

DW 00-222

PENNICHUCK WATER WORKS, INC.

Petition for Exemption Pursuant to RSA 674:30 III from Local Ordinances, Codes or Regulations of the Town of Derry Pertaining to the Proposed Construction of a 225,000 Gallon Water Tank

Order Granting Exemption from Local Ordinances of the Town of Derry

O R D E R N O. 23,619

January 10, 2001

APPEARANCES: Sullivan & Gregg, PA by James L. Sullivan, Jr., Esq. for Pennichuck Water Works, Inc.; Boutin Associates, PLLC by Steven A. Clark, Esq. for the Town of Derry; and Larry S. Eckhaus, Esq. for the Staff of the New Hampshire Public Utilities Commission.

I. PROCEDURAL HISTORY

On October 6, 2000, Pennichuck Water Works, Inc. (Pennichuck, Petitioner or Company) filed a petition (Petition) with the New Hampshire Public Utilities Commission (Commission) for exemption, pursuant to RSA 674:30, III, from local ordinances, codes or regulations of the Town of Derry pertaining to the expansion of the existing pump station, proposed construction of a 225,000 gallon water tank (Tank) and installation of an emergency generator (together the Facilities). Copies of the complete Petition were sent by Pennichuck to the Office of Consumer Advocate, the Derry Town Administrator and the Town's counsel, and to the Drew Woods Condominium Association (Association).

The Tank is proposed to be constructed on land within the development known as Drew Woods. The filing avers that Pennichuck moved forward in a timely manner, worked with the Association, presented three(3) alternatives for placement and configuration of the proposed tank before the Derry Conservation Commission (Conservation Commission) to resolve concerns about the Tank's location in relation to existing homes and wetlands, obtained a necessary wetlands permit from the Department of Environmental Services (DES) to install two (2) water lines from a proposed tank to the existing pump station, and secured low interest State Revolving Loan Fund (SRF) money¹, in the amount of \$445,000 at 3.85% over 20 years, with interest during construction of 1.0%, for the project.

Pennichuck initially filed its application for a variance with the Derry Zoning Board of Adjustment (ZBA) on March 8, 2000, and subsequently appeared before the ZBA on several occasions thereafter, seeking variances from local land use ordinances, in particular in relation to identified wetlands at the proposed Tank site, but was ultimately denied

¹By Order No. 22,959 in *Re Pennichuck Water Works, Inc.*, 83 NH PUC 355 (1998), the Commission authorized the Company to issue and sell up to \$445,000 in unsecured debt through the SRF to finance the construction.

a variance, by a vote of 2-3, on September 7, 2000. Those voting against seemed to prefer the original plan, with the tank adjacent to the pump station, a site which was objectionable to the residents. A Motion for Rehearing was denied by the ZBA on September 21, 2000. The filing indicated that the construction timetable necessary to comply with SRF funding requirements put that funding in jeopardy if construction is not authorized, and begun, promptly. According to the Petition, the commitment by the State for the financing expires July 1, 2001 if the project is not used and useful by that date. Pennichuck averred that it must begin work on or before November 30, 2000, in order to meet the July 1, 2001 financing deadline.

On October 13, 2000, the Commission issued an Order of Notice scheduling a Prehearing Conference for October 27, 2000. The Order of Notice indicated that the filing raised, inter alia, issues related to the extent of potential rate and quality of service impacts to the East Derry water system customers if the relief sought is not granted; whether other more suitable alternatives are available to address water availability and pressure problems and to provide water in sufficient quantity and pressure to provide fire protection in the East Derry system; the degree of urgency of the proposal;

and whether the requested exemption is reasonably necessary for the convenience or welfare of the public.

In accordance with the Order of Notice, Pennichuck provided for the publication of the Order of Notice in the *Union Leader*. On October 17, 2000, in accordance with the Order of Notice, Pennichuck also mailed copies of the Order of Notice to the Office of Consumer Advocate, the Association, the Clerk of the Town of Derry, and all abutters to the proposed site.

