

THE STATE OF NEW HAMPSHIRE

PUBLIC UTILITIES COMMISSION

Investigation to Determine if Lamplighter
Mobile Home Park, LP is a Public Utility

DW-09-267

LAMPLIGHTER MOBILE HOME PARK, LP'S
BRIEF IN SUPPORT OF MOTION TO DISMISS
REQUEST FOR DETERMINATION

NOW COMES Lamplighter Mobile Home Park, LP, and files this Brief in
Support of Motion to Dismiss Request for Determination and states as follows:

PROCEDURAL HISTORY

1. On or about December 19, 2009, Petitioners filed a Request for Determination asking the Commission to determine that Lamplighter Mobile Home Park, LP (hereinafter "LMHP") is a public utility and requesting various forms of relief from the Commission.¹
2. On or about February 24, 2010, LMHP filed a Motion to Dismiss Request for Determination asserting that LMHP is not, as a matter of law, a public utility and, accordingly, that the Petitioners' Request for Determination should be dismissed for a lack of jurisdiction.
3. On or about March 5, 2010, Petitioners filed an Objection to Respondent's Motion to Dismiss.

¹ The merits of the relief requested by Petitioners is not addressed herein as Respondent's position is that the Commission lacks jurisdiction over this matter. Respondent reserves the right to respond to the merits of Petitioners' claims at a later time.

4. Before ruling on LMHP's Motion to Dismiss, the Public Utilities Commission held a Prehearing Conference for oral argument on the issue of its jurisdiction and LMHP's Motion to Dismiss.

5. Following the Prehearing Conference, a schedule was implemented to allow for discovery, stipulated facts, and briefing on the jurisdictional issues raised by the Respondent's Motion to Dismiss. Pursuant to such schedule, LMHP hereby submits this Brief in supplement to its previously filed Motion to Dismiss.

RELEVANT FACTS

6. LMHP is a mobile home park currently comprised of a total of 247 lots. Stipulated Facts, para. 1.

7. Within LMHP, the park owns the land and leases the lots in the Park to the residents, while the residents own the homes located in the Park. Stipulated Facts, para. 1.

8. The number of occupied lots within LMHP varies, with a total of approximately 220 lots being occupied as of August 2010. Stipulated Facts, para. 1.

A. Water.

9. Residents of LMHP are provided with water that LMHP obtains from the Conway Village Fire District ("CVFD"). Stipulated Facts, para. 1.

10. The water from CVFD enters LMHP through two master meters and LMHP owns and maintains the water pipes of the distribution system in the Park

up to the point where the service lines emerge from the ground or slab to the individual resident's home. Stipulated Facts, para. 1.

11. LMHP has no water assets which extend outside the park and provides no water lines or other services to any individuals or entities that are not located within the park. Response to Staff Data Requests Nos. 1-2 and 1-5.

12. Within the park, each resident's home has an individual water meter which LMHP owns and maintains. Stipulated Facts, para. 1.

13. The individual water meters on the homes within the park were installed by LMHP in 2006 and 2007. Stipulated Facts, para. 4.

14. The water meters installed at the individual homes within the park were purchased in October 2004 at a cost of \$28,931.20 from E.J. Prescott.

Response to Petitioners' Data Request No. 1-2.

15. The costs associated with purchasing and installing the individual water meters were paid for by LMHP from the Park's general operating fund, and Residents were not separately billed for such costs. Stipulated Facts, para. 4;

Response to Petitioners' Data Request No. 1-4.

16. Any damage to a water meter caused by a resident's conduct or failure to comply with any Community Rule is the responsibility of the resident; all other problems and regular maintenance of the meters are the responsibility of LMHP.

Stipulated Facts, para. 1.

17. Only three residents have been billed for the repair or replacement of frozen meters that the residents did not protect from freezing in accordance with the Community Rules,² at costs ranging from \$55.00 to \$105.00 (depending on what parts needed to be replaced). Response to Petitioners' Data Request No. 1-6.

18. As part of the rental charges for each lot within the Park, LMHP charges each of the tenants for their water usage. Prior to October of 2007, water usage was included in the base rental rate charged to each resident of LMHP. Response to Petitioners' Data Requests Nos. 1-7 and 1-8.

