

**STATE OF NEW HAMPSHIRE  
PUBLIC UTILITIES COMMISSION**

**DW 18-099**

**TOWN OF DERRY**

**Petition for Approval of Franchise Expansion in the Town of Londonderry  
and Approval of MSDC Rates for Lorden Commons**

**Order *Nisi* Approving Petition**

**ORDER NO. 26,255**

**June 7, 2019**

This order approves an expansion of the Town of Derry's water franchise to an area in the Town of Londonderry known as Lorden Commons, and to the residential area surrounding the proposed water main extension from Derry. This order authorizes Derry to charge higher rates to customers in the new franchise area than it charges Derry residents, and exempts Derry from further Commission regulation. The Commission is issuing this order on a *nisi* basis to ensure that all interested persons receive notice of the decision and have the opportunity to request a hearing before the order becomes effective.

**I. BACKGROUND AND PROCEDURAL HISTORY**

The Town of Derry (Derry or the Town) provides potable water service to 15,000 residents, institutions, and businesses in Derry and parts of Londonderry. Lorden Commons is a four-phase housing development, located in Londonderry, close to the Derry town line. The previously completed Phase 1 contains 50 homes, all of which are served by private wells. Construction of Phases 2, 3, and 4, consisting of up to 83 homes, will occur over four years. After examining water service options for Phases 2 – 4, Lorden Commons' developer, Lorden Commons, LLC (Lorden), determined that service from Derry's nearby main would be the most cost effective option and asked the Town to provide that service.

A proposed water supply agreement between Lorden and Derry (Lorden/Derry Contract) allocates water service to Phases 2 – 4 only. Lorden has agreed to construct a water main and waterworks connecting to Derry's 12-inch main on Old Manchester Road. After completion, Derry will assume ownership of the main and waterworks with the exception of individual service lines connecting the curb stop to the customers' meters. Derry is also amenable to serving the homes in Phase 1, the existing homes along the proposed water main path, and approximately 10 homes along Old Derry Road, at Derry's discretion or in the event contamination from the nearby Auburn Road Superfund Site threatens the wells serving those homes. Derry will charge all new customers in the proposed franchise area the same rates, charges, and fees for service as those applied to Derry's municipal customers, with the exception of the Merrimack Source Development Charge (MSDC), which will be higher than the MSDC that Derry charges its own residents.

The MSDC is a capacity charge that applies in addition to regular water usage charges. Manchester Water Works (MWW), which is a municipal water utility not regulated by the Commission, applies the MSDC to support development of the Merrimack River as a supplemental water supply. *See Pennichuck East Utility, Inc. & Pennichuck Water Works, Inc.*, Order No. 26,076 at 2 (November 17, 2017) (providing a brief history of MWW's regulation by the Commission and the MSDC). Typically, MWW sells water capacity to other utilities and municipalities by entering into wholesale water contracts. Those contracts set capacity limits and apply a per-gallon MSDC. *See id.* (describing Pennichuck East Utility, Inc.'s, and Pennichuck Water Works, Inc.'s, wholesale contract with MWW). In contrast, residential customers within MWW's service area requesting a new service connection pay the MSDC

based on the size of their water meter (MSDC Meter Rate).<sup>1</sup> All MSDC rates generally increase approximately three percent each year.

Derry has a wholesale water contract with MWW, and charges its residents a similar MSDC Meter Rate. Though Derry's water rates have increased over the years, the MSDC Meter Rates Derry charges its residents have not changed for 14 years, pursuant to a 1998 wholesale water contract with MWW, which was revised in 2005 and extended in 2013 (MWW/Derry Contract).

The 2005 revision secured sufficient capacity for Derry, essentially pre-buying MSDC capacity and freezing the MSDC Meter Rate for its residents at the 2005 rates.<sup>2</sup> The 2013 contract revision prohibits Derry from reselling its water capacity without MWW's authorization. Even though the MWW/Derry Contract provides the Town with sufficient MSDC capacity to service the requested franchise expansion, MWW required Derry to enter into an additional wholesale water contract in 2018 (Expansion Contract) for that purpose.

The Expansion Contract will provide a maximum additional 28,000 gallons per day (GPD) to serve Phases 2 – 4. The Expansion Contract contains two pricing tiers and requires an initial payment for 8,425 GPD of MSDC capacity at the 2018 MSDC rate of \$3.57 per gallon. If capacity above 8,425 GPD is required, then that additional capacity will be at MWW's then current MSDC rate.

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<sup>1</sup> MWW's tariff is at [https://www.manchesternh.gov/Portals/2/Departments/water\\_works/WTR\\_RateSchedule.pdf](https://www.manchesternh.gov/Portals/2/Departments/water_works/WTR_RateSchedule.pdf). Effective January 1, 2019, the MSDC Meter Rates are as follows: 5/8" at \$1,093; 3/4" at \$2,248; 1" at \$3,132; 1 1/2" at \$8,215; 2" at \$14,507; and 3" or larger at \$3.68 per gallon.