On October 20, 2000, in accordance with the Order of Notice, Pennichuck filed the testimony of Donald L. Ware, Vice-President Engineering and Chief Engineer for Pennichuck, in support of the Petition and in response to the issues contained in the Order of Notice.

On October 23, 2000, the Town of Derry timely filed a Petition to Intervene. No objections to the Petition to Intervene were filed, and the intervention was granted at the Prehearing Conference. No other petitions to intervene were received and there were no other appearances at the Prehearing Conference.

The Prehearing Conference was held, as scheduled, on October 27, 2000. Pennichuck filed a Memorandum of Law in Support of the Petition and a Preliminary Statement pursuant

to N.H. Admin. Rule Puc 203.05, and made an oral presentation of its position. The Town of Derry filed a Preliminary Statement of its position and made an oral presentation of its position. Staff presented its position regarding the Petition as well.

On November 8, 2000, the Commission issued Order No. 23,588, formally approving the intervention of the Town of Derry and approving an expedited procedural schedule which included discovery, a site visit by Staff and Intervenor, and a hearing on the merits, which was held on November 14, 2000. At the hearing, Pennichuck provided the testimony of Donald L. Ware, and the Town of Derry and Staff made brief closing remarks.

On November 17, 2000, Pennichuck filed the minutes of the April 20, 2000 meeting of the Town Council of Derry as a late filed exhibit.

On November 17, 2000, Pennichuck also filed supplemental testimony of Donald L. Ware, pursuant to Puc 204.01(d), claiming that the issues presented in the supplemental testimony "were neither pleaded by staff nor raised by them in discovery", and, therefore, "Pennichuck was not in a position to present a complete answer on those issues when they were raised at the hearing".

On November 28, 2000, Staff filed an Objection to Pennichuck's Filing of Supplemental Testimony. Staff maintained that Pennichuck's filing should be rejected as the Commission has issued no supplemental order expanding the scope of the hearing and the information contained in the supplemental testimony was not beyond the original scope of the proceeding; there were no issues which were not reasonably anticipated by Pennichuck and the information contained in the supplemental testimony does not address any issue which was not reasonably anticipated by Pennichuck, See NH Admin. Rule Puc 204.01(d); there was no opportunity for discovery, pursuant to NH Admin. Rule Puc 204.04, and cross examination; and, viewed as a motion to either supplement or reopen the record, Pennichuck failed to seek concurrence of all the Parties and Staff pursuant to NH Admin. Rule Puc 203.04.

II. POSITIONS OF THE PARTIES AND STAFF

A. Pennichuck Water Works, Inc.

The Company avers that the facilities for which the exemption is being sought are required to remedy problems of meeting peak demand flow for its customers and to provide public fire protection to residents of East Derry, and, to a lesser extent, the attached Hubbard Hills and Redfield water systems. Pennichuck has sought the necessary variances from

the ZBA, regarding the placement of utility facilities in the zone and location of the tank within a 75 foot wetlands setback regardless of its location. Because those requests were denied by the ZBA, this filing, pursuant to RSA 674:30, III, became necessary. Although the ZBA turned down the request for variance, Pennichuck avers that it has received the support of, and/or approvals from, the Association, the East Derry Fire Department, the Derry Conservation Commission, and DES. Pennichuck maintains that the Commission has the jurisdiction to exempt it from the effect of Derry land use regulations, that the project is within the purview of RSA 674:30, III, and that the project is reasonably necessary for the convenience or welfare of the public.

In addition to meeting these requirements, the Company maintains that it has sought and been approved for low cost SRF funding which will reduce the capital requirements of the project, and, ultimately, lower rates to customers. In order to obtain the funding, however, the project must be completed by July 1, 2001. However, at the hearing, Pennichuck agreed that it would not require a building permit until mid-March 2001 in order to meet the July 1, 2001 deadline.

