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STATE OF NEW HAMPSHIRE
PUBLIC UTILITIES COMMISSION

January 6, 2020 - 1:06 p.m.
Concord, New Hampshire

NHPUC 22JAN'20PM3:40

RE: DW 19-131
OMNI MOUNT WASHINGTON, LLC:
Complaint by Omni Mount Washington
Hotel, LLC, against Abenaki Water
Company, Inc.
(Prehearing conference)

PRESENT: Chairwoman Dianne Martin, Presiding
Cmsr. Kathryn M. Bailey
Cmsr. Michael S. Giaimo

Jody Carmody, Clerk

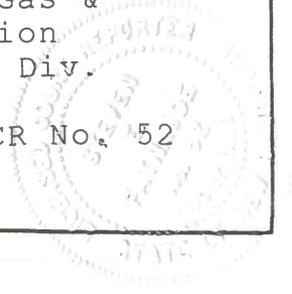
APPEARANCES: Reptg. Omni Mount Washington, LLC:
Thomas B. Getz, Esq. (McLane...)
Chris Ellms, Dir. of Operations
Doug Brogan, P.E. (Consultant)

Reptg. Abenaki Water Company, Inc.:
Marcia A. Brown, Esq. (NH Brown Law)
Donald Vaughan, President
Bob Gallo, P.E.
Phil Sausville, Operator

Reptg. Bretton Woods Property Owners
Association (BWPOA):
Paul Mueller

Reptg. PUC Staff:
Christopher Tuomala, Esq.
Jayson Laflamme, Asst. Dir./Gas &
Water Division
Robyn Descoteau, Gas & Water Div.

Court Reporter: Steven E. Patnaude, LCR No. 52



CERTIFIED
ORIGINAL TRANSCRIPT

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P R O C E E D I N G

1
2 CHAIRWOMAN MARTIN: So, we are here
3 this afternoon in Docket DW 19-131, which is
4 the Omni Mount Washington Hotel, LLC, complaint
5 against Abenaki Water Company.

6 Before we do anything else, let's
7 take appearances.

8 MR. GETZ: Good afternoon, Madam
9 Chair, Commissioners. I'm Tom Getz, from the
10 law firm of McLane Middleton, on behalf of Omni
11 Mount Washington Hotel. And with me are Chris
12 Ellms, who's the Director of Operations, and
13 Doug Brogan, who's an independent engineer, who
14 has been hired by Omni for this proceeding.

15 CHAIRWOMAN MARTIN: Thank you.

16 MR. MUELLER: Hi. I'm Paul Mueller.
17 I represent Bretton Woods Property Owners
18 Association, which is the master association
19 representing most of the homeowners in Bretton
20 Woods.

21 MS. BROWN: Good afternoon,
22 Commissioners. My name is Marcia Brown, with
23 NH Brown Law, and representing Abenaki Water
24 Company, Rosebrook Division. With me is the

1 president of the Company, Don Vaughan, and, to
2 his left, Bob Gallo, who is the Professional
3 Engineer, and Phil Sausville, who is the
4 operator of the system.

5 Thank you.

6 MR. TUOMALA: Good afternoon,
7 Commissioners. Christopher Tuomala, attorney
8 for the Public Utilities Commission. To my
9 left, Jayson Laflamme, Assistant Director of
10 the Gas and Water Division. To his left, Robyn
11 Descoteau, who is an Analyst in the Gas and
12 Water Division.

13 CHAIRWOMAN MARTIN: Thank you. We
14 have a Motion for Confidentiality in the record
15 at this time. Do we have any objections to
16 that motion?

17 MR. GETZ: Omni supports the motion.

18 MR. TUOMALA: Madam Chair?

19 CHAIRWOMAN MARTIN: Yes.

20 MR. TUOMALA: Staff is not ready to
21 take a position on that motion at this time.

22 CHAIRWOMAN MARTIN: And I'll also
23 note that the OCA is not present today, and did
24 file some written -- a written statement of

1 their initial position.

2 So, I think what we will do is treat
3 all the information marked "confidential" as
4 confidential, and address it in the final
5 order.

6 Does that work for everyone for the
7 time being?

8 MS. BROWN: The Company has, in its
9 presentation, no references to the confidential
10 information.

11 CHAIRWOMAN MARTIN: Okay. To the
12 extent that someone does need to raise that
13 information today, please point it out to me so
14 that I know.

15 MR. GETZ: Yes, Chair.

16 CHAIRWOMAN MARTIN: Okay. Then,
17 let's go ahead and start with the initial
18 positions.

19 MR. GETZ: Thank you, Madam Chair.
20 Two preliminary matters of note. That we filed
21 the affidavit of publication on Friday, so that
22 was filed electronically and in hard copy. So,
23 that should be taken care of. And, also, with
24 respect to a confidential docket -- document,

1 if I may approach, I'd like to provide a copy
2 of the drawings that were provided as
3 "Attachment A" to the complaint. This may help
4 in making my preliminary statements.

5 MS. BROWN: The Company has no
6 objection to the use of this document.

7 CHAIRWOMAN MARTIN: Okay. This is
8 attached currently?

9 MR. GETZ: Yes. This is Attachment A
10 to the complaint.

11 CHAIRWOMAN MARTIN: Okay.

12 *[Atty. Getz distributing*
13 *documents.]*

14 MR. GETZ: And I'll be referring to
15 that in my preliminary statement.

16 CHAIRWOMAN MARTIN: Okay. Proceed.

17 MR. GETZ: So, with respect to the --
18 to this drawing, I'd like to note a few things.

19 So, if you orient it the long way,
20 you can see that these are the as-built
21 drawings that were provided to the Company at
22 one point during the Step II proceedings last
23 year by Abenaki, and which the Hotel already
24 had in its record. And this represents the

1 as-built drawings of the facilities around the
2 Hotel, which are relevant to this proceeding.

3 And you can also note on this drawing
4 that the blue lines were added by Mr. Brogan,
5 representing the water mains, and also the
6 yellow markings were provided by Mr. Brogan.
7 And the handwritten references to valves and
8 mains was also done by Mr. Brogan.

9 So, if you orient the map the long
10 way, at the top of the page you can see "Base
11 Road", which is a public road. On the right
12 side, you can see the Hotel, which is
13 highlighted in yellow. And, between Base Road
14 and the Hotel, you can see an "8-inch main",
15 which is marked in blue.

