

**THE STATE OF NEW HAMPSHIRE
BEFORE THE
PUBLIC UTILITIES COMMISSION**

Pennichuck Water Works, Inc.

Docket No. DW 19-091

Petition for Arbitration

TOWN OF HUDSON'S MEMORANDUM

NOW COMES the Town of Hudson, by and through its attorneys, Tarbell & Brodich, P.A., and respectfully submits the within Memorandum, and in support thereof states as follows:

I. Introduction

The Town of Hudson ("Hudson") operates a municipal water utility which services the residents of Hudson. By way of background, Hudson acquired Consumers New Hampshire Water Company in 1998. Hudson immediately lowered all of the water rates for its customers by 10% and has not increased the rates since that time. There has not been a rate increase in the 21 years that Hudson has owned the water utility.

Notwithstanding the lack of rate increase, Hudson has undertaken numerous capital projects and upgrades, carries a fund balance (surplus), and has significant capital reserves for improvements, repairs and infrastructure replacements. Hudson's ability to manage its water utility so well is due to sound financial planning. One of Hudson's financial planning tools is a long-term Wholesale Water Supply Contract dated July 12, 2005 ("Special Contract") with Pennichuck Water Works, Inc. ("PWW"), which Special Contract was Approved by the Public Utilities Commission ("Commission") on March 31, 2006. *See* Order No. 24,611.¹

¹ Attached hereto are copies of the Order, pp. 11-16, and Special Contract, pp. 17-22.

According to the Special Contract, Hudson is required to pay: 1) an annual demand charge, and 2) a non-tariff volumetric charge.² In recent years, PWW has billed Hudson for various other non-volumetric charges, including rate case expense surcharges and the Qualified Capital Project Adjustment Charge (“QCPAC”) surcharge, charges which are not included in the Special Contract. Hudson disputes that it is required to pay any amount for any fee, fare or charge that is not required to be paid by the Special Contract.

The matter is important to Hudson, as aforesaid, because Hudson has not raised its rates in 21 years. Hudson believes PWW is required to abide by the terms of the Special Contract. As set forth below, because the Special Contract does not impose any obligation on Hudson to pay any fee other than the annual demand charge and the non-tariff volumetric charge, Hudson is not required to pay the QCPAC or any other surcharges.

II. Scope of Arbitration

The case was originally commenced by PWW with the filing of a Petition requesting both a declaratory ruling and a request for mediation or arbitration. *See* Petition dated May 10, 2019. Hudson objected to the request for a declaratory ruling on various grounds. *See* Motion to Dismiss dated May 23, 2019. Hudson also noted in its Motion to Dismiss that the correct dispute resolution process per the Special Contract was arbitration. *Id.*

The requested declaratory ruling sought a determination from the Commission that certain prior orders of the Commission had effectively modified or amended the Special Contract. By way of example, PWW alleged that the Commission’s Order No. 26,193 dated October 29, 2018 which approved the QCPAC had effectively modified or amended the Special Contract to require payment of the QCPAC.

² On information and belief, the parties’ dispute does not pertain to the annual demand charge.

Hudson raised a number of issues relative to this request for a declaratory ruling in its Motion to Dismiss and at the Technical Session on July 17, 2019. Among the issues raised by Hudson included the fact that Hudson was never notified of any amendment to the Special Contract, Hudson never agreed to any amendment to the Special Contract, and no amendment to the Special Contract was ever filed or approved by the Commission.³ Hudson also noted that a declaratory ruling would be binding on all parties with special contracts with PWW, and therefore, any such other parties (e.g. Anheuser-Busch or the Town of Milford) would be entitled to notice and an opportunity to intervene and participate.

Following the Technical Session on July 17, 2019, PWW withdrew its request for a declaratory ruling. *See* Amended Request for Mediation dated July 29, 2019.⁴ The withdrawal of PWW's request for a declaratory ruling greatly narrowed the scope of the dispute to be arbitrated by the Commission. Thus, the only issue presented to the Commission for arbitration is whether the Special Contract, as written, according to its express terms, requires payment of the QCPAC or other surcharges.