Pennichuck indicated that a Form E-22 had been filed with the Commission in accordance with NH Admin. Rule Puc 609.14. Pennichuck further indicated that it has submitted a site plan application to the Derry Planning Board, and does not now seek exemption from those regulations, but only from three specific Zoning Ordinances: Article 300, Section 315, pertaining to the 75 foot wetland setback, and Article 600, Sections 616.1 and 616.2 pertaining to the uses that are allowed in the zone. Pennichuck indicated that it was not averse to the Commission's setting a one year limitation, as proposed by the Town, on the exemption such that if construction did not begin within that time the exemption would expire.

The Company indicated that the 100 kW propane-fired emergency on-site generator, provided to support fire protection, will be equipped with a critical exhaust muffler which will significantly reduce the decibel level below that of a small lawnmower. Moreover, the generator would only operate during testing and in emergency situations, e.g. power failures. In addition, Pennichuck agreed that any exceptions to be granted by the Commission would be limited and specific to this application only, i.e. substantially the same application presented to the ZBA. The only difference between

the plan presented to the ZBA and the plan presented to the Commission is that the generator is moved from an area next to the pump house to a place behind the pump house.

The total cost of the project is estimated by Pennichuck to be approximately \$489,000.

B. Town of Derry, New Hampshire

The Town indicated that it would not object to the Petition as amended in that it understands that the Petition before the Commission relates to facilities identical to those disclosed to the ZBA; that the exemption sought will be limited to the facilities referenced in the Petition; that the exemption will not apply to any other facilities or locations within the Town; and that Pennichuck has agreed to submit the filing to site plan review provided the Town makes its request known in a timely manner on issues such as screening, noise abatement and wetlands protection, if any. The Town indicated that it has no objection to increasing the water supply and fire protection in the area, and agreed that the Town Council had been supportive of the concept. However, the Town requested that the exemption be limited to one year from the date of the hearing in the event the facilities are not constructed within that time.

C. Commission Staff

As a general matter, Staff indicated that it did not object to the Petition. However, Staff was somewhat concerned that the Petition came before the Commission coupled with the request for expedited treatment. During the hearing, Pennichuck stated that construction does not have to proceed as quickly as was indicated in the Petition, and that the exemption now being requested is far narrower in scope.

Staff also expressed its concern that the Company has taken as long as it has, from the time this Commission approved the funding to date, and to the estimated date of completion of this project. Staff took exception to Pennichuck's comments that the alleged saving of a few thousand dollars was worth such a substantial delay, when it is also claimed expedited treatment of its Petition claiming the urgency of providing fire protection and better quality service to customers. Staff maintains that the Company could have proceeded to perform the engineering work on this project earlier, that the project could have been completed by now, and would not be subject to losing its SRF funding. Staff suggests that if a rate case is forthcoming in the next year as the Company intimated and if the Company loses the SRF

funding, then the Commission should consider whether to impute the SRF rate for this project.

Insofar as this Petition is concerned, however, given the Town's position, Staff has no objection. Staff agrees that the one year time limit proposed by the Town is appropriate.

III. COMMISSION ANALYSIS

RSA 674:30, III provides:

A public utility which uses or proposes to use a structure which does not fit the criteria described in paragraph I, or fits those criteria and has been denied a waiver, or has been granted a waiver with conditions unacceptable to the utility when the waiver was applied for pursuant to paragraph I, may petition the public utilities commission to be exempted from the operation of any local ordinance, code, or regulation enacted under this title. The public utilities commission, following a public hearing, may grant such an exemption if it decides that the present or proposed situation of the structure in question is reasonably necessary for the convenience or welfare of the public and, if the purpose of the structure relates to water supply withdrawal, the exemption is recommended by the department of environmental services.

As Pennichuck notes, RSA 674:30, I is not applicable in this situation as the facilities exceed 200 square feet in area. Moreover, Pennichuck's appealing the denial of the rehearing petition could have jeopardized the SRF funding and further delayed construction of the facilities.

As Pennichuck notes in its Memorandum of Law,
...the purpose of the exemption provision is to ensure that a variety of conflicting local interests will not impede services provided by public utilities to consumers,...to the detriment of the best interests of the public as a whole. [Citations omitted] *Appeal of Milford Water Works*, 126 NH 127, 131 (1985).