16 You can also see, at the top left
17 corner of the Hotel, a blue circle that's
18 labeled "Hotel Exterior Shut-Off". And, at the
19 other end of the 8-inch main, on Base Road, you
20 can see another circle labeled "Valve", which
21 is referred to in the complaint as an
22 "isolation valve".

23 So, finally, roughly an inch to the
24 left of the Hotel Exterior Shut-Off valve, you

1 can see an arrow pointing to the location of
2 the "Easter Main Break".

3 The facts of what occurred on that
4 Easter morning are laid out in the complaint.
5 So, I won't repeat them here. But I would note
6 one subsequent development that I do not
7 believe is in the record, which is that Omni
8 wrote a check to AB Excavating in August, even
9 though it firmly believes that Abenaki is the
10 responsible party. But Omni did not think it
11 was fair for AB Excavating to be left holding
12 the bag because of the dispute between Omni and
13 Abenaki.

14 So, with respect to the valves, as I
15 understand the long-standing purposes of the
16 valves, if there's a problem in the Hotel, the
17 exterior shut-off valve can be used to shut off
18 the water. At the same time, if there's a
19 problem with the 8-inch main, somewhere between
20 Base Road and the Hotel, then Abenaki can close
21 the isolation valve to deal with any issues
22 that might occur, such as the one that occurred
23 on Easter Sunday morning.

24 One other thing of note, there is a

1 second valve next to the Hotel, and that second
2 valve is the -- is the isolation valve for
3 those buildings that are behind the Hotel, and
4 which include things like the pool house and
5 other facilities of the Hotel.

6 Now, Omni's ultimate position is that
7 Abenaki/Rosebrook owns the 8-inch main running
8 from Base Road to the Hotel, and that it is
9 therefore responsible for the operation,
10 maintenance, and repair of that main, and all
11 other similarly situated infrastructure on Omni
12 property.

13 And it's important to note that
14 nowhere in this case to this date has Omni --
15 or, Abenaki disputed that it owns the main and
16 all of those other properties and
17 infrastructure.

18 Abenaki's position, as I understand
19 it, is that, when it acquired Rosebrook,
20 including all the physical assets that comprise
21 its water system, that certain tariff changes
22 approved by the Commission in Docket DW 16-448
23 relieved Abenaki of responsibility for the
24 8-inch water main and any other infrastructure

1 on Omni's properties, and, presumably, any
2 infrastructure on property of the homeowners
3 associations.

4 Under Abenaki's theory, the isolation
5 valve on Base Road has now become the premises
6 shut-off valve for the Hotel. Abenaki's theory
7 leads to the absurd result that Abenaki owns
8 pipes that it has no responsibility for, while
9 Omni and other customers have responsibility
10 for pipes that they do not own.

11 As for the substance of Abenaki's
12 position, Omni agreed -- disagrees with their
13 entire theory. And I'd also note that, for the
14 most part, Omni does agree with Mr. Kreis's
15 position, as far as it goes, in what he filed
16 in writing on Friday.

17 But, with respect to Abenaki's
18 argument, first, Omni believes that the plain
19 language of the tariff, with respect to service
20 pipes, is prospective, in that it is written in
21 the future tense, and applies only to how
22 service pipe connections will be made in the
23 future. That is, after the date, in 2016, when
24 the new tariff was made effective by the

1 Commission's order.

2 The tariff does not, and cannot, ex
3 *post facto* change how service pipe connections
4 may have been made in the past. And this water
5 company, like all water companies, have a
6 unique set of circumstances. And the history
7 of this water company is, you know,
8 particularly long, and unusual, in that at one
9 point in time the Hotel and the water company
10 were essentially one in the same. But, over
11 time, those -- a distinction was made and the
12 sale was made to Rosebrook Water Company, and
13 all those assets were transferred to the water
14 utility, and then subsequently transferred to
15 Abenaki.

16 Second, to the extent the tariff may
17 be viewed as ambiguous, Omni agrees with Mr.
18 Kreis that the record in DW 16-448 supports the
19 conclusion that the tariff changes were
20 intended, both by Abenaki and the Commission,
21 to apply only to new service connections, not
22 to existing service connections, such as Omni.
23 And Omni believes that particularly relevant in
24 that regard is -- was a dialogue between

1 Commissioner Bailey and Mr. Vaughan about the
2 effects of the -- and intent of the tariff
3 changes in 16-448.

4 Moreover, assuming for the sake of
5 argument that Abenaki's position had some
6 merit, and that the Commission actually
7 intended to relieve Abenaki of its
8 responsibilities to operate and maintain its
9 pipes, the PUC does not have the authority to
10 take property rights and obligations away from
11 Abenaki and impose them on Omni and other
12 customers. The only authority the PUC has of
13 such a nature is set forth in RSA Chapter 371,
14 relative to a utility taking property, or, in
15 RSA 374:30, concerning a transfer of utility
16 assets; neither of which procedures were
17 followed here.

18 As for process, Omni agrees with Mr.
19 Kreis that the Commission probably has
20 sufficient information to issue a decision as
21 things stand. And, of course, Omni believes
22 that decision would find that Abenaki is
23 responsible for the costs of the water main
24 break on Easter Sunday.

1 Nevertheless, I would like to briefly
2 address RSA 365 and what is contemplated under
3 it. As things stand, Omni filed a complaint
4 pursuant to 365:1 on July 24. The Commission
5 issued a secretarial letter on July 26
6 directing Abenaki to respond. Abenaki
7 responded on August 16th, and Omni replied on
8 August 28th. The Commission subsequently
9 issued an Order of Notice on December 12, which
10 found, importantly, that there are reasonable
11 grounds for Omni's complaint; thus the hearing
12 this afternoon.

13 Under 365, therefore, we are at the
14 juncture where the Commission shall investigate
15 the matter in such manner and by such means as
16 it shall deem proper, which is a pretty broad
17 mandate.

18 Omni suggests that, as part of the
19 technical session, and Abenaki may raise this
20 point as well, it may be helpful to determine
21 whether there are any relevant facts in dispute
22 and try to reach agreement on a stipulated set
23 of facts.

24 As for the manner and means of

1 investigation, Omni suggests that the
2 Commission designate a hearing officer to
3 conduct an investigation, which could include
4 requests for admissions, requests for
5 documents, and then issue a recommended
6 decision to the Commission. At that point, the
7 parties would then have the opportunity to
8 simultaneously file briefs on exceptions, which
9 is a process similar to that used by FERC, in
10 states like New York and other jurisdictions,
11 with respect to decisions by administrative law
12 judges. And I would hope that there wouldn't
13 be a necessity for reply briefs on exceptions.

