

STATE OF NEW HAMPSHIRE
BEFORE THE
PUBLIC UTILITIES COMMISSION

Docket No. DW 19-091

Pennichuck Water Works, Inc.
Petition for Declaratory Ruling on Wholesale Contract with Town of Hudson
and
Request for Mediation

OBJECTION TO HUDSON'S
MOTION TO DISMISS

NOW COMES, Pennichuck Water Works, Inc. ("PWW" or "Company") pursuant to Puc 203.07(e), and hereby objects to the Town of Hudson's ("Town") motion to dismiss. The Commission should deny the Town's motion for the below reasons. In support of this objection, PWW states as follows:

1. In its motion to dismiss, the Town agrees that the instant dispute between PWW and the Town involves a "billing dispute". See, Town Motion at para. 6. The Town argues that the instant billing dispute is a contested case and, pursuant to RSA 541-A:1, IV, the Town must be given notice and an opportunity for hearing.

2. PWW does not dispute that the Town is owed notice and an opportunity to participate in a proceeding that affects its rights, duties, and privileges. After all, the instant billing dispute affects the Town's payments for water service under the special contract for wholesale water supply approved by the Commission in Order No. 24,611 in Docket No. DW 05-143 (March 31, 2006). Hudson is, therefore, a necessary party to this billing dispute and PWW does not object to its intervention. Because of the involvement of the Town's rights,

duties, and privileges, PWW requested the Commission assist in resolving this billing dispute.

That process will protect the Town's concerns that it be provided due process.

3. Where PWW and the Town disagree is on the applicability of PWW's request for a declaratory ruling to the instant billing dispute. By way of background, it is important to note that the paragraph fueling the dispute states:

"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, PWW-Hudson agreement at para. 7(b).

The Commission approved this term of the special contract in Order No. 24,611. This paragraph is also contained in PWW's other special contracts, although the Town of Hudson is the first to object to PWW's interpretation of the paragraph. PWW interprets orders issued by the Commission subsequent to approval of this special contract as having changed the "Volumetric Charge" and PWW has, accordingly, billed the Town such changed rates. As stated in the PWW's petition, at issue in this instant billing dispute are charges relating to rate case expenses and the Qualified Capital Project Adjustment Charge ("QCPAC"). The Town disputes that they are "Volumetric Charge(s)" within the meaning of the contract term.

4. The Commission has authority to entertain declaratory rulings and PWW argues that this is a necessary first step in resolving the instant billing dispute. Pursuant to RSA 541-A, V, agencies are authorized to issue rulings "as to the specific applicability of any ...order of agency". RSA 541-A:1, V. PWW seeks a Commission ruling on the applicability of the Commission's orders, issued after Order No. 24,611 and which changed PWW's "Volumetric Charge(s)" in Paragraph 7(b) of the PWW-Hudson special contract. PWW's request is not hypothetical; it is based on facts that are definite and concrete regarding the Town's non-

payment of bills for rate case expenses and the QCPAC. As an aside, even if PWW's request was for a declaratory ruling on a general contract term, because the request is combined with a request for specific dispute resolution involving the Town, the Town's due process rights are protected. As to this specific case, because resolution of whether subsequent orders modified the "Volumetric Charge" is central to the instant billing dispute, it must be decided before PWW and the Town can resolve their dispute. To state the issue another way, if PWW and the Town were to resolve this billing dispute on their own, it would involve PWW's interpretation of a term of a Commission-approved special contract. PWW's interpretation would be a deviation from PWW's general tariffed rates and all deviations from tariff "schedules of general application" require express Commission approval. See, RSA 378:18. For this reason, PWW sees no method of resolving the instant dispute that does not involve the Commission "ruling as to the specific applicability of any ...order of agency". RSA 541-A:1, V. Therefore, PWW argues a declaratory ruling is a necessary first step toward resolving the instant billing dispute.

