

**STATE OF NEW HAMPSHIRE
PUBLIC UTILITIES COMMISSION**

DW 19-131

OMNI MOUNT WASHINGTON HOTEL, LLC

Complaint Against Abenaki Water Company, Inc.

Order Addressing Complaint

ORDER NO. 26,493

June 30, 2021

APPEARANCES: McLane Middleton, by Thomas B. Getz, Esq., on behalf of Omni Mount Washington, LLC; NH Brown Law, by Marcia Brown, Esq., on behalf of Abenaki Water Company, Inc.; Paul Mueller, on behalf of the Bretton Woods Property Owners Association; and Christopher R. Tuomala, Esq., on behalf of Commission Staff.

In this order, the Commission finds that Abenaki Water Company, Inc., is the owner of an 8-inch main that failed on April 21, 2019, and is responsible for the cost of repairing the damage and restoring service to Omni Mount Washington, LLC's premises. Consequently, this order directs Abenaki Water Company, Inc. to compensate Omni Mount Washington, LLC, for the costs incurred to repair the main. Abenaki Water Company, Inc.'s request for confidential treatment will be addressed in a separate order.

I. PROCEDURAL HISTORY

On July 24, 2019, Omni Mount Washington, LLC (Omni) filed a complaint (Complaint) against Abenaki Water Company, Inc. (Abenaki or the Company), a regulated water utility as defined by RSA 362:2 and RSA 362:4. Abenaki operates the franchise that includes the Mount Washington Hotel (Hotel) owned by Omni. The complaint requested that the Commission find Abenaki responsible for the cost to repair an 8-inch water pipe that failed on April 19, 2019.

The Office of the Consumer Advocate (OCA) filed a letter of participation on July 25, 2019. The next day, the Commission issued a secretarial letter requiring Abenaki to file a written response. Abenaki filed its response on August 16. Omni filed a reply on August 28.

On October 1, 2019, Abenaki filed a Motion for Protective Order *Nunc Pro Tunc* and Confidential Treatment of facility plans pertaining to information attached to Omni's complaint. The Company supplemented its motion on March 24 and June 16, 2021. Those requests will be addressed in a separate order.

The Commission issued an Order of Notice on December 12, 2019, scheduling a prehearing conference for January 6, 2020. Omni, Abenaki, Commission Staff (Staff), and the Bretton Woods Property Owners Association (BWPOA) appeared at the prehearing conference. In lieu of its appearance, the OCA filed commentary on the possible procedural course of the complaint investigation.

The BWPOA filed a Petition for Intervention on January 16, 2020. Despite partial objection by Abenaki, the Commission granted BWPOA's intervention on January 24.

The Company filed a supplemental reply to Omni's complaint on January 24, 2020, which supersedes "Abenaki's earlier reply." Abenaki Water Company, Inc., Supplemental Reply to Omni Mount Washington, LLC Complaint at 1.

Omni and Abenaki filed memoranda of law on July 14, 2020, and reply memoranda on July 28. BWPOA also filed a reply memorandum of law on July 28. The Commission clarified the scope of the merits hearing by Secretarial Letter dated July 31, to include arguments from the parties regarding tariff interpretation and burden of proof issues. The letter also required Abenaki to file its Continuing Property Records (CPR), which the Company did on August 4.

The OCA filed a letter on August 4, stating that it would not be available to participate in the hearing and providing the OCA's legal analysis. The Commission held a merits hearing on September 28 and October 22, 2020. Staff filed a response to a record request on October 30, which Omni commented on, on November 2. Abenaki filed a response and objection to Omni's reply on November 9. Omni responded with its objection to Abenaki's response on November 16.

Omni's complaint 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 <https://www.puc.state.nh.us/Regulatory/Docketbk/2019/19-131.html>.

II. POSITIONS OF THE PARTIES AND STAFF

A. Omni

Omni filed the Complaint due to the failure on Sunday, April 21, 2019, of an 8-inch water pipe located on Hotel property. Complaint at 1. According to Omni, the 8-inch pipe runs approximately 1,600 feet from Base Road to the Hotel, where it terminates at an exterior shut-off valve. *Id.*¹ Omni stated that an additional 2,200-foot smaller diameter pipe branches off the 8-inch pipe and extends behind the hotel. *Id.*

As described in the complaint, members of Omni's engineering staff discovered the leak around 6:30 a.m. Complaint at 1-2. According to Omni, a representative of Abenaki arrived at the scene two hours later and informed Omni that the Company would not be able to repair the leaking pipe until Tuesday, April 23. *Id.* at 2.

Omni stated that after a conference call with Abenaki and Omni personnel, along with Jeremy Olson, the Twin Mountain Fire Chief, AB Excavating, Inc., (AB) was dispatched to the

¹ The terms "shut off valve" and "curb stop" are used interchangeably in this order.

site, with Abenaki's agreement, around 10:45. Complaint at 2. According to Omni, AB completed the repair by 12:30 p.m. the following day. *Id.*

The Complaint detailed that AB submitted a bill for \$22,848.74 to Abenaki on May 1, and that Abenaki declined to pay based on an assertion that the repaired pipe was a service line and therefore Omni's responsibility pursuant to tariff changes made in Docket No. DW 16-448. *Id.* at 2-3.² Omni argued that Abenaki's reasoning to deny payment based on the tariff language fails. *Id.* Omni based its argument on multiple grounds: (1) Abenaki's purchase of the water system included deeds and easements pertaining to the responsibility of pipe maintenance, which includes the failed pipe; (2) the shut-off valve is located immediately outside the Hotel, not at Base Road as claimed by Abenaki; thus, per the tariff language, Abenaki is responsible for the 8-inch pipe; (3) the revised tariff language can only be applied to new customers, not existing customers such as Omni; (4) it is contrary to the historic conduct of the Company which implies ownership of the 8-inch pipe; and (5) if ownership by Abenaki ends at the property line, a vast network of other pipes lie on Omni property, including a 16-inch main and water tank, which would also result in Omni's ownership. *Id.* at 3-6.

