

DW 05-135

TILTON AND NORTHFIELD AQUEDUCT COMPANY, INC.

Petition to Transfer Water Franchise, Works, and System

Order *Nisi* Approving Transfer

ORDER NO. 24,562

December 9, 2005

I. BACKGROUND

On August 19, 2005, Tilton and Northfield Aqueduct Company, Inc. (TNAC), a regulated public utility, and Tilton and Northfield Water District (TNWD), a municipal corporation, filed with the New Hampshire Public Utilities Commission (Commission) a joint petition (Petition) pursuant to RSA 374:22 and 30 to approve the transfer of TNAC to TNWD by means of a sale of stock. In support of the joint petition, TNAC and TNWD provided pre-filed testimony of Kenneth F. Money, the current President and General Manager of TNAC.

TNAC is a regulated water utility and received its franchise by legislative grant on June 21, 1887. 1887 N.H. Laws Chapter 165.¹ TNAC serves more than 900 customers in the Towns of Tilton and Northfield. It has a single class of stock, with 874 shares outstanding which the shareholders of TNAC have agreed to sell to TNWD. TNAC and TNWD executed a Stock Purchase Agreement (Agreement) on February 11, 2005, and executed two agreements to extend the stock purchase agreement, one dated June 29, 2005, and the second dated August 17, 2005. TNWD was formed pursuant to RSA Chapter 52 on June 10, 2004, for the purpose of acquiring the TNAC water system and operating it as a municipal entity. TNWD adopted By-Laws on

¹ The legislature created the Tilton and Northfield Aqueduct Company “for the purpose of bringing water into the village of Tilton in the towns of Tilton and Northfield or adjoining towns for domestic uses, the extinguishment of fires, and such other purposes as may be deemed necessary and proper.”

November 11, 2004.

On November 8, 2005, Commission Staff (Staff) filed a letter recommending the Commission approve the transaction. Staff stated that it had thoroughly reviewed the Petition and had conducted discovery on TNAC and TNWD. Staff attached discovery responses from TNAC and TNWD to its letter.

According to the Petition and discovery responses, TNWD will pay TNAC \$4,100,000 for its stock. The purchase price is subject to adjustment pursuant to Paragraph 1.3 of the Agreement. That paragraph stipulates that at the closing of the transaction, TNAC's net book value shall not be less than \$890,000. Staff inquired about this provision in Data Response 2-12 and TNAC stated that the parties to the Agreement sought to preserve the stock value established in February 2005, since that was the value approved by voters. In the event that the dividend to current stockholders reduces the net book value below the February level, the purchase price will be adjusted pursuant to Paragraph 1.3 of the Agreement. The primary reason for fluctuation in the equity value of the stock is that liabilities are being reduced as time passes. TNAC anticipates that the current shareholders will receive a dividend prior to closing as a way of maintaining the equity value of TNAC stock as it was when the Agreement was first executed.

As part of the transaction, TNWD will assume an existing TNAC State Revolving Loan Fund loan with the New Hampshire Department of Environmental Services (DES) in the amount of \$1,047,011.17.² TNWD will pay off a TNAC mortgage with the Bank of New Hampshire in the amount of \$3,851,321³; pay administrative, legal, and engineering fees

² The Commission approved this financing and associated construction projects in *Tilton-Northfield Aqueduct Company, Inc.*, Order No. 23,427, 85 NH PUC 116 (2000).

³ The Commission approved this financing and associated construction projects in *Tilton-Northfield Aqueduct Company, Inc.*, Order No. 24,169, 88 NH PUC 231 (2003).

estimated to be \$24,000; and pay for a title search and title insurance estimated to be \$15,000. These expenses were approved by voters at the first Annual Meeting of the TNWD on April 19, 2005. Voters authorized TNWD to acquire the TNAC water system and raise and appropriate \$9,124,000 for that purpose. Petition at 5-6. TNWD provided evidence that it will be obtaining a loan in the amount of \$7,975,000 from USDA Rural Development (Rural Development) to finance the transaction. According to Staff, TNWD expects the interest rate on the Rural Development loan to be 4.125%.

TNWD will be governed by three water commissioners who will be periodically elected by registered voters of TNWD. Following the sale of TNAC to TNWD, the current President and Vice President of TNAC, Kenneth F. Money and Barbara J. Money, will continue working for TNAC for a period of time to assist in an orderly transition in management. TNWD intends eventually to replace Mr. Money with a Water Superintendent. Staff stated in its recommendation letter that it believed TNWD's interim retention of Mr. and Mrs. Money will ensure a smooth transition of ownership.

