

STATE OF NEW HAMPSHIRE
BEFORE THE
PUBLIC UTILITIES COMMISSION

Pennichuck Water Works, Inc.

Docket No. DW 22-040

Petition for Approval of Amendment to Special Contract with Pennichuck East
Utility, Inc.

SETTLEMENT AGREEMENT

December 14, 2022

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A. BACKGROUND

Pennichuck Water Works, Inc. (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.

Pennichuck East Utility, Inc. (PEU) was initially authorized by the N.H. Public Utilities Commission (NHPUC) to be a regulated utility in *Southern New Hampshire Water Company, Inc.*, Docket No. DE 86-230, Order No. 18,691 (May 29, 1987) (order approving transfer of franchise to Pennichuck Corporation); *Southern New Hampshire Water Company, Inc.*, Docket No. DE 86-230, Order No. 18,760 (July 14, 1987) (order approving the Southern New Hampshire Water Company, Inc. (Southern) request to provide service to undisputed areas of Londonderry

and conditionally approving franchise to disputed area to Pennichuck); and *Southern New Hampshire Water Company, Inc.*, Docket No. DE 86-230, Order No. 18,807 (September 1, 1987) (order clarifying that the disputed franchise area is not awarded to either Southern or Manchester Water Works). As a result of the complicated history and break-up of the Southern water system, PEU supplies some of its customers with water purchased from the Town of Hudson, PWW, Hooksett Village Water Precinct, North Conway Water District, the Town of Derry, and Manchester Water Works. Lastly, PEU is also owned by Pennichuck Corporation.

In 2017, under the authority of RSA 378:18, the Commission approved a twenty-year contract for wholesale water supply between PEU and PWW (Current Contract). See, *Pennichuck Water Works, Inc.*, Order No. 26,049 in Docket No. DW 17-071 (August 23, 2017). The Current Contract has an initial term of twenty years and allows for two five-year automatic renewals. Because PWW's supply of water to PEU under the Current Contract was predicated on completion of a water main underneath the Merrimack River to interconnect PWW and PEU, , the Commission approved the effective date as follows: "the twenty-year term of the contract should not start until the interconnection is completed, the meter installed, and all other contract terms have been complied with by PWW and PEU." See Order No. 26,049 at 5. The interconnection was completed on October 10, 2018; therefore, under the twenty-year term, the Current Contract will terminate on October 9, 2038.

Since approval of the Current Contract, circumstances have materially changed. In July 2021, the Town of Hudson found itself without sufficient water to serve its customers, as a direct result of the New Hampshire Department of Environmental Services (NHDES) requesting Hudson to shut down its Dame and Ducharme wells because Perflouroctanoic Acid (PFOA) contamination exceeded allowable levels and standards. As a result, PWW and the town of

Hudson revised their special contract to allow for increased flows from PWW to Hudson. See, Docket No. DW 22-029. Additionally, because PEU obtained supply from Hudson for a portion of its overall needs in the town of Litchfield, PEU must now also rely on PWW to provide more water supply than what is provided in the Current Contract.¹ This increased usage, from 167,936 to 208,449 CCFs, during the 2021 and 2022 fiscal years ending June 30th, respectively, (an increase of approximately 25%,) is reflected in PWW's response to DOE 2-4, in Attachment B.

As with Hudson, PEU's increased water requirements change PWW's cost to provide the ongoing, necessary and needed water supply to PEU in that community, and other customers PEU serves on the eastern side of the Merrimack River. This cost change for the water supplied by PWW to PEU is also affected by other large users changing how much supply they will be taking from PWW going forward. For these reasons, PWW and PEU seek the Commission's approval for an Amendment to the Current Contract (Amendment) to align rates with PWW's new and existing forward-looking cost of service to PEU. Because the Current Contract runs through 2038, PWW and PEU, decided to amend the Current Contract rather than replace the contract.

The Commission has approved contract amendments in *Concord Steam Corporation*, Docket No. DG 10-116, Order No. 25,176 (December 9, 2010) and in *Liberty Utilities*, Docket No. DG 14-091, Order No. 26,002 (April 6, 2017).

B. PROCEDURAL HISTORY

On June 28, 2022, PWW filed a petition for approval of an Amendment to the Current Contract between PWW and PEU. PWW supported the petition with the pre-filed testimony of Donald L. Ware, related schedules, a Statement of Special Circumstances justifying continued

¹ As noted in PWW's response to OCA 1-4 appended to PWW's response to DOE 1-2 in Attachment B, obtaining replacement water supply from PWW was the most cost effective and feasible alternative to obtaining supply from Manchester Water Works or the Town of Hudson.

departure from PWW's general tariff schedules, and a new Cost of Service Study (COSS). The new COSS was prepared to determine appropriate, revised rates for the change in both consumption and guaranteed take by PEU stemming from the mandated shutoff of the Dame and Ducharme wells due to PFOA levels exceeding NHDES-allowed contaminant standards. See also Attachment B and PWW's response to DOE 1-4 for a list of allocated costs. PWW requested a retroactive effective date for the Amendment back to July 1, 2021, which was the date of PEU's substantial change in use. PWW also sought a waiver of Puc 1606.02(a)(1) which requires that special contracts be filed "at least 30 days before its proposed effective date."

