DW 03-077

RESORT WASTE SERVICES CORPORATION

Petition Requesting the Commission Determine Resort Waste is Not a Public Utility

Order Finding Resort Waste is Not a Public Utility

O R D E R N O. 24,289

March 5, 2004

I. BACKGROUND AND PROCEDURAL HISTORY

On March 26, 2003, Resort Waste Services Corporation (Resort Waste) filed with the New Hampshire Public Utilities Commission (Commission) a Petition Requesting that the Commission Determine that Resort Waste is Not a Public Utility Pursuant to RSA 362:2 or, in the Alternative, Grant Resort Waste an Exemption from Regulation Under Title 34 Pursuant to RSA 362:4 and RSA 378:1 (Petition).

By order of Notice dated April 24, 2003, the Commission established deadlines for intervention and scheduled a prehearing conference for May 21, 2003. John E. Sylvester, Jr., a landowner abutting the Bretton Woods resort area, filed a late request to intervene on July 15, 2003, which the Commission granted on August 5, 2003.

Resort Waste has been a franchised sewer utility since February 23, 1988 and began operations in December 1989. *See Resort Waste Services Corporation*, 73 NH PUC 68 (1988) and *Resort Waste Services Corporation*, 74 NH PUC 243 (1989). Resort Waste

has two classes of customers: User Members, who are owners of residential and commercial units within the Bretton Woods resort area and the Capacity Control Member, which is the developer of the Bretton Woods resort area.

The Commission, by Order No. 23,971 (May 10, 2002), required Resort Waste to file a petition to establish rates and expand its franchise, as it had been serving customers outside its authorized franchise territory. Instead, on March 26, 2003, Resort Waste filed the instant Petition.

The Parties and Commission Staff (Staff) developed a proposed procedural schedule that called for discovery through June 2003 and briefs on the legal issues by July 25, 2003. The Commission approved the schedule and also ordered Resort Waste to inform all of its user members of the proceeding, which it did in June of 2003. Resort Waste and Staff submitted briefs on July 25, 2003; Resort Waste submitted a Reply Brief on August 4, 2003.

II. POSITIONS OF THE PARTIES AND STAFF

A. Resort Waste

Resort Waste describes itself as a non-profit sewer company formed in 1987 "for the purpose of owning and operating a sewage treatment facility, serving solely the owners of residential and commercial units in the Bretton Woods resort area." Resort Waste obtained Commission authorization in 1988 as a sewer utility but now argues it need not have done so, as it

does not serve "the undifferentiated public" as described in *Appeal of Zimmerman*, 141 NH 605 (1977). In its Petition, Resort Waste argued it is not a public utility, or in the alternative, that it is a public utility that should be exempt from regulation and should not be required to submit the documents required in Order No. 23,971 regarding rates and franchise expansion.

Resort Waste operates under Articles of Agreement and Bylaws which confirm that the corporation is solely for the provision of sewage services to unit owners of the Bretton Woods resort areas. Purchase of a unit automatically makes the owner a User Member of Resort Waste. Until 50% of the units were sold, the Capacity Control Member/developer could appoint the majority of the Resort Waste Board of Directors. Now that over 50% have been sold, however, the majority of the Board is elected by the User Members. The Board is authorized to manage Resort Waste, appoint and remove officers, ensure the corporations' earnings are reinvested into Resort Waste and determine reasonable usage fees for members.[1] The Capacity Control Member has the sole authority to decide if, when and how to expand the system.

Resort Waste contends that because it only serves members of the Bretton Woods resort area and not the public at large, it is not a public utility. To be served, one must be a

[1] Under the current rates, Users Members pay a flat rate of $404 per year; the Capacity Control Member pays $275 per year per undeveloped unit.

residential or commercial unit owner of one of the Bretton Woods resort area properties. Neighboring properties that are not part of the Bretton Woods resort area are not eligible for service by Resort Waste.

Because it does not offer service to the "undifferentiated public," Resort Waste argues it does not meet the definition of a public utility found at RSA 362:2,I.

