

DW 00-247

DANIELS LAKE WATER WORKS, INC.

**Investigation into Quality of Service and
Continued Operation as a Viable Public Utility**

Order Imposing Receivership Pursuant to RSA 374:47-a

O R D E R N O. 23,604

December 22, 2000

APPEARANCES: John P. Higgins, Esq. for Daniels Lake Water Works, Inc.; and Donald M. Kreis, Esq. for the Staff of the New Hampshire Public Utilities Commission.

I. BACKGROUND AND PROCEDURAL HISTORY

On October 30, 2000, the New Hampshire Public Utilities Commission (Commission) began this proceeding by entering an order, No. 23,579, directing Daniels Lake Water Works, Inc. (DLWW or Company) to show cause why it should not be placed in receivership pursuant to RSA 374:47-a for failure to provide adequate and reasonable service to its approximately 23 customers in the Town of Weare.

Specifically, the Commission directed DLWW to appear at a hearing on December 7, 2000 to respond to specific deficiencies noted in Order No. 23,579, to show cause why fines and/or other penalties should not be imposed and to demonstrate why its authority to operate a water system should not be revoked.

In Order No. 23,579, the Commission instructed its

Executive Director and Secretary to send a copy of the order to each of the Company's customers, the Weare Town Clerk and the New Hampshire Department of Environmental Services. The Commission further directed any party seeking to intervene to file a petition on or before December 4, 2000. No intervention petitions were filed, although the Commission received letters from three DLWW customers expressing interest in the proceeding and concerns about DLWW's suitability to continue to hold its franchise.

On November 13, 2000, the Commission received a letter (bearing a date of November 4, 2000) from Josef Fitzgerald, president of DLWW and the Company's sole shareholder, reciting his position in connection with the proceeding and noting his intention to appear at the scheduled show cause hearing. On December 6, 2000, counsel to DLWW faxed the Commission a letter indicating that Mr. Fitzgerald¹ would not be present at the December 7 hearing because he was "unable to get a day off from work at this time of the year." Counsel's letter expressed apologies and asked on Mr. Fitzgerald's behalf "for an opportunity to address the

¹ As will become apparent, the major figures in the operation of DLWW are DLWW President Josef Fitzgerald and his father, Gary Fitzgerald. For purposes of clarity, references in this order to "Mr. Fitzgerald" should be understood to relate to Josef Fitzgerald.

Commission sometime after the holidays."

Through its Executive Director and Secretary, the Commission informed counsel to DLWW on December 6 that the show cause hearing would proceed on December 7 as contemplated in Order No. 23,579. The Commission conducted the hearing as scheduled, before Commissioner Susan S. Geiger; both Mr. Fitzgerald and his attorney were in attendance. At hearing, DLWW indicated that Mr. Fitzgerald's previously submitted letter would comprise the totality of the evidence it wished to present. Thereafter, however, at the request of the Staff of the Commission, Mr. Fitzgerald was directed to take the stand and submit to cross-examination. Following Mr. Fitzgerald's testimony, the Commission also heard testimony from two Staff members: Douglas Brogan of the Commission's Engineering Department and Eileen Hadley of the Commission's Consumer Affairs Department.

At the conclusion of the testimony, counsel for DLWW conceded that Mr. Fitzgerald and his company lacked the resources to continue to maintain the franchise. On December 8, 2000, pursuant to RSA 363:17, Commissioner Geiger submitted her report and recommendation to the Commission. Commissioner Geiger's recommendation was to place the utility in

receivership and impose a fine on Mr. Fitzgerald personally. The Commission deliberated on Commissioner Geiger's recommendation at its regularly scheduled meeting of December 11, 2000.