TNAC and TNWD's petition did not specifically request exemption from PUC regulation for the water utility post-transfer and, according to Staff's letter, Staff posed the issue to TNAC and TNWD. TNWD responded that it wished to incorporate such an exemption request pursuant to RSA 362:4 into the instant proceeding. Staff averred an exemption from regulation in this docket was appropriate, because TNWD is a municipal entity and municipal

entities are specifically exempted from regulation by RSA 362:4. Staff stated that voters of TNWD directly elect the water commissioners and thus will have direct input into the operations of the water utility. Staff felt confident that TNWD would be responsive to customer needs and recommended the Commission grant TNWD exemption from further Commission regulation once the transaction has been completed.

In support of the transaction, TNAC and TNWD noted in their petition that the DES has approved the suitability and availability of water supplied by the TNAC system. Staff noted it received a July 22, 2005 letter from DES, indicating that the TNAC system is in general compliance with water quality standards under the Safe Drinking Water Act, and that the system has no outstanding deficiencies.

According to TNWD's discovery responses, it does not anticipate major expansion of the water system. TNWD plans to welcome new customer connections, along existing mains or through minor expansion of its service area with main extensions, in order to increase revenues. TNWD indicated that it does not have immediate plans for significant capital improvements other than a continuation of TNAC's current efforts to replace older mains, services and hydrants.

II. COMMISSION ANALYSIS

In their joint petition, TNAC and TNWD ask, pursuant to RSA 374:22 and 30, that we approve the transfer of TNAC's franchise, works, and system to TNWD by means of a sale of stock. RSA 374:22 states that "[n]o person or business entity shall...exercise any right or privilege under any franchise...without first having obtained the permission and approval of the commission." RSA 374:30 states that "[a]ny public utility may transfer or lease its franchise,

works or system...when the commission shall find that it will be for the public good.” In determining whether a proposed franchise or franchise transfer is in the public good, the Commission assesses, among other things, the managerial, financial, and technical expertise of the petitioners. *See, Lower Bartlett Water Precinct*, 85 NH PUC 635, 641 (2000).

We have reviewed the joint petition submitted by TNAC and TNWD, the testimony of Mr. Money, Staff’s recommendation letter, and discovery responses provided by both TNAC and TNWD. TNWD has demonstrated its ability to raise and appropriate \$9,124,000, to assume TNAC liabilities, and convert TNAC’s existing debt to a lower interest debt through a loan from Rural Development. TNWD plans to continue charging the present tariff rates. To aid in a smooth transition, TNWD has adopted by-laws and TNWD will retain Mr. and Mrs. Money, the present owners of TNAC, to help it operate the water system while TNWD locates experienced staff. Based on this evidence, we conclude that TNWD has the requisite managerial, financial, and technical expertise to operate the TNAC water system.

We next discuss TNWD’s status as a public utility, after the transfer. TNWD’s status as a public utility is dependent primarily upon whether it serves within or without its corporate limits. In this case, TNWD, by definition, will be operating within its corporate boundaries, however, it also seeks franchise authority to operate outside its corporate boundaries to the full geographic extent of the existing TNAC utility franchise.

The record indicates TNWD is a village district formed under RSA Chapter 52. Pursuant to RSA 362:2, the term “public utility” does not include “municipal corporations and county corporations operating within their corporate limits, owning, operating or managing any plant or equipment or any part of the same for the ...furnishing of ...water for the public...”

The Commission has interpreted municipal corporations to include village districts. See, e.g., North Conway Water Precinct, Order No. 24,360 (August 16, 2004). This interpretation is consistent with the New Hampshire Supreme Court's reference in *Lisbon v. Lisbon Village District*, 104 NH 255, 258, (1962) to "municipalities and similar corporations which would include village districts" and its treatment of municipal corporation and municipality as equivalent terms in *Blair v. Manchester Water Works*, 103 NH 505, 506 (1961). According to minutes establishing it, the district consists of all the physical boundaries of the present customer units. The record further indicates that TNWD plans to operate within those corporate limits. Accordingly, to the extent TNWD operates within its corporate limits, it is not subject to Commission regulation.

TNWD does not intend to serve customers outside its corporate limits in the immediate future. It does, however, contemplate the prospect of new customer connections, outside its corporate limits but within the larger former TNAC franchise boundary, in order to increase revenues and lower customer rates. If this were to occur, it would be subject to some regulation by the Commission. A municipal corporation furnishing water service outside its municipal boundaries is not considered a public utility for the purpose of accounting, reporting, or auditing functions with respect to said service. See, RSA 362:4 (II). For service provided outside municipal boundaries, however, RSA 362:4, III-a (a) (1) states that the Commission retains its jurisdiction over franchise requirements, pursuant to RSA 374:22.

