

STATE OF VERMONT
PUBLIC SERVICE BOARD

Docket No. 5947

Petitions of Alpine Haven Water Company, Inc.)	Hearing held at
and AHA Water Cooperative, Inc., for approval)	Montpelier, Vermont
of the sale of all of the assets of the Water)	November 19, 1999
Company to the Cooperative)	

Order entered: 7/24/2000

Present: John P. Bentley, Esq.
Hearing Officer

Appearances: Martin K. Miller, Esq.
Miller, Eggleston & Cramer, Ltd.
for AHA Water Cooperative, Inc.

Geoffrey Commons, Esq.
for the Vermont Department of Public Service

Laura Snyder
Pro se

INTRODUCTION

On January 29, 1997, Alpine Haven Water Company, Inc. ("Alpine Water") and Alpine Haven Property Owner's Association, Inc. ("POA") filed a petition seeking Public Service Board ("Board") approval for the sale of the assets of Alpine Water to the POA.

For 35 years Alpine Water and its predecessors have provided water to the lot owners in a development known as Alpine Haven. There are a total of 104 service connections including 16 condominium units. Alpine Water has 36 year-round customers, with the remainder being second-home occupants.

On December 8, 1996, Alpine Water and the Alpine Haven Association, Inc. (a/k/a Alpine Haven Property Owners Association) entered into an Asset Purchase Agreement providing for the sale of the assets of Alpine Haven Water to the Alpine Haven Association, the property owners' association that undertakes general responsibility with respect to roads, garbage collection and recreational amenities for the Alpine Haven development.

In an amended petition filed September 14, 1998, the Alpine Haven Water Cooperative, Inc. ("Alpine Coop") was substituted for the POA as the entity that would receive and operate the water system if the petition were approved. A third amendment to the petition, filed November 25, 1998, asked that, should the Board determine that a certificate of public good is still required and should be issued, it be issued to Alpine Coop.

The other parties to this proceeding, the Vermont Department of Public Service ("DPS" or "Department") and Intervenor Laura Snyder, do not oppose the transfer of assets to Alpine Coop. However, in addition to seeking the transfer of assets, Alpine Coop also seeks a declaration from the Board that, once the transfer of assets is consummated, Alpine Coop will no longer be subject to jurisdiction of the Board. The Department opposes the declaration of no regulation sought by Alpine Coop, maintaining that Alpine Coop does not have the unanimous consent of the water company's customers, which the Department believes must be obtained before there can be freedom from regulation by the Board.

A technical hearing was held on November 19, 1999.

For the reasons set out below, I recommend that the transfer of assets be approved by the Board, that Alpine Coop requires a certificate of public good and should be issued one and that Alpine Coop should be required to file tariffs defining both the rates and the terms and conditions for service.

FINDINGS OF FACT

1. Alpine Water currently supplies water to 104 service connections primarily in a development known as Alpine Haven in the towns of Westfield and Montgomery, Vermont. Petition and Joint filing letter; Hawkins pf. at 1.

2. An Agreement was entered between Alpine Water and others as Sellers, and Alpine Haven Association, Inc. a/k/a Alpine Haven Homeowners Association a/k/a Alpine Haven Property Owners Association ("the POA") as Purchasers, for the sale of the assets of the water system which provides water to residents of Alpine Haven and to certain consumers lying contiguous to, but just outside of, Alpine Haven. The Agreement, dated December 8, 1996,

(Alpine Coop exh. B) was assigned on September 14, 1998, to Alpine Coop. Alpine Coop exh. C.

3. The purchase price for the water system assets was set at \$37,827 by the parties. Hawkins pf. at 3.

4. Alpine Coop was formed with the intention of running the water company separate and apart from the POA's operation of the recreational assets and provision of other services to Alpine Haven residents such as garbage collection, maintenance of roads, and oversight of recreational facilities. See Alpine Coop exh. A; Hawkins supp. pf. at 1-2.

