STATE OF NEW HAMPSHIRE
PUBLIC UTILITIES COMMISSION

DW 17-165

ABENAKI WATER COMPANY, INC.
ROSEBROOK WATER SYSTEM

Petition for Change in Rates

Order Denying Motion for Rehearing

ORDER NO. 26,312

November 27, 2019

This order denies the Motion for Rehearing of Order No. 26,295 filed by Omni Mount Washington Hotel, LLC.

I. PROCEDURAL HISTORY

In Order No. 26,295 (October 1, 2019), the Commission authorized, among other things, Abenaki Water Company, Inc. (Abenaki or the Company), to recover $79,657 in uncontested rate case expenses. The Commission granted Abenaki authority to recover that amount plus its temporary-permanent rate recoupment, through three different flat-fee surcharges: (1) $4.53 a month for 18 months from its residential customers; (2) $13.95 a month for 18 months from its commercial customers; and (3) $3,595.38 a month for 24 months from Omni Mount Washington Hotel, LLC (Omni).

The Commission allocated the rate case expense portion of the surcharges to produce a uniform percentage increase on existing customer bills, when calculated over an 18-month recoupment period for all three classes. For Omni, the rate case expense portion equated to a surcharge of $2,242.74 per month over 24 months.

On October 31, 2019, Omni filed its timely Motion for Rehearing of Order No. 26,295, (Motion), along with its Response Regarding Service Company Charges. Abenaki, the Office of

the Consumer Advocate (OCA) joined by the intervenors Bretton Woods Property Owners Association and the Forest Cottages Association, and Commission Staff (Staff) filed separate objections. Omni's motion and subsequent docket filings, other than any information for which confidential treatment is requested of or granted by the Commission, are posted on the Commission's website at http://www.puc.nh.gov/Regulatory/Docketbk/2017/17-165.html. See Order No. 26,295 for additional procedural history.

II. POSITIONS

A. Omni

Omni's Motion for rehearing centers on the Commission's allocation of rate case expenses among customer classes. Omni argued that the Commission "overlooked and mistakenly conceived certain matters, and [Order No. 26,295] is unlawful and unreasonable." Motion at 1. Omni posited four claims to advance its argument, as explained below.

Omni also included a response opposing the remaining rate case expenses of $26,369 in dispute, related to New England Service Company charges, and a comment on a separate Commission ruling regarding a separate step adjustment in Order No. 26,300 (October 23, 2019), both of which are not at issue for the Motion for rehearing. *See Id.* at 9-11 (arguing the service company charges are included in the revenue requirement and that the engineering expenses are not properly the subject of a step increase).

1. Commission Inappropriately Allocated Rate Case Expenses as Variable Cost

Omni argued the Commission failed to recognize basic principles of ratemaking regarding the recovery of fixed and variable costs as related to the allocation of rate case expenses. Omni argued that rate case expenses are a fixed cost, and the Commission erred by allocating those expenses as a variable cost to the three customer classes, resulting in a uniform percentage increase in customer bills across all customer classes. Omni argued that "implicit in

the conclusion … is the unstated premise that Omni can better afford to pay the rate case expenses," which was never factually supported by Staff or the Commission.

Omni noted that the Commission departed from Staff's usage-based surcharge recommendation and that the typical allocation of rate case expenses for "Abenaki or other water companies," is the "traditional meter-based approach" (dividing the total rate case expense by the number of meters). Motion at 4-5; *See* Commission Staff Recommendation – Recovery of Rate Case Expenditures, August 15, 2019, at 4 (recommending recovery of rate case expenses and temporary-permanent rate recoupment through a usage-based surcharge of $2.566 per 1,000 gallons of usage a month, for 18 months).

Omni contended that the Commission must consider the "most equitable" result, not the more equitable solution. Omni further offered a different allocation method, proposing to allocate rate case expenses to each customer class based upon the percentage each pay of the Company's fixed cost revenues. Motion at 5.

