

DW 01-027

HOLIDAY ACRES WATER AND WASTEWATER SERVICES

Petition to Revoke Franchise

Order Denying Petition

O R D E R    N O.    23,739

July 9, 2001

**I. BACKGROUND**

On February 7, 2001 the New Hampshire Public Utilities Commission (Commission) initiated Docket No. DW 01-027, pursuant to the position of James R. Jackson (Petitioner), a customer of Holiday Acres Water & Wastewater Services (the Company). Petitioner requested the Commission revoke the Company's franchise averring that the Company "deliberately misled" the Commission about the nature of the Company's legal status. Petitioner argued that the Company was not a proper New Hampshire entity as required by RSA 374:22. The petition also asked that the Commission revoke the permanent rates of the Company, place the Company into receivership, order a refund to all customers of "all fees collected since December 31, 1996," and seize the local assets belonging to Holiday Acres Joint Venture Trust.

The Petitioner also alleged that the Company had failed to file complete Annual Reports with the Commission for 1997, 1998, and 1999; and has failed to cooperate with the Commission because of the lack of access to the Company's records.

As a result of the petition, a pre-hearing conference (PHC) was held on March 27, 2001, after which the Staff of the Commission (Staff) and the Parties met in technical session for discussion on the scope of the case. Staff and the Parties agreed to a limited procedural schedule for the docket determining that the central questions of the docket could be resolved without a hearing.

In accordance with the procedural schedule the Parties submitted memoranda and other relevant material to the Commission. Staff filed its Recommendation, as contemplated by the procedural schedule, with the Commission on June 7, 2001. The Petitioner filed a Reply to the Staff Recommendation on June 8, 2001.

## **II. INTERVENTIONS**

A motion to intervene was received by the Commission on April 24, 2001, from John Provost, a resident of Holiday Acres Mobile Home Park and utility customer. Mr. Provost supports Mr. Jackson's petition to revoke the franchise of Holiday Acres Water and Wastewater Services (HAWWS). Staff filed its objection to Mr. Provost's motion to intervene on April 27, 2001. Staff argued that Mr. Provost brought no new evidence, allegation, or requested remedy to the proceeding, and that the appropriate time

for filing such motion for intervention had expired. The Commission received no further requests for full intervention.

The Commission, however, did receive two motions to enter a Statement of Position. A statement of position was filed by Mr. Jimmie D. Purselley, dated April 4, 2001, in which he argues that the provisions of RSA 205-A:2 should apply in this instance, and thus the collection of fees for utility service violates state law. Mr. Purselley is neither a resident of Holiday Acres Mobile Home Park, nor a utility customer of HAWWS.

Lois Parris, on behalf of the Statewide Tenants Association filed a Motion to Enter a Statement of Position, on April 25, 2001, making the same allegations as Mr. Purselley.

Additionally, the Commission received, on May 2, 2001, a letter from Ms. Nerevie Goodwin, stating support for Mr. Jackson's petition. Ms. Goodwin did not request Intervenor status in the case.

### **III. DISCUSSION**

#### **A. Franchise Issue**

In accordance with the procedural schedule agreed to by the Staff and Parties in the case the Petitioner submitted his memorandum of law on April 10, 2001, addressing the assertion that the PUC improperly granted the Company a franchise because the Company was not an entity organized under the laws of this

state. Petitioner asserted Holiday Acres Water and Wastewater Services is only a trade name for Holiday Acres Joint Venture Trust and the Trust is not registered pursuant to RSA 349:1. Petitioner asserts the Company "is in reality a Canadian Corporation or Partnership which has misrepresented itself as a New Hampshire company by setting up a 'trust' whose sole purpose is to conceal the true ownership of the company." In support of the argument, Petitioner provided the Registration of Trade Name for HAWWS, and a "Certificate of No Registration" from the Secretary of State regarding Holiday Acres Joint Venture Trust.

In response to the Petitioner's claim, the Company argued that the assets of the utility are owned by a New Hampshire Trust known as Holiday Acres Joint Venture Trust. That Trust was formed on June 15, 1995 and was recorded, the same year, in the Merrimack County Registry of Deeds at Book 1990, pages 0414-0417. The Company further asserted that the Trust is not required to register to do business in the state. The Trust, as the sole owner of the utility, has registered the trade name of Holiday Acres Water and Wastewater Services with the Secretary of State in accordance with RSA 349:1.

