

**STATE OF NEW HAMPSHIRE
PUBLIC UTILITIES COMMISSION**

DW 13-171

EASTMAN SEWER COMPANY, INC.

**Joint Petition for Approval of Sale to Village District of Eastman and
Exemption from Further Regulation**

Order Approving Settlement Agreement

ORDER NO. 25,634

March 11, 2014

APPEARANCES: Jay C. Boynton, Esq., for Eastman Sewer Company, Inc., Village District of Eastman and Eastman Community Association; Phillip C. Schaefer and James Van Dolah for the Eastman Sewer Users Coalition; Robert Logan and Geraldine Logan; and Marcia A. Brown, Esq. and Michael J. Sheehan, Esq. for the Staff of the New Hampshire Public Utilities Commission.

I. PROCEDURAL HISTORY

On June 13, 2013, Eastman Sewer Company, Inc. (Sewer Company), the Village District of Eastman (Village District), and the Eastman Community Association (Association) (together the Joint Petitioners), filed a Joint Petition with the Commission seeking approval of the Association's sale of the Sewer Company's assets and liabilities to the Village District and seeking the Sewer Company's exemption from future regulation.

The Sewer Company, a for-profit New Hampshire corporation wholly owned by the Association, is a regulated public utility that serves about 537 customers within the development known as Eastman, a community of about 1,330 homes and condominium units within the towns of Grantham, Springfield, and Enfield. Hearing Transcript of January 21, 2014 (1/21/14 Tr.) at 24, 26. The Association, a not-for-profit New Hampshire corporation, serves as Eastman's governing body and owns all the Sewer Company's stock. 1/21/14 Tr. at 24. The Village

District, a municipal corporation organized under RSA 52, owns and operates a water supply and distribution system with about 1,330 connections (including all the sewer customers) and is authorized to operate a waste water facility pursuant to RSA 52. 1/21/14 Tr. at 24, 33-34, 208; Exhibit 1 at 13. The Village District's water system is exempt from Commission regulation pursuant to RSA 362:4 because it is a municipal corporation serving customers within its boundaries. All of the Sewer Company's customers are within the corporate boundaries of the Village District. 1/21/14 Tr. at 38, 47.

The Joint Petitioners filed the following documents in support of their requests: the purchase and sales agreement (P&S), Exhibit 1 at 13; testimony of Brian Harding, General Manager of the Sewer Company, Exhibit 2; William Weber, District Manager of the Village District, Exhibit 4, and Maynard Goldman, President of the Association, Exhibit 3; the contract between the Sewer Company and the sewer operator, Exhibit 1 at 48; minutes of the Village District meetings at which the proposed sale was approved, Exhibit 1 at 53, 68; the Association's corporate resolution authorizing the proposed sale, Exhibit 1 at 88; the New Hampshire Department of Environmental Services (DES) discharge permit allowing the Sewer Company to operate, Exhibit 1 at 79; and confirmation from the DES that the permit can be transferred to a new owner, Exhibit 1 at 83.

The Commission granted separate motions to intervene of Geraldine Logan and Robert Logan, who are Eastman residents, customers of the Village District's water service, and members of the Association. The Commission also granted the motion to intervene of the Eastman Sewer Users Coalition (Coalition).

An earlier issue in this docket was the attempt by some Eastman residents to form a separate village district that could acquire the Sewer Company. *See* Petition, Exhibit 1 at 3-4.

The proposed village district did not pass when put to a vote in August 2013. 1/21/14 Tr. at 26, 32.

Staff filed a Stipulation Agreement (Agreement) on January 16, 2014, the terms of which reflected Staff's and the Joint Petitioners' agreement that the proposed sale meets the applicable legal requirements and recommended that the Commission approve the proposed sale and exempt the sewer system from further Commission regulation. Tr. at 9; Exhibit 9.

