

DW 04-235

STATE LINE PLAZA WATER COMPANY

Petition for Sale of Stock and Exemption from Regulation

Order Finding No Jurisdiction and, to the Extent Necessary, Approving Stipulation

ORDER NO. 24,563

December 15, 2005

**APPEARANCES:** Stephen P. St. Cyr & Associates by Mr. Stephen P. St. Cyr, on behalf of State Line Equity Partners, L.L.C. and Plaistow Project, L.L.C. and Marcia A.B. Thunberg, Esq. on behalf of Staff of the New Hampshire Public Utilities Commission

**I. PROCEDURAL HISTORY**

State Line Plaza Water Company (State Line) provides water service to 16 customers located in the Stateline Plaza Shopping Center in the Town of Plaistow, New Hampshire. On December 20, 2004, Plaistow Project, L.L.C. (Plaistow), the owner of Stateline Plaza Shopping Center, filed a petition with the Commission for approval *nunc pro tunc* for the sale of the State Line water system from State Line Equity Partners, LLC (Equity Partners) to Plaistow and for exemption from further regulation of the Commission. In the petition, Plaistow stated Equity Partners sold the shopping center to Plaistow on February 25, 2004.

On January 19, 2005, the Commission issued an Order of Notice establishing a Prehearing Conference on February 23, 2005. On February 14, 2005, Stephen P. St. Cyr filed testimony in support of the petition. On February 24, 2005, Staff filed a proposed procedural schedule for Commission approval. The Commission approved that schedule by secretarial letter dated February 24, 2005.

On March 21, 2005, Equity Partners and Plaistow requested the procedural schedule be suspended. The parties stated it was unclear whether the water system assets were

actually part of the February 25, 2004 sale of the shopping plaza and that they needed more time to assess the situation. By secretarial letter dated March 23, 2005, the Commission suspended the procedural schedule. On June 18, 2005, State Line filed a revised petition wherein Equity Partners and Plaistow requested approval of the sale of the water system and requested exemption from regulation. On August 11, 2005, Staff and the parties requested Commission approval of a revised procedural schedule, and the Commission approved that schedule by secretarial letter dated August 12, 2005.

On November 10, 2005, Staff and the parties filed a Stipulation with the Commission. On November 17, 2005, the Commission held a duly noticed hearing.

## **II. STIPULATION**

Among other things, Staff and the parties agreed that it is in the public interest for the outstanding stock of State Line to be conveyed to Plaistow and that Plaistow has the technical, financial and managerial expertise to operate the water system serving State Line customers. Plaistow also agreed to continue to purchase water from the City of Haverhill and Plaistow asserted that, to the best of its knowledge, Haverhill meets all applicable water quality standards. Furthermore, Plaistow agreed that it would bear the responsibility of repairing and replacing any plant necessary to provide service to its customers and that it would provide emergency numbers for its customers to call in event of a water outage or other incident.

In addition, the parties agreed that it is appropriate that State Line not be subject to further regulation of the Commission, whether as a result of a jurisdictional analysis pursuant to RSA 362:2, or a discretionary exemption pursuant to RSA 362:4. In either case, Plaistow agreed that it would fully disclose to prospective tenants the relationship of State Line with Plaistow, and would disclose the terms and conditions of water service to be provided.

Finally, Plaistow indicated it would increase the consumption rate to the State Line customers to what it is currently charged by Haverhill, \$2.21 per 100 cubic feet of water. State Line's currently authorized tariff rate for consumption is \$1.48. Plaistow also indicated that it would continue to bill customers a fixed quarterly charge of \$95.00 and acknowledged that it is its intent to increase the consumption charge in the future so that it remains the same as that charged by Haverhill.

### **III. COMMISSION ANALYSIS**

The extent of our jurisdiction is determined by RSA Chapter 362 and relevant case law. Pursuant to RSA 362:2, “[t]he term ‘public utility’ includes every corporation company, association, joint stock association, partnership and person...owning, operating or managing any plant or equipment or any part of the same for the conveyance of...water for the public.” Notwithstanding RSA 362:2, the Commission may permissively exempt a public utility pursuant to RSA 362:4, which states that “[i]f the whole of such water or sewage disposal system shall supply a less number of consumers than 75, each family, tenement, store, or other establishment being considered a single consumer, the commission may exempt any such water or sewer company from any and all provisions of this title whenever the commission may find such exemption consistent with the public good.”