At the January 6, 2020, prehearing conference, Omni presented an "as-built" drawing which detailed what it stated was the location of the break, the location of Base Road, and the

² See, Docket No. DW 16-448 at <https://www.puc.nh.gov/Regulatory/Docketbk/2016/16-448.html> (approving Abenaki's acquisition of the system and certain tariff amendments). Order No. 25,934 (August 9, 2016), which approved the tariff amendments, authorized the following change in the Company's Terms and Conditions: from

"1. Service Pipe, a. Location (3) Commercial Building: All service pipe up to and including the premises' exterior shut-off valve shall be owned and maintained by the Company. From the exterior shut off valve to the premises served, the service pipe shall be installed, owned and maintained by the customer(s)" *to*

"1. Service Pipe, a. Location (3) Commercial Building: All service pipes from the main to the property line or common area including the premises' exterior shut-off valve shall be owned and maintained by the Company. From the property line or common area to the premises served, the service pipe shall be installed, owned and maintained by the customer(s)"

shut-off valve to the Hotel, located just outside of the Hotel building. Hearing Transcript of January 6, 2020 (Tr. 1/6/20) at 5-8. Omni also noted that despite its belief that Abenaki is the responsible party, it paid AB in August 2019. *Id.* at 8. Omni stated that the valves shown on the “as-built” drawing near Base Road were not shut-off valves, as argued by Abenaki, but instead isolation valves to address issues in the water mains. *Id.* at 8-9.

Omni also stated that Abenaki’s argument that the tariff assigns ownership of the pipe to Omni “leads to an absurd result” and fails. *Id.* at 9-10.³ Omni argued that the tariff could only be applied prospectively, which would exempt Omni, as the main was installed prior to the tariff amendment. *Id.* at 10-11. Omni further argued that, even if the Commission were to find that the tariff did transfer ownership and maintenance responsibilities of the 8-inch pipe from Abenaki to Omni, the Commission would be exceeding its authority to take “property rights and obligations away from Abenaki and impose them on Omni and other customers.” Omni cited the Commission’s statutory powers to transfer utility property, RSA Chapter 371 and RSA 374:30, which is not at issue in the complaint. *Id.* at 12.

In its July 14, 2020, memorandum of law, Omni summarized its understanding of Abenaki’s position and acknowledged the unique and complicated history and relationship of the predecessors to the water system and the Hotel. *Id.* at 5. Omni argued, however, that because the Commission had determined in its Order of Notice that there are reasonable grounds for Omni’s complaint, pursuant to RSA 365:4, the burden of proof now lies with the Company, citing *Complaint of Ann and Tim Guillemette*, Order No. 24,070 (October 24, 2002). *Id.* at 6.

³ Omni originally believed that Abenaki did not dispute ownership, but its understanding changed after the Company’s presentation at the January 6, 2020, prehearing conference. Omni since stated that there was a “fundamental disagreement about who even owns the pipes” which, in its opinion, was addressed in the transfer of ownership to Abenaki. Tr. 1/6/20 at 52-53.

Omni again argued that the tariff modification from Docket No. DW 16-448 did not alter the ownership or maintenance responsibilities of the 8-inch pipe. *Id.* 7-8. Omni cited to the July 28, 2016, transcript in that docket. *Id.* at 8. Omni noted an exchange between Commissioner Bailey and Abenaki witness Don Vaughan, in which Mr. Vaughan stated that the Company would like to move the curb stops to the property line “when we have an opportunity” to do so. *Id.* (citing Transcript of July 28, 2016 (Docket No. DW 16-448) at 36). Omni further argued that the tariff changes can only be applied prospectively, not retroactively, citing *Appeal of Pennichuck*, 120 NH 562 (1980), which held that rates cannot be applied retroactively. *Id.* at 9. Omni stated that given the shut-off valve is immediately outside the hotel, a change of ownership to the property line would create a “new obligation in respect to a past transaction.” *Id.* at 10 (citing *Appeal of Pennichuck*).

Omni also argued that the plain language of the tariff, which is in the future tense, cannot be applied retroactively. *Id.* 10. Omni went on to state that prior tariff changes in the CIAC docket (Docket No. DW 11-117) did not address the ownership of the 8-inch pipe, nor does New Hampshire Code of Administrative Rule, Puc 606.04, which requires that curb stops be placed at the property line except in unusual situations. *Id.* at 11. Omni, lastly, argued that the plant list submitted by Abenaki to Staff in discovery clearly indicated that there was a main extension to the Hotel in 1985, including an approximate 1600 feet of 8-inch main, running to the Hotel. *Id.* That plant list, Omni argued, shows that Abenaki is the owner of the 8-inch pipe, despite Abenaki’s argument that the Company’s records are in too much disarray to validate its ownership. *Id.* at 11-12.

In its reply brief, filed on July 28, 2020, Omni challenged Abenaki’s arguments in its brief, as detailed below. Omni Mount Washington, LLC, Reply Memorandum (July 28, 2020)

at 1. Omni made five arguments: (1) the plant list submitted by Abenaki in discovery was accurate; (2) the doctrine of *res judicata* did not prohibit Omni's complaint, as the issue of responsibility for repair of the pipe had not been previously decided in Docket No. DW 11-117; (3) a tariff change cannot retroactively change customer responsibilities, and as currently written, the tariff assigns responsibility to Abenaki; (4) the easements listed in the purchase asset agreement for Abenaki acquisition of the water system could determine the property rights of the parties; and (5) the tariff is unclear as to the ownership of plant with shut-off valves located in common areas, which would be considered Company property. *Id.* 1-5.

At hearing, Omni reiterated some of its prior arguments in its opening statement. Omni also stated that, according to Commission records, the 8-inch pipe is Abenaki property. Hearing Transcript of September 28, 2020, Morning Session (Tr. 9/28/20 AM) at 20. Omni did not, however, rely on previously submitted deeds and easements to support its claim. Hearing Transcript of October 22, 2020, Afternoon Session (Tr. 10/22/20 PM) at 57-58. Omni also presented testimony of Douglas Brogan, an engineering consultant. Mr. Brogan testified that the exterior shut off valve owned by Abenaki is not located at Base Road but instead located 10 feet away from the Hotel, and that Commission records support the claim that Abenaki owns the 8-inch pipe. Hearing Transcript of September 28, 2020, Afternoon Session (Tr. 9/28/20 PM) at 126. Mr. Brogan further stated that he based this conclusion on review of the records in the instant proceeding, previous dockets, a review of the discovery, and site visits to the Abenaki system. *Id.*

Mr. Brogan first referred to the map introduced as Exhibit 23, described in the map itself as the as-built utility plant as it existed in 1988. *Id.* at 126-127. According to Mr. Brogan, Exhibit 23 is a "representation of water lines that the water company owned in 1988" and

divided at Route 302; “east of 302” being the Hotel property and “west of 302” being the ski resort area. *Id.* at 127. Omni’s witness further described the exhibit as a map that was entered into Abenaki’s predecessor’s rate case “as a representation of the water system.” Tr. 10/22/20 AM at 49.