The Commission conducted a hearing on the merits on January 21, 2014. In support of the Agreement, the Joint Petitioners and Staff presented exhibits and the testimony of Mr. Harding, Mr. Weber, Mr. Goldman, and Mark Naylor, Director of the Commission's Gas and Water Division. In opposition to the Agreement, the record contains the prefiled testimony of Phillip C. Schaefer on behalf of the Coalition, Mr. Logan, and Mrs. Logan as Exhibits 6, 7, and 8, respectively. The intervenors also introduced a number of exhibits, cross-examined witnesses, and offered closing statements.

II. THE SETTLEMENT AGREEMENT

The Agreement stipulated to the corporate status of the Joint Petitioners as recited above, Exhibit 9 at 2-3; the basic terms of the P&S, *Id.* at 3-4; that the current operator of the sewer system will continue to serve in the same role after the sale, *Id.* at 4; that the Village District obtained the necessary approvals from its voters to consummate the sale, *Id.* at 4-5; that DES approved the suitability of the sewer system and confirmed the transferability its permit, *Id.* at 5; that virtually all of the sewer customers are now served by the Village District's water system, and that the "Village District has demonstrated that it is capable of reliable and safe municipal operations and has the necessary technical, managerial, and financial resources to operate and enhance, as necessary, these systems," *Id.*

The Agreement contains a series of stipulated terms which the settling parties asked the Commission to adopt and approve. The most important of these terms are the following:

A. Sale of System

1. The Settling Parties agree that it is in the public interest for the assets and liabilities of the Sewer Company to be sold to the Village District, consistent with the [P&S]. The Village District will provide these services only within its municipal corporate boundaries.
2. The Joint Petitioners agree to hire Water System Operators, Inc., a certified operator and existing operator of the sewer system, to operate the system.
3. The Settling Parties agree that the Village District has the requisite capabilities to handle any repair or capital improvements to the system.
4. The Settling Parties agree that the Village District possesses the requisite capabilities to handle service complaints, billing, and other administrative matters ... to conduct regular, monthly Board meetings and regularly-scheduled Annual Meetings or Special Meetings. Sewer customers will be incorporated into the existing structure of the Village District.

B. Exemption from Regulation

1. The Settling Parties agree that, after the [sale] the system will be exempt from regulation pursuant to [New Hampshire law related to public utilities]. As such ... the Village District will make the terms of service and charges available to customers [through] information presented at Village District annual meetings [and] on the Village District website and, when appropriate, included with mailings to customers as part of the billing process.
2. The Settling Parties agree that the Village District will continue to comply with all DES requirements.

C. Other

1. The signatories seek an Order approving the transfer of the assets of the Sewer Company and exemption from regulation
2. The Settling Parties agree that ... it is in the public good for the Commission to determine that ... the Sewer Company after the transfer [may] cease operations and to no longer continue as a regulated public utility

Exhibit 9 at 5-7.

III. POSITIONS OF THE PARTIES AND STAFF

A. The Joint Petitioners and Staff

The Joint Petitioners and Staff recommended that the Commission approve the Agreement and allow the sale to go forward as presented. Through their prefiled and testimony at hearing, the Joint Petitioners presented evidence of their legal authority to complete the sale through approvals by boards of the Sewer Company, the Association, and the Village District, and through two votes by Village District residents that approved the sale generally and that approved by the required two-thirds majority the assumption of the Sewer Company's debt. 1/21/14 Tr. at 25-26; Exhibit 1 at 45, 60.

Staff and the Joint Petitioners stated that the proposed sale satisfies the legal standard requiring the Village District to have the managerial, financial, and technical ability to operate the sewer system. The Joint Petitioners and Staff testified that the sewer system needs substantial work and that the Village District will have easier and cheaper access to capital to fund the system's repairs through the State's Clean Water State Revolving Fund and through municipal rates at private banks, sources not available to the Sewer Company. 1/21/14 Tr. at 39, 209-210. Staff considered the Village District's improved access to capital to be the primary benefit that will flow from the proposed sale. 1/21/14 Tr. at 77, 210. The Village District said it plans to immediately raise sewer user rates to be "in line with other systems of this type, this size, and this capacity." 1/21/14 Tr. at 58; Exhibit 11. The Village District will follow the same public process for setting new sewer rates as it does for setting water rates. 1/21/14 Tr. at 71.

