

**STATE OF NEW HAMPSHIRE
PUBLIC UTILITIES COMMISSION**

DW 19-091

PENNICHUCK WATER WORKS, INC.

Petition for Declaratory Ruling and Request for Mediation

Order Regarding Special Contract Terms

ORDER NO. 26,429

December 3, 2020

This order resolves a dispute between Pennichuck Water Works, Inc., and the Town of Hudson over the terms of their special contract and construes the special contract to require the Town of Hudson to pay the Qualified Capital Project Adjustment Charge.

I. BACKGROUND AND PROCEDURAL HISTORY

Pennichuck Water Works, Inc., (PWW or the Company), is a regulated public utility, as defined by RSA 362:2 and RSA 362:4. The Company previously entered into a special contract approved by the Commission pursuant to RSA 378:18, with the Town of Hudson (Hudson or the Town). *Pennichuck Water Works, Inc.*, Order No. 24,611 (March 31, 2006). That special contract detailed a 20-year wholesale water agreement between the parties. *Id.*

On May 13, 2019, PWW filed a petition for declaratory ruling regarding the interpretation of the special contract and a request for mediation regarding a billing dispute. PWW alleged that Hudson violated the special contract by refusing to pay the Qualified Capital

Project Adjustment Charge (QCPAC)¹ and the Company's rate case expenses.² Both the QCPAC and rate case expenses are reflected in PWW's tariff on file with the Commission at First Revised Pages 52-55 and Supplement No. 3, Page 1, respectively. The pertinent terms of the special contract are contained in Section 7(b), relating to "Volumetric Charge." See Attachments to Town Memorandum at 19 (October 24, 2019).

The Office of the Consumer Advocate (OCA) filed a letter of participation on May 21, 2019. There was no objection to OCA's participation. On May 23, the Town filed a petition to intervene that was later granted by the Commission, and a motion to dismiss the petition for declaratory ruling. PWW filed its objection to Hudson's motion to dismiss on June 3.

The Commission scheduled technical sessions for July 17 and July 25, 2019. On July 30, PWW amended its petition, withdrew its request for a declaratory ruling, and requested mediation or arbitration by the Commission. PWW claimed that the amount in dispute increased by \$4,200 due to the Town's increased water use from the opening of the seasonal interconnection. PWW sought arbitration pursuant to Section 12(a) of the special contract, which states:

¹ The QCPAC mechanism, as approved in Order No. 26,070, is an "effective and balanced interim mechanism to allow PWW to collect revenues to service the debt obligations incurred to finance used and useful capital projects between full rate case filings ... [and serves] to mitigate rate shock for customers." *Pennichuck Water Works, Inc.*, Order No. 26,070 at 8 (November 7, 2017). The Commission approved PWW's first QCPAC at 1.69 percent for bills rendered after May 4, 2018. *Pennichuck Water Works, Inc.*, Order No. 26,183 (October 29, 2018). In that order, Commission Staff noted that "the QCPAC does not apply to the fixed charges associated with the Company's special contracts with ... the Town of Hudson." *Id.* at 5. The Commission later approved PWW's second QCPAC at 4.06 percent for bills rendered after April 4, 2019, inclusive of the initial 1.69 percent. *Pennichuck Water Works, Inc.*, Order No. 26,298 (October 9, 2019).

² The Commission found \$145,366 of PWW's rate case expenses from its last full rate case, Docket No. DW 16-804, to be just and reasonable, and approved recovery of that amount over a 12-month period through a monthly customer surcharge of \$0.43. *Pennichuck Water Works, Inc.*, Order No. 26,114 at 5 (March 20, 2018).

- (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.

See Attachments to Town Memorandum at 20 (October 24, 2019). On the same date, the OCA filed a response to PWW's amended petition.

After an additional technical session, the participants agreed to a procedural schedule, which set deadlines for initial and rebuttal legal memoranda, a statement of agreed-upon and contested facts by Hudson and PWW, and a tentative hearing to be held or limited at the Commission's discretion. PWW and Hudson filed memoranda and a joint statement of facts. The OCA submitted a rebuttal memorandum. Finding the joint statement of facts insufficient, the Commission required each party to file a separate statement of disputed facts by December 2, 2019. Hudson and PWW each filed a statement of disputed facts; the OCA did not. Based upon those filings, the Commission cancelled the tentative hearing, determining it was no longer necessary.

