

**THE STATE OF NEW HAMPSHIRE  
BEFORE THE  
PUBLIC UTILITIES COMMISSION**

Pennichuck Water Works, Inc.

Docket No. DW 19-091

Petition for Arbitration

TOWN OF HUDSON'S REBUTTAL MEMORANDUM

NOW COMES the Town of Hudson, by and through its attorneys, Tarbell & Brodich, P.A., and respectfully submits the within Rebuttal Memorandum, and in support thereof states as follows:

The Special Contract Represents the Entire Agreement Involving All Matters Relative to PWW's Sale of Water to Hudson

It is probably true that no one, including the Commission, Staff, or PWW, gave any consideration to whether or not surcharges could be imposed on Hudson or were permitted under the Special Contract. Rather, it appears that there was an assumption that the surcharges were simply allowed, or that Hudson's lack of participation in the proceedings before the Commission after approval of the Special Contract constituted a tacit acceptance of the subsequent surcharges. However, any such reasoning fundamentally misunderstands what it means to have a Special Contract.

The Special Contract defines the entire relationship between Hudson and PWW. There can be no changes to that relationship without the mutual agreement on both sides, and approval by the Commission. The Special Contract is a binding legal obligation, the consequences of which

are: 1) Hudson is entitled to rely on the Special Contract, and 2) PWW must be held to comply with the Special Contract.<sup>1</sup>

Where the Special Contract defines the entirety of the relationship between the parties, Hudson need not appear before the Commission in proceedings unrelated to its Special Contract to defend or preserve its rights. The Special Contract cannot be changed, modified, or amended without Hudson's participation and agreement. The Special Contract represents the complete agreement between the parties. No new fees, fares or charges may be imposed on Hudson which touch and concern its subject matter without Hudson's affirmative approval and agreement.

Hudson's Payment of Prior Surcharges Does Not Suggest any Agreement that the Surcharges are Volumetric Charges of Permissible Under the Contract

PWW's emphasis on Hudson's prior payment of surcharges in support of its position that the surcharges are permissible under the Special Contract is both legally and factually erroneous. In short, Hudson's payment reflects nothing more than a business decision, balancing the litigation expense of contesting the surcharges against the amount of the surcharges. Thus, up to this point, Hudson had deemed the amount of the surcharges insufficient to warrant legal action. However, when Hudson received its bill of December 13, 2018, in which it was assessed a \$7,575.27 QCPAC surcharge, that was the proverbial straw that broke the camel's back, forcing Hudson to defend its rights under the Special Contract. Hudson's past payment of surcharges does not support the legal conclusion that the surcharges are permissible under the Special Contract or the factual conclusion that Hudson believed or agreed that the surcharges were permissible under the Special Contract.

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<sup>1</sup> Of particular note is the fact that there are no new undertakings on the part of PWW that did not exist as of the date the Special Contract was agreed upon by the parties or approved by the Commission. In other words, PWW's performance under the Special Contract remains unchanged. Under such circumstances, in the absence of any new or additional consideration to Hudson, there can be no new or additional fees, fares or charges.

### Hudson's Lack of Notice

The issue regarding notice is as follows. First, the surcharges are not authorized under the Special Contract. Second, if PWW would like to require Hudson to pay surcharges, it is necessary to amend the Special Contract. Third, the only way to amend the Special Contract is pursuant to the corresponding procedural rules of the Commission relative to amending Special Contracts, with notice to Hudson. No such notice was ever given.

Equally, the corollary is also true, which is to say that any notice that was given to Hudson relative to the rate cases, etc., did not contemplate any amendment to the Special Contract.<sup>2</sup> As a result, because the notices would not have implicated Hudson's substantive rights under its Special Contract, Hudson would not have had any notice, nor reason, to believe that it was required to participate in the rate cases to defend its rights under the Special Contract. In the absence of proper notice, Hudson is not bound by any action of the Commission which effectuates an amendment or modification to the Special Contract.

### Principles of *Res Judicata* Do Not Apply to this Controversy

*Res Judicata* does not apply to the facts and circumstances of this matter because the prior proceedings of the Commission did not involve amendments to the Special Contract.

### PWW's Policy Arguments do Not Support the Interpretation that Surcharges are Permitted under the Special Contract

The QCPAC surcharge is was developed by PWW, and PWW sought approval of its QCPAC surcharge by the Commission, either assuming, or without regard to whether or not, the surcharges were permissible under its special contracts. With the current realization that surcharges are not permitted under the Special Contract, PWW recognizes that there will be collateral

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<sup>2</sup> PWW admits in its Brief at p. 7 that it "... never sought to amend the special contract." Thus, it stands to reason that no notice was ever given relative to an such amendments.

consequences relative to rate design and obtaining revenue from its other customers/classes because it will receive less revenue from its customer with special contracts. While Hudson recognizes that possibility, that is a situation which PWW created for itself, is not Hudson's responsibility, and most importantly, neither a legal nor factual basis upon which the Commission may impose these additional surcharges when they are not authorized under the Special Contract.

Respectfully submitted,  
Town of Hudson,  
By and through its attorneys,  
TARBELL & BRODICH, P.A.

Dated: November 5, 2019

  
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#### CERTIFICATION

I hereby certify that a true and accurate copy of the foregoing has been forwarded by e-mail to all parties on the docket service list.

Dated: November 5, 2019

  
David E. LeFevre, Esq.