

**STATE OF NEW HAMPSHIRE
PUBLIC UTILITIES COMMISSION**

Docket No. DW13-171
In Re: Eastman Sewer Company, Inc.

**VILLAGE DISTRICT OF EASTMAN'S
STATEMENT IN SUPPORT OF
JOINT PETITION TO APPROVE SALE**

Now Comes the Village District of Eastman, by its legal counsel, Gardner, Fulton & Waugh, PLLC, and says as follows:

PREFACE

The Village District of Eastman ['VDE'] is a district under RSA 52 within Grantham, Enfield and Springfield. It is one of the parties to the Joint Petition – and, contingent on this Commission's approval, is contractually bound to purchase the assets of the Eastman Sewer Company, Inc. ['ESC'], and to operate the system.

The Joint Petition and supporting materials submitted by ESC and Attorney Boynton are full and complete. The sole purpose of this separate filing is to support that Petition by stating as succinctly as possible why the Petition should be granted on an expedited basis as requested therein – and, in particular, why there is no need for the Commission to await the outcome of proceedings under the "second village district" petition, as described in paragraphs 9-11 of the Joint Petition.

A. ORIGIN OF THE 'SECOND DISTRICT' PETITION.

1. As stated in VDE General Manager William Weber's pre-filed testimony, the voters of VDE approved VDE's acquisition of the ESC sewer system, both at a

special meeting held on January 9, 2013, and then again at the VDE's annual meeting on March 21, 2013 – including the approval of a \$280,000 bond issue vote, which passed by the *2/3 vote* as required by RSA 33:8, to allow VDE to become the successor to ESC's debt.

2. The petition to the Grantham Selectmen to establish a second village district to operate a sewer system was originated by a group of people who had opposed VDE's acquisition, were disappointed about their failure to defeat it by vote, and are attempting to use the RSA Ch. 52 process to interfere with the will of the majority.

3. At a meeting held on June 6, the Grantham Selectmen did fix the boundaries of a hypothetical second district, as requested. The area fixed lies wholly within the Village District of Eastman and includes all sewer users, plus several additional properties included solely in order to make the area into a contiguous one. Notably, however, the proposed district does *not* include all of the real estate or fixtures included within ESC's sewer system, because in fact some of that system lies within the Town of Springfield, over which the Grantham Selectmen have no jurisdiction.

4. It is vital to recognize that – oddly and unfortunately – RSA 52:1 is written so as to give a board of selectmen no discretion. If they are petitioned by 10 or more voters, the statute mandates that they “*shall* fix, by suitable boundaries, a district...” And RSA 52:2 says that they “*shall* call a meeting of the voters domiciled in the district...” to see if they will vote to establish the district. Crucially, therefore, the granting of the “second district” petition cannot, and must not, be construed as any kind of approval or endorsement by the Selectmen of Grantham.

5. As of the date of this filing, a meeting at which voters residing within the proposed “second district” will decide whether or not to create such a district, has not yet been scheduled.

**B. SUMMARY OF REASONS WHY THE PUBLIC GOOD DOES
NOT REQUIRE THE COMMISSION TO CONSIDER
THE PROPOSED 'SECOND DISTRICT'.**

1. First, the “second district” does not at this time exist. Even assuming – solely for argument’s sake – that the voters were to bring it into existence within the next few months, it does not at this time even have any statutory officers, much less does it have any concrete plans for, or managers, employees or contractees capable or qualified to manage and operate, a wastewater system.

2. By contrast VDE does today have the infrastructure and is ready, willing, qualified and capable (all as detailed in ESC’s submissions). As set forth in the Joint Petition, the independent contractor which operates the system would not change. Furthermore, *only* VDE has an executed contract to acquire ESC. The hypothetical “second district” has no such contract, nor any expectation of such a contract.

3. A “second district” could not realistically take any affirmative vote toward acquiring the sewer system until its annual meeting in 2014. That is because such an acquisition would clearly require an appropriation of funds, but under RSA 52:4, village districts cannot appropriate *any* funds (including user fees) except at an annual meeting unless either: (a) 50% of all registered voters turn out for such a meeting (a rate of attendance almost no NH municipality can achieve), *or* (b) it petitions the superior court under RSA 52:4 for permission to appropriate funds at a special meeting. Under 52:4, such permission cannot be granted unless the court finds an “emergency” for which “immediate expenditure of money is necessary.” No such emergency exists. The mere fact that those seeking a “second district” disagreed with VDE’s vote to acquire the ESC sewer system, does not constitute an emergency.

4. For the Commission to delay acting on ESC's petition until the hypothetical "second district" had become organized and was ready to take a vote – sometime in 2014 – would create a substantial hardship for ESC and VDE. As discussed at both the special and annual VDE meetings (*see* Exhibit 4 attached to Joint Petition), there are elements of the wastewater system in need of upgrading in order to stay in conformity with applicable regulations, and the parties need certainty in order to be able to move forward and plan for the ongoing functioning of the system.