The Joint Petitioners stated that the Village District's general manager has experience with sewer systems and that the system will be operated by the same third party company that currently runs the system as required by the P&S. 1/21/14 Tr. at 34-35, 194-95; Exhibit 1 at 26

(Paragraph 13.08). Although DES is monitoring some operational issues, the Village District is aware of those issues and will continue to work with DES toward a long-term solution. The Sewer Company hired an engineer to investigate and propose solutions to the issues DES raised and, in January 2013, the Sewer Company approved further engineering work on one of the recommended plans. 1/21/14 Tr. at 54. The Village District will continue that process. 1/21/14 Tr. at 28-29. The Joint Petitioners noted that the Sewer Company nonetheless has a five-year groundwater discharge permit and release detection permit from DES. 1/21/14 Tr. at 52, 54-55; Exhibit 1 at 79.

The Joint Petitioners also testified that the Village District has the managerial ability to operate the sewer system. They testified that it will be relatively easy to transfer the Sewer Company's administrative functions to the Village District because their offices adjoin each other and the people involved have worked together for years. 1/21/14 Tr. at 29-30, 41, 197. The Joint Petitioners testified that the Village District has a long and successful record of managing the community's water system which serves more than twice as many customers as the sewer system. 1/21/14 Tr. at 196. Although the intervenors raised several concerns regarding the Village District's management abilities, discussed below, the Joint Petitioners and Staff argued that they sufficiently rebutted those concerns.

The Joint Petitioners and Staff thus testified that the proposed sale met the public interest standard. Tr. at 30, 40, 74.

B. Eastman Sewer Users Coalition

The Coalition objected to the sale for several reasons. First, the Coalition claimed the Association has been involved in self-dealing in its relationship with the Sewer Company. According to the Coalition, the Association caused the Sewer Company to pay real estate taxes

on property owned by the Association and improperly caused the Sewer Company to pay half of the legal and other costs related to this transaction. Exhibit 6 at 1, 5-7; 1/21/14 Tr. at 86, 102-103.

Second, the Coalition alleged the Sewer Company has been less than forthright with the Commission. For example, the Coalition noted that in Order No. 24,368 (Sept. 24, 2004) the Sewer Company was required to undertake a ten-year project to inspect and map its sewer lines at an annual cost of \$15,000 and to make annual reports to the Commission. 1/21/14 Tr. at 104. In fact the Sewer Company did not file progress reports and it did not advise the Commission when it suspended the project. Exhibit 6 at 2.

Third, the Coalition alleged that the Association and Sewer Company made “numerous misstatements” during a public forum prior to the critical votes “for the apparent purpose of influencing voters” to support the sale, and violated RSA 91-A in certain “meetings” that were not properly noticed. Exhibit 6 at 3. The Coalition listed a number of such statements including that the Village District would appoint a sewer board when no such board has been appointed and its very existence is in doubt, Exhibit 6 at 3; that the Sewer Company and Village District circulated a letter describing the process for a “precinct tax” that could be assigned to sewer users, which tax may be deductible, but which information was not accurate, Exhibit 6, at 3; and that DES raised the required performance level of the sewage treatment plant when in fact the DES relaxed its standard, which the Coalition stated exhibited “a lack of understanding of the technical issues related to operating a sewer system,” Exhibit 6 at 4. The Coalition claimed the Association unfairly raised voter concerns “by causing them to think that the sewer lines [close to the lake] were an imminent threat” when, the Coalition said, no such imminent threat had ever been established, Exhibit 6 at 4, and that the Joint Petitioners violated RSA 91-A by having

principals of the Village District and Sewer Company meet without proper notice to the public, 1/21/14 Tr. at 121.

