

DW 99-128

**ROSEBROOK WATER COMPANY, INC.**

**Prehearing Conference Order Establishing A Procedural Schedule**

**O R D E R   N O.   23,344**

**November 15, 1999**

**APPEARANCES:** Ransmeier & Spellman by Dom S. D'Ambruoso, Esq. on behalf of Rosebrook Water Company, Inc. and Mount Washington Hotel Preservation Limited; and Lynmarie Cusack, Esq. for the Staff of the New Hampshire Public Utilities Commission.

**I.   PROCEDURAL HISTORY**

On September 13, 1999, Rosebrook Water Company (Rosebrook) and Mount Washington Hotel Preservation Limited Partnership (MWH) filed a joint petition requesting the New Hampshire Public Utilities Commission's (Commission) approval for the transfer of 100% of Rosebrook stock from the current owners to MWH. The petition also asked for authorization for MWH to commence business as a water utility in the State of New Hampshire, Town of Carroll.

The petitioners requested that an Order Nisi be issued. The initial Order of Notice set a prehearing conference for October 15, 1999, to be followed immediately by a technical session. A duly noticed prehearing conference and technical session was held on October 15, 1999.

## II. Position of the Parties at the Prehearing Conference

### A. Rosebrook

Rosebrook questioned the Commission's jurisdiction over the Petitioners proposed transfer of stock. It is the Company's belief that there is no statute in Title 34 which expressly governs the sale of stock from Rosebrook to MWH. The Company argued that RSA 374:30 relates to an asset sale and not a stock sale and RSA 374:24 and 26 deal with the requirements for commencing a utility operation in the State of New Hampshire. The Company asserted that this was not the commencement of a new operation but merely new owners taking over an existing public utility.

The Company also emphasized the need for a procedural schedule which would not impede the progress of this matter with the MWH.

### B. Staff

In response to the Petitioners jurisdiction argument Staff cited two cases supporting the Commission's authority over this matter. Staff argued in State of New Hampshire v. New Hampshire Gas and Electric, 86 N.H. 16 (1932), the New Hampshire Supreme Court noted that when the control of the operation of the enterprise is to be surrendered the consent of the Commission is required. The Court acknowledged that the Commission was authorized to issue orders conferring upon a utility the right to commence business, acquire stocks of other utilities, transfer its

franchise, works or system, and to change its capital structure. Id., at 30. In Re Telephone and Data Systems, Inc., 73 N.H. PUC 166 (1988) the Commission applied the same analysis when determining whether to approve the acquisition of Chichester Telephone Company's capital stock by TDS Telephone. Staff believes that these cases support the Commission's assertion of jurisdiction where the ownership and control of the utility is to change due to a stock sale.

Staff also noted that the petition raised issues regarding: the current investigation of overearnings in Docket No. 99-073; the status of the 1999 Special Contract with the Mount Washington Hotel which was approved in Order No. 23,221 on June 2, 1999; the completion of needed system improvements; and the management and oversight responsibility of Rosebrook. Specifically, Staff has concerns regarding what may become an "affiliate relationship" between the new Rosebrook owners and the Company's largest customer, and questions concerning the continued progress on the Company's well upgrade project and other system improvements.

Staff also questioned the need for a speedy resolution of this matter and the continued use by the Mount Washington Hotel of services and/or contracts currently utilized in the operation of the Company.

### C. Concerned Customer

The Commission notes that it received a letter from one of Rosebrook's customers who was unable to attend the prehearing conference. In his letter, Mr. James Sullivan raised several issues, some of which centered on the rates to be set, who would regulate the new owner, the condition of the water system, and the relationship between the new owner and the Mount Washington Hotel. Mr. D'Ambruso stated that the Company would respond to the letter in the near future.

### III. Technical Session

Following the prehearing conference, the parties met to develop a procedural schedule. While Staff initially proposed a schedule which would have been dependent on the completion of the overearnings docket, the Company maintained that a more timely schedule was appropriate and indeed necessary in order to avoid the possible withdrawal of the parties from the proposed agreement.

The parties agreed to the following schedule. Data requests will be issued, on a rolling basis, with a seven day response time.

Last day for data requests	November 9, 1999
Data responses	November 16, 1999
Technical session/settlement conference	November 23, 1999
Submission of settlement	December 1, 1999
Hearing on the merits	December 8, 1999

#### IV. COMMISSION ANALYSIS

The cases relied on by Staff confirm that this Commission has the authority to require that a utility seek approval of any stock transfers which may result in the change of control of the company. The Commission has been given this approval authority pursuant to RSA 374:30, which provides that a "public utility may transfer... its franchise, works or system... when the commission finds that it shall be for the public good...." When there is, as here, the potential surrender of control of the operation from the existing utility to a new organization the Commission's permission is required. Re Telephone and Data Systems, Inc., at 172 citing State of New Hampshire v. New Hampshire Gas and Electric, 86 N.H. 16 (1932).

Additionally, pursuant to RSA 374:22 and 374:26 the Commission has the authority to investigate whether the acquisition by MWH of the Rosebrook stock will be in the public good. The Commission is obligated to find out whether the acquiring party is ready, willing and able to continue providing adequate service. Id., at 173. Thus, the Commission has jurisdiction over the acquisition.

The Commission also finds that the proposed Procedural Schedule is reasonable and therefore, will adopt it.

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

**ORDERED,** that the Commission has jurisdiction to over the matters at issue in this case as discussed above; and it is

**FURTHER ORDERED** that the Procedural Schedule enumerated above is adopted.

By order of the Public Utilities Commission of New Hampshire this fifteenth day of November, 1999.

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Douglas L. Patch  
Chairman

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Susan S. Geiger  
Commissioner

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Nancy Brockway  
Commissioner

Attested by:

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Thomas B. Getz  
Executive Director and Secretary