

DW 01-054

WEST EPPING WATER COMPANY

Investigation into Status of Franchise

Order Following Hearing

O R D E R N O. 23,909

January 29, 2002

APPEARANCES: Ingersoll & Sullivan, P.A. by Eugene F. Sullivan, III, Esq. for West Epping Water Company; Rick St. Jean, *pro se*; Sheehan Phinney Bass + Green, P.A. by James S. LaMontagne, Esq. for Paul R. Wright; and Donald M. Kreis, Esq. for the Staff of the New Hampshire Public Utilities Commission.

I. BACKGROUND AND PROCEDURAL HISTORY

A. Introduction

RSA 374:3 vests in the New Hampshire Public Utilities Commission (Commission) responsibility for "the general supervision of all public utilities" in the State. Pursuant to that authority, the Commission opened this docket on March 15, 2001 at the request of its Staff to conduct an investigation of West Epping Water Company (WEWC), a water utility serving approximately 12 customers in the Town of Epping. As stated in the Order of Notice entered on the date the docket was opened, 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 investigation was triggered by a letter of complaint received from Paul R. Wright, on whose property one or more of WEWC's wells is located, noting that WEWC had lost its status as a New Hampshire corporation in good standing because of non-payment of the appropriate fees to the New Hampshire Secretary of State. On October 9, 2001, WEWC filed a petition seeking approval to dissolve, and to transfer its system and works to a new system users association.

B. Background

WEWC was first franchised in 1988. See *West Epping Water Co.*, 73 NH PUC 243 (1988), *reh'g den.*, 73 NH PUC 301 (1988). At the time, WEWC was an unincorporated association of what were then its three customers, who were also providing water to a total of 11 tenants. *Id.* at 246. The three customers, two of whom were Richard Fisher and Judith Golden, were sharing the costs of operating the system and, thus, Commission approval of rates was deemed "not necessary." *Id.* at 246, 247. WEWC has never charged rates in connection with its provision of service.

The service territory approved in 1988 included eleven parcels of land with frontage on Hickory Hill Road, an 11.53

parcel of land between property of the Boston & Maine Railroad and Mill Road containing a six-inch well of the Company, and an undeveloped 11-acre parcel adjacent to the 11.53 acre parcel. *Id.* at 245.

WEWC sought an expansion of its franchise territory in 1990 but the docket was closed without prejudice based on the Company's failure to provide the necessary information. See *West Epping Water Co.*, 75 NH PUC 679 (1990). Four years later, the Commission granted WEWC authority to expand its service territory to include a 1.5 acre lot on Mill Road that contained a 12-unit apartment building. See *West Epping Water Co.*, 79 NH PUC 472, 473 (1994). The Commission noted that the 1994 Order concerned the same request the Company had originally filed in 1990. *Id.* In its Order approving the franchise expansion request, the Commission noted that (1) the WEWC system had not been, but was then, subject by virtue of its size to regulation by the Department of Environmental Services (DES), (2) that the Company was addressing five "significant deficiencies" noted in a 1984 DES sanitary survey, and (3) that the Commission was aware of no service problems or customer complaints with regard to the Company. *Id.*

The Commission Staff conducted an investigation of WEWC

in 1995, involving

serious concerns about, among other things, what water source or sources supply the water system of [WEWC] . . . ; what interconnections may exist between the system and other facilities such as the Epping Indian Springs and the EIS Corporation bottling plant in the Town of Raymond; what water may have been or is being imported or exported from the system through such interconnections; the possible interrelationship of some 14 known wells and the possibility of other unknown wells owned or operated by Mr. Richard Fisher or other principals of [WEWC], or otherwise related to the operations of the Company; the possibility of adverse health impacts to customers; the extent of misrepresentations made by the Company to Commission Staff regarding such interconnections and sources and other matters; and possible violations of various state statutes and rules of this Commission.

West Epping Water Co., 80 NH PUC 216 (1995). This 1995 Order reflected a difficulty the Commission was apparently having at the time in receiving accurate or complete information about the Company's operations, since the Order required WEWC to submit a map showing all wells currently or formerly used by the Company as well as information about system interconnections, installed facilities, affiliate transactions and certain of the Company's customers. *Id.* at 217. The Company provided responses on May 15, 1995 and June 15, 1995 but the docket remained open until 1999 when it was closed upon the recommendation of Water Engineer Douglas W. Brogan.

A March 4, 1999 memorandum to the Commission from Mr.

Brogan noted that (1) the information received from the Company in 1995 had become dated, (2) the number of customers served by WEWC peaked at 25 at the time service was extended to the apartment building referenced *supra*, but had since dipped to "about 10" because the apartment building and one or two other customers were "now reportedly served by their own wells," (3) complaints about the Company had been either "minimal" or "nonexistent," (4) many of the issues involving the Company fell more directly under the jurisdiction of DES, which was then "continuing to pursue the many system, compliance and health-related violations" noted by that agency in 1997, and (5) given limited Staff resources, closure of the docket was warranted even though "the original hope and aspiration of Staff was to bring an apparent miscreant to justice, as it were." March 4, 1999 Memorandum of Douglas W. Brogan in Docket No. DE 95-108 at 1-2. Mr. Brogan noted that "[c]losing the docket would not preclude pursuing issues on a more appropriate and limited basis, use at any later date of the information gained during the investigation, or opening of a new docket should the status of the Company change or new issues or information emerge to justify greater Staff involvement." *Id.* at 2.

