

DW 02-194

**WEST SWANZEY WATER COMPANY, INC.**

**Petition to Expand Franchise and Joint Petition with  
Swanzy Township Housing Associates Limited Partnership  
To Construct and Maintain a Water Pipe Under the  
Ashuelot River in the Town of Swanzy**

**Order Nisi Granting the Petitions to Expand Franchise and To  
Operate and Maintain a Water Pipe Under the Ashuelot River**

**O R D E R   N O.   24,128**

**February 28, 2003**

**I. INTRODUCTION**

On October 17, 2002, West Swanzy Water Company, Inc. (the Company or West Swanzy) filed a petition with the New Hampshire Public Utilities Commission (Commission) for approval of an expansion of its service territory in the western part of the Town of Swanzy, New Hampshire, known as West Swanzy, consisting of Tax Map 72, Lot 29. In addition, the Company and Swanzy Township Housing Associates Limited Partnership (STHA), a New Hampshire limited liability partnership of which SCS Housing, Inc. is the general partner and the New Hampshire Housing Investment Fund is the sole limited partner, filed a joint petition for Commission approval to construct and maintain an underground water pipe beneath the Ashuelot River in the Town of Swanzy to serve an 18-unit housing development being developed by STHA in the proposed franchise expansion area on the opposite (east) side of the Ashuelot River from the franchise area presently served by the Company. STHA owns the 8.34 acre parcel

(Project Property) on which the housing development is located and, when the development is completed, STHA will lease the units to residential tenants.

According to the petitions, the Company is able and willing to supply public water service to the above parcel at its current rates; no other water utility serves this area; the Selectmen of the Town of Swanzey and the New Hampshire Department of Environmental Services (DES) support the expansion; STHA is able and willing to construct the necessary water facilities needed to tie the Company's system to the buildings located on its property; STHA's financing is contingent on STHA maintaining ownership of the water pipe which would tie into the Company's system; the Company shall specify all equipment to be installed by STHA, approve the design of said systems, and inspect the construction of all water facilities; in order to secure water service in the expansion area, a water pipe needs to pass under the Ashuelot River through the use of directional drilling; and, the construction of the water facilities needs to commence as soon as practicable in order to install said water facilities prior to winter.

On November 12, 2002 the Commission received a memorandum from Mark A. Naylor, Director of the Commission's Gas & Water Division. Mr. Naylor detailed the Staff's commencement of an informal investigation of the two petitions in this docket

including informal data requests to the Company and STHA and a site visit conducted on November 5. Mr. Naylor's memorandum indicates that, on November 4, attorneys for the Company and STHA contacted the Staff to advise that the river crossing construction work had begun and, from an engineering point of view, work could not then be stopped. Mr. Naylor and Mr. Brogan of the Gas & Water Division traveled to West Swanzey as scheduled on November 5 and Mr. Naylor indicated that the work of boring under the river had already been completed and they did in fact observe work in progress on installing the water pipe underneath the Ashuelot River. The carrying out of the construction work prior to obtaining Commission approvals is the subject of a separate show cause order being issued concurrently with the present order.

Information subsequently provided by the petitioners, including responses to Staff's data requests, indicates the following:

1. The waterpipe, an eight-inch pipe made of high density polyethylene, is a minimum of thirteen feet below the river bed; the river is approximately 80 feet wide at the point of crossing; and all other necessary permits for the crossing have been obtained. Boretch, of Waterford, Vermont, is responsible for the directional drilling associated with the project. According to STHA, the

- drilling was done through gravel material.
2. The water pipe under the Ashuelot River is part of an eight-inch water main (Water Main) which will interconnect with the Company's existing water main located under Winchester Street, cross under land owned by Homestead Woolen Mills on the west side of the Ashuelot River,<sup>1</sup> continue under the Ashuelot River and the Project Property, and terminate at a fire hydrant on Main Street in West Swanzey.
  3. STHA will install, own and maintain the Water Main and other water distribution facilities on the Project Property, including service lines bringing water from the Water Main to the individual residences and structures and ancillary equipment (collectively, the Water Facilities). According to the Company, the design of the Water Main will be per the Company's standards.
  4. The Company has secured a lease of the Water Main from STHA in an agreement dated October 10, 2002 (Lease Agreement), which can be used in the event the Company should extend its service franchise beyond the service territory expansion requested in this docket.

