

STATE OF NEW HAMPSHIRE  
BEFORE THE  
PUBLIC UTILITIES COMMISSION

PENNICHUCK WATER WORKS, INC.

DOCKET NO. DW 19-091

**Petition for Mediation or Arbitration**

**BRIEF OF PENNICHUCK WATER WORKS, INC.**

**Background**

By petition dated May 10, 2019, Pennichuck Water Works, Inc. (“PWW”) requested the N.H. Public Utilities Commission’s (“Commission”) assistance in a billing dispute between PWW and the Town of Hudson (“Town”). The Town intervened and filed a motion to dismiss. The parties, along with the Office of the Consumer Advocate (“OCA”) and Commission Staff (“Staff”), met in a technical session on July 17, 2019 and agreed to a resolution of the scope of the proceeding and developed a procedural schedule to govern the remainder of the proceeding. PWW’s filing of an amended petition, discovery, and a second technical session were agreed to as part of that technical session. Although the Town has not withdrawn its motion to dismiss, PWW believes the procedural concerns have been addressed by PWW’s amended petition. The Commission approved this schedule by Secretarial Letter dated September 12, 2019.

At the second technical session, held on October 8, 2019, the parties and Staff further agreed to a briefing and hearing schedule. PWW files this brief as part of that procedural schedule. The arguments made in the above-referenced petition and attachments (found at Tab 1), objection to the Town’s motion to dismiss (Tab 5), and amended petition and attachments (Tab 9) are incorporated into this brief.

**Rates PWW Charges Hudson are Determined by the 2006 Special Contract and PWW's  
Approved Rate Schedules**

Pursuant to RSA 362:4, PWW is a public utility regulated by the Commission. Regulated utilities can only charge rates, fares, and charges approved by the Commission. Pursuant RSA Chapter 378, regulated utilities charge rates through two mechanisms: (1) pursuant to filed tariffs (RSA 378:1 and RSA 378:3); or (2) pursuant to Commission-approved special contracts (RSA 378:18). PWW's tariffs are on file with the Commission.<sup>1</sup> As noted in PWW's initial petition, pursuant to RSA 378:18, the Commission approved a twenty-year contract for wholesale water supply between the Town and PWW. See Order No. 24,611 in Docket No. DW 05-143 (March 31, 2006). The special contract contained a provision, discussed later, that made the volumetric component of the fee structure changeable with the rate schedules of the general metered customers. Therefore, the rates, fares, and charges that PWW bills the Town are the product of the approved special contract as well as pursuant to PWW's approved tariffs.

**The PWW-Hudson Special Contract Allows for Adjustments in Rates  
For Thirteen Years, the Commission has Authorized PWW to Charge the Town  
Volumetric-Based Charges**

The special contract approved by the Commission in Order No. 24,611 contained an express term allowing for future modification of the volumetric component of the contract:

Section 7(b), Volumetric Charge. "...The Volumetric Charge shall be adjusted from time-to-time by the same percentage and effective as of the same dates as any adjustment in the rates paid by residential customers in Nashua pursuant to the Company's tariff on file with the NHPUC." See, Commission Docket Book Tab 1, Attachment A, Special Contract, paragraph 7(b).

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<sup>1</sup> PWW's filed tariff is located at  
<http://www.puc.state.nh.us/Regulatory/Tariffs/Pennichuck%20Water%20Works%20Tariff%20No%206.PDF>.

Since the Commission approved the PWW-Hudson special contract, the terms of the contract have not changed.<sup>2</sup> Therefore, changes to what PWW bills the Town have been authorized via the tariffs referenced by the volumetric charge provision of the special contract.

The Commission has a long history of authorizing PWW to charge the Town rates that differ from the initial contract rates. It has done so via that volumetric charge clause. Those rates have been and are reflected in the residential customer tariffs “on file with the NHPUC”:

(1) In Docket No. DW 06-073, Order No. 24,751 (May 25, 2007), the Commission approved rate case expense recovery to all volumetric customers as well as a step adjustment in rates. “[t]his is because the step increase applies to the Milford and Hudson special contract volumetric charges but not to the overall contract charges. Exh. 18 at 25.” See, Order No. 24,751 at pages 12 and 20.

(2) In Docket No. DW 08-073, Order No. 25,006 (August 13, 2009) the Commission applied the one-time charge for the temporary-permanent rate reconciliation to the Town of Hudson, “...Staff and PWW anticipate recommending a one-time surcharge for General Metered customers, and the Anheuser-Busch, Milford, and Hudson contracts, and a twelve-month surcharge for fire protection customers. We will render a decision on this issue after the parties have made the proposed filings.” Then, later in Docket No. DW 08-073, in Order No. 25,018 (September 23, 2009), the Commission approved the one-time temporary-permanent reconciliation for Hudson of \$555.74. See, <http://www.puc.state.nh.us/Regulatory/Orders/2009orders/25018w.pdf> at page 3.