³ See Puc 1606.03 (d) ("Any change to a special contract shall be filed as an amendment")' *see also* Puc 1606.03 (d) ("An amendment in a special contract shall not become effective until approved by the Commission.").

⁴ There does not appear to be any disagreement between the parties regarding the resolution of the dispute by arbitration administered by the Commission. According to the Special Contract, Paragraph 12 (a), "[a]ny controversy or claim arising out of or relating to this Agreement, or the breach thereof, shall be settled by binding arbitration administered by the NHPUC, or its successor for resolution of the dispute." However, the Office of the Consumer Advocate ("OCA") does take issue with arbitration. To the extent the position of the OCA requires any response, Hudson notes the following.

First, RSA § 365:8, I (a), states quite clearly that "[t]he commission shall adopt rules, pursuant to RSA 541-A, relative to . . . [t]he conduct of its hearings, including alternative processes in hearings and other forms of alternative dispute resolution." (emphasis added). Second, at the time the Special Contract was agreed to and approved, the Rules of the PUC reiterated this statutory requirement. *See* Puc. 103.02 (f)(1) (eff. March 18, 1997). Indeed, the Rules of the PUC used to state "[t]he primary purpose of the commission is to act as the arbiter between the interests of the customer and the interests of the regulated entity." Puc. 101.01 (eff. March 18, 1997) (emphasis added). Thus, there does not appear to be any legal basis to suggest that the Commission lacks the authority to arbitrate the dispute. *See also* RSA § 542:1 ("A provision in any written contract to settle by arbitration a controversy thereafter arising out of such contract, or an agreement in writing to submit to arbitration any controversy existing at the time of the agreement to submit, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.") (emphasis added).

III. Commission Approval and the Special Contract

The Special Contract between Hudson and PWW is a special contract within the meaning of RSA § 378:18, and was approved by the Commission as such. *See* Order No. 24,611 ("[P]ursuant to RSA 378:18, Pennichuck Water Works, Inc. Contract with the Town of Hudson dated July 12, 2015 is APPROVED."). A "special contract" is by definition "a contract for service at rates other than those fixed by [sic] schedules of general application." RSA § 378:18. A special contract must be on file with the Commission, and in fact, "constitute[s] a part of the public schedules of the public utility making the same." RSA § 378:19.

The fees paid by Hudson under the Special Contract consist of: 1) an annual demand charge, and 2) "a non-tariff volumetric charge." Order No. 24,611 (emphasis added). In requesting its approval of the Commission for the Special Contract, "PWW submitted a written statement of special circumstances, pursuant to RSA 378:18, asserting that a deviation from the tarified rate is appropriate given the cost of providing water on a bulk basis to Hudson at a single metered location that is lower than the cost of servicing other customers, and that supplying a large quantity of water to Hudson through a single meter will generate revenues that will benefit PWW's remaining customers." *Id.* (emphasis added). "PWW further stated that the charges under the contract cover all of PWW's variable costs to provide service and contribute to PWW's fixed costs of providing service while also providing a significant supply of water to Hudson." *Id.* (emphasis added).

During the review process, "Staff opined that, pursuant to RSA 378:18, special circumstances exist to justify departure from general rated schedules of the utility and to conclude that the special contract is in the public interest." *Id.* (emphasis added).

"According to Staff, the Proposed Contract will provide additional revenues that will benefit its other customers and that the rates contained therein will provide sufficient revenues to

cover the cost of providing service to the Town of Hudson." *Id.* (emphasis added). Based on the foregoing, the Commission approved the Special Contract, expressly finding that "special circumstances exist to justify departure from PWW's schedules of general application." *Id.* (emphasis added).

