

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

Pennichuck Water Works, Inc.

Docket No. DW 19-091

Petition for Declaratory Ruling
Wholesale Water Supply Contract with the Town of Hudson
and
Request for Mediation

MOTION TO DISMISS PETITION FOR DECLARATORY RULING

NOW COMES the Town of Hudson, by and through its attorneys, Tarbell & Brodich, P.A., and respectfully submits the within Motion to Dismiss Petition for Declaratory Ruling, and in support thereof states as follows:

Introduction and Summary

1. The Petitioner, Pennichuck Water Works, Inc. ("PWW"), seeks a declaratory ruling relative to the Wholesale Water Supply Contract dated July 12, 2005 ("Special Contract") between PWW and the Town of Hudson ("Hudson").
2. PWW believes that under the Special Contract Hudson is required to pay the Qualified Capital Project Adjustment Charge ("QCPAC") approved by the Commission on November 7, 2017, as well as certain rate case expenses. *See* PUC Order 26,070.
3. Hudson does not believe it is required to pay the QCPAC or rate case expenses under the Special Contract.
4. PWW has two (2) theories as to why Hudson is required to pay the QCPAC and rate case expenses under the Special Contract: 1) the Special Contract should be interpreted and understood as requiring paying of the QCPAC and rate case expenses, or in the alternative, 2) if

the Special Contract does not require payment of the QCPAC and rate case expenses, then the Commission's Order approving the QCPAC effectively modified or amended the Special Contract, such that Hudson is now required to pay the QCPAC and rate case expenses.

5. Hudson does not believe it is required to pay the QCPAC or rate case expenses under the Special Contract because the fees called for under the Special Contract do not include either the QCPAC or rate case expenses.

6. The issue before the Commission is, at its heart, a simple billing dispute; nothing more, nothing less.

Appropriate Dispute Resolution

7. A "declaratory ruling" means "an agency ruling as to the specific applicability of any statutory provision or of any rule or order of the agency." RSA § 541-A:1, V.

8. By contrast, a "contested case" means "a proceeding in which the legal rights, duties, or privileges of a party are required by law to be determined by an agency after notice and an opportunity for hearing." RSA § 541-A:1, V.

9. While the Commission may process declaratory ruling and contested cases similarly from a procedural perspective, they are separate and distinct legal processes, which provide for separate and distinct remedies and relief.

10. The matter presented for review to the Commission is a simple billing dispute, i.e. contested case; the matter is not appropriate for declaratory relief.

11. According to the Special Contract, Paragraph 12 (a):

Arbitration. Any controversy or claim arising out of or relating to this Agreement, or the breach thereof, shall be settled by binding arbitration administered by the NHPUC, or its successor for resolution of the dispute.

12. According to the parties' Special Contract, the appropriate dispute resolution process in the event of an actual claim or controversy is arbitration administered by the Commission.

13. Under such circumstances, the Petition must be dismissed.¹

As a Matter of Law the Petition for Declaratory Ruling Must be Dismissed for Failure to State a Legally Cognizable Claim for Which Relief May be Granted

14. The Special Contract between Hudson and PWW is a special contract within the meaning of RSA § 378:18, and was approved by the Commission as such. *See* Order 24,611 ("[P]ursuant to RSA 378:18, Pennichuck Water Works, Inc. Contract with the Town of Hudson dated July 12, 2015 is APPROVED.").

15. A "special contract" is by definition "a contract for service at rates other than those fixed by [sic] schedules of general application." RSA § 378:18.

16. Such special contract must be on file with the Commission, and in fact, "constitute[s] a part of the public schedules of the public utility making the same." RSA § 378:19.

17. The fees paid by Hudson under the Special Contract consist of: 1) an annual demand charge, and 2) "a non-tariff volumetric charge." Puc Order 24,611 (emphasis added)

18. In requesting its approval of the Commission for the Special Contract, "PWW submitted a written statement of special circumstances, pursuant to RSA 378:18, asserting that a deviation from the tariffed rate is appropriate given the cost of providing water on a bulk basis to Hudson at a single metered location that is lower than the cost of servicing other customers, and that supplying a large quantity of water to Hudson through a single meter will generate revenues that will benefit PWW's remaining customers." *Id.* (emphasis added).

¹ PWW also requests mediation. It is not clear whether the request for mediation was intended as a request for arbitration. Hudson seeks dismissal of the request for a declaratory ruling, not any request for alternative dispute resolution which would be consistent with the parties' agreement and the Special Contract.

19. "PWW further stated that the charges under the contract cover all of PWW's variable costs to provide service and contribute to PWW's fixed costs of providing service while also providing a significant supply of water to Hudson." *Id.* (emphasis added).

20. During the review process, "Staff opined that, pursuant to RSA 378:18, special circumstances exist to justify departure from general rated schedules of the utility and to conclude that the special contract is in the public interest." *Id.* (emphasis added).

21. "According to Staff, the Proposed Contract will provide additional revenues that will benefit its other customers and that the rates contained therein will provide sufficient revenues to cover the cost of providing service to the Town of Hudson." *Id.* (emphasis added).

22. Based on the foregoing, the Commission approved the Special Contract, expressly finding that "special circumstances exist to justify departure from PWW's schedules of general application." *Id.* (emphasis added).

23. Moreover, "[a]ny change to a special contract shall be filed as an amendment" Puc 1606.03 (d).²

24. "An amendment in a special contract shall not become effective until approved by the Commission." Puc 1606 (f).

25. Pursuant to the Special Contract, "[t]his Agreement may be amended upon the mutual agreement of the parties, subject to any required approval of the NHPUC."

26. PWW requests a declaratory ruling that the Commission's orders approving the QCPAC and rate case expenses must be applied "uniformly across all customer classes."

² There is an exception for the need to file an amendment for "[a] change which exercises an option clearly delineated in the original contract." The QCPAC and rate case expenses are not clearly delineated in the Special Contract.

27. However, the rates paid by Hudson under the Special Contract, by statutory definition, per the express terms of the Special Contract, and per the Commission's Order approving the Special Contract, are not the same rates that are generally applicable.

28. Equally, the Commission's order approving the QCPAC and rate case expenses were never processed as an amendment to the Special Contract, nor was notice ever afforded to Hudson that PWV was seeking to amend the Special Contract.

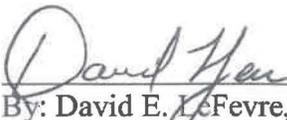
29. Hudson has never agreed to any amendment to the Special Contract, the Commission has not approved any amendment to the Special Contract, and the requested declaratory ruling that the Commission's orders relative to the QCPAC and rate case expenses modified or effectively amended the Special Contract must be dismissed.

WHEREFORE, the Town of Hudson, respectfully requests that the Public Utilities Commission:

- A. Grant the within dismiss the request for a declaratory ruling; and
- B. Grant such further relief as may be just and appropriate.

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

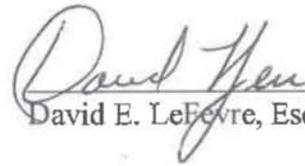
Dated: May 23, 2019


By: David E. LeFevre, Esq., BNH #13811
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CERTIFICATION

I hereby certify that a true and accurate copy of the foregoing has been forwarded by e-mail and First Class United States Mail, postage prepaid, to Marcia A. Brown, Esq., NH Brown Law, P.O. Box 1623, Concord, NH 03302-1623.

Dated: May 23, 2019


David E. Lefevre, Esq.