5. Alpine Coop organized itself to pursue ownership of the water company rather than allowing the POA to proceed with the sale in order to eliminate disputes between members of the POA questioning the appropriate allocation of expenses between the water company and other services provided by the POA. Also, there are water users who live outside the geographical confines of Alpine Haven; it is more appropriate that they along with all other users have the water system be part of a dedicated business entity, rather than just one of several services provided by the POA which primarily serves, and is governed by, residents of Alpine Haven. Hawkins supp. pf. at 2.

6. The POA has allowed its employee, Mr. Cote, to oversee and operate the water system for the current owner, Alpine Water, during the time Mr. Cote has been working for the POA. There have been no complaints of record made about operation of the water system. See, DPS exh. 1, Deposition of Hawkins at 120-121, 127, 129-132.

7. Alpine Coop expects to charge the same rates as charged by the current water company, except that it proposed to increase rates to cover start-up costs, liability coverage, and a provision for a contingency. Hawkins pf. at 3.

8. Alpine Coop will retain the same operations person for the water system, Mr. Cote. Also, a full-time resident has obtained the necessary training to provide additional backup. Hawkins pf. at 3.

9. Management of Alpine Coop have discussed with the Water Supply Division of the Agency of Natural Resources the planning and funding necessary to make capital improvements to the system. Hawkins pf. at 3.

10. Alpine Coop seeks a ruling from the Board that, if transfer of the water system is approved, Alpine Coop would not be subject to regulation by the Board. Second Amendment to Joint Petition at ¶4. This request is premised upon the proposition that all customers on the water system would be members of Alpine Coop, and therefore share in the ownership of the water system. Tr.¹ at 72 (Hawkins).

11. There are some consumers on the water system who do not wish to be members of Alpine Coop, and who object to being required to join. White pf. at 1; Hawkins supp. pf. at 2 (95% of users agree to run system); tr. at 17 (Hawkins). Alpine Coop now requests that everyone who wants water service from the system be required to become member/owners, whether or not they object. Tr. at 72 (Hawkins).

12. In order to raise money to fund the purchase of Alpine Haven's water system, the POA billed all water consumers, whether or not they were POA members, for a "Capital Assessment." This assessment is intended to continue until April 30, 2000. Hawkins pf. at 2-3.

13. The POA has stated that payment of the Capital Assessment by non-members was voluntary, but it has never taken any steps to advise non-members of that fact. Martin pf. at 5. Those receiving the bill for the Capital Assessment would reasonably believe they were required to pay it. *Id.*; DPS exh. 1 at 62-63.

14. Mr. Hawkins, Chairman of the Board of Directors of both the POA and of Alpine Coop, testified at hearing that the wording on bills was changed to indicate that payment of the Capital Assessment was voluntary. Tr. at 43-44 (Hawkins). This was not true. DPS exh. 5 at 5; DPS exh. 3.

15. Counsel for Alpine Coop and POA stated to the Hearing Officer in oral argument that billing non-members for the Capital Assessment was a mistake; however, Mr. Hawkins disagreed with that statement. Tr. at 63-64. The POA has continued to bill non-members for the Capital Assessment, and has ignored the Department's and non-members' stated concerns about the assessment. DPS exh. 3 (4/24/99 bill to non-member); DPS exh. 2 (letters between P. Giuliani (1/28/98) and G. Commons (2/18/98)); DPS exh. 5 at 4.

1. Unless otherwise noted, transcript citations are to the transcript of November 19, 1999.

16. The POA has never stated any plausible justification for billing non-members for the Capital Assessment. Martin pf. at 5. Mr. Hawkins testified that he was unaware of any authority for billing non-members to raise money for a purchase by the POA. DPS exh. 1 at 66-67. Billing for money that is not owed is poor business practice, to say the least, and is likely to mislead and confuse consumers. Martin pf. at 5.