At the outset of this proceeding, certain background facts were already known to the Commission. As noted in Order No. 23,579, the Commission imposed fines against six New Hampshire water utilities on October 29, 1999 (Order No. 23,334) for failure to file annual reports. *See Central Water Co.*, 84 NH PUC 577 (1999). DLWW was among the six utilities cited. As of October 29, 1999 DLWW had not filed the 1998 annual report that was due on March 31, 1999; its 1996 and 1997 annual reports had recently been received and rejected as facially inadequate. The Commission noted in its October 1999 order that DLWW failed to appear at a scheduled hearing on September 21, 1999 to show cause why fines should not be imposed pursuant to RSA 374:17 (authorizing fines of \$100 for each day annual report remains unsubmitted). Accordingly, the Commission imposed a \$1,000 fine against DLWW, suspended the fine, but ruled that it would be reimposed without further hearing in the event that either (1) the Company failed to file its 1998 Annual Report by November 15, 1999 or (2) that the Company failed to file its 1999 Annual Report by the

statutory deadline of March 31, 2000. The Commission also ruled that, in the event DLWW failed to file its 1998 Annual Report by November 15, 1999, it would forfeit without further hearing the sum of \$100 per day until the report was filed.

On January 20, 2000, the Commission Executive Director and Secretary wrote to DLWW, noting that the Company's 1998 Annual Report had not been received as of that date, nor had the Company resubmitted its 1996 or 1997 Annual Reports. The letter noted that, pursuant to Order No. 23,334, DLWW was therefore liable for fines in excess of \$7,500. The Secretary advised DLWW that the fines would be abated if the Commission received the Company's 1996 Annual Report by February 9, 2000, and the Company's 1997, 1998 and 1999 Annual Reports by March 31, 2000.

DLWW filed its 1996 Annual Report on February 7, 2000. The Commission has received no additional Annual Reports from the Company.

On August 10, 2000, the Commission's Secretary wrote to Daniels Lake, noting the Commission's non-receipt of the 1998 and 1999 Annual Reports. The August 10 letter noted that the fine against Daniels Lake in Docket No. 99-133 had been reinstated pursuant to Order No. 23,334, that the fine had reached \$26,900 as of July 31, 2000 and that Daniels Lake

should remit that sum to the Commission within 14 days. To date, Daniels Lake has not paid any of the fine imposed under Order No. 23,334.

The Commission granted Daniels Lake its utility franchise on October 24, 1995 (Order No. 21,875), approving temporary rates at the same time. At the hearing that preceded the issuance of Order No. 21,875, Mr. Fitzgerald testified that his responsibilities were minimal, chiefly limited to providing billing and accounting (in consultation with the Company's attorney and accountant) and that Mr. Fitzgerald's father, Gary Fitzgerald, was the certified operator. The Commission noted that the elder Mr. Fitzgerald was a resident of Weare, was on call 24 hours per day and was available to respond to billing inquiries and complaints. Based on Commission Staff's testimony that Gary Fitzgerald possessed the necessary managerial and technical expertise, the Commission awarded the franchise and established temporary rates. DLWW has never filed for permanent rates.

As noted in Order No. 23,579, the condition of the Company's pump station has been of serious concern. As cited in both the Company's own State Revolving Loan Fund (SRF) application dated January 25, 1998 and the latest Department of Environmental Services (DES) Sanitary Survey (December 3,

1999), the pump station is in poor condition. According to the DES survey, the pump station "has become hazardous to enter and should be replaced with a new above grade pumphouse. . . . This current situation is unacceptable and must be addressed immediately." Order No. 23,579 noted that, although the Commission Staff believed that DLWW may have replaced the pump station roof this year, the necessary major upgrade work remained outstanding with the Company not having followed through on obtaining low interest SRF funding for needed improvements.

Order No. 23,579 further noted that Daniels Lake had failed to comply with the federal rules requiring that it test the water of some of its customers for lead and copper contamination and take remedial action if necessary, had failed to provide either of two federally mandated Consumer Confidence Reports, had repeatedly failed to return calls from customers, officials of DES and the Commission Staff, and did not bill customers and/or accept cash customer payments for a four month period from May to August 2000. With regard to the real property on which the Company's well is situated, Order No. 23,579 raised the possibility that no deed transferring title to the Company had ever been recorded, thus triggering questions about whether the Company actually holds title to

the property. Further, as noted in Order No. 23,579, the Company has a history of poor customer relations, has triggered repeated customer complaints of low water pressure and has not complied with its stated intention to meter the system by the end of 1998.

