

June 8, 2018

BELFAST WATER DISTRICT
Notice of Proposed Sale of Water
Resource Land Pursuant to
35-A M.R.S. § 6109 and Chapter 691 of
the Commission's Rules

ORDER

VANNOY, Chairman; WILLIAMSON and DAVIS, Commissioners

I. SUMMARY OF DECISION

In this Order, the Commission (1) finds that the Belfast Water District (District) has complied with the requirements of 35-A M.R.S. § 6109 and Chapter 691 of the Commission's Rules concerning the proposed sale of water resource land and (2) waives the 8-month notice requirement in 35-A M.R.S. § 6109 and Chapter 691 relating to that sale. The Commission also authorizes the proposed sale pursuant to 35-A M.R.S. § 1101. Finally, the Commission approves the Water Supply and Purchase Agreement between the District and Nordic Aquafarms (NAF) dated January 29, 2018, as a special rate contract pursuant to 35-A M.R.S. § 703(3-A).

II. PROCEDURAL HISTORY

On February 14, 2018, the District filed notice of a proposed sale of water resource land to NAF and the City of Belfast (Belfast) pursuant to 35-A M.R.S. § 6109 and Chapter 691 of the Commission's Rules (February 14th Filing). In its February 14th Filing, the District requested expedited Commission review of its filing and a waiver of one of the notice requirements in section 6109 and Chapter 691.

On February 27, 2018, the Commission Staff issued its first set of data requests relating to the District's February 14th Filing. The District responded to the Staff's first set of data requests on March 6, 2018.

On March 1, 2018, the District made a supplemental filing in this docket seeking Commission review and approval of its proposed transactions with NAF and Belfast pursuant to 35-A M.R.S. §§ 703 and 1101 (March 1st Supplemental Filing).

On March 2, 2018, Belfast filed a Petition to Intervene in this proceeding. Belfast's Petition to Intervene was granted by Procedural Order issued on March 5, 2018.

On March 9, 2018, the Staff issued its second set of data requests to the District that relate primarily to the District's March 1st Supplemental Filing. The District responded to the second set of data requests on March 19, 2018.

On March 9, 2018, the Office of the Public Advocate (OPA) filed a Petition to Intervene in this case. The OPA subsequently withdrew its Petition to Intervene. On March 20, 2018, NAF filed a Petition to Intervene in this proceeding.

A technical conference was held in this case on March 30, 2018, during which Staff conducted follow-up discovery on the District's February 14th Filing and March 1st Supplemental Filing in this case. NAF's Petition to Intervene was granted at the outset of the March 30th conference. During the March 30th conference, Staff posed two oral data requests to the District, to which the District responded in a timely fashion.

An Examiners' Report was issued in this case on April 27, 2018. On May 1, 2018, the District filed a response stating that it had no comments on, or exceptions to, the Examiners' Report. No other party filed a written response to the Examiners' Report.

On May 3, 2018, the Examiners issued a Procedural Order requesting the District to (1) obtain written confirmation from the Town of Northport that Northport formally waives/rejects its right of first refusal regarding water resource land located in Northport and (2) file such confirmation with the Commission. On May 17, 2018, the District provided the information requested in the May 3rd Procedural Order.

The Commission considered the Examiners' Report during deliberations held on May 30, 2018.

III. LEGAL STANDARDS

A. Sale of Water Resource Land

1. 35-A M.R.S. § 6109

Section 6109 governs the sale of land by a consumer-owned water utility such as the District. Section 6109 imposes several requirements on a consumer-owned water utility that intends to sell or transfer land or property owned by the utility that is used for the purposes of providing a source of supply or land adjoining the source of supply. Section 6109 requires a consumer-owned water utility to give specific notice to the Commission, municipalities, and customers of pending land sales.

Section 6109(1) requires a consumer-owned water utility to provide the Commission with 8-months' notice prior to the sale of water resource land. Section 6109(2) provides: "Land subject to the provisions of this section may not be sold within the first 8 months after notice of the proposed sale has been given to the commission unless all or part of that time period is waived by the commission for good cause shown."

Section 6109(4) authorizes the Commission to promulgate rules to implement the provisions of section 6109.

Section 6109(5) provides: "The municipality in which the land is located shall have the right of first refusal to purchase any land that lies within that municipality's boundaries and is offered for sale under this section. That right is assignable by the municipality."

2. Chapter 691 of the Commission's Rules

Chapter 691 of the Commission's Rules implements section 6109 and establishes additional requirements for the sale of water resource land by a consumer-owned water utility. Section 1(E) of Chapter 691 defines "water resource land" as "any land or real property owned by a water utility for the purposes of providing a source of supply, storing water or protecting sources of supply or water storage, including reservoirs, lakes, ponds, rivers or streams, wetlands and watershed areas, and contains greater than five contiguous acres."

Chapter 691 establishes additional requirements regarding notice to the Commission and the local municipality of an intended sale or transfer of water resource land. Section 2(A) of Chapter 691 requires a consumer-owned water utility to provide 8-months' notice prior to the sale of water resource land. Section 2(B) requires the District to provide the same notice as required under Section 2(A) to municipalities where the water resource land in question is located. Section 2(C) requires a consumer-owned water utility to publish newspaper notice of its intention to sell water resource land within 30 days of notifying the Commission of the proposed sale.

Section 4 requires a consumer-owned water utility to hold a public meeting to inform its customers of the proposed sale of water resource land. Section 4 also establishes notice requirements relating to the public meeting. Section 4(E) establishes a procedure by which customers can file a complaint about the proposed sale of water resource land with the Commission.

Section 5 of Chapter 691 expands upon the right of first refusal requirements in section 6109(5) of Title 35-A. Section 5(B) reads as follows:

No binding contract for the sale of the water resource land under this chapter shall be concluded with any buyer unless the water resource land has been offered to the municipality or municipalities in which the water resource land is located under the same price, terms, and conditions that have been offered to the other buyer.

Section 5(C) provides, in part: "Once an offer to the municipality or municipalities has been made under section 5(B) above, the municipality shall have at least 90 days to either accept or reject the offer upon the same terms and conditions of an offer to or from another buyer."

Section 6 of Chapter 691 authorizes the Commission to waive any of the requirements of the Rule upon a showing of good cause.