17. The POA charges interest on overdue fees. Tr. at 45 (Hawkins). Between April 1997 and June 1997, the POA changed the interest rate it was charging, without notice to people being billed. *Id.* at 45-50. The interest rate charged in April was a legal rate, but it was increased to a rate that violated Vermont law. *Id.* at 50; Martin pf. at 5. After the POA sued various non-members for non-payment, the rate was changed back to a legal rate. Tr. at 47 (Hawkins).

18. One of the non-members sued for non-payment was Mrs. Verhelst, an elderly widow of limited means, and a vulnerable consumer. The POA's complaint states that Mrs. Verhelst "wrongfully refused to pay" the maintenance fees; however, Mr. Hawkins admitted in his deposition testimony that she had not actually refused to pay. Martin pf. at 4; DPS exh. 1 at 92.

19. Mrs. Verhelst offered to pay what she could afford toward the maintenance fees, twice sending checks. The POA kept the checks, neither cashing nor returning them. Martin pf. at 4. Mrs. Hawkins, Treasurer and Director of Alpine Coop, testified that the reason the checks were neither cashed nor returned was that she "didn't have time to return them." DPS exh. 1 at 91.

20. No one from the POA ever contacted Mrs. Verhelst to determine whether she was unwilling or unable to pay. DPS exh. 1 at 93-94. Mr. Giuliani, the POA's lawyer, wrote to Mrs. Verhelst telling her to contact Mrs. Hawkins; however, when she did so, the Hawkins refused to speak with her, telling her to call their lawyer. Martin pf. at 4-5; DPS exh. 10 (Verhelst Affidavit). The lawsuit against Mrs. Verhelst, for amounts she is unable to pay, has caused her significant anxiety. DPS exh. 10 (Verhelst Affidavit).

21. Public Service Board regulation provides certain protections to consumers of essential services such as water service. These include laws and rules regarding disconnection of service, deposit requirements, review of rates and management practices, and procedures for the resolution of consumer complaints. Mr. Hawkins has stated that consumer protections such as separate accounting requirements and disconnection procedures would apply even without Board

regulation, but he was unaware of the source of any such requirements. In fact, statutes and rules administered by the Board and the DPS are the only source of such protection. Tr. at 59-60; Martin pf. at 4.

22. While a majority of Alpine Haven water consumers have expressed support for Alpine Coop's request, it is apparent that the POA membership has been given incorrect information about the effects and costs of Board regulation. For example, information given to POA members has stated that under Board regulation, rates must necessarily include a "generous profit margin." Moreover, there is no evidence that POA members have ever been informed of the consumer protections afforded by such regulatory oversight, or that such protections would be lost if Alpine Coop operates outside of Board jurisdiction. Martin pf. at 6; DPS exh. 1 at 19-29.

23. The POA has been involved in other disputes that have resulted in a poor business relationship with some Alpine Haven residents. For example, the POA "request[ed] a contribution" of \$75 for the stated purpose of paying legal fees and expenses in connection with a proposed buyout of Alpine Water by the POA. White pf. at 2; DPS exh. 4 at 1, 2. This payment was later re-characterized as a membership fee, although some people who paid it as a voluntary contribution did not wish to be members of the POA. *Id.*

24. The POA does not provide cost information to Alpine Haven property owners who are not POA members, although non-members are required to pay the POA for services it provides. White pf. at 3, 5; DPS exh. 1 at 73-74. Non-members are charged for services on the basis of a court judgment. DPS exh. 1 at 73.

25. The deeds to Alpine Haven properties require payment of a "reasonable fee" for services. The POA management believes that it is charging a "reasonable fee" by billing an amount determined in a prior court judgment, increased annually by the Consumer Price Index. Tr. at 68-69; DPS exh. 1 at 73-74. Mr. Hawkins considers this a "reasonable fee" even if the costs of providing the services decrease. In this event, charges to non-members would continue to increase. Tr. at 68-69.

26. The management of the POA appears to have made no serious effort to determine why some customers are objecting to the proposed loss of Board jurisdiction. White pf. at 4; DPS exh. 9; tr. at 41-42; DPS exh. 1 at 13, 40, 57; DPS exh. 1 at 54-55.