2. Commission Failed to Acknowledge and Explain Departure from Precedent

Omni argued Commission precedent dictates that a meter-based allocation of rate case expenses be implemented, and that departure from precedent required a greater explanation.

Omni said that Staff's reliance on a gas-industry order allocating rate case expenses on a usage basis was inapt. Omni contended that the Commission adopted a third approach but did not cite any evidence or set forth any reasoning why a uniform percentage increase across customer classes is just and reasonable. Omni stated that the Commission's allocation was "an example of circular thinking and lacking in analysis," relying on the "tautology that a uniform increase is more equitable because the increases will be the same." Motion at 6.

3. Commission Failed to Provide Sufficiently Detailed Findings of Fact and Conclusions of Law

Omni contended that Order No. 26,295 was unlawful because the Commission did not provide sufficiently detailed findings of fact and conclusions of law, failing to meet its obligation under RSA 541-A:35. Omni argued that the Commission's conclusion that it "would be more equitable to allocate rate case expenses based on a uniform percentage bill increase is not based on any facts." Motion at 7. Omni further argued that, contrary to precedent, both Staff and the Commission "jumped to the conclusion" that Omni should pay a greater share of rate case expenses. *Id.*

4. Commission Violated Omni's Right to Due Process

Omni argued that the Commission adopted a new policy on the allocation of rate case expenses, an issue of first impression, without the benefit of notice or hearing. Omni contended that Staff "exceeded the boundaries of the audit function" by proposing a usage-based surcharge in its August 15, 2019, recommendation. Motion at 8. Omni argued that Staff should have filed testimony to support its recommendation and should have been made available for cross-examination. Omni also stated that the Commission did not provide Omni the opportunity to weigh in on the "new policy," and as such, violated its due process pursuant to RSA 541-A:31, IV (affords all parties to respond and present evidence and argument on all issues involved) and RSA 541-A:33, IV (affords parties the right to conduct cross-examination). *Id.*

B. Abenaki

Abenaki argued that Omni's Motion should be denied as "its arguments are without merit or it merely restates prior arguments and relief requested and asks for a different outcome." Abenaki Water Company, Inc., Objection to Omni Mount Washington Hotel, LLC's Motion for Rehearing, November 5, 2019, (Abenaki Objection) at 1. Abenaki did not address Omni's arguments related to the allocation of rate case expenses specifically, stating that it did "not view

the dispute on which mechanism to use to recover its rate case expenses to be its fight" and that the change in the recovery methodology is a "rate design proposed by Staff, not Abenaki." *Id.*

Abenaki addressed Omni's response regarding the outstanding rate case expenses related to New England Service Company and argued that "Omni never requested leave to file a reply and should not be permitted a second bite at the apple." *Id.* at 2. Abenaki further argued for approval of the outstanding rate case expenses. Abenaki urged the Commission not to act on Omni's comments related to Order No. 26,300, as the comments do not detail why Order No. 26,295 is unlawful or unreasonable, pursuant to RSA 541:3, offer no procedural structure, and are not ripe for Commission action.

C. OCA

The OCA, joined by intervenors Bretton Woods Property Owners Association and Forest Cottages Association, argued that Omni's Motion should be denied because it "uncovers nothing that is 'unlawful' or 'unreasonable' within the meaning of RSA 541:3." Office of the Consumer Advocate, Opposition to Motion for Rehearing, November 5, 2019, at 2.

The OCA first argued that Omni's claim regarding fixed and variable costs was meritless. The OCA stated that there is "no such authority" that rate case expenses should be treated as a fixed cost for the purposes of rate recovery. *Id.* at 3. The OCA further argued that Omni's theory, if applied, might justify increasing Omni's portion of rate case expenses "given the tenacity and persistence with which [Omni] had asserted its interests in the proceeding." *Id.* at 4. The OCA also contended that the Commission's allocation of the rate case expenses aligned with the "fairness principles that are the basis of the Commission's decision" as Omni is the water system's largest customer, and the only one with a future need for an increased water supply. *Id.*

The OCA also argued that Omni's claim that the Commission failed to adhere to precedent was "devoid of merit." *Id.* at 5. The OCA contended that New Hampshire law does

not require strict adherence to precedent and argued that the Commission may depart from precedent as long as the order satisfies due process and is legally correct. *Id.* at 6.