Mr. Brogan noted the original system dated back to the early 1970s, initially serving “west of 302,” but extended across Route 302 with the addition of a 16-inch main. Tr. 9/28/20 PM at 128. Mr. Brogan further described that the 16-inch main was further extended to the Hotel in 1985. *Id.*

Mr. Brogan next explained that the Hotel was on its own water supply until “significant problems” emerged in the 1980s with the Hotel’s surface water system. *Id.* at 130-131.

Mr. Brogan referenced reports included in Exhibit 22, which detailed the inadequate protection of the chemical treatment for the Hotel’s surface water system, and recommended connection to the new water system, later to become Abenaki. *Id.* at 131.⁴ Specifically, Mr. Brogan noted that a June 5, 1985, Sanitary Survey Report, at page 25, included a subject line referencing both a community water system (Rosebrook, or Abenaki’s predecessor) and non-community water system (the Hotel’s surface water system). *Id.* at 132-133. Mr. Brogan concluded that, based on a 1988 document, located on page 4 of Exhibit 22, and the map, Exhibit 23, construction of the 8-inch pipe to the Hotel was completed sometime between June 1985 and the preparation of the 1988 map. *Id.* at 131-136.

Mr. Brogan then referred to a 1995 as-built map for the water system, a portion of which is included in Exhibit 17. *Id.* at 138. Mr. Brogan pointed out the extension of the 16-inch main, and the 8-inch main to the Hotel. *Id.* He noted that the map also shows the 6-inch pipe

⁴ Mr. Brogan testified that reports cited were part of discovery in the utility’s 1989 rate case in Docket No. DR 89-031. Tr. 9/28/20 PM at 132.

connected at Base Road going to the Bretton Arms Inn and the water infrastructure inside the newer Fairway Village development. *Id.* at 138-141. From his observations, Mr. Brogan concluded that by 1995, the 16-inch diameter main, the backbone of the water system, extended to Mount Washington Place, which is the beginning of the 8-inch main to the hotel, and that the 16-inch main itself extends through Fairway Village onto Omni property, where it ends. *Id.* at 141.

Mr. Brogan connected the extensions shown on Exhibit 23 to entries in Abenaki's plant list, Exhibit 2, pages 3 and 4. *Id.* at 142. Mr. Brogan stated that the initial entry, 1973, is when the water system and the 16-inch main was constructed, and then noted the 1985 entry which referenced an 8-inch main to the Hotel and a 6-inch main to the Bretton Arms. *Id.* at 142-143. Mr. Brogan further noted the 1989 entry for the 16-inch main extension into Fairway Village. *Id.* at 143. Mr. Brogan also noted that each entry contained specific lengths of the described pipe. *Id.* Mr. Brogan, further noted that the plant list included an entry for Stickney Circle in 1994, and the 8-inch main extension to the Nordic Center in 2001. *Id.* Mr. Brogan stated that the entries in the Company's plant list reflect actual infrastructure installed throughout the years, despite some minor length inaccuracies. *Id.* 145-146.

Mr. Brogan detailed certain entries in the property list, noting some included associated dollar amounts, and some did not. Tr. 10/22/20 AM at 29-31. Mr. Brogan noted he believes that Abenaki would accept responsibility for those entries on the plant list with associated costs, including Drummond's Ski Shop and Rosebrook Townhomes, which, while not on Omni property, are served by a water main located on Omni property. *Id.* at 31-32. Mr. Brogan further detailed additional entries in the plant list in Exhibit 2, and commented that Abenaki would likely not deny "responsibility for a single one of the mains shown on [the plant list or

discussed]...yet, every one of them is listed on the [plant list], many without an associated cost.” *Id.* at 35. Mr. Brogan also stated that it would make little sense to apply water industry convention “to this unique resort development that is such a hybrid compared to a conventional municipal development.” *Id.*

Referring to Exhibit 18, an aerial map with superimposed depictions of the Hotel, Bretton Arms, Nordic Center, and Fairway Village mains, Mr. Brogan focused on the 16-inch main connecting Fairway Village. Tr. 9/28/20 PM at 149. Mr. Brogan said that the 16-inch main is larger than necessary to serve Fairway Village, and that 160 feet of it extends onto Omni property, where it ends. Mr. Brogan surmised that there “was no valid reason” for the 16-inch pipe, if “it was only intended to have served Fairway Village.” *Id.* Mr. Brogan further concluded that it was clear that the water utility contemplated future looping at the time the Fairway Village main was constructed, which would provide benefits with Hotel fire flows, water quality, and service reliability in the event of another pipe break. *Id.* at 150-151.

Mr. Brogan also addressed Exhibit 16, which consists of attachments to Omni’s original complaint, and included a detailed map of the 8-inch and 6-inch pipe, including two valves located on the pipes near Base Road, the valve located right outside the Hotel, and a valve on the pipe that extends behind the Hotel. *Id.* at 153. Mr. Brogan stated that he considered the two valves located near Base Road, which to Omni’s understanding Abenaki argues are the curb-stop or shut-off valves to the Hotel, are instead “isolation valves” for the 6-inch and 8-inch mains. *Id.* at 155-156. Mr. Brogan further stated that the fact the Company had kept the two valves clear of snow in the winter did not imply that they were considered curb-stops, not isolation valves. Tr. 10/22/20 AM at 12.