There are two ways TNWD could serve customers outside the District's current boundaries. TNWD could vote to change its boundaries, pursuant to RSA 52:5; a process that does not provide for a Commission role. Alternately, TNWD, as holder of the utility franchise,

could provide service beyond its district boundaries, subject to certain limitations regarding rates and services, pursuant to RSA 362:4. The Commission has jurisdiction to ensure that the rates are in compliance with these statutory limitations.

In order to determine whether the transfer is for the public good, we consider effects both within and without the district boundaries. Within the district boundaries, we find the transfer for the public good because, among other things, the voters in both Tilton and Northfield have shown strong support for the transaction and the DES has approved the suitability and availability of water supplied by the system.

Beyond the district boundaries, we look to the effect of the transfer of the franchise on prospective customers and particularly the status of the main extension provisions of the existing tariff. Pursuant to RSA Chapter 52, district voters include only those domiciled in the district; potential future customers located outside the district, therefore, will have no voice in the district's governance and election of Commissioners. Our jurisdiction over the franchise territory outside the district's boundary, however, ensures that potential inequities will be minimized. Pursuant to RSA 362:4, III-a (a) (1), a district must provide the same quantity and quality of water or level of water service to customers outside the district as provided to customers within the district and it cannot charge customers located outside the district more than 15 percent above the rates charged to customers located within the district, without implicating further Commission regulation, pursuant to RSA 362:4, III-a(b).⁴

⁴ Article IV, Section 2 of the By-Laws purports to govern service to customers outside the District. Such service is governed by RSA 362:4 and Commission authority thereunder.

We conclude that our jurisdiction under RSA 362:4 and maintenance of relevant provisions of the current tariff, most notably the present main extension policy, adequately ensure that the transfer of TNAC's franchise, works, and system to TNWD is for the public good. Therefore, pursuant to RSA 374:30, we approve the transfer as it applies beyond the district boundaries. In addition, pursuant to RSA 374:22 and 26, we grant TNWD permission to conduct business under a franchise approved by the Commission in the Towns of Tilton and Northfield.

Based upon the foregoing, it is hereby

ORDERED *NSI*, that the joint petition to approve the transfer of Tilton and Northfield Aqueduct Company, Inc.'s franchise, works, and system to Tilton and Northfield Water District is APPROVED; and it is

FURTHER ORDERED, that the Tilton and Northfield Water District is granted permission to exercise a franchise in the Towns of Tilton and Northfield; and it is

FURTHER ORDERED, that the Tilton and Northfield Water District shall work with Commission Staff to file a compliance tariff for service outside the District's boundaries by January 31, 2006 and that such tariff shall include, at a minimum, the current main extension provisions; and it is

FURTHER ORDERED, that the Tilton and Northfield Water District shall file a detailed geographic description of the boundaries of the water district, and correspondingly the boundaries of the franchise granted herein, by January 31, 2006; and it is

FURTHER ORDERED, that the Tilton and Northfield Water District, operating within its corporate limits, is not subject to Commission jurisdiction pursuant to RSA 362:2; and

it is

FURTHER ORDERED, that the Tilton and Northfield Water District is exempt from Commission regulation for purposes of accounting, reporting, or auditing functions pursuant to RSA 362:4; and it is

FURTHER ORDERED, that Tilton and Northfield Aqueduct Company, Inc. shall file with the Commission an Annual Report for the 2005 fiscal year containing data up to the date of transfer, and it is

FURTHER ORDERED, that Tilton and Northfield Aqueduct Company, Inc. and Tilton and Northfield Water District shall cause a copy of this Order *Nisi* to be published once in a statewide newspaper of general circulation or of circulation in those portions of the state where operations are conducted, such mailing and publication to take place no later than December 19, 2005 and to be documented by affidavit filed with this office on or before January 9, 2006; and it is

FURTHER ORDERED, that all persons interested in responding to this petition be notified that they may submit their comments or file a written request for a hearing on this matter before the Commission no later than December 27, 2005; and it is

FURTHER ORDERED, that any party interested in responding to such comments or request for hearing shall do so no later than January 3, 2006; and it is

FURTHER ORDERED, that this Order *Nisi* shall be effective January 9, 2006, unless the Commission provides otherwise in a supplemental order issued prior to the effective date.

By order of the Public Utilities Commission of New Hampshire this ninth day of
December, 2005.

Thomas B. Getz
Chairman

Graham J. Morrison
Commissioner

Michael D. Harrington
Commissioner

Attested by:

Debra A. Howland
Executive Director & Secretary