

DW 06-106

PROPERTY OWNERS ASSOCIATION AT SUISSEVALE, INC.

Petition for Exemption from Regulation

Order *Nisi* Granting Petition

ORDER NO. 24,698

November 8, 2006

I. BACKGROUND

On August 4, 2006, the Property Owners Association at Suissevale, Inc. (Suissevale), filed with the New Hampshire Public Utilities Commission (Commission) a petition for exemption from regulation as a public utility pursuant to RSA 362:4. Suissevale is an association of homeowners located in Moultonborough which owns and operates a water distribution system to provide service to 343 homes; two of those households are not members of the association. Suissevale purchases its water on a wholesale basis from Lakes Region Water Company, Inc. (Lakes Region), a regulated public utility which serves a franchise territory adjacent to Suissevale known as Paradise Shores. Pursuant to RSA 362:4 and N.H. Code Admin R. Puc 602.13, Suissevale requests exemption from regulation since it serves less than 75 consumers that are not members of the association.

Suissevale currently charges its non-member customers \$350 annually for water service, and states that it provides the same level of service quality to the non-member customers as it provides to members. Suissevale's current members pay \$700 in dues annually, which covers the cost of providing water as well as other services provided to each member. Suissevale states that it believes the \$350 charge to the non-members approximates the average cost of providing

water within Suissevale. Suissevale also states that it has no plans to increase the rate to the non-members, although it did not rule out the possibility in the event of increased costs.

On October 20, 2006, the Staff of the Commission (Staff) filed a letter supporting the exemption request of Suissevale. Staff indicated that after reviewing the petition and obtaining additional information, it did not believe the public interest would be served by regulating Suissevale as a public utility. Staff indicated that the service to the two non-members originated from an agreement made in the 1990s among Suissevale, Lakes Region, and the developer of two lots that were not located within either the Suissevale subdivision or Lakes Region's Paradise Shores franchise territory. In exchange for an easement which facilitated the delivery of water from Lakes Region to Suissevale, Suissevale agreed to permit the connection of the two additional homes to the Suissevale distribution system.

Staff compared the rate charged to the non-members with that charged to Suissevale members to determine if the rates were the same. Staff reported that, because Suissevale charges its members an annual \$700 fee for water as well as other services provided, and because Suissevale does not know the value of its existing distribution plant, an accurate comparison was not possible. In the alternative, Staff compared the \$350 non-member rate with the rates charged by Lakes Region Water Company in the adjacent Paradise Shores system, which Staff viewed as a reasonable comparison because the water consumed by Suissevale customers is the same water as that supplied to Paradise Shores homeowners. Staff concluded that the rate charged to the non-members was not unreasonable, and the inability to compare precisely the non-member rate to that paid by Suissevale members did not alter Staff's recommendation to grant the requested exemption.

II. COMMISSION ANALYSIS

This filing raises issues regarding whether Suissevale is a public utility and, if so, whether it is for the public good for it to be exempt from regulation. Pursuant to RSA 362:2, the term “public utility” includes every “association . . . owning, operating or managing any plant or equipment or any part of the same . . . for the manufacture or furnishing of . . . water to the public.” RSA 362:4, I, which is specific to water utilities, refines the scope of Commission regulation further, providing an exemption from regulation, but not from the definition of “public utility,” for certain small water suppliers. Specifically, “[i]f the whole of such water . . . system shall supply a less number of consumers than 75, each family tenement, store, or other establishment being considered a single consumer,” then the Commission may exempt the utility from regulation upon a finding that such exemption is “consistent with the public good.” Invoking this regulatory exemption in its petition, Suissevale contends it is applicable because the service it provides to members should be counted as one customer rather than 341 customers.

We agree that a homeowners’ association with 341 members and serving two non-member customers may qualify for the exemption provided to utilities serving fewer than 75 water consumers. The Commission has consistently concluded that a homeowners’ association is not subject to regulation as a public utility and therefore the number of homeowners association members is not germane to determining whether to exempt the homeowners association from regulation to the extent it serves non-members. *See, Belleau Lake Corp.*, 80 NH PUC 49 (1995) and *Chalet Village Assn.*, 80 NH PUC 648, 649-50 (1995) (relying on 1980 Attorney General opinion concluding that homeowners’ associations do not meet definition of “public utility”). Such an interpretation of the statute is also consistent with the New Hampshire

Supreme Court's decision in *Appeal of Zimmerman*, 141 NH 605 (1997). There, the Court concluded that a landlord offering telecommunications services to tenants was not a public utility within the meaning of RSA 362 because the landlord had "an underlying relationship with those persons who use his services that is sufficiently discrete as to differentiate them from other members of the relevant public." *Id.* at 612. The Court reached that conclusion notwithstanding the Legislature's use of the word "every" before the list of persons and entities subject to classification as a public utility, focusing instead on the meaning of the word "public." If a landlord-tenant relationship is sufficient to differentiate users of a utility service from the public, the same can be said of the relationship among homeowners who have formed an association.