The OCA argued that Omni's citations regarding adherence to precedent were inapplicable. The OCA contended that Omni failed "to cite any actual precedents from which the Commission actually departed." *Id.* at 7. The OCA stated that Omni's claim merely asks the Commission to only follow precedent which benefits Omni, despite precedent cited by Staff in support of its usage-based recovery method of rate case expenses in its recommendation.

According to the OCA, the Commission fulfilled the requirements of RSA 541-A:35, by providing sufficiently detailed findings of fact and conclusions of law in its order. The OCA argued that the findings and conclusions contained in the Order specifically detailed the just and reasonable rate standard under RSA 378:7 and the facts that were outcome determinative, specifically the "proportionality of recoverable rate case expenses in relation to the overall bill increase approved in the rate case." *Id.* at 8.

D. Staff

Staff argued that Omni failed to meet the standard for rehearing as it failed to "state a good reason for such relief." Commission Staff, Objection to Motion for Rehearing, November 7, 2019, (Staff Objection) at 3. Staff addressed each claim put forth by Omni.

Staff first argued that Omni's claim the Commission overlooked or mistakenly conceived basic principles of ratemaking failed because Omni did not provide any authority that supported its fixed rate theory of rate case expenses. *Id.* at 4. Staff further argued that Omni conflated Staff's usage-based surcharge recommendation with the percentage-increase method applied in Order No. 26,295. Staff noted that Omni's arguments against a usage-based surcharge were not appropriate as the percentage-increase surcharge method was starkly different, and any argument against the usage-based method fails as inapplicable. Staff further argued that the lack of facts

regarding Omni's ability to pay fails because ability to pay is not a consideration in the determination of just and reasonable rates, and such factual findings are not required. Staff argued that the Commission, in its power to set just and reasonable rates pursuant to RSA 378:7, may allocate rate case expenses as it sees fit, as long as the result is just and reasonable. Staff Objection at 7.

Staff further argued that the Commission did not overlook precedent, because precedent exists for allocating rate case expenses using methods other than a meter-based allocation. In *Abenaki Water Company, Inc.*, Order No. 25,945 (September 26, 2016), the Commission allocated rate case expenses among three different customer classes, using an average originally derived by that customer classes' water revenues. Staff listed several other orders that utilized a usage-based allocation of rate case expenses. *Id.* at 10. Staff further contended that Omni admitted that usage-based precedent existed when it argued that such precedent was "inapt." *Id.*

Staff believed that the Commission provided sufficiently detailed findings of fact and conclusions of law, satisfying RSA 541-A:35. Staff distinguished the precedent cited by Omni as inapplicable, and instead, provided authority that detailed and specific findings "are not mandated." *Id.* at 12, citing *Legislative Utility Consumers' Council v. Granite State Elec. Co.*, 119 N.H. 359, 363 (1979). Staff noted the basis for the Commission's determinations and its conclusions. Staff also argued that the Order contained all of the requirements of RSA 363:17-b (an order shall include the identity of the parties, position of each party on each issue, a decision on each issue including its reasoning).

According to Staff, the Commission did not violate Omni's due process rights. Staff stated that Omni failed to provide any authority supporting its due process claim, and that it failed to mention the number of opportunities afforded to Omni to present their objections. Staff noted that a "primary consideration of due process is fundamental fairness." *Central Water*

Company, Inc., Order No. 23,386 at 7 (January 7, 2000). Staff argued that Omni could not claim the Commission was unfair as it left the record open for them to respond to Staff's recommendation. Staff Objection at 14. Staff stated that Omni never requested a hearing at any time before Order No. 26,295 was issued. Staff pointed out that Omni received notice that a departure from a meter-based allocation of rate case expenses was possible as a departure was recommended by Staff. Staff argued that Omni was put on notice and had ample opportunity to respond.