Mr. Brogan detailed the photos representing his walkthrough of the area, taken by Mr. Brogan, including different buildings, both “east of 302” and “west of 302” which were submitted as Exhibits 26 and 27. *Id.* at 13, 18, 22. Mr. Brogan stated that the photos detail that the shut off valve is 10 feet from the outside of the Hotel, depicted as painted blue. *Id.* at 14-15. Mr. Brogan stated that other shut-off valves were located near the exterior of other buildings in that area. *Id.* at 14, 22. Mr. Brogan also reviewed Exhibit 18, which included a map of the water system “west of 302.” *Id.* at 19. Mr. Brogan noted that, although the service lines on that map were not visible, each building on the map had its own separate service line and exterior shut-off valve, including a valve on the inside of the building to allow for a customer’s independent ability to shut off water service from the inside. *Id.* at 21.

Mr. Brogan further stated that the entire “16-inch backbone of the system is on Omni property.” *Id.* Mr. Brogan additionally surmised that he did not think “Abenaki would deny responsibility for any of the mains or individual building service lines up to and including the exterior shut-off valve in this portion of the system...and almost all of the [property] lie within Omni property.” *Id.* at 27.

Mr. Brogan also said that there was “no such thing as a curb stop at the property line” on that side of Route 302, and no need for a “personal shut-off [valve]” outside a building because there is a shut-off valve inside the building. *Id.* Mr. Brogan went on to state that the “purpose of an exterior shut-off is for the Company, not the customer, but for the Company to be able to...shut off water” in case of leakage or non-payment of bills. *Id.* at 27-28.

Omni’s expert also stated that, after conducting his walkthrough of the area, there is support that the valve to the 8-inch main near Base Road, a state road, is inside the State right-of-way. *Id.* at 40. Mr. Brogan further stated that he did not think there would have been

any reason for the State of New Hampshire to grant a special dispensation to Omni, or its predecessor, a private entity, to own a water main inside a state road right-of-way, or have its curb stop located there. *Id.* at 41.

Mr. Brogan concluded that to consider the valve located near Base Road as a shut-off valve, or curb stop, is problematic for the fact that when utilized, it stops water service to multiple customers, possibly those that are not affected by a leak. *Id.* 41-42. Omni's expert further stated that the maps and the plant list do not include service lines. *Id.* at 42. By that same logic, if the 8-inch pipe starting from the valve near Base Road were indeed a service line, then "almost half of the 4,000 feet of the 8-inch [pipe]" would not have been included in the multiple maps reviewed, nor included in the plant list. *Id.* at 42-43. Mr. Brogan concluded that if the valve on Base Road were the curb stop, or shut-off valve, the Hotel would not have installed an additional valve directly outside its building. *Id.* at 43. Mr. Brogan pointed out the hotel resort development is unique, *id.* at 42, and asserted that there is no such thing as a "curb stop" on the west side of Route 302. *Id.* at 27.

In its November 2, 2020, filing, Omni submitted comments regarding the record request submitted by Staff. The record request included several special contracts between the Hotel and the water company and corresponding Commission Orders of approval. Omni included additional petitions and supporting documentation for two of the special contracts included in the record request, for Docket Nos. DR 95-098 and DR 96-069. Omni argued that the Commission should independently investigate the issues related to its Complaint. Omni Mount Washington, LLC, Response to Staff Record Request Filing (November 2, 2020) at 1. Omni further contended that nothing in the record request or its filing alleviated Abenaki's responsibility for the 8-inch pipe, but instead, citing special contract language, implied Abenaki ownership. *Id.* at

1-2. Omni also requested that the Commission investigate two other matters: (1) investigate the origins of the plant list in Docket No. DW 12-306, and (2) consider an email included in its memorandum of law, the contents of which were discussed in closing. *Id.*, at 2.

On November 16, 2020, Omni filed an objection to Abenaki's response and objection to Omni's November 2 filing. Omni requested that the Commission disregard Abenaki's comments as untimely as they were filed beyond the November 2 deadline set by the Commission at hearing, and without merit as the Commission has wide breadth with its investigations. Omni Mount Washington, LLC, Objection to Late-Filed Comment (November 16, 2020) at 1-2.

B. Abenaki

In Abenaki's supplemental reply (intended to supersede its original reply) the Company argued that the tariff change from Docket No. DW 16-448 dictates that Omni is responsible for the 8-inch pipe repair and, consequently, Abenaki should not be responsible for the costs incurred. Abenaki Water Company, Inc., Supplemental Reply to Complaint of Omni Mount Washington, LLC (January 24, 2020) at 1-2, 9. The Company argued that the tariff indicates that property up to and including the shut-off valve are owned by the utility, and that everything thereafter is owned by the customer. *Id.* at 6. Abenaki further stated that the shut-off valve is located at Base Road, which is well before the point of the break in the pipe, thus not the responsibility of the utility. *Id.*

The Company also argued that agreeing to Omni's request would essentially create a departure from Abenaki's current tariff, pursuant to RSA 378:18, which was not at issue. *Id.* at 7. Abenaki stated that Omni's requested relief was also a request to modify the prior order approving the tariff amendments in Docket No. DW 16-448, which Omni failed to do in a timely manner, or by the requirements of altering an order, pursuant to RSA 365:28. *Id.* at 8.

Noting the convoluted and sometimes blurred relationship between the water utility and Hotel, including multiple management service contracts between the two, Abenaki put forward six arguments in its memorandum of law to rebut Omni's complaint: (1) the plant records submitted in discovery by Abenaki are not reliable, as noted in previous Commission proceedings; (2) tariff revisions, approved in Docket No. DW 11-117, which defined exterior shut-off as the curb stop, determined that Omni is the owner of the 8-inch pipe since the break occurred beyond the curb stop, which Omni is barred from challenging by the doctrine of *res judicata* as its predecessor did not appeal the Commission's decision; (3) the tariff has the force and effect of law, which dictates that infrastructure past the property line is the responsibility of the customer, and as Omni has not requested a special contract to deviate from the tariff, it is Omni's responsibility; (4) the easements provided by Omni do not support the claim that Abenaki is responsible for the 8-inch pipe; (5) a curb stop located within private property violates both Commission and New Hampshire Department of Environmental Services (DES) rules; and (6) Omni's argument that the tariff language impacts property rights for homeowner associations is untrue. Abenaki Water Company, Inc., Memorandum of Law (July 14, 2020).