Fourth, the Coalition alleged the Association understated the borrowing capacity of the existing Sewer Company in support of the Association's argument that the Village District would have a much greater ability to borrow. Exhibit 6 at 5.

Fifth, the Coalition challenged the Village District's ability to run the Sewer Company because the Village District refused to "provide any personal commitments from [its] commissioners that they are willing and have the time to assume this additional responsibility" of running the Sewer Company themselves or through an advisory board, and because the Village District's general manager and staff allegedly lacked experience and licenses to manage or operate a sewer company. Exhibit 6 at 7.

In testimony filed in support of its petition to intervene, the Coalition gave further reasons in opposition to the sale. The Coalition noted that the sewer customers will lose the protection of the Commission if the sale is approved and that the sewer customers' votes will be diluted when they are mixed with the other Village District residents who are not sewer users. Coalition's Petition to Intervene, filed July 26, 2013, at 1-2. The Coalition stated that this dilution will leave the sewer customers at the mercy of the majority of non-sewer users and may result in the sewer customers bearing an unfair proportion of the costs of maintaining and upgrading the sewer facilities that benefit the entire community. *Id.* The Coalition stated that the sewer users "will have their operating and maintenance and capital recovery rates controlled by a majority of voters who have no direct interest in the Eastman sewerage." *Id.* at 2.

Finally, through cross examination of the witnesses, Mr. Schaefer challenged the accuracy of the \$20,000 per year savings that the Joint Petitioners cited. He argued that the Joint Petitioners failed to disclose the existence of a binding lease agreement. 1/21/14 Tr. at 74, 99.

The Coalition asked the Commission to reject the Agreement. 1/21/14 Tr. at 233.

C. Intervenors Robert and Geraldine Logan

Intervenors Robert Logan and Geraldine Logan, as noted above, are Eastman residents and Association members but they are not sewer customers. They also objected to the proposed sale. Exhibit 28 at 1.

Mrs. Logan argued, first, that Association and Sewer Company representatives repeatedly told the community that the “Sewer Company represents a ‘danger to the lake,’” and cited several such examples. Exhibit 7 at 1-2. Mrs. Logan stated there was “no presentation of any material facts” supporting these inflammatory statements. *Id.* Mrs. Logan also argued, as did the Coalition, that residents were misinformed prior to and during the Village District annual meeting where the sale was authorized. She provided several examples. Exhibit 7 at 3-4; Exhibit 27; 1/21/14 Tr. at 160.

Second, in a similar fashion as the Coalition, Mrs. Logan argued the Sewer Company did not comply with Order No. 24,368 relating to the inspection of the sewer system and reports to the Commission. Exhibit 7 at 5.

Third, Mrs. Logan argued that the Association board tried to “silence community members on this and other matters” through several mailings to Sewer Company customers and Association members. Exhibit 7 at 6. Mrs. Logan quoted from these mailings including the following statements: “although together we have made considerable progress at Eastman in recent years there continues to be a small group of dissenters who oppose virtually every

initiative to improve our community;” “there are several ways to respond to the types of irresponsible material contained in the anonymous letters and many postings that appear on the listserv;” “there are some reasons to pursue this course but it also provides opportunity for further mischief by the perpetrators;” and “find a statement or number that appears in a letter, report or other document and then surround it with innuendo or mis-statements wrapped in a cocoon of venom.” Exhibit 7 at 6-7. Those letters were introduced as Exhibit 27.

Mr. Logan opposed the Agreement and the sale for three reasons. First, Mr. Logan claimed the Village District committed many violations of RSA 91-A through the course of the public meetings that authorized the sale and through private meetings that should have been public and subject to the procedures of RSA 91-A. Mr. Logan presented almost two dozen examples of what he claimed are violations of RSA 91-A or related concepts. Exhibit 8 at 3-15; 1/21/14 Tr. at 152. Mr. Logan claimed this alleged inability to follow open meeting requirements is evidence that the Village District does not have the managerial ability to run the sewer company. During the hearing, Mr. Logan expressed that “the people [who] voted for [the sale] were wrongfully informed in January. And, that's what the record shows.” 1/21/14 Tr. at 152.