According to the Special Contract, Paragraph 7:

Fees. The Town shall pay the Company the following amounts for water supplied or to be supplied by the Company under this Agreement:

(a) Annual Demand Charge. [omitted]

(b) Volumetric Charge. In addition to the Demand Charge, the Town shall pay the Company \$1.116 per 100 cubic feet (748 gallons), the Company's production cost excluding administrative and general cost for all water taken by the Town (the "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. If the Company no longer has a tariff for service to residential customers in Nashua, the parties shall negotiate in good faith to determine an appropriate reference point for adjustments to the Volumetric Charge.

The Special Contract represents the entirety of the agreement between PWW and Hudson. As set forth in, Paragraph 12 (g), "[t]his Agreement constitutes the entire agreement of and understanding of the parties regarding the subject matter hereof, and supersedes all prior understandings, agreements, statements and representations, whether written or oral, between or made by the parties.

The Special Contract may only be amended by mutual agreement of the parties, subject to the approval of the Commission. Per Paragraph 12 (c), "[t]his Agreement may be amended upon the mutual agreement of the parties, subject to any approval of the NHPUC."

IV. Discussion

A. The Plain Language of the Special Contract does not Require Payment of any Surcharges

“The interpretation of a contract is a question of law....” *Audette v. Cummings*, 165 N.H. 763, 768 (2013). “Absent ambiguity, the parties’ intent will be determined from the plain meaning of the language used in the agreement.” *Behrens v. S.P. Constr. Co.*, 153 N.H. 498, 503 (2006).

In this case, the Special Contract is clear and unambiguous. By its plain meaning, “. . . the Town shall pay the Company \$1.116 per 100 cubic feet (748 gallons), the Company’s production cost excluding administrative and general cost for all water taken by the Town (the ‘Volumetric Charge’).” With the exception of the annual demand charge, the Special Contract makes no mention of any additional fees, fares or charges that Hudson will be required to pay. By the express terms of the Special Contract, Hudson is only required to pay the demand charge and the non-tariff volumetric charge (usage charge).

The Special Contract is also clear and unambiguous regarding what constitutes the volumetric charge. The volumetric charge is the “production cost excluding administrative and general costs.” The volumetric charge is not defined in reference to any other fees, fares or charges.

The Special Contract does provide for adjustments in the volumetric charge, and specifically, “[t]he 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.” Again, the language of the Special Contract is clear and unambiguous.

First, any adjustment to the volumetric charge is determined in reference to the volumetric rates paid by residential customers in Nashua. The adjustment is not determined in referenced to any other fee, fare or charge. Second, the amount of the adjustment is based on the “same

percentage” as the adjustment in the volumetric rates of the residential customers in Nashua. Third, the adjustment is effective “as of the same dates” as the adjustment in the volumetric rates of the residential customers in Nashua. Lastly, all of the foregoing are determined in reference to “the Company’s tariff on file with the NHPUC.”

By way of example, if the volumetric rate for residential customers in Nashua increased from \$3.40 per cubic 100 feet to \$3.66 per 100 cubic feet, the \$0.26 increase would be a 7.4% increase. Accordingly, if Hudson’s non-tariff volumetric charge was \$2.16 per 100 cubic feet, it would be increased by 7.4%, or \$0.16, to \$2.32% per 100 cubic feet. The change in the volumetric charge would be go into effect as of the same date as the adjustment to the volumetric rates paid by residential customers in Nashua pursuant to the PWW’s tariff on file with the Commission. All of the foregoing is clear and unambiguous per the express language of the Special Contract. There is no provision in the Special Contract that requires Hudson to pay the QCPAC or any other surcharge.

B. The Parties Never Intended for Hudson to Pay any Surcharges

Notwithstanding the plain language to the contrary, PWW is asking the Commission to interpret the Special Contract as requiring payment of the the QCPAC and other surcharges. The Commission should reject this interpretation for the following reasons.

- First, had the parties intended to include payment of the QCPAC and any other surcharges in the Special Contract, they would have done so by simply adding language to that effect, such as “[t]he 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 **or other surcharges** paid by residential customers in Nashua pursuant to the Company’s tariff on file with the NHPUC.” The parties did not provide for payment of

any additional surcharges in the Special Contract, and the Commission should not interpret the Special Contract as requiring payment of surcharges the parties themselves did not agree to include.