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<sup>2</sup> Under Section 12(c) of the special contract, the contract can be amended by the parties “subject to any required approval of the NHPUC.”

(3) In Docket No. DW 10-091, Order No. 25,230 (June 9, 2011) at page 13 and 14, in discussing how PWW would be recovering its revenue requirement, the Commission referenced that both the General Metered customers and Town of Hudson special contract would see an increase of approximately 12.8%. Later in that docket, in Order No. 25,278 (October 21, 2011) at page 3, the Commission approved the Town of Hudson's share of the temporary-permanent rate recoupment of \$31,899.70 and rate case expenses of \$0.36 per month for 12 months. See, electronic page 4 at <http://www.puc.state.nh.us/Regulatory/CASEFILE/2010/10-091/LETTERS,%20MEMOS/10-091%202011-10-28%20PWW%20TARIFF%20NO%205-SUPPLEMENTS%2011-12.PDF>

(4) In Docket No. DW 13,130, Order No. 25,752 (January 13, 2015), the Commission approved rate case expenses of \$0.32 per customer (which included the Town of Hudson) over 12 months. The tariff reflecting this approval appears at: <http://www.puc.state.nh.us/Regulatory/Docketbk/2013/13-130/LETTERS-MEMOS-TARIFFS/13-130%202015-02-13%20PWW%20REV%20COMPLIANCE%20TARIFF%20TAB%2048.PDF> at page 2.

(5) In Docket No. DW 16-806, Order No. 26,070 (November 7, 2017), the Commission approved rate increases applicable to the Town of Hudson. The rate increases included a 3.03% rate increase to the Town of Hudson for the Water Infrastructure Conservation Adjustment Charge ("WICA"). See Exhibit 3, Settlement Agreement-Permanent Rate Attachments, page 25. See, [http://www.puc.state.nh.us/Regulatory/Docketbk/2016/16-806/LETTERS-MEMOS-TARIFFS/16-806\\_2017-07-19\\_STAFF\\_ATT\\_SETTLEMENT\\_AGREEMENT\\_PERM\\_RATES.PDF](http://www.puc.state.nh.us/Regulatory/Docketbk/2016/16-806/LETTERS-MEMOS-TARIFFS/16-806_2017-07-19_STAFF_ATT_SETTLEMENT_AGREEMENT_PERM_RATES.PDF)

The Commission also approved recovery of PWW's \$145,366.00 in rate case expenses at a rate of \$0.43 per customer per month. See Order No. 26,114 (March 20, 2018) at 4-5. The \$0.43

surcharge was based on a total of 28,354 customers served by PWW as noted in Staff's recommendation at page 3.<sup>3</sup> This customer count included the Town of Hudson.

(7) In Docket No. DW 18-022, in Order No. 26,183 (October 29, 2018), the Commission approved PWW's Qualified Capital Project Adjustment Charge ("QCPAC") (which was approved in Order No. 26,070) at a rate of 1.69%, applicable to all customers, including the Town of Hudson. The Commission made a special distinction that the QCPAC applied to the volumetric but not the fixed component of the PWW-Hudson special contract:

"The QCPAC will be applied to all bills rendered after May 4, 2018. The QCPAC will be applied uniformly to all customer classes and charges with the exception that the QCPAC will not be applied against the monthly fixed contract charges associated with Anheuser-Busch, Town of Milford and Town of Hudson special contracts." Order No. 26,070, page 5.

See also PWW Tariff-Original Page 52, located at:

<http://www.puc.state.nh.us/Regulatory/Tariffs/Pennichuck%20Water%20Works%20Tariff%20No%206.PDF>

In each of these proceedings, the Commission found the rates to be just and reasonable, pursuant to RSA 378:7.

This thirteen-year history of the Commission authorizing PWW to charge the Town rates different than the initial contract fees (denoted in Section 7 of the special contract) is informative to the present billing dispute. The Commission has clearly and expressly authorized the PWW to collect from the Town rates, fares, and charges that include the very type of rate case expenses and QCPAC charges to which the Town now objects. The Town seeks to overturn that thirteen-year history.

