

**STATE OF NEW HAMPSHIRE
PUBLIC UTILITIES COMMISSION**

DW 15-199

ABENAKI WATER CO., INC.

PETITION FOR CHANGE IN RATES

Order on Motion for Confidential Treatment and Request for Rate Case Expenses

ORDER NO. 25,945

September 26, 2016

APPEARANCES: Upton & Hatfield, LLP, by Justin C. Richardson, Esq., for Abenaki Water Co., Inc.; Office of Consumer Advocate by Donald M. Kreis, Esq., for residential rate payers; and Staff of the Public Utilities Commission by John S. Clifford, Esq.

With this order the Commission denies the motion of Abenaki Water Co., Inc. (“Abenaki” or the “Company”), to treat as confidential certain information relating to the legal expenses incurred by Abenaki in connection with its petition for a change in rates and submitted for reimbursement by its ratepayers. The Commission authorizes Abenaki to reconcile the difference between temporary and permanent rates and to recover rate case expenses pursuant to the methodology and schedule outlined in this Order.

I. BACKGROUND AND POSITIONS OF THE PARTIES

On July 24, 2015, Abenaki filed a petition for a change in permanent rates pursuant to RSA 378:28. On August 18, 2015, Abenaki also filed a petition for a temporary rate increase pursuant to RSA 378:27, subject to reconciliation pursuant to RSA 378:29. The Commission issued an order approving temporary rates on January 11, 2016. Order No. 25,858. The parties filed a settlement agreement which was approved by Commission order on June 3, 2016. Order No. 25,905. On June 29, 2016, the Company submitted its rate case expenses pursuant to NH Code Admin. Rules Puc1905.03. As part of its submission, Abenaki submitted the invoices

of its legal counsel, Upton & Hatfield, LLP, and other expenses including those related to consultants who assisted with the petition for change in rates. Abenaki also filed a motion for confidential treatment pursuant to RSA 91-A:5 and Puc 203.08 to treat as confidential the description of legal services provided by Upton & Hatfield. The Office of the Consumer Advocate and Commission Staff filed objections to Abenaki's confidentiality request, and the Company submitted a reply to both objections.

Abenaki's motion for confidential treatment relies on RSA 91-A:5, which contains exemptions to the general open government requirements in RSA Chapter 91-A, New Hampshire's Right-to-Know Law. Specifically, RSA 91-A:5, IV, contains a list of governmental records that are exempted from public exposure. They include records pertaining to "confidential, commercial, or financial information." Abenaki's motion claims that the descriptions of legal services are confidential and privileged because if disclosed they "would reveal litigation strategy and the nature of legal services provided." As part of its submission, Abenaki provided Staff with redacted and un-redacted portions of its billing statements. As with past Commission practice, Abenaki does not intend to disclose to the public the hourly rates it charges for its services. *See, e.g., Pennichuck East Utility*, Order No. 25,752 (January 13, 2015); *Aquarion Water Company of New Hampshire, Inc.*, Order No. 25,586 (October 22, 2013); *Lakes Region Water Company, Inc.*, Order No. 25,454 (January 17, 2013); *EnergyNorth Natural Gas, Inc.*, Order No. 25,280 (October 25, 2011).

Abenaki's June 29, 2016, filing sought to impose \$103,430 in surcharges to recover rate case expenses and to reconcile an under-recovery during the temporary rate period. The rate case expenses totaled \$78,155 and the reconciliation between temporary and permanent rates totaled \$25,275. Based on its review, Staff filed a recommendation on August 18 recommending

approval of a recovery of \$75,389 in rate case expenses and \$25,275 in rate reconciliation charges for a total of \$100,664.

Staff deducted from Abenaki's rate case expense request a total of \$2,766 because it related to PUC audit inquiries. Audit expenses are not recoverable as rate case expenses under Puc 1907.01(e). Staff recommended that the rate case expenses and temporary/permanent rate reconciliation be recovered through a surcharge apportioned amongst ratepayers in 24 monthly installments at the same time the water rates are due. The OCA concurred with Staff's recommendations.