14 Finally, Omni would note that
15 Abenaki's position in this case has a carryover
16 effect on a pending issue with respect to the
17 proposed Step II rate increase in Docket DW
18 17-165, leading to potential concerns by Omni
19 and other customers about the granting of
20 easements, ownership of infrastructure on Omni
21 property, and who would be responsible for
22 that, any new infrastructure.

23 I won't go further into the details
24 of that other case, except to say that Omni

1 disagrees with statements in Abenaki's motion
2 filed last week, and intends to file a
3 response, which will reflect, among other
4 things, Omni's long-held belief, which it filed
5 as early as in July, and which it renewed
6 separately in September, that there should be a
7 way to resolve the outstanding issues between
8 the Hotel and Abenaki without further
9 litigation. And we would like to address
10 those -- all of those issues in a technical
11 session this afternoon.

12 I'd be happy to respond to any
13 questions you might have. Thank you.

14 CHAIRWOMAN MARTIN: Do either of the
15 Commissioners have questions?

16 CMSR. BAILEY: Go ahead. I've got a
17 question, but it's not -- it's different.

18 CMSR. GIAIMO: Okay. Mr. Getz, I
19 thought you said that there are two situations
20 where the Commission has authority to take
21 property: One was for a traditional taking
22 situation and is the other one a franchise
23 transfer?

24 MR. GETZ: Correct.

1 CMSR. GIAIMO: Is that another
2 situation that happened with the modification
3 from -- the modification of the tariff was part
4 of the transfer from Rosebrook to Abenaki, is
5 that correct or --

6 MR. GETZ: That is correct. But they
7 did, at that time, transfer ownership and
8 responsibility of those pipes to the customers.
9 So, you know, the position is to effect
10 Abenaki's argument about that they're no longer
11 responsible, they acquired it; customers didn't
12 acquire the property.

13 CMSR. GIAIMO: Thanks for the
14 distinction.

15 CMSR. BAILEY: Mr. Getz, do you
16 believe that -- well, first of all, tell me
17 what authority the Commission has to follow the
18 process that you have recommended, assigning
19 this to a hearings examiner and having
20 exception briefs, because I don't think this
21 Commission has done that before.

22 And, then, second, this, I think the
23 reason that we issued an order of notice is
24 because we're not just resolving your

1 complaint, but we're resolving a tariff
2 interpretation that would apply to all
3 Abenaki's customers. So, how does that play
4 into what we have to do? Do you think that we
5 should do Abenaki's complaint separately, and
6 then address the tariff interpretation? Or,
7 is, by addressing Abenaki's complaint, then we
8 -- I mean, sorry -- by addressing Omni's
9 complaint, then we are addressing the tariff
10 interpretation?

11 MR. GETZ: Well, let me begin with
12 the process that I've recommended. Now, 365:4
13 is written very broadly, says that the
14 Commission "shall investigate the same in such
15 manner and by such means as it shall deem
16 proper". So, that's extremely broad.

17 And my understanding also is that,
18 currently, you know, the Commission has
19 hearings examiners, who can sit on a -- either
20 a prehearing conference or other matters, and
21 they can't decide a matter, but they can refer
22 it to the Commission for the Commission's
23 decision. So, it's effectively the same
24 process in that regard. I was extending it an

1 extra step that, whatever comes out of the
2 investigation and the issue, that the parties
3 would then have an opportunity to weigh in,
4 using a fairly common process in other
5 jurisdictions.

6 CMSR. BAILEY: So, you think that
7 365:4 gives us the authority to do it that way,
8 because we could deem that proper?

9 MR. GETZ: Yes.

10 CMSR. BAILEY: Okay. And what about
11 the overarching decision that we have to make,
12 in how it applies to all of Abenaki's
13 customers, and how it would apply or may apply?

14 MR. GETZ: So, the complaint, which
15 in the Order of Notice found a reasonable
16 grounds for, goes to the nature of Abenaki's
17 interpretation of the statute.

18 CMSR. BAILEY: Of the tariff?

19 MR. GETZ: I mean, I'm sorry, of the
20 tariff. So, a decision that you would make I
21 think would be binding on all customers. We
22 have pointed out, though, that we believe that
23 this extends just beyond Omni's properties.
24 And Mr. Mueller has intervened, and he's here

1 today. So, he would be taking the position on
2 behalf of all other of the homeowners
3 associations.

4 So, I think it's ultimately the
5 Commission's discretion to say whether it only
6 applies to Omni or to all customers. But it
7 just seems the nature of the disagreement is a
8 fundamental interpretation, and it would apply
9 to all customers if they're similarly situated.

10 CMSR. BAILEY: I think I agree with
11 that. And, so, does that make this proceeding
12 more than a complaint proceeding?

13 MR. GETZ: I don't know if I could
14 draw that distinction. I mean, so, whatever
15 decision you make with respect to our complaint
16 would be, I think, binding on the utility.

17 So, you know, if the concern is, if
18 you find that our complaint is well-founded,
19 and that they misinterpreted the tariff, and
20 that what the Commission had understood and
21 intended was that the tariff changes would only
22 apply prospectively, then, for Abenaki to take
23 the position "well, no, we can interpret the
24 statute otherwise for the homeowners

1 associations, because they didn't file their
2 own complaint", I think that would be -- that
3 would be really pushing the envelope.

4 CMSR. BAILEY: Okay. Thank you.

5 CHAIRWOMAN MARTIN: Commissioner
6 Giaimo.

7 CMSR. GIAIMO: So, taking the hearing
8 examiner route that you've outlined, can the
9 Commission see the benefits being that it will
10 be quicker than a more traditional route, and
11 less source-intensive for all the parties,
12 including the Commission?

13 MR. GETZ: Well, I think that this is
14 not a case that calls for adjudication and
15 hearings on facts. I think that the facts are
16 pretty well agreed to, and I guess we'd have to
17 find out whether there's any dispute to that
18 issue from Abenaki, or for Staff for that
19 matter. But the -- I would hope we would not
20 be having adjudicative hearings.