We note that the Commission first approved permanent rates for State Line in 1995. *State Line Plaza Water Company*, 80 NH PUC 498 (1995). Two years later, in 1997, the New Hampshire Supreme Court found that the Commission's jurisdiction under RSA 362:2 only extended to utility service provided to the “undifferentiated public.” *Appeal of Zimmerman*, 141 NH 605 (1997). In that case, the Court found an underlying relationship existed between the provider and customers; a landlord was providing telephone service to commercial tenants.

Inasmuch as State Line has not been in for a rate case since 1995 and, given the development of the “undifferentiated public” test, we commence our review of the petitioner’s request in the light of the *Zimmerman* decision.

Applying *Zimmerman*, we consider whether the provider of service, in this case State Line, “enjoy[s] an underlying relationship with those persons who use [its] services that is sufficiently discrete as to differentiate them from other members of the relevant public.”

*Zimmerman*, 141 NH at 609. According to testimony at hearing, Equity Partners is not in the business of providing utility service; its primary business is ownership and rental of real estate. Hearing Transcript of November 17, 2005 (Tr. 11/17/05) at 16 line 24 and at 17 lines 1-4. We also know from the record that Equity Partners purchases its water from the City of Haverhill, Massachusetts and performs no water treatment. Tr. 11/17/05 at 13 lines 12-13. Plaistow plans to continue purchasing water from the City of Haverhill and will read meters and bill customers according to their usage at the same rate charged by the City of Haverhill. Tr. 11/17/05 at 13 lines 12-16. Additionally, Staff and the parties stipulated that it is Plaistow’s intent to continue to charge the same consumption charge as charged by the City of Haverhill. Exh. 4 at 3.

We recently found a pass-through of utility services, with no treatment by the landlord, not within our jurisdiction pursuant to *Zimmerman*. *Community Water and Wastewater Services, L.P.*, Order No. 24,499 (August 2, 2005). In *Community*, a mobile home park purchased water from a municipality and then passed water through to its tenants. The mobile home park owner and residents enjoyed a primary, landlord-tenant relationship to which the provision of utility service was incidental. We find that the manner in which service is provided to tenants of the Stateline Plaza Shopping Center is substantially similar to the facts in the *Community* and *Zimmerman* cases and that the provision of water service by the plaza owners to

the plaza tenants is incidental to and contingent upon the landlord-tenant relationship. Furthermore, we conclude that Equity Partners does not “offer...services to all comers without discrimination.” *Zimmerman* at 612. Accordingly, service to the Stateline Plaza Shopping Center tenants does not fall within our jurisdiction under RSA 362:2. As a result, we need not address discretionary exemption pursuant to RSA 362:4.

We understand that at the time the petition was filed by Plaistow, it was requesting exemption from Commission regulation pursuant to RSA 362:4, and not seeking a ruling that it was not a public utility as defined by RSA 362:2 and interpreted by the Court in *Zimmerman*. The subsequent Stipulation, however, was based in part on RSA 362:4 and acknowledged circumstances similar to the *Zimmerman* case. Inasmuch as our decision is based in part on representations contained in the Stipulation, we approve it to the extent necessary.

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

**ORDERED**, that the Stipulation entered in to between Staff, State Line Water Company, State Line Equity Partners, L.L.C., and Plaistow Project, L.L.C. is hereby **APPROVED** to the extent it enables the transfer of stock from Equity Partners to Plaistow and satisfies necessary conditions to complete the transaction; and it is

**FURTHER ORDERED**, that the provision of water service to tenants of Stateline Plaza Shopping Center does not constitute regulated utility service pursuant to RSA 362:2; and it is

**FURTHER ORDERED**, that Plaistow Project, L.L.C, the new owner of State Line Water Company, shall mail a copy of this order by first class mail to all water customers.

By order of the Public Utilities Commission of New Hampshire this fifteenth day  
of December, 2005.

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Thomas B. Getz  
Chairman

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Graham J. Morrison  
Commissioner

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Michael D. Harrington  
Commissioner

Attested by:

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Debra A. Howland  
Executive Director & Secretary