Discussion and Conclusions

This case would be a fairly routine matter of changing the ownership of a small water system from a single private owner to communal ownership but for one complication: the presence of several property owners and/or water customers who are strongly opposed to losing the protection of the Public Service Board and of the Department of Public Service through the regulation of rates and terms of service. One property owner, Ms. Laura Snyder, has been particularly vigorous in attempting to demonstrate that the managements of Alpine Haven in general, and of the water system in particular, have been guilty of numerous errors, breaches of duty, misrepresentations, and general underhanded maneuvers. However, Ms. Snyder is not a customer of the water system, although she has a deeded right to receive water from the system. As noted in the procedural order issued in this docket on May 27, 1999, it is unclear exactly what harm Ms. Snyder wishes to avoid, or what remedy she proposes. Certainly she is deeply mistrustful of the management of the POA and of Alpine Coop, and her misgivings do not appear to be entirely misplaced.

The DPS does not oppose the transfer of ownership, but argues for continued Board jurisdiction. The DPS has also requested a series of findings of fact should the Board not accept its direct legal argument. While I recommend that the Board accept that argument (for the reasons stated below), the Board's decision will be better informed by inclusion of the DPS's requested findings on the relationship between the predecessors of the Coop and certain potential customers. Thus, I have included the substance of those findings in the findings above (Findings 12 through 26).

Generally, the Board does not regulate a water system that is owned by its users. Municipal systems² are exempt by statute. 30 V.S.A. § 203(3). Likewise, with regard to private associations, when "the users of a water system are also its owners, it does not have the public nature that brings it under [§ 203(3)]." *In re Pfenning*, 136 Vt. 92, 385 A.2d 1070 (1978). Consequently, if some of the customers do not become owners (that is, they do not become members of Alpine Coop) then Alpine Coop will be an ordinary water utility serving customers

2. Including fire districts. See Docket 5884, Order of 12/20/96.

who are not owners, and will be regulated under Title 30. Just as clearly, if all of the customers were to voluntarily join Alpine Coop, the Board could cease regulating it, as it has many times in such circumstances. However, Alpine Coop's plan requires that all customers become members, whether or not they so wish. Alpine Coop attempts to draw parallels between its proposed plan and, for instance, Washington Electric Cooperative, Inc. ("WEC"): in general, if one moves into an area served by WEC and wishes to receive electric service, one must become a member of WEC. Membership in the electric cooperative is a condition of service, and may be compared to the membership that Alpine Coop wishes to require of its customers. Skirmishing between Alpine Coop and the DPS relative to whether the two types of membership/ownership are actually comparable should not obscure the DPS's most important point: members of WEC still receive the protection of Board and DPS regulation of rates, financing, and other important utility functions. The proposal by Alpine Haven would deprive the customers of this regulatory oversight, as well as related consumer protections. Comparisons to municipal systems and water districts are also inappropriate, since there are rights of public inspection and election that provide some level of protection to consumers; at any rate, the decision to exclude municipalities from regulation was made by the legislature, and the Board should not extend that exclusion merely by analogy.

In the past, the Board has often allowed the takeover of a water system by its customers, but only where all customers have agreed. However, the Board does not appear to have ever required customers to join a cooperative or otherwise take an ownership interest, with a loss of Board jurisdiction, over the customers' objections. It may be that there will someday be a case where the Board will take that action; given the level of animosity between the majority and the dissidents, this is not the appropriate case. In its brief, Alpine Coop mentions that this is a democratic situation, not a "tyranny by a minority." Quite. A tyrannized majority can at least hope to someday throw off its oppressors. Here the majority seeks to impose its will on a minority, who can have little hope of ever gaining the upper hand. Alpine Coop has made no convincing argument for setting aside prior Board practice concerning unanimous consent to a takeover, and I will certainly not recommend it to the Board.