19. In October of 2007, after the meters were installed, the base rental charge was reduced by \$10.00 per lot and water was billed to the residents as a separate charge. Response to Staff Data Request No. 1-10; Response to Petitioners' Data Request No. 1-7; Stipulated Facts, para. 5.

20. Residents currently receive monthly bills that include a flat rate and a metered rate for individual water usage that in a separate item on the monthly bill, based on a direct pass through of the base and volumetric water charges billed by CVFD. Stipulated Facts, para. 5.

² Rule L, 2 reads as follows: Prevention of Freezing Water Lines. Water lines under the home, up to the point where they connect to the service lines provided by the Community, must be protected against freezing by the use of adequate heat tapes and pipe insulation, which are to be provided and installed by each resident at the resident's expense. Installation must be completed by October 15th each year. Residents must not leave water running to prevent freeze ups. Any damage to the common utilities or other damage to the water meter or plumbing for that lot or the Community, resulting from any resident's failure to comply with this provision, will be repaired at the resident's expense and be charged to the resident as additional rent. Residents are encouraged to check their heat tapes frequently during freezing weather.

21. The monthly base charge of \$4,114.00 that LMHP is billed by CVFD is passed on to the residents at a rate of \$5.46 per month to each home. This figure was reached by dividing the base fee into a monthly charge (since the base fee is billed quarterly) and then dividing this by 251. This divisor of 251 represents the 247 total lots (even though only about 220 are occupied), plus the 4 connections used by the Park. Stipulated Facts, para. 5.

22. Volumetric charges are billed to the residents monthly based on their individual water usage at the same rate the park is billed by CVFD (\$.35 per 100 gallons). Stipulated Facts, para. 5.

23. In the event of a change of the rates billed to LMPH by CVFD, the rates charged to the residence are adjusted with 60 days notice based to reflect increase billing by CVFD. Stipulated Facts, para. 5. This is in accordance with the rental increase requirements of RSA 205-A:6.

24. Individual water charges to the residents of LMHP do not include any administrative expenses beyond those billed by the CVFD (Stipulated Facts, para. 5), although LMHP does have administrative expenses which are incurred each month such as labor costs involved in the reading of the individual meters and preparation of the water bills, costs associated with the preparation and mailing of bills, annual software licensing fees, and meter reading hardware maintenance expenses. Response to Petitioners' Data Request No. 1-10.

25. All water charges billed to LMHP by CVFD that exceed those paid by residents are paid by LMHP to CVFD from the general operating budget.

Stipulated Facts, para. 5.

26. On August 4, 2010 LMHP wrote to CVFD to ask if it would take over billing of the water to residents and providing the statute and case law which mandated the same. Exhibit 1.

27. Although CVFD initially indicated that the meters were incompatible (Exhibit 2) a follow up communication was mailed (Exhibit 3) and a meeting was ultimately held to discuss the transition in billing (Exhibit 4).

28. CVFD has recently provided LMHP with the requirements necessary to complete the transition (Exhibit 5) and LMHP is moving forward with negotiating final details and making necessary changes to compatibility so that CVFD can take over the billing of water in the Park (Exhibit 6).

29. Because of the way the water charges are shared among all tenants, LMHP makes no profit on either the base charges or the actual usage charges, and pays itself for all base charges associated with the vacant lots and water usage that exceeds that used by the individual tenants. Once the transition of billing to CVFD is completed, LMHP will have no involvement in the billing or rates charged to residents for their water usage.

B. Sewer Charges.

30. There are 110 septic systems in the Park which are owned and maintained by LMHP. Stipulated Facts, para. 2.

31. LMHP has no septic or sewage assets which extend outside the park and provides no septic or sewage services to any individuals or entities that are not located within the park. Response to Staff Data Requests Nos. 1-2 and 1-5.

32. With regard to the septic systems within the park, each resident is responsible for keeping in good condition and repair all lines and fixtures in and under the home, up to the point where the service lines penetrate the ground or slab. Stipulated Facts, para. 2.