II. COMMISSION ANALYSIS

A. Confidential Treatment

The purpose of RSA Chapter 91-A "is to provide the utmost information to the public about what its 'government is up to.'" *Union Leader Corp. v. City of Nashua*, 141 N.H. 473, 476 (1996) (quoting *EPA v. Mink*, 410 U.S. 73, 105 (1973)). RSA 91-A:5, IV, protects certain governmental records pertaining to confidential, commercial, or financial information from disclosure. The New Hampshire Supreme Court and the Commission apply a three-step balancing test to determine whether a document, or the information contained within it, falls within the scope of RSA 91-A:5, IV. *Lambert v. Belknap County Convention*, 157 N.H. 375, 382-83 (2008); see *Pennichuck East Utility, Inc.*, Order No. 25,758 at 4 (January 21, 2015) (citation omitted). Under the test, the Commission must first consider whether there is a privacy interest at stake that would be invaded by the disclosure. We must next ask whether there is a public interest in such disclosure. Finally, *Lambert* directs the Commission to balance those interests and decide whether disclosure is appropriate. *Lambert*, 157 N.H. 383-385.

The New Hampshire Supreme Court has addressed the confidentiality of attorney billing records in *Hampton Police Assoc. v. Town of Hampton*, 162 N.H. 7 (2011), a case cited by all parties here in support of their positions. In *Hampton*, the Town sought to shield from disclosure certain legal invoices it considered to be confidential. The Town had first argued that the billing statements were privileged as a matter of law. The court rejected that assertion and “decline[d] the Town’s invitation to adopt a *per se* rule that all descriptive narratives in attorney invoices to clients are subject to the attorney-client privilege,” holding that “the attorney-client privilege may apply to information in a billing record that reveals ‘the motive of the client in seeking representation, litigation strategy, or the specific nature of the services provided, such as researching particular areas of law.’” *Id.* at 16-17.

Other cases also support this assertion. See, e.g., *Maxima Corp. v. 6933 Arlington Dev. Ltd. P’ship.*, 641 A.2d 977, 983 (Md. App. 1994) (“[a]ttorneys’ bills are generally not protected by the attorney-client privilege”); *In re Grand Jury Proceedings*, 33 F.3d 342 at 353 (attorney-client privilege does not extend to billing records and expense reports); *Clarke v. American Commerce Nat’l Bank*, 974 F.2d 127 (9th Cir. 1992) (“the identity of the client, the amount of the fee, the identification of payment by case file name, and *the general purpose of the work performed* are usually not protected from disclosure”) (emphasis added). The determination of whether the billing statements are privileged hinges on whether the statements reveal something about the advice sought, or advice given. See, e.g., *Hampton*, 162 N.H.7 at 17 (citing cases); *In re Grand Jury*, 33 F.3d at 354; see also *Chaudhry v. Gallerizzo*, 174 F.3d 394, 402 (4th Cir. 1999) (upholding claim of privilege as to certain portions of statements which revealed particular areas of the law researched).

In the context of the Right-to-Know Law, the party seeking nondisclosure bears the burden of proof. *Hampton* at 17. As noted above, the purpose of the Right-to-Know Law “is to provide the utmost information to the public about what its government is up to.” *Union Leader Corp. v. City of Nashua*, 141 N.H. 473, 476 (1996) (quotations and citations omitted). “To best effectuate the Right-to-Know Law, whether information is ‘confidential’ must be determined objectively and not based on the subjective expectations of the party generating it.” *Union Leader Corp. v. NH Housing Fin. Auth.*, 142 N.H. 540, 553 (1997). In *Union Leader Corp. v. NH Housing Fin. Auth.*, the Court employed the test used by the Federal courts: To show that information is sufficiently confidential to justify nondisclosure, the party resisting disclosure must prove that disclosure is likely: (1) to impair the [State’s] ability to obtain necessary information in the future; or (2) to cause substantial harm to the competitive position of the person from whom the information was obtained. *Id.* at 554 (quotations and citations omitted).