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<sup>1</sup> The Company will cause Homestead Woolen Mills to grant an easement to STHA for the purpose of constructing, maintaining and operating the Water Main.

5. Water provided to the Project Property will be metered through three master meters.
6. The Company states that it intends to serve the STHA under its tariff and its currently applicable rates and does not plan to file a special contract covering service to the Project Property. The Company further states that the expansion of its service territory will have no impact on its rates.
7. Under section 2.1.1 of the Lease Agreement, STHA agrees to construct the Water Facilities in accordance with the Company's specifications; under section 4.2, meters and related equipment are to be installed by STHA as specified by the Company. In several sections the Lease Agreement delineates allocation of maintenance and repair responsibilities under certain scenarios. As provided in section 3.1, lease payments are \$1.00 per year for an initial term of 30 years, renewed automatically for consecutive 30 year terms unless the Company notifies STHA of its intent not to renew; however, under section 3.3, at such time as the Company begins providing service to parties other than STHA, the Company and STHA will negotiate an allocation of the maintenance costs, applicable taxes and insurance costs associated with the Water Main. In section 4.1, the Company will furnish

water in accordance with the Lease Agreement and the terms and conditions of the Company's tariff; however, to the extent that the lease terms conflict with the terms and conditions of service set forth in the tariff, the lease terms shall govern. Nevertheless, under section 6.4, in the event the Commission determines that changes to the lease terms are necessary in order for the Company to provide service to the Project Property or other prospective Company customers, the Company and STHA agree to negotiate terms and documents required to satisfy the Commission, which are consistent with the terms and understandings contained in the Lease Agreement. The Lease Agreement contains several provisions under which possible future disputes would be referred to the Commission for resolution, i.e., disputes over the negotiation of the allocation of costs specified in section 3.3; the allocation of condemnation awards (see section 3.6); the relocation of the Water Main ordered by a governmental authority (see section 3.4); and any other claim or controversy arising out of or relating to the Lease Agreement (see section 6.7). Further, under section 3.5, if and when the Company serves customers beyond the Project Property, termination of the Lease Agreement is subject to the review and approval of the

Commission. Finally, the Lease Agreement binds successors, assigns and purchasers of the Company and STHA (see sections 6.4 and 6.6), and under section 5.1, a notice of lease is to be filed in the registry of deeds. STHA is specifically authorized under section 6.6 to mortgage and assign its interest in the Water Facilities and in the Lease Agreement to its construction lenders.

The Commission approved the Company's request for permission to provide service as a public utility in its present service territory and for permanent rates in *West Swanzey Water Company, Inc.*, 73 NH PUC 475 (Order No. 19,239, November 29, 1988). The Lease Agreement contains certain provisions that vary from the compliance tariffs filed pursuant to Order No. 19,239, including the following:

1. STHA and not the Company will pay the cost of meter installation. See Tariff, Original Page 2.
2. STHA and not the Company will construct the Water Main extension and will own it. See Tariff, Original Page 7.
3. The Water Main extension is not being constructed in highways or streets dedicated to public use. See Tariff, Original Page 8.
4. The Lease Agreement does not follow the "contribution in aid of construction" provisions. See Tariff, Original Pages 8 and 9.

## II. COMMISSION ANALYSIS

### A. Petition for Franchise Expansion

RSA 374:22 and RSA 374:26 provide that the Commission shall not issue a franchise unless it would be for the public good. The public good standard requires the petitioning utility to demonstrate, *inter alia*, the legal, technical, managerial and financial expertise to operate a public water utility. See e.g., *Hampstead Area Water Company, Inc.*, 82 NH PUC 332 (1988).

Based on our review of the facts as set forth above, we find that granting authority to operate in the proposed franchise area is in the public good. In light of the support by the Town of Swanzey and DES, we shall approve the franchise expansion on a *nisi* basis without a hearing. See RSA 374:26. Our finding and approval is, however, subject to other provisions of this order.