33. Any cost of clogged drains or other problems that are due to any improper disposal of items or other improper actions of the resident, or others for whose actions the resident is responsible, are charged to the resident, while LMHP is responsible for all other maintenance and/or replacement costs. Stipulated Facts, para. 2.

34. On July 8, 2008, LMHP and CVFD entered into a Purchase and Sale Agreement ("Agreement") regarding connecting the Park to the municipal sewer system (Exhibit 7).

35. The land conveyance called for under the Agreement has occurred, but the completion of the initial operational capability of the Phase 1 Water and Wastewater Improvements Project described in section 4.A of the Agreement that

triggers the one year clock on the requirement to interconnect the front half of the Park to the CVFD municipal sewer has not yet occurred. Stipulated Facts, para. 6.

36. At this time, LMHP does intend to proceed with connecting the 133 homes in the front part of the Park to the municipal sewer. Supplemental Responses to Petitioners' Data Request 1-32.

37. It has not yet been determined whether those residents that are connected to the municipal sewer system will be billed for sewer service or if this will continue to be covered in the base rent as is currently the case with septic service; however, if there is a separate charge for sewer usage CVFD will be asked to assume the responsibilities of billing such charges pursuant to RSA 205-A:6. Supplemental Responses to Petitioners' Data Request 1-36.

38. Rent was increased by \$30.00 per month (to \$385.00) in January of 2010. Stipulated Facts, para. 9. This rental increase was associated with multiple factors, including anticipation of the upcoming need to connect to the municipal sewer (Exhibit 8).

39. Concerns arose among residents over the amount of the January 2010 rental increase and other projected rental increases associated with the sewer project; such concerns serving as the genesis of the action filed by the Petitioners. Stipulated Facts, para. 10.

40. Although statements were made by park employees which resulted in residents of LMHP concluding that there would be additional \$30.00 per month

increases in 2011 and 2012, LMHP has repeatedly repudiated these statements, and has committed to no rental increase in 2011 and no more than a \$15.00 per month rental increase in 2012 (Exhibit 9).

41. Despite these representations regarding future rent, the Petitioners continue to seek PUC oversight over the construction of the infrastructure which will connect the residents' homes to the municipal sewer project.

ARGUMENT AND AUTHORITIES

A. The Commission lacks jurisdiction as LMHP is not a public utility.

42. Administrative Rule Puc 602.13, under the Chapter on Rules for Water Service, limits a water utility to one that supplies, transmits or sells water "to the public" and specifically exempts a "landlord supplying water to tenants which service is include in the rental fee...."

43. Similarly, Administrative Rule Puc 702.09, under the Chapter on Rules for Sewer Utilities, limits a sewer utility to one that furnishes sewage disposal "to the public" and also specifically exempts a "landlord supplying sewage disposal service to its tenants which service is included in a rental fee...."

44. Both Administrative Rules Puc 702.09 and Puc 602.13 reference RSA 362:2 which also defines a "public utility" as entities "owning, operating or managing any plant or equipment or any part of the same for the conveyance of telephone or telegraph messages or for the manufacture or furnishing of light, heat, sewage disposal, power or water for the public." (emphasis added).

45. Petitioners look to RSA 362:4 to suggest that service to the public is not necessary, but this reading is inconsistent with (1) Administrative Rule Puc 602.13, which specifically references RSA 362:4 and still concludes that service to the public is necessary and that landlords are exempted; (2) Administrative Rule Puc 702.09 which also finds that service to the public is a necessary requirement and that landlords are exempted; and (3) with the precedent of the Public Utilities Commission.

46. It has long been held that “[s]ervice to the public without discrimination is one of the distinguishing characteristics of a public utility...” Claremont Gas Light Co. v. Monadnock Mills, 92 N.H. 468, 469-470 (1943)(citation omitted). Thus, where services are not provided without discrimination to the public, the services are not considered a public utility subject to the Commission’s jurisdiction.

47. When a private landlord provides utilities to his tenants such a landlord is not providing services without discrimination to the public and is not subject to the jurisdiction of the Commission. Appeal of Zimmerman, 141 N.H. 605 (1997). Specifically, in Zimmerman, the Court held that because the telephone services for which tenants were billed were provided only to those with whom Zimmerman has a landlord-tenant relationship such services did not constitute a public utility within the Commission’s jurisdiction. Id. at 612.

