

DW 00-222

PENNICHUCK WATER WORKS, INC.

Petition for Exemption Pursuant to RSA 674:30 III from Local Ordinances, Codes or Regulations of the Town of Derry Pertaining to the Proposed Construction of a 225,000 Gallon Water Tank

Order Approving Procedural Schedule

O R D E R N O. 23,588

November 8, 2000

APPEARANCES: Sullivan & Gregg, PA by James L. Sullivan, Jr., Esq. for Pennichuck Water Works, Inc.; Boutin Associates, PLLC by Steven A. Clark, Esq. for the Town of Derry; and Larry S. Eckhaus, Esq. for the Staff of the New Hampshire Public Utilities Commission.

I. PROCEDURAL HISTORY

On October 6, 2000, Pennichuck Water Works, Inc. (Pennichuck or Company) filed a petition (Petition) with the New Hampshire Public Utilities Commission (Commission) for exemption, pursuant to RSA 674:30, III, from local ordinances, codes or regulations of the Town of Derry pertaining to the expansion of the existing pump station and proposed construction of a 225,000 gallon water tank (Tank). According to the Petition, the Tank is a major component of improvements intended to address water availability and pressure problems and to provide water in sufficient quantity and pressure to provide public fire protection in the East Derry Community Water System (East Derry), which is owned and operated by

Pennichuck and serves or provides backup supply to over 500 customers. Copies of the complete Petition were sent by Pennichuck to the Office of Consumer Advocate, the Derry Town Administrator and the Town's counsel, and to the Drew Woods Condominium Association (Association).

The Tank is proposed on land within the development known as Drew Woods. The filing avers that Pennichuck moved forward in a timely manner, worked with the Association, presented three(3) alternatives for placement and configuration of the proposed tank before the Derry Conservation Commission (Conservation Commission) to resolve concerns about the Tank's location in relation to existing homes and wetlands; obtained a necessary wetlands permit from the Department of Environmental Services (DES) to install two (2) water lines from a proposed tank to the existing pump station; and secured low interest State Revolving Loan Fund (SRF) money¹, in the amount of \$455,000 at 3.85%, with interest during construction of 1.0%, for the project. The filing includes letters of support from the Association and the East Derry Fire Department (EDFD).

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By Order No. 22,959 in *Re Pennichuck Water Works, Inc.*, 83 NH PUC 355 (1998), the Commission authorized the Company to issue and sell up to \$445,000 in unsecured debt through the SRF to finance the construction.

Pennichuck initially filed its application for a variance with the Derry Zoning Board of Adjustment (ZBA) on March 8, 2000, and subsequently appeared before the ZBA on several occasions thereafter, seeking variances from local land use ordinances, in particular in relation to identified wetlands at the proposed Tank site, but was ultimately denied a variance, by a vote of 2-3, on September 7, 2000. Those voting against seemed to like the original plan, with the tank near the pump station, which was objectionable to the residents. A Motion for Rehearing was denied by the ZBA on September 21, 2000.

The filing indicates that the construction timetable necessary to comply with SRF funding requirements now puts that funding in jeopardy if construction is not authorized promptly. According to the Petition, the commitment by the State for the financing expires July 1, 2001 if the project is not used and useful by that date. In order to do so, Pennichuck avers that it must begin work on or before November 30, 2000, in order to meet the July 1, 2001 financing deadline.

On October 13, 2000, the Commission issued an Order of Notice scheduling a Prehearing Conference for October 27, 2000. The Order of Notice indicated that the filing raises,

inter alia, issues related to the extent of potential rate and quality of service impacts to the East Derry water system customers if the relief sought is not granted; whether other more suitable alternatives are available to address water availability and pressure problems and to provide water in sufficient quantity and pressure to provide fire protection in the East Derry system; the degree of urgency of the proposal; and whether the requested exemption is reasonably necessary for the convenience or welfare of the public.

In accordance with the Order of Notice, Pennichuck provided for the publication of the Order of Notice in the *Union Leader*. On October 17, 2000, Pennichuck mailed copies of the Order of Notice to the Office of Consumer Advocate, the Association, the Clerk of the Town of Derry, and all abutters to the proposed site.

On October 20, 2000, in accordance with the Order of Notice, Pennichuck filed the testimony of Donald L. Ware, Vice-President Engineering and Chief Engineer for Pennichuck, in support of the Petition and in response to the issues contained in the Order of Notice.

On October 23, 2000, the Town of Derry timely filed a Petition to Intervene. No objections to the Petition were filed, and the Petition was granted at the Prehearing

Conference. No other petitions to intervene were received and there were no other appearances at the Prehearing Conference.

The Prehearing Conference was held, as scheduled on October 27, 2000. Pennichuck filed a Memorandum of Law in Support of the Petition and a Preliminary Statement Pursuant to N.H. Admin Rule Puc 203.05, and made an oral presentation of its position. The Town of Derry filed a Preliminary Statement of its position and made an oral presentation of its position. Staff presented its position regarding the Petition as well.