II. POSITIONS OF THE PARTIES AND STAFF

A. Daniels Lake Water Works

The letter received by the Commission on November 13 from Mr. Fitzgerald (Exh. 1) concedes that Order No. 23,579 "does an acceptable job at explaining the history" of DLWW, with a few details absent. The letter avers that DLWW employs Stephen St. Cyr to provide accounting services to the utility and that Mr. St. Cyr was working on the utility's 1998 and revised 1997 annual reports. According to Mr. Fitzgerald, employing Mr. St. Cyr to do this work is "substantially expensive" and recent developments have left DLWW with "even less revenue with which to finance Mr. St. Cyr."

Mr. Fitzgerald's letter goes on to explain that he became a "figurehead" president of the utility at the request of his father, who had planned to run the company. According to Mr. Fitzgerald, his responsibilities as DLWW president "quickly became a nightmare," with his father using his role as the company's certified operator as "a springboard for

revenge." Mr. Fitzgerald averred that his father would disconnect customers without notice in the event that they "stood in his way toward further development in the Daniels Lake area," with the ensuing outcries directed to him as president. Mr. Fitzgerald further contended that his father would, at other times, forgive the utility bills of customers from whom he "needed something personally."

According to Mr. Fitzgerald,

[d]uring the summer of 1996, when I chose to no longer abide by the rules set forth by my father, I was ordered to hand the company back to my parents, but I would still need to retain my role as President. I was therefore still in charge of taking customer complaints, because although Daniels Lake Water Works was "my father's company," if anything went wrong, a scapegoat would be necessary.

Mr. Fitzgerald then went on to state that the DLWW's bookkeeping "became too much for my mother and sister in 1998," thus causing him to be restored to that role.

According to Mr. Fitzgerald's letter, it was at that time that his father informed him of the availability of SRF financing to make necessary improvements to the system, with his father recommending a loan "nearing \$90,000, which would have supplied him with a considerable amount of profit in the event he constructed the [needed] new pumphouse himself."

Mr. Fitzgerald's letter also purported to explain

the relationship between DLWW and Opal Holdings Ltd.² According to the letter, Opal Holdings is "another company with a figurehead/scapegoat character" in the form of his grandmother. According to Mr. Fitzgerald, Opal Holdings spent nearly \$40,000 to purchase the system in 1994 and, during the period when he was not in control of DLWW's books, received "substantial amounts of money" from DLWW as loan repayments, resulting in the neglect of the utility's operating expenses.

With regard to Gary Fitzgerald's resignation as DLWW's certified operator, Mr. Fitzgerald's letter contends that his father took this action without notifying either him or any of the utility's customers but, rather, by writing to the Town of Weare. Mr. Fitzgerald further avers that his father took it upon himself to "bypass the softening, conditioning, and pH-controlling systems in the pumphouse and allowed the water pressure to drop below 15 p.s.i."

Finally, Mr. Fitzgerald stated in his letter that he

² By way of background not supplied in Mr. Fitzgerald's letter: Exhibit 8 in this proceeding consists of a data response provided by DLWW in connection with its original franchise petition. According to Exhibit 8, the water system was owned at that time by an entity known as Daniels Lake Development Corporation (DLD), with "Opal Holding, LTD" slated to purchase the water system from DLD and convey it to DLWW in exchange for a promissory note. As noted, *infra*, the extent to which Opal Holdings actually conveyed the water system to DLWW is at least in doubt.

had had two recent meetings with representatives of two outside firms, MDM Wells and Secondwind Environmental, which would be in a position to assist him with his company's franchise obligations. Thus, according to Mr. Fitzgerald,

Daniels Lake Water Works has the potential to be a great company with the right management in place. The resignation of Gary Fitzgerald means the days of vendettas against customers, the destruction of checks, and haphazard service based on convenience are over, and I assure the members of the Commission and my customers that Daniels Lake Water Works' service will be like never before.

Mr. Fitzgerald therefore proposed a "probationary period" in which he be allowed to prove his optimistic forecast correct.

At hearing, Mr. Fitzgerald's testimony on cross-examination was largely corroborative of the written account he had provided. As already noted, at the conclusion of the hearing Mr. Fitzgerald's attorney conceded that his client lacked the ability to operate the system and would, therefore, cooperate with any effort by the Commission to place DLWW in receivership.