B. Sale of Utility Property

Section 1101 of Title 35-A governs the sale, lease, and mortgaging of utility property. Section 1101(1)(A) provides that a public utility must obtain Commission approval before it may:

Sell, lease, assign, mortgage or otherwise dispose of or encumber the whole or part of its property that is necessary or useful in the performance of its duties to the public, or any part of its property under construction for the performance of its duties to the public, or its franchises, permits or rights under them.

Section 1101(4) authorizes the Commission to exempt certain transactions from the requirements of section 1101(1). Specifically, section 1101(4) allows the Commission to certify that certain transactions relating to utility property do not require Commission authorization where the property sought to be transferred does not materially affect the ability of the utility to perform its public service.

C. Special Rate Contract

1. 35-A M.R.S. § 309

Section 309 of Title 35-A requires a utility to adhere to its rate schedules which are on file with the Commission. Section 309 reads as follows:

Except as otherwise provided in section 703, it is unlawful for any public utility to charge, demand, collect or receive, for any service performed by it within the State or for any service in connection with that performance, a greater or lesser compensation than is specified in such printed schedules as may at the time be in force, or to demand, collect or receive any rate, toll or charge not specified in the schedules. The rates, tolls and charges named in the schedule are the lawful rates, tolls and charges until they are changed as provided in this Title.

2. 35-A M.R.S. § 703(3-A)

Section 703 of Title 35-A prohibits a public utility from providing rebates, discounts, or otherwise discriminatory rates. However, section 703(3-A) allows a public utility to enter into a special rate contract subject to Commission approval. Section 703(3-A) provides: "A public utility, subject to the commission's approval, may make a contract for a definite term for its product or service, but the published rates for the product or service may not be changed during the term of the contract without the commission's consent."

IV. THE DISTRICT'S REQUEST

A. Introduction

In its February 14th Filing and March 1st Supplemental Filing, the District requests the Commission to (1) review a series of proposed transactions with NAF and Belfast

and (2) grant all necessary approvals. The District's request involves several distinct components that must be considered by the Commission in this proceeding. For instance, the District's request implicates three distinct parcels of property and the elements of its proposed transactions are memorialized in three separate Agreements between and among the District, NAF, and Belfast.

In evaluating the District's request, the Commission needs to consider such things as the District's reasons for selling the property, the reasonableness of the proposed sale price for each parcel, the impacts the proposed sale would have on the District's ratepayers, whether the District has sufficient water resource capacity to provide service at the levels requested by NAF, whether the District's current infrastructure is sufficient to meet the demands of NAF, and other ancillary issues relating to the proposed transactions.

The various components of the District's request, the District's justification for those components, and the issues raised by the request, are summarized below.

B. Description of Property to Be Sold and Proposed Sale Price

In its February 14th Filing, the District identifies the following three components that make up the property it proposes to convey to either NAF or Belfast. All of the parcels of land that the District proposes to convey were acquired by the District from the Belfast Water Company in 1919. This property was initially used for the District's source of supply, which was known as the "Little River water source." However, in 1980, the District transitioned from the Little River water source to an underground source of supply located in the Goose River Aquifer in East Belfast. The District's current source of supply consists of two wells¹ which are located approximately 6 miles from the property that the District proposes to convey to NAF and Belfast.

1. The Realty and Additional Parcels

Collectively, the Realty and Additional parcels consists of 30 acres. The District's current office building and two garage buildings are located on the Realty and Additional parcels. The Realty parcel excludes the Lower Dam, which is discussed below.

The District proposes to sell the Realty and Additional parcels for \$1,059,000. The District asserts that the sale price "was the product of an arm's length negotiation" and therefore represents fair market value. EXM 001-002. The District asserts that its negotiating position was informed by an appraisal of the property conducted by Worth Real Estate dated December 20, 2017. EXM 002-002.

¹ The District's two active wells are known as the Smart Road Well and the Jackson Pit Well. The District plans to bring a third well in the Goose River Aquifer, the Talbot Well, on line as soon as the transactions with NAF and Belfast close.

2. The Lower Dam

The Lower Dam is located on the southeast portion of the Realty parcel and includes all appurtenances, rights, privileges and easements pertaining to the dam including any flowage rights. As discussed in Part IV(C) below, the District considers the dam to be a liability.

The District proposes to sell the Lower Dam to NAF for \$1.

3. The Waterfront Parcel

The Waterfront parcel consists of approximately 34 acres, a portion of which is located in the City of Belfast and a portion of which is located in the Town of Northport.

The Waterfront parcel will be restricted to conservation and passive recreation use and the property is further subject to certain easements relating to NAF's aquaculture facility.

The proposed sale price for the Waterfront parcel is \$100,000. The District asserts that this sale price "is the Fair Market Value of the Property given zoning restrictions and given current and future conservation and passive recreational uses of the Waterfront Parcel." EXM 001-006. The District's assertion is based in part on the appraisal that was conducted in December 2017. EXM 002-002.

C. The District's Justification for the Proposed Transactions

In its February 14th Filing, the District provides the following background relating to the proposed transactions with NAF and Belfast and the District's justification for those transactions.

In the fall of 2017, the District, through the City of Belfast, was approached by NAF about the possibility of selling the District's land as described above, which contains the District's current headquarters. NAF, a Norwegian aquaculture company that is formed in the United States as a Delaware corporation, sought the property to build a major land-based salmon farming operation in the United States. NAF's interest in the District's property is based on its proximity to both salt water and fresh water sources. After several months of negotiations, on January 30, 2018, the Trustees of the Belfast Water District signed three agreements with NAF and the City of Belfast, which include: (1) the Options and Purchase Agreement; (2) the Evaluation Agreement; and (3) the Water Supply and Purchase Agreement.²

The Agreements approval and execution by the parties are contingent upon, *inter alia*, environmental due diligence and approval of the sale of land by the Commission within 120 days of the signing of the agreements. If all environmental tests go as expected, and everyone receives approval from all

² These three Agreements are discussed in Part IV(D) below.

local and State agencies, NAF will take ownership of the Realty and Additional Parcel later this year, and eventually the Lower Dam as well. Once it has received its necessary permits, NAF will begin constructing its \$150 million state-of-the-art aquaculture facility, which will employ 40 - 60 people when the first phase is completed. NAF's ultimate goal is to make additional investment in the Belfast aquaculture facility that could total \$500 million.

