

DW 04-108

NORTH CONWAY WATER PRECINCT

Petition to Expand Franchise Area

Order Nisi Approving Expansion Request

ORDER NO. 24,360

August 16, 2004

I. PROCEDURAL HISTORY AND BACKGROUND

On June 8, 2004, the North Conway Water Precinct (Precinct), a municipal corporation formed under RSA 52:1 and located in North Conway and Bartlett, filed with the New Hampshire Public Utilities Commission (Commission) a petition to expand its franchise territory to include an additional area within the Town of Conway. Specifically, the Precinct requests authority to provide water and sewer/wastewater services to the Conway School District's proposed new Kennett High School, which lies outside the Precinct's boundary. The proposed franchise territory would run along land just south of Eastman Road and U.S. Route 302 in the Town of Conway in an area known as Pine Hill. The water and sewer/wastewater pipelines, as well as related appurtenances will continue along a proposed access road, called Eagles Way, to the new high school. A sewer/wastewater pumping station will be located adjacent to the high school.

According to the petition, the Conway School District has requested the Precinct provide water and sewer/wastewater services to the new high school. Construction of the new high school is set to begin in 2004 in order to be completed for the 2006 school year. Conway has negotiated twenty-year tuition contracts with Tamworth, Jackson, Bartlett, Freedom, Madison, Eaton and Albany which obligate Conway to accept students from these towns as of

July 1, 2006. The Conway School District will provide all materials and labor necessary to expand the Precinct's existing water supply and sewer/wastewater infrastructure to service the new high school. According to the terms of the tuition contracts, the water supply and sewer/wastewater service expenses will be apportioned among Conway and the other towns according to a formula based on equalized valuation ratios and average daily membership ratios. Voters in Conway, Tamworth, Jackson, Bartlett, Freedom, Madison, Eaton and Albany have approved the arrangements contained in the tuition contracts.

By way of a special meeting on November 4, 2003, held pursuant to RSA 197:3 and with authority from the Carroll County Superior Court, the Conway School District approved the forty-six million dollar high school project as well as the construction of the necessary water and sewer/wastewater improvements. By agreement between the Precinct and the Conway School District, once water and sewer/wastewater services are constructed, the Precinct will assume ownership of, and responsibility for, all water and sewer/wastewater pipelines and related appurtenances. The cost of operating, maintaining, and repairing the pipelines, related appurtenances, and pumping station will be borne by the Conway School District.

At a special meeting held on June 23, 2004, the Precinct voted and approved expanding the existing infrastructure to provide water supply and sewer service to the proposed high school. The Precinct filed copies of the meeting minutes with the Commission on July 20, 2004.

The Precinct asserts in its petition that it possesses the requisite technical, managerial, and financial expertise to provide water and sewer/wastewater service in the proposed franchise area. The Precinct stated that it has provided service in New Hampshire for a

number of years and that it has established a reputation for reliable and efficient service to the public. The Precinct avers that it would be in the public good for the Commission to grant the Precinct the proposed franchise.

The Precinct attached to its petition copies of letters from the New Hampshire Department of Environmental Services (DES), pursuant to RSA 374:22,III, which attest to the suitability and availability of water to support the proposed franchise expansion. DES supports the proposed franchise expansion.

The Precinct also requests authority to charge the Conway School System the same core system tariff rates currently in effect. The Precinct will provide the Conway School System with the same quantity and quality of water and same level of sewer/wastewater service as it provides customers within its existing franchise.

Lastly, the Precinct requests a waiver of the public hearing requirement pursuant to RSA 374:26. In support of the waiver request, the Precinct included documentation in its petition that the towns of Conway, Tamworth, Jackson, Bartlett, Freedom, Madison, Eaton and Albany as well as the Conway School District and Precinct all support the high school project.

On August 4, 2004, Commission Staff recommended approval of the Petition. Staff reported that it had not received complaints concerning the Precinct's quality of service. Staff supported the Precinct's request that the Commission issue an order without a hearing. Staff recited that the high school project and associated utility service extension had been the subject of public meetings in the towns of Conway, Tamworth, Jackson, Bartlett, Freedom, Madison, Eaton and Albany. The project had been approved by the Conway School District on November 4, 2003 and had been approved by the Precinct on June 23, 2004.

II. COMMISSION ANALYSIS

The Precinct is a municipal corporation formed as a village district pursuant to RSA 52:1. Pursuant to RSA 362:4,III and III-a, a municipal corporation furnishing sewage or water service is not considered a public utility if, for sewage service, it serves new customers outside its municipal boundary at the same rate it charges customers within the municipal boundary. For water service, the municipal corporation is not considered a public utility if it charges new customers outside the municipal boundary at rates no higher than fifteen percent above that charged to customers within the municipal boundary and provides those new customers a level of water service equal to that provided to customers within the municipal boundary. RSA 362:4 also states that although municipal corporations may be exempt if they satisfy the above criteria, municipal corporations are not exempt from the franchise application requirements of RSA 374.

