

DW 00-214

HAMPSTEAD AREA WATER COMPANY, INC.

**Petition for Exemption from Municipal Zoning Ordinance
Pursuant to RSA 674:30, III**

Order Following Prehearing Conference

O R D E R N O. 23,610

December 27, 2000

APPEARANCES: Robert H. Fryer, Esq. for Hampstead Area Water Company, Inc.; Donahue, Tucker & Ciandella by Robert D. Ciandella, Esq. for Town of Kingston; Donald M. Kreis, Esq. for the Staff of the New Hampshire Public Utilities Commission.

I. PROCEDURAL HISTORY

On September 29, 2000, Hampstead Area Water Company, Inc. (Hampstead or Company) filed with the New Hampshire Public Utilities Commission (Commission) a petition pursuant to RSA 674:30, III. The statute authorizes the Commission to exempt a utility structure from any local ordinance, code or regulation upon petition by the affected utility, based on a determination "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." At issue here are three wells, a pump house and related water mains that Hampstead proposes to operate in the

Town of Kingston for the benefit of Hampstead's approximately 650 customers, all located in the adjacent Town of Hampstead.

According to a written decision issued by the Kingston Planning Board, the Company constructed the three wells in question without Town of Kingston approval and the Town only learned of the project when construction began on the pump house, whereupon the Town issued a cease and desist order. Subsequently, the Town of Kingston Planning Board declined to grant the Company the requisite zoning and site plan approval. Hampstead's petition invoking RSA 674:30, III followed.

The Commission issued an Order of Notice on November 27, 2000 in which the Commission (1) scheduled a Pre-Hearing Conference for December 19, 2000, (2) directed Hampstead to provide notice of the Pre-Hearing Conference by mailing a copy of the Order of Notice to the Kingston Town Clerk and causing it to be published in the *Eagle Tribune* and *Rockingham County News* on or before December 5, 2000; and (3) ordered any party seeking intervenor status to file a petition on or before December 14, 2000, with objections due five days thereafter. The Town of Kingston filed a petition to intervene on December 6, 2000, to which there were no objections in writing or at the Pre-Hearing Conference. The Pre-Hearing Conference itself

took place as scheduled on December 19, 2000. General Counsel Gary Epler presided, having been appointed by the Commission to serve as Hearing Examiner pursuant to RSA 363:17.

II. LACK OF PUBLIC NOTICE

At the Pre-Hearing Conference, Hampstead reported that it had failed to provide the public notice specified in the Commission's November 27 Order. The Hearing Examiner ruled that the Pre-Hearing Conference should nevertheless proceed, noting that he would recommend that the Commission take appropriate steps to cause the public to be given notice of the pendency of this docket, with an appropriately extended period for intervention. He instructed the parties and Commission Staff (Staff) to conduct a technical session after the Pre-Hearing Conference, as contemplated in the Order of Notice, for the purpose of seeking agreement on a proposed procedural schedule for the remainder of the docket. However, he instructed the parties and Staff to account in such a proposal for the possibility that additional intervenors may be accorded full party status, with attendant rights to participate fully in all aspects of the proceeding.

We agree with the Hearing Examiner that it was appropriate both to conduct the Pre-Hearing Conference as scheduled and also to take steps to provide the public notice

required by our rules. See Puc 203.01. Accordingly, concurrently with this order the Executive Director and Secretary is issuing a revised Order of Notice providing an additional period of time for intervention petitions and, if necessary, the convening of a second Pre-Hearing Conference to give any new intervenors an opportunity to make their preliminary views known and participate in the development of the procedural schedule. Further, we place the Company on notice that it will not be permitted to recover from its customers any increased costs associated with its failure to provide public notice as directed in our November 27 Order.

III. PETITION TO INTERVENE

At the Pre-Hearing Conference, both the Company and Staff assented to the Town of Kingston's petition to intervene. We therefore adopt the Hearing Examiner's recommendation to grant the petition. We stress that the Commission will entertain any additional intervention petitions that are submitted pursuant to the revised Order of Notice.

