

DW 01-054

WEST EPPING WATER COMPANY

Regulatory Status of Water Utility

Order Nisi Granting Conditional Exemption from Regulation

O R D E R   N O.   24,309

April 12, 2004

The New Hampshire Public Utilities Commission opened this docket on March 15, 2001 at the request of Staff to conduct an investigation of West Epping Water Company (WEWC), a water utility serving approximately 12 customers in the Town of Epping.

The investigation involved all aspects of WEWC's operations and included an inquiry into whether the Company should be placed in receivership pursuant to RSA 374:47-a and/or whether the Company should be exempted from regulation pursuant to RSA 362:4,I, given the small number of customers served. The procedural history of this docket is detailed in Order No. 23,909 (January 29, 2002) and in Order No. 24,016 (July 24, 2002).

Subsequent to the issuance of Order No. 24,016, a show cause hearing was held in this docket on September 19, 2002. The Commission heard evidence as to West Epping's compliance with Order No. 23,909, which authorized with certain conditions the transfer of West Epping's plant, property and franchise to an association of its users.

The Commission has reviewed recent developments in the West Epping Water Company (WEWC) docket and determined that, in light of current statutory provisions and other circumstances, WEWC qualifies for exemption from regulation, pursuant to RSA 362:4. That statute authorizes the Commission to exempt from regulation any water utility serving less than 75 customers. Until 2001, the discretionary exemption applied only if there were less than 10 customers. In 2001, the New Hampshire legislature increased the allowable number of customers for which an exemption could be granted to less than 75. At the time it was franchised in 1988, WEWC served only 3 customers but in 1990 expanded its franchise to serve a total of 12. It now appears to serve a total of 13 customers in four separate, unconnected systems. *West Epping Water Co.*, 79 NH PUC 472 (1994).

WEWC customers are not, and have never been, charged for the water service they received. Further, there are not currently any complaints to the Commission regarding water quality or quantity. In addition, in April of 2002 the New Hampshire Department of Environmental Services (NHDES) issued a letter finding that the so-called Hickory Hill Road water system, a portion of WEWC, was no longer under its jurisdiction because the number of customers had dropped to below 15. That Hickory Hill Road system consists of two of the unconnected systems. In addition, in March of 2004, NHDES issued a letter finding that

the so-called Mill Pond Road portion of the WEWC system was no longer within its jurisdiction. Thus, no portion of the WEWC system remains under NHDES jurisdiction.

The principals of WEWC, Richard Fisher and Judith Golden, have supplied evidence that they transferred WEWC to a non-profit water users association by quitclaim deed, recorded at Rockingham County Registry of Deeds, on April 8, 2002. This fact was not revealed by the company at the September 19, 2002 hearing. Mr. Fisher subsequently indicated to the Commission that this attempted transfer was done without the knowledge of WEWC's counsel at the time, Eugene F. Sullivan, III. Mr. Sullivan filed a letter with the Commission on November 21, 2002 stating that the transfer was done without advice of counsel and was void as it was not approved by the Commission pursuant to RSA 374:31. Notwithstanding this letter, however, the Commission has not seen evidence of a rescission of the deed or other steps to invalidate the transfer.

Irrespective of the terms or validity of the purported transfer to the water users association, the Commission believes that regulation of this company (under certain circumstances) is not necessary. We reach this conclusion based on the very small number of customers, the fact that customers are not charged for water, that there are no complaints with the Commission regarding water service, and longstanding disputes over ownership of

certain wells have finally been resolved, as described below.

For many months there had been litigation between WEWC and a neighbor, Paul Wright regarding use of wells on Mr. Wright's property to serve WEWC customers. That matter has been resolved with a verdict in favor of Mr. Wright. See Rockingham County Superior Court, Docket No. 01-E-0181 (November 25, 2002).

As a result, WEWC no longer uses wells on Mr. Wright's property and has obtained water from other wells to serve the users. Mr. Wright is no longer a WEWC customer. Similarly, litigation between Mr. Wright and a WEWC customer Judith Button, who supplied a multi-unit apartment building on her property, has been resolved through a settlement agreement dated February 27, 2004 and approved by the Rockingham County Superior Court on March 1, 2004. See Order of Rockingham County Superior Court, Docket No. 03-E-0374 (March 1, 2004). As a result, Ms. Button now obtains water from a source located on the property where the apartment building is located, and is no longer a customer of WEWC.

In light of these circumstances, as well as the NHDES determination that WEWC's system size is below its threshold for regulation, the Commission will grant WEWC, on a *nisi* basis, an exemption from regulation pursuant to RSA 362:4. Though we do not make a finding as to the validity of the transfer of assets, it should be noted that, to the extent the water users

association is formed, holds valid title to the WEWC assets, and serves only its user members, the provision of water service is not to the general public. As such WEWC would not be a public utility pursuant to RSA 362:2. See *Appeal of Zimmerman*, 141 N.H. 605 (1997); *Re Resort Waste*, Order No. 24,289 (March 5, 2004).

The exemption determination is conditional, however, on WEWC submitting payment in full to the Commission no later than ten days of the date of this order, for transcription costs incurred in a Commission hearing dated September 19, 2002, pursuant to N.H. Admin. Rules, Puc 202.14(b). The amount owed is \$298.75, which was never billed to WEWC as it should have been.

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

**ORDERED NISI**, that West Epping Water Company shall be exempt from regulation pursuant to RSA 362:4; and it is

**FURTHER ORDERED**, that West Epping shall submit to the Commission, no later than ten days from the date of this order, \$298.75 for payment of transcription costs that were incurred by WEWC, payment shall be received no later than May 6, 2004, and it is

**FURTHER ORDERED**, that West Epping Water Company shall mail a copy of this Order to each current customer by first class mail no later than April 22, 2004, such mailing to be documented by affidavit filed with this office on or before April 27, 2004;

and it is

**FURTHER ORDERED**, that all persons interested in responding to this petition be notified that they may submit their comments or file a written request for a hearing on this matter before the Commission no later than April 29, 2004; and it is

**FURTHER ORDERED**, that any party interested in responding to such comments or request for hearing shall do so no later than May 6, 2004; and it is

**FURTHER ORDERED**, that this Order Nisi shall be effective May 12, 2004, unless West Epping 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 twelfth day of April, 2004.

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Thomas B. Getz  
Chairman

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Susan S. Geiger  
Commissioner

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Graham J. Morrison  
Commissioner

Attested by:

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Debra A. Howland  
Executive Director & Secretary

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