In addition to paying the District fair market value for its land and buildings, NAF also has agreed to purchase a significant amount of water from the District, which will generate additional revenue and help the District's ongoing efforts to upgrade and maintain its infrastructure, while keeping its water rates as low as possible. The City of Belfast has agreed to financially participate in this transaction by offering to take ownership of the Waterfront Parcel, which contains the Little River Trail, ensuring that the trail will continue to be open to the public. The City also has agreed to donate property on Crocker Road to the District as a potential site for its new headquarters.

February 14th Filing at 2-3.

In addition to the above-described benefits from the proposed transactions that are articulated in its February 14th Filing, the District asserts that the proposed transactions will produce several other benefits for its ratepayers.

For instance, the District asserts that the proposed transactions will allow the District to bring a third well, the Talbot Well, on line, which will increase the District's water supply capacity and provide redundancy. EXM 001-002; EXM 001-006; EXM 002-023; Tr. at 34, 46-48, 54-56, 59-62. The District asserts: "With the Talbot well added, the District's wells can sustainably provide over 2 times the requirement of existing customers plus the maximum ceiling under the Water Supply Agreement with Nordic." Exhibit 2 to ODR 001-002 at 3.

Prior to 1980, the District relied, at least in part, on the Little River water source to supply water to its customers. Because the District has not drawn water from the Little River source of supply since 1980, the District considers the Lower Dam a liability. Tr. at 7-8. The proposed sale may result in the District conveying the Lower Dam to NAF. On this point, the District notes:

c. By the end of NAF's due diligence as to the Lower Dam Parcel, NAF must exercise its option within two (2) year of the Closing. See Section 2(b) of the Options and Purchase Agreement attached as Exhibit 4 to EXM-001-2(a). d. The District has faced long term obligations and cost to maintain the Lower Dam; if NAF exercises its Option, the District and its ratepayers will no longer have those obligations and costs. If NAF does not exercise its Option, the District will abandon the dam under the State dam abandonment provisions in 38 MRS §§ 901 to 908, inclusive.

EXM 001-003.

The District asserts that providing service to NAF will have benefits to the District's system. One specific benefit cited by the District would be reduced chlorine costs. "We feel because of the high user [NAF] at the very end of the system will actually reduce the amount of chlorine that we're putting in at the well site because the water will be moving a lot quicker." Tr. at 57.

Finally, the District notes that the proposed transactions will allow the District to move its headquarters and garage facilities to a more favorable location on Crocker Road which will result in several benefits to the District's customers. March 1st Supplemental Filing at 5-6; EXM 001-002. The District notes that the new location is closer to downtown Belfast and is more central in relation to service calls. The District summarizes the benefits of the location of its new headquarters as follows.

Centralization for customer access and easier access to service calls, updated larger and heated single structure garage, updated and more technologically advanced facilities with access to fiber optic cable to the building, increased ability/opportunity to coordinate joint work projects (and realize cost efficiencies) with the Belfast Highway Department, which is constructing a new state of the art facility on an adjacent parcel of land.

EXM 001-008.

D. Description of Agreements

Attached to the District's March 1st Supplemental Filing are three Agreements that relate to the District's proposed transactions in this proceeding. These Agreements include (1) the Options and Purchase Agreement (Attachment A to the March 1st Supplemental Filing), (2) the Evaluation Agreement (Attachment B to the March 1st Supplemental Filing), and (3) the Water Supply and Purchase Agreement (Attachment C to the March 1st Supplemental Filing). Each of these three Agreements is described below.

1. Options and Purchase Agreement

The Options and Purchase Agreement was executed by the District, NAF, and Belfast on January 30, 2018. This Agreement describes the property to be conveyed by the District to NAF and Belfast. The Options and Purchase Agreement identifies various options, terms, and conditions relating to the transactions. This Agreement also specifies the sale price for each parcel. The District summarizes the key points of the Options and Purchase Agreement as follows:

As of January 30, 2018, NAF has a twelve (12) month option to purchase the Premises (and the rights to extend the option for an additional six (6) months) for the total purchase price of \$1,059,000 (\$976,000 for the Realty and \$84,000 for the Additional Parcel). NAF also has the option to purchase the Lower Dam for the total purchase price of \$1 for a term ending on the earlier of: (a) two (2) years from the date of closing on the Premises, or, (b) if NAF does not exercise its option on the Premises, upon the expiration of the option for the Premises. NAF

will pay \$30,000 for the initial twelve (12) month option term, and if it decides to extend the option for an additional six (6) months, it will pay the District an additional \$15,000.

Furthermore, under the Options Agreement, the City will purchase the Waterfront Parcel for the total purchase price of \$100,000 upon NAF closing on the purchase of the Premises. The Waterfront Parcel will be restricted to conservation and passive recreation use.

March 1st Supplemental Filing at 2-3.

2. Evaluation Agreement

The Evaluation Agreement was also executed by the District, NAF, and Belfast on January 30, 2018. The District summarizes the major provisions of the Evaluation Agreement as follows:

The Evaluation Agreement was entered into in order to set out due diligence procedure, requirements, and expectations for all parties regarding the purchase of the District's Water Resource Land pursuant to the Options Agreement. Specifically, the provisions of the Evaluation Agreement set out requirements for due diligence issues relating to, *inter alia*: (1) allowing NAF to test and inspect the Premises and surrounding land; (2) providing time for NAF to assess the public water resource and surrounding wells as to water quality and quantity; (3) for NAF to conduct tests and inspections on the Lower Dam, sharing costs of the tests and inspections with the City; (4) allowing the District to seek approval of the sale of the Premises, Lower Dam, and Waterfront Parcel from the Commission; (5) allowing time for the District to find a location suitable for relocation of its headquarters and associated operation facilities; and (6) providing time for NAF to procure permitting approval from local, state, and federal authorities for the aquaculture facility.

Id. at 3.

