

STATE OF NEW HAMPSHIRE
BEFORE THE
PUBLIC UTILITIES COMMISSION

Pennichuck Water Works, Inc.

Docket No. DW 22-029

Petition for Approval of Special Contract with Town of Hudson

SETTLEMENT AGREEMENT

November 14, 2022

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A. SUMMARY OF REQUEST

Pennichuck Water Works, Inc. (PWW, or the Company) 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.

The Town of Hudson (Hudson) is a New Hampshire municipal corporation providing water service to its customers.

PWW and Hudson request Commission approval of a revised special contract concerning increased usage by Hudson from PWW, as of July 1, 2021, on account of contamination of Hudson's main supply wells, Dame and Ducharme.

B. PROCEDURAL HISTORY

On April 27, 2022, PWW filed a petition for approval of the new proposed special contract with Hudson. PWW supported the petition with the pre-filed testimony of Donald L. Ware, related schedules, and a new Cost of Service Study (COSS). As part of its petition, PWW requested a waiver of Puc 1606.02(a)(1) which requires parties to file a proposed special contract “at least 30 days before its proposed effective date.” PWW requested an effective date back to July 1, 2021, which was the date of Hudson’s substantial change in use.

On April 27, 2022, the Commission issued an acknowledgement letter.

On April 28, 2022, the New Hampshire Department of Energy (DOE) filed a notice of appearance.

On May 3, 2022, PWW filed a letter of support from the Town of Hudson.

On June 1, 2022, the Commission issued an order commencing an adjudicative proceeding and set a prehearing and technical session for July 6, 2022. The Commission also ordered that PWW notify the public by posting the Commission’s order on its website. Lastly, the Commission granted PWW’s request to waive Puc 1606.

On June 2, 2022, PWW filed its affidavit attesting that it had posted the Commission’s order on its website.

On June 6, 2022, the Office of the Consumer Advocate (OCA) filed its notice of participation.

On July 7, 2022, on behalf of the parties, PWW filed a proposed procedural schedule that included dates for data requests and responses, as well as for a technical session.

On July 11, 2022, the Commission approved the proposed procedural schedule.

On September 13, 2022, on behalf of the parties, PWW filed a supplemental proposed procedural schedule that provided for additional discovery and a technical session and settlement conference.

On September 15, 2022, the Commission approved the proposed supplemental procedural schedule.

On October 7, 2022, PWW filed a statement that the DOE and PWW were drafting a settlement agreement and that they would file the agreement no later than November 10, 2022.

C. BACKGROUND AND PROPOSED SPECIAL CONTRACT

In 2006, under the authority of RSA 378:18, the Commission approved a twenty-year contract for seasonal wholesale water supply between Hudson and PWW to replace a prior contract. See, *Pennichuck Water Works, Inc.*, Order No. 24,611 in Docket No. DW 05-143 (March 31, 2006). This 2006 contract contains an automatic 5-year renewal and a 3-year notice for termination. Section 6 of the 2006 contract allows PWW and Hudson to increase the quantity of water taken and to negotiate a price. Also, although Section 10 of the 2006 contract states termination “shall not be effective until three (3) years from the date” of such termination notice, Section 10 allows for earlier termination “as may be determined by order of the NHPUC”.

Hudson’s usage changed substantially as of July 1, 2021. Mr. Ware described in the pre-filed testimony that, on or about July 1, 2021, Hudson could no longer use two of its water wells, Dame and Ducharme. Ware Testimony at 5 lines 12-13. To meet its customer’s needs, Hudson increased its seasonal, non-winter use of “up to, but not in excess of, two million gallons of water per day (2 MGD)” to meet only its peak summer demands, to full-time usage with a guaranteed minimum annual purchase of 487,968 hundred cubic feet (CCF)-which is the Average Daily Flow of 1.0 MGD measured over a period of one year. As a result of this substantial change from

seasonal to full-time use, Hudson and PWW negotiated a new contract with the aid of an updated COSS. Mr. Ware explained in his testimony that because the COSS used for the 2006 contract was based on seasonal, non-winter supply, those recommended rates no longer matched the cost to provide the new water service to Hudson. See Testimony of Mr. Ware at 16, lines 6-7.

The COSS was funded by the New Hampshire Department of Environmental Services. The COSS reviewed PWW's costs to provide Hudson with the new, full-time water supply and determined the rates needed to cover that cost to serve Hudson.