The petition and subsequent docket filings, other than any information for which confidential treatment is requested of or granted by the Commission, are posted at <http://www.puc.nh.gov/Regulatory/Docketbk/2019/19-091.html>.

II. POSITIONS

A. PWW

1. Initial Filings

PWW claimed that Hudson owed it in excess of \$7,576.56, comprised of unpaid rate case expenses and the QCPAC. PWW Petition at 2 (May 13, 2019). According to PWW, Hudson claimed it was not responsible for those charges, because they are not applicable pursuant to the

special contract. *Id.* at 3. The Company requested that the Commission oversee mediation and declare that Hudson is responsible for those charges, arguing that they are components of their special contract's volumetric charge. *Id.* at 5.

PWW stated that Hudson paid four subsequent increases in the volumetric rate, resulting from four approved rate increases. *Id.* at 1. The Company also stated that, even with the special contract in place, Hudson previously paid the Water Infrastructure and Conservation Adjustment (WICA) charge, the precursor to the QCPAC. *Id.* at 4. *See Pennichuck Water Works, Inc.*, Order No. 25,230 at 15 (June 9, 2011) (WICA charge is a pilot "mechanism that would allow PWW to place into rates a surcharge to recover significant ongoing costs of replacing aging infrastructure"). PWW also noted that Hudson did not intervene in the Company's most recent rate case proceeding, Docket No. DW 16-806. *Id.* at 2. In that proceeding, the Commission examined and ultimately approved the QCPAC mechanism, and later approved the rate case expenses associated with that docket. *Id.* Last, the Company argued that Hudson provides water to Pennichuck East Utility, Inc., PWW's affiliate, and includes the QCPAC in Hudson's charges to PEU along with a 20 percent administrative cost. *Id.* at 4.

2. Brief

PWW contended that the special contract's volumetric charge provision allowed it to apply the Company's tariff changes to Hudson. PWW Brief at 2, 4 (October 25, 2019). Those changes included step adjustments, rate case expenses, temporary-permanent rate reconciliation, general rate increases, the WICA, and the QCPAC. *Id.* at 2-5. The Company argued that, pursuant to the Commission's precedent, the Commission intended for those tariff changes to apply to the special contract. *Id.* at 6.

According to PWW, permitting the Town to avoid payment of the QCPAC and rate case expenses would violate RSA 378:14, which states that a public utility cannot charge any less 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.” *Id.* at 8. In addition, the Company’s rate design, as approved in its prior rate cases, would have to be re-examined because PWW would not be earning the authorized revenue requirement from the customer classes as approved, and the charges not paid by the Town would have to be reallocated to other customers. *Id.* at 6-7.

The Company submitted that the doctrine of *res judicata* bars Hudson from arguing that the charges do not apply pursuant to the special contract. *Id.* at 7. PWW said that Hudson had adequate notice and opportunity to participate in the previous ratemaking dockets, including those that approved the QCPAC and rate case expenses, but chose not to intervene. *Id.* PWW argued that Hudson is now precluded from making its claims. *Id.*

Last, PWW claimed that the Town’s argument that it never received notice of an amendment to the special contract fails, because the Company never intended to amend the special contract. *Id.* at 7. The Company argued that the plain language of the contract already provides for an adjustment to the volumetric charge. *Id.* at 7-8.

3. Reply Brief

The Company argued that the crux of the dispute is whether the “QCPAC and rate case expenses constitute ‘any adjustments in the rates paid by residential customers in Nashua.’” PWW Reply Brief at 1-2 (November 5, 2019). PWW contended that arguments by Hudson seeking to limit the phrase “any adjustment” are impermissible and contrary to the contract’s terms. *Id.* at 2. The Company again cited the underlying Commission orders approving the

QCPAC and rate case expenses, observing that those orders had been duly noticed. *Id.* at 3-4. The Company listed 16 prior Commission orders approving rate increases for PWW's customers, which were duly reflected in the Company's tariffs at the time, and noted that none were previously challenged by Hudson. *Id.* at 4-5.