- Second, the parties could not have possibly intended to include the payment of the QCPAC surcharge or any similar surcharge (e.g. WICA), because the concept of such an interim surcharge in between rate cases did not exist in 2005 when the parties entered into the Special Contract, or in 2006 when the Commission approved the Special Contract. Rather, it would have been the intent of the parties that Hudson's non-tariff volumetric charge only be adjusted when the volumetric rates were adjusted for residential customers in Nashua.
- Third, the parties did not intend for Hudson to pay any surcharge, such as the QCPAC, for capital facility improvements which are not related to Hudson. As part of the Special Contract, Hudson already pays a demand charge, which represents repayment/recoupment of PWW's investment in capital facilities specific to Hudson.⁵ Had the parties intended for Hudson to pay for other capital facility improvements not specific to Hudson, the Special Contract would have so provided.
- Fourth, the QCPAC and other surcharges are not volumetric charges. A surcharge is, by definition, an additional charge. The QCPAC and other surcharges are assessed in addition to the volumetric charge, not as a part of the volumetric charge. The fact that the QCPAC surcharge and other surcharges are itemized separately from the volumetric charges on customer's bills illustrates this fact. If the QCPAC or other surcharges were

⁵ Attached hereto is a copy of the Cost of Service Analysis dated May 20, 2005, pp. 23-25.

truly adjustments to Hudson's volumetric charge, they would have been included as an adjustment to Hudson's volumetric charge.

- Fifth, as above, the QCPAC surcharge and other surcharges are not volumetric charges because they are either imposed equally on all customers or are imposed as percentage on the entire bill.⁶
- Sixth, requiring Hudson to pay the QCPAC surcharge or other surcharges, which are surcharges of general applicability, is inconsistent with the findings of the Commission which approved the Special Contract, which is a contract for service at rates other than those fixed by schedules of general application.

C. Reference to the Commission's Prior Orders does not Support Payment of Any Surcharges

The only order of the Commission which is relevant to the present dispute is Order No. 24,611 in which the Commission approved the Special Contract. "Any change to a special contract shall be filed as an amendment" Puc 1606.03 (d). "An amendment in a special contract shall not become effective until approved by the Commission." Puc 1606 (f). Moreover, the Special Contract requires that any amendment be mutually agreed upon by both parties and approved by the Commission. No amendment has been negotiated or agreed to between PWW and Hudson, filed with the Commission, or Approved by the Commission

The only exception to the rule that amendments need to be filed and approved by the Commission is for "[a] change which exercises an option clearly delineated in the original contract." Puc 1606.03 (e). Plainly, payment of the QCPAC or other surcharges is not an "option" that was "clearly delineated" in the Special Contract. However, to the extent that there are other

⁶ While PWW has not sought to impose the QCPAC against the annual demand charge portion of Hudson's bill, that does not render the QCPAC a volumetric charge.

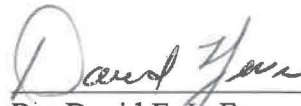
orders of the Commission which are susceptible of being understood as a determination that the QCPAC or other surcharges would be applicable to Hudson, any such conclusion would be legally erroneous. First, any reliance on any such orders, demonstrates that the QCPAC or other surcharges were not options clearly delineated by the Special Contract within the meaning of Puc 1606.03 (e). Second, any such other orders were not processed as amendments to the Special Contract, with Hudson's agreement, and therefore, are not binding on Hudson.

V. Conclusion

Based on all of the forgoing, Hudson requests that the Commission determine that the Special Contract does not impose any obligation on Hudson to pay the QCPAC surcharge or any other surcharge.

Respectfully submitted,
Town of Hudson,
By and through its attorneys,
TARBELL & BRODICH, P.A.

Dated: October 24, 2019




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CERTIFICATION

I hereby certify that a true and accurate copy of the foregoing has been forwarded by e-mail to all parties on the docket service list.

Dated: October 24, 2019


David E. LeFevre, Esq.