We note that the proposed arrangement is an unconventional one in that the Company would not own or operate significant elements of the facilities necessary to serve the STHA development. See *Bodwell Waste Services Corporation*, Order No. 23,975 (May 22, 2002). Like the situation in *Bodwell*, the Company is assuming an obligation to serve that could well survive the present owners of the Project Property; unlike the situation in *Bodwell*, there is a formal agreement between the Company and STHA that by its terms is intended to be binding on STHA's successors. Thus, the question before us in this docket



is whether the Lease Agreement presents any regulatory concerns that would cause us to limit the scope of, or place conditions on, our approval of the requested service territory expansion. Although we are not asked to approve the Lease Agreement as a special contract or otherwise, and we neither approve nor disapprove it, we examine its provisions in order to determine whether any of them are inconsistent with the Company's obligations to serve, or the Commission's jurisdiction to regulate the Company, in the expanded franchise area.

With respect to the ownership and/or periodic testing of meters, we will require that STHA and West Swanzey provide us with a written agreement that the meters owned by STHA will be tested periodically in accordance with our Puc 600 rules. We will also direct STHA and West Swanzey to provide for the results of these meter tests to be submitted to the utility so that they can become part of the utility's records for tests conducted. This way we can be assured that meter testing will be done periodically in spite of the fact that the utility will not own those meters.

With respect to the designation of the Commission in the lease as arbiter of disputes, we will note here that it appears there are some matters contemplated in the Lease Agreement that the Commission may not have jurisdiction over. However, in the event STHA and West Swanzey do at some future

time submit a matter to us for resolution, we will make a determination at that time whether the matter submitted is appropriate for our involvement. If it is not, we will so indicate to the parties.

It is apparent that there are several differences and/or conflicts between the Lease Agreement and West Swanzey's tariff currently on file with the Commission. Because of this, we direct West Swanzey to file a compliance tariff that would make the tariff consistent with the lease. Such a compliance tariff filing would also render moot section 4.1 of the Lease Agreement, which states that the lease prevails over the tariff in a case of a conflict. Finally, in order to ensure that future amendments to the Lease Agreement do not impair customers' or our regulatory interests, we direct West Swanzey to file with us for review any proposed amendments to the Lease Agreement.

The parties to the Lease Agreement intend for it to be binding on STHA and its successors. In order to ensure that this intent is realized, we will require West Swanzey to demonstrate to the satisfaction of the Commission's general counsel that the Lease Agreement would as a matter of law survive a possible future foreclosure proceeding involving the owner of the Project Property.

**B. Company's Quarterly Customer Charge and Fire Protection Rates**

A separate issue brought to light during discovery is the fact that the Company is charging certain water and fire protection rates, included among which are those presumably to be charged STHA, that have not been approved by the Commission. This is a serious situation and we will direct the Company to file a full accounting and explanation of its current rate structure, with a proposed tariff, within three weeks of the date of this order.

**C. Ashuelot River Crossing**

RSA 371:17 provides in part that whenever it is necessary, in order to meet the reasonable requirements of service to the public, that any public utility, corporation or individual should construct a pipeline or conduit under any of the public waters of New Hampshire, it shall petition the Commission for a license to construct and maintain the same. "Public waters," as defined in RSA 371:17, means "all ponds of more than ten acres, tidewater bodies, and such streams or portions thereof as the Commission may prescribe." Many years ago, the Commission established a policy of prescribing the portions of streams which are "commonly used for navigation" as public waters within the meaning of this statute, see *Public Utilities and Others*, 35 NH PUC 94 (Order No. 6217, May 1, 1953), and STHA asserts in its answers to Staff's data requests that the

Ashuelot River at the site of the crossing is not in fact navigable. The Company's profile graph/as built plan of the crossing discloses that the Ashuelot River is approximately 80 feet wide at the site of the crossing. For purposes of this order, we do not inquire further into the matter of navigability because we have previously prescribed the Ashuelot River in the Town of Swanzey and upstream in the City of Keene and downstream in the Town of Winchester as being "public waters." See e.g., *Public Service Company of New Hampshire*, 83 NH PUC 376 (Order No. 22,937, July 6, 1998) and *Public Service Company of New Hampshire*, 80 NH PUC 574 (Order No. 21,817, September 6, 1995). Based on this precedent and the information presented about the Ashuelot River at the site of the crossing, the Commission prescribes the part of the Ashuelot River at the location of the water pipe crossing as being "public waters" under RSA 371:17.