B. Hudson

1. Initial Filing

The Town asserted that it is not required to pay the QCPAC and rate case expenses, because the special contract does not include language requiring payment of those charges. Town of Hudson Motion to Dismiss at 1-2 (May 23, 2019).

According to Hudson, RSA 378:18 refers to a "special contract" as "a contract for service at rates other than those fixed by schedules of general application." Therefore, tariff changes outside the special contract do not apply to Hudson. *Id.* at 3. Hudson insisted the contract dictates the charges owed, does not include language regarding rate case expenses and the QCPAC, and therefore, Hudson is not obligated to pay PWW those costs. *Id.* The Town further argued that an amendment to the contract was never noticed, or agreed to, by Hudson. *Id.* at 4-5.

2. Memorandum

Hudson maintained that, pursuant to the special contract, the Town is required to pay 1) an annual demand charge and 2) a non-tariff volumetric charge. Town Memorandum at 2 (October 24, 2019). The Town contended that the QCPAC and rate case expenses do not fall into either category of required fees, and thus are not allowed. *Id.* Hudson argued that the plain language of the special contract does not include either the QCPAC or rate case expenses. *Id.* at 6. Specifically, the Town argued that the volumetric charge is defined in the special contract

as “production cost excluding administrative and general costs,” which does not reference any additional fees, including the QCPAC or rate case expenses. *Id.* Hudson further relied on the language of the underlying order approving the special contract, Order No. 24,611, which stated that deviation from the tariff was appropriate, and that the rates contained in the special contract provided sufficient revenues to cover the cost of water service to Hudson. *Id.* at 4-5.

Hudson asserted that adjustment to the volumetric charge is determined solely by reference to, and adjustment of, the “volumetric rates paid by residential customers in Nashua,” and not by other adjustments, such as the QCPAC and rate case expenses. *Id.* at 6-7. By way of example, Hudson stated that a resulting rate case’s 7.4 percent rate increase to the residential volumetric rate in Nashua would also increase Hudson’s special contract volumetric rate by 7.4 percent. *Id.* at 7. The Town argued that no other surcharges are permitted. *Id.*

Hudson also posited six reasons why PWW and the Town never intended Hudson to pay the QCPAC or rate case expenses: 1) the special contract did not include the language “or other surcharge,” in the adjustment of the volumetric charge, to include the QCPAC and rate case expenses; 2) the QCPAC did not exist at the time the special contract was approved; 3) the special contract did not include language requiring Hudson to pay for other capital facility improvements not specific to the Town; 4) the QCPAC and rate case expenses are surcharges, which are in addition to the volumetric charge, not a part of the volumetric charge, and would have been included as an adjustment to the volumetric charge, if intended; 5) neither rate case expenses nor the QCPAC are based on volume, as they are imposed either equally by customer or as a percentage of the customer’s bill, respectively; and 6) the special contract is a contract for

service at rates other than those fixed by the Company's tariff, and thus the QCPAC and rate case expenses are not applicable, as they are included in the Company's regular tariff. *Id.* at 8-9.

Lastly, Hudson argued that, absent amendment of the special contract pursuant to N.H. Admin R., Puc 1606.03(e), the QCPAC and rate case charges cannot be applied. *Id.* at 9.

Referencing the OCA's objection to binding arbitration, Hudson cited RSA 365:8, I(a), which states that the Commission can adopt rules relative to the conduct of its hearings, including alternative process and other forms of alternative dispute resolution. *Id.* at 3. The Town also cited RSA 542:1, which states that a provision for arbitration in any written contract "shall be valid, irrevocable, and enforceable." *Id.* Hudson argued that the correct dispute resolution process was arbitration, and that PWW's withdrawal of its declaratory ruling petition narrowed the scope of the dispute to the sole issue of whether the special contract requires payment of the QCPAC or other surcharges. *Id.*

