inc. and Hampstead Area Water Company, Inc. They all use the curb stop as the demarcation of responsibility. Thus, when Abenaki used this term in its New Hampshire acquisitions, it was merely incorporating a traditionally-used concept. Abenaki has no plans to change the terms and conditions of its tariff. Like other utilities, it is easier to manage multi-state operations when the tariffs are similar.

11. Omni incorrectly instills fear among the area homeowners that assets within their common areas may suddenly become their responsibility. This is not the case. Original Page 2, section 1.b.3 makes it clear that all service pipes from the main to the property line or common area shall be owned and maintained by Abenaki. Common areas are a specifically defined term under the State's statute. See, RSA Chapter 356-B. Common areas are specifically laid out and identified in recorded land records. There is no question where they are and Abenaki affirmed at the prehearing and technical session that it remains responsible for assets in common areas. As noted at the prehearing, Omni interpreted the dialogue between Abenaki's president and Commissioner Bailey in Docket No. DW 16-448 to mean that Abenaki would be moving valves on the resort. This dialogue, however, concerned Abenaki's wish to move inconvenient curb stops within common areas to more accessible locations. The discussion had nothing to do with moving valves on the resort property.

12. 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 RSA 365 complaint. Omni has made no public interest arguments. Omni has not set forth any special circumstances justifying 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.

13. Omni's complaint seeks to reopen Docket No. 16-448 and modify a prior order, Order No. 25,934, yet it filed no request 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 final. Thus, reopening the order or modifying the order must be done pursuant to RSA 365:28, *Altering Orders*, and Omni's complaint fails to make the necessary arguments. This is more of a technicality, but it is important that proper due process be followed so that Abenaki's interests are protected. Furthermore, Omni's relief, if approved, would result in an inconsistent application of Abenaki's tariff. Where this Commission abhors inconsistent applications of rules, statutes, and tariffs, it means that the proper arguments setting up the relief under RSA 378:18 (Special Contracts) will need to be made.

14. 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.

15. 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. Deny Omni's request for Abenaki to pay AB Excavating, Inc.'s repair bill; 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: January 24, 2020

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Certificate of Service

I hereby certify that a copy of the foregoing reply has been emailed this day to the docket-related service list.

Dated: January 24, 2020

Marcia A. Brown  
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