21 So, then, the issue was "who will do
22 the investigation?" I mean, I think,
23 naturally, it should be, I mean, it's the
24 Commissioners, but, you know, I don't believe

1 you would actually be doing the investigation,
2 so you're going to designate somebody to do it.
3 And it seems that an appropriate process would
4 be to designate a hearing examiner, because
5 most of these issues I think are going to be
6 legal interpretations, and then to come up with
7 a recommended decision.

8 CMSR. GIAIMO: Thank you.

9 CMSR. BAILEY: What kind of
10 investigation would be needed if no facts were
11 in dispute?

12 MR. GETZ: Well, that's what I --
13 it's unclear. So, that's what -- what could
14 make things go quicker. Well, first of all,
15 you have to find out if there's any dispute,
16 then we'd come up with a stipulated set of
17 facts. But the hearing examiner may look at
18 what's been presented, and, you know, conclude
19 like "I need some more information", or "maybe
20 it would be helpful if I, you know, if I have a
21 request" -- "make a request for admissions to
22 Abenaki to say, you know, do you own these
23 properties or do you now have an alternative
24 theory that you no longer own them?" Or, there

1 could be requests for other documents. You
2 know, I'm not sure what they would be, but it's
3 conceivable.

4 CHAIRWOMAN MARTIN: I was going to
5 ask you why you thought that approach would be
6 better in this situation, but I think you just
7 answered my question.

8 You mentioned that Omni paid AB
9 Excavating. Did they pay the full amount that
10 was needed?

11 MR. GETZ: Yes.

12 CHAIRWOMAN MARTIN: Okay. I think
13 that was all the questions I have left.

14 So, I have a question for you, Mr.
15 -- Was it "Muller" or "Mueller"?

16 MR. MUELLER: Mueller.

17 CHAIRWOMAN MARTIN: Mueller. Did you
18 file a motion to intervene?

19 MR. MUELLER: I did not.

20 CHAIRWOMAN MARTIN: Okay. So, are
21 you making an oral motion to intervene today or
22 are you just here for public comment?

23 MR. MUELLER: I guess I would call it
24 "public comment".

1 CHAIRWOMAN MARTIN: Okay.

2 MR. MUELLER: I'm representing most
3 of the homeowners. BWPOA is a residential
4 umbrella association, if you will, representing
5 most of the homeowners. And, once we heard of
6 the issue, we were all concerned that,
7 depending on how the ownership of pipes was
8 interpreted, that the pipes into our roads may,
9 you know, be interpreted as owned by the
10 individual associations. Because, today, I can
11 assure you that is not the case.

12 CHAIRWOMAN MARTIN: Can I just stop
13 you for one second?

14 *[Chairwoman and Commissioners*
15 *conferring.]*

16 CHAIRWOMAN MARTIN: Okay. We'll take
17 your public comment now.

18 MR. MUELLER: Well, could I -- well,
19 could I move to intervene, because I've been
20 recognized as an intervenor?

21 MR. GETZ: You can move to intervene.
22 If you could -- we'll take your oral motion
23 today and we'll take your comment today. But,
24 if you could file a written motion, addressing

1 all of the standards for intervention, that
2 would be appreciated.

3 MR. MUELLER: I will do that. I'm
4 sorry, so, within how much of a timeframe?

5 *[Chairwoman Martin and Cmsr.
6 Bailey conferring.]*

7 CHAIRWOMAN MARTIN: Is there any
8 objection to the motion to intervene by this
9 party?

10 MR. GETZ: No, Madam Chair.

11 MS. BROWN: Yes.

12 CHAIRWOMAN MARTIN: Okay.

13 MS. BROWN: And I'd like to see what
14 the scope of intervention he's asking for. If
15 he's going to file something in writing, if I
16 could just have an opportunity to respond. I
17 don't think there's any problem with him, you
18 know, speaking today, because it will just
19 simply go in as a comment.

20 But it bears on the process. And, if
21 this is a dispute between a customer and the
22 utility, then there's not much impact on
23 another customer. But, if it's going to be
24 broadened to change the tariff -- so, I think I

1 just need to sort through those issues. I'll
2 explain.

3 CHAIRWOMAN MARTIN: Mr. Tuomala, any
4 objection or position?

5 MR. TUOMALA: Staff would not object
6 to Mr. Mueller's intervention.

7 CMSR. BAILEY: When you get to your
8 remarks, are you going to explain how this
9 would not apply to other customers, this
10 decision?

11 MS. BROWN: Yes.

12 CMSR. BAILEY: If we interpret the
13 tariff?

14 MS. BROWN: Yes.

15 CMSR. BAILEY: Okay.

16 CHAIRWOMAN MARTIN: Do you have a
17 question?

18 CMSR. GIAIMO: I do. So, this is a
19 separate and a unique distinction that only
20 applies to the Hotel, and cannot find itself
21 reoccurring for condo associations or
22 residential customers?

23 MS. BROWN: I will be explaining
24 that, yes.

1 CMSR. GIAIMO: Okay. Thanks.

2 CHAIRWOMAN MARTIN: Okay. So, we'll
3 take your comment now, and then we'll proceed.
4 And, if you could file a written motion, that
5 would be appreciated.

6 MR. MUELLER: Okay. Thank you.

7 CHAIRWOMAN MARTIN: And you asked
8 "how soon." I should have answered that
9 question, I apologize. How soon do you think
10 you could file that?

11 MR. MUELLER: Two weeks.

12 CHAIRWOMAN MARTIN: How about sooner?

13 MR. MUELLER: Sooner.

14 CHAIRWOMAN MARTIN: Seven days? One
15 week?

16 MR. MUELLER: Sure.

17 CHAIRWOMAN MARTIN: Okay.

18 MR. MUELLER: That's fine.

19 CHAIRWOMAN MARTIN: Okay.

20 MR. MUELLER: Thank you. And I
21 guess, again, I'm here, and it really goes to
22 the Commissioner's question as to whether this
23 is a tariff interpretation or just this
24 specific issue. If it's a tariff

1 interpretation, then we're very concerned that
2 it could be construed to affect the homeowners.

3 When I first became aware of this
4 issue and looked at the documents, I wasn't
5 aware that there was a change to the terms and
6 conditions back in 2016, when Abenaki purchased
7 the assets from Rosebrook. And I can assure
8 you that none of the homeowners, myself or
9 anybody I have talked to, is aware of any
10 communication in 2016 that changes to the terms
11 and conditions were being made that could
12 potentially be construed to say that homeowners
13 now own the pipes under our roads.