In its reply memorandum, the Company states that the "litmus test...is whether the exterior shut-off/curb stop is at the property line...and if Abenaki controls it." Abenaki Water Company, Inc., Reply Memorandum (July 28, 2020) at 1. Abenaki continued to argue that the Company does not operate the valves on Omni's property, and thus is not responsible for damage occurring past Base Road. *Id.* The Company also argued, again, that there is no reason to deviate from the current tariff, which is ultimately Omni's request to assign ownership of the 8-inch pipe to Abenaki. *Id.* at 1-2. Abenaki, lastly, called into question the plant list relied on by Omni that lists the 8-inch pipe as possible Company property. *Id.* at 4-5.

At hearing, Abenaki maintained that it was not responsible for the 8-inch pipe, from Base Road to the Hotel. Tr. 9/28/20 PM at 29. Abenaki stated it did not agree to pay for the repair of the 8-inch pipe, nor did it arrange for AB to make the repairs, thus it was not liable for any costs. *Id.* at 95. To support its claims, Abenaki presented four witnesses at hearing, including Ms. Nancy Oleson, a former employee for the service company that operated Abenaki's predecessor water utility, Rosebrook Water Company (Rosebrook), and later associated with Abenaki, from 2007 to 2018. Tr. 9/28/20 AM at 31; Tr. 9/28/20 PM at 12. Ms. Oleson testified that during her tenure, the maps and plans of the water system were updated. *Id.* at 31.

Mr. Vaughan also detailed Exhibit 13, the Company's calculation of Rosebrook's purchase price and continuing property records (CPR), and noted that he did not have any reason to think that the infrastructure located on the Hotel property, including the 8-inch pipe, was included as part of Abenaki's purchase of Rosebrook. *Id.* at 42, 45; Tr. 9/28/20 PM at 70. Mr. Vaughan also stated that, in relying on the tariff language at the time, the Company did not conduct due diligence on the Hotel's resort infrastructure on the belief that it was not acquiring lines on Omni's private property. *Id.* at 36-37.

As to the plant list included in Exhibit 2 which contains the 1985 entry for the Hotel, Mr. Vaughan testified that he did not know when or who created the plant list, speculating that "somebody associated with the Hotel" may have created the record. Tr. 9/28/20 AM at 45-46. Mr. Vaughan further denied the argument that the 8-inch pipe is included as an asset on Abenaki's books, noting that there is no cost associated with the 1985 entry on Exhibit 2. *Id.* at 47, 50. Mr. Vaughan also stated that some of the entries without a cost associated did not make it into the calculation of the purchase price, and furthermore, would not be considered on the Company's books and records, thus not earning a return. *Id.* at 56. Mr. Robert Gallo,

President of Abenaki, later testified that the 1985 entry included on page 3 of Exhibit 2 was incorrect in that it should actually be PVC pipe, not ductile iron. *Id.* at 25, 90.

Mr. Vaughan stated that the Company's CIAC records, included at page 8 of Exhibit 32, do not support Omni's theory that the 8-inch pipe, installed in 1985, was considered CIAC, as there are no entries prior to 1996. *Id.* at 57-58.⁵ Mr. Vaughan testified that a "331" account entry on page 8 of Exhibit 32, for \$1,800, is not related to the 8-inch pipe, based on the total cost and remaining depreciation expense. *Id.* at 63-65. Mr. Gallo testified that the 8-inch pipe could not have been installed for \$1,800. *Id.* at 62. Mr. Steve St. Cyr, consultant for Abenaki, later corrected the record by testifying that the \$1,800 entry for account 331 could not have been installed in 1985, but instead 1995 or 1996, based the amount of accumulated depreciation. Tr. 9/28/20 PM at 4, 6.

Mr. Gallo testified that Abenaki maintains and owns service lines up to and including the curb stops through common areas or common property, as included in the tariff. *Id.* at 66, 68. He stated that there are no common areas or common property located on the Hotel premise. *Id.* at 67. Both Ms. Oleson and Mr. Gallo also testified that the curb stop for the Hotel is located at Base Road, the Hotel's property line, and Mr. Gallo further testified that it is his understanding that is the end of Abenaki's responsibility for ownership and maintenance. *Id.* at 73-75, 76, 101. Ms. Oleson stated that the valves at Base Road were the valves the Company kept clear of snow in the winter, in case of emergency. Tr. 9/28/20 PM at 25. Mr. Gallo stated that when the water utility and Hotel were under common ownership, the Hotel maintained the 8-inch pipe all the way back to the valve located on Base Road. *Id.* 69.

⁵ Mr. Vaughan and Mr. Gallo later retracted their definitive agreement that the 8-inch pipe was installed in 1985, but then later agreed to by Mr. Gallo. Tr. 9/28/20 PM at 38, 56.

Mr. Gallo surmised that the valves located within Hotel property are not curb stops, thus the end of Company responsibility, but isolation or control valves which are not under the Company's control. *Id.* at 80-81. Mr. Gallo further stated that valves outside buildings such as the Hotel are typical of college campuses, which would be used to isolate service to a particular building in case of emergencies. Tr. 9/28/20 PM at 74. Mr. Vaughan further testified that the example is similar to a request by Omni to shut off water service at two exterior valves at the Hotel addition which were considered isolation valves and not a curb stop. *Id.* at 74-75.

When questioned during cross-examination, Mr. Gallo further testified that, hypothetically speaking, if the valves on Base Road were located in the right-of-way, it could still be considered private and not Company property. *Id.* at 40-41, 85. Both Mr. Gallo and Mr. Vaughan reviewed a work order from Abenaki's parent company, New England Service Company, detailing work to locate other valves located on Omni property near the Hotel, included as Exhibit 33. Tr. 9/28/20 AM at 82-83. Mr. Gallo indicated that Omni would be maintaining the interior valves as the valves were located on private property. *Id.* at 84. Mr. Gallo further stated that he would not consider the interior valves associated with the work order to be curb stops. *Id.* at 85. If the Commission considered the interior valves to be curb stops, however, Mr. Gallo opined that the Company would need to trespass on private property in order to reach Abenaki-owned infrastructure. *Id.* at 85. Mr. Vaughan later testified that it appeared that there were Company water mains on other Omni private property. Tr. 9/28/20 PM at 31.

Mr. Gallo indicated that the size of the pipe does not determine whether it is a main (Company property) or a service line (customer property). Tr. 9/28/20 AM at 86-87. He

testified that customers in Abenaki's sister-companies also have large service lines, similar to the 8-inch pipe. *Id.* at 89.