Staff argued that while the Commission may alter any order made by it, pursuant to RSA 365:28, such action should not be taken in this instance. Staff contends the Commission had full knowledge of the structure of this Company in 1996, when the franchise was granted. Staff, therefore, contends that since the Commission was provided with the organizational structure of the Company, the Petitioner's claim that the Company misrepresented itself is fallacious. Staff further contends that in this instance the doctrine of res judicata should be applied. Moreover, Staff asserts that the Company has complied with applicable New Hampshire law, as the Company met the requirements of RSA 349:1, and that the trade name was registered with the Secretary of State.

#### **B. Lack of Recordkeeping**

As part of the petition, Mr. Jackson originally argued that the Company had not provided the Commission with complete Annual Reports for the years 1997, 1998, and 1999. Petitioner further stated that the PUC Audit Staff could not properly conduct an audit because of the Company's lack of cooperation in providing financial records to the Commission. Petitioner requested relief based on the Company's perceived unwillingness to conform to Commission rules.

These issues were first raised in Docket No. DW 99-154, a case initiated by the Company for a rate increase but closed in September, 2000 without resolution. As part of DW 99-154, the Commission ordered the Audit Staff to complete an audit using the Company's 1999 financial records. The Commission Audit Staff issued a final audit report on April 23, 2001. The report contained 51 audit finds which observed various shortcomings of the Company, including lack of compliance with accounting and reporting requirements, the inter-company accounting relationship with the Mobile Home Park, failure to keep written contracts with outside firms, and overall lack of accurate utility accounting. Staff states that the Company failed to respond to the audit requests in a timely manner, and failed to comply with a letter from the Finance Director dated November 28, 2000 requiring that all audit requests be answered within a specified time.

Based on the lack of cooperation by the Company with the Commission Audit Staff during the audit, in its memorandum to the Commission of June 6, 2001, Staff sets forth various options for the Commission's consideration, including penalties pursuant to RSA 374:17.

Staff ultimately recommended that the Company be required to bring its financial records into compliance with Commission rules, incorporating all necessary revisions, and re-

submitting the 1999 Annual Report to the Commission. Staff also recommended that: the general ledger supporting the annual report be provided; the work order system and continuing property records be brought into compliance with Commission rules and provided to Staff for review; the 2000 Annual Report be provided to Staff with all supporting schedules and documents; and the 2001 Annual Report be submitted to the Commission no later than March 31, 2002.

**C. Motion under RSA 205-A:2, IX**

On April 24, 2001, a motion was filed by John A. Provost requesting the Company's franchise be revoked claiming that because Holiday Acres Mobile Home Park and HAWWS were the same legal entity, RSA 205-A:2, IX precludes the Company from charging "a tenant for repair or maintenance to any underground system, such as... water, electrical or septic systems, for causes not due to negligence of the tenant." Mr. Provost argued that allowing the Company to continue to charge for water and sewer in a utility rate is an unfair trade practice within the meaning of RSA 358-A:2.

In reply, Staff argues that an interpretation of RSA 205-A:2, IX, which would not allow a utility operator to charge for services, is incorrect and inconsistent with the general intent and purpose of the State's public utility laws. Staff

points to RSA 378:14 which provides that a utility owner is "prohibited from granting free service or from charging or receiving a different compensation for any service rendered to any person ... than the compensation fixed for such service by the tariffs on file with the Commission". Staff argues that both residents of the park and the nonresident customers must be charged for services received from the utility operator. Therefore, given the circumstances of this case, a park owner who is also a utility owner can charge both residents and non-residents for maintenance and repair of the utility system.

**D. Petitioner's Reply to Staff Recommendation**

In the June 8<sup>th</sup> letter from the Petitioner to the Commission, Petitioner asserted a need to clarify misconceptions for the Commission. Petitioner indicated that Holiday Acres was merely a parcel of real estate that had a trust declaration attached to it but that the company was really a partnership organized under the laws of British Columbia. Petitioner asked that the Commission not confuse real estate with the Company. In support of his argument Petitioner enclosed a copy of his personal registration of the trade name "Holiday Acres Joint Venture Trust" signed by the Secretary of State on March 28, 2001. Petitioner argued that permission, from the Secretary of



State, for use of the trade name - Holiday Acres Joint Venture Trust - was never sought by Mr. Hynes or an agent.

Petitioner argues that the Hynes, as owners of the mobile home park, may not charge tenants for repair and maintenance of the sewer and water system. He claims that there is no conflict with RSA 378:14 because the utility may charge the landlord for the services rendered.

Petitioner alleges that the Commission did not follow the laws of the State of New Hampshire when the original franchise was granted and he requested that the Commission not repeat a mistake it made in 1996.

