

**STATE OF NEW HAMPSHIRE
PUBLIC UTILITIES COMMISSION**

DW 06-149

**ROSEBROOK WATER COMPANY, MWH PRESERVATION LIMITED
PARTNERSHIP AND BW LAND HOLDINGS, LLC**

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

Order on Joint Petition

ORDER NO. 24,773

July 12, 2007

Appearances: James D. Kerouac, Esq. of Nixon Peabody, LLP on behalf of BW Land Holdings, LLC; and Suzanne G. Amidon, Esq. on behalf of Commission Staff.

I. PROCEDURAL BACKGROUND

On October 24, 2006, Rosebrook Water Company (Rosebrook), MWH Preservation Limited Partnership (MWH) and BW Land Holdings, LLC (BW) filed with the Commission a joint petition for authority to transfer stock and authority for BW to operate as a public utility. Rosebrook is a regulated public utility owned by MWH which provides water service to approximately 359 customers in parts of Bethlehem, Carroll and Crawford's Purchase, and the Bretton Woods Resort Community, including the Mt. Washington Hotel. BW is a limited liability company, organized under Delaware law. MWH is a limited partnership organized under the laws of New Hampshire. The Petitioners requested that the Commission approve MWH's transfer of all its stock in Rosebrook to BW pursuant to RSA 374:30. The petition was accompanied by the direct testimony of Dane Vincent, Vice President and Treasurer of BW.

On November 22, 2006, the Commission issued an order of notice scheduling a prehearing conference for December 12, 2006. The prehearing conference was held as scheduled. Staff filed an agreed upon proposed procedural schedule on December 14, 2006,

which was adopted by a secretarial letter dated January 8, 2007. On April 10, 2007, Staff filed a Settlement Agreement on behalf of itself and Petitioners, and a hearing on the Settlement Agreement was held on May 16, 2007. At hearing, the Commission made a record request for information to support the financial ability of BW to manage a public water utility and information regarding corporate structure. BW filed the record request responses on June 13, 2007.

II. POSITIONS OF THE PARTIES

A. Petitioners

The Petitioners indicated that in June 2006 MWH sold to BW certain assets comprising part of the Bretton Woods development. In a separate transaction MWH sold other Bretton Woods properties to CNL Income Bretton Woods, LLC (CNL). The Rosebrook stock was excluded from the sale of Bretton Woods' assets to BW pending Commission approval. MWH and BW agreed to transfer the Rosebrook stock to BW within ten business days after the expiration of any appeals period following the Commission's approval of the transaction. The Petitioners have agreed to a \$600,146 purchase price for all of Rosebrook's stock and working capital. As part of its purchase of certain assets in Bretton Woods, BW has already paid \$264,108 toward the purchase of Rosebrook. An additional \$336,038 will be paid by the date of the utility transfer.

Petitioners stated that after the transfer, Mark Fuller, an existing employee of Rosebrook, would continue to act as the primary day-to-day operator of the utility. Petitioners state that Mr. Fuller has the requisite skills and knowledge to conduct the facility's operations in compliance with applicable regulations, permits and approvals. Petitioners further state that Dane Vincent,

an employee of BW, would be responsible for oversight and management of Rosebrook's operations. Petitioners state that Mr. Vincent has experience in the operation of two regulated sewer facilities in North Carolina and is therefore aware of and experienced with the managerial, technical, financial and operational issues associated with a small public utility. According to the Petitioners, BW also has sufficient financial resources for maintenance activities and capital improvements required for the ongoing operation of Rosebrook.

According to the petition, BW was in the process of negotiating a water services agreement with CNL for service to certain Bretton Woods properties purchased by CNL and served by Rosebrook. The properties include the Mount Washington Hotel, the Mount Washington Hotel administration building, the Bretton Arms Country Inn, the Lodge at Bretton Woods, Fabyan's Station and Restaurant, the Bretton Woods Ski Area, and the Bretton Woods Ski Lodge (CNL Properties).

The pre-filed testimony stated that, under the proposed water services agreement, any rates paid by the CNL Properties could not exceed the lowest rates paid by any other commercial or non-residential customer of Rosebrook. The Petitioners took the position that the rates contained in the proposed water services agreement between BW and CNL are not a special contract because the proposed agreement does not modify any scheduled rate charged by Rosebrook pursuant to its tariff. In the alternative, the Petitioners initially requested that if the Commission determines the proposed agreement is a special contract, the Commission find the rates just and reasonable and approve them pursuant to RSA 378:18.