We thus turn to whether it is consistent with the public good to exempt Suissevale from regulation pursuant to RSA 362:4 insofar as it serves consumers that are not members of the homeowners association. Our analysis in these circumstances involves consideration of the benefits that regulation by this Commission would provide the two non-member customers. With respect to water quality, Suissevale's distribution system is interconnected and water supply to both the non-member customers and member customers depends upon the same critical facilities. Thus, non-member customers will receive the same quality of water that the remaining member customers receive. Further, Suissevale does not treat the water. According to the special contract between Suissevale and Lakes Region, which we approved in Order No. 24,693 (October 31, 2006), Lakes Region is responsible for supplying Suissevale with water meeting the drinking water quality criteria established from time to time by the federal Environmental Protection Agency and the state Department of Environmental Services. Direct Commission oversight would add little to the quality assurance provided by those two agencies.

We next consider whether regulation is necessary to assure Suissevale's maintenance of the distribution system and related facilities. In *Property Owners Association at Suissevale Inc.*, Order No. 24,693 (October 31, 2006), in Docket No. DW 06-133, we recognized that Suissevale had made significant financial contributions to Lakes Region for the construction of a water storage facility in Paradise Shores and that Suissevale had committed to making additional financial contributions to the tank project. We also note that Suissevale has recently secured a thirty-year water supply contract with Lakes Region to ensure that Suissevale has sufficient water to serve its members as well as the two non-members. These commitments to invest in critical facilities and efforts to secure long term water supplies demonstrate that Suissevale is managing its distribution system in a manner that is consistent with the public good.

As to whether Commission regulation is necessary to ensure reasonable rates to the non-members, Suissevale currently charges an annual flat rate of \$350 to each non-member customer. Staff reviewed this flat rate and determined it was not unreasonable. Because Suissevale does not bill its members separately for water, and does not know what its investment is in its distribution plant, Staff could not provide a precise comparison of the non-member rate with the rate charged for water to the Suissevale members. Staff did, however, provide the Commission with an analysis and comparison with the water rates charged in the adjacent Lakes Region franchise, Paradise Shores, from which Suissevale acquires its purchased water. Staff's inability to compare with precision the non-member rate to that paid by Suissevale members for water did not alter Staff's conclusion that the rate charged to the non-members was not unreasonable.

As to future rate increases, Suissevale indicated in discovery submitted to Staff that it intends to increase water rates charged to non-members at the same time there is an increase in

water costs that are passed on to members. In Order No. 24,693, we approved Suissevale's water supply agreement with Lakes Region as a special contract pursuant to RSA 378:18. This special contract contains an annual reconciliation mechanism to ensure the cost basis underlying the special contract remains accurate. Suissevale's rate could increase or decrease each calendar year but, as Suissevale has stated, this rate will apply indiscriminately to members and non-members. Because of this parity, Commission regulation of Suissevale is not necessary. Moreover, a significant portion of Suissevale's rates are indirectly regulated by virtue of our approval and oversight of Suissevale's special contract with Lakes Region. Additionally, revenues derived by Lakes Region from its special contract will continue to be subject to Commission oversight pursuant to RSA 378.

Having reviewed the record and having considered the benefits to the two non-member customers of Commission regulation, we find it unnecessary to regulate the service Suissevale provides to the two non-members. We find that exempting Suissevale from regulation pursuant to RSA 362:4 is consistent with the public good. We agree with Staff that the rates charged to the non-member customers appear to be reasonable. Our approval of Suissevale's exemption request in this docket is conditioned on Suissevale continuing to provide the same quality of service to non-members as provided to members, and that documentation be provided to the non-member customers as is provided to member customers at such time as Suissevale implements any future increase in rates. Should circumstances change such that the non-members fail to receive the same quality of service that members receive, then the decision to exempt Suissevale from regulation may be revisited.

Based upon the foregoing, it is hereby

ORDERED *NISI*, that the Property Owners Association at Suissevale, Inc.'s petition for exemption is hereby GRANTED; and it is

FURTHER ORDERED, that subject to the effective date below, the Property Owners Association at Suissevale, Inc. is granted full exemption from regulation of the Commission pursuant to RSA 362:4; and it is

FURTHER ORDERED, that a significant change in the quality of service or other circumstances could require a reconsideration of this exemption; and it is

FURTHER ORDERED, that Property Owners Association at Suissevale, Inc. 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 November 20, 2006; and to be documented by affidavit filed with this office on or before December 8, 2006; and it is

FURTHER ORDERED, that Property Owners Association at Suissevale, Inc. provide a copy of this Order *Nisi* by first class mail to the two non-member customers it presently serves; and it is

FURTHER ORDERED, that all persons interested in responding to this Order *Nisi* be notified that they may submit their comments or file a written request for a hearing which states the reason and basis for a hearing no later than November 27, 2006 for the Commission's consideration; and it is

FURTHER ORDERED, that any party interested in responding to such comments or request for hearing shall do so no later than December 4, 2006; and it is

FURTHER ORDERED, that this Order *Nisi* shall be effective December 8, 2006, unless Property Owners Association at Suissevale, Inc. fails to satisfy the publication obligation 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 eighth day of November, 2006.

Thomas B. Getz
Chairman

Graham J. Morrison
Commissioner

Clifton C. Below
Commissioner

Attested by:

Debra A. Howland
Executive Director & Secretary