3. Water Supply and Purchase Agreement

The Water Supply and Purchase Agreement was executed by the District and NAF on January 29, 2018. The District summarizes the major provisions of the Water Supply and Purchase Agreement as follows:

Under the Water Supply and Purchase Agreement, NAF will pay the District for its ground water at the rate equal to the annual water rates charged by the District to its customers in the same rate classification as would apply to NAF pursuant to the applicable tariffs approved by the Commission. The Water Supply Agreement requires NAF to purchase a minimum of 100,000,000 gallons of water annually at the current District water rates, which will result in approximately \$287,579 a year to the District in additional revenue. See **Attachment E, Customer Bill Calculation**. In the event that NAF were to use

less than 100,000,000 gallons of water in a year, it is still required to pay the District for 100,000,000 gallons of water annually. The Water Supply Agreement allows NAF to purchase up to 262,800,000 gallons of water annually from the District at a maximum rate of 500 gallons per minute. Moreover, NAF will make an advanced payment for the 100,000,000-gallon minimum for the first year of supply, providing the District significant upfront revenues.

Id.

E. Capacity Evaluation

A central issue presented by the District's request in this case is whether the District's water resource capacity is sufficient to meet NAF's current and future needs.

To address this issue, the District retained Rick Pershken, P.E., of A.E. Hodsdon Engineers, to evaluate and summarize the District's operational ground water resource capabilities. Mr. Pershken's analysis, titled *Capacity Evaluation for the Belfast Water District Belfast, Maine* (Capacity Evaluation) is included as Attachment F to the District's March 1st Supplemental Filing. In the Capacity Evaluation, Mr. Pershken specifically considers the District's resource capabilities relative to the potential sale of water to NAF of a minimum of 100,000,000 gallons annually and up to a maximum of 262,800,000 gallons annually, with a maximum rate delivered of 500 gallons per minute. Mr. Pershken concludes that the District "has sufficient capacity to operate the Belfast Water District, supply water to Northport Village Corporation by contractual obligation, provide Nordic Aquafarms with up to [262,800,000 gallons per year], and maintain a reserve capacity for future needs." Capacity Evaluation at 1. In its March 1st Supplemental Filing, the District summarizes the "key findings" of the Capacity Evaluation as follows:

- Following the closure of the Maplewood Poultry facilities in 1980, the District has not used the Little River water source to supply any water to its customers or for any other purpose in 38 years. Capacity Evaluation at 3.
- Instead, the District has used ground water from the Goose River Esker Aquifer to serve its customers - partially since 1955 and fully since 1980- via the Smart Road Well and the Jackson Pit Well. *Id.* at 4.
- There is ample reserve capacity in the Goose River Esker Aquifer and the Smart Road Well and the Jackson Pit Well to serve the District's current customers and the anticipated NAF land based aquaculture facility. *Id.* at 6. Specifically:
 1. Since 1980, there has been a significant decrease in water use by District customers as part of poultry and fish processing and canning facility closures.

2. The Jackson Pit Well and Smart Road Well have a history and capacity to safely serve large water consumers at approximately 1,330 gallons per minute ("GPM") of water production. *Id.* at 5.
 3. The Smart Road Well alone has the capacity to meet the District's current average demand of 543,582 gallons (378 GPM) and the maximum day demand of 719,300 gallons (500 GPM). *Id.*
 4. Likewise, the Jackson Pit Well, by itself, can also meet current District demands, but not with much reserve. *Id.*
 5. Together, the Smart Road and Jackson Pit Wells can provide approximately three times the current water requirements of the District. With the proposed sale of up to 262,800,000 gallons of water annually, the District will still be left with an annual operating reserve of approximately 221,500,000 gallons.
- The Talbot Well, installed in 2015, has already been tested and modeled by Jacques Whitford (1999) and tested by Caswell (2015).³ The Talbot Well capacity is set out in Table No. 2 of the Capacity Report and includes a standalone capacity of 1200 GPM. *Id.*
 - Even with an interference effect (as to Smart Road from the Talbot Well), the Capacity Report concludes that both the Smart Road Well and the Talbot Well, when brought fully on line, together could produce 1,600 GPM. When the 530 GPM capacity of the Jackson Pit Well is included, this capacity is more than twice the demand of both (1) the current District demand and (2) the maximum requirements of NAF for the land based aquaculture facility. *Id.*

Based on its summary of the key findings of the Capacity Evaluation and discussion of the anticipated demands of NAF, the District concludes:

After reviewing potential interference between the Smart Road Well and Talbot Well, several recharge considerations, and all appropriate drought considerations, the Capacity Report concludes that, with the Goose River Esker Aquifer and the associated Smart Road, Jackson Pit, and Talbot Wells, the District has ample capacity to supply up to the maximum contract limit of

³ In EXM 002-001, the Staff requested the District to explain how a well installed in 2015 could be tested and modeled in 1999. The District responded:

The site of the Talbot Well was originally located in 1989 and had a small diameter test well drilled. In 1999, Jacques Whitford constructed a computer model of the aquifer which assumed a well located at the Talbot Well Site. The model was used to determine the feasibility of locating a production well at this site and determining the safe yield of the Talbot Well and the Smart Road Well pumping under different scenarios. The Talbot Well was actually installed in 2005 and tested by Caswell at that time.

262,800,000 gallons annually to NAF, plus all existing customer demand while providing an "adequate reserve quantity of water for future growth, contractual obligations and emergency situations."

March 1st Supplemental Filing at 5.

F. Additional Issues Raised by Proposed Transactions

1. NAF's Need for Continuous Supply of Fresh Water

NAF has indicated that its facility needs a continuous flow of water from the District during the initial 6-year term of the Water Supply and Purchase Agreement. In a letter filed by NAF in this case, NAF stated:

Farming of salmon requires both fresh- and seawater to achieve an optimal production. The application of recirculating aquaculture systems (RAS) minimize the use of water, while approximately 0.5-1 percent of tank volumes must be exchanged every hour to ensure good fish welfare. The hatchery and smolt phase for salmon must be based on fresh water only.

Nordic Aquafarms is thus dependent on a reliable supply of bio-secure fresh water for smolt operations, approximately equal to the amount of water that the Belfast Water District has offered to sell to Nordic Aquafarms....

NAF Letter dated March 28, 2018 at 1.