3. Rebuttal Memorandum

The Town maintained that the special contract defines the entire relationship between Hudson and PWW, and subsequently approved rates, including the QCPAC, cannot modify the special contract absent mutual agreement. Town Rebuttal Memorandum at 1 (November 5, 2019). Hudson argued that it did not need to appear or participate in other unrelated dockets, such as PWW's rate cases or the QCPAC proceeding, to preserve its rights under the special contract, as those proceedings could not modify the terms of the special contract. *Id.* at 2. The Town contended that only mutual agreement may modify the special contract, and none exists between the parties. *Id.* According to Hudson, no new fees or charges may be added without additional consideration. *Id.* n.1. Hudson contended that the separate proceedings "did not

contemplate any amendment to the special contract.” *Id.* at 3. Hudson averred that *res judicata* does not apply, as the prior proceedings did not concern an amendment to the special contract. *Id.* It argued that PWW’s contention that a ruling in the Town’s favor would contradict Commission precedent regarding PWW’s rate design was not persuasive. *Id.* While recognizing that a finding for the Town might be disruptive, disruption alone would not require Hudson to pay the costs that are not included in the special contract. *Id.* at 3-4. Finally, Hudson argued that its prior payment of the WICA surcharge reflected nothing more than a business decision and cannot be used to interpret the contract as requiring payment. *Id.* at 2. Hudson contended that the \$7,575.27 QCPAC surcharge prompted its decision to defend its contractual rights. *Id.*

C. OCA

1. Initial Filing

The OCA argued that, pursuant to the special contract’s terms, Hudson is required to pay the QCPAC and rate case expenses. OCA Response at 1 (July 30, 2019). The OCA noted the contract’s language, which states that the fees “shall be adjusted from time to time ... as any adjustment in the rates paid by” residential customers in Nashua. It contended that the QCPAC and rate case expenses constitute such an adjustment. *Id.* The OCA further argued that it would be unfair to PWW’s other customers if the Commission were to rule in favor of Hudson, as those residential customers would have to make up the revenue shortfall. *Id.*

Relying on *Greenwald v. Keating*, 172 N.H. 292 (2019), the OCA argued that contract interpretation is a question of law for the tribunal to resolve, and with no fact-based ambiguity existing, an evidentiary record is not required. *Id.* at 2. The OCA contended that the legal standard for the Commission’s approval of a special contract under RSA 378:18, “just and

consistent with the public interest,” is inconsistent with Hudson’s interpretation of the contract.

Id. The OCA stated that the Commission could not have intended that interpretation when it approved the contract, nor can it adopt that interpretation now. *Id.*

The OCA stated that the parties made this proceeding more procedurally complicated than necessary by asking for mediation or arbitration. *Id.* It disputed the authorities relied on by PWW to justify arbitration or mediation by the Commission. *Id.* The OCA predicted that other parties to special contracts with PWW would adopt Hudson’s argument if the Town were to prevail, thus potentially magnifying PWW’s revenue shortfall. *Id.* at 2-3. The OCA stated that ratepayers would ultimately bear any revenue shortfall, because PWW would not forgo that shortfall if those other parties successfully pursued the same special contract interpretation as the Town. *Id.* at 1-3.

The OCA argued that the arbitration language in the special contract is “void and the Commission must disregard it,” citing *Rizzo v. Allstate Insurance Co.*, 170 N.H. 708, 713 (2018), which states that a contract term which “contravenes public policy” is unenforceable. *Id.* at 3. The OCA contended that arbitration is inappropriate with regard to special contracts, because RSA 378:18 requires the Commission to find that they are in the public interest. *Id.* The OCA argued that arbitration is a form of private alternative dispute resolution, and that a special contract dispute must instead be a public matter. *Id.*

Last, the OCA argued that the Commission should not turn the proceeding into an arbitration or mediation. *Id.* The OCA recommended that the Commission resolve the dispute in favor of PWW based on the pleadings. *Id.* It did not object to scheduling a hearing for the purpose of taking testimony and/or entertaining argument. *Id.*

2. Rebuttal Memo

In its rebuttal memo, the OCA argued that the language of the special contract is unambiguous, and that the Commission should rule in favor of PWW without a hearing. OCA Rebuttal Memo at 1. The OCA submitted that the special contract plainly states that the volumetric charge will adjust in accordance with “any adjustment in the rates paid by residential customers in Nashua,” and is not limited to a certain type of volumetric charge adjustment, “nor does it preclude a surcharge billed volumetrically.” *Id.* at 2. It noted that the special contract’s language, “pursuant to the Company’s tariff on file,” does not distinguish between categories of volumetric rate. *Id.* The OCA asserted that both Order No. 26,070 and the underlying settlement agreement demonstrate “that the rate adjustment for permanent rates and the QCPAC applied the same percentage rate adjustment to Nashua residential ratepayers as it did to Hudson’s volumetric charges.” *Id.* at 2-3.

