DW 99-051

BEDFORD WASTE SERVICES CORP.

Petition for General Rate Increase

Order Setting Rates after Hearing

O R D E R N O. 23,388

January 7, 2000

APPEARANCES: Charles F. Cleary, Esq. and Stephen P. St. Cyr for Bedford Waste Services Corp., Philip B. Taub, Esq. and William Winn for Bedford 3 Corners Owners' Association, Inc.; Edward J. Comiskey, III, *pro se*; and Donald M. Kreis, Esq. for the Staff of the New Hampshire Public Utilities Commission.

I. PROCEDURAL HISTORY

On June 7, 1999, Bedford Waste Services Corporation ("Bedford") filed with the New Hampshire Public Utilities Commission a petition seeking a 34 percent increase in permanent rates, a proposal that would increase Bedford's annual revenue by $12,727.00 or $163.00 annually for each of the sewer utility's 78 customers. The Commission suspended the proposed rates and conducted a duly noticed prehearing conference on July 8, 1999. At the prehearing conference, the Commission granted requests for intervention filed by Mr. Edward J. Comiskey, III, Mr. William Wynn on behalf of Bedford 3 Corners Owners' Association, Inc. ("Owners' Association") and Mr. Philip B. Taub.[1]

[1] Mr. Taub later clarified that he also appears on behalf of the Owners' Association, of which he is president.

The Commission thereafter established a procedural schedule to govern the remainder of the proceeding. The Staff of the Commission submitted prefiled testimony of Utility Analyst Steven E. Mullen and Engineer Douglas W. Brogan. The Commission also received prefiled testimony from Mr. Comiskey and Mr. Taub. The parties met for a settlement conference on September 9, 1999. The Commission conducted a hearing on September 23, 1999 at which Bedford and Staff jointly submitted a Stipulation and Settlement Agreement intended to resolve all outstanding issues in the proceeding. The Intervenors are not parties to the agreement and, at hearing, presented evidence in support of their position that the Commission should not adopt the proposed settlement.

Pursuant to a schedule established at the hearing, on October 4, 1999, Bedford filed responses to several record requests that were made at the hearing and, on October 12, 1999, the Commission received written comments from the Owners' Association, Mr. Comiskey and Mr. Donald W. Morgan, a Bedford ratepayer who attended the hearing. The Commission thereafter determined that Bedford's responses to the record requests were inadequate because its principal, Mr. Robert LaMontagne, had failed to provide personal responses. The Commission determined that the concerns raised by the intervenors were sufficiently well-founded to require Mr. LaMontagne to appear before the Commission to testify

regarding the subject matter of the record requests. Accordingly, the Commission reopened the record and conducted an additional hearing on November 2, 1999 at which Mr. LaMontagne testified at the express direction of the Commission. At the November 2 hearing, the Commission invited Bedford to submit additional evidence by November 10 concerning certain representations made to potential homebuyers in the subdivision served by the Company and developed by Mr. LaMontagne. On November 12, 1999 Bedford filed a document it characterized as an "additional response" to the issues raised at the November 2 hearing.

II. POSITIONS OF THE PARTIES AND STAFF

A. Bedford Waste Services Corporation and Staff

The stipulation and settlement agreement entered into by Bedford and the Commission Staff proposes a resolution of all issues in the rate case, and is summarized as follows:

Bedford and Staff agreed to setting the Company's permanent rates at $548.84 per annum, payable quarterly at the rate of $137.21, compared to the present rates of $480.12 annually or $120.03 per quarter. These rates are based on a revenue requirement of $42,809, a 14.31 percent increase over the revenue requirement approved by the Commission in 1995. Because the Company is almost entirely debt-financed at the annual rate of 8 percent, an 8 percent

cost of capital was agreed upon by Staff and the Company.

Bedford and Staff agreed to certain adjustments in the Company's test year expenses, specifically: an adjustment of ($452) to normalize test year revenue to reflect the actual number of the Company's customers; an adjustment of $(2,200) to reflect disallowance of expenses relating to the process of locating septic tanks, necessitated by the Company's failure to keep proper records at the time of the tanks' installation; an adjustment of ($736) to reflect disallowance of sums paid to repair clogged baffles, an expense properly charged to the individual ratepayers involved; an adjustment of ($2,333) to reflect (1) disallowance of labor charges relating to locating septic tanks in preparation for pumping them, an expense that is non-recurring because of the tank location effort disallowed as an expense per above (2) normalizing the expense of tank pumping to reflect the Company's plan to pump 39 tanks per year and (3) amortizing certain non-recurring costs incurred in the test year over the anticipated 25-year life of the septic tanks; an adjustment of $1,326 to reflect the Company's plan to pump 39 tanks per year rather than the 30 pumped in the test year; an adjustment of ($720) to normalize the number of filters the Company expects to purchase annually; and an adjustment of $1,554 to reflect the Company's 1999 management agreement with St. Cyr & Associates and to reflect certain costs related to billing services.