During discovery, Commission Staff asked the District if there are any terms or provisions in any of the three Agreements between the District and NAF that would allow the District to curtail water sales to NAF if there were need to do so due to drought or other water supply emergency. In response, the District stated:

As a result of the negotiations between the District, the City and NAF, there are no specific contractual curtailment provisions in the Water Supply Agreement for the supply of water to NAF during the first 6 years. If there were a need to curtail or reduce water sales to NAF in the case of a drought or other water supply emergency, the District would carefully exercise its general authority to curtail or reduce water sales to its customers, ensuring sufficient water is provided to emergency public health and safety providers and priority customers, including hospitals, schools, retirement homes, and those customers requiring a continuous supply of water to sustain their operations.

EXM 002-003.

The District asserts that there are several factors that support the District's ability to provide a continuous supply of fresh water to NAF, even under emergency circumstances. The District notes that it has (1) adopted an Emergency Response Plan, (2) negotiated an interconnection agreement with the Searsport Water District, (3) developed a plan to bring the Talbot Well on line which, when completed, will provide a

reserve of 57% of the District's total GPY capacity. EXM 002-003. The District states that it also has four standpipes in Belfast which provide a three-million-gallon reserve capacity to allow for repairs. Tr. at 15. Finally, the District notes: "... the [Waldo Regional Hospital] is, as Nordic Aquafarms will be, on a brand new main that's looped together. It's fed from two directions. There is a short dead-end piece that Nordic will be tied to, but it is main that's eight years old." *Id.*

2. Contingent Issues Relating to Second Buildout Phase of NAF Facility

NAF contemplates building its Belfast facility in two phases. *Id.* at 13. The first phase will roughly correspond to the initial 6-year term of the Water Supply and Purchase Agreement. The details of the anticipated second phase of the project are contingent upon a variety of variables and are therefore not known at this point. One such variable is whether NAF will find a supply of groundwater on the Realty and Additional parcels and, if so, to what extent that supply will affect NAF's demand for water from the District going forward. *Id.* at 62-67.

Another significant variable is how NAF's total water needs will evolve after the completion of the initial phase of the project. On this point, NAF states:

That's a really complicated question. And right now, given where we are in the early due diligence stages, we are looking at a ton of different options for an assortment of different kinds of water, meaning different levels of salinity. So, we are also looking at an intake out to the harbor for saline water. And we are also looking at what the supply is on the property. And, of course, we have, as kind of a given, our baseline need which is the agreement with the water district. So, saying -- obviously what we have from the Belfast Water District is the certainty. Everything else is variable. And we have been delayed in a lot of the research on the land due to the availability of rigs and that kind of thing. So, we might change our production capacities based on what we can find on the site.

Id. at 65-66.

In response to questions about the contingent nature of NAF's water supply needs going forward and the District's ability to meet those needs, the District responded:

We are taking it stages at a time. We are confident that we can meet the need of the -- if they want the maximum yield of 262 million gallons a year, and we are confident we could meet that need infinitely. Beyond that, we would certainly have to do more studies, and I can't predict at this time what that may be or what the improvements might -- what improvements might need to be done.

Id. at 66.

The District expressed confidence that it has adequate water supply capacity to meet NAF's future needs. Tr. at 69-70. However, the District's Superintendent, Keith

Pooler, noted: "I can't predict now what kind of other changes may have to be done or improvements may have to be done to accomplish that." *Id.* at 71.

As noted above, the Water Supply and Purchase Agreement would allow NAF to take up to 262 million gallons per year. When asked hypothetically if the District's system could handle a doubling of that amount, up to 524 million gallons per year during the second phase of the project, Mr. Pooler replied:

Past history has showed that -- shown that we reached those figures or close to those figures at times. My first thought is infrastructure more than aquifer, again. Without doing a hydrological study, without mapping the system over, I can't predict what kind of an effect pushing -- for lack of a better term, pushing that much water through the system --

Id. at 74.

Mr. Pershken, the author of the District's Capacity Evaluation, agreed that although the District's water supply is likely sufficient to meet this hypothetical increased demand from NAF, the District's current infrastructure may not be. On this point, Mr. Pershken noted: "I do think Keith is correct, though, that the hydraulic study would need to be done. Pushing a thousand gallons a minute through a 12-inch pipe is getting towards the upper end of it." *Id.* at 76.

3. Belfast and Northport's Right of First Refusal

As discussed in Part III above, 35-A M.R.S. § 6109 and Chapter 691 of the Commission's Rules create an assignable right of first refusal for municipalities in which the proposed sale of water resource land is located. Section 5 of Chapter 691 expands upon the right of first refusal requirements in section 6109(5). Section 5(B) of Chapter 691 provides that no sale of the water resource land can occur "unless the water resource land has been offered to the municipality or municipalities in which the water resource land is located under the same price, terms, and conditions that have been offered to the other buyer." In addition, Section 5(C) provides that a municipality that is notified of a proposed sale of water resource land and of its right of first refusal regarding that land "shall have at least 90 days to either accept or reject the offer upon the same terms and conditions of an offer to or from another buyer."

As part of its February 14th Filing, the District included two letters relating to its proposed sale of water resource land to NAF which the District represents were mailed on February 14, 2018. February 14, 2018 Cover Letter at 1. One letter was sent to City of Belfast; the other letter was sent to the Town of Northport. Both letters include a description of the property to be sold and a discussion of why the District proposes to sell the property. Both letters include explicit notice that the municipality in question has an assignable right of first refusal regarding the applicable property under 35-A M.R.S. § 6109 and that each municipality has 90 days from receipt of the notice to accept or reject its right of first refusal.

On March 12, 2018, the City of Belfast filed a letter in this proceeding indicating that Belfast waives its right of first refusal regarding the Realty and Additional parcels and the Lower Dam. However, in its March 12th Letter, Belfast noted that it retains the right to purchase the Waterfront parcel as provided for by the District, NAF, and Belfast in the Options and Purchase Agreement.

In response to a Staff data request, the District indicated that it anticipated that the Town of Northport would decide to waive its right of first refusal during a meeting to be held on March 12, 2018. The District further stated: "Appointed Counsel for the Town of Northport has discussed this with the Town Administrator and anticipates no desire at all for the Town of Northport to buy any land involved in the underlying transaction." EXM 001-013.

