

**STATE OF NEW HAMPSHIRE
PUBLIC UTILITIES COMMISSION**

DW 18-101

PENNICHUCK EAST UTILITY, INC.

Petition for Approval of Special Contract for Woodmont Commons in Londonderry

Order Approving Special Contract

ORDER NO. 26,473

April 21, 2021

This order approves a revised special contract between Pennichuck East Utility, Inc., and Pillsbury Realty Development, LLC. The special contract allows Pennichuck East Utility, Inc., to deviate from its general tariff and collect funds from Pillsbury Realty Development, LLC, enabling the parties to share the costs of constructing a water tank and supporting infrastructure.

I. BACKGROUND AND PROCEDURAL HISTORY

Pennichuck East Utility, Inc. (PEU or the Company), filed a petition for approval of a special contract with Pillsbury Realty Development, LLC (Pillsbury), on June 29, 2018. The Commission approved that special contract on August 9, 2019. *Pennichuck East Utility, Inc.*, Order No. 26,285 (August 9, 2019). The special contract approved by the Commission allowed PEU to deviate from its general tariff and collect funds from Pillsbury, enabling the parties to share the costs of constructing a 1.1 million gallon water tank. *Id.*

On March 9, 2020, the Company submitted a Verified Supplemental Petition for Approval of Special Contract for Woodmont Commons in Londonderry (Petition). The Company also submitted the pre-filed testimony and accompanying attachments of John J. Boisvert, Chief Engineer of Pennichuck Water Works, Inc.¹

¹ Pennichuck Water Works, Inc., is a sister-utility of PEU that performs Operations and Maintenance work for the Company on a work order basis.

According to the Company, subsequent to the issuance of Order No. 26,285, the Town of Londonderry Zoning Board of Adjustment (ZBA) denied the variance requested by PEU required to build the water tank. *Id.* at 2. PEU represented that the denial was based, in part, on the height of the proposed tank. *Id.* The Company indicated that a request for rehearing of the ZBA's decision was also denied, and its appeal of that decision in Superior Court is stayed pending Commission determination. *Id.* The underlying project and the approved Special Contract were modified after the ZBA denied the variance, and PEU requested that the Commission "affirm its approval of the special contract" approved by Order No. 26,285. Petition at 3.

With its Petition, PEU submitted a revised special contract, which would enable PEU to collect from Pillsbury its portion of the cost to construct a 1.25 million gallon ground-level water tank, a water main, and a booster pumping station to serve Woodmont Commons. Attachments of John Boisvert, JJB-C, March 9, 2020. The revised special contract also included language regarding the cost sharing of the Company's tax liability for the receipt of contributions in aid of construction (CIAC) from Pillsbury. *Id.*; *see also* Order No. 26,285 at 1 ("the federal 2017 Tax Cuts and Jobs Act ... removed the exclusion of CIAC from gross income for tax purposes for water companies. As of January 1, 2018, water companies were responsible for income tax on CIAC received"). Commission Staff (Staff) submitted its recommendation for approval on March 24, 2021.

The petition and subsequent docket filings, other than any information for which confidential treatment is requested of or granted by the Commission, are posted on the Commission's website at <http://www.puc.nh.gov/Regulatory/Docketbk/2018/18-101.html>.

II. POSITIONS

A. PEU

PEU's franchise area in Londonderry includes Woodmont Commons, an approximate \$1 billion development of which Pillsbury is the principal developer. Order No. 26,285 at 2. After the ZBA denied PEU's requested variance, the Company proposed a revised special contract, which detailed a ground-level tank project, but contained the same cost sharing formula as the previously approved special contract (49 percent PEU/51 percent Pillsbury determined by water requirements). Petition at 2; *see also* Order No. 26,285 at 3 (providing further details on how Pillsbury and PEU derived the cost sharing formula).

The Company stated that, while the proposed project detailed in the revised special contract differed from that outlined in the previously approved contract, it continued to meet the same goals as the prior project. Petition at 2. Those similar goals included the ability to construct a water tank to meet the needs of Woodmont Commons and PEU's existing Londonderry Core System (Core) customers, which includes fire protection service at a reasonable cost share. The goals also included reduced wholesale water rates from Manchester Water Works (MWW), as PEU would no longer need to purchase fire flow capacity. *Id.*, *see also* Staff Discovery 4-8. *Id.* at 3. The Company also maintained that the revised special contract is consistent with the public interest. *Id.*

In support of its Petition, PEU provided a memorandum from Underwood Engineers, Inc. (Underwood). After the ZBA denied PEU a variance, the Company contracted Underwood to assess alternative water supply storage and distribution options that would achieve the same objectives as the original elevated storage tank project. Mr. Boisvert's pre-filed testimony summarized the key finding from the Underwood report, which concluded that the domestic water demand and fire flow requirements for existing Core customers are not being met, and that

a water tank is necessary. Attachments of John Boisvert, JJB-E, March 9, 2020, and Testimony of John J. Boisvert at 4-6, March 9, 2020. PEU also filed a letter from the New Hampshire Department of Environmental Services on April 16, 2020, in support of the ground-level water tank project now proposed by the Company.

B. Staff

Based on review of the filings, discovery, and a technical review by Staff consulting Engineer Douglas W. Brogan, P.E., Staff recommended approval of the revised special contract. Staff agreed that the revised special contract allows for the receipt of funds that would produce benefits to PEU and its current and future customers.

