

**STATE OF NEW HAMPSHIRE
PUBLIC UTILITIES COMMISSION**

DW 20-080

PENNICHUCK EAST UTILITY, INC. AND TOWN OF SALEM

Petition to Transfer Service Territory and Assets and to Commence Business

**Order *Nisi* Approving Transfer of Service Territory
and Assets and to Commence Business**

O R D E R N O. 26,509

August 16, 2021

In this order, the Commission approves Pennichuck East Utility's (PEU) transfer to the Town of Salem (Salem) of a portion of its franchise, together with certain PEU assets located in the Town of Windham (Windham), grants Salem's request for permission to provide water service in that limited area of Windham, and grants Salem an exemption from public utility status and from Commission rate regulation for its proposed water service outside its municipal boundaries.

I. PROCEDURAL HISTORY AND BACKGROUND

On May 21, 2020, PEU and Salem (together the Petitioners) filed a petition along with supporting pre-filed testimony (Petition). The Petitioners requested the Commission approve the transfer of portions of PEU's service territory abutting Routes 28 and 111 in Windham along with certain assets to Salem pursuant to RSA 374:30 and RSA374:26. In addition, Salem asked the Commission for permission to commence business in the Town of Windham, pursuant to RSA 374:22 and RSA 362:4, III-a. (a). The petition and subsequent docket filings, other than any information for which confidential treatment is requested of or granted by the

Commission, are posted to the Commission's website at [New Hampshire Public Utilities Commission \(nh.gov\)](http://www.nh.gov/UtilitiesCommission).

PEU is a regulated public utility serving water customers in the southeastern region of New Hampshire, and is a subsidiary of Pennichuck Corporation, which is owned by the City of Nashua. PEU's authority to provide water service in Windham stems from *Southern New Hampshire Water Company*, Order No. 17,597 (May 10, 1985). Salem and Windham are municipalities existing under New Hampshire law, RSA Chapter 31. Salem owns and operates a public water system providing service in Salem. PEU is a regulated water utility pursuant to RSA 362:2 and 362:4.

According to the Petition, PEU and Salem, among other parties, are signatories to the *Agreement Regarding the Southern New Hampshire Regional Water Interconnection Project* (Interconnection Agreement), Petition at Attachment A, approved by the New Hampshire Attorney General on April 22, 2019. Petition at 2. The Interconnection Agreement, developed in collaboration with the New Hampshire Department of Environmental Services (DES), addresses water contamination and capacity issues within certain Southern New Hampshire communities, including Windham, by facilitating water transmission from Manchester Water Works. *Id.* The Interconnection Agreement memorializes a joint public works program for the provision of water services pursuant to RSA Chapter 53-A. *Id.*

The interconnection project is divided into phases, with Phase I's funding comprised of funds from DES's Drinking Water and Groundwater Trust Fund and the State of New Hampshire MtBE settlement funds. Petition at 36, 135. The Interconnection Agreement provides that, as a part of Phase I, Salem will construct,

own, operate and maintain a 20-inch and 12-inch water transmission main, along Route 28 and Route 111, respectively, in Windham. The total projected cost of the water main installation is \$14.9 million.

PEU's current franchise encompasses all of Windham. Windham does not own or operate its own public water system. Attachment to Petition at 125. The Interconnection Agreement states that PEU will surrender a portion of its Windham franchise rights to Salem in order for Salem to serve customers in Windham. Petition at 2-3. The franchise exchange directly affects 17 PEU customers who would then be served by Salem after the franchise approval. *Id.* The Petitioners indicated that PEU would remove its meters from those 17 customer locations, to be replaced by meters installed by Salem. Testimony, Donald L. Ware, at 131.

The Agreement identifies how to transmit water supply from Manchester Water Works (MWW) to meet domestic water demands in the towns of Windham, Salem, Atkinson, Hampstead and Plaistow. Two supply volumes from MWW form of this project; 1.0 million gallons a day (MGD) defined as Phase I flows and 3.13 MGD defined as Phase II flows. Attachment to Petition at 10-11.