However, during the technical conference which took place on March 30, 2018, the District reported that the Town of Northport had not made a decision regarding the property in question and that such decision would likely be made by the people of Northport at a Special Town Meeting that will be scheduled at some point in the future. Tr. at 17-20.

On April 13, 2018, Northport's Town Administrator, Barbara Ashe, filed a public comment in this case (April 13th Public Comment) indicating that the Town of Northport did not receive notice of the proposed sale of water resource land until March 12, 2018. In her April 13th Public Comment, Ms. Ashe contradicts certain assertions in the District's response to EXM 001-013 and questions whether Northport should have until June 10, 2018, to exercise its right of first refusal. Finally, Ms. Ashe notes that the Town of Northport has scheduled a Special Town Meeting for April 25, 2018, during which the voters of Northport will be asked to decide whether they want to exercise their right of first refusal regarding the portion of the Waterfront Parcel that is located within Northport.

On April 13, 2018, the Examiners issued a Procedural Order requesting the District to provide a response to Ms. Ashe's April 13th Public Comment by April 18, 2018. On April 18, 2018, the District filed a partial response to the Examiners' request for comment and also sought an extension for the remainder of its response to Ms. Ashe's April 13th Public Comment until after the Special Town Meeting to be held on April 25, 2018.

On April 20, 2018, counsel for the Town of Northport filed a letter in this docket confirming that Northport did not receive actual notice of its right of first refusal relating to the land in question until March 12, 2018 and stating that Northport's deadline for acting on its right of first refusal is, in fact, June 10, 2018 (April 20th Letter). The April 20th Letter further noted that a Special Town Meeting will be held on April 25, 2018, to resolve the question of whether Northport should waive or exercise its right of first refusal.

On April 26, 2018, the District filed an additional response to the questions posed by the Examiners in their April 13, 2018 Procedural Order (April 26th Response). In its

April 26th Response, the District stated that the Town of Northport held a Special Town Meeting on April 25, 2018, and during that meeting, a majority of participants voted in favor of Northport waiving its right of first refusal regarding the portion of the Waterfront parcel that is located in Northport.⁴ The District's April 26th Response also notes that it has filed an amendment to its response to EXM-001-013 that responds to the comments filed by Northport's Town Administrator on April 13, 2018.

On May 3, 2018, the Examiners issued a Procedural Order requesting the District to (1) obtain written confirmation from the Town of Northport that Northport formally waives/rejects its right of first refusal regarding water resource land located in Northport and (2) file such confirmation with the Commission. On May 17, 2018, the District filed a letter from Barbara Ashey, Northport Town Administrator, dated May 16, 2018. The May 16th letter confirmed that, at the April 25, 2018 Northport Town Meeting, the Town voted to effectively waive its right of first refusal relating to the water resource land located in Northport.

V. DISCUSSION AND DECISION

A. Sale of Water Resource Land

1. Compliance with 35-A M.R.S. § 6109 and Chapter 691 of the Commission's Rules

The Commission finds that collectively, the Realty and Additional parcels, the Lower Dam, and the Waterfront parcel that the District proposes to sell to NAF and Belfast, meet the Chapter 691 definition of "water resource land" and, consequently, the requirements of both 35-A M.R.S. § 6109 and Chapter 691 apply to the proposed transactions under consideration in this proceeding.

The Commission finds that the District has satisfied all the requirements of section 6109 and Chapter 691 relating to the public meeting it must hold (Chapter 691, Section 4), informing ratepayers how they can file a complaint about the proposed sale with the Commission (Chapter 691, Section 4(E)), and notifying affected municipalities of their assignable right of first refusal regarding the land in question (section 6109(5) and Chapter 691, Section 5).

The Commission further finds that, with one exception which is discussed in Part V(A)(2) below, the District has satisfied all the requirements in section 6109 and Chapter 691 relating to notice.

2. Waiver of the 8-Month Notice Requirement in 35-A M.R.S. § 6109 and Chapter 691 of the Commission's Rules

As noted above, the record indicates that the District complied with all the requirements of section 6109 and Chapter 691 except for the requirement in sections

⁴ The District's April 26th Response indicated that the vote was 15 in favor, and 27 opposed, to Northport exercising its right of first refusal.

6109(1) and 6109(2), and Section 2(A) of Chapter 691 that the District provide the Commission with notice of the proposed sale at least 8 months prior to the sale of the land. The District provided notice to the Commission of its proposed sale of water resource land on February 14, 2018. The 8-month notice requirement in section 6109 and Chapter 691 would preclude the District from completing the proposed sale prior to October 15, 2018.

However, section 6109(2) and Section 6 of Chapter 691 authorize the Commission to waive the 8-month notice requirement for good cause shown. In its February 14th Filing, the District requests the Commission to waive the 8-month notice requirement and asserts that good cause exists for such a waiver. In support of its waiver request, the District argues: "The Agreements with NAF and the City of Belfast are contingent upon the District obtaining approval of the sale of land within 120 days of execution (as of January 30, 2018), and so by May 30, 2018." February 14th Filing at 3. The District notes that it has complied with all other requirements of section 6109 and Chapter 691 and asserts that the Commission has granted a similar waiver of the 8-month notice requirement to the District regarding a past sale of water resource land. *Id.*

The Commission finds that good cause exists to grant the District's requested waiver of the 8-month notice requirement in section 6109 and Chapter 691 in this specific instance. Requiring the District to comply with the 8-month notice provision would directly conflict with the 120-day approval period set forth in provision 2(A) of the Evaluation Agreement and referenced in provision 4(h)(iii) of the Options and Purchase Agreement and provision 1 of the Water Supply and Purchase Agreement. Provision 2(A) of the Evaluation Agreement explicitly states that NAF may terminate the Agreement if the District is unable to obtain Commission review and all necessary approvals within the 120-period. This is a serious potential consequence which cannot be ignored.