B. Staff

In their testimony, Mr. Brogan and Ms. Hadley elaborated on the history of DLWW and the complaints received by the Commission from DLWW customers since the utility received its franchise. Mr. Brogan testified that Secondwind Environmental is a reputable system operator. Mr. Brogan also

testified that there is no town water or public water utility in close proximity to this system. At the conclusion of the hearing, Staff urged the Commission to place the utility in receivership, based on the facts that Mr. Fitzgerald resides out of state (in Massachusetts), has no expertise that would be relevant to the operation of a utility, is only able to discharge his DLWW responsibilities when he is not otherwise engaged in his fulltime job that is unrelated to DLWW, is unable to verify to the Commission that DLWW owns the realty occupied by the utility's pump house, is in charge of a utility that (as of the hearing date) was liable to the commission for \$39,800 in fines relating to failures to complete annual reports, was unable to explain to the Commission what it would cost to bring DLWW up to applicable technical standards and had conceded that his company was unable to generate the necessary revenue to pay Mr. St. Cyr to prepare all the annual reports then outstanding.

III. COMMISSION ANALYSIS

The relevant facts are largely undisputed. Beyond those noted in Mr. Fitzgerald's written statement of his position, the facts adduced at hearing reveal that Mr. Fitzgerald resides in Lowell, Massachusetts and works full time as a human resource associate at Griffin Greenhouse (a

nursery). Mr. Fitzgerald stated that he owns 100% of the stock of DLWW but that it has no value. However, in correspondence to Commission Finance Director Mark Naylor dated February 26, 2000, Mr. Fitzgerald indicated that DLWW and all of its assets were owned by Opal Holdings Ltd. See Exhibit 14. While documents comprising Exhibit 9 indicate that Opal Holdings Ltd. sold both the real and physical property of the water company to DLWW, evidence adduced at the hearing indicates that Opal Holdings Ltd. has been exercising control over the pump house and the land on which it is situated. See Exhs. 11 and 13 (permit applications for building and excavation respectively, both of which were signed by Gary Fitzgerald on behalf of Opal Holdings Ltd.) and Exh. 12 (Opal Holdings, Ltd. certificate of intent to cut timber).

Mr. Fitzgerald became the president of the company at the age of 19. He testified that he does not know if the company has by-laws, does not know who owns the system pump house, and does not know if a deed purporting to convey the land on which the pumphouse is situated has ever been recorded in the Hillsborough County Registry of Deeds. See Exhibit 9. Mr. Fitzgerald filed personal bankruptcy proceedings in 1999. He stated that his parents' intention to file bankruptcy

proceedings in 1995 led to Josef Fitzgerald being named President and sole stockholder of DLWW so that the company's assets would not be included in his parents' bankruptcy estate.

Gary Fitzgerald had been operating the system until his resignation on October 19, 2000. Exhibit 6 consists of a letter from Gary Fitzgerald stating that he is no longer the Certified Water Operator for DLWW, and that if there are water concerns, they should be addressed to "Jesef" (sic) Fitzgerald. Although a phone number for contacting Josef Fitzgerald was provided in the letter, Mr. Fitzgerald stated that the phone number in Gary's letter is incorrect. According to Mr. Fitzgerald, he has not spoken to his father in over a year.

Mr. Fitzgerald testified that he has recently been responsible for billing the system's 25 customers and that he was "behind in invoicing" in the amount of \$3,400. He stated that currently there is approximately \$300 in the company's bank account.

Although no customers appeared at the hearing, three letters from customers were placed into evidence. Exhibit 16 dated December 4, 2000, recites various complaints about water pressure, shutoffs and poor customer relations on the part of

Mr. Gary Fitzgerald. Exhibit 17, signed by "The Daniels Lake Water Works Recipients" suggests that a petition for self control of the water system is being considered. However, Exhibit 18, a letter from customers Roland and Jeannette Boisvert, states that it would be in the best interest of all parties if the commission were to place the company in receivership and put it under the supervision of an experienced company. The Boisverts also do not support the aforementioned petition for self-control.