#### **IV. Commission Analysis**

As an initial matter, the Commission will grant the request for intervention of Mr. Provost. We find that all parties had an opportunity to comment on the issues he raised, and his participation did not impede the proceedings in any way.

There are three matters for consideration in this case: First, Mr. Jackson has called into question the validity of the Company's franchise because of its alleged failure to register as a New Hampshire corporation. Second, both Mr. Jackson and Staff allege that the Company failed to maintain accurate financial records and to provide timely responses to the Staff's financial audit. The third issue is the claim that pursuant to RSA 205-

A:2, IX the mobile home park may not charge its residents for water and sewer system operation and repair.

**A. Validity of Franchise**

The Commission's determination to grant Holiday Acres its franchise in 1996 has been called into question. In Petitioner's June 8<sup>th</sup> reply to the Staff Recommendation, it is argued that the Commission did not follow the laws of the State of New Hampshire. We disagree with this assessment.

Mr. Jackson's petition challenges the franchise on two bases. First, he indicates that the Company deliberately misled the Commission regarding the nature of the Company's legal status. Second, he claims the Company was not a business entity organized under the laws of the state as required by RSA 374:24.

We do not agree that the Company deliberately misled this Commission about its organizational status. A review of the original franchise docket, DE 96-242, reveals the Commission was expressly informed that Mr. Steven Hynes, a Canadian resident, was the owner of the utility and the utility was not separately incorporated. In fact, the Commission was aware that Holiday Acres Joint Venture Trust acquired Holiday Acres Mobile Home Park out of bankruptcy in 1995 and that the Park filed and received authorization to utilize the trade name Holiday Acres Water &

Wastewater Services. DE 96-242, Transcript Dec 20, 1996, pp. 32-33.

Staff argues that we should apply the doctrine of administrative *res judicata* to our decision in this instance. We do not believe that is necessary.<sup>1</sup> As discussed we are not convinced that the Company deliberately misled us in any way. Moreover, we cannot accept the proposition that the Company was not organized under the laws of this state.

Mr. Jackson claims that Mr. Hynes' business entity is not organized under New Hampshire laws as required by RSA 374:24. He claims Holiday Acres Joint Venture Trust must be a New Hampshire entity or, at minimum, registered as a trade name with the Secretary of State under RSA 349:1. In his June 8<sup>th</sup> letter, Mr. Jackson informs us that since March 28, 2001, he has been the sole registered owner of the trade name "Holiday Acres Joint Venture Trust" and that we should not confuse the "real property" trust for the "Company."

Staff claims that Holiday Acres Water and Wastewater Services is the business entity that is organized in New

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<sup>1</sup> We do note that Mr. Jackson has attempted to litigate this issue in small claims court. In 1997, he brought a complaint against the Trust, Docket No. 97-SC-00145. The Hooksett District Court, found for the Trust. In January, 2001, Mr. Jackson petitioned for a new trial alleging newly discovered evidence, i.e. that the Trust was not organized under the laws of this state. The Court, (Larson, J.) denied his motion finding that the evidence was available in January, 1998, when the initial hearing on the merits was held.

Hampshire. Both Staff and the Company assert that under New Hampshire law there is no requirement for a joint venture to be registered and that RSA 349:1 merely requires the trade name for the business to be registered.

We agree that this Company is a "business entity" under New Hampshire law. As Staff pointed out, the facts disclose that Holiday Acres Joint Venture Trust is a New Hampshire Trust established by Stephen Hynes of British Columbia, as Trustee, for the benefit of the joint venturers of Holiday Acres Joint Venture, a British Columbia joint venture. Moreover, Holiday Acres Joint Venture Trust applied for registration of the trade name "Holiday Acres Water & Wastewater Services" in July, 1996 and thus fulfilled the obligations of RSA 349:1. There is no requirement that the Trust's name be registered as the Trust's trade name. RSA 349:1, I simply requires a trust or association doing business in this state to register the trade name of such business, trust or association. Here, the Joint Venture Trust met that obligation when it registered its trade name "Holiday Acres Water and Waste Water Services," and is therefore organized under the laws of the state.

Mr. Jackson gleans from Staff's Recommendation that only a trust for real property requires a writing and argues that the Holiday Acres Joint Venture Trust must be a real estate

venture and not a company. A reading of the Trust Declaration does show that the "Trust Declaration establishing the Holiday Acres Joint Venture Trust...", is for the "benefit of the joint venturers of Holiday Acres Joint Venture...", and is "pertaining to the beneficial ownership of the real property in Merrimack County." This, however, does not mean that Holiday Acres Water and Wastewater Services is not a "business entity." For example, the trust document also indicates that the Trustee has the full power to "deal with" the property of the trust. See Trust Declaration, July 14, 1995, paragraph 2.