Meanwhile, difficulties with the Commission's regulation

of WEWC continued. A December 1995 audit report concluded that "[t]he financial records of the Company leave much to be desired" and "[r]eceipts in a box do not constitute recordkeeping in any form close to that required by this Commission." Audit Report of December 28, 1995 by PUC Examiner Michelle A. Caraway at 5. The auditor expressed "serious doubts about the abilities of either of the Company's Representatives to maintain the Company's records in the manner prescribed by this Commission." *Id.* Letters on file, from Staff to WEWC and dated March 13, 1998, January 6, 1999, March 8, 1999, June 21, 2000 and July 12, 2000 indicate an ongoing problem with late-filed, unfiled or incompletely filed annual reports.

On December 2, 1999, Assistant Finance Director Stephen P. Frink wrote to WEWC President Judith M. Golden. Mr. Frink noted that he had received a phone call on March 24, 1999 from Mr. Fisher in his capacity as WEWC's system operator. According to Mr. Frink, Mr. Fisher stated "that the Company had transferred its assets to the homeowners association and intended to petition the Commission for approval to discontinue service." December 2, 1999 letter from Assistant Finance Director Stephen P. Frink to Judith M. Golden at 1. Mr. Frink advised Ms. Golden that any such transfer required

Commission approval, and he instructed her to seek such approval by petition if the Company wished to pursue such a transfer.

C. The Instant Proceeding

On February 14, 2001, Mr. Wright submitted to Mr. Brogan at the Commission what Mr. Wright delineated as a "formal complaint" against WEWC. Mr. Wright noted that the Secretary of State had dissolved the corporation in 1996 for non-payment of registration fees. Mr. Wright suggested that in these circumstances the Company should also be divested of its utility franchise.

An inquiry to the Corporation Division of the New Hampshire Department of State confirmed the facts as alleged by Mr. Wright. Accordingly, the Commission opened the instant docket and entered an Order of Notice on March 15, 2001. Pursuant to that Order of Notice, the Commission conducted a Pre-Hearing Conference on April 11, 2001 and thereafter entered Order No. 23,682 (April 20, 2001) establishing a procedural schedule and granting the intervention petitions of Mr. Wright and Rick St. Jean, who identified himself as a member of the Company's Board of Directors.

On April 16, 2001, Mr. Wright filed suit in the Rockingham County Superior Court against WEWC, Mr. Fisher and

Ms. Golden. The lawsuit alleged that two wells exist on Mr. Wright's property in Epping and that WEWC was using one of those wells to supply the above-referenced apartment building, Mr. Wright and another neighbor with water. According to Mr. Wright's petition, the second well was not functioning and had not been in use for several years. Mr. Wright's lawsuit seeks to extinguish the easement by which WEWC has been using one or both of these wells. The case remains pending and is presently scheduled for trial in June of 2002.

Discovery commenced in the proceeding before the Commission but did not go smoothly. Concerns that WEWC was not responding adequately to discovery requests led Mr. Wright to request a stay in the procedural schedule on May 15, 2001 and for Staff to move to compel discovery responses on June 4, 2001. Mr. Fisher wrote to the Commission on June 6, 2001, indicating that at least some of the discovery problems were the result of Staff having written to WEWC at an outdated address. By secretarial letter dated June 8, 2001, the Commission responded to these filings by revising the procedural schedule to provide more time for discovery.

Pursuant to that revised schedule, the parties and Staff submitted pre-filed direct testimony on July 11, 2001. Specifically, WEWC filed testimony of Mr. Fisher, Mr. Wright

provided his own testimony and Staff submitted testimony of Mr. Brogan and Henry Bergeron of the Commission's Finance Department.

On July 31, 2001, acting through counsel, WEWC filed a letter addressed to the Commission's General Counsel and its Executive Director and Secretary. The subject of the letter was a data request that had been submitted to WEWC by Staff, seeking information about WEWC's counsel, who had been previously employed by the Commission. The data request asked counsel to state whether he was involved in any matters during his employment with the Commission that related to WEWC.¹ The July 31 letter answered this query in the negative, except as to certain general conversations with Mr. Brogan and another

¹ Specifically, the data request at issue stated:

Please state whether counsel to WEWC ever handled any matters related to WEWC during his employment with the Commission and, if so, provide complete details including a precise description of the matters handled and the applicable dates. Please further state whether, either in connection with matters handled or otherwise, counsel during his employment with the Commission ever had any conversations with other employees of the Commission regarding WEWC that would be covered with attorney-client privilege or viewed confidential documents in the Commission's files regarding WEWC. If so, please identify the Staff persons involved and/or the nature of the documents involved and provide the relevant dates.

member of the Commission's Engineering Department. The July 31 letter drew the inference that the Commission and/or its Staff had concerns about counsel's participation in the proceeding given the requirements of the New Hampshire Rules of Professional Conduct. Accordingly, the letter (1) sought the Commission's consent to counsel's continued representation of WEWC, (2) requested suspension of the procedural schedule "until this issue is resolved," and (3) contained a statement from counsel that "[g]iven the gravity of the allegations pregnant within [Staff's] data request, I do not feel I can effectively represent my client while this cloud hangs over my actions." July 31, 2001 letter of Eugene F. Sullivan, III, Esq. to Executive Director Thomas B. Getz et al. at 3. The Commission did not suspend the procedural schedule nor otherwise respond to the matters raised in the July 31 letter.

On August 1, 2001 the Commission received a letter from Mr. St. Jean. The letter took exception to "some of the material and so called facts provided by Mr. Wright and allegations made by Mr. Wright." July 29, 2001 letter from Rick St. Jean at 1.