The agreement further provides for no recovery of any tax expenses on the ground that Bedford is a Subchapter S Corporation and, as such, incurs no direct tax liability.

Bedford and Staff further agreed that the Company's debt is reflected in two $100,000 demand notes, payable to the sole shareholder and bearing the dates of December 31, 1995 and December 31, 1996; that during the test year, the Company began making repayments of principal and interest that would result in the debt being retired after 15 years; that a repayment period of 20 years, providing for two annual debt payments (principal and interest) of $9,737.14, is in the best interests of the ratepayers because it improves the Company's cash flow and provides for an appropriate amortization of the debt obligations; that the Company will, within ten days of the Commission's adoption of this agreement, cause a new promissory note, duly executed by the Company and its lender and reflecting the new terms described herein, to be filed with the Commission; and that, upon the filing of such promissory note, the Company will be deemed to be in compliance with any obligation under RSA 366:3 to seek the Commission's approval for changes in its contractual obligation to its lender.

Bedford's failure to develop continuing property records as required by PUC 706.06 is also addressed in the agreement. Bedford and Staff agreed that the Company will promptly develop such

continuing property records, that Staff will provide reasonable assistance to the Company in developing such records and that the Company will certify to the Commission in writing, no less than six months from the date of the Commission's order in this proceeding, that the Company is in compliance with the requirement to maintain continuing property records.

Bedford also responded to the Intervenors' complaint about misrepresentation in the developer's offering statement. The Company argued that any reference in offering statements to the effect that a reserve might be established for the sewer system was inadvertent. Bedford also argued that the inclusion in some copies of the offering statement of a budget showing a reserve were qualified by a clause advising potential homebuyers that the system might be organized as a public utility, subject to the jurisdiction of the PUC, which would determine its rates.

B. Intervenors

The intervenors expressed concerns about the Company's expenses that are similar to those that were originally raised by Staff. Accordingly, the intervenors indicated their agreement with the revenue adjustments contained in the settlement agreement. Additionally, Mr. Comiskey contends that when the Commission entered its final order in the Company's 1995 rate case the Commission inappropriately shortened the useful lives of Bedford's pumping

equipment and leach fields. Accordingly, Mr. Comiskey proposes an adjustment in Bedford's depreciation expense to reflect what he regards as more appropriate useful lives for these assets.

The intervenors' central concerns, however, relate to the formation and capitalization of the utility. Bedford's president and sole shareholder is Robert C. LaMontagne, who is also the builder of the subdivision serviced by Bedford. It is the contention of the intervenors that the $192,725.00 presently being carried on Bedford's book as debt should be recharacterized as a Contribution in Aid of Construction. They take that position because the debt, evidenced by two $100,000 promissory notes, is owed by Bedford to Mr. LaMontagne. The intervenors believe that Mr. LaMontagne has already recovered the entire cost of the utility's capital assets when he sold the homes in the subdivision to their buyers and that, by continuing to include the outstanding debt in Bedford's rate base, Mr. LaMontagne is attempting through his wholly-owned sewer utility to recover twice on the same investment. Further, even assuming the legitimacy of the debt, the intervenors contend that (1) the second of the two promissory notes - the one bearing the date of December 31, 1996 - was never filed with the Commission, never approved by the Commission pursuant to RSA 366:3 and that recovery on the note should be disallowed on these bases. As did Staff, the intervenors note that the Company has been making payments on both notes on terms that are

inconsistent with their express terms.

A related issue raised by the intervenors involves certain representations made by Mr. LaMontagne to the ratepayers at the time they purchased their homes in the subdivision. According to the intervenors, the offering statement they received from LaMontagne indicated that the homeowners' sewer payments would capitalize a reserve fund of $21,500 per year for the purpose of replacing leach fields and that such a reserve fund would come into existence regardless of whether Mr. LaMontagne turned the sewer system over to the Owners' Association or formed a sewer utility subject to rate-setting and other regulation by the Commission. The intervenors assert that statements made to the buyers by Mr. LaMontagne's real estate agent further led them to believe that such a reserve fund would come into existence. The intervenors also contend that Mr. LaMontagne continued to represent to homebuyers that he might turn the sewer system over to the Owners' Association well after he had opted for creation of a regulated utility, obtained a franchise from the Commission for that purpose and instituted the previous rate case decided in 1995. For these reasons, the intervenors ask the Commission to impose a reserve fund on Bedford without increasing rates for that purpose.

