STATE OF NEW HAMPSHIRE
PUBLIC UTILITIES COMMISSION

DW 09-267

LAMPLIGHTER MOBILE HOME PARK

Investigation into Whether Lamplighter Mobile Home Park is a Public Utility

Order Denying Petition and Granting Motion to Dismiss

ORDER NO. 25,224

May 19, 2011

APPEARANCES: Orr & Reno, P.A. by Douglas L. Patch, Esq., for residents of Lamplighter Mobile Home Park; Bianco, P.A. by Anna M. Zimmerman, Esq., for Lamplighter Mobile Home Park, L.P.; and Staff of the Public Utilities Commission by Marcia A. B. Thunberg, Esq.

I. PROCEDURAL HISTORY

On December 18, 2009, residents of Lamplighter Mobile Home Park (Lamplighter residents or residents) filed a request for determination that the Lamplighter Mobile Home Park, LP (the Park) is a public utility pursuant to RSA 362:2 and 362:4 and asked the Commission to prevent the Park from charging unjust, unfair, and unreasonable rates, fees, and costs for present and planned water and sewer construction projects. The Park is located in Conway. The residents also request that the Commission prohibit any proposed or current charges relative to sewer system construction billed now or in the future to Lamplighter residents.

On February 25, 2010, the Park filed a motion to dismiss arguing that it is not a public utility as a matter of law, and that the residents' request should be dismissed for lack of jurisdiction. On March 5, 2010, Lamplighter residents filed an objection to the motion to dismiss and stated that the Park's claim that it is not a utility is the central question raised by the residents and thus the Commission should not dismiss the petition. The Lamplighter residents

assert that it is within the Commission's statutory authority to decide questions of its jurisdiction based on the evidence and specific circumstances of this case.

On March 19, 2010, the Commission issued an order of notice and scheduled a prehearing conference and technical session for May 13, 2010. On April 14, 2010, the Lamplighter residents requested that the Commission hold the prehearing conference and technical session in Conway. On April 26, 2010, the Park objected to the request to move the prehearing location. On May 12, 2010, the Commission canceled the prehearing conference and, on June 22, 2010, rescheduled the prehearing conference to July 8, 2010, in Conway.

On July 13, 2010, Staff filed a proposed procedural schedule, which the Commission approved by secretarial letter dated July 15, 2010. Staff and the parties engaged in discovery and, on August 31, 2010, the Park and Lamplighter residents filed a stipulation of facts. On September 23, 2010, the Park and Lamplighter residents filed a joint motion to extend the deadline for filing briefs. The Commission approved the extension request by secretarial letter on September 24, 2010, and the Park and Lamplighter residents filed briefs on November 29, 2010.

II. POSITIONS OF THE PARTIES AND STAFF

A. Lamplighter Residents

The Lamplighter residents argue that the Park's provision of water and sewer service meets the definition of a public utility pursuant to RSA 362:2 and RSA 362:4. According to the residents, the Park has attributes of a monopoly and it is in the public interest for the Commission to regulate the Park and protect the resident's rights. The residents state that they do not have other options when it comes to water and sewer service and the Park has "unfettered discretion" to raise charges for water and sewer service.

The Lamplighter residents also argue that if the Park is charging residents for costs associated with the construction of the sewer project before it is completed, the Park, as a public utility, is violating the prohibition on including in rates construction work in progress (CWIP), *see* RSA 378:30-a. The residents have not been able to determine whether sewer construction costs are presently included in the monthly rent, but based upon statements made by the park manager, the residents believe that such costs might be included in the rent. The residents contend that RSA 362:4 does not require service to the public in order to be a regulated public utility, rather, RSA 362:4 only requires "ownership or operation of any water or sewage disposal system." The residents state that exemptions exist in RSA 362:4 to exempt homeowners' associations and entities serving less than 75 customers, but that the legislature specified no exemption for mobile home parks.

The residents also contend that the Park has violated RSA 205-A:6 by collecting money from residents to pay for the sewer conversion. The residents contend that the Park has not taken the steps necessary to convert the responsibility for payment of the sewer service to the tenants pursuant to the statute. The residents claim that the Park has stated that it is already charging the costs of the sewer service to the tenants and that the sewer system is not "even close to being constructed."

The residents seek the following relief: (1) have the Park escrow all revenues received from the $30 increase since January 1, 2010 pending the Commission's review of its operations; (2) prohibit the Park from raising rent to cover any additional costs relating to water and sewer until the Commission has conducted a thorough review of the Park's operations; and (3) open a new proceeding to establish the parameters of the Park's operation as a public utility.