Abenaki has not claimed that requiring disclosure is likely to impair the State’s ability to obtain the necessary information in the future. We do not believe that such disclosure would cause utilities to stop providing such information. The submission of legal invoices is required under the Commission’s rules for a utility to establish whether the reimbursement of legal expenses is reasonable and allowable. The submissions are received by the Commission “in furtherance of its official function.” N.H. RSA 91-A:1-a III. The Commission must determine for itself whether “recovery of the expense is just, reasonable, and in the public interest.” Puc 1904.02(a)(3). In making those determinations, the Commission must determine, among other things, whether “the work was relevant and reasonably necessary to the ... proceeding.” Puc 1904.02(b)(4). The only way for the Commission to establish the reasonableness of the work performed and how it relates to the proceeding is for the Commission to evaluate the very

invoices which Abenaki now seeks to shield from public scrutiny. The key component of the balancing test is that the “emphasis should be placed on the potential harm that will result from disclosure, rather than simply promises of confidentiality, or whether the information has customarily been regarded as confidential.” *Union Leader Corp.*, 142 N.H. 540, 554 (citation omitted).

Abenaki stated that the Commission previously granted confidential treatment to certain descriptions of legal services. *See Lakes Region Water Company, Inc.*, Order No 25,454 (January 17, 2013). In Order No. 25,454, the Commission balanced the relevant interests and provided confidential treatment to legal invoices. Here, however, Abenaki has not made a showing sufficient to tip the balance in favor of keeping the descriptions of legal services confidential. Absent a showing that the rest of the information could harm Abenaki or its counselors, the Commission finds that the descriptive information sheds light on what the Commission is doing and would inform the public of the conduct and activities of its government. The test for disclosure under the Right-to-Know law “is whether the documents would be routinely or normally disclosed upon a showing of relevance.” *N.H. Right to Life v. Dir.*, 2016 N.H. Lexis 55, *13 (June 2, 2016). It is up to the Commission to determine whether the fees are reasonable and should ultimately be paid for by the consumers. The public purpose served by disclosure is to increase the public knowledge about how the Commission operates and what the consumers are paying for in a rate case proceeding.

Abenaki has argued that disclosure of the description of its legal services would reveal litigation strategy and the nature of the legal services provided. Absent a specific showing of which entries show requests for legal advice or reveal proprietary information, the records should be deemed available to public inspection under the New Hampshire Right-to-Know Law in the

future so that citizens can determine for themselves just what their “government is up to.” With a few exceptions, the legal bills submitted by Upton & Hatfield contain nothing more than brief recitations of the services performed and do not disclose litigation strategy or reveal any confidences or the motive for seeking legal advice. The exceptions are the entries identified by Upton & Hatfield that describe its cross-examination strategy of a particular witness and an entry that should have been entered on another client’s ledger. The Commission agrees and those entries will remain confidential.

With respect to the hourly rates of Abenaki’s counsel, we agree that the rates should be confidential. In prior dockets, the Commission found that the disclosure of billing rates could result in a competitive disadvantage to the company’s legal counsel and could damage competitive positions to the detriment of ratepayers. *Unitil Energy Systems*, Order No. 24,746 (April 30, 2007) and *EnergyNorth Natural Gas*, Order No. 25,280 (October 25, 2011).¹ We find that disclosure of counsel’s billing rates could result in a competitive disadvantage to Upton & Hatfield in future rate case proceedings. *See, Union Leader Corp.*, 142 N.H. 540, 554.

The attorney billing records in this case, with billing rates and certain descriptions redacted, should be released to the public if requested.

B. Rate Reconciliation

The Company also seeks to recover the difference between temporary and permanent rates, because our final order differs from that of the temporary rates approved earlier in the proceeding. RSA 378:29 requires the Commission to allow utilities to amortize and recover the difference between the temporary and permanent rates over the effective period of the temporary

¹ We recognize that in those two orders, and in the Lakes Region Water Company order, No. 24,454, the Commission kept the descriptions of the attorneys’ services confidential as well. In all three orders, however, the Commission made it clear that it reserved the right to reconsider its determination of confidential treatment.

rates if, on final disposition of the rate proceedings, the rates ultimately approved differ from the earlier-imposed temporary rates.

The revenue shortfall, when permanent rates are compared with the temporary rates actually charged since the September 18, 2015, effective date, totals \$25,275. We have reviewed the rate recoupment proposal and agree with Staff's recommendation supporting that amount. Accordingly, we approve recovery of the proposed revenue differential between temporary and permanent rates in the amount of \$25,275. We note that Belmont Single Family, Commercial Class A, and Commercial Class B water customers paid temporary rates slightly higher than those ultimately approved and are entitled to a rebate. Under the recoupment proposal, those customers will receive a credit and the remaining Abenaki customers will pay a surcharge to recover the difference between their respective temporary and permanent rates.