III. COMMISSION ANALYSIS

We have reviewed the stipulation and settlement agreement

entered into by Staff and Bedford and we have determined that the operations and maintenance expense adjustments contained therein are just and reasonable. In particular, we agree that it would be inappropriate to charge Bedford ratepayers for the cost of tank location when the reason for this expense is the utility's prior failure to keep adequate records dating from the point at which the tanks were first placed into the ground. In that regard, we also adopt the portion of the agreement committing Bedford to develop the requisite Continuing Property Records within six months of the entry of this order.

When Bedford was before us in 1995 for its initial rate case, the development served by this sewer utility was still in its building phase and there were only 12 customers actually receiving service. *See Bedford Waste Services Corp.*, 80 NH PUC 501, 502 (1995). Based upon the record before us in 1995, we deemed it an appropriate use of our resources and that of the utility to approve rates at that time with the expectation that the Company would balance contributed and non-contributed plant such that the amount in rate base would justify the revenue requirement when all 78 customers were on line. *Id.* at 503. The proposed agreement now before us, and the record developed in the instant proceeding, suggest that the anticipated balance between contributed and non-contributed plant has been maintained. The basis for the proposed rate increase is higher

operating expenses. We believe these increases are reasonable, particularly because they enable the Company to employ professional management and to provide for a more appropriate level of annual tank pumping and technical oversight in the interest of the system's longterm viability. In that regard, we share Staff's concern about the lack of long-term property records and will hold the Company to its agreement to correct this deficiency within six months. We are also satisfied that any failure by the Company to obtain Commission approval for changes in its financing arrangements is cured by Bedford's agreement to take the necessary steps to reconfigure its repayment plan to provide for a 20-year repayment period on its presently outstanding debt. We therefore stress that we will hold the Company to that aspect of the agreement.

The most significant issue raised by this proceeding concerns the argument advanced by the intervenors that we should attach serious consequences to misrepresentations that the intervenors contend were made to both the Commission and to ratepayers at the time they purchased their homes in the Bedford subdivision. The record adduced at the September 29, 1999 hearing was inconclusive. However, at a further hearing on this issue on November 2, 1999, Mr. LaMontagne testified that he was not aware of precisely when the formal offering statement provided to prospective homeowners was amended to reflect that Bedford would indeed be a

utility subject to PUC regulation and ratesetting. Counsel to Mr. LaMontagne, although not testifying under oath, indicated that the relevant amendments to the offering statement were made "just after August 1995," i.e., following the issuance of Order No. 21,769 (August 1, 1995), in which we approved the initial rates to be charged by Bedford. At the hearing preceding the issuance of that order, Bedford was represented by the same attorney, who was asked by Commissioner Geiger whether "the customers within this development [were] familiar with the fact that there is going to be an assessment made for sewer charges in the future?" Counsel's reply: "Absolutely. From the very beginning, they have been provided with written materials, and they have talked with brokers and my clients about the *rates to be set by the Public Utilities Commission*." (Emphasis added.) It is obvious, then, that the representation made to us in 1995 was not correct and that, as of the hearing in June 1995, potential homebuyers were still being furnished with an inaccurate offering statement even though we determined on December 6, 1994 that Bedford should receive a franchise to operate a utility subject to our jurisdiction. *See Bedford Three Corners Waste Corp*., 79 NH PUC 674 (1994).[2]

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[2] Subsequent to its incorporation and franchise petition, the Company amended its articles of incorporation to adopt its present name. *See Bedford Three Corners Waste Corp*., 80 NH PUC 26 (1995).