Ms. Oleson, while testifying about her involvement with the tariff revisions in Docket No. DW 11-117, stated that curb stops are usually located at the property line. *Id.* at 98.

Ms. Oleson further testified that the tariff modification was to apply to new water service installations. *Id.* at 100.

Concerning the burden of proof issue, Abenaki agreed that Omni had met its initial burden to go forward with the complaint investigation. Tr. 10/22/20 PM at 75. Abenaki also recognized the burden of establishing facts is by a preponderance of the evidence, which applies to the facts it put forward. Tr. 9/28/20 AM at 14. The Company further stated that the burden also applies to Omni as it "has facts to present" and that the parties were at the "stage of the battle of the facts, which preponderance of the evidence standard applies" *Id.* and Tr. 10/22/20 PM at 76. Abenaki, however, stated in its November 9, 2020, response and objection to Omni's comments, that allowing further comment "invites additional closing argument and is contrary to Abenaki's burden in this proceeding and position of having the last word." Abenaki Water Company, Inc., Reply to Omni Comments (November 9, 2020) at 1.

At closing, Abenaki also argued that the records in Exhibits 2, 13, and 32 establish what was considered in the purchase price paid by the Company for the water system, but does not include the 8-inch pipe. Tr. 10/22/20 PM at 84. Abenaki reiterated that the records did not show the 8-inch pipe was CIAC. *Id.* Abenaki further recognized that it was responsible for infrastructure in common areas, which does not exist on Hotel property. *Id.* at 86-87. Abenaki also argued that if the Commission were to find the Company responsible for the 8-inch main, it would be considered an unconstitutional taking as there is no component in its revenue

requirement pertaining to that property. *Id.* at 92. Abenaki also stressed that Mr. Brogan consulted with Hotel employees, not the Company, to determine the location of the external valves near the Hotel. *Id.* at 94. Abenaki reiterated that having a curb stop beyond the property line violates Commission and DES rules. *Id.* at 96-97. Abenaki also argued that regardless which tariff version is applied, the curb stop for the 8-inch pipe was placed at the property line, and that is where the Company's obligation ends. *Id.* at 102. The Company further argued that there is no provision in the tariff to exempt the Hotel from its application, which would allow a curb stop to be beyond the property line. *Id.* at 111-112.

Following Omni's response to Staff's record request submission, the Company filed its own objection to Omni's comments, arguing that Omni sought to improperly expand the record and scope of the hearing after close of the record. Abenaki Water Company, Inc., Reply to Omni Comments (November 9, 2020) at 1. Abenaki further commented that Omni's interpretation of the special contracts fails and that the contracts do not confer ownership of the 8-inch pipe on Abenaki. *Id.* at 2. The Company further argued that it objects to Omni's filing as it sought to introduce transcripts from another docket without a proper request for administrative notice and its attempt to introduce a new witness without producing him for cross examination. *Id.* at 3. Abenaki, lastly, requested that the Commission deny Omni's request to add additional issues to its investigation. *Id.* at 4.

C. BWPOA

In its reply brief, BWPOA contended that the tariff language pertaining to condominiums and housing associations, particularly the inclusion of "from the property line or the common area" as the demarcation of customer ownership, is confusing and should be removed. Bretton Woods Property Owners Association, Reply Memo (July 28, 2020) at 1-2. BWPOA reiterated

that concern at hearing. Tr. 9/28/20 AM at 21. BWPOA also noted that some of the condominium documents attached to Abenaki's memorandum of law were incomplete or false. Bretton Woods Property Owners Association, Reply Memo, (July 28, 2020) at 2. At hearing, BWPOA argued against Abenaki's assertion that entries in the Exhibit 2 plant list without a dollar figure were not Company property. Tr. 10/22/20 PM at 34-35.

D. OCA

The OCA, citing *In Re Verizon New England, Inc.* 158 N.H. 693 (2000), argued that the dispute between Omni and Abenaki is one of tariff interpretation, noting that the tariff defines the contractual relationship between utility and customer, and also has the force and effect of law. The Office of the Consumer Advocate, Notice of Scheduling Conflict (January 6, 2020) at 1. According to the OCA, the ambiguous language in Abenaki's tariff relates to whether Abenaki or its customers are responsible for maintaining service lines that cross a customer's property to the customer's premises, for those lines that were in service prior to the approval of the 2016 tariff. *Id.* at 2. The OCA further stated that the Commission should order Abenaki to resolve the tariff ambiguity and, in the meantime, find in favor of Omni. *Id.*

In its second filing, the OCA restated its position that the Commission should focus on the testimony from the Abenaki acquisition hearing, noted in the Complaint. The Office of the Consumer Advocate, Letter of Non-Participation (August 4, 2020) at 2. The OCA said that to interpret the tariff language to have the effect of shifting the responsibility of pre-existing lines buried beneath customer property on a retrospective basis would be "absurd and unfair." *Id.* The OCA further asserted that it had reviewed the legal memoranda and reply briefs of the parties, and stated that nothing in those documents changed its view that Abenaki is responsible for maintenance of the 8-inch pipe and that Abenaki has the burden of proof to prove that it is

not responsible for those repairs. *Id.* Again, it renewed its position that the Commission find in Omni's favor. *Id.*

E. Staff

At hearing, Staff commented on the legal arguments regarding the burden of proof and interpretation of the tariffs. Staff cited *Wilton Telephone Company and Hollis Telephone Company*, Order No. 23,744 (July 26, 2001) for the Commission's consideration regarding the burden of proof in complaint proceedings. Tr. 10/22/20 PM at 36-37. Staff stated that the Order mandated that the "ultimate burden of persuasion on the subject matter of the complaint or investigation is on the public utility." *Id.* at 37.

Regarding the standard for tariff interpretation, Staff referred to *Pennichuck Water Works*, 120 N.H. 562 (1980), which holds that tariffs are a contract between a utility and its customers and that tariffs have the force and effect of law. *Id.* at 37-38. Staff noted that the decision in *Pennichuck* also discussed whether a tariff could be implemented retroactively, and while the decision focused on rates, the Court noted that retroactive implementation of a tariff could be a violation of the contracts clause of the United States and New Hampshire Constitutions. *Id.*

Based on the *Pennichuck* holding, Staff concluded that tariff interpretations cannot be retroactive, and that the tariff that was in place before the 8-inch pipe was installed should be the relevant tariff to determine ownership of the main. *Id.* at 41. Staff stated, furthermore, that it was up to the Commission to determine if the 8-inch pipe were a service line or main extension, then apply the applicable tariff provisions to determine ownership *Id.* at 41.

