

**STATE OF NEW HAMPSHIRE
PUBLIC UTILITIES COMMISSION**

Docket DW 21-134

Pennichuck Water Works, Inc.

Supplemental Petition for Approval of Emergency Temporary Special Contract

Pennichuck Water Works, Inc. (PWW or Company) hereby supplements its petition for Commission approval, pursuant to RSA 378:9 and RSA 378:18, of an emergency temporary rate for water supplied to Merrimack Village District (MVD) and requests the Commission approve the special contract filed on November 12, 2021. In support of this request, PWW states as follows:

1. PWW is a New Hampshire corporation and regulated water utility that provides service to approximately 29,000 customers in a number of municipalities in southern New Hampshire including the City of Nashua, and the Towns of Amherst, Bedford, Derry, Epping, Hollis, Merrimack, Milford, Newmarket, Newton, Plaistow, and Salem. PWW is owned by Pennichuck Corporation, a private corporation, which in turn is wholly owned by the City of Nashua. Although Pennichuck Corporation is wholly owned by a municipality, PWW is still a private corporation and regulated public utility within the definition of RSA 362:2 and 4.
2. MVD is a village district established and is regulated in accordance with the provisions of RSA 38 and 52. MVD manages over 7,500 service connections that include residential, municipal, commercial and industrial properties. MVD's service area covers more than 87% of the Town of Merrimack. MVD owns, services, and maintains approximately 930,800 feet (or roughly 176 miles) of water mains, 930 fire hydrants, six wells (Wells 2, 3, 4, 5, 7, and 8, three water storage tanks, an Iron & Manganese treatment plant, three booster stations and a Per- and Polyfluoroalkyl Substances (PFAS) Treatment Plant.

3. As stated in the initial petition, on September 23, 2021, MVD received a Notice of Violation (NOV) from the NH Department of Environmental Services (NHDES). As a result of the NOV, MVD ceased using its tainted water supply wells. Without the use of these wells, MVD does not currently have enough compliant potable water to meet its customers' basic needs.¹ MVD has active construction underway to add Perfluorooctanoic Acid (PFOA) treatment to Wells 7 & 8, however, those treatment facilities are not expected to be online until Summer 2022.² As of October 20, 2021, MVD commenced taking water service from PWW. PWW is providing MVD with up to 1.0 MGD (million gallons per day).
4. On October 21, 2021, pursuant to the 30-day notice requirement of RSA 378:3, PWW filed a tariff to charge MVD a rate of \$0.67 per 100 hundred cubic feet (CCF) (Initial Rate) of water. The Initial Rate is based on the total cost of electricity, chemicals, and consumed carbon capacity and is divided by the total gallons of raw water delivered to the Company's water treatment plant, treated at the water treatment plant, and then delivered into PWW's distribution system for consumption. This rate would be reconciled against the actual costs of producing the water (Actual Rate) once MVD ceases taking the emergency temporary service.
5. On October 22, 2021, PWW filed a petition for approval to charge the proposed \$0.67 per CCF rate retroactively to the date MVD first took service, October 20, 2021.
6. On November 8, 2021, the Commission held a hearing on PWW's petition for approval of the emergency water rate.

¹ MVD cannot meet its' base winter demand of about 1.6 to 1.7 MGD with its treated wells, Wells 4 and 5. Wells 4 and 5 can produce about 0.60 MGD on a year-round basis. Production from Wells 7 and 8, which are expected to be online in March 2022, can provide about 1.15 MGD and thereby meet MVD's expected non-summer demand.

² For completeness, MVD expects treatment for its last two wells (Wells 2 and 9) to be online in early fall of 2022. Well 9 is a new well which will replace Well 3, which is being taken offline.

7. On November 12, 2021, the Commission approved PWW's tariff for a period of six months. Order No. 26,552 (November 12, 2021).

8. Also on November 12, 2021, PWW and MVD filed a fully signed special contract that incorporated the rate and reconciliation feature from the tariff as well as a provision to allow the rate to be effective back to October 20, 2021. The special contract was discussed at the hearing as an alternative to the tariff for providing emergency temporary water service to MVD.

9. Pursuant to RSA 378:14, no public utility "shall charge or receive a greater or different compensation for any service rendered to any person, firm, or corporation than the compensation fixed for such service by the schedules on file with the Commission and in effect at the time such service is rendered." PWW has a tariff and rate schedules on file with the Commission that depict the rates and terms of service. Pursuant to RSA 378:18, the Commission may deviate from RSA 374:14 and approve special rates for utility service if it finds that "special circumstances exist which render such departure from the general schedules just and consistent with the public interest..." RSA 378:18.