Moreover, in its supplemental filing of November 12, 1999, Bedford concedes that it is "clear" that on "some occasions" its real estate broker "erroneously distributed a 1994 proposed budget which described charges based on a homeowner association owned system." This is consistent with other record evidence - namely, the offering statement furnished to intervenor Edward J. Comiskey, III, which appears in the present record as Exhibit 19. Mr. Comiskey testified that he received this document in late June or early July of 1995. Exhibit 19 discloses that the sewage system serving the subdivision would be owned and operated "either" by "a public utility regulated by the PUC, or by the [homeowners'] Association" and that, in the former case, rates "will be determined exclusively by the PUC." Appended to Exhibit 19, with no indication given that it might not be applicable in the event of PUC regulation, was a "projected sewer budget" reflecting a total of $35,000, of which $21,500 was designated for "reserve replacement of leach fields." Based on this evidence, we find that, as of the date of our previous decision on August 1, 1995, the Company had, through its affiliates, failed to clearly advise potential homebuyers and ratepayers that the sewer system would not be turned over to the homeowners' association and thus opened the door to confusion as to whether it would be operated so as to set aside $21,500 per year as a reserve fund for replacement of leach fields. To the extent that Bedford seeks to place

responsibility for these misrepresentations on the real estate agent who marketed the homes, we discern no relevance. Obviously, the real estate agent was acting on behalf of the seller.

However, we are not a court of general jurisdiction with broad powers to redress every wrong that might come to our attention. The offering statement at issue is a requirement of the Land Sales Full Disclosure Act. *See* RSA 356-A:6. Under the Act, the Attorney General has plenary authority to investigate allegations of false, deceptive or misleading advertising in connection with real estate sales in New Hampshire. *See* RSA 356-A:10. Further, the Act specifically creates a civil remedy for persons who have been damaged by a material misrepresentation in connection with an offering statement. *See* RSA 356-A:14. The Commission is obviously not part of this regulatory scheme.

Nevertheless, the Commission does have both the authority to exert "general supervision of all public utilities" in the state, RSA 374:3, as well as the "duty . . . to keep informed" as to all facets of the utilities' operation, RSA 374:4. Our ability to exercise our supervisory authority and discharge our duty to keep informed is obviously and thoroughly thwarted when utilities appearing before us provide us with information that they either know to be false or have not thoroughly investigated. In this instance, if the Commission had been provided with accurate information in 1995

as to the adequacy of disclosures to ratepayers and potential ratepayers, it might have then been in a position to avert the problem we now confront: ratepayers who reasonably believe they were misled as to how their sewer payments would be used.

In these circumstances, we deem it appropriate to invoke our authority under RSA 374:10 to require Bedford to maintain a depreciation account, into which the Company shall place any revenues in excess of (1) operation and maintenance expenses and (2) interest and repayment of principal payable in accordance with the revised payment schedule described in the previous paragraph, until further order of the Commission. Further, these funds shall be utilized exclusively for such purposes as are described in RSA 374:11, and we order that the Company shall pay no dividends pursuant to RSA 374:12 without the express consent of the Commission. Although such a step is unusual, and something of a departure from traditional ratemaking principles, in these unique circumstances it has the salutary effect of putting in place something approximating the leach field replacement fund that homebuyers were told they would be funding with part of their sewer payments.[3]

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[3] In its statement filed subsequent to the November 2 hearing, Bedford proposed that Mr. LaMontagne unilaterally contribute $10,000 to be deposited in such a reserve fund. We find this offer to be laudable in the circumstances and encourage Mr. LaMontagne to make good on it.

Of related significance is the intevenors' vigorously asserted contention that Mr. LaMontagne has already recovered the full cost of Bedford's plant-in-service when he sold the units in the subdivision and, therefore, that we should recharacterize any debt owed by Bedford to Mr. LaMontagne as a contribution in aid of construction ("CIAC") and exclude the sum from rate base. It is axiomatic that if a utility or its owner has already recovered the cost of the plant it has placed in service, the utility cannot recover the same costs again through rates. *See Eastman Sewer Company*, 77 NH 93, 98-99 (1992), *rehearing den*ied, 77 NH PUC 180 (1992), *affirmed by Appeal of Eastman Sewer Co.*, 138 N.H. 221, 224 (1994); *see also Mountain High Water and Gas Sales*, Inc., 76 NH PUC 415, 417-18 (1991) (noting that, "[a]s a matter of public policy, we will not permit utilities to profit unjustly from inconsistent statements concerning their assets made to the IRS and us").

However, we cannot adopt the intervenors' position. Bedford has made a prima facie showing through the copies of the two promissory notes it has submitted and through the testimony of its manager who prepared rate schedules indicating that Bedford has incurred debt in the amount asserted. Thereafter, Mr. LaMontagne personally appeared at our direction and testified under oath that he has loaned money to Bedford in the amount of $200,000. To contravene these factual assertions, the intervenors point only to the

circumstances surrounding the development of the subdivision and the creation of the utility, specifically the fact that the putative lender is both the subdivision's developer and the utility's sole shareholder. The intervenors also note that the Commission is not in possession of documentation, acquired through an audit or otherwise, conclusively demonstrating that Mr. LaMontagne is not seeking to recover as debt what is actually CIAC. In essence, the intervenors ask us to find that Mr. LaMontagne has deceived the Commission and therefore the Company's customers. We have carefully reviewed the entire record and find no evidence that any subterfuge has taken place.