14 So, none of us got any kind of
15 communication that we're aware of. And, even
16 if it were, honestly, I'm not sure we would
17 have appreciated the significance that these
18 redlined changes to Ts and Cs now mean that we
19 own the pipes, because our understanding is we
20 don't. And none of us, honestly, have any kind
21 of reserve set up to maintain those pipes under
22 the roadways. It is common property.

23 And there have been instances in the
24 past where Abenaki's behavior has been to

1 repair and maintain those pipes since their
2 ownership. There's been pipe breaks under the
3 roads that broke, a camp called River Front and
4 Forest Cottages Associations, that have been
5 repaired and maintained by Abenaki. And they
6 certainly repair and maintain hydrants and
7 other water pipe connections.

8 So, again, I'm very surprised that
9 this could be interpreted this way. And that's
10 why I'm here.

11 And I will certainly file my
12 intervention in writing within a week.

13 CHAIRWOMAN MARTIN: Thank you.

14 MR. MUELLER: Thank you.

15 MS. BROWN: Good afternoon. Again,
16 Marcia Brown, representing Abenaki Water.

17 If I may, there are a number of
18 issues that have arisen from this complaint.
19 And I would like to start with some factual
20 errors in the Order of Notice. The Order of
21 Notice refers to the "Omni property". And I
22 want to make clear that the Hotel does not own
23 the three parcels that the service is taken off
24 of at the curb stop. The property is

1 comprised, if you look at the confidential map
2 that was taken out, there are three parcels.
3 I'm not sure that they're all denoted here.
4 But they are all owned by Omni Mount
5 Washington, LLC, not Omni Mount Washington
6 Hotel. And, so, I just want to make that point
7 clear.

8 So, when the Order of Notice is
9 referring to "Omni", they're referring to the
10 Hotel. And, so, right at the very first
11 paragraph, where it says "water pipe on Omni's
12 property", it's actually another entity's
13 property.

14 That is important, because the assets
15 reside on a nonparty's property, or a entity
16 that's not -- the landowner is not represented
17 in this proceeding. And I'm not sure that the
18 Hotel has standing to determine the
19 responsibilities of the property owner as to
20 those assets.

21 So, it would seem to be that the
22 complaint would need to be expanded, and that
23 gets into the scope, and that gets into whether
24 365 applies.

1 Now, the other matter is, I want to
2 make sure the Commissioners are clear that the
3 Hotel is not the only customer account that
4 Abenaki Water serves. There is the Hotel,
5 which is on a six-inch meter. There's an
6 Administration building, an Alpine Club.
7 Bretton Arms is a building that's, if I may
8 demonstrate, and sorry for not being able to
9 describe this for the stenographer, but I'm
10 pointing to a yellow building on a straight
11 service line coming off of the curb stop at
12 Base Road.

13 And, also, this -- other accounts on
14 this property include the caretaker's house,
15 Fabyans, Ski First Aid building, Nordic Golf
16 building, another ski area building.

17 So, the point being is that the Hotel
18 is here [*indicating*]. And it is making an
19 argument as to assets that are serving other
20 accounts and involve other -- and the
21 underlying property owner. So, I just raise
22 the question that the account may -- the
23 complaint may not be sufficient to address all
24 of the issues that are -- that arise in simply

1 saying "Please pay this AB construction bill."

2 I would also like to address, the
3 Order of Notice says that, when the tariffs
4 went into effect in 2016, after Commission
5 approval, that it "placed more ownership and
6 maintenance responsibility on customers than
7 before". That only applies to Omni, and that's
8 only if you have a clear understanding of who
9 did what prior to Abenaki's acquisition.

10 Prior to the acquisition, there were
11 greatly blurred lines. There was no clear
12 demarcation on who was doing what. The water
13 company was run by, let's see, Mike Hahaj was
14 the Finance Director for, I think, Natural
15 Retreats, who was retained by BW Holdings, LLC,
16 who was doing work on the property. The annual
17 report reflects that MWH Construction did most
18 of the operations. So, there was a blending of
19 who was doing what. So, it's unclear as to the
20 Omni property, and when I say "Omni property",
21 I mean the resort and all of its many LLCs, not
22 clear who was doing what. So, I do wish to
23 make that point that it's not clear that
24 there's any before-and-after change as to Omni.

1 If I may now address the issue of
2 timeliness. And I briefly responded to that in
3 the reply. This matter was front -- this issue
4 was front and center in the acquisition docket,
5 on how this new water company would come in,
6 take this Rosebrook Water system and operate it
7 like a traditional water utility should be
8 operated, having clear demarcations of
9 ownership. None of this blending of roles.

10 And if this issue had been addressed
11 back then, then perhaps in that, in the 2017
12 rate case, then a cost of service study could
13 have been done, maybe it would have shown that
14 Omni needed to -- the Hotel or a collection of
15 customers on that property needed to go back to
16 a special contract.

17 To raise it now, we are undoing how
18 the Company presented its 2017 rate case. That
19 rate case was based on the tariff and the
20 demarcations, of a curb stop being the
21 demarcation of the responsibility between the
22 customer and the utility.

23 I also want to bring up that OCA had
24 sided with Omni on the tariff interpretation.

1 And I was a little surprised at that, because
2 these assets that are depicted on this
3 confidential map do not serve any other
4 customers. And, so, if Abenaki is deemed to
5 own them, then the other customers, largely
6 residential ratepayers, which Office of
7 Consumer Advocate represents, would be
8 subsidizing the cost. Again, these assets do
9 not serve -- are not necessary for the rest of
10 the system. If it were looped, that would be
11 different. But these dead-end and serve only
12 the resort accounts.

13 And another point about the
14 intermingling, and the cross subsidy that
15 surprises me from OCA's position, is that, from
16 the 2012 rate case for Rosebrook, it came to
17 light, and there was an enforcement action,
18 that, in all of blurring of roles, there were
19 nine meter bypasses that the Hotel and the
20 water company needed to sort out. And, even at
21 the end of 2013, Mike Hahaj had reported to the
22 Commission that they still had four meter
23 bypasses at the Hotel that weren't fixed yet.

24 So, it just goes back to the history

1 of the intermingling, and how, when Abenaki
2 came in, they tried to have a clean break in
3 that 2016 docket, and run this company
4 professionally, like a regulated water utility
5 should.