IV. PRELIMINARY POSITIONS OF THE PARTIES

A. Hampstead Area Water Company

Hampstead summarized the history of the project, noting that it began when the developers of a condominium

project asked to have their proposed units served by the utility. According to Hampstead, it agreed to serve the condominium project in exchange for an easement granting water rights. Thereafter, according to Hampstead, it drilled three wells on a portion of the project's property located in Kingston. Hampstead further avers that it poured the foundation for the associated pump house while seeking the required building permit from the Town, whereupon Town officials issued a cease and desist order. According to Hampstead, it then sought but was unable to obtain a zoning waiver that would have authorized it to complete the project.

According to Hampstead, it has obtained the approval of the Water Supply Engineering Bureau of the Department of Environmental Services, has filed an "easement plan" with the Town showing the relationship of the three new wells to other wells in the area, and has also submitted to Town officials a "Well Owner's Response Plan" designed to address the possibility that Hampstead's three new wells might affect production at other wells in the vicinity. In its petition, Hampstead complains that, in denying Hampstead's requested zoning waiver, the Kingston Planning Board did not concern itself with the Well Owner's Response Plan but focused instead on the use of "open space" land in Kingston for production of

water by a public utility.

B. **Town of Kingston**

It is the position of the Town of Kingston that granting the exemption from local land use regulation requested by Hampstead is not reasonably necessary for the convenience or welfare of the public. The Town criticizes what it characterizes as Hampstead's disregard of the municipality's land use regulation processes. The Town also believes that granting Hampstead's request before the Commission would inappropriately compromise the Town's "control of its land use destiny."

According to the Town, given that Hampstead proposes to serve all of its customers with the three new wells, it is inevitable that the Town's overall water resources will be "diminished" if the project is allowed to go forward. The Town contends that Hampstead's proposed expansion would disrupt the municipality's long-range planning process. Further, the Town recites what it regards as Hampstead's failure to comply with the municipality's application and approval processes in several relevant instances.

According to the Town, it will focus in discovery on the question of whether Hampstead's chosen location for the wells is appropriate from a hydrogeological standpoint, given

the possible or even likely effect on other wells. In the Town's view, it is likely that other possible well sites exist that would not have the same adverse impact on the Town's zoning plan.

Finally, with regard to the failure of Hampstead to provide public notice of the Pre-Hearing Conference, the Town urged the Commission to take into account the possibility that area residents may want to seek intervenor status upon being informed of the pendency of these proceedings.

A. Staff

Staff indicated that it remained neutral on Hampstead's request and that it anticipated full participation in the discovery process. However, Staff expressed the view that the Commission's inquiry under RSA 674:30, III is broader than the question of whether Hampstead's proposal is consistent with the Town's land use regulation plans.

C. PROCEDURAL SCHEDULE

Following the Pre-Hearing Conference, the parties and Staff met for a technical session and discussed the procedural schedule for the remainder of this docket. There was agreement to propose the following schedule to the Commission:

Publication of Revised Order of Notice

December 29,

	2000
Intervention Petitions	January 12, 2001
Second Pre-Hearing Conference, if necessary	January 16, 2000
Rolling data requests	through February 16, 2001
Pre-Filed Direct Testimony	March 9, 2001
Technical Session/Settlement Conference	March 16, 2001
Submission of Settlement Agreement	March 23, 2001
Merits hearing	April 3-4, 2000

In connection with the proposed schedule, Parties and Staff agreed to recommend that the second Pre-Hearing Conference be convened only in the event that additional intervention petitions are received. The Parties and Staff also noted that, although the reservation of two days of hearing time is recommended, they believe that only one day of hearings will most likely be necessary.

Upon consideration, we conclude that the proposed procedural schedule is reasonable and we will approve it, subject to the explicit understanding that, in the event any additional parties seek intervenor status, it may be necessary to revise the schedule to accommodate the additional intervenor or intervenors.

Based upon the foregoing, it is hereby

ORDERED, that the procedural schedule outlined above is approved and shall govern the remainder of this proceeding unless further revised as noted; and it is

FURTHER ORDERED, that Hampstead Water Works, Inc. shall cause public notice of this proceeding to be given in accordance with the Revised Order of Notice being issued contemporaneously with this Order.

By order of the Public Utilities Commission of New Hampshire this twenty-seventh day of December, 2000.

Douglas L. Patch
Chairman

Susan S. Geiger
Commissioner

Nancy Brockway
Commissioner

Attested by:

Claire D. DiCicco
Assistant Secretary