

**STATE OF NEW HAMPSHIRE
PUBLIC UTILITIES COMMISSION**

DW 13-101

WESTGATE ESTATES OF RAYMOND HOMEOWNERS ASSOCIATION

Request for Exemption from Regulation as a Public Utility

Order *Nisi* Granting Franchise and Approving Exemption from Regulation

ORDER NO. 25,568

September 3, 2013

I. BACKGROUND

On April 2, 2013, Westgate Estates of Raymond Homeowners Association (Westgate) filed, pursuant to RSA 362:4, a request for exemption from regulation as a public utility.

Westgate is a homeowners association that currently operates a water system that serves 32 residential customers in the Town of Raymond. 31 of the 32 customers are members of the homeowners association. Westgate states there are currently five additional lots for sale within the development it serves, which will bring the potential customer count to 37.

Westgate seeks exemption from regulation, pursuant to the provisions of RSA 362:4, I because it serves fewer than 75 consumers. The petition and subsequent docket filings, other than any information for which confidential treatment is requested of or granted by the Commission, is posted to the Commission's website at

<http://www.puc.nh.gov/Regulatory/Docketbk/2013/13-101.html>

Though operational since 2003 under a service agreement with Pennichuck Water Service Company, Westgate has never been regulated as a public utility believing that because service was limited to members of the association, it was not considered a public utility. In

2012, however, it became aware that one of its customers was not a member of the homeowners association, leading to this petition for exemption from regulation.

While Westgate members are charged \$625 annually for dues, \$558 of that amount is for the cost of providing water service. In 2012 the non-member was billed \$558, but refused to pay on the basis of a provision in the property's purchase and sale agreement. Moving forward, Westgate intends to treat the non-member the same as members of the association in relation to billing and terms for water service. In requesting exemption from regulation, Westgate cited the Commission's long standing practice of treating associations such as Westgate, not providing service to the general public, as one customer and therefore exempt from regulation as a public utility. Westgate stated that regulating the association's provision of water service would produce no corresponding public benefit.

On May 10, 2013, Staff filed a letter on behalf of itself and Westgate, requesting that the Commission defer ruling on Westgate's request for 60 days. Staff indicated that it had conducted discovery and had discussed the outstanding issues with Westgate. Westgate wished to discuss its options at its association membership meeting in late June. On June 10, 2013, the Commission approved the request for a 60 day extension by way of a secretarial letter, directing Staff to provide an update no later than July 8, 2013.

On July 8, 2013, Staff filed a letter recommending the Commission approve Westgate's request. Staff stated that, although Westgate was a homeowners association, because it served a non-member it could not be exempt from jurisdiction as a homeowners association under RSA 362:4, VII. Staff, therefore, concluded that Westgate could seek a permissive exemption under RSA 362:4, I. Staff also stated that, as a jurisdictional public utility, Westgate could not provide

free service pursuant to RSA 378:14 and must be compensated for the service provided to the non-member customer.¹ Staff stated that Westgate reported that an agreement had been reached with the non-member customer to pay the same water rate as that charged to members. Further, Westgate advised Staff that, while the association membership had determined to sell the water system to Hampstead Area Water Company, Inc., it was expected to take some time for that transaction to occur, and that Westgate wished to go ahead with its request for exemption. Staff recommended approval of Westgate's request for exemption from regulation.

II. COMMISSION ANALYSIS

This filing raises issues regarding whether Westgate is a public utility and, if so, whether exemption would be consistent with the public good. RSA 362:2 defines "public utility" to include every "association . . . owning, operating or managing any plant or equipment or any part of the same . . . for the manufacture or furnishing of . . . water to the public." RSA 362:4, I, which is specific to water utilities, refines the scope of Commission regulation further, providing a discretionary exemption from regulation, but not from the definition of "public utility," for certain small water suppliers. Specifically, "[i]f the whole of such water . . . system shall supply a less number of consumers than 75, each family tenement, store, or other establishment being considered a single consumer," then the Commission may exempt the utility from regulation upon a finding that such exemption is "consistent with the public good."

RSA 362:4, VII removes homeowners associations from the definition of a jurisdictional public utility if service is limited to its members. Section VII further provides that members of a

¹ Staff's letter provided an explanation that the non-member customer was refusing to pay for water service provided, relying on a condition listed within its purchase and sale agreement with the developer of Westgate Estates that the customer would receive water without cost in perpetuity. The condition was that the customer's premises be connected to the community water system at the developer's expense.

homeowners association constitute one customer when evaluating a request for discretionary exemption under RSA 362:4, I. Because Westgate has never been regulated as a public utility, we must also evaluate the request in the context of the franchise requirements found at RSA 374:22.