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<sup>3</sup> [http://www.puc.state.nh.us/Regulatory/Docketbk/2016/16-806/LETTERS-MEMOS-TARIFFS/16-806\\_2018-02-23\\_STAFF\\_LTR\\_RECOMMENDATION.PDF](http://www.puc.state.nh.us/Regulatory/Docketbk/2016/16-806/LETTERS-MEMOS-TARIFFS/16-806_2018-02-23_STAFF_LTR_RECOMMENDATION.PDF)

The facts support that PWW is charging the Town lawfully and that the Commission clearly intended certain rate changes to apply to the Town. The law also supports these conclusions. It is a well settled that courts defer to an agency's interpretation on factual and judgmental issues. *Appeal of Conservation Law Foundation*, 127 N.H. 606, 616 (1986). The Commission has made factual and judgment findings with respect to volumetric charges in the instant special contract over the past thirteen years. In light of its thirteen-year history, the Commission is owed deference on its interpretation of the special contract and the Town should pay its bill.

### **The Town's Argument Implicates Other Commission Findings**

It is important to put the Town's objection to paying its bill in context. Rate design and how much revenue should be allocated to each rate class, including the special contracts, is the subject of cost of service studies. The cost of service studies not only inform the Commission and PWW on how much revenue should be obtained from each customer class, but the studies also inform the Commission and PWW on how much revenue ought to be collected under the flat and volumetric rates. Public policy, such as accelerating the replacement of aging infrastructure, are also considered in rate design. The Town's arguments reopen these issues. If the Commission's interpretation were to be undone, the allocation of the revenue requirement among PWW's rate classes would have to be adjusted (likely increased) to account for PWW receiving less revenues from the special contracts.<sup>4</sup> Otherwise, PWW would not be earning its authorized revenue requirement from the customer classes as intended.

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<sup>4</sup> The volumetric charge clause appears in other special contracts approved by the Commission.

Undoing the Commission's interpretation also reopens whether this volumetric term in this and other the special contracts remains "consistent with the public interest." For these reasons, the Town's objection to paying its bill affects more issues than simply whether the Commission's past orders apply to the PWW-Hudson special contract. Conversely, it is the very weight of these past orders that affirm that PWW is charging lawful rates and that the Town should pay its bill.

### ***Res Judicata***

For completeness, PWW must raise *res judicata*. Under *res judicata*, a final judgment by a court of competent jurisdiction is conclusive upon the parties in a subsequent litigation involving the same cause of action. *Cook v. Sullivan*, 149 N.H. 774, 777 (2003), citing *West Gate Village Assoc. v. Dubois*, 145 N.H. 293, 296 (2000). The doctrine has been applied to administrative proceedings acting in their judicial capacity. *Meserve v. State*, 119 N.H. 149, 154 (1979). Each of the adjudicative proceedings noted above in which the Commission was acting in its quasi-judicial capacity, was noticed, the Town had an opportunity to participate, the issue involved the volumetric clause of the special contract, and the Commission's decisions became final. Therefore, the Town's argument fails under the doctrine of *res judicata*.

### **The Town's Argument of No Notice is Without Merit**

Also for completeness, PWW addresses the Town's notice argument. In paragraph 28 of its motion to dismiss, the Town states that it never received notice that PWW intended to amend the special contract. This argument is without merit procedurally and substantively because PWW noticed the above-noted proceedings and has never sought to amend the special contract. Additionally, an amendment is not specifically needed for the fees PWW has charged the Town. The plain language of Section 7(d) itself authorizes PWW to adjust the volumetric charge

charged to the Town “from time-to-time by the same percentage...and effective as of the same dates as any adjustment in the rates paid by residential customers in Nashua pursuant to the Company’s tariff on file with the NHPUC.” PWW has followed that process with each of its duly-noticed adjudicative rate proceedings before the Commission and those rate changes have been reflected in its filed tariffs. For each rate case proceeding, PWW has provided legal and actual notice to all of its customers. For these reasons, the Town’s argument regarding lack of notice is without merit.

### **Conclusion**

For the foregoing reasons, PWW respectfully requests that the Commission affirm that PWW is charging the Town lawful rates. PWW wishes to also note that it is obligated under its tariff to continue to bill the Town the Commission-approved rates. To do otherwise would run afoul of RSA 378:14 and the prohibition that PWW charge rates that differ from its rate schedules. Therefore, PWW will continue to bill and issue overdue notices to the Town until this matter is resolved.

Respectfully submitted,

PENNICHUCK WATER WORKS, INC.

By Its Attorney

Date: October 25, 2019




Marcia A. Brown, Esq.  
NH Brown Law, P.L.L.C.  
20 Noble Street  
Somersworth, NH 03878  
(603) 219-4911  
mab@nhbrownlaw.com



CERTIFICATE OF SERVICE

I hereby certify that a copy of this brief has been emailed this day to the Commission's Docket-Related service list for this proceeding.

Dated: October 25, 2019

  
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Marcia A. Brown, Esq.