The proposed facilities have received the endorsement of the abutters, the Association, the Derry Town Council and the East Derry Fire Department, and Pennichuck has received approvals from the Derry Conservation Commission and DES. The Commission finds that the location proposed for the facilities: is more suitable than the location preferred by the ZBA; has the least impact on abutters and the neighborhood; and allows for the relocation of the proposed generator, thereby further reducing its noise impact. In addition, we anticipate that reasonable screening, noise abatement and wetlands protection conditions resulting from the site plan review process before the Planning Board will further reduce the impact on abutters. We are especially cognizant of the approvals given by the Conservation Commission and DES, as the pipelines connecting the tank to the pump station cross a wetland.

Although issues pertaining to the ratemaking treatment of the facilities are not the subject of this

proceeding we are mindful of the benefit SRF funding will confer upon the Petitioner and its customers. Based upon information provided during the hearing, the SRF loan rate of 3.8% is significantly less than Pennichuck's average rate of return of 8.34%. Assuming approximately \$22,000 in fire protection revenues from the Town, the impact on Pennichuck's water customers will be minimal when spread over all of Pennichuck's core customers. However, as Staff correctly notes, it will be more than three years from the date this Commission approved SRF funding for this project until it is completed. While we do not decide ratemaking treatment in the context of this proceeding, the Company is on notice that loss of the SRF funding could be an issue in any future rate case proceeding. Similarly, in light of the Petitioner's allegations as to the need for these facilities, failure to complete these facilities would also subject Petitioner to scrutiny.

In addition, in order to expedite this matter, the Commission will keep this docket open pending Petitioner's receipt of site plan approval from the Derry Planning Board. In the event Pennichuck, upon further submission of evidence to the Commission, with copies to the Town and Staff, demonstrates that an exemption from Derry's site plan

regulations is warranted, we will take appropriate action at that time. Pennichuck shall notify the Commission of any final action by the Derry Planning Board within 10 days of such action and whether Pennichuck intends to seek further assistance from this Commission.

Finally, we see no need to reopen the record to include the supplemental testimony filed by the Petitioner on November 17, 2000 after the close of the hearing. As Staff correctly points out, the Commission issued no supplemental order expanding the scope of the hearing, the information contained in the supplemental testimony is not beyond the original scope of the proceeding; there were no issues contained in the supplemental testimony which were not reasonably anticipated by Pennichuck; and, viewed as a motion to either supplement or reopen the record, Pennichuck failed to seek concurrence of all the Parties and Staff pursuant to NH Admin. Rule Puc 203.04. As the Commission is not, in this proceeding, deciding issues related to the ratemaking treatment of these facilities, Pennichuck is not precluded from providing this testimony in a future proceeding.

Based upon the foregoing, it is hereby

ORDERED, that Pennichuck Water Works, Inc. is hereby granted an exemption from the operation of Article 600,

Sections 616.1 and 616.2 and Article 300, Section 315 of the Zoning Ordinance of the Town of Derry, as the same pertain to Pennichuck's construction of an extension to the existing pump station, construction of a concrete pad for placement of an emergency generator, and construction of a 225,000 gallon water storage tank, with appurtenant facilities, at Drew Woods Development, Tax Map 137-1010, Drew Woods Drive, LMDR District, all as depicted on plans submitted to the Commission in this proceeding; and it is

FURTHER ORDERED, that the grant of this exemption does not include exemption from the site plan regulations of the Town of Derry; and it is

FURTHER ORDERED, that should construction of these facilities not commence prior to November 15, 2001, the exemption herein granted shall be deemed withdrawn, null and void unless extended by the Commission pursuant to a subsequent order.

By order of the Public Utilities Commission of New
Hampshire this tenth day of January, 2001.

Douglas L. Patch
Chairman

Susan S. Geiger
Commissioner

Nancy Brockway
Commissioner

Attested by:

Thomas B. Getz
Executive Director and Secretary