Resort Waste argues, in the alternative, that it should be exempt from regulation because its customers are also User Members that have a direct governance role in the operations of the corporation. Further, it argues that Resort Waste has no profit motive and provides only benefits to its members, thereby removing the need for Commission regulation.[2]

B. Commission Staff

Staff asserted that, in its view, Resort Waste should be regulated pursuant to RSA 362:2, as it is a natural monopoly for which there is no competitive alternative, and therefore has the ability to discriminate against neighboring landowners not affiliated with the Bretton Woods resort area, such as intervenor John Sylvester.

[2] Resort Waste advanced other arguments in its Petition, including its initial suggestion that it might be exempt from regulation as a seasonal tourist attraction pursuant to RSA 378:1, or that it should be exempt because it served only 12 condominium "villages", pursuant to RSA 362:4,I, but those arguments were not briefed and will not be addressed herein.

Staff also asserts that the existence of the Capacity Control Member constitutes a conflict of interest, as Capacity Control Member/developer is not a true customer of sewer services. In Staff's view, the relationship between Resort Waste and the User Members is not sufficiently discrete to meet the *Zimmerman* standard of utility services that are incidental to the dominant relationship between the provider and the customer. Rather, in Staff's view, the provision of utility service is an essential condition of that relationship. Resort Waste's intention to provide service to the entire Bretton Woods resort area, consisting of multiple residential condominium "villages" and commercial units, in Staff's view, further renders it a provider of service to the general public.

Finally, Staff argues that Resort Waste should not be exempted from regulation, as was the case in *Belleau Lake Corporation*, 80 NH PUC 49 (1995). *Belleau Lake* involved a non-profit homeowners association, which operated a water system serving only those members of the association. By rendering service only to themselves, the Commission found that Belleau Lake was not serving the general public and therefore was not subject to RSA 362:2. *Belleau Lake*, 80 NH PUC at 51. In Staff's view the existence of the Capacity Control Member renders *Belleau Lake* inapplicable, as the Capacity Control Member is not a customer.

III. COMMISSION ANALYSIS

In order to determine whether a provider of utility services is subject to the jurisdiction of the Commission, one begins with the definition of public utility found at RSA 362:2, which provides that anyone owning, operating or managing plant or equipment for sewage disposal for the public is a public utility. However, that is by no means the end of the inquiry. As clarified by the Commission and New Hampshire Supreme Court, most recently in *Appeal of Zimmerman*, 141 N.H. 605 (1997), certain utility services do not give rise to public utility status.

In *Zimmerman*, a landlord provided telecommunications services as part of the tenancy package offered to commercial tenants in a small shopping plaza. Though the Commission had found the services to constitute the operation of a public utility, the Court disagreed. As delineated by *Zimmerman*, we must determine whether the "underlying relationship with those persons who use his services is sufficiently discrete as to differentiate them from other members of the relevant public." *Zimmerman*, 141 N.H. at 612. The Court found it was, and that the provisions of telecommunications services was "incidental to and contingent upon his tenants' status as tenants." *Id.* The Court cited with approval prior determinations finding no public utility to exist: *Plymouth State College* 75 N.H. PUC 65 (1990) (telecommunications services provided to dormitory residents,

faculty and administrators of the college did not constitute service to the public); *Claremont Gas Light Co. v. Monadnock Mills, Inc.*, 92 N.H. 468 (1943) (provision of steam to a handful of customers by a series of industrial contracts did not constitute service to the public); and *Dover, Somersworth & Rochester Street Railway Co. v Wentworth,* 84 N.H. 258 (1930) (bus service solely for employees traveling between Dover and the employer's factory in Somersworth did not constitute service to the public).

We are not persuaded that the ownership of condominium units is enough to constitute the discrete relationship *Zimmerman* requires. The transient nature of *Zimmerman's* commercial tenants and the college students and employees in college buildings in *Plymouth State* is not an element in this case. Condominium unit owners are making a substantial investment and potentially long term commitment by investing in a unit within the Bretton Woods resort area.