As reflected in our 1994 order granting the utility franchise, LaMontagne Builders received approval from the Bedford Planning Board for the subdivision on June 6, 1994. *See Bedford Three Corners Waste Corp.*, 79 NH PUC at 674. That, presumably, is the earliest date upon which Mr. LaMontagne and his building company could have begun constructing the subdivision and depreciating for income tax purposes any capital investment associated with the project. Approximately one year later, on June 29, 1995, Mark Naylor of the Commission's Finance Department testified in support of an agreement Staff had reached (and that we ultimately adopted) concerning the Company's initial rates. *See* Transcript of June 29, 1995 in Docket No. DR 95-008 at 11. Explaining the basis for this

agreement to the Commission, Mr. Naylor testified that Mr. LaMontagne "has elected to treat some portion of his construction of the system as contributed CIAC," that "$100,000 is being taken as a note by Mr. LaMontagne," and, accordingly, "the rate base of the utility is made up of that $100,000 and an allowance for working capital." *Id*. at 13-14 (also noting that future development would involve an additional $100,000 note and additional CIAC). The legitimacy of this debt was not placed in dispute during the 1995 proceeding, and it is apparent that Staff found no reason to question the line drawn between CIAC and debt.

These factual circumstances stand in contrast to that presented in *Eastman Sewer*, in which a sewer utility began providing service in 1974 and then, after having had the opportunity to depreciate its investment for tax purposes for some 15 years without any Commission review of its books and records, sought in 1990 to treat 30 percent of its investment as includable in rate base. *See Eastman Sewer*, 77 NH PUC at 94-95. We stress this point because, although *Eastman Sewer* articulates an ironclad legal rule concerning the role of CIAC in ratesetting, we cannot apply it here in rote

fashion to draw the factual inference requested by the intervenors.[4] Further, we can and do take administrative notice of Mr. Naylor's testimony in the 1995 proceedings in support of our factual determination that there has been no double recovery here of the sort precluded by *Eastman Sewer*.

Viewed in the light most favorable to the intervenors, the record here shows only that some ratepayers received inconsistent information as to the status of the sewer system. There is nothing of record that permits us to determine that the ratepayers are being called upon to pay twice for Mr. LaMontagne's investment in the utility, once through the purchase price of the homes and again in rates. Accordingly, we are unable to agree with the intervenors that we should order Bedford to place into the reserve fund sums that would otherwise go toward debt repayment.

Finally, we take up the question of rate case expenses. The Stipulation and Settlement Agreement calls for Bedford to submit

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[4] The facts in *Mountain High* are even more distinguishable from the instance case. In Mountain High, we credited record evidence that a water utility and its owners engaged in a "subterfuge" by placing the word "maintenance" on bills rendered to customers - and thereafter ceased efforts to become a regulated utility, billed ratepayers not simply for maintenance expenses but also for capital costs, and expensed the costs of constructing the utility against the proceeds from the sale of the condominiums serviced by the utility. *See Mountain High*, 76 NH PUC at 418. No such evidence appears in this record.

its rate case expenses to the Commission for recovery. We place the parties on notice that, because Bedford's incomplete and evasive responses to the record requests made at the initial hearing made it necessary for us to conduct an additional hearing, we will not permit the Company to recover expenses associated with the second hearing.

Based upon the foregoing, it is hereby

ORDERED, that the Stipulation and Settlement Agreement entered into by Bedford and Staff is APPROVED, subject to the additional conditions enumerated herein; and it is

FURTHER ORDERED, that Bedford submit a properly revised tariff with the Commission within 14 days of the date of this order in accordance with PUC 1603.05; and it is

FURTHER ORDERED, that Bedford shall, within 10 days of the date of this order, file with the Commission a copy of a duly executed promissory note to reflect the revised debt repayment schedule contained in the Stipulation and Settlement Agreement; and it is

FURTHER ORDERED, that Bedford shall, within six months of the date of this order, certify to the Commission in writing that it is in full compliance with the requirement in PUC 706.06 that it maintain continuing property records.

By order of the Public Utilities Commission of New Hampshire this seventh day of January, 2000.

Douglas L. Patch	Susan S. Geiger	Nancy Brockway
Chairman	Commissioner	Commissioner

Attested by:

Thomas G. Getz
Executive Director and Secretary