Staff argued that the Commission should not grant rehearing on the basis of Omni's alternative allocation proposal within its rehearing motion. Staff contended that proposal could have been offered well before issuance of Order No. 26,295, thus not qualifying as "new evidence that could not have been presented in the underlying proceeding." Staff Objection at 16, citing *O'Loughlin v. N.H. Personnel Comm'n*, 117 N.H. 999, 1004 (1977).

Staff also argued that Omni's additional comments regarding Order No. 26,300 and response regarding the remaining rate case expenses are outside the scope of Order No. 26,295 and are not grounds for rehearing.

III. COMMISSION ANALYSIS

Pursuant to RSA 541:3, the Commission may grant rehearing or reconsideration when a party states good reason for such relief. Good reason may be shown by identifying new evidence that could not have been presented in the underlying proceeding, *O'Loughlin v. N.H. Personnel Comm'n* 117 N.H. 999, 1004 (1977), or by identifying specific matters that were "overlooked or mistakenly conceived" by the Commission, *Dumais v. State*, 118 N.H. 309, 311 (1978). A successful motion for rehearing does not merely reassert prior arguments and request a different outcome. *Aquarion Water Company of New Hampshire, Inc.*, Order No. 26,102 at 3 (February 9, 2018).

Omni contended that the Commission overlooked and mistakenly conceived certain matters, rendering its decision in Order No. 26,295 unlawful and unreasonable. Omni advanced its argument on four grounds. We disagree with each, and rule that Omni has not reached the threshold to grant rehearing.

1. Classification of Rate Case Expenses: Fixed vs. Variable Costs

Omni argued that the Commission failed "to recognize basic principles of ratemaking" by allocating rate case expenses to the three customer classes to result in a uniform percentage increase on the customer classes' average bill. Omni based that argument on its theory that rate case expenses are classified as fixed costs, and should not be allocated as variable costs. We disagree, noting that Omni provided no authority or evidence to support its theory. The Commission did not overlook or misconceive that basic ratemaking principle, as it does not exist.

The Commission, furthermore, has the authority to allocate the rate case expenses as it ruled in Order No. 26,295. Under RSA 365:38-a, the Commission may allow the recovery of costs associated with utility proceedings before the Commission, provided that recovery of costs for utilities and other parties shall be just and reasonable and in the public interest. Historically, the Commission has treated prudently-incurred rate case expenses as a legitimate cost of business and thus appropriate for recovery through rates. *Pennichuck East Utility, Inc.*, Order No. 26,222 at 5 (February 26, 2019). The Commission, furthermore, evaluates the request for recovery of rate case expenses "according to the same 'just and reasonable' standard that applies to all rates charged by public utilities pursuant to RSA 378:7." *Kearsarge Telephone Company*, Order No. 24,372 at 4 (September 17, 2004).

The Commission "has broad statutory authority to set rates in addition to powers inherent within its broad grant of express authority." *Northern Utilities, Inc.*, Order No. 26,186 at 7 (October 31, 2018). Neither state statute nor New Hampshire Supreme Court precedent "require

that the Commission use a particular formula or a combination of formulas in performing its statutory duty of determining whether rates are just and reasonable among themselves as well as in total." *Granite State Alarm, Inc. v. New England Tel. & Tel., Co.*, 111 N.H. 235, 238 (1971). "In arriving at its conclusions, the Commission, in addition to the testimony presented at the public hearing, could rely also on the exhibits introduced, the records and reports required to be filed with it by the company, and on the Commission's own expertise as well as that of its staff." *Id.* As such, the Commission did not misconceive or overlook a fundamental principle of ratemaking as it exercised its authority in making such a determination.

