

**STATE OF NEW HAMPSHIRE
PUBLIC UTILITIES COMMISSION**

DW 07-136

MOUNTAIN LAKES DISTRICT

Investigation into Service Provided Outside Corporate Boundaries in the Town of Bath

Order Approving Exemption from Regulation

ORDER NO. 24,880

July 28, 2008

I. BACKGROUND

This proceeding concerns issues raised in November 2007 by two customers of the Mountain Lakes District (MLD), a municipal water district that provides service in Haverhill and Bath. The customers, both residents of Bath, reported that they had been notified that MLD intended to terminate water service to all properties located in the Town of Bath by April 1, 2008.

On November 29, 2007, New Hampshire Public Utilities Commission Staff filed a letter recommending a proceeding be opened to investigate the proposed termination of service. Staff advised that the water system serving the customers of MLD had been acquired from a previously regulated water utility, Mountain Springs Water Company (Mountain Springs), whose service territory was located in Haverhill and Bath. When MLD acquired the water system in 1986, the Commission determined it to be precluded from regulation pursuant to RSA 362:2. *Mountain Springs Water Co.*, 71 NH PUC 194 (1986).

Staff noted that the letter from the MLD commissioners referred to the Bath customers as “non-district” users. According to Staff, MLD sent the letters to Bath customers because it had concluded they were not paying their full share of the district’s expenses because some of the

expenses were recovered through a tax assessed only to district customers in Haverhill.

According to the MLD letter, the tax could not be levied on the customers in Bath because the Town of Bath had not authorized expansion of the water district into Bath. Staff pointed out that, if the Bath customers are truly outside the corporate limits of the water district, rates for the customers living in Bath could nevertheless be increased and MLD could still be exempted from regulation.

On January 7, 2008, the Commission issued an order of notice, scheduling a prehearing conference and technical session for January 29, 2008, and inviting interventions from interested parties. On January 14, 2008, Robert Duquette, a Bath resident and water customer of MLD, filed an intervention request. The prehearing conference was held as scheduled, and Mr. Duquette's request for intervention was granted. The Office of Consumer Advocate (OCA) also appeared at the prehearing conference, stating an intention to monitor the hearing.

On February 7, 2008, MLD filed a letter indicating that the water district was no longer planning to terminate service to the Bath customers. The letter also expressed interest in developing a fair and equitable rate such that Bath customers would be charged a fair proportion of the cost of water service. Additionally, the letter indicated that, notwithstanding references to RSA 362:2 in any previous Commission order concerning the district, the district did not consider itself automatically exempt from utility regulation.

On March 4, 2008, Staff filed a report on the technical session held subsequent to the prehearing conference. Staff and the parties requested approval of a procedural schedule, which was granted by the Commission in a secretarial letter issued March 12, 2008. The procedural schedule provided that recommendations from the Staff and parties be filed on April 18, 2008.

On April 18, 2008, the Commission received a joint recommendation from Staff and MLD. The OCA and Mr. Duquette also filed recommendations. On May 28, 2008, Staff filed a letter with the Commission explaining that it had contacted Mr. Duquette to ascertain whether he wanted the Commission to conduct a hearing at which he could present evidence. According to Staff, Mr. Duquette characterized any presentation he would make at a hearing as duplicative and he did not object to the Commission ruling on this matter based on the papers on file.

II. POSITIONS OF THE PARTIES

A. Staff and MLD

Staff and MLD filed a joint recommendation that the Commission treat a water rate of \$765 annually for the 16 MLD customers in Bath as equivalent to the \$400 rate charged within the corporate boundaries of MLD when adjusted for taxes paid by customers within the district. Staff and MLD recommended that the Commission find MLD's provision of water service outside its corporate boundaries to be exempt from Commission regulation pursuant to RSA 362:4, III-a (b). The letter noted that, although paragraph (a) of section RSA 362:4, III-a limits regulatory exemptions to municipal corporations seeking to serve new customers outside their boundaries, paragraph (b) authorizes the Commission to exempt any water district from utility regulation upon a determination after notice and hearing that the exemption would be consistent with the public good.

Staff and MLD acknowledged that, although the Commission approved the franchise transfer from Mountain Springs Water Company to MLD in 1986 and determined that MLD was not subject to regulation based on RSA 362:2, the Town of Bath never approved the expansion of the water district into the town. Since some MLD operating costs are recovered through the

district tax not collected in Bath, MLD has not been charging equivalent rates outside its corporate boundaries.

To remedy the rate disparity, Staff and MLD proposed that a proportionate share of MLD's debt service and administrative costs be added to the district's water rate charged to Bath customers as permitted under RSA 362:4, III-a. This rate, for 2008, would be \$400 inside the district boundaries and \$765 outside, with the difference paid by Haverhill customers through the district tax. Staff and MLD also recommended the Commission approve the method, as set forth in the attachment to their recommendation, for calculating the Bath rate in future years. Staff and MLD proposed that certain district administrative and debt service costs be allocated to the provision of water service, which would then be allocated to district and non-district customers based on the relative proportion of property value assessment inside MLD and in Bath. Staff and MLD contend that the proposed rate of \$765 for 2008 for the 16 Bath customers is an equivalent rate to that charged inside MLD, and that Commission approval of that rate and the method to calculate future rates would be for the public good.

In addition, MLD agreed to provide adequate notice to Bath customers regarding the water rates, including supplying a copy of the MLD proposed budget each year as well as the final budget approved by the MLD voters. MLD stated that Bath customers are invited to attend and participate in the meetings where the proposed budget is presented to residents and discussed. For these reasons, Staff and MLD recommend that the Commission find MLD's provision of water service exempt from regulation pursuant to RSA 362:4, III-a (b).