<sup>2</sup> Derry's tariff at [https://www.derrynh.org/sites/derrynh/files/uploads/2017\\_revised\\_water\\_rates\\_and\\_fees.pdf](https://www.derrynh.org/sites/derrynh/files/uploads/2017_revised_water_rates_and_fees.pdf). The current MSDC Meter Rates for its residents are as follows: 3/4" at \$721; 1" at \$2,069; 1 1/2" at \$5,429; 2" at \$9,589; and 3" or larger at \$2.36 per gallon. Derry's tariff does not include a 5/8" charge; however, its 3/4" charge is equivalent.

The Lorden/Derry Contract essentially mirrors the Expansion Contract, except it sets the initial 8,425 of MSDC capacity at \$31,004, which equates to \$3.68 per gallon.<sup>3</sup> That initial capacity is intended to serve the first 25 of 83 homes constructed in Phases 2 – 4. The Lorden/Derry Contract would require Lorden to pay for 337 GPD of MSDC capacity at the current MSDC per gallon rate for meters 3 inches or larger in diameter before each additional home in Phases 2 – 4 is connected. For all other customers in the expanded franchise, such as Phase 1 residents or homes along the water main, Derry proposes to charge the current MSDC Meter Rate set by MWW, which is dependent on the size of the meter connected. Because the MSDC has not changed for Derry residents since 2005, the MSDC rate for all proposed franchise expansion customers would be more than 15 percent higher than its tariffed rate for Derry residents. That price difference requires Commission authorization and triggers possible Commission regulation under RSA 362:4, III-a(b).

On June 22, 2018, Derry filed a franchise expansion petition to provide water service pursuant to RSA 374:22. Derry also requested authority to charge new customers outside its municipal boundaries a rate at least 15 percent higher than its tariffed rate for municipal customers, and to remain exempt from further Commission regulation. On July 26, 2018, the Commission issued an Order of Notice scheduling a Prehearing Conference for September 6, 2018. Commission Staff (Staff) filed its initial recommendation on October 25, 2018. After identifying additional issues that required examination, Staff conducted two technical sessions and propounded additional discovery. Staff filed a revised recommendation on May 10, 2019.

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<sup>3</sup> While the proposed contract was silent on the per gallon charge for the initial purchase, Staff calculated the charge to be \$3.68 per gallon (\$31,004/8,425 gallons). Staff Recommendation, May 10, 2019, at 6, n. 7. The \$3.68 per gallon charge is derived from the 3” or larger rate included in MWW’s MSDC Meter Rate, which increases approximately 3 percent each year.

Derry's petition and subsequent docket filings, other than any information for which confidential treatment has been requested of or granted by the Commission, are found on the Commission's website at <http://www.puc.nh.gov/Regulatory/Docketbk/2018/18-099.html>.

## **II. POSITIONS**

### **A. Derry**

#### **1. Franchise Expansion**

Derry argued that the Commission should grant the franchise expansion because it is in the public good. The Town stated that it has the required managerial, technical, and financial expertise as evidenced by the operation of its water system, which serves 15,000 customers. Derry's water department, furthermore, has the requisite technical and managerial expertise because it currently employs five full-time employees and one part-time employee, and has four additional employees available to assist in operations. Derry pointed out that the Commission previously found the Town possesses the requisite managerial, technical, and financial expertise in *Consumers New Hampshire Water Company, Inc.*, Order No. 22,173 (May 29, 1996). According to Derry, the New Hampshire Department of Environmental Services (DES) is satisfied with the quality and availability of water to serve the proposed franchise.

#### **2. Authority to Charge Rates and Exemption**

Derry argued that it would be consistent with the public good to charge customers in the proposed franchise area MSDC rates at least 15 percent higher than the MSDC rates applied to its municipal customers. Derry asserted that it would be inequitable to find otherwise because comparing the rates would effectively punish the Town for having had the foresight to pre-buy sufficient MSDC capacity to freeze the charge at the 2005 rate for its residents.

Although the Town acknowledged that it had sufficient MSDC capacity to supply the new franchise area without charging a higher rate, it argued that the terms of the MWW/Derry contract forced Derry to purchase additional MSDC capacity at the present-day rate to serve the

proposed expansion. According to the Town, it would be unfair to the residents of Derry to bear that cost. The Town also stated that the charges faced by the new franchise customers would be the same MSDC charges faced by any new retail customer served by MWW, and argued that it would just be passing through a mandatory charge. Derry believes that it would be consistent with the public good to exempt the Town from Commission regulation.