6 I'd like to move on to the
7 interpretation of the tariff. And it appears
8 there's a lot of emphasis put on Original Page
9 2, Section 1.b(3), where "All service pipes
10 from the main to the property line or common
11 area including the premises' exterior shut-off
12 valve shall be owned and maintained by the
13 Company." Just because Omni points out on this
14 map where are valves, maybe isolation valves,
15 that are outside of the building, does not mean
16 that they are exterior shut-off valves per the
17 terms of the tariff. The tariff has to -- all
18 of the provisions of the tariff have to be read
19 together. And, in the "Definitions" section,
20 on Original Page 1, "exterior shut-off" is
21 defined as the "curb stop", or -- or, also the
22 "water shut off controlled by the Company". As
23 a matter of fact, since Abenaki has acquired
24 the system, it has not been managing the

1 main -- the valves within the property.

2 There is some relationship that I can
3 go into later that the Company does go on the
4 premises and open hydrants, just because of the
5 sensitivity of the high pressure, they do it as
6 a courtesy and do not charge Omni.

7 But, from a operational perspective,
8 the Company controls the curb stops, and the
9 curb stops are, you can see on this map, down
10 by Base Road there's an arrow pointing to a
11 valve and a valve, those are the curb stops.
12 And the curb stop is a traditional demarcation
13 of responsibility between -- that utilities use
14 between customers and utilities.

15 Just for kicks, I took a look at the
16 Aquarion Water Company tariff, Aquarion Water
17 Company of New Hampshire tariff, they use this
18 similar language that Abenaki is using.
19 Abenaki, in fact, uses this tariff in
20 Massachusetts and Connecticut. So, it's not a
21 unique template. The only uniqueness is the
22 historical legacy of the Omni Hotel property
23 and the intermingling.

24 Pennichuck Water Works, Pittsfield

1 Aqueduct Company, Pennichuck East Utility,
2 Forest Edge, Hampstead Area Water Company all
3 use the curb stop as demarcation of who's
4 responsible for what.

5 So, when there's this fear from other
6 homeowners associations saying "well, you know,
7 we've got assets that are within the common
8 area, and are those going to be affected?" The
9 answer is "no." Because, under Original Page
10 2, it says that the service pipes in the common
11 areas are going to be maintained by the
12 Company. So, that's not going to change.
13 That's why I go back to the only change, from
14 the '16 tariff acquisition docket, or 2016
15 acquisition docket, really applied to Omni, but
16 Omni didn't raise the issue at the time and
17 didn't intervene. I'm not trying to fault
18 them, but, you know, that's where the
19 discussion was happening.

20 And that's why, when you read the
21 full provisions on Original Page 2, Original
22 Page 1, the only customer that's affected by
23 this interpretation will be the Omni property.

24 So, I'd like to address Commissioner

1 Bailey's question about, you know, "whether 365
2 is appropriate?" 365 is appropriate, if it
3 stays as a interpretation for this particular
4 customer, as to the application of the terms
5 and conditions. Abenaki doesn't have any plans
6 to change its terms and conditions, because
7 this template is used elsewhere, and the
8 language is used by other water companies.

9 If, down the road, it is ordered to
10 acquire these mains, that, again, don't serve a
11 purpose for any of the other customers, it
12 would want, you know, the O&M for these lines
13 to be covered, because it's not something that
14 it expressly put in its revenue requirement in
15 the 2017 rate case. That's why I raise the
16 timeliness issue, because, had they known that
17 these were going to be their responsibility,
18 they would have built it in. In particular,
19 they would have built in, in the capital
20 program, the fact that Omni, or I don't know
21 which LLC, this is not something that the Omni
22 companies have expressly contacted Abenaki
23 about, is they have got a 60 or 66-unit hotel
24 addition going on. And the 8-inch main barely

1 meets fire protection. They're going to want
2 fire protection, we assume, at that
3 construction site or for that addition. Had
4 they known that this was their responsibility,
5 they would have put that upgrade of this
6 system -- of this 8-inch main in their capital
7 plan, so that they could have known and
8 budgeted for that going forward.

9 Now, since it acquired the Rosebrook
10 system, Abenaki has been trying to walk the
11 talk, it's been trying to implement its tariff.
12 And I think it is telling that, if Omni
13 believes that these lines are Abenaki's, that
14 the tariff provision, Paragraph 21, on Original
15 Page 8, expressly states, for any main
16 extensions, whoever is wanting the main
17 extension, needs to come in with plans, pay for
18 the Company to review those plans, so that the
19 Company can assure that it has the capital
20 infrastructure to provide the safe and adequate
21 service that it's obligated to, if this is its
22 system.

23 The Company -- the Hotel has not come
24 in under this provision to have a dialogue with

1 the Company. So, you know, I draw that
2 distinction that, if the Hotel truly felt that
3 these were Abenaki's assets, they would be
4 abiding by the tariff provisions.

5 Another point to make is that these
6 were deemed as "as-built" plans. The Company
7 doesn't have any as-built plans they can really
8 say are "as-builts". I think they would show
9 topography in them. But, anyway, so, we can't
10 say for certain whether this is accurate, when
11 it was accurate, because there either is a line
12 that goes around the Hotel or it -- or it does?

13 I'm sorry, I'm asking the operator.

14 *[Atty. Brown conferring with*
15 *Mr. Sausville.]*

16 MS. BROWN: Okay. There are some
17 plans that show that the main goes -- and the
18 operator has said that he knows that some of
19 these lines go underneath the Hotel. And it
20 would be very difficult for a water company to
21 be maintaining a line that goes under a
22 private, you know, a customer's premises.

23 So, I know I've bounced around.

24 There's just a lot of issues that arise from

1 just the simple request of, you know, "can the
2 water company pay the excavator bill?" You
3 know, prospectively, they would have, had they
4 known that these were going to be their assets,
5 it would have carved out a provision in the
6 tariff to accommodate this special unique
7 circumstance. It would have built in in its
8 capital improvement plans to upgrade these,
9 knowing that, you know, it would need to have
10 fire protection.

11 There is a lot of things that would
12 have happened had this issue been timely
13 raised. Not that, you know, it can't be raised
14 now. It's just cumbersome. And, if we're
15 doing rate design issues, you know, even for a
16 small water company, you know, an attorney's
17 time, that would have been something that they
18 would have recovered as a rate case expense.
19 And it sounds like, you know, maybe the
20 resolution here is a rate design issue.