I conclude that the transfer of the water system to Alpine Coop will promote the general good of the state pursuant to 30 V.S.A. § 109, and that the Board should approve it. No party has opposed the transfer, and the great majority of customers support it.

However, I further conclude that only those customers who wish to be members of the cooperative should become so. Since Alpine Coop will be serving customers who are not also owners, it will remain subject to Board jurisdiction. Alpine Water has a tariff in effect, and Alpine Coop should continue to provide service under that tariff until its new one is filed. When that new tariff is filed, the Board and the DPS will have an opportunity to review it, as usual. At that time the costs and capital structure of the water system may be examined and any improper or extraneous costs excluded. Alpine Coop management should be reminded that only actual historical costs may be included in rate base. *In re Towne Hill Water Co., Inc.*, 139 Vt 72, 422 A.2d 927 (1980). Management may also wish to consider whether they will forgo the opportunity for a return; there is no legal requirement that a return be included in rates, only that a reasonable one be allowed if a return is sought.

The foregoing is reported to the Public Service Board in accordance with the provisions of 30 V.S.A. § 8.

This Proposal for Decision has been served on all parties to this proceeding in accordance with 3 V.S.A. § 811.

DATED at Montpelier, Vermont, this 19th day of May, 2000.

s/John P. Bentley
John P. Bentley, Esq.
Hearing Officer

BOARD DISCUSSION

The Board heard oral argument by the parties on June 21, 2000. Having considered the arguments, and having reviewed documents filed by the parties both before and after the hearing, we adopt the findings and conclusions proposed by the Hearing Officer, with the following additional analysis.

Alpine Coop's Concerns About the Proposal

The proposal for decision would allow the water system to be sold to Alpine Coop, but would maintain Board jurisdiction over rates so long as there are some customers of the water system who are not members. Counsel for Alpine Coop argued that this protection is not necessary because all non-member users will become owners of the system. However, he did not address two problems raised by this argument: first, the petition before the Board is for Alpine Coop alone to purchase the system, not for a purchase by Alpine Coop and other, unnamed, persons. Second, it appears that this ownership interest is to be thrust upon the non-member customers, willing or not. Since those persons are not parties to this docket, we have not heard their positions on such ownership; but if they are unwilling to join Alpine Coop, they are not likely to willingly accept an ownership interest in the water system.

We conclude that, even viewing Alpine Coop's argument in a light most favorable to the Coop, the addition of owners of the system besides Alpine Coop would necessitate an amendment to the pleadings. Even under the liberal amendment provisions of V.R.C.P. 15, we will not grant leave to amend where the amendment would have such an impact upon non-parties. Therefore, while we approve the sale to Alpine Coop, we expressly note that our present action is not an approval of the transfer of any ownership interest in the water system to any individuals not listed in the petition before us.

Alpine Coop also argues that customers are protected by the cooperative form of ownership, because 11 V.S.A. § 1016 states that members are not liable for the debts of cooperatives. This argument is unpersuasive as to the non-member customers of the system, who under Alpine Coop's scheme would be owners, not members, and would not be protected by § 1016.

Finally, we note that Alpine Coop also argued that it should not be regulated because the cost of regulation outweighs its value. The simple answer to this argument is that such a balancing has already been made by the legislature in creating Title 30. As counsel for Alpine Coop noted, the legislature has already declined to act to provide special relief.³

Mrs. Snyder's Concerns

Mrs. Snyder's concerns seem to center on whether she, as a non-member customer of the Property Owners' Association, will subsidize the operation of the water system through her Property Owners' Association fees. We conclude that these concerns can be addressed by an impartial and careful review of the closing documents from the sale of the water system to assure that all proper costs of setup and of pre-transfer operation have been transferred from the accounts of the Property Owners' Association to Alpine Coop, and of the accounting procedures adopted by Alpine Coop to account for in-kind payment of water system expenses by the Property Owners' Association. We ask that the Department of Public Service conduct such a review, and we will condition our approval of the transfer upon a satisfactory report of the result of the review.