II. POSITIONS OF PARTIES

A. PEU

The Petitioners represented the franchise exchange is for the public good, pursuant to RSA374:30, in part, because it is a crucial component of a project that addresses water capacity and contamination issues in a timely and cost effective manner. Petition at 4, 137. In addition, PEU asserts that the franchise exchange is necessary for three additional reasons.

First, PEU stated that ownership of the franchise by Salem would have save ratepayers money by avoiding incurring unnecessary income tax expenses. Testimony of Donald L. Ware, at 129. If PEU were to accept the water mains after construction, the plant would be considered a contribution in aid of construction (CIAC) which PEU estimates would result in approximately \$5.1 million of income tax liability, increasing the project cost by approximately 34%. *Id.*¹ According to PEU's tariff, PEU may have to collect that money from DES. By transferring its franchise to Salem, and thereby allowing Salem to take ownership of the mains, PEU represented tax liability would be avoided as municipalities are not subject to state or federal income tax.

Second, PEU stated that if it owned the water mains, rather than Salem, it would be subject to approximately \$400,000 in Town of Windham and State of New Hampshire annual property taxes. *Id.* at 130. PEU estimated it would need to collect \$360,000 from the Towns of Plaistow and Salem, and the Hampstead Area Water Company, Inc., to cover that tax liability because PEU believes those entities are the primary beneficiaries of water transported through the mains. PEU stated that by transferring its franchise to Salem, and thereby allowing Salem to take ownership of the mains, the property tax liability concerns would be avoided as municipalities are not subject to local or state property tax, resulting in lower purchased water costs.

Third, PEU stated the franchise exchange would have additional benefits to the Company and its customers. PEU currently serves a portion of an area near Route

¹ The Tax Cuts and Jobs Act of 2017 removed the exemption for CIAC from taxable income previously appreciated by water utilities, effective January 1, 2018. Order No. 26,407 at fn. 1, 1 (September 28, 2020).

111, which is contaminated by MtBE², but the PEU wells providing water are at maximum capacity and cannot provide additional water to serve the entire area contaminated by MtBE. The addition of a 12-inch main to that area will provide safe drinking water and allow further development. *Id.* PEU also stated that the franchise exchange would benefit the Company by reducing the water demand on its burdened system by approximately 10,000 to 15,000 gallons per day. *Id.* at 131. PEU represents the franchise transfer would also reduce PEU's existing property tax liability. PEU also represented the assets to be transferred to Salem (1,400 feet of eight-inch water main, 17 water services and two hydrants) have no value for ratemaking purposes because the property was all CIAC. PEU represented that the transfer will not result in any disadvantages to its current customers. *Id.* at 132. PEU asserts the franchise exchange is for the public good because it is crucial to a project seeking to resolve water capacity and contamination issues effectively. Thus capacity and contamination issues are a primary driver of the project.

B. Town of Salem

Salem asserted it possesses financial, managerial and technical expertise to furnish water service to Windham as required by RSA 374:22 and RSA 374:26.

1. Financial

Salem stated it has operated a municipal water utility since 1905, when the Town purchased the private Salem Water Works Company. Salem represented that the Water Fund's unrestricted fund balance is currently \$2.1 million dollars which

² MtBE stands for methyl tert-butyl ether, which is a chemical gasoline additive that is toxic for human consumption.

represents 51% of the water fund's operating budget. Salem represented it annually reviews the rates to ensure that the fund remains fiscally stable. Salem asserts over ten million dollars of capital improvements have been approved by Salem voters in the past five years including securing water rights through purchases of Merrimack Source Development rights from Manchester Water Works. Annual revenues for the water system in 2018 were approximately \$3.6 million and capital investment in that year amounted to approximately \$2.4 million.

2. Managerial

Salem represented its Utilities Division has twelve full-time employees and provides water service to over 7,700 homes and businesses in Salem, distributing on average over 2.3 million gallons of drinking water per day. Salem asserts it uses two reservoirs for drinking water; Canobie Lake from the months of May through October, and Arlington Pond from October through May.

3. Technical

Salem represents it has significant technical experience resulting from operating its water system that comprises over 140 miles of water main, including 1,750 valves and 932 hydrants.

