

**DW 06-001**

**WARNER VILLAGE WATER DISTRICT**

**Petition of Peter St. James et alia**

**Order Following Pre-Hearing Conference**

**ORDER NO. 24,625**

**May 18, 2006**

**APPEARANCES:** Eugene F. Sullivan III, Esq. for Peter St. James, Rhonda St. James, Debra Buckley and Kenneth Benward; Brackett L. Scheffey, Esq. for Water Village Water District; Suzanne M. Amidon, Esq. of the Staff of the New Hampshire Public Utilities Commission.

**I. PROCEDURAL HISTORY**

The New Hampshire Public Utilities Commission (Commission) opened this docket upon the jointly filed petition of Peter and Rhonda St. James, Debra Buckley and Kenneth Benward, all of Warner. They comprise three of the four residential customers who have been placed on notice by the Warner Village Water District that the District intends to discontinue the provision of water service to them at some point in the summer of 2006. The petitioners, all of whom reside outside the boundaries of the District, seek an order of the Commission that temporarily restrains the District from disconnecting them and that takes “appropriate actions” to ensure that the Petitioners “are adequately protected to ensure that they continue to receive safe and adequate service for the long term.” The Petitioners made their filing on January 4, 2006.

On February 2, 2006, the District sought and obtained an extension of the time for filing a response to the petition, to February 20, 2006. The District submitted a responsive pleading on February 21, 2006. Included in the pleading was a motion to dismiss the petition on the ground that the Commission lacks jurisdiction over the dispute. There were no objections made to this submission on the ground of its timeliness.

The Petitioners filed an opposition to the dismissal motion on March 15, 2006. The Commission issued an Order of Notice on April 6, 2006, scheduling a Pre-Hearing Conference for April 25, 2006, and establishing April 21, 2006 as the deadline for submitting intervention petitions. No requests for intervention were filed. Pursuant to RSA 363:17, the Commission designated Hearings Examiner Donald M. Kreis to conduct the Pre-Hearing Conference, thereafter reporting the facts and making recommendations to the Commission. The Pre-Hearing Conference took place as scheduled, after which the parties and Staff conducted a technical session. Staff filed a report of the technical session on April 26, 2006, and Mr. Kreis submitted his report and recommendations on May 1, 2006.

## **II. POSITIONS OF THE PARTIES AND STAFF**

### **A. Peter St. James, Rhonda St. James, Debra Buckley and James Benward**

The premise of the Petitioners is that the District is a public utility within the meaning of RSA 362:4 and is thus obliged to continue to provide service to them, notwithstanding the fact that the District never sought a utility franchise pursuant to RSA 362:4, III-a and RSA 374. RSA 362:4, III-a provides an exemption from Commission regulation for a municipal corporation providing service to customers outside its boundaries in certain circumstances, but explicitly makes such municipal entities subject to the requirement to seek franchise authority under RSA 374.

The Petitioners concede that the provision of service to their premises by the District antedates the requirements of RSA 362:4, III-a but nevertheless argue that the Commission has, in the past, ordered municipal water districts to seek franchise authority in similar circumstances. According to the Petitioners, allowing the District to discontinue their service on the assumption that the District is not a utility subject to Commission regulation would be to reward the District

for ignoring RSA 362:4, III-a. The Petitioners further contend that they have contributed over the years to the District's infrastructure costs and, thus, it would be inequitable to discontinue service based on the notion that it has become too expensive for the District to provide such service.

### **B. Warner Village Water District**

In the view of the District, the water service it has been providing to the Petitioners amounted to the voluntary granting of a license that the District may now lawfully revoke. According to the District, the Commission has no jurisdiction over a municipal entity that has never sought a utility franchise and has no history of promising the petitioners they would continue to receive water. The District's position is that a municipal corporation without a utility franchise is not subject to the jurisdiction of the Commission.

With respect to the petitioners' request for emergency injunctive relief, the District indicated that its plans to discontinue service to the Petitioners is related to a road reconstruction project being undertaken by the Town of Warner, a municipal entity distinct from the District. According to the District, it is "at the mercy" of the Town with respect to the scheduling of this project, which the Town has indicated it intends to undertake during the summer of 2006. Although the District indicated at the Pre-Hearing Conference that it would not cut any of the four households off while this proceeding is pending, the District expressed uncertainty about whether it could honor such a commitment if the case remains unresolved at the beginning of the summer.

The District justified its position in part by suggesting that providing service to these customers is causing a significant amount of water to be wasted. This is because the pipe serving

them is eight inches in diameter, far greater than what is necessary to provide such service, notwithstanding which the flow of water through the pipe must be continuous.