III. COMMISSION ANALYSIS

We first address the legal issues that arise in connection with the Complaint: tariff interpretation and the burden of proof. Concerning tariff interpretation, we recognize the well settled holding in *Pennichuck*, which states that tariffs “do not simply define the terms of the contractual relationship between a utility and its customer [but] have the force and effect of law and bind both the utility and its customers.” *Appeal of Pennichuck Water Works*, 120 N.H. 562, at 566 (September 10, 1980). We further rely on the Court’s holding, noting its concerns of the retroactive application of a tariff, which would be “creating a new obligation in respect to a past transaction [in violation of the Federal and State Constitution’s Contract Clause].” *Id.* While the Court in *Pennichuck* examined the retroactive impact of tariffed rates, we do not believe that the principles underlying the court’s holding are limited to rates, but extend as well to terms such as ownership of and financial responsibility for the maintenance of equipment. *Id.* Accordingly, we hold that the tariff change cannot be applied retroactively in this instance.

With regard to the burden of proof, Abenaki is responsible for maintenance and ownership of its infrastructure. The Complaint asserted that Abenaki had not maintained and repaired its infrastructure. As a result, Abenaki has the burden of proving by a preponderance of the evidence that it is not responsible for maintenance, ownership, and repair of the 8-inch main that failed on April 21, 2019. Our ruling is supported by our recognition that as a regulated entity under Commission purview, it is the Company’s duty to keep accurate records of the plant and facilities it owns. *See* RSA 374:4 (it shall be the duty of the Commission to be kept informed of “franchises and the manner in which the lines and property controlled or operated by them are managed and operated;” *see also* N.H. Admin. R., Puc 607.03 (a)(3) “each utility shall have on file....maps or drawings showing the following: (3) the layout of all principal pumping

stations, filter and chlorinating plants to show size, location and character of all major equipment, pipe lines, connections, valves and other equipment used”).

While we recognize, based on testimony, that Abenaki acquired a system with incomplete and inaccurate records, it does not alleviate the Company of its duty to meet the requirements of proper plant records as the current utility owner. Abenaki acknowledged that the prior owners of the utility failed to maintain records that support an accounting of all CIAC infrastructure and other investments in the utility systems. Abenaki Water Company, Inc., Memorandum of Law (July 14, 2020) at 4-5; Tr. 9/28/20 AM at 34; and Tr. 9/28/20 PM at 58-59. The result leaves gaps in the history of the development of this one-of-a-kind water utility franchise that is necessary to support a typical regulatory record, which Abenaki failed to provide.

Regardless of who bears the burden of proof, we find that a preponderance of the evidence demonstrates that the curb stop/exterior shut-off valve is located approximately 10 feet from the exterior of the Hotel building, and that the break occurred in a water main and not in a service line. Abenaki’s arguments do not persuade us otherwise. During the two days of hearing, we had several occasions to review both the plant list in Exhibit 2, pages 3-4, the CPR submitted by Abenaki as Exhibits 13 and 32, and the as-built plans submitted as Exhibit 23. Exhibit 2 informs us that the 8-inch line to the Hotel, indicated as a 1985 addition, is part of the property owned by the water utility, prior to Abenaki’s acquisition. Exhibit 23 shows that the 8-inch pipe is part of the as-built water utility by 1988. These two exhibits read together support our finding that the 8-inch main was utility property by 1988. Our finding is bolstered by the fact that Abenaki submitted Exhibit 2 in response to a Staff discovery request, in which the Company answered “[n]ot only the PUC auditors, but Abenaki were troubled by the lack of adequate and coherent progression of CPRs [and thus] cannot furnish the requested main

footages by size and location in full...[p]lease see the partial listing attached.” Exh. 2 at 2 (emphasis added) (referring to the plant list included in page 3-4). Omni’s witness, Mr. Brogan, established that Exhibit 2 represents the continuing property records of the Company and demonstrated that each phase of the Company’s expansion was included on the CPR regardless of whether the cost was recorded. TR 9/28/20 PM at 142-143. We find that the plant list is a prior CPR for the utility without determining whether the list is complete. We further find that the entry in that CPR supports the conclusion that Abenaki owns the 8-inch main.

Abenaki argued that the 8-inch pipe is not Company property as there is no cost associated with the 1985 entry in Exhibit 2, thus it is not an asset included on Abenaki’s books. Tr. 9/28/20 AM at 47, 50. When discussing the possibility that the entry was designated as contribution in aid of construction (CIAC), Abenaki disagreed, noting it conflicts with its CIAC records in Exhibit 32. *Id.* at 57-58. From the record, we are unable to conclude whether or not construction of the 1985 main was paid by the hotel and accounted for as CIAC. That does not, however, persuade us that Abenaki is not the successor-in-interest to the 8-inch pipe. The Commission’s inability to determine if the 8-inch pipe was accounted for as CIAC does not alter our finding that Abenaki owns the 8-inch pipe, as the designation of CIAC relates only to the plant’s inclusion in rate base, and is not determinative of utility ownership in general.

The Company also argued that it could not have acquired the 8-inch pipe in its acquisition because it did not include an estimated value of the pipe when it calculated a purchase price for the utility. Tr. 9/28/20 AM at 42, 45; Tr. 9/28/20 PM at 70. We find this to be better evidence that Abenaki did not properly investigate entries in the property records without a dollar value than that Abenaki does not own the pipe. We also note that purchase price is not determinative of the utility property owned, especially when considering CIAC. *See*

Hampstead Area Water Company, Inc., Order No. 24,608 (March 24, 2006) (the Commission noted that the purchase price of \$31,800 is well below the estimated construction cost of \$289,277 to build a water system, inclusive of two wells, a pumping and treatment station with appurtenances required by the system, transmission and distribution mains, services and meters, and the difference was accounted for as CIAC).