48. Petitioners may argue that Zimmerman does not apply as the case (1) did not address a landlord in a manufactured housing park, and (2) addressed telephone services, not water or sewer which might be treated differently due to the seemingly conflicting language between RSA 362:2 and RSA 362:4. The Commission, however, has already addressed both these arguments and established the precedent that Zimmerman does apply to manufactured housing parks -- exempting such parks from Commission jurisdiction over their water and sewer connections to municipal services.

49. In Community Water and Wastewater Services, LP, 90 NH PUC 331, pg. 5 (2005), the Commission considered a case involving a manufactured housing park, Holiday Acres, that provided water and sewer through local municipal providers. The water services were provided in a manner that was virtually identical to the method used by LMHP, whereby costs were passed on to the individual residents at the same rates charged by the municipal water system. Sewer services were provided in a similar manner.

50. In its analysis of the case, this Commission noted that, as with LMHP, no administrative or other expenses were being charged to the residents in their monthly bills and the requirements of RSA 205-A:6 were being complied with. Considering the method by which services were to be provided (essentially identical to the method by which services are provided at LMHP) and applying Zimmerman, this Commission concluded that "Holiday Acres' provision of water

and wastewater services to its tenants is not within the purview of the Commission's jurisdiction." Id. at p. 7 (emphasis added).

51. The decision in Community Water and Wastewater Services, LP is consistent with the way manufactured housing parks have typically been addressed by this Commission. In Interlakes Water and Sewer Company, 81 NH PUC 281 (1996), decided before Zimmerman, the Commission declined to extend jurisdiction to a manufactured housing park that supplied water to its tenants, noting that:

The Commission has never regulated these providers of water services at mobile home parks. RSA 362:2 has been amended a number of times with no effort to bring such park operations within our jurisdiction. Moreover, 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. *See* RSA 205-A:[2], IX.

52. As in Zimmerman and Community Water and Wastewater Services, LP, LMHP provides sewer and/or water connections only to the residents of the park and bills – each of whom are involved in a landlord-tenant relationship with LMHP. The charges are billed at the same rate that CVFD charges and, in the near future, LMHP will no longer be involved in the billing for these services and will simply be providing the pipes between the municipal water and sewer systems and the individuals homes while CVFD bills for the charges.

B. RSA Chapter 205-A addresses the regulation of manufactured housing parks and should be the statute deferred to in matters involving such regulation.

53. RSA Chapter 205-A addresses the regulation of manufactured housing parks and has requirements independently of the Public Utilities Commission which regulate what may be included in rent or otherwise charged to residents, and how rental increases must be handled. see e.g. RSA 205-A:2, IX and RSA 205-A:6, I.

54. The Board of Manufactured Housing has already addressed the issue of capital improvements involving water a sewer work and ruled that such improvements may be charged to residents without violating RSA 205-A:2. Leach v. Langley Brook Realty, LLC, State Board of Manufactured Housing, Docket No. 001-02 (June 10, 2002).

55. The Petitioners' action seeks to have the Commission oversee and regulate what rents are charged by LMHP and how rent proceeds are spent. Such oversight and regulation is beyond the Commission's jurisdiction; falls, instead, within the purview of RSA Chapter 205-A; and involves a park rental issue which has already been addressed by the State Board of Manufactured Housing.

56. As, for all the foregoing reasons, the regulation sought by Petitioners is outside of the Commission's jurisdiction, Petitioners' action should be dismissed.

WHEREFORE, the Petitioner respectfully requests that the Commission:

A. Dismiss Petitioner's Petition for Determination for lack of jurisdiction; and

B. Grant such other and further relief as may be just and proper.

Respectfully submitted,
Lamplighter Mobile Home Park, LP
By its Attorneys

Bianco Professional Association



Dated: November 29, 2010

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CERTIFICATE OF SERVICE

I hereby certify that I have this 29th day of November, 2010, forwarded electronically and by regular mail a copy of Lamplighter Mobile Home Park, LP's Brief in Support of Motion to Dismiss Request for Determination to Dismiss to the individuals on the Service List.



Anna Goulet Zimmerman, Esquire