

**State of New Hampshire**

**Before the Public Utilities Commission**

**Pennichuck Water Works, Inc.**

Petition for Declaratory Ruling and Request for Mediation

Docket No. DW 19-091

Rebuttal Memo of the Office of the Consumer Advocate

NOW COMES the Office of the Consumer Advocate (“OCA”), a party in this docket, in support of this Rebuttal Memo the OCA states as follows:

First, the language of the subject contract is unambiguous such that the Commission should rule as a matter of law without a hearing. Second, if a hearing is necessary, arbitration is not an appropriate mechanism of dispute resolution for a regulated entity.

***A. On the basis of the language of the contract and the underlying orders, the PUC should issue an order as a matter of law that the Town of Hudson’s volumetric charge be adjusted by the same percentage and take effect as of the same dates as any adjustments in the rates paid by residential customers in Nashua.***

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.

The special contract between Pennichuck Water Works, Inc. (PWW) and Town of Hudson (Special Contract) states at 7.(b):

“The Volumetric 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.”

1. **Contract Language:** The Special Contract is specific in stating that the Town of Hudson Volumetric charge will adjust in accordance with “*any adjustment in the rates paid by residential customers in Nashua.*” This language does not limit the adjustment to a certain type of volumetric charge, nor does it preclude surcharges that are billed volumetrically.
2. **Tariff Language:** This interpretation is further confirmed by the Special Contract language “*pursuant to the Company's tariff on file.*” The tariff does not break down types or sub-categories of volumetric rate – there is one volumetric rate that encompasses the adjustments approved by Order of the Commission. The current company tariff for residential customers in Nashua includes:

*Volumetric Rate: In addition to the standard customer charge, the monthly volumetric charge based on usage will be as follows:*

*Volumetric Charge: \$ 3.66 per 100 cu. ft.*

3. **Order Language Approving QCPAC:** The annual “Qualified Capital Project Adjustment Charge” (QCPAC) for PWW was approved in Order No. 26,070 dated November 7, 2017 as a step adjustment to rates between full rate cases. “Customer bills would include the annual QCPAC after the issuance of an order approving such surcharge, in the month following the effective date of the order.”
4. **Settlement Agreement on QCPAC:** The settlement agreement identifies that the QCPAC is part of customer rates enacted to help ‘maintain adequate cash flows’ between rate cases and to ‘mitigate rate shock for customers’. (DW 16-806, Settlement Agreement, Bates 18-19.)
5. **Settlement Agreement Exhibit 2:** The exhibit (Bates 29) clearly shows in the last column that the rate adjustment for the permanent rates and the QCPAC (step rates - which will

become part of the permanent rate) applies the same percentage rate adjustment to residential rate customers of Nashua as it does to the Volumetric Charges of Hudson which is in accordance with the Special Contract.

The Special Contract is unambiguous in establishing that the Town of Hudson's volumetric charge is adjusted by *any adjustment in rates* at the same percentage and on the same date. The Commission has upheld the terms of the Special Contract by approving the Settlement Agreement which applies the rate increase to the Town of Hudson's volumetric charge. While the fact that the Town of Hudson has not had to raise water rates to its citizens in 21 years is laudable, there should not be a transfer of costs from the Town of Hudson to the ratepayers of Nashua and other communities served by PWW. The Special Contract is clear and the Commission should rule as a matter of law that the percentage adjustment to the volumetric rate in the tariff applies as a percentage adjustment to the Town of Hudson volumetric rate on the same effective date.

***B. Arbitration is not an appropriate dispute resolution mechanism for a regulated entity and was not specifically approved by the Commission in the Special Contract.***

The Town of Hudson argues that the Special Contract was approved by the Commission and requires settlement of a controversy by "binding arbitration administered by the NHPUC." (12.(a) of the Special Contract). The first issue is whether the Commission "approved" administering binding arbitration. The second issue is whether the binding arbitration clause can continue to exist as written as a matter of law.

1. The Special Contract was approved by the Commission under DW 05-143, Order No. 24,611, dated March 31, 2006. In that Docket, Staff and Commission requested identification of all the differences between then existing special contract and the new Special Contract for

analysis (Staff Data Request 1-8). In response, witness Stephen J. Densberger identified eight changes for evaluation by the Public Utilities Commission. None of the identified changes mentioned dispute resolution.

The dispute resolution clause in the previous special contract dated November 5, 1997 stated: "Disagreements between the parties over the terms of this agreement shall be submitted to the NHPUC, or its successor, for resolution." An amendment to the agreement dated March 13, 1998 amended that paragraph to add the sentence: "Disagreements between the parties over the terms of renewal or termination shall be submitted to the New Hampshire Public Utilities Commission, or its successor, for resolution." Although the title of clause 15 is "Arbitration," the heading is for reference, *none of the legal contractual language* in the previous contract or the amendment refers to arbitration. When changes between the contracts were requested for evaluation, the change in the dispute resolution clause to "binding arbitration administered by the NHPUC" was neither identified nor discussed in the record approving the Special Contract. Therefore, the intent of the parties must not have been to change the rights of the parties by changing to "arbitration" as defined under RSA Chapter 542, Arbitration of Disputes, and case law.

Certainly the Commission is an *arbiter* that administers binding resolutions to disputes.

**363:17-a Commission as Arbiter.** – The commission shall be the arbiter between the interests of the customer and the interests of the regulated utilities as provided by this title and all powers and duties provided to the commission by RSA 363 or any other provisions of this title shall be exercised in a manner consistent with the provisions of this section.

The dispute resolution clause in the Special Contract should either be interpreted as referring to the Commission's role as arbiter under 363:17-a, or alternatively, if the term "binding arbitration" is interpreted literally then the clause should be struck as contravening public policy.

*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.

The Commission should act as an arbiter under 363:17-a. The Commission should not submit itself to the entirely different set of statutes and case law that govern binding arbitration.

WHEREFORE, the OCA respectfully requests that this honorable Commission:

- A. Rule as a matter of law that the percentage adjustment to the volumetric rate in the PWW tariff applies as a percentage adjustment to the Town of Hudson volumetric rate on the same effective date.
- B. Grant any other such relief as it deems appropriate.

Sincerely,



Christa Shute  
Staff Attorney  
Office of the Consumer Advocate  
21 South Fruit Street, Suite 18  
Concord, NH 03301  
(603) 271-1174  
[donald.kreis@oca.nh.gov](mailto:donald.kreis@oca.nh.gov)

November 5, 2019

#### Certificate of Service

I hereby certify that a copy of this Rebuttal Memo was provided via electronic mail to the individuals included on the Commission’s service list for this docket.



Christa Shute