However, the Commission wishes to remind that District that including such deadlines in a contractual arrangement creates significant problems for the Commission and other interested persons. One of the primary reasons for the 8-month notice requirement in section 6109 and Chapter 691 is to afford the Commission and other interested persons a reasonable opportunity to review and process the proposed sale of water resource land. By contractually shrinking that review period from 8 months to 3 and a half months,⁵ the District created the very realistic possibility that the Commission

⁵ While Provision 2(A) of the Evaluation Agreement purportedly creates a 120-day review period for the Commission, the actual review period in this case was considerably less than that. While the Agreements were executed on January 29, 2018 and January 30, 2018, creating a functional deadline of May 30, 2018, the District did not make its initial filing in this case until February 14, 2018. This two-week delay in the District's filing reduced the Commission's review time by a corresponding two weeks. The Commission's review of the proposed transactions was further delayed by the fact that the District did not make its Supplemental Filing until March 1, 2018. The District's March 1st Supplemental Filing included such critical documents as the Options and

would not be able to complete its review in the requested period of time. The District's filing was quite complex, involving multiple parcels of property and multiple contractual arrangements which were signed by multiple parties. The Commission hereby puts the District, and any other similarly-situated utility, on notice that a comparable future waiver request may not be granted due to lack of sufficient time for the Commission and other interested persons to review the underlying proposed transactions. However, in this case, the Commission has been able to complete its review of the District's February 14th Filing and March 1st Supplemental Filing within the abbreviated review period created by the District. The Commission will therefore grant the District's waiver request pursuant to section 6109(2) and Section 6 of Chapter 691.

The Commission's finding that good cause exists to grant the District's waiver request is supported by the facts that (1) the District has complied with all other requirements in section 6109 and Chapter 691 and (2) none of the District's customers has filed a complaint with the Commission pursuant to Chapter 691(4)(E) demanding further Commission review of the District's proposed sale of water resource land.⁶

3. City of Belfast and Town of Northport's Right of First Refusal

As required by both section 6109 and Chapter 691, the District provided the City of Belfast and the Town of Northport the right of first refusal regarding the proposed sale of water resource land. By letter dated March 12, 2018, the City of Belfast indicated its rejection of its right of first refusal with respect to the Realty and Additional parcels and the Lower Dam. By letter dated May 16, 2018, the Town of Northport confirmed that, at the April 25, 2018 Northport Town Meeting, the Town voted to effectively waive its right of first refusal relating to the portion of the Waterfront parcel that is located in Northport.

Based on the record, the Commission finds that the District has satisfied the requirements in section 6109 and Chapter 691 that create a right of first refusal for any

Purchase Agreement, the Evaluation Agreement, the Water Supply and Purchase Agreement, and the Capacity Evaluation. Because of the timing of the District's filings, the Commission, in fact, had less than 90 days to review and conduct discovery on these essential documents and render a final decision in this case.

⁶ Section 4(E) of Chapter 691 provides the mechanism through which the District's customers can file a complaint with the Commission requesting a formal investigation of the proposed sale of water resource land. Section 4(E) provides:

If within 30 days of the public meeting regarding the sale, 15% of the customers of the utility or 1,000 customers, whichever is less, file with the utility and with the Commission petitions demanding a review of the utility's decision to proceed with the sale, the Commission shall have the authority to suspend, investigate, and review the decision of the utility with respect to the proposed sale.

The District held its public meeting regarding the its proposed sale of water resource land on March 15, 2018. No District customer filed a complaint, or requested Commission investigation, within the 30-day period established in Section 4(E).

municipality in which water resource source land, which is subject to a proposed sale, is located.

B. Sale of Utility Property

As discussed in Part II(B) above, 35-A M.R.S. § 1101(1) requires a utility to obtain Commission authorization before it sells utility property that is “necessary or useful in the performance of its duties to the public.” Section 1101(4) authorizes the Commission to exempt certain transactions from the requirements of section 1101(1) where the property sought to be transferred does not materially affect the ability of the utility to perform its public service.

In its March 1st Supplemental Filing, the District (1) argues that the property involved does not materially affect its ability to perform its public service and (2) requests the Commission to certify, pursuant to section 1101(4), that the proposed sale does not require Commission authorization under section 1101(1). March 1st Supplemental Filing at 6-7. The District sites two bases for its assertion that the property in question is not necessary to the performance of its duties to the public. First, the District notes that it has not used the Little River source of supply since 1980 and therefore argues that the property associated with that source of supply is no longer necessary to the District. *Id.* at 6. Second, the District argues that while its headquarters and garage facilities are currently located on the property it proposes to sell, the transactions will allow the District to move its headquarters and garage facilities to a different location at some point in the future. The District argues that this fact renders its current headquarters and garage facilities unnecessary in the performance of its duties to the public for the purposes of the Commission’s section 1101 review. *Id.* at 7.

The Commission agrees that the Little River source of supply is no longer “necessary or useful in the performance of [the District’s] duties to the public” which is a prerequisite for Commission authorization under section 1101(1). However, the District is currently using its headquarters and garage facilities located on the property in question and, pursuant to Options and Purchase Agreement and the Evaluation Agreement, will continue to occupy its current headquarters and garage facilities for up to a year after closing. EXM 001-008. The fact that the District will continue, for an extended period of time, to use its current headquarters and garage facilities that are located on the property the District proposes to sell makes that property “necessary or useful in the performance of [the District’s] duties to the public.” The Commission therefore finds that the property in question is not subject to exemption under section 1101(4) and that the District’s proposed transactions require Commission authorization under section 1101(1).

In the past, when granting authorization for proposed transaction under section 1101(1), the Commission has found that the proposed transaction will neither be adverse to the public interest nor inconsistent with the interests of the utility’s ratepayers. This is sometimes called the “no net harm” public interest standard. *Fryeburg Water Company, Commission Investigation into Lease Agreement and*

Contract for Build Water Sales between Fryeburg Water Company and Nestle Waters of North America, Docket No. 2012-00487, Order at 5-6, 11, (Nov. 21, 2014).

In support of its request for Commission authorization under section 1101, the District asserts that it has the capacity and infrastructure to provide the levels of service to NAF that are outlined in the Water Supply and Purchase Agreement. The District contends that the Capacity Evaluation it presented in this proceeding supports the conclusion that the District has sufficient capacity to meet its current demands combined with NAF's maximum usage of 262,800,000 gallons of water annually at a rate up to 500 gallons/minute delivered to the facility. Tr. 24-32, 41-62. The District concludes: "Thus, the sale of the District's property to NAF and its access to the Little River former District's water source will not harm the District's ground water resource supply." March 1st Supplemental Filing at 7.

