

ROSEBROOK WATER COMPANY

**Petition for Approval to Purchase Stock and
Authority to Operate as a Public Utility**

**Order Approving Stock Purchase and Granting
Permission to Operate as a Public Utility**

O R D E R N O. 23,379

January 6, 2000

APPEARANCES: Dom D'Ambruoso, Esq. of Ransmeier & Spellman on behalf of Rosebrook Water Company, Inc. and Mount Washington Hotel Preservation Limited Partnership; and Lynmarie Cusack, Esq. for the Staff of the New Hampshire Public Utilities Commission.

I. PROCEDURAL HISTORY

This docket was opened on September 13, 1999 when Rosebrook Water Company (Rosebrook) and Mount Washington Hotel Preservation Limited Partnership (MWHPLP) filed a joint petition requesting approval of the transfer of 100% of Rosebrook stock from the current owners to MWHPLP. By Order of Notice dated September 28, 1999 a prehearing conference was scheduled for October 15, 1999. On November 15, 1999, this Commission issued Order No. 23,344 setting a procedural schedule in the case. The Commission also asserted jurisdiction in the case, an issue that was raised at the prehearing conference.

Staff and the Parties agreed to accelerate the discovery process so that the Purchase Agreement entered into

by Rosebrook and MWHPLP could be effectuated as soon as possible. Staff conducted discovery through data requests and meetings with representatives of Rosebrook and MWHPLP. The discovery in the case focused on MWHPLP's ability to operate, manage and finance a small water company and the special contract situation existing between Rosebrook and the Mount Washington Hotel (Hotel).

II. THE PARTIES

A. Rosebrook and MWHPLP

Both the current owners of Rosebrook and MWHPLP believe that it is in the public interest for MWHPLP to own and operate the water system. In the testimony of Wayne Presby, sole general partner of MWHPLP, attached to the petition, Mr. Presby attests that his company will be able to acquire Rosebrook without any debt and that MWHPLP has the ongoing financial resources to apply to capital improvements. Additionally, Mr. Presby avers that his company has the experience and resources necessary to meet the ongoing requirements of a water utility. Moreover, Mr. Presby indicates that MWHPLP knows and understands the operations, plant and equipment of Rosebrook. Finally, Mr. Presby states that he is aware of the current overearnings proceeding, docket DW 99-073, currently before the Commission and takes this proceeding as he finds it with all of the potential

liabilities.

B. Staff

In testimony Staff filed in docket DW 99-073, Staff filed comments regarding the proposed transfer of stock to MWHPLP. Mr. Douglas Brogan, Water Engineer, noted that on the surface MWHPLP appeared to have perhaps significantly more capability to own and operate a water system than did Rosebrook. Mr. Brogan observed that MWHPLP had employees who were involved in operations on a day to day basis, local principals and utility experience through ownership and operation of two sewer systems. Moreover, Mr. Brogan acknowledged that the Hotel as Rosebrook's largest customer also had a direct interest in the viability of the system. Mr. Brogan recommended five conditions to the transfer including conditions relating to systems improvements and a long term commitment regarding the special contract between Rosebrook and the Hotel.

Henry Bergeron, Finance Examiner at the Commission, also testified regarding the special contract between Rosebrook and the Hotel. Mr. Bergeron believed that the contract should be evaluated in this docket.

III. THE AGREEMENT

Prior to the hearing on the merits scheduled for

December 8, 1999, the Parties and Staff entered into a stipulation regarding the docket. The Agreement stated that MWHPLP had the requisite financial, operational and managerial abilities to own and operate Rosebrook. In particular the Agreement provides that MWHPLP will provide Staff with reports outlined in recommendations Mr. Brogan made in docket DW99-073. Specifically, the MWHPLP will provide any further studies on distribution improvements, system looping, and pH control; reports will also be provided on the current improvement projects which include the well project, a comprehensive list of future improvements, a five year capital improvements plan and a biannual report for the next five years on the status of improvements. MWHPLP will also complete the pump and improvement projects already initiated by Rosebrook

The Agreement also requires MWHPLP to provide guarantees on Rosebrook's State Revolving Fund loan, sufficient to cause the Department of Environmental Services (DES) to release the current stock owners from liability. Along with these guarantees MWHPLP has agreed that it will not attempt to recover any acquisition premium from ratepayers. Additionally, Staff and the parties agreed that a five year special contract between Rosebrook and the Hotel would be included, setting fixed payments of \$56,000 per year along

with a \$12,000 per year Contribution in Aid of Construction.

IV. COMMISSION ANALYSIS

This Commission may allow an entity to engage in business as a public utility where it finds that the exercise of the right, privilege, or franchise is in the public good. See, RSA 374:26. Given the testimony of Mr. Brogan in Docket No.

DW 99-073¹, and Mr. Presby's testimony, we believe that allowing MWHPLP to own and operate Rosebrook is in the public good.