On June 29, 2022, the Commission issued an acknowledgement letter.

On July 18, 2022, the New Hampshire Department of Energy (DOE) filed a notice of appearance.

On August 1, 2022, the Office of the Consumer Advocate (OCA) filed its notice of participation.

On August 17, 2022, the Commission issued an order, granting PWW's waiver request, commencing an adjudicative proceeding, and scheduling a prehearing conference and technical session for September 28, 2022. The Commission also ordered that PWW notify the public by publishing the Commission's order in a newspaper with general circulation in those portions of the State in which operations are conducted.

On September 13, 2022, PWW filed affidavits of timely publication from the newspapers it had received to date: New Hampshire Union Leader and the Conway Daily Sun.

On September 19, 2022, PWW filed the remaining affidavits of timely publication from the newspapers: Concord Monitor and The Telegraph.

On September 28, 2022, the Commission held the scheduled prehearing conference, during which record requests were issued from the bench to PWW. During the technical session that immediately followed the prehearing conference, the parties drafted a procedural schedule for proposal to the Commission.

On October 3, 2022, on behalf of the parties, PWW filed the proposed procedural schedule that included dates for data requests and responses, as well as for a technical session.

On October 5, 2022, the Commission issued a procedural order entering a record request requiring PWW provide a live copy of the COSS to the Commission.

On October 12, 2022, PWW provided its response to the Commission's record request along with a motion for protective order and confidential treatment of the response.

On October 14, 2022, the Commission approved the proposed procedural schedule.

On November 18, 2022, by Order No. 26,727, the Commission approved PWW's motion for protective order and confidential treatment.

C. LEGAL AUTHORITY

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." Pursuant to RSA 378:18, however, 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.

The Commission has used the authority of RSA 378:18 broadly to approve just and reasonable rates to meet the unique needs of parties. See, e.g., *Aquarion Water Company of New*

Hampshire, Inc., Docket No. DW 16-804, Order No. 25,938 (August 22, 2016) at 4 (approving retroactive special contract rates for water supply to the Wiggin Farm Homeowner’s Association which was facing an emergency loss of its own water supply); and *Public Service Company of New Hampshire*, Docket No. DE 03-064, Order No. 24,151 (March 31, 2003) at 18 (in dicta, the Commission opined that “an appropriate reconciliation mechanism” may be needed in another docket to provide retroactive rate relief to an intervenor, Wausau Papers of New Hampshire, Inc., consistent with the applicable [just and reasonable] legal standards).

The Commission also has authority pursuant to RSA 378:7 and RSA 378:27 and 29 to provide unique rate relief. See *Pennichuck Water Works, Inc.*, Docket No. DW 21-134, Order No. 26,597 (March 25, 2022) (wherein Commission approved a settlement agreement which included a retroactive application of the new rate and a reconciliation mechanism to address any over or under collections.) See, *PSNH Proposed Restructuring Settlement*, Docket No. DE 99-099, Order No. 23,443 (April 19, 2000) (affirmed on appeal in *Appeal of Campaign for Ratepayers Rights*, 145 N.H. 671 (2001)) (although this was not a special contract case, the Commission approved retroactive application of rates in a global settlement to respond to the unique situation of PSNH and its customers).

More recently, as it pertains to PWW and the needs of PWW’s special contract customers, the Commission approved retroactive rates for the Merrimack Village District² and approved retroactive rates for Anheuser-Busch, LLC³ to reflect the sudden change in water taken by the Town of Hudson, as of July 1, 2021, and the associated change in costs that ought to be reallocated to those special contracts. As with the Merrimack Village Water District and Anheuser-Busch, LLC, a specific COSS was conducted to determine what the appropriate

² *Pennichuck Water Works, Inc.*, Docket No. DW 21-134, Order No. 26,597 (March 25, 2022).

³ *Pennichuck Water Works, Inc.*, Docket No. DW 21-115, Order No. 26,647 (July 1, 2022).

allocation of costs from PWW to PEU should be to ensure that PEU pays its fair share of costs, but not more.

Cost causation is a traditional ratemaking policy. *Pennichuck Water Works, Inc.*, Docket No. DR 97-058, Order No. 22,883. This policy also gives the Commission authority to approve the relief requested in this proceeding. When faced with a review of respective subsidies among rate classes, the Commission has looked to the facts to determine what level of subsidy is being incurred and whether that subsidy is “beyond the zone of ‘just and reasonable’”. *Id.* Here, there is no subsidy because the COSS is a direct assessment of cost causation and PWW’s costs to provide the service to PEU. The rates proposed in the Amendment reflect the updated costs to ensure the rates keep up with current conditions and that no subsidies occur as a result of the PWW-PEU special contract.

Based on the statutory authorities, traditional ratemaking policy, and past Commission orders, PWW and the DOE believe the Commission has adequate authority to approve the relief requested in this Agreement.