4. Tariffs

The Petitioners represented PEU customers in Windham pay \$7.51 per 100 Cubic Feet under existing rates. Salem asserts it will charge Windham residents rates 15% above the rates charged to Salem residents (currently, \$3.65 per 100 Cubic Feet), that is, \$4.20 per 100 Cubic Feet. As a result of these proposed rates, Salem claims it

should not be considered a public utility, pursuant to RSA 362:4, III-a (a)(1), and should thus remain unregulated by the Commission. *Id.* 3-4,

As part of Department of Energy Staff (Energy) discovery, the Petitioners represented Salem and PEU may enter into a wholesale water contract with Salem. Salem represented municipal approval has not yet been obtained for such a contract.

C. DES

DES confirmed “the subject public water system meets the suitability and availability criteria” of RSA 374:22, III. Petition at 140. DES further stated that it supported the franchise exchange as it is in the public good and in the best interests of both PEU’s and Salem’s customers, allowing both to continue to provide safe and reliable service at just and reasonable rates.

D. Windham

Windham also supported the Petition, including the franchise transfer from PEU to Salem and Salem’s provision of water service to Windham residents.

E. Energy

Energy recommended the Commission approve the franchise and asset transfer from PEU to Salem, and recommended the Commission grant Salem permission to provide water service in the proposed franchise area of Windham. Energy, however, recommended that the Commission’s approval of exemption from Commission regulation be temporary.

Energy asked the Commission to direct the Petitioners to submit the wholesale water agreement once it is approved and finalized by all parties. Energy, also, recommended the Commission direct the Petitioners to file monthly updates regarding

the status of the wholesale contract. Energy requested that the monthly report provide verification that any new customers added each month, and served by Salem, are not charged a rate 15% greater than its municipal customers. If Salem indicates otherwise, Energy recommended that the Commission hold a hearing as soon as possible to determine why Salem should remain exempt from regulation, pursuant to RSA 362:4, III-a(b). Energy further recommended that the Commission include a definitive time period for its temporary approval, not to exceed one year from the date of its initial order, at the end of which, if the wholesale contract is not finalized, or abandoned by the Petitioners, the Commission may hold a hearing to determine whether or not Salem should be considered a regulated utility.

III. COMMISSION ANALYSIS

A. Transfer of PEU Franchise and Assets to Salem

“Any public utility may transfer or lease its franchise, works, or system...when the commission shall find that it will be for the public good and shall make an order assenting thereto, but not otherwise.” RSA 374:30. The record supports finding the transfer is for the public good for several reasons. First, transfer of the franchise and assets to Salem will avoid incurring unnecessary income tax and property tax expenses and thereby reduce costs passed on to ratepayers. Second, Salem’s ability to provide clean drinking water to customers facing a possibly contaminated water supply, and the alleviation of PEU supply concerns in its existing franchise area, are benefits of the transfer for the public good. Third, the franchise exchange will enable the interconnection project, per the Interconnection Agreement, to be completed. Fourth, PEU currently has a water capacity issue impacting its ability to serve a

portion of an area near Route 111, which is contaminated by MtBE. The addition of a 12-inch main to that area will provide safe drinking water and allow further development. *Id.* In addition, the franchise exchange would benefit the Company by reducing the water demand on its burdened system by approximately 10,000 to 15,000 gallons per day. Finally, based on the Petition and supporting pre-filed testimony, PEU's transfer of franchise and assets to Salem will not result in any economic or detrimental impact on current PEU customers. As a result, we find the transfer of the franchise and assets to be for the public good, and approve the transfer, pursuant to RSA 374:30.

B. Salem's Provision of Water Service in Windham

Pursuant to RSA 374:22, "[n]o person or business entity shall commence business as a public utility within this state ... without first having obtained the permission and approval of the commission." The Commission will grant a request for franchise authority if it finds that it is for the public good. RSA 374:26. When determining whether a proposed franchise is for the public good, the Commission assesses, among other things, the managerial, technical, and financial expertise of the petitioner. *Hampstead Area Water Company, Inc.*, Order No. 26,301 at 4 (October 22, 2019). Under RSA 374:22, III, no water company shall obtain the permission or approval of the Commission to operate as a public utility without first satisfying any DES requirements concerning the suitability and availability of water. The record supports Salem's demonstrated managerial, technical, and financial expertise required to provide water service in the franchise area. Salem's has served its municipal water customers for more than a hundred years and has made numerous capital

improvements to maintain that system. Further, Petitioners have provided the statement from DES verifying that Salem has suitable water available, pursuant to RSA 374:22, III. For all of these reasons, we find Salem's operation of the additional franchise in Windham is for the public good, and therefore approve Salem's franchise expansion.