10. PWW believes special circumstances exist that support deviating from the general tariff rates for the instant service to MVD. Please see Attachment A (statement of special circumstances). These reasons were included in PWW's initial petition and are summarized here: (1) MVD owns its own infrastructure; (2) PWW's retail rates are predicated upon the customer remaining an ongoing customer of the Company, purchasing water along with all of the other customers, with a water rate that is designed not only for variable cost of production, but also the long-term carrying costs of supplying water, inclusive of capital costs; (3) Conversely, PWW's provision of water service to MVD is expected to be temporary and only exist during the time of this health-based emergency; (4) As soon as MVD's treatment is online, the emergency

is expected to be over; (5) Consistent with the facts of *Appeal of Campaign for Ratepayers Rights*, 142 N.H. 629, 632 (1998) and that no other customer rates will change and that there are no cross-subsidies, PWW's other rates will not change as a result of this contract, ratepayers will not be subsidizing MVD's rate, and MVD will not be subsidizing other ratepayers because the Actual Rate will ensure that MVD fully pays the actual costs of the water; (6) Lastly, if MVD were to pay retail rates it would be a windfall to PWW at the expense of an emergency.

11. Both the MVD and the NHDES support PWW providing emergency, temporary water to MVD.

12. With respect to the retroactive application of the rate to the date MVD first took service under this emergency, the rate-making power of the Commission is distinguished from auxiliary powers which are more strictly limited. *State v. New England Telephone & Telegraph Co.* 103 N.H. 394, 396 (1961) citing *State v. N.H. Gas & Elec. Co.*, 86 N.H. 16 (1932). "While the authority of the Commission 'does not extend beyond expressed enactment or its fairly implied inferences' the authority of the Commission to regulate rates 'is plenary save in a few specifically excepted instances'" *New Eng. Tel.*, supra. Although the Commission "has the power to alter or amend rates charged by public utilities, RSA 378:7... such action may not violate the contract clause³, U.S. Const. art. I, § 10." *Richter v. Mountain Springs Water Co.*, 122 N.H. 850, 852 (1982). The concern with the Contracts Clause is that implementation of retroactive rates "affect the rights and obligations of parties who have previously formed a contractual relationship" with the utility such that retroactive rates are "highly injurious,

³ Article I, Section 10, Clause 1: No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.

oppressive and unjust.” *Appeal of Pennichuck Water Works*, 120 N.H. 562 565 (1980). The instant case is highly distinguishable from these Contracts Clause concerns. The proposed special contract terms are the very terms both parties seek to be contractually bound by. In other words, the contractual intent of the parties is reflected in the terms of the proposed special contract, not in the general tariff rates. As stated in MVD’s letter of support (Exhibit 5 at 2), in Mr. Ware’s testimony (Exhibit 1 at 19), and by MVD and PWW at hearing, both parties to the proposed special contract agree to the terms. The parties agree to the terms because if MVD is not able to access the proposed cost-based rates (Initial and Actual) for the entire duration of this emergency, MVD will run out of funds to procure uncontaminated water. *Id.* For these reasons, approval of the special contract, which includes a reconciliation provision that would effectively retroactively apply the contracted-for rate, does not violate the Contracts Clause rights of the parties and ought to be found in the public interest.

13. Additionally, this is also not a case where due process was not afforded before a rate is implemented. On the contrary, the Commission held a duly-noticed hearing on November 8, 2021. PWW and MVD testified at that hearing in support of the special contract. RSA 451-A:31 and 33.

14. The Commission has exercised its plenary authority to retroactively apply rates so long as customers have received proper notice. In *Property Owners Association at Suissevale, Inc.*, order No. 24,693 (October 31, 2006) the Commission approved a special contract between Lakes Region Water Company, Inc. and Suissevale and authorized the effective date to be the beginning of 2006 and authorized an adjustment mechanism such that the rate charged Suissevale remained cost-based. In *Aquarion Water Company of New Hampshire*, Order No.

25,938 (August 22, 2016), the Commission approved an emergency temporary rate, retroactively, for Aquarion's service to the Wiggin Farm Homeowners Association.

15. The Commission has also authorized retroactive changes to rates to cure harms. In *Petition of Wausau Papers of New Hampshire, Inc.*, the Commission authorized rate relief to Wausau Papers because a special contract between Public Service Company of New Hampshire, Inc. and Fraser N.H., LLC created an economic, competitive disadvantage to Wausau Paper. *Petition of Wausau Papers of New Hampshire, Inc.*, Order No. 24,171 (May 12, 2003) in Docket DE 03-078.

16. The instant case is even more compelling than *Wausau* in that PWW's service to MVD involves a health-based emergency. As stated in the NHDES' letter of support, "28,000 people in regions of Merrimack, Bedford, and Amherst" depend on MVD being able to afford uncontaminated water for the full duration of this emergency. PWW avers that this reason itself, would be sufficient for the Commission to approve the instant departure from the filed tariffs and a finding that the proposed special contract is just and consistent with the public interest. RSA 378:18.