The parties and Staff met as scheduled for a Settlement Conference on August 15, 2001. Staff thereafter advised the Commission by letter that settlement was not achieved.

Mr. Wright moved to reschedule the merits hearing on August 21, 2001, based on his counsel's unavailability. The Commission granted this request.

On October 9, 2001, WEWC submitted a pleading captioned "Petition of West Epping Water Company, Inc. for Permission to Discontinue Business as a Public Utility in a Limited Area of the Town of Epping and for Approval of the Transfer of its Franchise and Works to a Non-Profit User's Association Known as West Epping Water Users, Inc." (October 9 Petition). The Commission treated this pleading as an alternative proposal submitted in this docket, as opposed to opening a separate docket to consider the petition.

A merits hearing was convened on October 12, 2001 as scheduled. The parties and Staff had not completed the presentation of the evidence at the conclusion of the hearing day and, accordingly, additional hearings took place on November 2 and November 7, 2001. During the November 7 hearing, WEWC made an oral motion to designate Mr. Brogan and Staff Attorney Donald M. Kreis as Staff Advocates pursuant to RSA 363:32. A Staff Advocate is precluded from advising the Commission "with respect to matters at issue" in the case. RSA 363:25. The Commission granted the motion as to Mr. Brogan but not as to Mr. Kreis, although the Commission treated Mr.

Kreis as a Staff Advocate pending resolution of the motion. The Commission granted WEWC's request to submit a written brief in support of its request. The Company did so, Mr. Wright thereafter filed a brief in opposition and Staff submitted a letter taking no position. On December 21, 2001, the Commission entered Order No. 23,873, denying WEWC's motion to designate Mr. Kreis as a Staff Advocate.

II. POSITIONS OF THE PARTIES AND STAFF

A. Staff

Through the testimony of Mr. Brogan, Staff initially recommended that the WEWC be shut down. In the alternative, Mr. Brogan recommended that Staff and the parties be given more time for consideration of additional reporting, monitoring and other requirements as well as the establishment of a deadline for the filing of a rate case. Both Mr. Brogan and Mr. Bergeron recommended that the Company be required to charge rates, as opposed to relying on the contributed resources of its principals, if it is to maintain its franchise.

Alluding to WEWC's representation at the Pre-Hearing Conference that its objective is simply to provide residents of its service territory with free water, Mr. Brogan alleged that the true motivation of the Company's principals is to

create favorable conditions for various real estate and business ventures in which they have been or intend to be involved.

According to Mr. Brogan, the Company's conduct since its franchising in 1988 calls into question fundamental aspects of its character and management ability. Both in his pre-filed testimony and on the stand, Mr. Brogan sought to identify numerous examples of Mr. Fisher having given contradictory, incomplete or false information to the Commission about WEWC's operations. Mr. Brogan also drew the Commission's attention to litigation between Mr. Fisher and the New Hampshire Land Surveyors Association, in which it was alleged that Mr. Fisher engaged in the practice of land surveying without a license. Mr. Brogan noted that the case was ultimately settled.

Mr. Brogan disagreed with the Company's suggestion at the Pre-Hearing Conference that it has never had any problems with water quality. According to Mr. Brogan, WEWC faced sustained deterioration in water quality during 1995 and 1996, as well as a "boil water" order in 1997. Mr. Brogan said that the Company has sought to blame these problems on the State of New Hampshire's expansion of the nearby Route 101, although formal claims against the State in connection with the project and its alleged effect on WEWC were denied.

Mr. Brogan testified that the Commission has received a few complaints from WEWC customers. In particular, he referred to a 1997 complaint in which the Company allegedly harassed a customer who was installing a well designed to allow her to discontinue service from WEWC. According to Mr. Brogan, the WEWC service territory consists of a close-knit neighborhood in which residents are "at the mercy of the Company." Exhibit 12, Testimony of Douglas W. Brogan at 9.

Asked to summarize his comments in his pre-filed testimony, Mr. Brogan stated:

This is a system for which full compliance is always just around the corner. The number of easements, plans, deeds, corporations and ventures relating to this one tiny company is mind-boggling, for lack of a better word. It is a system that would seem to require an army of lawyers and other personnel to stay abreast of. Contrary to company assertions that it is not too good at the paperwork end of things . . . it is in fact massively efficient at churning out paperwork when it suits the Company's purposes. Yet the level of compliance with even basic requirements is poor.

Id. at 10.

Mr. Brogan acknowledged that WEWC had recently begun bacteria testing in the part of its service territory serving Mill Road. However, Mr. Brogan said this has

very limited implications at best. One must weigh compliance over a very few weeks under the heat of this docket (threatening receivership, etc.) against eight years of very poor historic compliance. While

I do not mean to be harsh on this Company, history suggests that as soon as the heat is off, the compliance will once again fade. I believe these must of necessity be overriding concerns in any consideration of the future of this Company.

Id.

In testimony and in response to a record request, Mr. Brogan supported the proposed users association, with certain caveats. Mr. Brogan expressed particular concerns about language in the new entity's Articles of Agreement that (1) refers throughout to "user" of the system without defining this term, (2) names Ms. Golden as the person issuing initial shares and holding unissued shares, (3) lists the home address of Mr. Fisher and Ms. Golden as the address of the users' association, (4) provides for reversion of the entity's assets to Ms. Golden in the event of dissolution of the new entity,² and (5) lists Ms. Fisher and Ms. Golden as initial incorporators. Additionally, Mr. Brogan is concerned about Mr. Fisher being listed as chairman of the users' association

² With regard to this issue, Mr. Brogan recommends that any reference to reversion of the association's assets be eliminated from the Articles of Agreement or, in the alternative, that the document provide for the equal division among system users of its assets in the event of dissolution. We note that the latter course is consistent with the applicable statute. See RSA 292:2, III (requiring Articles of Agreement forming nonprofit corporation include "provisions for disposition of the corporate assets in the event of dissolution of the corporation, including the prioritization of rights of shareholders and members to corporate assets").

and signatory at the end of the proposed transfer agreement.