RSA 374:22 states that no person or business entity shall commence business or "exercise any right or privilege under any franchise not theretofore actually exercised in such town, without first having obtained the permission and approval of the Commission." RSA 374:26 requires the Commission make a finding that the franchise is in the public good before approving such franchise requests. In determining the public good, the Commission reviews the need for service and the ability of the applicant to provide that service. The Commission assesses the petitioner's financial backing, management and administrative expertise, technical resources, and general fitness to operate a utility. *Pennichuck Water Works, Inc.* 73 NH PUC 279, 281 (1988) These statutes frame our review.

We note that the Precinct, according to Staff's August 4, 2004 letter, has had no complaints as to the quality of service it provides. The Precinct held a special meeting to vote on

the high school project and keeps minutes of its meetings. The Precinct, through its counsel, filed the instant petition with ample supporting documentation, including engineering plans, of the proposed franchise expansion. The Precinct also thoroughly described how the project will be funded by the Conway School District. We believe these elements demonstrate the Precinct can conduct its business properly. Having reviewed the record, we find that the Precinct possesses the requisite financial backing, management and administrative expertise, and technical resources to operate a utility and offer water and sewer/wastewater services to the proposed new Kennett High School.

With respect to rates, the new Kennett High School is located outside the Precinct's boundary and the Precinct proposes to charge the Conway School District the same core rate it charges customers within its municipal boundary. The Precinct's present rates and charges do not differentiate between customers inside and outside the Precinct and thus we find the Precinct satisfies the exemption requirements of RSA 362:4, III.

RSA 374:22, III, requires a water company to satisfy the requirements of the DES concerning the suitability and availability of water. By letter dated April 14, 2004, the DES agreed that the Precinct meets the suitability and availability requirements of RSA 374:22, III. The DES supported the proposed franchise expansion. We find the Precinct satisfies the requirements of RSA 374:22, III.

Finally, the Precinct has requested that the Commission act on the petition without a hearing because all interested parties are in agreement. RSA 374:26 explicitly authorizes the Commission to act on a franchise petition without hearing when all interested parties are in agreement. We find that in light of the extensive public notice and the results of the Conway School District special meeting and the North Conway Water District special

meeting, as well as the support expressed by the various Towns, that an adjudicative hearing pursuant to RSA 374:26 is not required.

RSA 38:25-a, however, also imposes a specific public hearing requirement in cases involving a water village district or precinct. This statute, enacted in 2002, after the passage of RSA 374:26, requires the Commission to hold a public hearing in each town or city in which the district or precinct is located before acting on any franchise expansion request. We construe RSA 38:25-a to require an additional hearing, separate and distinct from the adjudicative hearing anticipated by RSA 374:26. The RSA 38:25-a hearing is an opportunity for the public to make statements, and to facilitate their ability to be heard, which must be held in the locality in which the district or precinct is located.

We do not find the two statutes to be in conflict with one another. Rather, they can be read in conjunction with one another so as to effectuate the legislative purpose of the statute, as is required by general standards of statutory construction. *See Appeal of Ashland Electric*, 141 N.H. 336, 340 (1996) citing *Petition of Public Ser. Co. of N.H.*, 130 N.H. 282 (1988). Even if they were considered to be in conflict, it is an established principle of statutory construction that the later enacted, more detailed statute “will be regarded as an exception to the general enactment.” *State v. Farrow*, 140 N.H. 473, 476 (1995). RSA 38:25-a applies specifically to the subset of franchise expansions relative to village districts and precincts and was enacted in 2002; RSA 374:26 is a statute applicable to all public utilities and all franchise requests and was last amended in 1961. We find that, notwithstanding the apparent agreement of the interested parties, a public hearing in the Town of Conway is required, pursuant to RSA 38:25-a, before the franchise expansion can be authorized.

After reviewing the record currently before us in this matter, we find, on a nisi basis¹, that the Precinct's request to expand its franchise area is for the public good and should be approved. However, in order to satisfy the requirements of RSA 38:25-a, before authorization of the franchise expansion may take effect, we will hold a public hearing to take public statements on the franchise expansion request. That hearing will take place in Conway, at the Conway Police Station, at 7:00 p.m. on August 23, 2004. Unless comments received at the public hearing persuade us that an alternate conclusion or further investigation is required, authorization for the franchise expansion will become effective August 25, 2004.

Based upon the foregoing, it is hereby

ORDERED NISI, that subject to the effective date below, the request by the North Conway Water Precinct to expand its franchise area is hereby **APPROVED**; and it is

FURTHER ORDERED, that the Executive Director shall provide a copy of the order to the Clerk of the Town of Conway and shall cause a display ad providing public notice of the public statement hearing scheduled for August 23, 2004 to be published in the Coos County Democrat no later than August 20, 2004; and it is

FURTHER ORDERED, that this Order Nisi shall be effective August 25, 2004, unless the Commission provides otherwise in a supplemental order issued prior to the effective date.

¹ A nisi order, which typically is based on documents filed with the Commission and/or a Staff investigation and recommendation, becomes effective on a date certain unless the Commission determines prior to the effective date that there is a reason for the order not to take effect, such as the need for further investigation or a hearing.

By order of the Public Utilities Commission of New Hampshire this sixteenth day
of August, 2004.

Thomas B. Getz
Chairman

Graham Morrison
Commissioner

Attested by:

Debra A. Howland
Executive Director and Secretary