21 So, with that, the Company looks
22 forward to discussing these issues in the
23 technical session and trying to come up with a
24 roadmap.

1 Let me just make sure I haven't
2 missed any other issues.

3 *[Atty. Brown conferring with*
4 *Abenaki representatives.]*

5 MS. BROWN: The professional engineer
6 just made an observation to me that, again,
7 it's, you know, who's walking the talk here,
8 you know, and complying with the tariff.

9 If these assets are indeed Abenaki's,
10 why is the Hotel rerouting their service, the
11 lines? They should be having the Company do
12 that or check with the Company. So, and that
13 is the line that's around the Hotel, because on
14 this confidential map it's showing it's
15 rerouted, when we have plans that it shows it
16 goes under it.

17 So, with that, thank you very much.

18 CHAIRWOMAN MARTIN: Thank you. Do
19 either Commissioner have any questions?

20 CMSR. GIAIMO: I guess I'll go ahead,
21 if that's okay?

22 Attorney Brown, thank you for the
23 thorough update. I just want to clarify
24 something that I thought I heard.

1 So, post tariff change, Abenaki has
2 not been maintaining the valves?

3 MS. BROWN: Correct. Since the
4 tariff change, it has not been doing any
5 maintenance on the Omni Hotel property, except
6 for there are instances, because of the
7 sensitivity of the system, that there's a
8 relationship where they go in and -- actually,
9 I can have the operator explain what he does,
10 if that would be --

11 CHAIRWOMAN MARTIN: That's okay.
12 Briefly, if you don't mind.

13 MR. SAUSVILLE: So, we go in -- my
14 name is Phil Sausville. I'm Senior Operator
15 for Abenaki Water. Go in, on Omni property
16 itself, to flush the hydrants, because of the
17 high pressure and because of the water quality.
18 Because it's technically a dead-end line, and
19 because there is chlorine in the system, we
20 have to go in there and actually flush that
21 system, in order to make sure the water quality
22 stays as good as it is.

23 CMSR. GIAIMO: Okay. So, there are
24 exceptions. That's what I thought I heard, and

1 I just wanted to make sure I understood.

2 So, I just want to make sure I also
3 want to give you the opportunity to respond to
4 Mr. Getz's assertion that your position is that
5 your responsibility ends at the Base Road?

6 MS. BROWN: Yes. Consistent with the
7 tariff provisions, the curb stop is the
8 delineation between the responsibility of the
9 utility and the customers or the landowner
10 takes that responsibility on.

11 Now, given the situation where we
12 have multiple accounts on property that's owned
13 by someone else, it's, you know, for them to
14 figure out who's paying for what.

15 CMSR. GIAIMO: You also said that,
16 prior to the tariff change, "responsibilities
17 blurred"?

18 MS. BROWN: Yes, as to the Omni
19 property only.

20 CMSR. GIAIMO: Okay. So, assume this
21 issue happened prior to the tariff change, how
22 would this issue be resolved?

23 MS. BROWN: Don't know, because it
24 was so blended, it would probably have been --

1 well, I'm speaking out of turn, I don't know
2 who would have -- who would have paid for it.
3 But it was very blended at the time, between
4 Omni and Rosebrook. Rosebrook didn't -- I
5 believe they had three employees, I don't know
6 if two were not paid, but one was paid. They
7 didn't have, you know, the physical staff.

8 Anyway, that's my response.

9 CMSR. GIAIMO: Thank you.

10 CHAIRWOMAN MARTIN: I have a
11 follow-up on that same issue. So, I'll
12 interject.

13 You mentioned that there was a
14 "blurring of roles". I understood you to be
15 saying that it related to the "maintenance
16 responsibilities", is that correct?

17 MS. BROWN: Well, Mike Hahaj I think
18 had two hats. He worked for, I think, Natural
19 Retreats, and was retained by -- this was
20 explained in some audit report that I can
21 produce later. But, even the Staff Audit had a
22 question as to why there was such a heavy
23 presence at the Hotel related and, you know,
24 employees -- I don't know if they were

1 employees or subcontractors or what, in the
2 water company's filings, because the annual
3 report would come from Bretton Woods. The rate
4 case was filed by someone affiliated with the
5 Bretton Woods property.

6 CHAIRWOMAN MARTIN: Okay. So, I
7 think the answer was "yes", if I'm
8 understanding that response right. It was
9 blurred as to who did what for maintenance.

10 But I guess my question is, do you
11 disagree with Attorney Getz's representation
12 that there's no dispute over ownership? Was it
13 blurred only as to maintenance, but not
14 ownership?

15 MS. BROWN: It's disputed as to both,
16 because there was a lot of contributed capital
17 that wasn't recorded when I spoke to the
18 accountant today. The books were a mess.
19 Well, you know, not -- anyway, but they were
20 useable. But the accuracy that you would
21 expect from a traditionally, you know, run
22 utility, that something that, you know, the
23 present owners are cleaning up those continuing
24 property records.

1 CHAIRWOMAN MARTIN: So, it's
2 Abenaki's position that there is a dispute as
3 to the legal ownership of the line in question?

4 MS. BROWN: That, and other facts are
5 in dispute, yes.

6 CHAIRWOMAN MARTIN: All right.

7 MS. BROWN: And with respect to the
8 question on maintenance, I was giving you
9 examples of regulatory matters that I knew.
10 And the maintenance was only because I looked
11 at the 2013 Annual Report that showed MHW --
12 no, MWH Construction, and the name didn't fit
13 as a water utility entity, it fit as a resort
14 entity who was doing work for the utility.
15 And, given the comment that "it only had three
16 employees", it would make sense.

17 CHAIRWOMAN MARTIN: Okay. Thank you.

18 CMSR. BAILEY: In your remarks, you
19 said that Omni has a "6-inch meter"?

20 MS. BROWN: That is correct.

21 CMSR. BAILEY: Okay. Off of an
22 8-inch main?

23 MS. BROWN: I'm being told "yes", but
24 I don't know if there are any other nuances

1 that -- that is accurate.

2 CMSR. BAILEY: Okay. And you said
3 that, in 2012, there were nine meter bypasses,
4 and you sorted out five of them, and there were
5 four left?

6 MS. BROWN: In the 2012 rate case,
7 there are some compliance reports towards the
8 end of that docket in 2013 that reported, from
9 the settlement agreement, the party -- the
10 Hotel and the Water Company were to address the
11 bypasses. And the report that came from Mike
12 Hahaj, in late December 2013, said that he was
13 disappointed that the Hotel still had four
14 remaining bypasses that it hadn't addressed by
15 the deadline.