As discussed in Part IV(C) above, the District also argues that the proposed transactions with NAF and Belfast will produce several direct and indirect benefits to the District and its ratepayers. The direct benefits asserted by the District include allowing the District to:

- Upgrade its infrastructure;
- Keep its rates as low as possible;
- Bring a third well on line;
- Move its headquarters and garage facilities to a more favorable location;
- Reduce chlorine costs; and
- Potentially divest itself of the Lower Dam, which the District considers to be a liability.

The District argues that, in addition to these direct benefits, the proposed transactions with NAF and Belfast will result in several indirect benefits to the District and its ratepayers. These indirect benefits include:

- Creating jobs in the area;
- NAF investing up to \$500 million in the area; and
- The City of Belfast maintaining the Little River Trail.

Finally, the District argues that the terms of the proposed sales are reasonable and in the interests of its ratepayers. The District asserts that the sale price for each of the parcels in question is reasonable under current market conditions. The District further argues that other aspects of the proposed transactions, such as the relocation of its headquarters and garage facilities, will redound to the benefit of its ratepayers.

After considering all of the facts and circumstances of this matter, the Commission finds that the District's proposed sale of property in this case satisfies the no net harm public interest standard for authorization under 35-A M.R.S. § 1101(1). Accordingly, the Commission authorizes the proposed sales pursuant to section 1101(1).

C. Special Rate Contract

Section 309(1) of Title 35-A requires a utility to adhere to its rate schedules which are on file with the Commission, unless authorized to deviate from those rate schedules by the Commission pursuant to Section 703. Section 703 prohibits a public utility from providing rebates, discounts, or otherwise discriminatory rates. However, section 703(3-A) allows a public utility to enter into a special rate contract subject to Commission approval. Section 703(3-A) provides: "A public utility, subject to the commission's approval, may make a contract for a definite term for its product or service, but the published rates for the product or service may not be changed during the term of the contract without the commission's consent."

The District notes that, pursuant to terms of the Water Supply and Purchase Agreement, the District will provide a water supply to NAF for a fixed term and at rates that will track the tariff rate. However, the District acknowledges: "If NAF takes less than the minimum 100,000,000 gallons, they are still required to pay for the entire minimum 100,000,000, thus meeting or exceeding the tariff rate in that instance." March 1st Supplemental Filing at 9. The District concludes that, the Water Supply and Purchase Agreement satisfies the definition of a special rate contract and must be approved by the Commission pursuant to section 703(3-A).

The District asserts that the standard the Commission should apply when reviewing a special rate contract is whether the contract will benefit ratepayers and argues that the Water Supply and Purchase Agreement "more than meets the requirements of approval for a special contract." *Id.* at 8.

The record indicates that, if NAF pays an amount that deviates from the District's tariff rate, the amount paid by NAF will exceed what NAF would have paid under the tariff rate. The Commission finds that such a result would benefit the District's other ratepayers and is consistent with the interests of the District and its ratepayers. The Commission therefore approves the Water Supply and Purchase Agreement as a special rate contract pursuant to section 703(3-A).

In approving the Water Supply and Purchase Agreement, the Commission approves the specific terms of the contract for the duration of contract. However, if the District proposes to amend any material term of the Water Supply and Purchase Agreement during term of the agreement, the District must bring the proposed change to the Commission for review and approval as a new special rate contract under section 703(3-A).

D. Conclusion

Therefore, the Commission

O R D E R S

1. That the Belfast Water District has complied with the requirements of 35-A M.R.S. § 6109 and Chapter 691 of the Commission's Rules concerning the proposed sale of the Realty and Additional parcels, the Lower Dam, and the Waterfront parcel as described in this Order;
2. That the Commission waives the 8-month notice requirement in 35-A M.R.S. §§ 6109(1) and (2) and Chapter 691 of the Commission's Rules and authorizes the District to complete the proposed transactions at any time after May 30, 2018;
3. That, pursuant to 35-A M.R.S. § 1101, the Commission authorizes the proposed sale of the Realty and Additional parcels, the Lower Dam, and the Waterfront parcel as described in this Order; and
4. That, pursuant to 35-A M.R.S. § 703(3-A), the Water Supply and Purchase Agreement between the Belfast Water District and Nordic Aquafarms dated January 29, 2018 and included as Attachment C to the District's March 1, 2018 Supplemental Filing in this case is approved as a special rate contract consistent with the conditions set forth in this Order and will be allowed to take effect on May 30, 2018.

Dated at Hallowell, Maine this 8th day of June, 2018.

BY ORDER OF THE COMMISSION

/s/Harry Lanphear

Harry Lanphear
Administrative Director

COMMISSIONERS VOTING FOR: Vannoy
Williamson
Davis

NOTICE OF RIGHTS TO REVIEW OR APPEAL

5 M.R.S. § 9061 requires the Public Utilities Commission to give each party to an adjudicatory proceeding written notice of the party's rights to review or appeal of its decision made at the conclusion of the adjudicatory proceeding. The methods of review or appeal of PUC decisions at the conclusion of an adjudicatory proceeding are as follows:

1. Reconsideration of the Commission's Order may be requested under Section 11(D) of the Commission's Rules of Practice and Procedure (65-407 C.M.R. 110) within **20** days of the date of the Order by filing a petition with the Commission stating the grounds upon which reconsideration is sought. Any petition not granted within **20** days from the date of filing is denied.
2. Appeal of a final decision of the Commission may be taken to the Law Court by filing, within **21** days of the date of the Order, a Notice of Appeal with the Administrative Director of the Commission, pursuant to 35-A M.R.S. § 1320(1)-(4) and the Maine Rules of Appellate Procedure.
3. Additional court review of constitutional issues or issues involving the justness or reasonableness of rates may be had by the filing of an appeal with the Law Court, pursuant to 35-A M.R.S. § 1320(5).

Note: The attachment of this Notice to a document does not indicate the Commission's view that the particular document may be subject to review or appeal. Similarly, the failure of the Commission to attach a copy of this Notice to a document does not indicate the Commission's view that the document is not subject to review or appeal.