II. POSITIONS OF THE PARTIES AND STAFF

A. Pennichuck Water Works, Inc.

Pennichuck provided an overview of the history of this project and the project specifications as provided in the Petition and the prefiled Testimony of Donald L. Ware. The Company avers that the facilities for which the exemption is sought is required to remedy problems of meeting peak demand flow for its customers and to provide public fire protection to residents of the area. Pennichuck has sought the necessary variances from the ZBA which have been denied; hence this filing pursuant to RSA 674:30, III. In addition to meeting these requirements, the Company maintains that it has sought, and been approved for, low cost SRF funding which will reduce

the capital requirements of the project, and ultimately, rates to customers. In order to obtain the funding, the project must be completed by July 1, 2001, hence the expeditious nature of this proceeding. Although the ZBA turned down the request for variance, Pennichuck avers that it has received the support of, and/or approvals from, the Association, the EDFD, the Derry Conservation Commission, and DES. Pennichuck maintains that the Commission has the jurisdiction to exempt it from the effect of Derry land use regulations, that the project is within the purview of RSA 674:30 III and that the project is reasonably necessary for the convenience or welfare of the public. Pennichuck indicated that a Form E-22 had been filed with the Commission in accordance with NH Admin Rule Puc 609.14. Pennichuck indicated that it is willing to cooperate with any reasonable site plan requirements regarding screening and soundproofing. The Company indicated that the emergency on-site generator, provided to support fire protection, will be equipped with a critical exhaust muffler which will significantly reduce the decibel level below that of a small lawnmower. Moreover, the generator would only operate during testing and in emergency situations, e.g. power failures. In addition, Pennichuck agreed that any exceptions to be granted by the Commission would be limited and specific to this

application only, i.e. the same application presented to the ZBA. The Company was also agreeable to a site plan visit as proposed by Commissioner Geiger at the prehearing conference.

B. Town of Derry, New Hampshire

The Town indicated that it has conferred with counsel for Pennichuck and that, as a result, it would stipulate that it understands that the Petition before the Commission relates to facilities identical to those disclosed to the ZBA; that the exemption sought be limited to the water storage tank and pump house addition; that the exemption not apply to any other facilities or locations within the Town; that Pennichuck has agreed to cooperate with the Town concerning site plan issues provided the Town makes its request known in a timely manner on issues such as screening, noise abatement and wetlands protection, if any; and that Pennichuck needs to commence construction on or before November 30, 2000. The Town would prefer that, if the exemption is granted, Pennichuck file with the Planning Board for site plan approval to address the issues discussed above.

C. Commission Staff

The Staff indicated that it was aware of this project, had been following its progress and had discussions with Pennichuck prior to the filing of the Petition, but had

not yet had an opportunity to discuss the matter with the Town. Staff is aware of the urgency regarding the proposed improvements and, based upon the statements by the Town and the Company, believes that this matter may be expedited. Staff indicated that it had a number of questions regarding the filing which could be addressed in the Technical Session following the Prehearing Conference.

III. COMMISSION ANALYSIS

RSA 674:30 III provides:

A public utility which uses or proposes to use a structure which does not fit the criteria described in paragraph I, or fits those criteria and has been denied a waiver, or has been granted a waiver with conditions unacceptable to the utility when the waiver was applied for pursuant to paragraph I, may petition the public utilities commission to be exempted from the operation of any local ordinance, code, or regulation enacted under this title. The public utilities commission, following a public hearing, may grant such an exemption if it decides that the present or proposed situation of the structure in question is reasonably necessary for the convenience or welfare of the public and, if the purpose of the structure relates to water supply withdrawal, the exemption is recommended by the department of environmental services.

Based upon the information contained in the filing, which information is not yet disputed by the Town of Derry or Staff, we believe that this matter is properly before us. In addition, given the support contained in the filing from the

Association, and the East Derry Fire Department, and the approvals of the Conservation Commission and DES, as well as the availability of low cost SRF funding, we believe that this matter should be expedited for review. Staff has informed us that the Parties and Staff have agreed to a procedural schedule at the Technical Session as follows:

Pennichuck Responses to Technical Session Data Requests	November 3, 2000
Site Visit	November 9, 2000 (3:00 pm)
Hearing on the Merits	November 14, 2000 (2:00 pm)

Based upon the foregoing, it is hereby

ORDERED, that the above procedural schedule is

APPROVED.

By order of the Public Utilities Commission of New
Hampshire this eighth day of November, 2000.

Douglas L. Patch
Chairman

Susan S. Geiger
Commissioner

Nancy Brockway
Commissioner

Attested by:

Thomas B. Getz
Executive Director and Secretary