B. The Park

The Park states that it is not a public utility. It cites N.H. Code Admin. R. Puc 602.13 and Puc 702.09 as well as the requirement that service be provided to the public, RSA 362:2, in support of its position that the Park is not a public utility. The Park contends that RSA 362:4 must be interpreted to include the requirement of service to the public set forth in RSA 363:2. It cites *Claremont Gas Light Co. v. Monadnock Mills,* 92 N.H. 468, 469-470 (1943), holding that service to the public without discrimination is a distinguishing characteristic of a public utility, and *Appeal of Zimmerman,* 141 N.H. 605 (1997), holding that a landlord-tenant relationship made the telephone service non-public and therefore not utility service. The Park also relies on, *Community Water and Wastewater a/k/a Holiday Acres*, Order No. 24,499, 90 NH PUC 331 (2005), where the Commission determined that the provision of water and sewer service in a mobile home park was not within its jurisdiction.

The Park next argues that the Board of Manufactured Housing has ruled that capital improvements for utility services can be charged to residents without violating RSA 205-A:2. *See, Leach v. Langley Brook Realty, LLC.* State Board of Manufactured Housing, Docket No. 001-02 (June 10, 2002). Finally, the Park states that the residents are effectively asking the Commission to oversee and regulate how rent proceeds are spent. The Park states that this type of review is beyond the Commission's jurisdiction. According to the Park, such oversight is within the purview of RSA Chapter 205-A and the Board of Manufactured Housing.

III. COMMISSION ANALYSIS

A. Facts Presented

The stipulation of facts and the pleadings filed in this docket establish the following. The Hines Group owns Lamplighter Mobile Home Park and the Park provides water and sewer

service to its tenants. There are no other providers of water and sewer service in the Park. The Park installed individual water meters in 2006 and 2007 and paid for the installation through its general operating fund.[1] The Park meters the tenants for water service and residents receive an itemized charge for water in their monthly rental bill. The Park began billing for water service as a separate item on the rental bill in October 2007, coincident with the Park lowering the monthly park rent by $10.

The Conway Village Fire District (CVFD) is a village district established pursuant to RSA Chapter 52 and the Park is wholly within the corporate boundary of the CVFD.[2] CVFD provides water service to the Park through two master meters. The Park owns the water distribution system in the Park and pays CVFD for the water service. In turn, the Park charges residents for the water service at the same rates as those charged by CVFD. Presently, the Park divides the quarterly base charge of $4,114 by three to reach a monthly charge and then by 251 lots, resulting in a fixed monthly billing rate for residents of $5.46 per month per lot. About 220 of the lots are occupied; four are used by the Park. All charges for water not paid by the residents are paid by the Park. In addition, the Park charges residents the CVFD volumetric rate of $0.35 per 100 gallons. The Park charges no administrative fee to conduct the billing. On August 4, 2010, the Park notified CVFD that it "intends to shift responsibility for billing of water service to CVFD." CVFD and the Park have continued to work on the details of the shift to CVFD for direct water billing, however, according to the briefs filed on November 29, 2010, the shift had not yet been completed.

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[1] We note that the Department of Environmental Services has a policy of encouraging mobile home parks and other community water systems to implement conservation measures such as installing water meters. See RSA 485:61 and N.H. Code Admin. R. Chapter Env-Wq 2100, eff. 2005.

[2] *Conway Village Fire District,* Order No. 24,208, 88 NH PUC 417 (2003).

As to the provision of sewer service, the Park owns and maintains 110 septic systems. The Park does not bill separately, or itemize any amount for sewer service on the rent bill. On July 8, 2008, the Park entered into an agreement with CVFD to connect the park to the sewer system. CVFD agreed to purchase 0.27 acres of land, for $33,837.56, and construct a pump station. The Park also agreed to install a master meter to monitor actual sewer flow to CVFD. The Park agreed to and intends to connect the front half of the park, 133 units plus 1 community building, to the CVFD system within one year of the initial operational capability of the project. CVFD purchased the land and the Park has spent $4,641.40 on plans and engineering work related to the sewer project. The Park indicated that it has not determined whether it will bill the residents that are connected to CVFD sewer service separately for that service or continue to cover the cost in base rent.

B. Application of RSA Chapter 362

The residents argue that the Park is a public utility under RSA Chapter 362; specifically they assert that the provision of water and sewer service by this mobile home park satisfies the criteria in RSA 362:4 for being a regulated utility. RSA 362:4, I provides:

> I. Every corporation, company, association, joint stock association, partnership, or person shall be deemed to be a public utility by reason of the ownership or operation of any water or sewage disposal system or part thereof. If the whole of such water or sewage disposal system shall supply a less number of consumers than 75, each family, tenement, store, or other establishment being considered a single consumer, the commission may exempt any such water or sewer company from any and all provision of this title whenever the commission may find such exemption consistent with the public good.

