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July 30, 2019

Ms. Debra A. Howland
Executive Director
New Hampshire Public Utilities Commission
21 South Fruit Street, Suite 10
Concord, New Hampshire 03301

Re: Docket No. DW 19-091
Pennichuck Water Works, Inc.
Petition for Declaratory Ruling and Request for Mediation

Dear Ms. Howland:

Please treat this letter as the response of the Office of the Consumer Advocate (OCA) to the pleading captioned "Amended Request for Mediation" filed by petitioner Pennichuck Water Works, Inc. (PWW) on July 29, 2019. The OCA entered an appearance in this docket on May 21, 2019, consistent with RSA 363:28, II (authorizing the OCA to appear in "any proceeding concerning rates, charges, tariffs, and consumer services . . . in which the interests of residential utility customers are involved").

As noted in the petition by which PWW initiated this proceeding, at issue is a disagreement between PWW and a wholesale customer with which PWW has a Commission-approved special contract, the Town of Hudson. PWW contends the special contract requires Hudson to pay the utility's Qualified Project Adjustment Charge (QPAC) and rate case surcharge. Hudson contends the special contract imposes no such obligation.

Paragraph 7(b) of the special contract, which is attached to the petition, establishes a volumetric charge to be paid by Hudson and further specifies that the 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." The subsequently approved QPAC and rate case surcharge comprise such an adjustment and the volumetric rate payable by Hudson is therefore subject to increases that reflect the QPAC and rate case surcharge. Any other outcome is unfair to PWW's other customers, including particularly its residential customers, because they must ultimately make up any revenue shortfall arising out of Hudson's erroneous interpretation of the special contract.

In New Hampshire, interpretation of a contract is a question of law for the tribunal to resolve. *Greenwald v. Keating* (N.H. Supreme Ct., June 29, 2019), 2019 WL 2588884 at *3 (citation omitted). Although ambiguity could require factfinding, and thus justify the development of an evidentiary record, there is no ambiguity here. Moreover, the Commission may only approve special contracts when such a departure from otherwise applicable rates is “just and consistent with the public interest.” RSA 378:18. The interpretation favored by Hudson is not just or consistent with the public interest; thus it could not have been what the Commission intended when it approved the special contract and it cannot be adopted now.

Unfortunately, for reasons the OCA does not fully grasp, both Hudson and PWW have made this case more procedurally complicated than necessary. Hudson moved on May 23 for dismissal, contending that “the appropriate dispute resolution process in the event of an actual claim or controversy [in connection with the special contract] is arbitration administered by the Commission.” Town of Hudson Motion to Dismiss Petition for Declaratory Ruling (May 23, 2019) at ¶¶ 11-12 (invoking paragraph 12(a) of the special contract, stating that controversies “arising out of or relevant to” the special contract “shall be settled by binding arbitration administered by the NHPUC”). The Commission responded by scheduling two technical sessions, on July 17 and 25, in an obvious effort to encourage PWW and Hudson to resolve their dispute. The upshot of these discussions was not an agreement but PWW’s pleading of July 29.

The utility now seeks to withdraw its request for a declaratory order. Instead, PWW is asking the Commission “to mediate or arbitrate a dispute concerning paragraph 7(b)” of the special contract. PWW Amended Request for Mediation at 1. The authorities invoked by PWW are RSA 365:5, RSA 365:23, RSA 365:25, N.H. Code Admin. Rules Puc 204.06, and N.H. Code Admin. Rules Puc 1203.07. PWW Amended Request for Mediation at 5.

These authorities do not justify the approach to this dispute now urged by PWW. RSA 365:5 simply authorizes the Commission to conduct inquiries and investigations as to the rates and activities of public utilities. RSA 365:23 merely states that public utilities must follow the requirements set forth in orders of the Commission. RSA 365:25 states that Commission-approved rates remain in effect until altered by a subsequent order. Rule Puc 204.06 merely provides that nothing in the process the Commission has established for resolving consumer complaints shall limit the Commission’s RSA 365:5 investigative authority. And Rule Puc 1203.07 describes the process utilities must use to establish payment arrangements for residential customers in arrears.

The OCA assumes that PWW intended to invoke Rule Puc 1203.17, which authorizes (but does not require) the Commission to convene a “conference” when there is a dispute between a utility and a customer that does not involve disconnection. Paragraph (b) of this rule requires the Commission to deny a request for such a conference when such efforts to mediate the complaint are “not appropriate.” This is such a situation.

Although (at least from the perspective of PWW’s overall revenue requirement) a relatively small sum is at issue here, resolution of this dispute in favor of Hudson would likely cause all of the other municipalities in southern New Hampshire that obtain water at wholesale from PWW via special contract to take positions similar to that asserted by Hudson in this docket. This, in

turn, would have significant consequences for PWW's retail customers – including the residential customers whose interests are represented by the OCA. As the Commission is aware, PWW recently filed a rate case (Docket No. DW 19-084). At the July 25 technical session, PWW politely (and understandably) declined to state that it would forego for rate case purposes any revenue lost to municipalities that successfully pursue the kind of special contract interpretation Hudson is seeking in the instant docket.


For this reason, it would not be appropriate for the Commission to invoke its Puc 1203.17 conference process here, as if this were a garden variety dispute between a single customer and a utility. Even if it were, the technical sessions conducted on July 17 and 25 have already demonstrated that efforts to mediate this dispute are futile, rendering a Puc 1203.17 conference a waste of time.

Although PWW appears to be willing to submit to arbitration, the language in the special contract requiring disputes to be resolved via arbitration is void and the Commission must disregard it. *See, e.g., Rizzo v. Allstate Insurance Co.*, 170 N.H. 708, 713 (2018) (noting that a contract term which “contravenes public policy” is unenforceable). Arbitration (as distinct from mediation) is a form of binding, private alternative dispute resolution. *See, e.g., John A. Cookson Co. v. New Hampshire Ball Bearings, Inc.*, 147 N.H. 352 (2001) (discussing significance and effect of contractual arbitration clauses). As such, arbitration of disputes arising under special contracts is patently inconsistent with RSA 378:18, which explicitly recognizes that such deviations from rates of general applicability are matters of public interest *not* suitable for private resolution.

In light of the foregoing, the Commission should neither dismiss the petition as requested by Hudson nor turn the proceeding into a mediation or arbitration as recommended by PWW. Instead, the Commission should resolve this dispute on the papers, favorably to PWW. Although the OCA does not believe that the development of an evidentiary record is necessary here, because the dispute can be resolved as a matter of law, the OCA does not object to the Commission scheduling a hearing for the purpose of taking testimony and/or entertaining argument.

Thank you for considering our views. Please feel free to contact me if there are any questions or concerns about the foregoing.

Sincerely,



D. Maurice Kreis
Consumer Advocate

cc: Service list, via e-mail