

**STATE OF NEW HAMPSHIRE
PUBLIC UTILITIES COMMISSION**

DW 07-003

**ATKINSON WOODS OWNERS ASSOCIATION
AND ATKINSON WOODS WATER, LLC**

Joint Petition to Transfer Franchise

Order Approving Transfer

ORDER NO. 24,754

May 25, 2007

I. PROCEDURAL HISTORY

On January 2, 2007, the Atkinson Woods Owners Association¹ and Atkinson Woods Water, LLC (AWW) filed a joint petition for: (1) approval of the transfer of the water utility assets of AWW to the association, and (2) exemption for the association from regulation pursuant to RSA 362:2 once the assets were so transferred. Attached to the petition was a purchase and sale agreement, dated December 26, 2006, for the sale of the assets of AWW, including the water system equipment, structures, easements, and water rights. The association agreed to pay \$75,000.00, conditioned, among other things, upon approval by the Commission. The petitioners asset that time is of the essence due to financing arranged with a lending institution. Therefore, according to the purchase and sale agreement, a closing would occur within 30 days upon approval granted by the Commission.

On January 31, 2007, the Commission issued an order of notice scheduling a pre-hearing conference and technical session for March 23, 2007. The Commission also directed the mailing of the order of notice to the Atkinson Town Clerk and mailing or hand delivery of the order of

¹ According to the Association, it inadvertently filed its petition under the name Atkinson Woods Homeowners Association. We apply the correct name throughout.

notice to all association members and customers of AWW. All such mailings were completed and affidavits documenting same were filed with the Commission on March 9, 2007.

On February 23, 2007, the Staff propounded its data requests on AWW and the association. On March 15 and March 16, respectively, the Association and AWW provided responses to the data requests.

The pre-hearing conference and technical session were held as scheduled on March 23, 2007. There were no requests for intervention in this proceeding, nor were there any objections to the joint petition. At the pre-hearing conference, Staff noted the objective of the parties to proceed as expeditiously as possible and to incur as few expenses as possible. Staff stated that all data requests had been answered and that there were no outstanding issues. Staff stated it believed there was no need for additional discovery, testimony, or hearings. Lastly, Staff recommended the proceeding be resolved by the filing and approval of a settlement agreement.

Representatives of the Association also attended the prehearing conference and described the governing board of the organization. The association also described the process it intends to use to handle customer complaints. Customers with a service question would have a designated board member to call day or night. That board member would then contact the operator, Epping Well and Pump, if assistance is needed. The association also stated that any concerns regarding rates, bills, etc. could also be addressed at regular board meetings, which occur monthly, or at annual meetings of the association at which officers are elected.

After the pre-hearing conference and technical session, Staff filed a proposed procedural schedule which contained a single date, April 20, 2007, for filing a settlement agreement. The Commission approved this schedule in a secretarial letter dated April 3, 2007.

In accordance with the procedural schedule, on April 20, 2007 the association, AWW, and Staff filed a settlement agreement for the Commission's consideration and requested the Commission issue an order *nisi* approving the stipulation.

II. STIPULATION TERMS

The association, AWW, and Staff (together, the signatories) agreed as follows:

A. Sale of System.

1. The signatories agree that it is in the public interest for the assets of AWW to be sold to the Association, consistent with the Joint Petition and the Purchase and Sale Agreement filed in this docket. The Association will provide water service only to its members.
2. The Association has retained a certified operator, Epping Well & Pump Co., Inc., which currently operates the water system, to continue to operate the system.
3. There are no pressing needs for repair or capital improvements to the water system.
4. There are no meters, and the Association will continue to use the current rate structure. The Association understands it will not be subject to regulation after the transfer. It has sufficient capital reserves to address any maintenance or capital improvement needs that arise. The Association will set aside surplus fees as well as some Association reserved funds as a separate reserve fund for the water system and adjust rates as necessary to maintain an appropriate reserve.
5. The Association has a mechanism in place for handling water service complaints, as well as billing inquiries, at the Association's board's regular monthly meetings and at the Association's annual meeting. The Association has previously addressed water conservation issues and is prepared to do so again in the future, if necessary.

B. Exemption from Regulation.

The Association is the condominium owners' association for the 56-unit, Atkinson Woods townhouses. The Association holds regular monthly board meetings and the Association elects officers at its annual meeting. AWW is a regulated public utility and provides water service in the Town of Atkinson to the 56 customers in the Atkinson Woods condominiums only. All 56 AWW customers are members of the Association.

1. The signatories agree that, after transfer of the assets from AWW, the water system will be exempt from regulation pursuant to RSA 362:2 and PUC Rule 602.13(d). As such, no tariff will be necessary.
2. The signatories note that compliance with RSA 374:22, III, regarding meeting the requirements of the Department of Environmental Services regarding the suitability and availability for the water system was previously satisfied in an earlier docket involving the same water system, Docket 03-103. See, *Hall Farm Realty Trust*, 88 NH PUC 608 (2003). Nothing has changed since that time except that the Association will not be a public utility after the transfer.