According to the stipulation of facts, the park is a limited partnership, satisfying the first requirement of RSA 362:4. The stipulation of facts further establishes that the Park owns and operates a water and sewage disposal system or part thereof, satisfying the second requirement of

RSA 362:4. This, however, is not the end of the analysis. RSA 362:4 must be read together with the general definition of a public utility contained in RSA 362:2.

> "[t]he term 'public utility' shall include every corporation, company, association, joint stock association, partnership and person, their lessees, trustees or receivers appointed by any court ... owning, operating or managing any plant or equipment or any part of the same for the conveyance of ... sewage disposal... or water *for the public* ... and any other business, except as hereinafter exempted, over which on September 1, 1951, the public utilities commission exercised jurisdiction." (emphasis added)

Statutes are to be construed in a manner consistent with the spirit and objectives of the legislation as a whole. *City of Manchester School District v. City of Manchester,* 150 N.H. 664, 669 (2004). When interpreting two statutes that deal with a similar subject matter, we construe them so that they do not contradict each other, and so that they will lead to a reasonable result and effectuate the legislative purpose of the statutes. *Estate of Jaycob Gordon-Couture v. Brown,* 152 N.H. 265, 272 (2005), *see also Allied New Hampshire Gas Company v. Tri-State Gas & Supply Co., Inc.,* 107 N.H. 306, 308 (1966) (the exercise of an agency's jurisdiction must comport with the purposes the statute seeks to accomplish).

The residents base much of their argument that the Park is a regulated utility on the circumstance that RSA 362:4 does not expressly require that service be to the undifferentiated public. The residents acknowledge that both RSA 362:2 and 362:4 apply to the provision of utility service, but they emphasize that only RSA 362:2 requires service to the undifferentiated public, as articulated in *Appeal of Zimmerman, supra.* The Commission, however, has interpreted RSA 362:4 as requiring service to the public. In *Community Water and Wastewater Services*, Order No. 24,499, 90 NH PUC 331, 335 (2005) the Commission found the provision of water and sewer service to mobile home park tenants was "not within the purview of the Commission's jurisdiction;" *see also Interlakes Water and Sewer Company*, Order No. 22,103,

81 NH PUC 281 (1996) (the Commission declined to assert jurisdiction over mobile home park providing water service to its tenants), *Solar Village,* Order No. 16,694, 68 NH PUC 605 (1983) (the provision of water service to member-owners was not a public utility service); *Mount Crescent Water Company,* Order No. 19,157, 73 NH PUC 337 (1988) (water service provided by a nonprofit to its members was not service to the public and thus the company was not a public utility).

The Legislature enacted what is now RSA 362:4 in 1951 and has made numerous amendments over the ensuing 60 years. None of these amendments, however, have explicitly stated that such water or sewer corporations must provide service "to the public." Nonetheless, over this period the Commission has continued to limit its jurisdiction to those entities providing service to the public, that is, those within the franchise area of the utility.[3] The Commission has not interpreted RSA 362:4 as amending or modifying the requirement that service be to the public stated in RSA 362:2. The New Hampshire Supreme Court made explicit that to be a utility, an entity must provide service to "the undifferentiated public." *See Zimmerman,* 141 N.H. at 611 *citing Dover, Somersworth and Rochester Street Railway Co. v. Wentworth,* 84 N.H. 258 (1930) and *Claremont Gas Light Co. v. Monadnock Mills,* 92 N.H. 468 (1943). In *Zimmerman* the Court held that neither RSA 362:3-a nor RSA 362:4 represent any clear legislative intent to alter the construction of "public." Since *Zimmerman* was decided in 1997, the Legislature has modified RSA 362:4 several times, but has made no attempt to overrule the

[3] *West Epping Water Company,* Order No. 24,309, 89 NH PUC 224 (2004); *Resort Waste Services Corporation,* Order No. 24,289, 89 NH PUC 157 (2004); *State Line Plaza Water Company,* Order No. 24,563, 90 NH PUC 604 (2005); *Property Owners Association at Suissevale, Inc.,* Order No. 24,698, 91 NH PUC 552 (2006); and *Atkinson Woods Owners Association,* Order No. 24,754, 92 NH PUC 169 (2007).