Abenaki argued that Omni could not rely on the water system records to support its claim that Abenaki owns the pipe. Abenaki Water Company, Inc., Memorandum of Law (July 14, 2020) at 4-5; Tr. 10/22/20 PM at 103-104. Abenaki cannot simultaneously assert that the prior water system records are unreliable and cannot be used by Omni in furtherance of its Complaint, but then rely on the same records to explain that it does not own the property in question. Abenaki also contended that the misidentification of the 8-inch pipe as ductile iron and not its actual composition, PVC, suggests the 8-inch main is not the pipe named in Exhibit 2. Tr. 9/28/20 PM at 91-92. That description in the 1985 entry in Exhibit 2 does not preclude determination that the pipe exists and is Abenaki's property.

The Company also argued that the valves at Base Road were the shut-off valves, rather than the valve near the exterior of the Hotel. Thus, by its current tariff, and also its prior tariffs, Abenaki argued that its responsibility ended at the property line near Base Road. The Company bolstered its claim with witness testimony from Ms. Oleson, stating that the curb stop, or shut-off valve, for the Hotel is at Base Road, which is typical as curb stops are usually located at the property line. Tr. 9/28/20 AM at 98, 101. Mr. Gallo presented the same testimony, including that it would be problematic for the Commission to find that a shut-off valve is beyond the property line as it would induce trespassing on the part of the Company to access the valve. *Id.* at 76, 85, and 102. We find those arguments and supporting testimony unpersuasive.

Mr. Brogan testified that the two valves at Base Road are isolation valves commonly used at a T intersection to isolate longer lengths of water main adjacent to such a junction and pointed out similar valves through the distribution system. TR 9/28/20 at 155-156.

We instead are persuaded that the Hotel complex and the various homeowner associations and recreational structures make the water system a unique and atypical water franchise. Tr. 10/22/20 AM at 35. Omni stated that the construction in this area has resulted in the evolution of the water utility “as built” infrastructure over time and in a manner that does not conform to the typical utility model. *Id.* Omni’s witness, Mr. Brogan, testified that the exterior valve near the Hotel is the shut-off valve or curb stop. In particular, we note his following testimony: there is “no such thing as a curb stop at the property line” on the other side Route 302, and no need for a “personal shut-off [valve]” outside a building. Tr. 10/22/20 AM at 27. He concluded that to consider the valve located near Base Road as a shut-off valve, or curb stop, would be problematic because when utilized, it stops water service to multiple customers, possibly those that are not affected by a leak. *Id.* 41-42. After review of all the system maps, many of which do not show service lines, there would be no need for the depiction of at least half the 8-inch pipe on the map. *Id.* at 42-43. He also opined that if the valve on Base Road were the curb stop, or shut-off valve, the Hotel would not have installed an additional valve directly outside its building. *Id.* at 43.

We note that the Company made additional arguments that Abenaki does not own or maintain the 8-inch pipe, including, but not limited to: the deeds and easements originally provided by Omni fail to establish Abenaki’s ownership; the operating expense of 8-inch pipe is not included in Abenaki’s revenue requirement; as the Company owns infrastructure in common areas, such as housing associations, it does not own the 8-inch pipe on Omni property as it is not

on a common area; the shut-off valves are at property lines in compliance with PUC and DES rules; deviation from the tariff requirement that Company responsibility ends at the property line can only be addressed through a special contract; if it is forced to own the 8-inch pipe, the Commission would be authorizing an unconstitutional taking. Tr. 10/22/20 PM at 79-81, 85, 88, 96-96, 110-111, 113-114. After thorough review of the record, we find those arguments unsupported by the evidence and testimony submitted.

We examine the remaining objections of both Omni and Abenaki made after close of the hearing. Abenaki objected to Omni's November 2, 2020, filing as it argued that Omni improperly sought to enter evidence into the record after it had closed. Abenaki Water Company, Inc., Reply to Omni Mount Washington, LLC (November 9, 2020) at 1. Omni, in turn, objected to Abenaki's filing as it was without merit and "procedurally deficient because it was not filed as a motion" pursuant to Puc 203.07 Omni Mount Washington, LLC, Objection to Abenaki (November 16, 2020) at 1.

Regarding Omni's objection, we do not find Abenaki's filing violated Puc 203.07, as this format of filing pleadings and motions is widely accepted in other dockets, including from Omni itself, such as its objection. The Commission, furthermore, has the power to waive its rules, pursuant to Puc 201.05, which it does to the extent that Abenaki's filing violates our rules. As such, Omni's objection is denied.

Turning to Abenaki's objection, any purported evidence sought to be introduced by Omni in its November 2, 2020, filing was not relied upon by the Commission in its decision above. Accordingly, Abenaki's objection is moot.

On that basis, and in conclusion, we find that Abenaki owns, and has the duty to operate and maintain, the 8-inch main, as described above. We hereby order Abenaki to pay \$22,848.74 to Omni for the costs of repair to the pipe.

Last, we will direct Abenaki to file proposed tariff language that explicitly states that its current tariff regarding commercial service lines applies only to service lines installed after that tariff became effective in 2016, and that service lines installed prior are governed by the previous tariff provision.

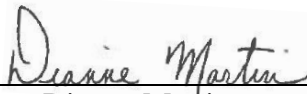
Based upon the foregoing, it is hereby

ORDERED, that, Abenaki Water Company, Inc. shall pay \$22,848.74 to Omni Mount Washington, LLC, for the costs it incurred in repairing damage to the main in April 2019; and it is

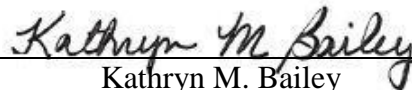
FURTHER ORDERED, that Abenaki Water Company, Inc., will file a proposed tariff revision regarding service pipe language as described above; and it is

FURTHER ORDERED, that Omni Mount Washington, LLC's objection is DENIED.

By order of the Public Utilities Commission of New Hampshire this thirtieth day of June, 2021.

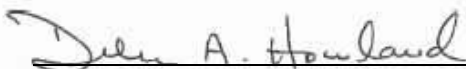


Dianne Martin
Chairwoman



Kathryn M. Bailey
Commissioner

Attested by:



Debra A. Howland
Executive Director

Service List - Docket Related

Docket#: 19-131

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