

DW 04-218

**COMMUNITY WATER AND WASTEWATER SERVICES, L.P.
AND
HOLIDAY ACRES JOINT VENTURE TRUST**

Request for Exemption

Order Approving Settlement Agreement

ORDER NO. 24,499

August 2, 2005

APPEARANCES: Devine, Millimet & Branch, P.A., by Frederick J. Coolbroth, Esq., for Community Water and Wastewater Services, L.P. and Holiday Acres Joint Venture Trust; and Marcia A.B. Thunberg, Esq. on behalf of Staff of the New Hampshire Public Utilities Commission

I. BACKGROUND

On November 24, 2004, Community Water and Wastewater Services, L.P. (Community) and Holiday Acres Joint Venture Trust (Holiday Acres) filed with the New Hampshire Public Utilities Commission (Commission) a Petition for an order determining that: 1) the provision of water and sewer services by Holiday Acres to the tenants in its Holiday Acres manufactured housing community will not constitute service as a public utility; 2) the provision of water and sewer service by Holiday Acres to the existing water and sewer customers on Chester Turnpike will not constitute public utility service or, in the alternative, is exempt from utility regulation pursuant to RSA 362:4, I; and 3) following such determinations, authorize Community and Holiday Acres pursuant to RSA 374:28 to cease operations as a public utility. Community and Holiday Acres' filing also included prefiled testimony of Stedman Holton, Park Manager for Holiday Acres manufactured housing community.

On January 3, 2005, Commission Staff (Staff) filed a response to Community and Holiday Acres' Petition. Staff summarized recent dockets involving Community and Holiday

Acres. Staff stated that, in DW 02-051, the Commission ordered Holiday Acres to transfer all utility assets to Community. *Holiday Acres Water and Wastewater Services*, 88 NH PUC 133 (2003). Staff stated that in DW 04-131, Community and Holiday Acres filed to discontinue business as a public utility, be exempt from regulation, and requested permission to transfer the utility assets back to Holiday Acres. Staff stated that during a Staff desk audit, it became evident that the assets had never been transferred to Community, which Community and Holiday Acres confirmed in a letter to the Commission dated November 24, 2004. In response, Staff recommended that the Commission: 1) permit Community and Holiday Acres to withdraw their filing in DW 04-131 and close that docket; 2) move the remaining compliance issue from DW 02-051 to DW 04-218; and 3) issue an Order of Notice in DW 04-218 and establish a proceeding to consider the new petition as well as the outstanding compliance issues.

On January 31, 2005, the Commission issued an Order of Notice setting a Prehearing Conference and technical session for February 25, 2005. On February 22, 2005, James R. Jackson, a water and sewer customer located adjacent to Holiday Acres on Chester Turnpike, filed a motion to intervene. The Commission granted Mr. Jackson's intervention at the Prehearing Conference. Staff and the Parties proposed a procedural schedule which the Commission approved by letter dated March 3, 2005. Staff and the Parties conducted discovery and filed a Settlement Agreement (Agreement) with the Commission on June 3, 2005. The Commission held a hearing on June 14, 2005, at which Staff and the Parties presented the Agreement.

II. TERMS OF SETTLEMENT AGREEMENT

The Agreement entered into by Staff, Community, Holiday Acres, and Mr. Jackson is described below:

1. DW 02-051 Compliance Issues

Staff, Community, Holiday Acres, and Mr. Jackson agree to resolve compliance issues from DW 02-051. Community and Holiday Acres agree to make payment of two thousand dollars (\$2,000) within thirty (30) days from the date the Commission approves the Agreement in consideration of Staff and Mr. Jackson agreeing to recommend that the Commission close DW 02-051 and deem Community and Holiday Acres as having complied in full with Order No. 24,140.