C. Rate Case Expenses

The Commission has consistently found that prudently incurred rate case expenses are legitimate costs of utility service that should be included in rates. *See EnergyNorth Natural Gas, Inc., d/b/a National Grid NH*, Order No. 25,064, 95 NH PUC 13, 17 (January 15, 2010). We have reviewed Abenaki's rate case expense summary and agree with Staff's recommendations that the costs amounting to \$2,766 for expenses related to the Commission Audit should be disallowed. We, therefore, approve the amount of rate case expenses proposed by Staff of \$75,389.

The Company proposed to allocate rate case expenses in proportion to the revenue received from various customer groups. The results of this methodology produced differing amounts of rate case expenses for similar customers. Under the company's proposal, Bow single family water customers would pay \$8.13, Belmont single family water customers would pay

\$6.46, and Belmont families living in apartment buildings would pay \$8.00 per month for rate case expenses. We believe it would be more appropriate to allocate rate case expenses evenly among residential customer classes. Accordingly, we direct Abenaki to use the sum of all residential water revenue from single family Bow and Belmont homes and Belmont Multi-Family homes and divide the proportionate share of rate case expenses by the total number of residential customers to produce a uniform rate case expense surcharge for each residential water customer. We direct a similar calculation for single and multi-family sewer customers. While the ultimate surcharges paid by these customers will vary depending on the reconciliation required between temporary and permanent rates, we believe the portion of the surcharge related to rate case expenses will be fairer by making it the same for each type of customer.

D. Recoupment Period

The sum of reconciliation charges and rate case expenses equates to a total of \$100,664. The company proposed to collect the surcharge over 24 months. Using the revised methodology described above, the surcharge for Bow water customers would be greater than \$10 per month. We believe it would be more appropriate to spread the surcharge for both rate case expenses and reconciliation of temporary rates over 30 months to reduce the monthly impact on bills. We direct Abenaki to verify the calculation of surcharges below, as we have outlined, and authorize collection beginning with the next billing cycle.

Customer Class	Rate Case Expense Monthly Surcharge	Temp. Rate Reconciliation Surcharge or (Credit)	Surcharge to be Applied for 30 Months
Bow Water (All single family)	\$5.77	\$3.69	\$9.46
Belmont Single Family Water	\$5.77	(\$0.53)	\$5.24
Belmont Multi-Family Water	\$5.77	\$0.06	\$5.83
Belmont Single Family Sewer	\$3.53	\$2.91	\$6.44
Belmont Multi-Family Sewer	\$3.53	\$2.47	\$6.00
Belmont Comm. Class A Water	\$73.98	(\$0.68)	\$73.30
Belmont Comm. Class A Sewer	\$43.51	\$33.22	\$76.73
Belmont Comm. Class B Water	\$30.06	(\$1.23)	\$28.83
Belmont Comm. Class B Sewer	\$13.85	\$10.53	\$24.38

Based upon the foregoing, it is hereby

ORDERED, that Abenaki's Motion for Confidential Treatment is denied, with the limited exceptions described above; and it is


FURTHER ORDERED, that Abenaki is authorized to recover \$25,275 representing the difference between its temporary rates approved in Order No. 25,858 and the permanent rates approved in Order No. 25,905; and it is

FURTHER ORDERED, that Abenaki is authorized to surcharge or refund its customers for reconciliation of temporary and permanent rates over a thirty (30) month period, until full reconciliation has been achieved; and it is


FURTHER ORDERED, that Abenaki is authorized to recover \$75,389, representing its just and reasonable rate case expenses over a thirty (30) month period until the full expense amounts are recovered; and it is

FURTHER ORDERED, that Abenaki shall file compliance tariffs within 14 calendar days of the date of this order reflecting their recoupment and rate case expense surcharges approved herein.

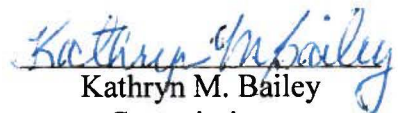
By order of the Public Utilities Commission of New Hampshire this twenty-sixth day of September, 2016.



Martin P. Honigberg
Chairman



Robert R. Scott
Commissioner



Kathryn M. Bailey
Commissioner

Attested by:



Debra A. Howland
Executive Director