Second, Mr. Logan argued the Village District did not perform sufficient financial due diligence prior to its purchase of the Sewer Company, improperly relying on the sellers’ financial disclosures rather than conducting an independent analysis. He argued that the purchase price is not reasonable and that the Village District does not understand the true risks of the proposed purchase. 1/21/14 Tr. at 182-83, 186. Mr. Logan presented what he called a “cost comparison” of some Sewer Company costs and concluded that the “general and administrative costs will increase.” Exhibit 8 at 16-17. He disputed the Village District’s claim that it will be easier for

the Village District to raise capital. *Id.* at 17-18. Mr. Logan also disagreed with the claimed areas of cost savings. *Id.* at 19-21; 1/21/14 Tr. at 137.

Third, Mr. Logan argued the Village District does not have the technical ability to acquire and operate the Sewer Company because it failed to perform sufficient “engineering due diligence.” Exhibit 8 at 22; 1/21/14 Tr. at 187-88. Mr. Logan stated that the Village District “has taken all of the representations of the seller as reasonable and accurate as to the” cost to improve the capital infrastructure, whereas Mr. Logan stated a third party engineering assessment would have concluded that the costs will be at least twice as much. Mr. Logan testified that a fair price “would most likely be a significant seven-figure [Sewer Company] payment to the [Association].” Exhibit 8 at 22.

IV. COMMISSION ANALYSIS

The Commission shall approve the disposition of any contested case by settlement “if it determines that the result is just and reasonable and serves the public interest.” N.H. Code of Admin. Rules Puc 203.20(b); *see* RSA 541-A:31, V(a) (“Unless precluded by law, informal disposition may be made of any contested case ... by stipulation [or] agreed settlement”). In this case there is only partial agreement because the intervenors object to the proposed sale. Regardless of whether there is full or partial agreement, the Commission will not approve a settlement agreement “without independently determining that the result comports with applicable standards.” *Unitil Energy Systems, Inc.*, Order No. 24,677, at 18 (Oct. 6, 2006) (citation omitted).

The applicable standard in this case is that the Commission will approve the sale of a public utility if the Commission finds that the transfer will be for the “public good.” *See* RSA 374:30 (“Any public utility may transfer its franchise, works or system ... when the commission

shall find that it will be for the public good and shall make an order assenting thereto”). To determine whether the proposed transfer is for the public good, the Commission “has a longstanding practice of evaluating the managerial, financial, and technical ability of the proposed transferee to operate a public utility.” *Hampstead Area Water Company*, Order No. 24,803, at 3 (Nov. 2, 2007); *see* RSA 149-I:4 (a village district “may ... purchase ... sewage or waste treatment facilities ... whenever they judge the same necessary for the public convenience, health and welfare”). A similar public good standard governs the Joint Petitioners’ second request for the Sewer Company to cease operating as a public utility. RSA 374:28 provides that the “commission may authorize any public utility to discontinue ... any part of its service ... permanently ... whenever it shall appear that the public good does not require the further continuance of such service.”

The proposed transaction before us is the Village District’s purchase of all the Sewer Company’s assets and liabilities from the Association. Thus, the question is whether the Village District has the “managerial, financial, and technical ability ... to operate” the sewage system. The issue is not to examine the parties’ past performance except as it may relate to whether the Village District currently has the managerial, financial and technical ability to operate the system.

We find, first, that the Village District has the financial ability to operate the sewer system. The record demonstrates that the Village District has access to low cost financing through the State Revolving Fund and more favorable rates from private lenders, and the Village District plans to raise user fees to a level consistent with other sewer utilities. 1/21/14 Tr. at 39, 58, 209-210. Access to these loans and more income from higher user rates will allow the

Village District to maintain current operations and to begin work on the capital needs of the sewer system.