2. Water Service

Staff, Community, Holiday Acres, and Mr. Jackson agree that it is in the public interest for Holiday Acres to change its source of supply and receive water service from Pembroke Water Works (Pembroke). Staff, Community, Holiday Acres, and Mr. Jackson further agree that Holiday Acres should be permitted to charge customers the Pembroke rates that would apply if such customers were direct customers of Pembroke. Based on current Pembroke rates, that rate would be \$6.25 per month, as well as \$1.10 per thousand gallons for usage that is over a 3,000 gallon per month allowance.¹ Holiday Acres agrees to base customer bills on actual customer meter readings, regardless of the amount of the bill from Pembroke. Holiday Acres agrees to read meters within one business day of when the Master Meter is read to maintain consistency with the Pembroke billing cycle. Holiday Acres agrees to adjust its water rates to its customers only at such time that Pembroke changes the applicable rates it charges to its residential customers.

Staff, Community, Holiday Acres, and Mr. Jackson agree and understand that Holiday Acres may typically not recover the full amount of the billing from Pembroke and that this billing deficiency is an incentive for Holiday Acres to take all reasonable steps necessary to reduce the amount of water lost from the system. Staff, Community, Holiday Acres, and Mr. Jackson agree that in no event shall Holiday Acres recover more from customers in any billing cycle than Holiday Acres is billed by Pembroke. Should the total calculated amount due from customers exceed the charges from Pembroke in any given month, Holiday Acres agrees to reduce the monthly fixed customer charge proportionally so as not to recover more than Pembroke charges.

3. Sewer Service

Staff, Community, Holiday Acres, and Mr. Jackson agree that Holiday Acres will bill its customers for sewer service at the Allenstown rates that would apply if the customers were direct customers of Allenstown. Based on current Allenstown rates, Holiday Acres agrees to charge customers a fixed charge and a variable charge per month as follows: the fixed charge shall be \$23.68 per quarter (billed at \$7.89 per month); and the variable charge shall be based on each customer's water meter readings and shall be \$2.64 per thousand gallons of metered water consumption, which is 80% of the \$3.30 per thousand gallons charged by the Town of Allenstown for sewer service. Holiday Acres agrees to adjust its sewer rates to its customers

¹ The 3,000 gallon per month usage allowance is the average usage upon which Pembroke calculates its \$6.25 flat rate.

only at such time that Allenstown changes the applicable rates it charges to its residential customers.

4. Declarations to be Filed with Registry of Deeds

Staff, Community, Holiday Acres, and Mr. Jackson agree that it is in the public interest for Holiday Acres to file a Declaration of Covenants with the Merrimack County Registry of Deeds for all properties to which Holiday Acres provides water and sewer service along Chester Turnpike, in an effort to set forth Holiday Acres and property owner responsibilities for water and sewer facilities.

Holiday Acres agrees to maintain, repair and replace the water and sewer lines and pipes from the connection at the main to the boundary lines in the case of sewer, or to the curb stop or shut-off valve generally located at the boundary lines in the case of water, of the respective benefited properties on Chester Turnpike.

Owners of benefited properties on Chester Turnpike shall be responsible for maintaining, repairing, and replacing the water and sewer lines and pipes from such owner's premises, or meter horn where a meter is installed, to the property line in the case of sewer, or to the curb stop or shut-off valve at the property line in the case of water.

The Declaration of Covenants will also make clear that each owner of benefited property on Chester Turnpike furnished with water or sewer service by Holiday Acres is responsible for maintaining such owner's water and sewer service lines, plumbing and fixtures within their premises in good repair, free from leaks and protected from freezing, at their own expense; and for failure to do so, water or sewer service may be disconnected. Sewer service shall not be disconnected for non-payment. Any relocation of the service pipes on the respective owner's premises due to change in grade, relocation of grade or otherwise shall be at the owner's expense, and in no event shall Holiday Acres be responsible for any damage done by water or effluent escaping therefrom.

5. Customer Service

Community and Holiday Acres agree to provide no less quality of service to customers located on Chester Turnpike than to customers located within the Holiday Acres manufactured housing community. Community and Holiday Acres agree to have a means by which customers can inform Community and Holiday Acres of problems with or complaints about the water or sewer service twenty-four hours a day, seven days per week.