## **B. Staff**

### **1. Franchise Expansion**

After review of the petition, additional filings, and extended discovery, Staff agreed with Derry and recommended approval of the franchise expansion. Staff also acknowledged that Derry provided DES verification regarding the suitability and availability of water to serve the proposed franchise expansion, pursuant to RSA 374:22, III.

Staff concurred with the Town's arguments and noted that Derry's provision of water service to the proposed franchise area is the most cost effective for Lorden and the new franchise area. In addition, Staff examined the other water source options presented, including a direct connection to MWW, and found a difference in cost of approximately \$800,474. Staff determined that extending the water main from the Derry town line is the most cost-effective choice and therefore the most advantageous for end users.

### **2. Authority to Charge Rates and Exemption**

Staff believed it would be consistent with the public good to authorize Derry to impose higher MSDC rates on customers in the expanded franchise area than on the Town's municipal customers. Staff pointed out the existence of two separate customer classes and therefore two separate MSDC rates in the proposed new franchise area: Lorden Commons Phases 2 – 4 and all other customers. Staff also noted that the Lorden/Derry Contract assigned an average daily consumption of 337 gallons for each new home constructed in Phases 2 – 4. That per-house average daily consumption is greater

than the per-house average embedded in MWW's current MSDC Meter Rate for the equivalent 5/8 inch meter.<sup>4</sup> Direct comparison by meter size results in a greater per-home MSDC charge for Phases 2 – 4 than faced by Derry's municipal customers and even MWW's current new customers. Staff's concerns were allayed, however, because only the per-home average daily consumption differed from MWW's MSDC Meter Rate, not the MSDC per gallon charge itself. In addition, Staff pointed out that all of the customers in the new franchise are located in a rural setting, where average water usage is expected to be higher than in MWW's own service territory. Furthermore, the Lorden/Derry contract produced the greatest savings to Lorden Commons Phases 2 - 4 and secured water rights for future residents.

For other customers in the franchise expansion, Staff noted that Derry would charge those new customers according to MWW's prevailing MSDC Meter Rate, based on the new customer's meter size, at the time the customer requests service. Those customers would therefore be subject to the exact same MSDC Meter Rate as if Lorden decided to contract with MWW directly, which would have been a significantly larger financial burden for Lorden.<sup>5</sup> According to Staff, Derry's commitment to forward the MSDC charges collected from those customers directly to MWW in the same fiscal year that the Town receives such payment constructively acts as a pass-through in which Derry would gain no economic benefit. In Staff's opinion, Derry's foresight to pre-buy MSDC capacity caused the great disparity, not an arbitrary application of higher rates.

Staff also discussed its concern that all new franchise customers could be subject to the MSDC numerous times. That issue surfaced in the language of the Expansion Contract, which states that exceeding the 28,000 GPD capacity would result in further charges due upon demand. Derry

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<sup>4</sup> Staff concluded that the average daily consumption associated with a 5/8 inch meter, according to MWW's MSDC Meter Rate, is approximately 297 GPD (\$1,093 (MWW MSDC Meter Rate for 5/8 inch meter)/\$3.68 (MSDC per gallon charge)).

<sup>5</sup> Staff noted that Derry does not have a 5/8 inch meter charge and that its 3/4 inch charge is the equivalent. Staff also noted that the difference between Derry's and MWW's MSDC Meter Rate is currently 52 percent.

pledged that the Town would absorb the risk of payment for any additional capacity, limiting the new proposed franchise customers to a single MSDC payment.

Staff concluded that the MSDC rates proposed to be charged by Derry to customers in Lorden Commons are consistent with the public good. Staff therefore recommended authorization by the Commission.

Staff also opined that, despite a greater than 15 percent difference in MSDC rates, Derry should not be subject to Commission regulation pursuant to RSA 362:4, III-a(b). Staff maintained it would be inequitable under these circumstances to impose regulation on Derry based solely on the difference in MSDC rates. Staff agreed with Derry's arguments and recommended that the Commission find it consistent with the public good to exempt the Town from utility regulation.

### **III. COMMISSION ANALYSIS**

The Commission "may exempt a municipal corporation ... except the franchise application requirements of RSA 374." RSA 362:4, III-a(b). Pursuant to RSA 374:22, "[n]o person or business entity shall commence business as a public utility within this state ... without first having obtained the permission and approval of the commission." The Commission will grant a request for franchise authority if it finds that it is for the public good. RSA 374:26. When determining whether a proposed franchise is for the public good, the Commission assesses, among other things, the managerial, technical, and financial expertise of the petitioner. *Hampstead Area Water Company, Inc.*, Order No. 26,153 at 4 (June 26, 2018). Under RSA 374:22, III, no water company shall obtain the permission or approval of the Commission to operate as a public utility without first satisfying any DES requirements concerning the suitability and availability of water.