C. Other.

1. The signatories agree that there are no customer service deposits held by AWW.
2. The signatories agree that no further discovery, testimony or evidentiary hearings are necessary to resolve the issues.
3. The signatories seek an Order Nisi approving the transfer of the assets of AWW and exemption from regulation of Association after the transfer under any and all provisions of Title XXXIV, Public Utilities of the N.H. Revised Statutes Annotated. The signatories agree that RSA 362:2, 362:4 and PUC Rule 602.13(d) support the Association not being a public utility after the transfer.
4. The signatories agree that, pursuant to RSA 374:28, it is in the public good for the Commission to determine that it is expedient for AWW after the transfer of the assets to cease operations and to no longer continue to serve as a public utility.
5. The signatories agree that, in the event that the Commission grants the petition and finds the Association is not a public utility, the rates presently on file regarding water service provided by AWW should be deemed to no longer apply. Those rates are pursuant to PUC Order No. 24,404 in Docket No. DW 04-001 dated November 19, 2004 and as modified by Orders 24,418 and 24,593 dated December 30, 2004 and March 3, 2006, respectively, in the same docket.
6. The signatories agree that for purposes of completing a full record in this proceeding that the Joint Petition, the discovery responses and this Stipulation should be entered as full exhibits in this proceeding and that said exhibits be marked as Exhibit 1, Exhibit 2, and Exhibit 3, respectively.

III. COMMISSION ANALYSIS

The transfer of water utility assets and franchises is governed by RSA 374:22 and RSA 374:30. Pursuant to RSA 374:22, I, “[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.” The Commission grants requests for franchise authority and allows an entity to engage in the business of a public utility when it finds, after due hearing, that the exercise of the right, privilege, or franchise is for the public good. *See* RSA 374:26.

Pursuant to RSA 374:30 “[a]ny public utility may transfer or lease its franchise, works or system, or any part of such franchise, works or system, exercised or located in this state ...when the commission shall find that it will be for the public good and shall make an order assenting thereto.” In determining whether a proposed franchise or franchise transfer is for the public good, the Commission assesses, among other things, the managerial, financial, and technical expertise of the petitioners. *See Lower Bartlett Water Precinct*, 85 NH PUC 635, 641 (2000). Lastly, pursuant to RSA 362:2 and N.H. Code Admin. Rules. Puc 602.13(d), a regulated utility does not include an association of residents supplying water to themselves.

The association asks us to approve its purchase and acquisition of the water system serving its 56 condominium owners/members. According to the petition, the association and AWW entered into a purchase and sales agreement on December 26, 2006 to effectuate the transfer. The Association paid AWW \$10,000 as a deposit toward the purchase price of \$75,000. The association has arranged to finance the remaining \$65,000 either through a bank loan or private loan through AWW.

At the prehearing conference, the association explained that it meets annually and assesses members fees associated with maintaining the common areas. The association expressed an intention to use same billing system as is presently employed to bill members for costs associated with operating the water system. Importantly, the Association stated it plans to accumulate a surplus in a reserve fund to capital improvements or other large maintenance items. Exh. 3 at 5. In situations where a system serves a small number of customers, a fund such as this helps minimize rate spikes and helps maintain rate stability for its members. The association has already selected its water system operator, Epping Well & Pump Co.. As stated earlier, the association will inform members of the telephone numbers of association board members so that, in the event of a problem, members can contact a board member who in turn will contact Epping Well & Pump Co., Inc. to fix the problem. Based on this and other evidence in the filings, we find that the association has demonstrated that it has the requisite managerial, financial, and technical expertise to operate a water system. We thus find transferring the franchise will be for the public good.

The Commission has consistently concluded that a homeowners' association is not subject to regulation as a public utility because it is providing service to itself as distinct from the public on an undifferentiated basis. *Property Owners Assn. at Suissevale, Inc.*, Order No. 24,698 (Nov. 8, 2006), slip op. at 3-4 (citing *Appeal of Zimmerman*, 141 N.H. 605 (1997)). Accordingly, upon transfer of the system to the association, it will no longer be subject to regulation by the Commission.

Based upon the foregoing, it is hereby

ORDERED, that the transfer of the franchise serving the 56-unit Atkinson Woods townhouses from Atkinson Woods Water, LLC to the Atkinson Woods Owners Association is hereby APPROVED; and it is

FURTHER ORDERED, that all of the terms of the settlement stipulation are incorporated in our Order herein; and it is

FURTHER ORDERED, that Atkinson Woods Water, LLC and Atkinson Woods Owners Association may consummate their agreement to transfer the water system equipment, structures, easements, water rights, and franchise for the 56-unit Atkinson Woods townhouses from Atkinson Woods Water, LLC to the Atkinson Woods Owners Association; and it is

FURTHER ORDERED, that the Atkinson Woods Owners Association mail, by first class mail, or hand deliver a copy of this order to the Atkinson Town Clerk and to all customers of the Atkinson Woods water system.

By order of the Public Utilities Commission of New Hampshire this twenty-fifth day of May, 2007.

Thomas B. Getz
Chairman

Graham J. Morrison
Commissioner

Clifton C. Below
Commissioner

Attested by:

Debra A. Howland
Executive Director & Secretary