The Commission is vested by statute with responsibility for "the general supervision of all public utilities . . . so far as necessary to carry into effect the provisions" of the Commission's enabling statutes, RSA 374:3, including the requirement that every public utility "furnish such service and facilities as shall be reasonably safe and adequate and in all other respects just and reasonable," RSA 374:1. Accordingly, the Commission "may . . . appoint a receiver or direct its staff to take such temporary action as is necessary to assure continued service if, after notice and hearing, the commission finds that any public utility . . . is consistently failing to provide adequate and reasonable

service." RSA 374:47-a.³

The record adduced here more than supports a determination that Daniels Lake Water Works is consistently failing to provide adequate and reasonable service and must be placed in receivership. Under its present management, the Company is simply not able to meet its obligations, either to maintain the water system or to operate the company in a financially responsible manner. As Mr. Fitzgerald conceded at hearing, DLWW is caught in a downward spiral in which revenues are not adequate to meet the company's public service obligations (e.g., by completing the annual reports that are necessary to permit the Commission to exercise appropriate financial oversight) and in which Mr. Fitzgerald lacks the resources to seek permanent rates that might alter the situation. When the Commission granted DLWW its franchise in 1995, we did so based on a determination that the Company, through Gary Fitzgerald, possessed the necessary managerial and technical expertise. Now, Josef Fitzgerald concedes that such expertise has departed with his father.

³ RSA 374:47-a also authorizes the Commission to place certain utilities in receivership without notice and hearing if the failure to provide adequate and reasonable service comprises a "serious and imminent threat to the health and welfare of the customers of the utility." The Commission has not opted to proceed here under these emergency powers.

While Mr. Fitzgerald suggests that the consultants he has identified might be in a position to step into the breach, he has no plan for making such action possible financially beyond paying certain expenses out of his own pocket. Moreover, while Mr. Fitzgerald purports to have completely cut his ties and those of his company from his father, the record reflects that DLWW remains inextricably linked to Gary Fitzgerald because it remains indebted to Opal Holdings and because Opal Holdings continues to assert title to the realty beneath the DLWW pump house. In these circumstances, assuming that the significant operational problems DLWW has experienced since obtaining its franchise can be laid at the feet of Gary Fitzgerald, the Commission cannot assume that Gary Fitzgerald's resignation as operator means the end of the ill effects of his involvement.

Accordingly, we direct staff to contact Secondwind Environmental or another certified water system operator forthwith to determine the terms and conditions under which it would be willing to act as a receiver and operator of this water company. In the event that those terms and conditions are acceptable to staff and the Commission, that operator shall be appointed receiver of Daniels Lake Water Works without further proceedings. The Commission expects the

complete cooperation of Mr. Fitzgerald in effecting an orderly transition from his operation of the company to that of the receiver, in a manner that causes no interruption in service or billing problems. Absent such cooperation, the Commission will promptly "lay the facts before the attorney general" and "direct him immediately to begin an action in the name of the state praying for appropriate relief by mandamus, injunction or otherwise." RSA 374:41.

It should be stressed here that receivership under RSA 374:47-a is a "temporary" measure designed to maintain adequate and reasonable service while a longterm solution is sought and implemented. See *Birchview by the Saco, Inc.*, 83 NH PUC 440, (1998). We direct Staff to work with DLWW's customers, its present owner, the Department of Environmental Services, the Town of Weare and others, as necessary, in order to seek and implement a longterm solution that will involve new, responsible management of this system. We further direct Staff to report on the Status of these efforts within 45 days of this Order.

The remaining issue concerns the ongoing fine imposed against DLWW in Order No. 23,334 for failure to file annual reports. As of the hearing on December 7, DLWW was liable under Order No. 23,334 for a fine in the amount of

\$39,800. We will take up, in a subsequent order, the extent to which DLWW and its principal will be liable for this fine in light of the facts adduced at hearing and resulting receivership.

Based upon the foregoing, it is hereby

ORDERED, that Daniels Lake Water Works, Inc. is placed under receivership pursuant to RSA 374:47-a; and it is

FURTHER ORDERED, that Staff immediately seek a certified operator to assume day-to-day management of Daniels Lake Water Works, Inc. as soon as possible and report its recommendation for such certified operator to the Commission; and it is

FURTHER ORDERED, that Staff report within 45 days on the results of its efforts to find a new owner for the Daniels Lake Water Works system.

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

Douglas L. Patch
Chairman

Susan S. Geiger
Commissioner

Nancy Brockway
Commissioner

Attested by:

Claire D. DiCicco
Assistant Secretary