With regard to Exhibit 4 to the October 9 Petition, which purports to be a record of a vote taken by the directors of the new entity, Mr. Brogan identifies what he characterizes as a "fatal flaw:" that the "actual sources" of water used by the users' association in the Mill Pond Road area of the franchise territory - i.e., the well or wells on Mr. Wright's property - are "to be retained by West Epping Water Co[.] Not For Profit." Exhibit 33 at 3; Exhibit 4 to October 9 Petition at 1. According to Mr. Brogan, this provision would leave WEWC in control of these wells, providing or selling water to the users' association and thus a public utility within the meaning of RSA 362:2, and "in a role too closely related to the function of the current WEWC system." Exhibit 33 at 3.

Finally, as to the formation of the users' association, Mr. Brogan recommends that the Commission "ascertain on its own the true extent of customer participation" in the users' association, specify that any transfer of the system to a users' association be on a permanent rather than on a trial basis, require that the transfer include all necessary assets and easements, and specify that the transfer occur by a date certain, failing which "the Commission should move forward to shut the system down." *Id.*

B. Paul R. Wright

Mr. Wright argued in his pre-filed testimony and on the stand that WEWC's franchise should be revoked. According to Mr. Wright, this result is appropriate in light of WEWC's formal dissolution as a company by the Secretary of State, and the Company's transfer of its assets to a successor entity, a newly registered not-for-profit corporation of the same name. According to Mr. Wright, by this conduct WEWC has violated RSA 374:30, which requires a utility to transfer its franchise only with prior Commission approval.

According to Mr. Wright, awarding the franchise to this successor WEWC would not be in the public interest because WEWC is operating wells in violation of town ordinances and DES regulations. The wells in question are those on Mr. Wright's property, according to his testimony.

Mr. Wright further accuses WEWC of what he describes as "bad faith actions." Exhibit 5 at 6. Specifically, he accuses WEWC of violating RSA 485-A:30-b, RSA 358-A:10, RSA 374:22, RSA 374:30, RSA 374:31, RSA 485:8, RSA 485:3-a, sections 7.4.5 and 7.4.6 of the Town of Epping Aquifer Protection Ordinance, the Town of Epping's Health Officer Regulations and the Town's setback requirements. According to Mr. Wright, WEWC has engaged in illegal excavations,

misrepresented the location of wells, failed to submit annual reports to the Secretary of State from 1997 to 2000, failed to make the required annual report to the Commission, failed to employ a licensed system operator as required by the DES, allowed itself to be dissolved and failed to reinstate itself properly. Further, Mr. Wright contended that additional evidence of WEWC's bad faith consists of its failure to comply with the Commission's procedural requirements with regard to discovery in this docket, and having accused Mr. Wright of having "ulterior motives" without specifying the nature of their accusations. *Id.* at 8. According to Mr. Wright, WEWC has "shown a proclivity to misrepresent facts, disregard all regulations, rules and procedures." *Id.*

The last point in Mr. Wright's pre-filed testimony is that the newly incorporated not-for-profit WEWU, Inc. cannot be franchised by the Commission because the Company is unable to comply with RSA 374:22. This statute provides that no water company may receive a utility franchise from the Commission "without first satisfying any requirements of the department of environmental services concerning the suitability and availability of water for the applicant's proposed water utility."

At the conclusion of the case Mr. Wright took certain

positions through counsel relative to potential limitations on the proposed users' association that he would support. To the extent relevant, these are discussed *infra*.

C. Rick St. Jean

Mr. St. Jean did not submit pre-filed testimony or offer evidence on his own behalf. WEWC called Mr. St. Jean to the stand as a rebuttal witness. In his rebuttal testimony, and in the various filings he has made with the Commission, Mr. St. Jean made clear his desire to support the Company's objectives in the proceeding.

D. West Epping Water Company

WEWC presented evidence and testimony through Mr. Fisher, who identified himself in his pre-filed testimony as the Company's acting president and certified operator. Mr. Fisher stated that WEWC faces four major obstacles: (1) Mr. Wright's lawsuit, (2) its failure to "file its books and records in accordance with the standards of the New Hampshire Public Utilities Commission," (3) its failure to maintain itself as a corporation in good standing, and (4) the Company's ongoing management and its responsibility for providing safe and adequate service to its customers. Exhibit 2 at 3.

Mr. Fisher noted that WEWC "had not prepared and filed annual reports with the commission over a period of some

years" but has retained New Hampshire Bookkeeping Services to bring the Company into compliance. *Id.* at 5. Conceding that WEWC was administratively dissolved by the Secretary of State, Mr. Fisher nevertheless took the position that "administrative dissolution can not in and of itself result in the transfer of property or assets nor does it result in the complete disregard of the entity for all purposes." *Id.* at 6. Thus, according to Mr. Fisher, the original WEWC has continued to exist for purposes of Commission regulation. He therefore urges the Commission to permit transfer of the Company's assets to the recently incorporated not-for-profit entity, which, he said, "would request authorization to charge rates designed to recover the ongoing expenses of the Company and to fund a depreciation reserve to be used by the Company for maintenance, repair and replacement of capital items." *Id.* at 7.