The proposed special contract would run from July 1, 2021 to June 30, 2023 and have three automatic extensions of two-year terms unless either party gives written notice to the other, at least twelve months in advance of the renewal date, of an intent to not renew.

Under the special contract, PWW agrees to reserve 1.0 MGD of capacity from its Nashua water treatment plant for Hudson. In addition to the guaranteed minimum take noted above, Hudson agrees to pay a monthly meter charge, a monthly fixed charge, and a monthly volumetric charge. The monthly volumetric charges would be based upon a minimum of 1,337 CCF per day (based on the number of billing days in the month), or the actual volume of water used, whichever is greater.

In the event there is a month where Hudson does not use a minimum of 1,337 CCF per day, the difference between 1,337 CCF billed per day and the actual amount used by Hudson for that bill would be carried forward into the next month as a credit for Hudson's usage in the following month(s). Hudson would be allowed to carry any usage credits over month-to-month, but not from one contract period to the next contract period. A contract period, or term, runs over two years, commencing July 1st and ending June 30th of each two-year term. The renewal terms are intended to give Hudson time to assess and implement a plan for replacing its source of

supply. Petition at para. 4. It is unknown at this juncture if another special contract will be needed after the proposed contract, and if so, what those terms will look like.

In advocating for the new rate to go into effect July 1, 2021, Mr. Ware stated in response to the DOE's data request DOE 4-4 that based on Hudson now guaranteeing a minimum daily purchase amount of 1.0 MGD, the appropriate rate to charge Hudson beginning on July 1, 2021 are the rates detailed in the updated COSS. See Attachment B, PWW's response to DOE 4-4(c). Otherwise, if charges for service, from July 1, 2021 to the approval date of the proposed contract, were maintained at the 2006 COSS rates, and if no credit for that period were applied for the difference between the 2006 and the proposed contract rates, Hudson would be "overcharged". The reduction to the volumetric rate per CCF, from \$2.5610 in the 2006 contract to \$1.0093 in the proposed contract illustrates this point. The annual fixed demand charge increases to \$457,441 under the proposed contract, from \$32,800 in the 2006 contract. The increase in the fixed demand charge is directly linked to the increase in Hudson's guaranteed purchase amount, which was triggered by NHDES's requirement for Hudson to obtain a new supply source as of July 1, 2021. The updated COSS is the basis for the rates and charges in the proposed contract, as it properly reflects, as of July 1, 2021, PWW's cost of providing service to Hudson based on the change in demand. The rates used in the proposed contract are shown in the updated COSS Summary page. See Attachment B, Attachment DOE 3-4a, p 11. Because of this cost differential, between those in the 2006 and in the updated COSS, Mr. Ware opined that the 2006 contract rates are not just and reasonable relative to Hudson's new usage level. *Id.*

Mr. Ware identified benefits the proposed Hudson contract brings to PWW's customers. For example, in its general rate case, Docket No. DW 22-032, PWW has pro formed the proposed Hudson rates into the revenue requirement and that pro forma results in a reduction in the revenue

requirement to PWW's General Metered (G-M) customers of approximately \$285,000. See Attachment B, PWW's response to DOE 2-10, DOE 3-2, Attachment DOE 3-2. Also, under the proposed Hudson contract, Hudson will be contributing more to PWW's General and Administrative costs, thereby lowering G-M customer rates to less than they otherwise would be. See Attachment B, PWW's response to DOE 2-1. These benefits exist even with the proposed rates being effective July 1, 2021.

Further, Mr. Ware identified reasons justifying billing Hudson under a special contract as opposed to PWW's current tariff rates:

- (a) Hudson has its own water storage. It does not require water to meet its peak instantaneous needs like a normal G-M customer as those are met from its water storage tanks.
- (b) Hudson, unlike the G-M metered and unmetered customer classes, municipal fire protection class, and private fire protection class, is contractually obligated to purchase a minimum amount of water from PWW, regardless of whether it uses that water or not, compared to PWW's other customer classes who are not obligated to purchase a minimum amount.
- (c) Hudson, unlike a G-M customer, takes water at a fixed rate versus a variable rate. PWW can work with Hudson, as necessary to control when that water is taken to help reduce peak day usage rates. Reducing peak day usage helps keep costs down for PWW and its customers.
- (d) If PWW were to create a separate customer class in its general rate schedules for service taken by Hudson, it would be a class of one (1) customer. That being the case, that customer's usage needs ought to be addressed as the Commission has in the past, via RSA 378:18 and a special contract so that the costs to analyze the appropriate rate are not socialized to other customers. Also, importantly, if a customer class were created to address Hudson's needs, PWW would lose the ability to lock this large user into a long-term commitment because PWW's general tariffs are all subject to general rate cases every three years. As stated earlier, using the general tariff model to meet Hudson's needs would not yield the benefits to PWW's other customers that the long-term special contract model provides.