Further, the underlying relationship of employer to employee, to which bus service is only incidental, as in *Dover*, is not present. On the facts before us, once a unit is sold, there is only one relationship; the new owner is simply a "member" of a utility from which it receives services.

Finding that Resort Waste's operations do not meet the *Zimmerman* standards does not necessarily mean, however, that

Resort Waste is a regulated public utility. For many years the Commission has recognized that associations providing service to their members are not public utilities. A provider of water service, even if an association, is a public utility if it owns, operates or manages any plant or equipment for the conveyance of water to the public, pursuant to RSA 362:2. *Re Solar Village*, 68 N.H. PUC 605 (1983). As the Commission found in *Solar Village*, "[w]ith the understanding that the association is non-profit, and provides water only to its member-owners, the Commission finds that the Ladd's Hill Road Water and Sewer Assoc. is not a public utility." *Id.* at 606.

Similarly, in *Re Mount Crescent Water Company*, 73 NH PUC 337 (1988), the Commission found it to be in the public good to allow a water utility to transfer its assets to a non-profit association that would serve only the members of the association. Because it was not selling water to the public, the association would not constitute a public utility. *Mount Crescent*, 73 NH PUC 337, 340 (1988).

Finally, in *Re Belleau Lake Corporation*, 80 NH PUC 49 (1995), a public utility sought to transfer its assets to a non-profit corporation that would serve only its members.[3] The

[3] *Belleau Lake* was further complicated by the presence of three customers who chose not to join the association but nevertheless sought water service. Service to those three customers rendered the association a public utility, but the Commission granted it an exemption pursuant to RSA 362:4,I which, at the time, allowed exemption when service was provided to less than ten customers.

Commission found the transfer to be in the public good and, citing a 1980 Opinion of the Attorney General, concluded that the Association, serving only its members, would not constitute a public utility. As the Attorney General noted, when "all of the consumers of the water service are also all the providers of water service . . . there is no entity providing water to the public. Rather, it is a group of people providing water to themselves." *Belleau Lake*, 80 NH PUC 49, 51 (citing Opinion of the Office of the Attorney General at 2 (January 31, 1980)).

In this case Resort Waste customers are automatically User Members. Because 50% of units have been sold, the User Members now elect the majority of the Resort Waste Board of Directors. The Board is authorized to operate the Resort Waste system, which includes the setting of user fees for sewage services. The only thing the User Members cannot do is decide whether or when to expand the system, decisions that are solely within the discretion of the Capacity Control Member/developer.

We find the structure, though a bit more complex than in *Solar Water, Mount Crescent* and *Belleau Lake*, to again create a circumstance in which control is vested in the consumers of the service and their customers are one and the same. In all aspects of the operations but one, the customers are in control. They cannot decide whether to expand the system, but even this power appears limited by the customers' authority. Because they must

assess user fees for all members, they effectively must be consulted before new costs are added to the system; otherwise, the Capacity Control Member will be left to absorb all of the new costs.

We are satisfied that the circumstances presented by Resort Waste justify a finding that it is a user group providing service to itself. As such, it is not a public utility and is not subject to Commission regulation. Resort Waste need not, therefore, make further findings or reports to the Commission. We hasten to add, however, that we base our ruling in great part on the representations of Resort Waste regarding User Members authority. Should there be evidence in the future that User Members are not accorded the authority contained in the current governing documents or the documents are changed to limit that authority, we will undertake an investigation to determine Resort Waste's public utility status.

Based upon the foregoing, it is hereby

ORDERED, that Resort Waste is deemed not to be a public utility provided the user members continue to be vested with the authority described herein.

By order of the Public Utilities Commission of New Hampshire this fifth day of March, 2004.

Thomas B. Getz	Susan S. Geiger	Graham J. Morrison
Chairman	Commissioner	Commissioner

Attested by:

Debra A. Howland
Executive Director & Secretary