Court's requirement that service be to the public. Further, the Legislature has not expressly made water and sewer service provided in mobile home parks subject to regulation.[4]

Accordingly, we find that the Park is not a regulated public utility pursuant to RSA 362:2 and 362:4. We therefore decline the residents' request to open a new proceeding to establish parameters for the Park's operation as a public utility. Because the Park is not a regulated utility, we do not address the residents' argument that the Park's rent is contrary to RSA 378:30-a.

C. RSA Chapter 205-A

The residents argue that the Park has violated RSA 205-A:2, IX. RSA Chapter 205-A deals with manufactured housing parks and governs eviction of tenants, unfair trade practices, health and safety conditions, and park rules. *Hynes v. Hale*, 146 N.H. 533, 536 (2001). It vests jurisdiction over evictions in the New Hampshire District Courts and jurisdiction over complaints of unfair practices and health and safety violations in the New Hampshire Superior Courts. *Id.* The Board of Manufactured Housing has jurisdiction to hear and determine matters involving manufactured housing park rules and to adopt rules relative to its administration over mobile home parks, subject to the approval of the Bureau Chief of the Consumer Protection and Antitrust Bureau of the New Hampshire Department of Justice. *Id.*

The residents argue that "by collecting increased rent from park residents effective January 1, 2010 for the express purpose of converting to a new sewer system and not paying for the conversion costs itself, the Park Owner has already exhibited an intent that is contrary" to RSA 205-A:2. Residents Brief at 8. As the Park notes, the Board of Manufactured Housing has ruled on this issue. *See, Leach v. Langley Brook Realty, LLC,* Board of Manufactured Housing, Docket No. 001-02 (June 10, 2002). The residents' argument that collecting rents to recover the capital improvements involved in connecting the residents to CVFD's sewer system violates

[4] 2002 N.H. Laws 141:4. 2003 N.H. Laws 178:15 and 281:12. 2007 N.H. Laws 25:2.

RSA 205-A:2, IX requires a determination by the Board and not by this Commission because the Board is the specialized agency with jurisdiction to decide these matters.

The residents also assert that the Commission has authority pursuant to RSA 205-A:6, II and III. Pursuant to RSA 205-A:6, II, if a park owner no longer wishes to be responsible for the cost of utility services to tenants, the park owner can shift such responsibility to the utility, but must pay for the cost of such conversion.

> In the event that a park owner or operator shifts responsibility for payment of water, sewer, or any other utility service to the tenant, the park owner or operator shall be responsible for the cost incurred in the conversion, including the cost of installation of utility meters, if any, on each manufactured home in the park, except as permitted by the public utilities commission pursuant to RSA 374 and RSA 378. After such a conversion, manufactured housing park tenants shall be billed directly by the utility for the use of such services. RSA 205-A:6, II.

Conversion costs can include installing utility meters such as those installed by the Park. *See Schiavi v. City of Rochester,* 152 N.H. 487, 432 (2005). In this case, the cost of installing water meters has already been paid by the Park and the Park is not seeking to recover any costs of conversion of the water system from the residents. As to the sewer service, the Park states that the connection to the sewer system has not been completed, however, it does intend to connect the 133 homes in the front part of the Park to CVFD sewer service. The Park has no plans to transfer billing responsibility for sewer service to CVDF. The residents argue a conversion of sewer service has begun, however, as we noted earlier, whether such costs are properly within rent is a determination that must be made by the Board of Manufactured Housing. Accordingly, the current circumstances do not trigger the Commission's authority.

Finally, pursuant to RSA 205-A:6, III:

> Any park owner or operator who is billed as a single entity for any utility service shall be prohibited, on and after the effective date of this paragraph, from charging manufactured housing park tenants an administrative fee in relation to such utility service, except as

permitted by the public utilities commission pursuant to RSA 374 and RSA 378. RSA 205-A:6, III.

Inasmuch as the Park charges no administrative fee for its water billing services and has not requested that it be allowed to collect administrative fees, there is no request for the Commission to consider pursuant to RSA 205-A:6, II or III.

Based upon the foregoing, it is hereby

ORDERED, that the Residents' petition is denied; and it is

FURTHER ORDERED, that the Park's motion to dismiss is granted.

By order of the Public Utilities Commission of New Hampshire this nineteenth day of May, 2011.

Thomas B. Getz
Chairman

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Amy L. Ignatius
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Attested by:

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05/19/11 Order No. 25,224 issued and forwarded to all parties.
Copies given to PUC Staff.

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FILING INSTRUCTIONS: **PURSUANT TO N.H. ADMIN RULE PUC 203.02(a),**

WITH THE EXCEPTION OF DISCOVERY, FILE 7 COPIES (INCLUDING COVER LETTER) TO:

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