Mr. Fisher contended that receivership would be an inappropriate result because WEWC has never failed to provide safe and adequate service. He indicated an intention to "take control" personally of the not-for-profit entity with the assistance of Ms. Golden. *Id.* at 8. According to Mr. Fisher, head injuries suffered by Ms. Golden are responsible for the Company's present state of non-compliance with the applicable

Commission requirements.

The petition filed by WEWC on October 9, 2001 posits a somewhat different outcome than the one reflected in Mr. Fisher's pre-filed testimony. This filing requests permission for WEWC to cease business as a public utility and to transfer for nominal consideration its franchise, equipment and works to an entity identified as West Epping Water Users, Inc. (WEWU, Inc.).

According to this filing, simply shutting down the WEWC system would cause substantial harm to customers of the system because the apartment building served by WEWC currently has no other source of water available to it and other customers would be forced to incur expenses of between \$3,000 and \$4,000 each in order to drill wells or otherwise acquire water service. The filing identifies WEWU, Inc. as a non-profit New Hampshire corporation in good standing, established solely to acquire, own and operate the WEWC franchise as a users' association.

WEWC avers that each "user or customer" of the current WEWC system is entitled to "membership in the corporation" with each member having equal voting rights on all issues, including rates and terms of service. Petition to Discontinue Business and Transfer Assets dated October 9, 2001 at ¶ 6.

According to WEWC, allowing WEWU, Inc. to assume the WEWC franchise would eliminate the need for Commission regulation because the association would be providing service to itself.

Appended to the petition are four documents: (1) the certificate of incorporation for WEWU, Inc., (2) the Articles of Agreement governing WEWU, Inc., (3) the Transfer Agreement by which WEWC would convey its franchise, system and works to the new association, and (4) a document indicating that on August 20, 2001 the directors of both the original WEWC and the newly incorporated WEWC (who are the same persons) met and voted to transfer the Company's assets to the proposed users' association. The Articles of Agreement specify that each user shall receive one share of stock, that Ms. Golden currently holds all of the new entity's initial 100 shares and that, in the event of dissolution, the assets of the corporation would revert to Ms. Golden. The Articles of Agreement further specify that the address at which the new entity would conduct business is the current home address of Mr. Fisher and Ms. Golden.

During his cross-examination, Mr. Fisher indicated that although he himself is not a customer of WEWC he intends to serve as an officer of the proposed users' association.

Transcript of November 2, 2001 hearing (Transcript II) at 37-

40. Mr. Fisher stated that he "would love not to be a director" but did not "feel that the group would feel anything but that I was deserting them if I left now. . . . [O]nce they get on their feet, they can do what they want." *Id.* at 38-39. He indicated that Ms. Golden would distribute eleven shares - one for each of the ten individual households on the system and an eleventh to the owner of the apartment building - and that, although Ms. Golden would retain the additional, non-issued shares, these would not have voting rights. *Id.* at 43-44. Thus, as to the governance of the users' association, Mr. Fisher made clear that there would be "11 votes," one for each customer receiving a share. *Id.* at 44. He also said that he "would like to be within the next couple of years" a user of the system, which he said would entitle him to a share of voting stock in the association. *Id.* at 44-45.

With regard to the provision in the Articles of Agreement providing that upon failure of the association its shares would revert back to Ms. Golden, Mr. Fisher testified that it was not WEWC's intention to retain its utility franchise. *Id.* at 46-47. According to Mr. Fisher, if the users' association failed and the system were to revert back to Ms. Golden WEWC would be "a public water supply, but not a public utility." *Id.* at 47.

Mr. Fisher testified in detail as to the composition of the Board of Directors of the users association. He said the Board would consist of himself, Ms. Golden, Ann Howard, William Howard, Philip Sciandra, Ann Kagan, Lisa Kagan, Josh Parenteau and Laura Howard. Mr. Fisher confirmed that neither he, Ms. Golden nor Mr. Sciandra are WEWC customers or present users of the system, noting that Mr. Sciandra is an employee of the Cambridge Water Department in Massachusetts who is involved here as a "technical person." *Id.* at 48-49. The witness also confirmed that Ann Howard and William Howard share a household and therefore would together own one share of stock in the association, as would Ann Kagan and Lisa Kagan as well as Josh Parenteau and Laura Howard. *Id.* at 49. In other words, according to Mr. Fisher's testimony, only three of WEWC's 11 customers would be represented on the Board of the users' association. *Id.* at 50, 53. However, Mr. Fisher noted that the intent of this proposal is to assure that the system is not "controlled by the old guard" because "I sense that what the Commission is looking for is some new blood in here, some new control, a new say." *Id.* at 54. "And," Mr. Fisher continued, "we're trying to assure the Commission that this is what our intent is." *Id.*

III. COMMISSION ANALYSIS

A. Statutory Framework

Certain statutory principles govern our consideration of this docket. RSA 365:4 authorizes the Commission to conclude an investigation by taking "such action within its powers as the facts justify." A public utility may transfer its franchise, works or system "when the commission shall find that it will be for the public good and shall make an order assenting thereto, but not otherwise." RSA 374:30. "Any such attempted transfer . . . shall be void unless the same shall have been approved by the commission." RSA 374:31. The Commission may place a public utility in receivership, effectively taking control of the Company, if, after notice and hearing, we determine that the utility "is consistently failing to provide adequate and reasonable service." RSA 374:47-a. Finally, the Commission may exempt from regulation as a public utility a water system with "a less number of consumers than 75, each family, tenement, store, or other establishment being considered a single consumer," if we determine that such exemption is "consistent with the public good." RSA 362:4, I. It is uncontested that WEWC serves a less number of consumers than 75.