### **C. Staff**

Staff in essence endorsed the arguments of the Petitioners. In the view of Staff, RSA 362:4 obliges the District to provide service to the Petitioners – and the Commission should order the District to seek a utility franchise rather than eschew the exercise of jurisdiction.

### **III. COMMISSION ANALYSIS**

As noted by the Hearings Examiner, most of the relevant facts are essentially undisputed. We begin by outlining them briefly.

The Petitioners are three of the four residential customers of the District who currently receive water service from the District but are not within the District's boundaries. Ms. Buckley is the lessee of her premises but, as of the date of the Pre-Hearing Conference, was in the process of purchasing the property. The fourth affected residential customer was present at the pre-hearing conference but is not a party and did not enter a formal appearance.

The four premises began receiving water service from the District prior to the enactment of RSA 362:4. The District has never sought a utility franchise. Service to the four households is provided through an eight-inch pipe. Previously, the four households were between the District's water source and the rest of the District's users so that, in essence, the water needed to flow past the four homes in any event. This is no longer the case and the pipe in question is needed only to serve the four homes.

The District has always charged these customers the same rates it applies to users within the District's boundaries. There is no suggestion that the quality of water service has varied depending on whether the user was located inside the District or not. *See* RSA 362:4, III-a

(reciting these circumstances as preconditions for an exemption from Commission regulation for municipal corporations serving customers outside municipal boundaries).

The District has notified the four customers of plans to discontinue service at some point this summer. According to the District, the reason for this decision is the Town's project for the reconstruction of Mill Street in Warner, including the underlying water system. However, upon questioning from the Hearings Examiner the Town indicated that the only additional expense the District would incur, in order to maintain service to the four households after the Mill Street project, involves the purchase of a valve the District estimated at \$800 to \$1,000 in cost. The District stressed that it has no control over the Town's construction project and thus cannot pinpoint when service to the four households would be terminated.

In its report of the technical session, Staff noted that settlement efforts to date had been unsuccessful, but that the parties and Staff had agreed that the principle issue – the jurisdiction of the Commission – is a question of law rather than fact. Accordingly, there was agreement that (1) the Petitioners and the District would confer and file a factual stipulation no later than April 28, 2006, and (2) the parties and Staff should have an opportunity to brief the jurisdictional issue on or before May 23, 2006.<sup>1</sup> These procedural recommendations are consistent with the public interest and we therefore adopt them.

Finally, we address the Hearings Examiner's recommendation that we invoke the plenary authority over utilities, as conferred by RSA 374:3, to direct the District not to discontinue the provision of service to any of the four affected households until further order of the Commission. The Hearings Examiner suggested that, in a case where the dispositive question is whether an

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<sup>1</sup> Pending the Commission's approval of the proposed procedural schedule, petitioners on April 28, 2006 sought an extension of time for the filing of the factual stipulation, which was then filed on May 3, 2006. There have been no objections or requests for alterations of the proposed procedural schedule arising out of the date on which the factual stipulation was actually filed.

entity is a utility subject to Commission jurisdiction, it would be inconsistent with common sense and our legislative mandate to relieve the potential utility of its obligation to serve pending resolution of the threshold issue. *See, e.g., New Hampshire Electric Cooperative*, 86 NH PUC 351, 355(2001) (referencing “the obligation to serve with which utilities have historically been vested”).

We agree. The situation is somewhat analogous to a request for a preliminary injunction made in a civil proceeding. The Superior Court grants interim relief where not doing so would cause “immediate irreparable harm.” *UniFirst Corp. v. City of Nashua*, 130 N.H. 11, 13 (1987). Depriving the four households of their water supply, in circumstances where there is a significant possibility they are entitled to it, would constitute such harm. We thus exercise our plenary authority in the manner recommended by the Hearings Examiner. At the same time, we note that this action should not be construed as a final decision on the question of jurisdiction or, in the event there is jurisdiction, a resolution of the question of whether it would be permissible for the District to discontinue service. It is our expectation that, given the briefing schedule, we will be able to resolve the legal issue to be addressed in those filings expeditiously – and, further, that such resolution will either comprise a final resolution of the case or cause the parties to reach agreement on such resolution.

**Based upon the foregoing, it is hereby**

**ORDERED**, that the briefing schedule set forth above is APPROVED; and it is

**FURTHER ORDERED**, that the Warner Village Water District shall not terminate service to the petitioners or any household similarly situated pending further order of the Commission.

By order of the Public Utilities Commission of New Hampshire this eighteenth day of  
May, 2006.

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Thomas B. Getz  
Chairman

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Graham J. Morrison  
Commissioner

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Clifton C. Below  
Commissioner

Attested by:

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ChristiAne G. Mason  
Assistant Executive Director & Secretary