The OCA again argued that binding arbitration is inappropriate to resolve a special contract dispute. *Id.* at 3. First, the OCA argued that the Commission did not specifically approve the special contract’s “binding arbitration” language, as it was not identified as a change from the contract’s prior version, as requested by Commission Staff (Staff) at the time. *Id.* at 3-4. The OCA contended that PWW and Hudson had not intended to change their rights to include binding arbitration, as it was neither identified nor discussed in the record approving the special contract. *Id.*

The OCA averred that the term “binding arbitration” should be specifically construed within the context of the Commission’s role under RSA 363:17-a as arbiter between the interests of customers and the interests of the public utility. *Id.* at 4. Alternatively, the OCA argued, if

“binding arbitration” were to be interpreted literally, then the special contract’s binding arbitration clause “should be struck as contravening public policy.” *Id.* The OCA, citing the same case law and arguments included in its previous filing, reiterated that arbitration of disputes arising under a special contract is “patently inconsistent with RSA 378:18,” which permits special contracts providing for deviations from a company’s tariff to be approved only when in the public interest. *Id.* at 5. The OCA argued that the public interest considerations inherent in the approval of a special contract bar the use of binding arbitration, a form of private dispute resolution, to resolve special contract disputes. *Id.*

III. COMMISSION ANALYSIS

A. Arbitration

As a preliminary matter, the OCA’s arguments regarding the arbitration clause are without merit. The arbitration clause was explicitly stated in the contract agreed to by the parties and approved by the Commission. The clause applies to “[a]ny controversy or claim arising out of or relating to this [a]greement, or the breach thereof” and the parties have brought forward exactly that. The failure of either party to identify the arbitration clause as a change from a prior special contract is of no consequence in light of the plain language of the contract that is currently in effect.

Moreover, alternative dispute resolution is explicitly permitted by RSA 365:8, I(a) and consistent with the Commission’s role pursuant to RSA 363:17-a, as arbiter between the interests of regulated utilities and their customers. Once the Commission approved the special contract, it became “a part of the published schedules of [PWW].” *See* RSA 378:19. As a result, the Commission retains jurisdiction over the special contract and appropriately resolves disputes

consistent with the public good. In addition, RSA 542:1 evinces a strong legislative policy determination that the arbitration of disputes is in the public interest. *See* RSA 542:1. Accordingly, we find that the arbitration provision in the special contract is valid and enforceable.

We also find that the process followed in this docket conforms with the Commission's enabling statutes and RSA Chapter 541-A. RSA Chapter 365 permits the Commission, among other things, to resolve complaints made against public utilities (RSA 365:1) and to investigate any rate charged by a public utility (RSA 365:5). When we conduct such an investigation, we have broad statutory authority to determine the manner in which we will proceed. RSA 365:5.

B. Rates Paid Under Special Contract

To resolve the parties' contract dispute, we must construe section 7(b) of the special contract. Interpretation of a contract, including whether a contract term or clause is ambiguous, is a question of law. *Merrimack Sch. Dist. v. Nat'l Sch. Bus Serv., Inc.*, 140 N.H. 9, 11 (1995). When interpreting a contract, we must "give words their ordinary meaning unless it appears from the context that the parties intended a different meaning." *Id.* at 13. "Absent ambiguity, the parties' intent will be determined from the plain meaning of the language used." *Gen. Linen Servs. v. Franconia Inv. Assocs., L.P.*, 150 N.H. 595, 597 (2004). Language within a contract is ambiguous when the parties to the contract could reasonably disagree as to the meaning of that language. *In re Taber-McCarthy*, 160 N.H. 112, 115 (2010).