B. Robert Duquette

Mr. Duquette objected to the allocation of certain district expenses to water service. He stated that MLD had refused to respond to certain of his questions, or had inadequately

responded to questions regarding MLD's budget. Mr. Duquette objected to the allocations of costs associated with the office manager's salary, debt service associated with the MLD dam, failure of MLD to allocate costs to the MLD Lodge, and costs associated with office supplies and utilities such as telephone, electricity, propane and water. Mr. Duquette proposed reducing costs allocated to water service, and thereby increasing the costs allocated to recreation services. The adjustments would result in an annual rate to Bath customers of \$697.94, rather than the \$765 proposed by MLD and Staff.

C. Office of the Consumer Advocate

OCA agreed that MLD should be exempted from regulation under the public good standard of RSA 362:4, III-a (b). OCA asserted that MLD may not terminate service to Bath customers without explicit authorization from the Commission. OCA cites the Commission's decision in *Petition of Peter St. James*, Order No. 24,649 (July 18, 2006), in which a municipal water district subject to the franchising requirements of RSA 374:28 was ordered to not discontinue service to customers outside its corporate boundaries without Commission approval.

III. COMMISSION ANALYSIS

According to RSA 362:2, a municipal corporation is not a public utility if it operates only within its corporate limits. It is clear that, as a result of the Town of Bath's refusal to permit the extension of the water district into Bath, that the Mountain Lakes District provides water service to customers outside its boundaries. The Commission's 1986 order is therefore inoperative insofar as it presumed the boundaries of MLD would extend into Bath.

In addition to the general provisions defining "public utility" in RSA 362:2, RSA 362:4 refines the definition as applied specifically to providers of water service to the public. There have been numerous amendments to RSA 362:4 over the years. At one point, RSA 362:4, III(a)

provided that so long as a municipality was providing water service outside its boundaries at rates no higher, and at a quality and quantity equal, to that provided municipal customers, it was not a public utility. This automatic exemption from regulation did not survive statutory changes made in 2003, but separate language allowing for permissive exemption from regulation in certain circumstances was retained. For instance, pursuant to RSA 362:4, III-a (b), the Commission may exempt a municipal corporation from regulation, except for the franchise application requirements of RSA 374, upon a finding that such exemption is consistent with the public good.

Despite any previous representations to the contrary, MLD seeks to continue to serve its Bath customers. To do so, however, MLD must have the ability to charge a rate to those customers that reflects their fair share of the costs of providing them service.

Staff and MLD propose a rate of \$765 for the Bath customers, and assert that this rate is equivalent to that charged within MLD when consideration is given to the additional amount Haverhill customers pay for water service through their district tax bills. Mr. Duquette does not dispute the imposition of an equivalent rate. Rather, he proposes an equivalent rate lower than the one calculated by MLD and Staff, based on his adjustment of specific items in the MLD budget.

In their joint recommendation, Staff and MLD provided a clear method for the establishment of a water rate for the non-district customers once MLD's annual budgets are adopted. This method allocates certain administrative and debt service budget items to MLD's water service, which are paid for by all customers, inside MLD as well as outside, on an equivalent basis. Significantly, this allocation also results in property owners within the district, who have yet to construct homes and take service, contributing to the fixed costs of the water

system through the payment of their district tax rate. This is a clear benefit to the Bath customers outside the district.

MLD plans to use this same method for setting its water rate in the future as it has done for the 2008 budget. MLD commits to providing adequate notice to Bath customers regarding the water rates, and has agreed to provide the Bath customers with a copy of the MLD proposed budget each year as well as the final budget approved by the MLD voters. MLD states that Bath customers are invited to attend and participate in the meetings where the proposed budget is presented to residents and discussed.

After reviewing the filings of Staff, MLD, Mr. Duquette, and OCA, we generally adopt the recommendations of Staff and MLD. First, we reiterate that MLD may not terminate service to Bath customers at any time without explicit authorization from the Commission. Second, we find that the proposed rates for service to the Bath customers outside MLD's corporate boundaries are equivalent to rates charged within the district through both the water rate and the district tax. In this regard, we observe that Mr. Duquette's objection really concerns the overall water rate level charged by MLD within its boundaries. His objection is not the relevant inquiry under the statutory scheme set forth in RSA 362:4, III-a, which focuses on the comparability of treatment of customers inside and outside the boundaries of the water district. In any event, we observe as well that MLD arguably could charge Bath customers a water rate up to 15 percent above that charged to Haverhill customers. Furthermore, we note that the rate setting method recommended by Staff and MLD provides adequate protection for non-district customers, and we will accept it. Finally, we find that, to the extent MLD could be considered a public utility insofar as it serves customers outside its boundaries, it is consistent with the public good in these circumstances to exempt it from regulation.

Based upon the foregoing, it is hereby

ORDERED, that MLD's request to charge an annual rate outside district boundaries of \$765 for 2008 is approved; and it is

FURTHER ORDERED, that MLD's provision of water service to customers in the Town of Bath, within the franchise area previously granted, is exempt from Commission regulation consistent with the public good; and it is

FURTHER ORDERED, that future annual rates to be charged outside MLD's corporate boundaries shall be established in accordance with the method as recommended by Staff and MLD, and that any material alterations of that method shall be submitted to the Commission for review.

By order of the Public Utilities Commission of New Hampshire this twenty-eighth day of July, 2008.

Thomas B. Getz
Chairman

Graham J. Morrison
Commissioner

Clifton C. Below
Commissioner

Attested by:

Debra A. Howland
Executive Director & Secretary