Nevertheless we have concerns regarding the transfer. For example, the purchase price of the stock was not part of the Agreement. Only as part of our inquiry from the bench did we learn that the purchase price for the stock of the water company is \$275,000. The cost of the entire stock purchase agreement is \$445,000 which also encompasses the sale of stock for the BW Community Television, Inc. The financial statements show that average gross Plant in Service, excluding the 1989 acquisition adjustment, equals \$282,623. While this does not represent a significant concern it is rather unusual that the purchase price was not part of the

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We hereby take official notice of the record in DW 99-073. See, *NH Electric Cooperative, Inc.*, 70 NH PUC 127, 128 (1985); See also, RSA 541-A:33, V.

Agreement.

More troubling, however, is the clause in the Stock Purchase Agreement at paragraph 3 that calls for MWHPLP, as the buyer, to "succeed to all of the Corporations' liabilities and all of their assets, *except cash in the Corporations' operating accounts* which will be distributed to the Sellers [current Rosebrook owners] prior to Closing..." [emphasis added]. Additionally, the Amendment to the Stock Purchase Agreement, which is Exhibit 3 in the Record, obligates, at ¶2.03 C, Rosebrook, the Sellers, to credit or rebate customers any overearnings that have been found to exist at the completion of DW 99-073. These clauses read together present a more tangible concern. Payment of the operating account to the current owners of Rosebrook is tantamount to a dividend payment. As per the balance sheet provided in the Agreement the Current Assets of the Company, as of June 30, 1999 reflected \$107,703.90. According to the Final Audit Report in DW 99-073 the operating account is the Peoples' Bank account which amounted to \$57,516.33. Reducing Rosebrook's current assets by almost 50% is not what we would consider prudent financial management. Moreover, it is our understanding that \$15,500 of the money in the Peoples' Bank checking account represents a payment from the Town of Carroll for Contribution

in Aid of Construction (CIAC). This payment was not properly deposited; thus, it is not properly considered part of the operating account.² Accordingly, even if we were to agree that the current owners should be allowed to take the operating account as a dividend, the total amount would be \$42,016.33.

We are not inclined, however, to allow the current owners to take as a disbursement the current cash in the operating account. Since the Amended Stock Purchase Agreement calls for the current owners to reimburse customers any overearnings found in docket DW 99-073, we require the Company to establish an escrow account in the amount of \$42,016.33 for use as a refund/credit to customers.³

Our final concern relates to the affiliate relationship between the new owners of Rosebrook and the Mount Washington Hotel. The Hotel is Rosebrook's largest customer.

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Rosebrook's capital reserve account is a savings account established at Meredith Village Savings Bank. The CIAC payment should have been deposited into this account but rather was deposited into the Peoples Bank checking account which is used for normal operating expenses. See Final Audit Report, DW 99-073, Page 3.

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Should there be a determination that no refund is warranted the money will stay with the Company and the clause in the Purchase and Sale Agreement requiring a dollar-for-dollar increase in the purchase price may take effect as per the agreement.

Both the hotel and Rosebrook will be owned by the MWHPLP. As a result, there exists the threat that the Hotel will garner an advantage which the other ratepayers do not have.

Pursuant to RSA 366 the Commission "is given wide and encompassing powers over relationships, arrangements and contracts between utilities and their affiliates." *Gas Service, Inc.*, 67 NH PUC 730, 732 (1982). Moreover, RSA 366:9 provides the Commission with significant authority to obtain all the necessary information to evaluate the impact, control, relationship, and interaction of an affiliate upon a utility and more importantly its customers. Given the fact that our Staff has not expressed concerns over the new five year contract recommended by the Agreement, we will not anticipate reasons to withhold our approval from the Agreement and the Special Contract.

We say this, however, with specific thought to our continued ability to investigate the terms, conditions and price of the contract under RSA 366:5. While we expect the Company and the Hotel to conduct their business affairs in a manner that is consistent with state and federal law we will exercise vigilance in monitoring the Company to prevent any self-dealing. We also expect that the Company will meet the requirements of PUC Rules 1606, *et. seq.*

Based upon the foregoing analysis we believe that it is in the public interest to approve the transaction. We do so, however, with the understanding that the escrow account will be established in the event there is a refund due in DW 99-073.

Based upon the foregoing, it is hereby

ORDERED, that the stock purchase by MWHPLP is in the public interest pursuant to RSA 374:30 and is therefore, approved; and it is

FURTHER ORDERED, that pursuant to RSA 374:22, MWHPLP is granted permission and approval to operate Rosebrook Water Company as a public utility; and it is

FURTHER ORDERED, that Rosebrook will establish an escrow account as specified above and will report back to the Commission Staff by January 30, 2000 regarding the establishment of such an account; and it is

FURTHER ORDERED, that the five year Special Contract is approved.

By order of the Public Utilities Commission of New
Hampshire this sixth day of January, 2000.

Douglas L. Patch
Chairman

Susan S. Geiger
Commissioner

Nancy Brockway
Commissioner

Attested by:

Thomas B. Getz
Executive Director and Secretary