Section 7(b) states:

(b) Volumetric Charge. In addition to the Demand Charge, the Town shall pay the Company \$1.116 per 100 cubic feet (748 gallons), the Company's production cost excluding administrative and general cost for all water taken by the Town (the "Volumetric Charge"). 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 [Commission].

We find the plain meaning of the provision to be clear. The first sentence of section 7(b) sets a base volumetric charge of \$1.116 per 100 cubic feet of water delivered. The second sentence describes how that charge is to be adjusted over time. "When parties use expansive, unrestricted language, we will give those phrases their normal broad reading." *Merrimack Sch. Dist. v. Nat'l Sch. Bus Serv., Inc.*, 140 N.H. at 13. Here, the parties agreed to adjust the base volumetric charge proportionally by *any adjustment in the rates* paid by residential customers in Nashua and as reflected in PWW's tariff. "The plain meaning of 'any' is 'every' or 'all.'" *AIMCO Props., LLC v. Dziewiszcz*, 152 N.H. 587, 589 (2005). Their choice of the phrase "any adjustment" demonstrates that the parties intended for the volumetric charge to increase proportionally, by any adjustment to the rates contained in PWW's tariff as it applies to its Nashua residential customers. Consequently, we reject the Town's argument that rate adjustments must be specifically mentioned by name in the contract to be included in adjustments to the base volumetric charge. Similarly, we reject the Town's arguments that such adjustments require an amendment of the special contract and may not refer to charges in the Company's tariff.

The QCPAC acts as an interim annual adjustment to PWW's rates made in anticipation of its next formal base rate adjustment in its next general rate proceeding. As such, the QCPAC is expressed as a percentage, which closely approximates the revenues necessary for PWW to recover its annual investments and associated operating expenses resulting from prudent, used, and useful capital projects made between full rate proceedings. At the conclusion of PWW's

next general rate proceeding, PWW's QCPAC revenues approved since its last prior general rate case will be incorporated into its new revenue requirement and adjusted base rates. *See generally Pennichuck Water Works, Inc.*, Order No. 26,070 (November 7, 2017); and *Pennichuck Water Works, Inc.*, Order No. 26,383 (July 24, 2020). Regardless of what we call the charge, the QCPAC is an adjustment in rates charged by the utility to allow the utility just compensation for the supply of water, and therefore falls within the broad category of "any," "every," and "all" adjustments" in the rates paid by PWW's Nashua customers.

Unlike the QCPAC, which is calculated and expressed as percentage increase over current rates, the rate case expense surcharge is expressed as a simple flat fee per customer of 43 cents per month per customer. Although the rate case expense surcharge is paid by residential customers, we find that this minimal amount is incapable of being expressed as a percentage and being translated into a volumetric charge in any meaningful way. Consequently, we conclude that the volumetric charge is to be modified by changes in the QCPAC, but, in this case, not by the surcharge associated with rate case expenses.

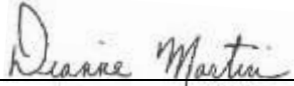
Finally, we note that Hudson has not withdrawn its motion to dismiss PWW's petition for declaratory ruling, although PWW withdrew its motion for declaratory ruling in its revised filing on July 30, 2019. Therefore, we deny Hudson's motion to dismiss as moot.

Based upon the foregoing, it is hereby

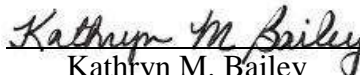
ORDERED, that the respective rights of Pennichuck Water Works, Inc., and the Town of Hudson, pursuant to the special contract are adjudged as described in the decision herein and, accordingly, that Pennichuck Water Works, Inc., is entitled to the Qualified Capital Project Adjustment Charge from the Town of Hudson pursuant to the special contract; and it is

FURTHER ORDERED, that the Town of Hudson's motion to dismiss the request of Pennichuck Water Works, Inc., for declaratory ruling, is DENIED.

By order of the Public Utilities Commission of New Hampshire this third day of December, 2020.

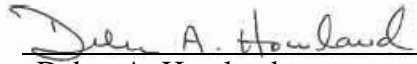


Dianne Martin
Chairwoman



Kathryn M. Bailey
Commissioner

Attested by:



Debra A. Howland
Executive Director

Service List - Docket Related

Docket#: 19-091

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