17. To further emphasize the plenary authority granted to the Commission, in analogous, non-special-contract cases, the Commission has also authorized retroactive rates by approving bills-rendered implementation of rate changes: *Dockham Shores Water Company, Inc.* Docket DW 12-355, Order No. 25,582 (October 14, 2013) (bills-rendered effective date allowed the company to recover three months of unbilled revenues); and *Lorden Commons Sewer Company, LLC*, Docket DW 13-305, Order No. 25,677 (June 13, 2014) (bills-rendered effective date allowed the company to recover 6 months of unbilled revenues).

18. In conclusion, PWW believes past precedence from this Commission supports that under RSA 378:7 and under RSA 378:18, the Commission has authority to approve the cost-based Initial and Actual rates proposed by PWW, to approve the post-emergency reconciliation mechanism that will ensure that MVD is charged cost-based rates, and to approve the special contract between PWW and MVD. If the Commission approves the proposed special contract, PWW will file a cancellation page for PWW's Original Page 45A, which the Commission approved in Order No. 26,552 (November 12, 2021) pending resolution of the special contract matter.

WHEREFORE, PWW respectfully requests that the Commission:

- A. Find that special circumstances exist which render a departure from PWW's general tariff rate schedules just and consistent with the public interest;
- B. Approve the special contract between PWW and MVD;
- C. Grant such other and further relief as may be just and equitable.

Respectfully submitted,

PENNICHUCK WATER WORKS, INC.

By its Attorney,

NH BROWN LAW, PLLC

Date: November 17, 2021

By: Marcia A. Brown
Marcia A. Brown, Esq., NH Bar #11249
20 Noble Street
Somersworth, NH 03878
(603) 219-4911 / mab@nhbrownlaw.com

Certificate of Service

I hereby certify that a copy of the foregoing supplemental petition have been emailed this day to the Docket Related Service List.

Marcia A. Brown
Marcia A. Brown, Esq.

STATEMENT OF THE SPECIAL CIRCUMSTANCES

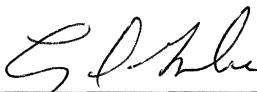
1. On September 23, 2021, the Merrimack Village District (MVD) received notice from the NH Department of Environmental Services (NHDES) that the water produced from 4 of MVD's 6 wells had failed the State of NH/NHDES PFOA standard of 12 parts per trillion (ppt), based upon quarterly samples averaged for a 12-month trailing period. MVD operates 6 wells. MCD presently has treatment in place for two of its contaminated wells, however, treatment for its other wells has been delayed due to unforeseen construction delays. As a result, MVD does not currently have enough compliant water supply to meet the base needs of its customers. It is also important to note that PWW obtains water from MVD to serve 76 customers in Amherst and 383 customers in Bedford.

2. MVD has conducted discussions with Pennichuck Water Works, Inc. (PWW) to provide emergency water supply on a temporary basis until MVD's emergency is over. PWW is able to provide up to 1 million gallons per day (MGD) to aid MVD, through an existing interconnection between their respective distribution systems. Provision of this 1 MGD will not hamper PWW's ability to provide safe and adequate service to its own customers.

3. PWW believes special circumstances exist that support deviating from the general tariff rates for this emergency temporary service to MVD. These reasons include: (1) MVD owns its own infrastructure; (2) PWW's retail rates are predicated upon the customer remaining an ongoing customer of the Company, purchasing water along with all of the other customers, with a water rate that is designed not only for variable cost of production, but also the long-term carrying costs of supplying water, inclusive of capital costs; (3) PWW's provision of water service to MVD is expected to be temporary and only exist during the time of this health-based emergency, predicated upon the treatment of MVD's wells within compliancy of the PFOA standards; (4) As soon as MVD's PFOA treatment is online, the emergency is expected to be over; (5) No other PWW customer rates will change as a result of providing water supply to MVD; (6) There are no cross-subsidies either to or from PWW's customers, to or from MVD; (7) PWW proposes a reconciling true-up rate mechanism such that at the conclusion of the emergency, PWW will calculate the cost of providing MVD with the water supply and MVD will pay a rate that reflects actual costs incurred; and (8) If MVD were to pay retail rates it would be a windfall to PWW at the expense of an emergency, and inconsistent with the basis for which this emergency supply of water is needed.

4. For the above reasons, PWW believes there are sufficient facts for the Commission to find that special circumstances exist which render a departure from the general schedules just and consistent with the public interest. RSA 378:18.

Date: November 16, 2021



Larry D. Goodhue, Chief Executive Officer
Pennichuck Water Works, Inc.