Omni also argued that the Commission should have considered the "most equitable" result for the allocation of rate case expenses. We disagree. "A just and reasonable rate is one that, after consideration of the relevant competing interests, falls within the zone of reasonableness between confiscation of utility property or investment interests and ratepayer exploitation." *See re Campaign for Ratepayer Rights*, 145 N.H. 671, 676 (2001). The Commission has found that the zone of reasonableness consists of not a single rate, but a broad range of rates. *New England Telephone and Telegraph Company*, Order No. 20,149, 76 NH PUC 393, 405 (1991). In fact the Commission has determined that the applicability of a broad range of rates is logical because:

> the Constitution mandates not a particular answer but, rather, a rate that falls within a zone of reasonableness, a level of flexibility that resonates with a standard of appellate review that will leave Commission orders intact unless there is an error of law or the utility demonstrates by a clear preponderance of the evidence that the decision was unjust or unreasonable or reflects an abuse of [the Commission's] discretion.

Public Service Company of New Hampshire, Order No. 24,552 at 18-19 (December 2, 2005) (quotations and citations omitted). As such, the Commission is not required to find the single, most equitable rate, but a just rate within the zone of reasonableness, pursuant to RSA 378:7.

Omni, furthermore, contended that implicit in the Commission's determination that the resulting rate was more equitable "is the [unsupported and] unstated premise that Omni can better afford to pay the rate case expenses." Motion at 4. We again disagree. While we are mindful that the rates may not be so high as to produce ratepayer exploitation, ability to pay is not a consideration of ratemaking principles employed by the Commission, including the instant allocation of rate case expenses. Therefore, a rehearing is not required as the Commission did not overlook or mistakenly conceive Omni's theory of basic ratemaking principles.

2. Precedent

Omni contended that the Commission ignored its own precedent with respect to the allocation of rate case expenses. While not explicitly stated in Omni's argument, we assume that Omni refers to the meter-based approach as the "precedent for the collection of rate case expenses," referring to the "traditional meter-based approach for water companies." Motion at 5. Omni further argued that the Commission did not provide an explanation for this departure. We disagree.

First, Omni offers no authority that the Commission is strictly bound by its own precedent. Second, and more importantly, precedent exists for the Commission to deviate from meter-based allocation of rate case expenses for both water and non-water utilities. The Commission previously approved a rate case expense allocation different from the "traditional meter-based approach for water companies" in *Abenaki Water Company, Inc.*, Order No. 25,945 (September 26, 2016). Furthermore, the Commission has previously approved numerous usage-based surcharges for rate case expenses across gas, electric, and steam utilities. *See Unitil Energy Systems, Inc.*, Order No. 26,007 at 8 (April 20, 2017) (rate case expenses are to be recovered by a "uniform rate per [kilowatt hour]"); *Liberty Utilities (EnergyNorth Natural Gas) Corp. d/b/a Liberty Utilities*, Order No. 26,122 at 52 (April 27, 2018) ("We will provide for recovery of just

and reasonable rate case expenses through the [local delivery adjustment charge]"); and *Concord Steam Corporation*, Order No. 25,100 at 7 (May 6, 2010) (order approving recovery of rate case expenses "through a $0.06 per [1,000 pounds of steam] surcharge"). Accordingly, Omni's lack of precedent argument fails to meet the standard for requiring rehearing.

3. Sufficiency of Findings of Fact and Rulings of Law – RSA 541-A:35

Omni also argues that a rehearing is required as Order No. 26,295 did not contain sufficient detailed findings of fact and rulings of law, as required by RSA 541-A:35. Order No. 26,295, however, contains sufficient findings of fact and rulings of law to permit judicial review. The Commission noted in the Order "the parties involved recommended different methods to implement the surcharge." Order No. 26,295 at 7. The Commission went on to conclude that the surcharge parameters were just and reasonable, which is a conclusion of law pursuant to RSA 378:7. *Id.* Furthermore, the Commission, after dividing the customer base into three separate classes, stated:

> [t]he rate case expense component shall be based on a uniform percentage increase on existing customer bills, of approximately 15 percent for each customer type, when calculated over an 18-month recoupment period for all customer types. That method is more equitable because the increase in all customer bills will proportionately be the same relative to rate case expenses.