Thus, in summary, we are authorized after notice and

hearing to determine what the public good requires here, placing WEWC in receivership if it is failing to provide adequate and reasonable service, revoking the franchise, approving the transfer as proposed, or ordering other relief. We note that, as argued by WEWC, the fact that the corporation was administratively dissolved by the Secretary of State does not result in the transfer of its property or assets, and does not render the utility a non-entity for the purpose of providing utility service subject to Commission regulation.

In considering the disposition of the case, it is useful to note an important limitation on our authority. The Commission lacks jurisdiction to grant or deny WEWU, Inc., the authority to provide water service to its members. When a users' association organized as a non-profit corporation undertakes to provide water service only to its members, and is open to all users of the water system in question, then the association constitutes "one entity providing service to itself" and is therefore not a public utility because "there is no entity providing water to the public." *Belleau Lake Corp.*, 80 NH PUC 49, 51 (1995) (quoting January 31, 1980 Opinion of the Office of the Attorney General). WEWU, Inc. was organized as a non-profit user' association, and its members by the organizing documents agree that they are

creating this entity in order to provide water to themselves. WEWU, Inc. is by its organizing documents open to all users of the water system, and not to others. WEWU, Inc. falls within the regulatory exception noted by the Attorney General in the January 31, 1980 Opinion.

In making the determination that the customers of WEWC have organized the WEWU, Inc. for the stated purposes, we expressly rely on Mr. Fisher's representation that all of the current customers of the WEWC system have assented to the Company's proposal.³ See Transcript II at 55. Exhibit No. 11, submitted by the Company on December 12, 2001 in response to a record request, is a document containing the signatures of 15 persons whom the Company identifies as the owner of the apartment house served by the system as well as the customers comprising the remaining ten households receiving water from the WEWC system other than Mr. Wright. The evidence supports a finding that the proposed users' association enjoys the support of all current WEWC customers within the Company's franchise territory. Indeed, we view it as particularly noteworthy that no such customer has come forward in this case

³ Mr. Wright is a user of part of the WEWC system in the sense that he receives water from a well located on his property that is also serving some of WEWC's customers. Mr. Wright's shared use of this one part of the system does not make him a WEWC customer - a key distinction.

to state an objection to the manner in which WEWC has operated the Company nor its proposal to discontinue operations and transfer the system to an association of users.

Mr. Wright is not a customer of WEWC but, rather, shares his property's water supply with the utility. Accordingly, his refusal to join the users' association is not fatal to the association's exemption from Commission jurisdiction. Nor need we consider Mr. Wright's assertion that the Commission should only authorize the transfer to a users' association of only those parts of its system serving Hickory Hill Road, i.e., those parts of the system that do not receive water from the well or wells on his property. See Transcript of November 7, 2001 (Transcript III) at 138-39 (also suggesting that Mr. Wright would support the users' association including Mill Pond Road users if alternate source of water not on his property is found).

The question then becomes whether it is in the public interest for WEWC to transfer its system and works to a non-profit users association, and in particular to the WEWU, Inc., so that WEWU, Inc. may use those works and that system to provide service to its members. RSA 374:30, 31. Our overarching concern is that the customers who are receiving water service today from the WEWC continue to have access to

safe, adequate water, at reasonable prices, and that the transfer not diminish or impede the access of such customers to such service. To the extent transfer of the system and works of WEWC to WEWU, Inc. will permit WEWC's customers to enjoy such benefits of those assets, the fact that WEWU, Inc. will not be subject to economic regulation is not a barrier to the transfer.

The questions raised by Staff and Mr. Wright about WEWC's compliance with lawful requirements, and ability to serve its customers, need to be addressed in the context of deciding whether WEWU, Inc. is likely to use such works and system to provide safe, adequate and reasonably priced water to its members, given the overlap not only in physical plant between WEWC and WEWU, Inc., but its proposed leadership and management. Again, this question must be answered in the context of the paucity of reasonable alternatives to the proposed transfer.

The record makes clear that WEWC's compliance with the requirements set forth in our rules has been difficult, and sometimes impossible, to induce. Staff has found it improvident to rely on the representations of WEWC principals. These concerns provide the backdrop for Mr. Brogan's initial recommendation that the WEWC franchise be summarily terminated

and its customers encouraged to look elsewhere to meet their water needs. However, Mr. Brogan agreed that this option would involve "hardship" for WEWC's customers and could even leave some with "no apparent solution" to the problem of where to obtain water. Transcript III at 48.

Mr. Wright raised a number of issues regarding the character of WEWC's principals, the accuracy of certain representations they have made to the Commission, their qualifications to hold a utility franchise, the extent to which WEWC is in violation of town ordinances and the effect of WEWC's 1996 dissolution by the Secretary of State. Mr. Wright's status as a non-customer of WEWC, and his express interest as a landowner in obtaining a determination that WEWC's franchise is revoked, informs the Commission's consideration of his contentions regarding these matters. But even if each of Mr. Wright's contentions were demonstrably true, no action the Commission could take here would have the effect of achieving the ultimate result sought by Mr. Wright: elimination of the easement asserted by WEWC to access the well located on Mr. Wright's property. This is because it would not be in the public interest, and would not be consistent with our statutory responsibility to assure safe and reliable water service to WEWC's present customers, if we

were simply to terminate WEWC's franchise and leave its customers without any community water supply. Thus, at the very least, if we determined we could not permit WEWC or its successor WEWU, Inc. to operate the system, we would impose an RSA 374:47-a receivership until such time as a suitable successor entity could step into WEWC's shoes, as by purchase, which would include the assumption of whatever legal rights WEWC presently enjoys.