Staff noted and examined three differences in the Company's filing and revised special contract from the previously approved special contract: (1) the accompanying statement of special circumstances; (2) change of the proposed project from an elevated tank to a ground-level tank; and (3) an increase in PEU's projected income tax liability. Staff Recommendation at 3-5.

An updated statement of special circumstances, which PEU provided in a discovery response, contained one difference from the previously submitted statement. Staff Recommendation at 20. Staff stated that the scope of the proposed work now includes associated water mains and a booster pumping station. *Id.* at 3. Staff agreed, however, that despite the change, the additional work still pertains to providing water service to meet the needs of the Core system and Woodmont Commons. *Id.*

Changes were included in the description of construction work in the revised special contract. Those changes included, among other things, the shift from an elevated tank to a ground-level tank. *Id.* at 3-5. Staff reviewed the contemplated benefits of the new project, including: the provision of water service to existing PEU customers and Woodmont Commons; the possibility of avoiding further litigation; a decrease in wholesale water rates between MWW

and PEU; and alleviation of costly demand on other pump stations. *Id.* at 4. Staff concluded that despite the difference in proposed work, the purpose of the revised special contract is the same as the one previously approved. Staff relied on the Underwood memorandum, Mr. Brogan's conclusion that the project "appears reasonable," and the fact that the prior Commission Order merely allowed PEU to collect funds but did not determine the prudence of the project itself. *Id.*

PEU's projected income tax liability increased, despite the identical 49 percent PEU/51 percent Pillsbury cost sharing arrangement previously agreed upon. *Id.* at 5. Staff, however, agreed that despite the possible tax liability increase, which is reasonable considering the prior estimate was based on a 2017 cost estimate, there is no material difference from the previously approved special contract. *Id.* Staff further stated that its position was supported by PEU's representation that it would meet its tax obligation with the use of net operating losses (NOLs) (tax losses from previous years that can be applied against a current year's income, thus reducing tax liability) instead of cash, which insulates ratepayers from a possible associated rate increase. *Id.*

Staff concluded that special circumstances continue to exist which justify departure from PEU's current tariff, and that the proposed departure is just and consistent with the public interest, per RSA 378:18. As such, Staff recommended Commission approval. Staff stressed that its recommendation is not intended as support for a prudence determination, or for any proposed financing or recovery of the proposed project costs. *Id.* at 5-6. Last, Staff recommended that the Commission not affirm the prior special contract approved by Order No. 26,285, as requested by the Company, but instead approve the revised contract as a separate and distinct special contract.

III. COMMISSION ANALYSIS

RSA 378:14 requires public utilities to only charge customers rates identified in the utility's tariff. The Commission may, however, approve special contracts for services by a public utility, "if special circumstances exist which render such departure from the general schedules just and consistent with the public interest." RSA 378:18. We find that special circumstances exist that render departure from PEU's tariff just and consistent with the public interest. *See* RSA 378:18. Sharing the cost of constructing the water tank, supporting infrastructure, and related tax costs with Pillsbury will provide benefits to PEU's current and future ratepayers, and enable provision of service to the customers in Woodmont Commons, including necessary fire flows critical to its Core customers. PEU and its customers will enjoy lower costs of water purchases from MWW. Accordingly, we approve the special contract and find that it is just and reasonable and consistent with the public interest.

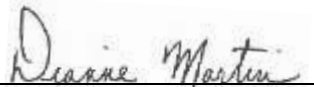
While we recognize the ultimate goal of PEU and Pillsbury is to construct a water tank and associated infrastructure, we are not deciding whether PEU's investment is prudent at this time. Approval of the special contract merely allows PEU to collect funds from Pillsbury should PEU decide to proceed.

Staff's recommendation noted that, while the Company requested Commission affirmation of the previously approved special contract, the proposed special contract is separate and distinct, which merits its own examination and approval. Staff Recommendation at 2. We agree, and note that this order serves as approval for the revised special contract submitted by PEU, and is not merely an affirmation of previous approval by Order No. 26,285. *See* Order No. 26,285 at 5 ("[e]ach special contract must meet the standards of RSA 378:18 on an individual basis . . ."). Lastly, we note that this approval supersedes our prior special contract approval in Order No. 26,285.

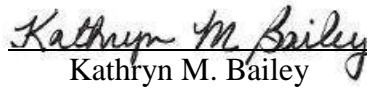
Based upon the foregoing, it is hereby

ORDERED, that the revised special contract between Pennichuck East Utility and Pillsbury Realty Development is hereby APPROVED.

By order of the Public Utilities Commission of New Hampshire this twenty-first day of April, 2021.

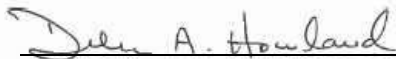


Dianne Martin
Chairwoman



Kathryn M. Bailey
Commissioner

Attested by:



Debra A. Howland
Executive Director

Service List - Docket Related

Docket#: 18-101

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Email Addresses

ExecutiveDirector@puc.nh.gov
john.boisvert@pennichuck.com
douglas.brogan@gmail.com
mab@nhbrownlaw.com
robyn.descoteau@puc.nh.gov
steve.frink@puc.nh.gov
jayson.laflamme@puc.nh.gov
anthony.leone@puc.nh.gov
amanda.noonan@puc.nh.gov
ocalitigation@oca.nh.gov
Christopher.tuomala@puc.nh.gov
david.wiesner@puc.nh.gov