In its responses to Staff's data requests, STHA states that it is unclear whether Commission approval of the river crossing is necessary since it is not being constructed or maintained by a water company under the Commission's jurisdiction. STHA further states that it and the Company decided to jointly petition the Commission under RSA 371:17 in the event the Commission does in fact have jurisdiction.

Under the first sentence of RSA 371:17, "[w]henver it is necessary, in order to meet the reasonable requirements of

service to the public, that any public utility should construct a pipeline...under...any of the public waters of this state...,it shall petition the commission for a license to construct and maintain the same." Under the last sentence of RSA 371:17, "[every] corporation and individual desiring to cross any public water...for any purpose herein defined shall petition the commission for a license in the same manner prescribed for a public utility." We think the last sentence plainly means that entities other than public utilities, including limited partnerships, are subject to the licensing requirements of RSA 371:17.

Given the minimal impact from the now completed directional drilling and water pipe installation to the river and its surrounding environment, we find that the requested license may be exercised without substantially affecting the public rights in the waters of the Ashuelot River. For this reason and given the need for water service to the STHA development, we will approve the joint petition for the river crossing. We note that our approval under RSA 371:17 does not supersede the requirements of other regulatory agencies with jurisdiction, if any. Furthermore, our approval extends only to the prospective operation and maintenance of the crossing and not to its construction, which has already been substantially completed. In this regard, we are issuing a separate order to address the fact that construction on the crossing proceeded prior to the approval

contemplated by RSA 371:17.

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

**ORDERED NISI**, that subject to the effective date below, West Swanzey Water Company, Inc. is granted authority to extend its service territory to include Tax Map 72, Lot 29 in the Town of Swanzey; and it is

**FURTHER ORDERED**, that the joint Petitioners are authorized, pursuant to RSA 371:17 et seq., to operate and maintain the water pipe under the Ashuelot River in Swanzey, New Hampshire as depicted on plans and drawings submitted by the Petitioners and on file with this Commission; and it is

**FURTHER ORDERED**, that the joint Petitioners file an agreement with respect to meter testing and maintenance of results therefrom, within three weeks from the date of this order; and it is

**FURTHER ORDERED**, that West Swanzey file a compliance tariff within three weeks from the date of this order to bring its tariff into compliance with any and all conflicting aspects of the Lease Agreement entered into with STHA; and it is

**FURTHER ORDERED**, that should West Swanzey and STHA or their successors desire to amend the Lease Agreement at any time in the future, the parties submit the proposed amendments to this Commission for our review prior to their implementation; and it is

**FURTHER ORDERED**, that West Swanzey submit information within three weeks from the date of this order demonstrating to the satisfaction of the Commission's general counsel that the Lease Agreement would as a matter of law survive a possible future foreclosure proceeding involving the owner of the Project Property; and it is

**FURTHER ORDERED**, that West Swanzey file a full accounting and explanation of its current rate structure, as discussed earlier in this order, with appropriate revisions to its tariff, no later than three weeks from the date of this order; and it is

**FURTHER ORDERED**, that the Petitioners shall provide a copy of this Order Nisi to the Swanzey Town Clerk and, pursuant to RSA 371:19, the New Hampshire Attorney General and the owners of the land bordering on said public waters at the location of the river crossing, by first class mail, no later than March 10, 2003 and to be documented by affidavit filed with this office on or before March 24, 2003; and it is

**FURTHER ORDERED**, that the Petitioners shall cause a copy of this Order Nisi to be published once in a statewide newspaper of general circulation or of circulation in those portions of the state where operations are conducted, such publication to be no later than March 10, 2003 and to be documented by affidavit filed with this office on or before March

24, 2003; and it is

**FURTHER ORDERED**, that all persons interested in responding to these petitions be notified that they may submit their comments or file a written request for a hearing on this matter before the Commission no later than March 17, 2003; and it is

**FURTHER ORDERED**, that any party interested in responding to such comments or request for hearing shall do so no later than March 24, 2003; and it is

**FURTHER ORDERED**, that this Order Nisi shall be effective March 28, 2003, unless the Petitioners fail to satisfy the notification or publication obligations 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 twenty-eighth day of February, 2003.

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Thomas B. Getz  
Chairman

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Susan S. Geiger  
Commissioner

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Nancy Brockway  
Commissioner

Attested by:

\_\_\_\_\_  
Michelle A. Caraway  
Assistant Executive Director