Finally, Rosebrook sought approval after the fact for \$89,643.26 in expenditures it made from a contributions in aid of construction (CIAC) account. The Commission approved this fund

in *Rosebrook Water Company*, 85 NH PUC 150 (2000). Petitioners noted that the Commission authorized the CIAC fund to receive contributions from the Town of Carroll and annual payments of \$16,000 from MWH required under Special Contract—Water No. 7 dated November 3, 1999 and approved by the Commission in *Rosebrook Water Company, Inc.*, Order No. 23,379, 85 NH PUC 1 (2000). In addition, through Order No. 23,441, the Commission required Rosebrook to seek Commission approval prior to using any CIAC funds.

According to the testimony, the Town of Carroll made five annual payments of \$15,500 to Rosebrook since 2000; however MWH did not make any of the required payments until March 14, 2006, at which time MWH made a payment in the amount of \$80,000 to cover five required annual payments. In addition, Order No. 23,441 required Rosebrook to file reports specifying the current balance, interest accrued and disbursements made regarding the CIAC funds.

The Petitioners acknowledge that when the Commission authorized the creation of the CIAC fund, it also required such reporting. BW agreed to comply with all requirements regarding the CIAC fund once it assumed ownership of Rosebrook.

B. Commission Staff

Staff testified at hearing that it had initial concerns about the proposed transaction related to the conditions of the utility and Rosebrook's non-compliance with prior Commission orders. First, Staff observed that the Rosebrook distribution system is in need of improvements related to replacement of a rusted elbow fitting in the pump station and some non-functioning valves in the distribution system, the addition of valve bypasses to allow other distribution system valves to operate, and hydrants for draining the system for emergency repairs. Staff indicated that the

storage tank cover had deteriorated to the point that there are concerns about its structural integrity. Staff noted that the Petitioners agreed to report on the improvements to these facilities.

Staff also noted that the solar panels that power the telemetry directing the system's pumps are not effective when covered with snow, but indicated that BW had agreed to install an alternative power supply. Staff indicated that the hotel had been taking water from a hydrant for snowmaking on a hill adjacent to the hotel, and that, through the Settlement Agreement, the utility agreed to meter water used for snow-making if the hotel doesn't procure another source of water. Staff also noted that there appeared to be significant levels of water loss within the utility's distribution system, and that the Settlement Agreement required the utility to file water loss reports. Finally, Staff noted that BW had agreed to file a capital improvements plan.

Staff's second concern focused on the CIAC fund and Rosebrook's past non-compliance with the Commission's orders regarding the use of that fund. Staff noted that these issues were raised with MWH prior to the filing of the petition and that MWH had agreed to address the issues in this docket. Staff testified that the Commission had ordered the establishment of a CIAC fund as the Town of Carroll had been making annual payments to the utility in support of capital improvements. In addition, Staff noted that by the terms of the special contract between the Mount Washington Hotel and Rosebrook, the hotel had agreed to make payments into the CIAC fund.

Staff testified that when the Commission approved the CIAC fund in 2000, it specified how the CIAC fund would be handled, how activity in the account should be reported to the Commission, and how the utility's desire to use those funds for improvements should be communicated to the Commission prior to the use of the funds. According to Staff, it became

aware that Rosebrook had not been requesting permission to use the funds, and had not reported activity in the account to the Commission.

Next, Staff observed that MWH had also continued to charge the hotel and related parties a special contract rate which had expired in the spring of 2005, which resulted in an under-collection of rates in the amount of \$105,000. Staff explained that MWH agreed to deposit \$105,000 into the CIAC account no later than the date the utility is transferred to the new ownership.

Finally, Staff testified regarding BW's proposed arrangement whereby CNL would receive the lowest rate offered by Rosebrook regardless of when such rate was offered, and requested that the Commission find that such an arrangement was not a special contract. Staff disagreed with that arrangement, and as a result the Settlement Agreement required the utility to present any future special contract to the Commission for consideration.

III. SETTLEMENT AGREEMENT

MWH acknowledges that it had not complied with Commission Order No. 23,441 regarding the CIAC account. In addition, it acknowledges that MWH properties were provided the benefit of lower water rates after the expiration of Special Contract No. 7. Consequently, MWH agreed to deposit \$105,000 into the CIAC account on or before of the date of the transfer of the Rosebrook stock. The utility agreed to provide evidence of that deposit to the Commission within five days of the deposit.