The Commission previously found that Derry possesses the requisite managerial, technical, and financial capabilities to provide water service. *See* Order No. 22,173 (May 29, 1996) (approving the transfer of water system assets and franchise rights to Derry). Based on our

review of the record and Staff's recommendation, we find that Derry continues to possess the managerial, technical, and financial capabilities to provide service to the proposed franchise expansion area in Londonderry.

Regarding Derry's request to charge higher rates and be exempt from Commission regulation, notwithstanding the authorized difference, we are guided by RSA 362:4, III-a(b):

The commission may exempt a municipal corporation from any and all provisions of this title except the franchise application requirements of RSA 374, and may authorize a municipal corporation to charge new customers outside its municipal boundaries a rate higher than 15 percent above that charged to its municipal customers, if after notice and hearing, the commission finds such exemption and authorization to be consistent with the public good. The commission may not authorize a municipal corporation to charge existing customers outside its municipal boundaries a rate higher than 15 percent above that charged to its municipal customers until any rate agreements in effect for those customers on May 13, 2002 shall have expired.

Based on Staff's analysis, it appears that there are two distinct MSDC rates for customers in the expanded franchise area: the wholesale contract rate applied to Lorden for Phases 2 – 4, and MWW's current MSDC Meter Rate applied to all other customers. We agree with Staff's recommendation and authorize Derry to charge the rates.

The Commission has also previously authorized a municipality to charge rates higher than the 15 percent threshold. *See Riverside Water Works, Inc.*, Order No. 24,713 (December 15, 2006) (finding application of a rate higher than 15 percent above that charged to municipal customers consistent with the public good.). We note here that the significant reason for the difference between the Derry MSDC rates and the proposed MSDC rates for customers in Lorden Commons is that the Town previously negotiated and pre-paid for the lower MSDC rates for the benefit of its residents. We will not penalize Derry for entering into such a long-term arrangement for its residents by imposing additional regulation on the Town. We further note that, had Lorden decided to receive service directly from MWW, customers within the proposed franchise area would have been charged MWW's current MSDC Meter Rate.

Under these circumstances, we find that it is consistent with the public good to grant Derry authority to charge Lorden an MSDC rate pursuant to the Lorden/Derry Contract and all other customers in the proposed expansion the MWW MSDC Meter Rate. RSA 362:4, III-a(b). We find further that exempting Derry from regulation as a public utility is also consistent with the public good. *Id.*

We issue this order on a *nisi* basis to ensure that all interested persons receive notice of the decision and have an opportunity to request a hearing before it becomes effective.

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

**ORDERED *NISI***, that, subject to the effective date below, Derry's request for a franchise to provide water service to customers in the Lorden Commons development, and to homes along the path of the water main that connects to Lorden Commons, in the Town of Londonderry, is APPROVED; and it is

**FURTHER ORDERED**, that Derry is authorized to charge the MSDC rates to Lorden Commons and all other customers in the expansion area, as stated above; and it is

**FURTHER ORDERED**, that Derry shall remain exempt from regulation by this Commission; and it is

**FURTHER ORDERED**, that Derry shall cause a summary of this order 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 publication to be no later than June 17, 2019, and to be documented by affidavit filed with the Commission on or before July 5, 2019; and it is

**FURTHER ORDERED**, that all persons interested in responding to this order be notified that they may submit their comments or file a written request for a hearing, which states the reason and basis for a hearing no later than June 24, 2019, for the Commission's consideration; and it is

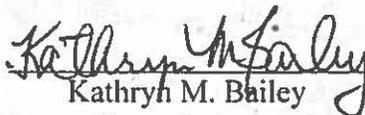
**FURTHER ORDERED**, that all persons interested in responding to this order be notified that they may submit their comments or file a written request for a hearing, which states the reason and basis for a hearing no later than June 24, 2019, for the Commission's consideration; and it is

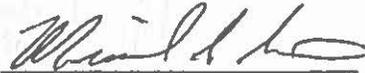
**FURTHER ORDERED**, that any person interested in responding to such comments or request for hearing shall do so no later than July 1, 2019; and it is

**FURTHER ORDERED**, that this order shall be effective on July 8, 2019, unless Derry fails to satisfy the publication obligation set forth above or the Commission provides otherwise in a supplemental order issued prior to the effective date.

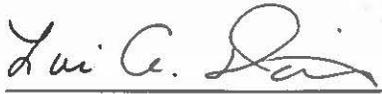
By order of the Public Utilities Commission of New Hampshire this seventh day of June, 2019.

  
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Martin P. Honigberg  
Chairman

  
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Kathryn M. Bailey  
Commissioner

  
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Michael S. Giaimo  
Commissioner

Attested by:

  
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