The New Hampshire statutes dealing with utilities do not define "business entity." Consequently, in interpreting RSA 374:24 we ascribe the plain meaning to the words of that term. Aiding our analysis, however, is the New Hampshire statutory term, "business organization." The term business organization is defined in RSA 77-A:1, I as "any enterprise, whether corporation, partnership, limited liability company, proprietorship, association, business trust, real estate trust or other form of organization; organized for gain or profit, carrying on any business activity within the state...."

HAWWS is a New Hampshire enterprise that meets the requirements for registering with the state. Moreover, a review of the financial records on file with the Commission establishes

that Holiday Acres Mobile Home Park (of which the utility is a division) filed New Hampshire Business Tax Returns for 1998 and 1999.

Because the Commission considered HAWWS was a division of the Mobile Home Park when it granted the franchise and since HAWWS is registered with the Secretary of State as a trade name, we believe the requirements of RSA 374:22 and 24 have been met. Accordingly, we find that the franchise was properly granted in 1996 and will deny Petitioner's requested relief as it relates to this issue.

**B. Applicability of RSA 205-A:2, IX**

The issue of whether the franchise was properly granted given the provisions of RSA 205-A:2, IX, may be resolved by careful consideration of the purpose of this section. While we have in the past decided not to assert jurisdiction over water and sewer companies that were also mobile home park operators, we believe Holiday Acres can be distinguished given the circumstances of this case.

In *Re Interlakes Water and Sewer Company*, 81 NH PUC 281 (1996), the Commission found no basis in which to assert jurisdiction over Interlakes Mobile Home Park observing that while some operations fall technically within the language of RSA 362:2 they may not be regulated operations given RSA 205-A:2, IX.

The Commission remarked, "even if these parks were technically within the meaning of a public utility, the legislature has clearly manifested its intent that they not be treated like other public utilities because they are prohibited from charging customers for water system maintenance." *Id.*, at 284.

The Commission stated that where a mobile home park is not charging for utilities separately from the monthly rent charge there is justification in not regulating the park. Here, however, the mobile home park is charging for utility services separately from the monthly park rent. Moreover, there are approximately fourteen customers that do not reside within the park. The Legislature has granted no exemption from regulation for this type of situation. See e.g. RSA 362:4, II (exception to municipal corporation furnishing water or sewage disposal service outside its municipal boundaries.)

We believe RSA 205-A:2, IX can be reconciled with RSA 362:2 and 362:4. The utility in this instance is the enterprise recovering from ratepayers the costs associated with the water and sewer systems. The mobile home park cannot recover those costs. This Commission can assure that HAWWS, as a regulated entity, is charging only just and reasonable rates to its customers for the utility services. Thus, we believe the intent

of the Legislature is being fulfilled and the public interest is being met.

This Commission has repeated over the years the principle that if a utility or its owner has already recovered the cost of the plant it has placed in service, the utility cannot recover the same costs again through rates. See *Bedford Waste Service Corp.*, DW 99-051, Order No. 23,388; January 7, 2000; *Eastman Sewer Company*, 77 NH 93, 98-99 (1992), rehearing denied, 77 NH PUC 180 (1992), affirmed by Appeal of *Eastman Sewer Co.*, 138 N.H. 221, 224 (1994); see also *Mountain High Water and Gas Sales, Inc.*, 76 NH PUC 415, 417-18 (1991) (noting that, "[a]s a matter of public policy, we will not permit utilities to profit unjustly from inconsistent statements concerning their assets made to the IRS and us"). In order to assure the park does not attempt to collect from its residents the costs associated with the utility system we will require HAWWS to provide evidence to the Commission certifying that the same costs are not being collected twice. Proof may be submitted in the form of an affidavit or other attestation.

As Staff pointed out, under New Hampshire law, statutes will be construed consistent with each other where reasonably possible. Re *New Hampshire Public Utility Commission Statewide Restructuring*, 143 NH 233 (1998). We believe that our treatment



of this issue, given a succinct reading of RSA 205-A:2,IX, is consistent with our powers under RSA 374:3. We therefore deny the motion to revoke the franchise on the basis of conflict with RSA 205-A:2.