BW and Rosebrook agreed to revise the utility's tariff to reflect the current-applicable rates as last approved by the Commission. In addition, BW and Rosebrook specifically agreed that they no longer sought Commission approval of any special contract or other agreement with

CNL that guarantees or offers CNL a rate that is the lowest of the tariff rate or of any other rate that Rosebrook or BW may negotiate in the future with any commercial customer. The Settlement Agreement acknowledged that BW or Rosebrook would not be precluded from requesting approval of a special contract pursuant to RSA 378:18.

Rosebrook agreed to reconstruct its accounting to accurately provide information related to the value of fixed plant, the CIAC account, accumulated depreciation and accumulated CIAC amortization accounts and submit its revised accounting to Staff for its review within three months of the Commission's approval of the Settlement Agreement. Rosebrook specifically agreed to forego recovery of any costs of consulting or contract services incurred in connection with such accounting reconstruction from ratepayers.

Rosebrook agreed to assume the responsibilities of managing the CIAC account in strict accordance with the 2000 order approving the fund, including (a) seeking prior approval of the Commission regarding use of funds from the CIAC account, and (b) providing semi-annual detailed report accounting for all receipts and disbursements from the CIAC account.

With respect to system improvements, Rosebrook agreed to replace the rusted elbow fitting within six months of the approval of the Settlement Agreement, and to provide Staff with initial comments on potential systems improvements within the same time period. Within 12 months, Rosebrook agreed to replace the solar panels with a full time, reliable power source and meter water used for snowmaking on the tubing hill if an alternate water source for snowmaking is not procured.

Finally, Rosebrook agreed to file by March 31, 2008, and each March 31 thereafter, the following items:

- (a) a list of significant improvements begun or completed during the previous year;
- (b) a list of engineering or other written reviews of the water system begun or completed during the year;
- (c) a capital improvements plan and budget for the calendar year;
- (d) a report, to be filed with the company's Annual Report, detailing water produced, consumed and lost during the previous year; and
- (e) a summary of leak detection and other measures used to address lost water issues.

IV. COMMISSION ANALYSIS

The transfer of water utility assets and franchises is governed by RSA 374:22 and RSA 374:30. Pursuant to RSA 374:22, I, “[n]o person or business entity shall commence business as public utility within this state. . . or shall exercise any right or privilege under any franchise not theretofore actually exercised in such town, without first having obtained the permission and approval of the commission.” The Commission shall grant requests for franchise authority and allow an entity to engage in the business of a public utility when it finds, after due hearing, that the exercise of the right, privilege, or franchise is for the public good. RSA 374:26. Pursuant to RSA 374:30, “[a]ny public utility may transfer or lease its franchise, works or system, or any part of such franchise, works or system, exercised or located in this state . . . when the commission shall find that it will be for the public good and shall make an order assenting thereto, but not otherwise.” In determining whether a proposed franchise or franchise transfer is for the public good, the Commission assesses, among other things the managerial, financial and technical expertise of the Petitioners. See *Lower Bartlett Water Precinct*, 85 NH PUC 635, 641 (2000).

Based on the record, we note that MWH has not complied with Commission orders and its tariff in the operation of Rosebrook. First, as documented by Staff, MWH has not properly maintained the facilities. Second, MWH permitted the hotel to use water from Rosebrook, on an un-metered basis, to make snow for a tubing hill. Third, MWH continued to charge the hotel and related properties a special contract rate which had expired in the spring of 2005, resulting in an under-collection of over \$100,000. Finally, MWH failed to comply with the Commission's order regarding deposits to and withdrawals from the CIAC.

While BW has no prior record of utility ownership, the record demonstrates that it has the managerial, financial and technical expertise to operate Rosebrook as a public water utility. Furthermore, we note that the settlement imposes certain specific requirements on BW as a condition to the transfer. For example, the settlement establishes a timetable for Rosebrook to reconstruct its accounting, requires the utility to comply fully with the Commission's order related to the operation of the CIAC fund, sets deadlines for certain improvements, and holds the utility to a variety of reporting requirements regarding, among other things, water losses, engineering reviews and capital improvements. Therefore, we grant the petition to transfer Rosebrook to BW as conditioned by the Settlement Agreement.

Based upon the foregoing, it is hereby

ORDERED, that the Petition for Authority for BW Land Holdings, LLC to Purchase Stock in Rosebrook Water Company, Inc. and Authority to Operate as a Rosebrook as Public Utility is APPROVED according to the terms and conditions of the Settlement Agreement among BW, MHW Preservation Limited Partnership and Commission Staff.

By order of the Public Utilities Commission of New Hampshire this twelfth day of July,
2007.

Thomas B. Getz
Chairman

Graham J. Morrison
Commissioner

Clifton C. Below
Commissioner

Attested by:

Debra A. Howland
Executive Director & Secretary