Holiday Acres agrees to provide customers located within the Holiday Acres manufactured housing community and customers located on Chester Turnpike with information on how their water or sewer bill was calculated, within a reasonable time from a customer requesting such information.

6. Exemption from Regulation

Staff, Community, Holiday Acres, and Mr. Jackson agree that due to the unique factual circumstances involving Community and Holiday Acres' operation of water and sewer facilities serving residents of the Holiday Acres manufactured housing community and adjacent residences on Chester Turnpike, that it is consistent with the public good for the Commission to

exempt Holiday Acres from any and all provisions of Title XXXIV, Public Utilities, of the N.H. Rev. Stat. Ann. Staff, Community, Holiday Acres, and Mr. Jackson agree that N.H. Rev. Stat. Ann. §§ 205-A, 362:2, and 362:4 (1995 & Supp. 2004) support Holiday Acres' petition for exempt status.

7. Permission to Cease Operation

Staff, Community, Holiday Acres, and Mr. Jackson agree that, pursuant to RSA 374:28, it is in the public good for the Commission to determine it is expedient for Community, and Holiday Acres to not continue to serve as a public utility.

8. Suspension of Tariffs

Staff, Community, Holiday Acres, and Mr. Jackson agree that in the event the Commission grants Community and Holiday Acres' petition and exempts Community and Holiday Acres from regulation under Title XXXIV, Public Utilities, of the N.H. Rev. Stat. Ann., the tariffs presently on file regarding water and sewer service provided by Community, and Holiday Acres should be suspended. Those tariffs are as follows: NH PUC No. 1 – Water, Community Water and Wastewater Services, Limited Partnership issued April 25, 2003; and NH PUC No. 1 – Sewer, Holiday Acres Water and Wastewater Services, issued January 1, 1997.

III. COMMISSION ANALYSIS

Community and Holiday Acres' request for non-regulated status involves analysis of RSA 362:2 as to when a provider of service is a public utility; RSA 362:4, I as to when a discretionary exemption from Commission regulation serves the public interest; and RSA 205-A regarding utility service within manufactured housing parks and the regulations applicable to public utilities. In this case, there are customers who are tenants within a manufactured housing park and customers who live adjacent to the park on Chester Turnpike and are served through the facilities owned by Holiday Acres. We must determine whether service to either set of customers constitutes a public utility.

For customers within the manufactured housing park, we must evaluate whether the provision of water and sewer service makes Holiday Acres a public utility. The Commission has discretion in interpreting the statute when provision of utility services is by an entity that has not traditionally been regulated or may not have been contemplated by the legislature. *Allied*

New Hampshire Gas Co. v. Tri-State Gas Co., 107 NH 306, 308 (1966). The Commission concluded in 1996 that a manufactured housing park providing water and sewer service to its tenants did not constitute a public utility, under the facts of that case. *Interlakes Water and Sewer Company*, 81 NH PUC 281 (1996). In *Interlakes*, the manufactured housing park received water service from a municipality and passed it along to the tenants; the tenants had no billing relationship with the municipality.

In 1996, the Commission granted Holiday Acres' request to be regulated as a public utility, based on its circumstances at the time. *Holiday Acres Water and Wastewater Services*, 81 NH PUC 1058 (2001). Since then, Holiday Acres' circumstances have changed considerably. It now takes water from Pembroke, as opposed to wells, to serve its tenants. It agrees to bill customers at the Pembroke rate, and commits to no administrative or other charges for utility service in accordance with RSA 205-A:6. And in accordance with RSA 205-A:2, IX, tenants will pay for water and sewer services as part of their rent, in contrast to the billing in 2001. Tenants will no longer be charged for repair or maintenance of water or septic systems not due to the negligence of the tenant, again in conformance with RSA 205-A:2, IX. Further, Holiday Acres commits to follow the notification procedures for increases to utility charges pursuant to RSA 205-A:6