RSA 374:22, I provides that “[n]o person or business entity shall commence business as a public utility within this state . . . or shall 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.” Such requests can only be approved upon a determination that the franchise is for the public good. RSA 374:26. In evaluating a franchise request we assess, among other things, the managerial, financial, and technical expertise of the petitioners. *See Lower Bartlett Water Precinct*, Order No. 23,562, (September 25, 2000), 85 NH PUC 635, 641 (2000).

We find that Westgate has the requisite capability to provide water service. It meets all Department of Environmental Services requirements for suitability and availability of water. It has managed the system, through a contract with Pennichuck Water Service Company, since 2003. Westgate’s annual budget also provides for, among other things, insurance, maintenance, and payment of the requisite permit fees. We find, therefore, that granting a franchise is for the public good.

Because Westgate serves one non-member customer, it is a jurisdictional public utility and, therefore, seeks exemption under the provisions of RSA 362:4, I. We agree that a homeowners association serving its members plus one non-member customer may qualify for the exemption provided to utilities serving fewer than 75 water customers if such exemption would

be consistent with the public good. We must ask if the burdens of regulation would be outweighed by the benefits that regulation would provide to the one non-member customer. Because the non-member customer will receive the same quality of water as association members and will be charged the same rate for service, we do not see that the added burdens of regulation would provide sufficient benefits to the non-member customer. We understand that Westgate was not aware that the non-member customer was connected to the water system until 2012; and when approached for payment, that customer relied upon a purported agreement with the developer of the subdivision that the customer's water service would be provided without cost. We agree with Staff that all customers of jurisdictional utilities must pay for the water service provided and that Westgate could avail itself of the option to disconnect service in the event of non-payment. According to Staff, the non-member customer has now agreed to pay water charges equal to those charged to members. Thus there is no longer an issue of "free" service that would violate RSA 378:14.

Having reviewed the record and having considered the benefits of Commission regulation to the non-member customer, we find it unnecessary to regulate the service Westgate provides. We find that exempting Westgate from regulation pursuant to RSA 362:4 is consistent with the public good. Our approval of Westgate's exemption request in this docket is conditioned on Westgate 1) continuing to provide the same quality of service, at the same rates, to the non-member as is provided to members; 2) providing the non-member customer the same documentation as is provided to member customers whenever Westgate implements any change to its rates or service; and 3) limiting its provision of service to the association (including the additional lots if developed) and the single non-member customer.

Should circumstances change such that the non-member fails to receive the same quality of service that members receive, or is charged a rate that differs from the association members' charge for water service, the decision to exempt Westgate from regulation may be revisited. In the event Westgate expands its service territory to serve additional non-association customers, it will need to seek additional franchise approval.

RSA 374:26 authorizes the Commission to grant requests for franchise authority without a hearing "when all interested parties are in agreement." While we are not aware of any parties opposed to the franchise petition, we will nonetheless afford interested parties the opportunity to comment. Accordingly, we will issue our decision on a *nisi* basis.

Based upon the foregoing, it is hereby

ORDERED *NISI*, that Westgate Estates of Raymond Owners Association is hereby GRANTED a franchise for service provided to its members and to one non-association customer; and it is

FURTHER ORDERED, that Westgate's petition for exemption is hereby GRANTED, subject to the conditions delineated herein; and it is

FURTHER ORDERED, that in the event Westgate expands its service territory to serve additional non-association customers, it must seek additional franchise approval; and it is

FURTHER ORDERED, that Westgate provide a copy of this Order *Nisi* by first class mail to all of its current and known prospective customers by September 13, 2013 such mailing to be documented by affidavit filed with this office on or before September 30, 2013; and it is


FURTHER ORDERED, that all persons interested in responding to this Order *Nisi* be notified that they may submit their comments or file a written request for a hearing which states

the reason and basis for a hearing no later than September 20, 2013 for the Commission's consideration; and it is

FURTHER ORDERED, that any party interested in responding to such comments or request for hearing shall do so no later than September 27, 2013; and it is

FURTHER ORDERED, that this Order *Nisi* shall be effective October 3, 2013, unless Westgate fails to satisfy the mailing requirement set forth above or the Commission provides otherwise in a supplemental order issued prior to the effective date.

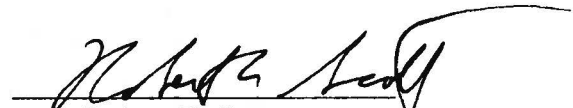
By order of the Public Utilities Commission of New Hampshire this third day of September, 2013.



Amy L. Ignatius
Chairman



Michael D. Harrington
Commissioner



Robert R. Scott
Commissioner

Attested by:



Debra A. Howland
Executive Director