### **C. Financial Reporting**

The lack of accurate reporting of the financial information is of great concern to the Commission. The ongoing lack of demonstrated financial and managerial expertise and the apparent disregard for the uniform system of accounts for water utilities have jeopardized the franchise authority granted in 1996. While we decline to revoke the franchise at this time, we stress that the Company must take all necessary steps to maintain the accounts of the Company and comply with the record keeping requirements of the Commission.

Both our Staff and Mr. Jackson have raised issues regarding the financial records of the Company. Staff has documented problems going back to the Company's 1998 Annual Report. The Commission's Finance Director and Executive Director have had their attempts to obtain information from the Company on a timely basis repeatedly frustrated by the Company. For example, in a September, 2000 letter the Executive Director stated:

The Company is now over five months late in filing its annual report as required by Puc 609.05. The Commission has allowed the Company reasonable time to prepare its annual report and it is troubled by the lateness. Mr. Jackson has raised issues that merit attention. The Commission has determined to examine the imposition of a fine against the Company for failure to timely file its annual report and will investigate the proposals made by Mr. Jackson. Upon receipt of the 1999 Annual Report, which the Company is directed to file by September 22, 2000, Staff will undertake an audit. Upon Completion of the audit, the Commission will determine whether to initiate a show cause proceeding, rate investigation or other appropriate proceeding to address the issues noted above. To the extent the Company seeks to renew its request for a rate increase, which it has the statutory right to do, the Commission may, alternatively, decide to address the various issues raised here in the context of the Company request.

We are concerned not only with the timeliness of reporting but also with the quality of the information conveyed. Staff's memo suggests that we could consider imposing penalties against the Company in the amount of \$143,500. We are not convinced that penalties imposed pursuant to RSA 374:17 for past practices would have the effect we desire. Simply put, this Company needs to accurately and timely report information to the Commission. The Company's expressed apology for the fact that there had been a "perceived" lack of cooperation is tantamount to an admission. The explanation for the troubles that occurred in 1997 through 1999 was that there were problems with work done by a previous accountant. We are aware that the Company has hired a new accountant and has made representations that it will remedy

its previous reporting difficulties. As a result we will not fine the Company at this time, but will accept Staff's other recommendations.

The Company is therefore required to produce the following items no later than the date indicated:

- 1) Revised 1999 Annual Report by August 31, 2001, incorporating all of the necessary revisions stemming from the 51 audit finds. If the Company disagrees with the audit find revisions it should make the revision but specifically note its concern or objection. The Company must also submit by August 31, 2001 its 1999 General Ledger (G/L) (revised), copies of the continuing property records (CPR's), aged accounts receivables and aged accounts payables as of December 31, 1999 (revised).
- 2) A sample of its work order system by September 20, 2001.
- 3) The 2000 Annual Report by October 31, 2001, along with its year 2000 G/L, copies of CPR's as of December 31, 2000, copies of 2000 work orders, copies of their year 2000 bank statements for the utility, aged accounts receivables and aged accounts payables as of December 31, 2001.

4) The 2001 Annual Report by March 31, 2002, and documentation including the 2001 G/L, copies of CPR's as of December 31, 2001, copies of 2001 work orders, copies of 2001 bank statements, aged accounts receivable and aged accounts payables as of December 31, 2001.

We agree with Staff regarding the future actions of the Company. Should the Company fail to comply with any of the requirements listed above we will issue a show cause hearing Order of Notice to determine fines and possible revocation of the franchise.

**Based upon the foregoing, it is hereby**

**ORDERED** that Petitioner's Request to revoke the Holiday Acres Water and Wastewater Services franchise is denied; and it is

**FURTHER ORDERED**, that the Company provide evidence that residents of the Mobile Home are not being double charged for utility services. This evidence should be submitted annually with the Annual Report; and it is

**FURTHER ORDERED**, that Holiday Acres Water and Wastewater Services comply with the schedule as outlined above for submitting its financial information to the Commission, and it is

**FURTHER ORDERED,** that should the Company seek a general rate increase within the next year the Commission will suspend the proposed tariff for a period no shorter than 12 months, under RSA 378:6, so a complete investigation of the Company can be conducted; and it is

**FURTHER ORDERED,** that the request for intervention filed by Mr. Provost is granted and the motions to enter a statement of position filed by other individuals are accepted.

By order of the Public Utilities Commission of New Hampshire this ninth day of July, 2001.

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Douglas L. Patch  
Chairman

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Susan S. Geiger  
Commissioner

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Nancy Brockway  
Commissioner

Attested by:

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Kimberly Nolin Smith  
Assistant Secretary