Id. at 7-8. The Commission's determination contained findings of fact related to a uniform increase in each customer classes' bills, and ruled that the uniform percentage increase was just and reasonable, pursuant to RSA 378:7. Accordingly, Omni's argument fails.

Although neither rehearing nor reconsideration is necessitated by Omni's Motion, we will clarify our decision regarding the rate case expense allocation. With the 18-month historical consumption information provided, the Commission found that Staff's classification of the three customer groups was appropriate. Order No. 26,295 at 7 (*see* Commission Staff

Recommendation, August 15, 2019, at 10 (verifying that Omni consumes 82 percent of the water in the Rosebrook System)). The Commission, drawing partly upon Staff's recommendation, noted the apparent and disparate bill impacts of a meter-based allocation and Staff's proposed usage-based recommendation. Commission Staff Recommendation, August 15, 2019, at 3. Pursuant to RSA 378:7, the Commission concluded that a uniform percentage increase among the three customer classes produced just and reasonable rates. In doing so, the Commission calculated a 15 percent increase to produce that uniform increase, a result different than both Abenaki's and Staff's proposal. The Commission acted pursuant to its authority. *See Granite State Alarm, Inc., v. New England Tel. & Tel.*, 111 N.H. 235, 238 (1971) ("[i]n arriving at its conclusions, the Commission ... could rely also on ... [its] own expertise as well as that of its staff").

Accordingly, Order No. 26,295 meets the requirements of RSA 541-A:35. Thus, Omni's argument fails to provide good reason for a rehearing.

4. Due Process

We reject Omni's argument that Order No. 26,295 is unlawful because it adopted a new rate case expense allocation without benefit of notice or a hearing, thus violating Omni's due process rights. Omni contended that the Commission should have allowed Omni to respond and submit Staff to cross-examination. Omni argued that those violations require rehearing. "A primary consideration of due process is fundamental fairness." *Central Water Company, Inc.*, Order No. 23,386 at 7 (January 7, 2000). "Due process requires notice reasonably calculated, under all circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Id.*

Omni cannot claim a lack of fairness, notice, or an opportunity to respond. First, Omni had not only constructive but actual notice that the Commission would consider an allocation

method other than the "traditional meter based approach" when Staff filed its August 15, 2019, recommendation which included the usage-based method. Second, the Commission granted Omni extended time to respond to Staff's recommendation. Secretarial Letter, September 3, 2019. Third, Omni did not request a hearing after Staff's recommendation was filed, nor request Staff to file testimony, in any of Omni's three filings (August 22, September 9, and September 23, 2019), all submitted before the Commission issued Order No. 26,295 on October 1, 2019. Fourth, Omni did in fact respond, and argued that the meter-based allocation approach should be employed for Omni. Omni Mount Washington Hotel, LLC, Response to Staff Recommendation, September 9, 2019, at 2.

Accordingly, we find that the process provided does not rise to the level of a due process violation.

IV. CONCLUSION

None of the four claims presented by Omni in its request for rehearing meet the legal standard of good reason to grant that relief. Thus, we deny rehearing on that basis. Furthermore, we will not grant rehearing based on Omni's alternative allocation proposal contained in its Motion, as it certainly could have been brought up in the underlying proceeding. *See O'Loughlin*, 117 N.H. 1004 ("[g]ood reason [for rehearing] may be shown by identifying new evidence that could not have been presented in the underlying proceeding").

Lastly, we will not address Omni's response regarding outstanding rate case expenses nor its comments on Order No. 26,300, as both of those issues are outside the scope of the analysis for rehearing.

For the foregoing reasons, we deny Omni's Motion for Rehearing.

Based upon the foregoing, it is hereby

ORDERED, that the Motion for Rehearing by Omni Mount Washington Hotel, LLC is hereby DENIED.

By order of the Public Utilities Commission of New Hampshire this twenty-seventh day of November, 2019.

Kathryn M. Bailey
Commissioner

Michael S. Giaimo
Commissioner

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