In addition, after Holiday Acres was first found to be a public utility, the New Hampshire Supreme Court further interpreted the meaning of "service to the public" in RSA 362:2. In *Appeal of Zimmerman*, 141 NH 605 (1997), the Court found that the Commission could not assert jurisdiction because the utility service was not offered to the "undifferentiated public" but rather was available only to those with an underlying relationship with the provider. There, as in this case, the underlying relationship was of landlord and tenant, and the provision

of utility service was incidental to that relationship. Given the current circumstances under which Holiday Acres will provide service to its tenants and the standards of *Appeal of Zimmerman*, we find that Holiday Acres' provision of water and wastewater service to its tenants is not within the purview of the Commission's jurisdiction.

We must next determine whether Community and Holiday Acres' provision of service to the 15 customers on Chester Turnpike constitutes public utility service that is subject to our jurisdiction. The customers on Chester Turnpike came to take service in the first instance through "bilateral agreements between the prior Park owners and the purchasers of property on Old Chester Turnpike. In most instances, these transactions involved the construction of residences by the owner of the Park and the sale of lots with residence thereon to the purchaser." Exh. 1 at 3. In *Appeal of Zimmerman*, the Court considered whether the provider of service "enjoy[ed] an underlying relationship with those persons who use his services that is sufficiently discrete as to differentiate them from other members of the relevant public." *Id.* at 609.

In *Appeal of Zimmerman*, as with the customers living within the mobile home park in this case, a landlord-tenant relationship exists. The relationship between the provider of service and the Chester Turnpike customers, however, is a unique one based on the historical sale of land by the Park owner, ownership of property contiguous to the Park, previous bilateral agreements, the pass through of municipal water service, and, pursuant to the Settlement Agreement, the filing of Declarations of Covenants with the Merrimack County Registry of Deeds setting forth the rights and responsibilities running between Holiday Acres and the Chester Turnpike customers. We find that the relationship here is "sufficiently discrete as to differentiate [the Chester Turnpike customers] from other members of the relevant public." *Id.*

Moreover, Holiday Acres does not share the “affinity” it has with the Chester Turnpike customers with other members of the relevant public and therefore it “cannot be said to offer...services to all comers without discrimination.” Id. Accordingly, we conclude that service to the Chester Turnpike customers does not fall under the jurisdiction created by RSA 362:2.

In the Agreement, Staff and the Parties also request the Commission permit Community and Holiday Acres to cease serving as a public utility pursuant to RSA 374:28. That statute applies when there is a temporary or seasonal discontinuance of service or where a public utility’s authority to engage in business is withdrawn. This case differs in that it involves a determination that the service in question is not subject to the Commission’s jurisdiction. As a result, specific permission to cease operation is not required.

Based upon our review of the Agreement as well as the supporting testimony and exhibits provided at the hearing, we find that the terms of the Agreement are just and reasonable and are consistent with the public good. We find Community and Holiday Acres’ provision of water and sewer service to the tenants of the Park and on Chester Turnpike does not constitute public utility service.

Based upon the foregoing, it is hereby

ORDERED, that the Settlement Agreement entered in to between Staff, Community, Holiday Acres, and Mr. Jackson is hereby APPROVED; and it is

FURTHER ORDERED, that Community and Holiday Acres’ provision of water and sewer service to tenants of Holiday Acres Mobil Home Park and to customers along Chester Turnpike does not constitute regulated utility service pursuant to RSA 362:2; and it is

FURTHER ORDERED, that Community and Holiday Acres shall file with the Commission, within 30 days of the date of this Order, proof that it has filed the Declaration of Covenants discussed above with the Merrimack County Registry of Deeds; and it is

FURTHER ORDERED, that Community and Holiday Acres shall mail a copy of this order by first class mail to all water and sewer customers.

By order of the Public Utilities Commission of New Hampshire this second day of August, 2005.

Thomas B. Getz
Chairman

Graham J. Morrison
Commissioner

Michael D. Harrington
Commissioner

Attested by:

Debra A. Howland
Executive Director & Secretary