(Source: Attachment B, PWW's response to DOE 2-1.)

With respect to the credit¹ that will result from applying the proposed rates back to July 1, 2021 and its effect on the combined Rate Stabilization Fund (RSF) accounts, Mr. Ware stated that if no credit is granted there would be additional revenues booked from Hudson, based on existing contract rates applied against a greater usage, which would result in a higher projected year-end 12/31/2022 RSF combined balance. This increased balance would trigger a credit back to the G-M customers. See Attachment B, PWW's response to DOE 4-4. This greater credit to the G-M overall revenue requirement would be at the expense of Hudson as a special customer, and would be a subsidy from one customer to the rest of PWW's customers with no benefit to Hudson.

D. LEGAL AUTHORITY

Pursuant to RSA 378:14, the general rule is that 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

¹ This credit is not to be confused with the credit Hudson might incur under Section 7(b) of the special contract if its monthly usage, as calculated each August, falls below 40,107 CCF.

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 allocation of costs should be for Hudson to ensure that Hudson 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

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).

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.* As Mr. Ware noted in response to OCA 2-4, the differential between the updated COSS rates and the older 2006 COSS-based rates, for the period July 1, 2021 to June 30, 2022 is \$213,987. As of October 4, 2022, the differential was \$351,227. This represents the amount over the true cost to provide service to Hudson that Mr. Ware, and the Company, considers to be beyond the zone of just and reasonable. See Attachment B, and PWW’s responses OCA 2-4 and DOE 3-2.

With respect to early termination of the 2006 contract, other prior Commission decisions are supportive. See, *Public Service Company of New Hampshire*, Docket No. DR 98-139, Order No. 23,139 (February 8, 1999) citing *Re Town of Derry*, Docket No. DR 90-123, Order No. 20,365 (January 7, 1992) (the Commission recognized that it retains jurisdiction over all contracts filed with it for its approval under the so-called Mobile-Sierra doctrine)⁴. *Public Service Company of New Hampshire*, Docket No. DE 17-177, Order No. 26,083 (December 11, 2017) (the Commission approved early termination of the special contract). PWW and Hudson are mutually in agreement on the need to terminate the existing contract unlike in *University of New Hampshire*, Docket No. DW 04-118, Order No. 24,436 (February 25, 2005) where the parties disputed early termination.

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.

⁴ “The Mobile-Sierra doctrine provides that a contractually based tariff which has been filed by the contracting parties, and approved by the regulatory agency after a finding of reasonableness, may be set aside by the regulatory agency if it later finds that the rate is contrary to the public interest.” See *Unites States Gas Pipeline Co. v. Mobile Gas Service Corp.*, 350 U.S. 332 (1956) and *FPC v. Sierra Power Co.*, 350 U.S. 348 (1956).

E. TERMS OF THIS SETTLEMENT AGREEMENT

1. The DOE does not take exception to PWW and Hudson’s revised special contract, as attached to this settlement agreement as Attachment A. In taking no exception, PWW, Hudson, the DOE agree that the proposed contract will have no detrimental effect on other ratepayers. PWW’s reconciliation between the prior and proposed contracts for the term July 1, 2021 to the date of Commission approval of the proposed contract, will be reviewed by the DOE Staff and any over or under collection will be either recovered from or refunded to Hudson per the terms of the proposed contract. There will be no recovery from, or refund to, other ratepayers.

2. PWW, Hudson, and the DOE agree that Attachment A supersedes all prior versions of the proposed special contract filed with the Commission. The changes in Attachment A, as compared to the prior version of the proposed contract, are the result of discovery and comments from the Commission at the prehearing conference in DW 22-040, Pennichuck Water Works Special Contract with Pennichuck East Utility, on September 28, 2022. A track-change version of the special contract, as compared to the version filed with the petition, is attached as Attachment A-1.⁵ 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 and the revised COSS is attached as Attachment C. This version of the COSS supersedes all prior versions filed with the Commission.