Receivership and sale to an entity that would operate the system in the place of WEWC is not a realistic alternative for the customers of this system. The system is small and undercapitalized, and has never charged for its services. Its sparse and disorganized records make it difficult to assess the system's financial situation. These features present great obstacles to attracting capital and sustaining a viable for-profit model of a water utility. The only realistic alternatives to continued operation by WEWC is transfer to WEWU, Inc., or placing the burden on WEWC's consumers to develop their own water supplies. For the reasons described above, we must give all possible consideration to the transfer alternative, even in the light of criticisms of WEWC made by Staff and Mr. Wright.

With respect to the failure to employ a licensed system

operator as required by the DES, this failure may have contributed to our investigation of WEWC, but does not determine the suitability of WEWU, Inc. WEWU, Inc. will be required to comply with all applicable statutes and regulations relating to water quality, including the requirement of employing a licensed system operator as set forth in RSA 332-E:10.

The record contains ample evidence that some violations of applicable rules and statutes have taken place by WEWC during its operation of the system. At the very least, there is no debate that WEWC chronically failed to file required reports with the Commission and the Secretary of State. The illness of its chief officer, Ms. Golden, does not excuse the Company from these requirements. Were WEWC to remain subject to our jurisdiction, such failures would have to be eliminated, by stiff fines and other penalties if need be. Regulation cannot be effective if utilities fail to provide needed information. See *Central Water Co.*, 84 NH PUC 577, 578-79 (1999) (noting that Commission is aware of the "particular challenges that confront small water utilities" but they cannot "hamstring effective oversight of their operations"). However, if WEWU, Inc. takes control of the system, we would no longer require this information. What is

left of such issues is whether the documented sloppiness in accounting and reporting, and the alleged failure of WEWC principals to be forthcoming and accurate in such information as is provided, renders WEWU, Inc. unsuitable as a successor to WEWC's system.

In a system with 11 customers, which does not charge for service, the rigor with which the members keep their association's accounts is largely a matter for their own determination. Certainly, the WEWU, Inc. will have to take care to make the annual filings with the Secretary of State's office, or it will lose its corporate status. Given the administrative dissolution of WEWC for failure to make analogous filings, we would expect the members of WEWU, Inc. to be keenly aware now of the potential consequences of such non-feasance. We note that even before the proposed transfer, WEWC has retained New Hampshire Bookkeeping Services to bring the Company into compliance with our reporting requirements. We do not consider the record-keeping issues to be a significant disqualifier for WEWU, Inc.

With regard to adequacy of the water, the evidence shows that, other than incidents in the 1995-1997 time frame, the Commission has received no complaints concerning the amount and quality of the water provided by WEWC. Residents and

members of WEWU, Inc. testified that the water quality is excellent, and that WEWC has been responsive to their concerns. *See generally* Transcript II at 60-71. Mr. Fisher testified that he is a certified water operator, and Mr. Brogan confirms that in recent months, required water testing has been performed satisfactorily at the system.

The type and nature of the water quality issues the Commission has experienced with WEWC, even if they were to be repeated with WEWU, Inc., would not in and of themselves disqualify WEWU, Inc. from providing adequate and reliable service. This is particularly the case as DES will continue to have jurisdiction over the safety and adequacy of the water provided by WEWU, Inc.

Mr. Brogan testified that the WEWC plan to transfer the franchise, system and works to a users' association comprised a "commendable effort" that "could work, with some modifications." In final positions before the Commission, the only party objecting to the proposed transfer was Mr. Wright. Mr. Wright's objections do not overcome the reasonableness of the proposed transfer, particularly in light of the absence of viable alternative dispositions of the system, and water supply for its customers.

We turn to the modifications to the organization and

operation of WEWU, Inc. recommended by Mr. Brogan. Certain of Mr. Brogan's recommendations go to the objective of excluding the current WEWC principals from membership in, or management of, the users' association. We endorse, in principle, many of these recommendations. With regard to the specifics of the recommendations, we will not impose relief here in the form of line-by-line changes of the documents submitted by WEWC in the October 9 petition. Rather, we will instruct WEWC and representatives of WEWU, Inc. to work with the Commission's legal department to draft such documents and take such actions as are consistent with the determinations made herein.

A central precondition we establish on the proposed transfer is that the users' association be self-governing, which requires that Mr. Fisher, Ms. Golden, Mr. Sciandra and anyone else who does not rely on the system for water supply may not serve as directors, and may not be shareholders. Regardless of our considerations of questions of credibility or the past record WEWC management, we view this autonomy as an important attribute of the kind of users' association that is not a public utility within the meaning of our enabling statutes.