Second, we find the Village District has the technical ability to operate the sewer system. The Village District will maintain the day-to-day operation of the sewer system by retaining the same third party operator that has run the system in prior years and will bring its own expertise to bear through its general manager and staff. The Village District has the technical ability to address the system's known capital issues through its intent to continue the work begun by the Sewer Company. The Sewer Company hired engineers to identify a new disposal system and locate a site for that system. 1/21/14 Tr. at 53-54. The Village District intends to continue that process. 1/21/14 Tr. at 28-29.

We also find the Village District has the managerial ability to operate the sewer system. The Village District has successfully operated Eastman's substantially larger water system for years without regulatory issues and it has the administrative knowledge and capacity to assume the sewer customers. 1/21/14 Tr. at 29-30, 41, 196-197.

Therefore, we find that the Joint Petitioners have satisfied the "public good" standard necessary for our approval of the Association's transfer of the Sewer Company's assets, liabilities, and franchise rights to the Village District as set forth in the P&S and the Agreement. In light of this public good finding, we further find that the Sewer Company's request to cease operating as a public utility is also in the public good. Accordingly, we will authorize the Sewer Company to discontinue engaging in the business of providing regulated sewer service pursuant to RSA 374:26 and RSA 374:28. Because the Village District is considered a municipal corporation by virtue of its organization under RSA 52, it is exempt from Commission regulation pursuant to RSA 362:2 and RSA 362:4 for service within its corporate boundary.

In reaching these findings we have given careful consideration to the intervenors' arguments. The Coalition, Mr. Logan and Mrs. Logan raised important issues and their participation in this docket contributed to our review. In the end, however, we find their arguments to be insufficient to warrant our rejection of the proposed sale. First, regarding RSA 91-A, whether a violation of the law occurred is not for this Commission to decide. We do not, however, find any conduct by the joint petitioners regarding RSA 91-A that demonstrates that the Village District lacks the managerial capability to operate the sewer utility. Second, the issues relating to the relationship between the Association and Sewer Company and how they ran the sewer system in prior years were not sufficient to undermine the Village District's abilities to operate the sewer system. Third, the intervenors' disagreement with the terms of the P&S and the Agreement did not render those documents unreasonable. The sale of a utility can take many forms and incorporate many terms; the particular sale presented to us reflects a thoughtful and reasonable transaction.

Based upon the foregoing, it is hereby

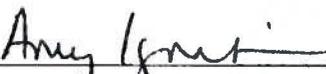
ORDERED, that the Joint Petitioners' request for the Association to sell the assets and liabilities of the Sewer Company to the Eastman Village District as provided in the Agreement is **APPROVED**; and it is

FURTHER ORDERED, that because the Village District is a municipal corporation under RSA 52 it is not a regulated public utility subject to the Commission's jurisdiction pursuant to RSA 362:2 and RSA 362:4 for service provided within its corporate boundaries; and it is

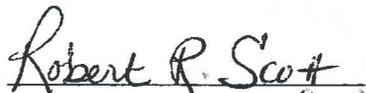
FURTHER ORDERED, that consummation of the transfer of the utility assets, liabilities, and franchise to the Village District shall occur within one year from the date of this order, documentation of which shall be filed in this docket by Eastman Sewer Company; and it is

FURTHER ORDERED, that Eastman Sewer Company is relieved of its obligations to provide regulated utility service within its authorized franchise boundary effective as of the date of the transfer to the Village District.

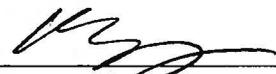
By order of the Public Utilities Commission of New Hampshire this eleventh day of March, 2014.



Amy D. Ignatius
Chairman



Robert R. Scott (KRS)
Commissioner



Martin P. Honigberg
Commissioner

Attested by:



Debra A. Howland
Executive Director