5. The Commission has accepted requests from utilities for declaratory rulings in matters involving billing disputes in the past. See, Docket No. DE 11-105 (involving a billing dispute between Unitil Energy Systems, Inc. and RiverWoods Company of Exeter¹); RSA 363:17-a (the Commission is authorized to act as an arbiter between a customer and a utility); and *In re Appeal of Verizon New England, Inc.* 153 N.H. 50, 64 (2005) (affirming that the Commission is empowered to act as an arbiter). Therefore, there is precedence for PWW requesting a declaratory ruling in the context of a billing dispute.

¹ Unitil and RiverWoods ultimately resolved their dispute and RiverWoods withdrew its complaints before Superior Court and the Commission.

6. The Town cites Paragraph 12(a) of the PWW-Hudson contract as reason why PWW's request for declaratory ruling should be dismissed. See, Town Motion para. 11. This paragraph states that disputes shall be settled by the Commission. The irony in the Town's argument for dismissal is that the relief the Town seeks is precisely the type of assistance PWW has requested. Therefore, both PWW and the Town agree that it is appropriate for the Commission to assist the parties in resolving this billing dispute.

7. Regardless of whether the Commission's assistance to the Town and PWW is called mediation or arbitration, the PWW-Hudson contract allows for such assistance. The legislature authorized the Commission to be an arbiter pursuant to RSA 363:17-a. The Commission promulgated a specific process to effectuate that authority in N.H. Code Admin. Rule Puc 1203.17, *Conference to Mediate Complaints Other Than Disconnection Complaints*. Puc 1203.17 is more specific than RSA 363:17-a. The Commission has the authority to pursue mediation conferences via Puc 1203.17 or waive portions of the rule under Puc 201.05. RSA 363:17-a affords the Commission flexibility in how it conducts itself as an arbiter.

8. The Town's objection is based on whether the dispute resolution assistance provided by the Commission is called mediation or arbitration and is rooted in due process and Paragraph 12(a), however, it is a form-over-substance argument under the circumstances of this dispute. Paragraph 12 refers to the dispute resolution as "arbitration", however, it also states that it is "administered by the NHPUC". Notwithstanding RSA 363:17-A referring to arbitration, N.H. Code Admin. Rule Puc 1203.17 administers a dispute resolution process and refers to it as a mediation conference, not arbitration. For this reason, Paragraph 12 is arguably ambiguous. Because mediation conferences are administered by the Commission, PWW believes the contract does not prohibit mediation when it refers to "arbitration". As a practical matter, PWW believes

it is beneficial to the parties to resolve this dispute in the most efficient method possible. If the parties can reach agreement using the Commission's mediation process, then the expense of binding arbitration before the Commission will not be necessary. The caveat being that any resolution between the parties must be consistent with the Commission's interpretation of the applicability of its subsequent orders on Paragraph 7(b). If the parties cannot reach agreement, then a final ruling from the Commission binding the parties is the next step. Because of the availability of a dispute resolution process administered by the Commission and that PWW's request affords the Town due process, PWW disagrees that it is appropriate to dismiss its petition.

9. In light of the legal issues involved in this billing dispute, PWW respectfully recommends that the Commission offer the parties a technical session with the Commission's Staff or Hearings Examiner, so that the parties can develop a proposed procedural schedule to govern this proceeding. This process would be similar to the Commission's handling of Docket No. DW 11-105.

WHEREFORE, Pennichuck Water Works, Inc. respectfully requests the Commission:

- A. Deny the Town of Hudson's motion to dismiss;
- B. Order the parties to attend a technical session on a mutually-agreeable date for the purpose of developing a proposed procedural schedule to govern the proceeding;
and
- C. Grant such other relief as is just and equitable.

Respectfully submitted,

Pennichuck Water Works, Inc.

By its Attorney,
NH BROWN LAW, PLLC

Dated: June 3, 2019

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Certificate of Service

I hereby certify that a copy of the foregoing objection has been emailed this 3rd day of June, 2019 to the docket-related service list.

Marcia A. Brown
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