The Department's Requested Conditions

The Department asked the Board to include as a condition of our approval of the transfer a requirement that Alpine Haven receive clear title to the water company property from the seller. We will insert that condition into the Order; we conclude that such a condition is a wise precaution where the transaction is not arms length.

The Department also suggested that we require Alpine Coop to modify its Articles of Association to reflect the fact that Alpine Coop will be providing water service to non-members. We will adopt that suggestion and so modify the Order.

3. See transcript, June 21, 2000, at 25.

Future Steps

As noted by the Hearing Officer, the net result of this transfer will be a cooperative association serving its members without regulatory oversight, at the same time that it also serves some small number of customers subject to regulatory oversight. After completion of the transfer and the review by the Department, Alpine Coop must file a tariff for service to its remaining non-member customers. It is, of course, possible that, at some point in the future, Alpine Coop will succeed in persuading the last few customers to accept membership. At such time, Alpine Coop may file a notice to that effect with the Board and the Department, and at that time seek an order terminating this Board's jurisdictional regulatory oversight.

ORDER

IT IS HEREBY ORDERED, ADJUDGED AND DECREED by the Public Service Board of the State of Vermont that:

1. The findings and conclusions of the Hearing Officer are accepted, except as noted above.
2. Ownership and operation of a water system by Alpine Haven Water Cooperative, Inc. will promote the general good of the state.
3. The transfer of ownership of all of the assets of Alpine Haven Water Company, Inc., to the Alpine Haven Water Cooperative, Inc., is approved, and certificates of consent and of public good shall be issued.
4. Before the transfer may take place, Alpine Haven Water Cooperative, Inc., shall provide access to its books and closing documents sufficient for the Department of Public Service to review them and assure that all proper costs of setup and of pre-transfer operation have been transferred from the accounts of the Property Owners' Association to Alpine Haven Water Cooperative, Inc., and of the accounting procedures adopted by Alpine Haven Water Cooperative, Inc., to account for in-kind payment of water system expenses by the Property Owners' Association. The transfer shall not be completed until the Department has performed its review.
5. This approval is contingent upon the transfer of clear title by the seller to Alpine Haven Water Cooperative, Inc.
6. Alpine Haven Water Cooperative, Inc., shall modify its Articles of Association to reflect the fact that it will be providing water service to non-members. The modified Articles of Association shall be filed before the actual transfer of assets.

7. Alpine Haven Water Cooperative, Inc. shall inform the Public Service Board and the Department of Public Service of the date of the transfer of assets, within fifteen days of said transfer.

8. Alpine Haven Water Cooperative, Inc., shall file with the Public Service Board and the Department of Public Service pursuant to 30 V.S.A. Section 225, proposed rate and conditions of service tariffs within sixty days of the transfer of assets. It shall continue to serve existing customers at the rates now in effect for Alpine Haven Water Company, Inc., until the new tariffs are approved.

DATED at Montpelier, Vermont, this 24th day of July, 2000.

<u>s/Michael H. Dworkin</u>)	
)	PUBLIC SERVICE
)	
)	BOARD
)	
)	OF VERMONT
<u>s/David C. Coen</u>)	

OFFICE OF THE CLERK

FILED: July 24, 2000

ATTEST: s/Susan M. Hudson
Clerk of the Board

NOTICE TO READERS: This decision is subject to revision of technical errors. Readers are requested to notify the Clerk of the Board (by e-mail, telephone, or mail) of any technical errors, in order that any necessary corrections may be made. (E-mail address: Clerk@psb.state.vt.us)

Appeal of this decision to the Supreme Court of Vermont must be filed with the Clerk of the Board within thirty days. Appeal will not stay the effect of this Order, absent further Order by this Board or appropriate action by the Supreme Court of Vermont. Motions for reconsideration or stay, if any, must be filed with the Clerk of the Board within ten days of the date of this decision and order.