5. Any significant delay in the Commission's approval of the transfer could potentially give a "second district" a window within which it could initiate proceedings to acquire the ESC's assets by Eminent Domain. While no such intent has been expressed by anyone, and while VDE believes such an acquisition could be defeated on grounds of lack of public necessity, such proceedings would nevertheless be a wasteful drain on taxpayers and sewer users. Hence it is in the interests of both sewer users and the public for the Commission to preclude any such possibility by approving the sewer acquisition by VDE with reasonable dispatch.

6. Another factor is that the hypothetical "second district" is unlikely to have adequate resources to do the job. Under RSA 33:4-a, paragraph V, a village district is not permitted to incur net indebtedness of more than one percent of its total equalized assessed valuation (as computed under RSA 33:4-b). As of 2010 the Village District of Eastman had a total valuation of around \$413 million – thus giving it a debt limit more than sufficient to take on the existing debt obligation of ESC, in addition to its outstanding water system-related debt, and still have enough additional debt capacity for needed system upgrades. By contrast the VDE General Manager William Weber has estimated, using data from the Dept. of Revenue Administration and local real estate professionals, that the total valuation of the real estate within the proposed new

district (as its boundaries have been tentatively set by the Grantham Selectmen) is only around \$60 million. If the “second district” were to assume the ESC’s outstanding \$280,000 debt, that would leave a potential bonding capacity of only around \$320,000 to address ongoing issues.

7. As noted above, some key components of the wastewater treatment system lie outside the boundaries of the proposed “second district,” and it is unclear how such a district could exercise jurisdiction and authority over those components.

8. The main argument opponents have raised against sewer system acquisition by the VDE is the fact that a majority of VDE voters are not sewer customers. That is not a valid argument because:

(a) VDE’s acquisition has been approved by its voters on the basis that the operation and maintenance of the sewer system would continue to be funded through user fees. Neither sewer users nor non-sewer VDE voters have any reason to believe it would be otherwise.

(b) New Hampshire is full of sewer systems operated and managed – without appreciable problems – by municipalities with large percentages of non-sewer-user voters.

(c) Non-sewer users would have every incentive to ensure the continued function of the sewer system because – as stated in ECA President Goldman’s pre-filed testimony – the entire community is economically tied to the proper functioning of the sewer. Among other things, any failure would adversely impact Eastman Pond, which is the key natural asset around which the Eastman community was constructed.

CONCLUSION.

The legal standard for the Commission's review of the Joint Petition in this case is very similar to the case involving the *Hanover Water Works Co.* (DW 10-061, Order No. 25,096, April 29, 2010). Here VDE's voters on January 9, 2013 voted to give its commissioners all the authority of "mayor and aldermen" under RSA 149-I:24 – including the power under RSA 149-I:4 to "*enter into contracts to...sell or purchase sewage or waste treatment facilities to or from any other...person whenever they judge the same necessary for the public convenience, health and welfare.*" Then on March 21, 2013, the voters approved the acquisition and financing by a 2/3 majority. Although RSA 149-I:4 does not explicitly state that the VDE voters' approval is entitled to a rebuttable presumption – as does RSA 38:5 – still, the plain legislative intent is that the policy judgments of the municipality's voters should be given deference, as long as the Commission finds the transfer to be in the public good pursuant to RSA 374:30.

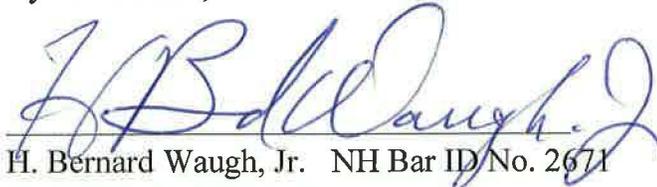
Most importantly, there is *no* legal precedent, either in statute or prior PUC or court decision, holding that the Commission is required, *or even permitted* – when examining the "public good" issue – to consider the question of a hypothetical acquisition by an alternative municipal entity. Such consideration is simply not legally relevant. The Village District of Eastman therefore urges the Commission to approve the Joint Petition as submitted.

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Respectfully submitted this 25th day of June, 2013.

VILLAGE DISTRICT OF EASTMAN

By its Counsel,



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Certificate of Service

I hereby certify that on this 25th day of June, 2013, copies of the foregoing filing were sent by both regular and electronic mail to the Public Utilities Commission, the Office of Consumer Advocate, Albert J. Cirone, Jr., Esq., Jay C. Boynton, Esq., Brian Harding, and to all persons listed on the Commission's on-line service list for Docket No. DW13-171.