C. Salem's Exemption from Regulation as a Public Utility

Pursuant to RSA 362:4, III-a(a)(1), the Commission may exempt municipal corporations serving new customers outside their municipal boundaries from regulation, other than for franchise territory expansions, if they charge rates to outside customers that are no higher than 15% above rates charged to customers inside the municipal boundaries, and the Commission finds such exemption consistent with the public good. RSA 362:4, III-a(a)(2) further provides that municipal corporations furnishing water services shall not be considered a public utility if it supplies bulk water pursuant to a wholesale rate or contract to another municipality, village district, or water precinct. Salem has represented that it will not charge its new, non-municipal customers a rate more than 15% above the rates it charges its municipal customers. Based on that representation, we find that granting Salem exemption from public utility status, so long as it meets its commitment on rates, is for the public good. Accordingly, we grant the exemption.

D. Wholesale Contract for PEU to Purchase Water from Salem

The pending negotiations of a bulk water purchase by PEU were not discussed in the petition and testimony provided by PEU and Salem. Energy discussed the potential bulk sale in its recommendation, however, the contract's terms are not

currently finalized or approved by either PEU or Salem. As a result, we cannot consider the wholesale contract in this order. We instruct the parties to report on the progress of this wholesale contract at six month intervals until the contract is either finalized and submitted for Commission approval, or abandoned.

Based upon the foregoing, it is hereby

ORDERED NISI, that subject to the effective date below, PEU's request to transfer to Salem certain franchise areas and assets as described in this order and in the Petition is **APPROVED**, pursuant to RSA 374:30; and it is

FURTHER ORDERED, that Salem's operation as a public utility in certain areas of the Town of Windham and Salem's provision of water service in those areas is **APPROVED**, pursuant to RSA 374:22 and RSA 374:26; and it is

FURTHER ORDERED, that Salem's exemption from regulation as a public utility, except for any franchise expansion, is **APPROVED**, so long as its rates to outside customers are not more than 15 percent above its municipal rates; and it is

FURTHER ORDERED, that Salem and PEU shall report to the Commission in writing within six months of the effective date of this order, and each six months thereafter, on the status of the negotiations concerning PEU's bulk water purchase from Salem; and it is

FURTHER ORDERED, that the Petitioner shall cause a copy of this order to be published once in a statewide newspaper of general circulation or of circulation in those portions of the state where operations are conducted and posted to its website, such publication and posting to be no later than August 26, 2021 and to be

documented by affidavit filed with this office on or before September 13, 2021; and it is

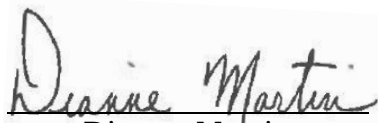
FURTHER ORDERED, that all persons interested in responding to this order be notified that they may submit their comments or file a written request for a hearing which states the reason and basis for a hearing no later than September 2, 2021 for the Commission's consideration; and it is

FURTHER ORDERED, that any party interested in responding to such comments or request for hearing shall do so no later than September 9, 2021; and it is

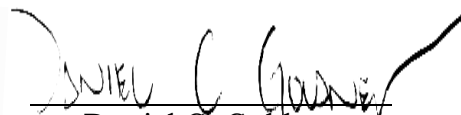
FURTHER ORDERED, that this order shall be effective September 16, 2021, unless the Petitioner fails to satisfy the publication obligation set forth above or the Commission provides otherwise in a supplemental order issued prior to the effective date; and it is

FURTHER ORDERED, that the Petitioner shall file a compliance tariff with the Commission on or before October 6, 2021, in accordance with N.H. Code Admin. Rules Puc 1603.02(b). All compliance tariff filings shall be annotated.

By order of the Public Utilities Commission of New Hampshire this sixteenth day of August, 2021.



Dianne Martin
Chairwoman



Daniel C. Goldner
Commissioner

Service List - Docket Related

Docket# : 20-080

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