Mr. Fisher represents that he has no objection to the Commission requiring him to withdraw from the Board of

Directors of the users' association as a condition of approving the Company's request to transfer its franchise, system and works to WEWU, Inc. See *id.* at 122 ("Whatever it takes to keep the water flowing."). In addition, Mr. Fisher states that the intent of WEWC's proposal is to assure the Commission that the WEWU, Inc., will have new leadership, and that he and Ms. Golden will no longer control the affairs of the water system, as through service as officers or employees of WEWU, Inc. Mr. Fisher's credibility and his record as an officer of a regulated utility were matters of great contest among the parties and Staff in this proceeding. We need not, and do not, make any factual findings about the credibility of Mr. Fisher as a witness or his record as an officer of WEWC because of his expressed willingness to withdraw as an active participant in the users' association so long as he is not a system user. WEWU, Inc.'s organizing documents have a condition excluding non-users (including Mr. Fisher and Ms. Golden) from WEWU, Inc. membership.

Mr. Brogan also recommended that we specify that any transfer of the system to a users' association be on a permanent rather than on a trial basis, require that the transfer include all necessary assets and easements, and specify that the transfer occur by a date certain, failing

which "the Commission should move forward to shut the system down." We adopt these recommendations. There is no reason to delay transfer of the system to the new ownership and management, and the certainty and clarity of the transfer will assist in putting to rest at least part of the continuing contention between the various parties.

Staff also proposes that any reference to reversion of the non-profit corporation's assets be eliminated from the Articles of Agreement or, in the alternative, that the document provide for the equal division among system users of its assets in the event of dissolution. The statute governing incorporation of non-profit organizations requires that the Articles of Agreement include "provisions for disposition of the corporate assets in the event of dissolution of the corporation, including the prioritization of rights of shareholders and members to corporate assets." RSA 292:2, III. It does not require that disposition on dissolution be to system users, and such a dispersal of control of the assets could be detrimental to the orderly reorganization of an entity to operate the system, in the event of such dissolution. In order to assure that system assets remain available to serve users in the event of WEWU, Inc.'s dissolution, we will require WEWU, Inc. to amend its Articles

of Agreement and any other relevant documents to provide for the distribution of RSA 292:2, III dissolution assets to an entity qualified to provide water service to the system's users unless otherwise permitted by order of the Commission.

Beyond issues directly related to the formation of the users' association, Mr. Brogan makes certain additional recommendations. Specifically, he suggests that WEWC be required to provide a thorough and complete list of the assets being transferred to the users' association. Again, we agree with this recommendation in principle and instruct WEWC to work with the Commission's legal department to implement it.

Mr. Brogan also recommends that the language in the transfer agreement relative to the water rights conveyed to the association be limited to rights to use water "to the extent required" by the Department of Environmental Services. We cannot accept this recommendation, as it would leave WEWC in possession of all residual rights, that is, rights now held by WEWC to water over and above that "required" for service by DES regulation. It not being practical or in some cases even possible to segregate required and non-required water physically and control each separately, there would be a risk that WEWU, Inc. could be left without sufficient water resources, if it were required to share ownership of the water

supply with WEWC.

Mr. Brogan and Mr. Bergeron suggested that if WEWC retains its franchise it be required to charge rates. This recommendation is moot in light of our determination with regard to the users' association and accordingly we do not address it.

The users association will be exempt from regulation by the Commission, if the conditions of this transfer approval are accepted and implemented. Another theory of exemption for WEWC itself was advanced, as noted above. Under RSA 362:4, I, an entity providing water service to fewer than 75 consumers, which would otherwise be considered a public utility, qualifies for an exemption from regulatory oversight upon our determination that the public good would be served thereby. Because we are conditionally granting a transfer of the system and works to an unregulated users association, we need not consider whether we would grant an RSA 362:4, I exemption to the WEWC.

Accordingly, it is our determination that it is consistent with the public good for us to grant WEWC's request to transfer its franchise, system and works to a users' association, subject to the conditions to which WEWC, either through counsel or Mr. Fisher, has already assented.

IV. CONCLUSION

For the reasons described above, it is our determination that the public interest will be best served by granting the request of West Epping Water Company to transfer its franchise, system and works to a users' association that would, in turn, not constitute a public utility and thus not be subject to Commission regulation because it is not providing water service to the public. Our approval of this request is expressly conditioned on the implementation of the conditions we have set forth elsewhere in this Order. In order to alleviate any potential future confusion on the issue, we wish to make clear that our favorable determination with regard to transfer to a users' association does not mean that we have permanently declined to assert jurisdiction over entities that provide water service in the area presently franchised to WEWC. In other words, we reject Mr. Fisher's contention that if the users' association failed, WEWC could again take over as a public water supply that would not be a public utility.

The conditions included in our Order will require the revision of the documents previously submitted by the Company, possibly necessitate the reincorporation of the association and no doubt involve additional steps that will require

Commission oversight. We instruct our General Counsel or his designate to work with the Company to accomplish these objectives, and we deem it appropriate to establish a deadline for their accomplishment. In our determination, 90 days from the entry of this Order will give the Company ample time to effect the transfer in a form that is approved by the General Counsel or his designate as consistent with our decision today.

Based upon the foregoing, it is hereby

ORDERED, that the petition of West Epping Water Company to discontinue business as a public utility and to transfer its franchise, system and works to a users' association is **APPROVED,** subject to the conditions described herein; and it is

FURTHER ORDERED, that West Epping Water Company shall within 90 days accomplish the proposed transfer in a manner consistent with this Order and in a form acceptable to the Commission's General Counsel or his designate; and it is

FURTHER ORDERED, that all other requests for relief pending in this docket are hereby **DENIED.**

By order of the Public Utilities Commission of New Hampshire this twenty-ninth day of January, 2002.

Thomas B. Getz
Chairman

Susan S. Geiger
Commissioner

Nancy Brockway
Commissioner

Attested by:

Debra A. Howland
Executive Director and Secretary