4. A summary of pertinent terms of the proposed special contract are:

⁵ In addition to modifications to the Demand Charge and Volumetric Charge, the revisions to the contract included: changing Section 7(a) to allow for changes to the Demand Charge when material investment is needed to comply with Federal and State regulations; changing Section 7(b) to expressly state how the bill credit would occur and to expressly state that the Volumetric Charge may change due to changes in the Qualified Capital Project Adjustment Charge.

(a) PWW will maintain facilities capable of delivering water to Hudson continuously at the rate of up to 1.0 MGD peak hour. Hudson will have the right to take up to, but not in excess of, two million, one hundred thousand (2,100,000) gallons of water per day at the interconnection point on the Nashua side of the Taylor Falls Bridge. Hudson's peak draw at the interconnection point will be limited to 1,460 gallons per minute. The number of days in the year will be 365, and 366 in a leap year.

(b) The contract is for a two-year term from July 1, 2021 (Initial Term) and may be extended beyond July 1, 2023 for three additional terms of two (2) years each (Renewal Term) unless either party gives written notice to the other, at least twelve (12) months prior to the date on which the Initial Term or any Renewal Term expires, of its intention to terminate the Agreement at the expiration of the Initial Term or the then-current Renewal Term, as the case may be.

(c) PWW will invoice Hudson monthly, in arrears. The invoice will contain three main charges: an Annual Demand Charge of \$457,441, payable in equal monthly installments; a Volumetric Charge of \$1.0093 per CCF for a minimum guaranteed take of 487,968 CCF per year measured over a two-year period starting with the initial term date of July 1, 2021; and a Monthly Fixed Meter Charge of \$940 annually, payable at \$78.33 per month. See Attachment C, Cost of Service Study, at page 11. The Fixed Meter Charge represents the cost to read the meter monthly and to annually test the meter for accuracy, and is billed to Hudson on a monthly basis. The Monthly Fixed Meter Charge may be adjusted by the same percentage and at the same time as any future change in volumetric rates for general metered core system customers in Nashua.

(d) The Volumetric Charge may only be adjusted by the same percentage and at the same time as any future change in the volumetric rates for general metered service, as adjudicated by

the Commission, which PWW charges to its core system customers in the City of Nashua. The Volumetric Charge includes modifications made from time to time by adjustments to the Qualified Capital Project Adjustment Charge, as approved by the Commission. Source: *Pennichuck Water Works, Inc.*, Docket No. DW 19-091, Order No. 26,429 (December 2, 2020).

(e) Regarding implementation of the proposed contract rate effective July 1, 2021, Commission approval after that date may require issuance of corrected bills to reflect the approved rate for usage as of July 1, 2021. In such an event, the difference in revenues between what was actually billed, for service from July 1, 2021 forward, and what would have been billed under the new approved rates will be used to create a bill credit. This bill credit will be returned over the number of months that the credit was earned, similar to the minimum guaranteed usage credit described below. See Attachment A, Volumetric Charge, at page 4.

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

6. PWW, Hudson, and the DOE agree that, within thirty (30) days of Commission approval of the proposed contract, PWW shall file for the Commission, Hudson, DOE's review its reconciliation of the difference between the rates charged from July 1, 2021 to the date of Commission approval of the proposed contract. Because PWW bills Hudson monthly, PWW will calculate this reconciliation using the bills issued to date. PWW, Hudson, and the DOE agree that PWW shall not charge or refund Hudson the difference between the 2006 and the proposed special contracts until such charge or refund is approved by the Commission.

7. PWW, Hudson, and the DOE request the Commission approve the proposed contract 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 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, Hudson, and the DOE agree to the disposition of the docket by settlement agreement. Therefore, because RSA 378:18 does not require a hearing, PWW, Hudson, and the DOE recommend that the Commission approve the signed special contract 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, Hudson, 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 departure from the general schedules just and consistent with the public interest. PWW, Hudson, and the DOE agree that the proposed special contract is necessary to provide appropriately priced water service to Hudson under the terms of the special contract, and that the contract does not shift costs to ratepayers or effect PWW’s current tariff rates.

F. 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 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: November 14, 2022

Marcia A. Brown
By its Attorney, Marcia A. Brown

New Hampshire Department of Energy

Dated: November 14, 2022

/s/ Suzanne G. Amidon
By its Attorney, Suzanne G. Amidon

Town of Hudson

Dated: November 14, 2022

/s/ David E. LeFevre
By its Attorney, David E. LeFevre