D. TERMS OF THIS SETTLEMENT AGREEMENT

1. The DOE does not take exception to PWW and PEU’s proposed Amendment attached to this settlement agreement as Attachment A. PWW, PEU, and the DOE agree that the proposed Amendment will have no detrimental effect on other ratepayers. PWW’s reconciliation between the Current Contract rates and the Amendment rates, for the term July 1, 2021 to the date of Commission approval of the proposed Amendment, will be reviewed by the DOE Staff and any over-collection will be credited back to PEU per the terms of the amended Section 2(c) of the special contract. There will be no recovery from, or refund to, other ratepayers.

2. PWW, PEU, and the DOE agree that Attachment A supersedes all prior versions of the proposed Amendment to the Current Contract filed with the Commission. The changes in Attachment A, as compared to the initially filed version of the proposed Amendment, are the result of discovery and are depicted in red font. Relevant data responses provided in discovery are attached hereto as Attachment B.

3. The discovery also resulted in slight revisions to the original COSS and rates. The Excel version of the revised COSS is attached as Attachment C.⁴ The COSS in Attachment C supersedes all prior versions of such filed with the Commission.

4. PWW agrees to file a fully signed version of the Amendment within thirty (30) days from the Commission's order approving the proposed Amendment.

5. PWW, PEU, and the DOE agree that, within thirty (30) days of Commission approval of the proposed Amendment, PWW shall file for the Commission and DOE's review, a reconciliation of the difference between the actual rates charged and the new rates for the period from July 1, 2021 to the date of Commission approval of the proposed Amendment. A draft reconciliation appears in Attachment B, PWW's response to DOE 2-2. Because PWW bills PEU monthly, PWW will calculate this reconciliation using the bills issued to date. PWW, PEU, and the DOE agree that PWW shall not refund PEU the difference between the Current Contract and the proposed Amendment until such refund is approved by the Commission.

6. PWW, PEU, and the DOE request the Commission approve the proposed Amendment and reconciliation without a hearing. Under RSA 378:18,

“nothing herein shall prevent a public utility from making a contract for service at rates other than those fixed by its schedules of general application, if special circumstances exist which render such departure from the general schedules just

⁴ Attachment C is the same COSS originally provided with PWW's response to DOE Set 1, "Attachment DOE 1-4." Therefore, to avoid duplication, Attachment DOE 1-4 has not been included in Attachment B.

and consistent with the public interest and...the commission shall by order allow such contract to take effect.”

Adjudicative process and agency hearings are required when hearings are “required by law”. *In re Support Enforcement Officers I*, 147 N.H. 1, 7 (2001), in determining whether a proceeding is a “contested case” thereby triggering RSA 541-A:31-36, the Court looks to “whether an agency hearing is ‘required by law’”. Here, no hearing is expressly required under RSA 378:18, and PWW, PEU, and the DOE agree to the disposition of the docket by settlement agreement.

Therefore, because RSA 378:18 does not require a hearing, PWW, PEU, and the DOE recommend that the Commission approve the Amendment without a hearing. See, *Pennichuck Water Works, Inc.*, Order No. 26,597 (March 25, 2022) (Commission approved special contract with Merrimack Village District without additional hearing).

PWW, PEU, and the DOE further contend that there is ample support in the record, which includes this settlement agreement and attachments, to find that special circumstances exist that warrant continued departure from the general schedules just and consistent with the public interest. PWW, PEU, and the DOE agree that the proposed Amendment to the Current Contract is necessary to provide appropriately priced water service to PEU under the terms of the Amendment, and that the Amendment does not shift costs to ratepayers or effect PWW’s current tariff rates.

E. CONDITIONS

The parties expressly condition their support of this agreement upon the Commission’s acceptance of all its provisions, without change or condition. If the Commission does not accept the provisions in their entirety, without change or condition, any party hereto, at its sole option exercised within fifteen (15) days of such Commission order, may withdraw from this agreement,

in which event it shall be deemed to be null and void and without effect and shall not be relied upon by any party to this proceeding or by the Commission for any purpose.

The Commission's acceptance of this agreement does not constitute continuing approval of, or precedent regarding, any particular principle or issue in this proceeding, but such acceptance does constitute a determination that the adjustments and provisions set forth herein in their totality are just and reasonable and consistent with the public interest.

The discussions that produced this agreement have been conducted on the explicit understanding that all offers of settlement relating thereto are and shall be confidential, shall be without prejudice to the position of any party or participant representing any such offer or participating in any such discussion, and are not to be used in connection with any future proceeding or otherwise.

IN WITNESS WHEREOF, the parties have caused this agreement to be duly signed by their respective fully authorized representatives.

Pennichuck Water Works, Inc.

Date: December 14, 2022



By its Attorney, Marcia A. Brown

Pennichuck East Utility, Inc.


Date: December 14, 2022



By its Attorney, Marcia A. Brown

New Hampshire Department of Energy

Dated: December 14, 2022



By its Attorney, Suzanne G. Amidon