16 CMSR. BAILEY: Were they addressed
17 before Rosebrook -- before Rosebrook sold to
18 Abenaki?

19 MS. BROWN: We believe so.

20 CMSR. BAILEY: Okay. Can you tell
21 me, on the confidential map, if there are any
22 common areas?

23 MS. BROWN: As to the Omni property?

24 CMSR. BAILEY: Yes.

1 MS. BROWN: No. There are no common
2 areas, because it's on one parcel, it hasn't
3 been subdivided. It's not a -- no common areas
4 have been delineated in any deeds.

5 CMSR. BAILEY: Didn't you start with
6 the fact that there are three parcels of
7 properties?

8 MS. BROWN: Right. Right. They're
9 all owned by Mount Washington.

10 CMSR. BAILEY: Okay. So, I'm trying
11 to figure the difference between this and the
12 property owners association properties and
13 common areas there?

14 MS. BROWN: I liken this to more like
15 a strip mall, where you have accounts that
16 have, you know, water meters, but then you have
17 a common property owner. And the big common
18 property owner would be owning those, the
19 distribution system within that strip mall.

20 Q So, is it your position then that, in the
21 property owners associations, the property that
22 is owned by the association is common area, and
23 the property owned by the individual residents,
24 do they own their own property in those?

1 MS. BROWN: Those associations
2 have -- follow the subdivision rules, and they
3 have denoted the common areas. And they're,
4 you know, outlined on maps, some of them. So,
5 the common areas are usually the public ways.

6 CMSR. BAILEY: And anything beyond
7 the common area the customers are now
8 responsible for?

9 MS. BROWN: Those curb stop -- well,
10 when you say -- I'm troubled by when you say
11 "now". Because, when the curb stop is
12 installed in those subdivisions, it's at the
13 property line.

14 CMSR. BAILEY: And that was the case
15 when Abenaki bought the system from Rosebrook?

16 MS. BROWN: Uh-huh. Yes. Yes. So,
17 those haven't changed. And, so, you know, I
18 know there's a lot of hay raised in the
19 transcript with Don Vaughan testifying about,
20 you know, he wants to move the curb stops.
21 What he's talking about are the common area
22 ones. The ones where you have a condo, you
23 don't have the customer owning the land, and
24 you've got the curb stop deep into that common

1 area. He wants to bring it out towards the
2 road more, just for ease and access.

3 He's not talking about, you know,
4 these isolation valves that are on the Omni --
5 within the Omni Hotel property -- or, I'm
6 sorry, here I am making the same mistake -- the
7 Omni resort property.

8 CMSR. BAILEY: Okay. Thank you.

9 CHAIRWOMAN MARTIN: I just want to
10 make sure I'm understanding what you're saying
11 at this point.

12 Original Page 2, Paragraph (3),
13 "Commercial Building", the language was
14 modified there, to add the reference to "common
15 area". Is that not a change? Is that --

16 MS. BROWN: I understand where you're
17 coming from. On the change, I think the tariff
18 was updated to reflect what they were doing in
19 practice.

20 CHAIRWOMAN MARTIN: Okay. And the
21 "exterior shut-off valve" reference there in
22 that language, is it's your position that's the
23 one at the property line, if we look at the
24 confidential map up on Base Road?

1 MS. BROWN: Correct, because the
2 "curb stop" is defined as -- within the
3 industry, the "curb stop" is interpreted as the
4 "property line valve". And that property line
5 valve, for the Omni -- Omni Mount Washington,
6 LLC, property is at the Base Road, those two
7 curb stops.

8 CHAIRWOMAN MARTIN: Okay. Thank you.
9 Mr. Tuomala.

10 MR. TUOMALA: At this point, Staff
11 looks forward to meeting with the parties at
12 the technical session, given the input in
13 today's prehearing conference. Staff had
14 questions before, and now we certainly do,
15 which we would hope to hamper out some type of
16 procedure. We'll take Omni's suggestion of a
17 hearings officer under advisement. But,
18 hopefully, we can work in conjunction together
19 to formulate some type of roadmap.

20 Definitely we anticipate issuing
21 discovery, a few rounds, especially in light of
22 the fact that Abenaki stated that there are
23 significant facts in dispute, there are
24 obviously legal questions as well.

1 So, we look forward to meeting with
2 the parties and working that out after the
3 prehearing conference today.

4 CHAIRWOMAN MARTIN: Thank you.

5 *[Chairwoman and Commissioners*
6 *conferring.]*

7 CHAIRWOMAN MARTIN: Okay. I think
8 the way we'd like to proceed is to have you
9 folks work in the technical session to see if
10 you can reach a stipulated set of facts as
11 proposed before deciding how we would proceed
12 beyond that. And, so, I think that would be
13 our ideal scenario, if you can go to the
14 technical session and see where you can get to.

15 Obviously, there are lots of issues
16 on the table, and I think it will be difficult,
17 but at least let's give it a try.

18 And, if there are no other issues, we
19 will adjourn for today.

20 MR. GETZ: If I could just say one
21 thing, Madam Chair.

22 I came here today and Omni came here
23 today thinking that there would be some meeting
24 of the minds about some of the facts, and then

1 we could come to agreement on the process.

2 But it looks like we now have a
3 fundamental disagreement about who even owns
4 the pipes, which, from Omni's perspective, seem
5 pretty clear from the records in the transfer
6 proceeding.

7 And, if there's not agreement on that
8 issue, it's going to be tough to get any
9 further. So, I just wanted to point that out
10 there.

11 But we'll make a good faith effort
12 to, as I said before, address this issue and
13 the other issues that are pending.

14 CHAIRWOMAN MARTIN: And we understand
15 and appreciate that. And I think Staff's
16 suggestion that there may be a need for
17 discovery may assist with that issue as well.

18 MR. GETZ: Thank you.

19 CHAIRWOMAN MARTIN: And as
20 Commissioner Bailey just pointed out, if you
21 can't reach a stipulation, then, if you could
22 propose a schedule for adjudication, that would
23 be helpful.

24 All right. If nothing further, then

1 we're adjourned. Thank you, everyone.

2 ***(Whereupon the prehearing***
3 ***conference was adjourned at***
4 ***2:12 p.m., and a technical***
5 ***session was held thereafter.)***

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