

**STATE OF NEW HAMPSHIRE
PUBLIC UTILITIES COMMISSION**

DW 22-082

RESIDENTS OF COLONIAL DRIVE, MOULTONBOROUGH

**Complaint by Residents of Colonial Drive, Moultonborough
against Agape Community Church Sewer System**

Order Staying Proceeding

ORDER NO. 26,841

June 8, 2023

In this order the Commission grants the motion filed by the residents of Colonial Drive in Moultonborough to stay the proceedings in this docket for 90 days to allow the residents to negotiate with Agape Community Church (Agape) for a purchase of the sewer system located along Colonial Drive.

The motion and subsequent docket filings are posted on the Commission's website at www.puc.nh.gov/Regulatory/Docketbk/2022/22-082.html.

I. PROCEDURAL HISTORY

On December 2, 2022, a group of residents with homes located on Colonial Drive in Moultonborough, New Hampshire (Residents) filed a Complaint for Receivership with the Commission (Complaint). The Complaint requested that a receiver be appointed pursuant to RSA 374:47-a to oversee the ongoing emergency response to a failure of the sewer system that serves the Residents. A preliminary hearing was held on January 12, 2023 to consider a number of issues raised by the Complaint, including whether a public utility existed and, if so, whether a receivership should be established.

On February 1, 2023, the Commission issued a notice commencing an adjudication and scheduling a prehearing conference that was duly held on April 5,

2023. Following the prehearing conference, the Commission requested legal briefs. The Residents filed a brief on April 26, and a supplemental brief on April 28, 2023.

Lamprey filed a brief and DOE filed a letter in lieu of a brief on April 26, 2023.

On May 24, 2023 the Residents filed a partially assented to motion to stay the proceedings for 90 days (Motion) to permit time to negotiate with Agape concerning a purchase of the sewer system located along Colonial Drive. On May 31, 2023 Lamprey Suburban Septic, Inc. (Lamprey) filed an objection to the motion. On June 2, 2023 the New Hampshire Department of Environmental Services (DES) filed a request for limited intervention, and a response to the Lamprey objection.

II. BACKGROUND

A. Residents of Colonial Drive

According to the Complaint, the sewer system on Colonial Drive is owned by Agape as successor to Center Harbor Church. In 2006, Center Harbor filed a subdivision plan for the proposed Colonial Drive subdivision (Plan Book 213, Pages 27-28, "Subdivision Plan – Lands of Center Harbor Christian Church (Tax Map 40, Lots 38 & 38F) Bean Road, Moultonborough, Carroll County, NH" dated 22 November 2004").

The Complaint describes the subdivision plan as showing, *inter alia*, a pump station, sewer facilities, and sewer easements within the development. Center Harbor Church, through contractors, proceeded to construct a road and sewer system within the development. The sewer system assets were installed mostly within the road right of way and connected to the existing sewer line running along Bean Road. Center Harbor sold lots in the development in 2006-2009, 2010, 2011, 2012, and 2015. Homes were constructed on a number of lots within the subdivision and connected to the sewer system.

The Complaint alleges that Center Harbor Church, now Agape, still owns the sewer system. Neither the former Center Harbor Church, nor Agape, has ever billed customers. The Complaint argues that Agape is a public utility that has failed to meet its obligation to provide safe and adequate service to the residents of Colonial Drive and, therefore, the extraordinary remedy of receivership is necessary to correct the emergency that arose with the sewer system connections.

According to the Complaint, the Residents purchased their lots with the incorrect disclosure that they were receiving municipal sewer service. The Residents have been paying sewer bills to Bay District Sewer since purchasing their properties and connecting to the sewer system. Bay District Sewer is part of the State-owned sewer system under the auspices of the Winnepesaukee River Basin Program managed by DES. So far, ten of the lots have been developed. The Town of Moultonborough owns the remaining four lots due to tax lien sales.

At the prehearing conference held on April 5, 2023, the Residents indicated that they had pooled their resources and paid for the purchase and installation of two new pumps. The Residents informed the Commission that as of April 5, 2023, the system was functioning properly, and no further pumping and hauling are required.

B. Agape Community Church

Agape asserts that in 2017, it acquired the building and property at 80 Bean Road by corporate transfer and took over the debts and assets of Center Harbor Church, formerly owned and run by Robert Farah, pastor. According to Agape, Mr. Farah and his son, Scott, had developed and sold the 10 existing properties along Colonial Drive. Agape asserted that, to its knowledge, all homes and rights to the road, water and sewer systems were transferred to the individual owners. Based on the record, however, no homeowner's association was formed.

Agape is connected directly to the Bay District Sewer system on Bean Road and pays a yearly fee to Bay District Sewer for sewer service. Agape claims that the first time it had any knowledge of the situation on Colonial Drive was when it received a notice from Attorney Brown on behalf of the Residents that the sewer system pumps had failed, and that emergency pumping had been taking place. Agape claims it had no idea that the system belongs to it, and that it has never collected any utility fees. Agape expressed a willingness to turn over the land and the system to whoever will manage it correctly,

C. Lamprey Suburban Septic

Lamprey Suburban Septic, Inc. (Lamprey) pumped and hauled wastewater from the failed system at Colonial Drive to disposal sites beginning on August 10, 2022 and continuing until January 16, 2023. Initially, DES had asked Lamprey to do the pumping and removal to prevent contamination from the pump failure and resulting system overflow. Lamprey claims that when DES asked for the emergency pumping and disposal, DES had assured Lamprey that it would be paid for its services.

At the preliminary hearing on January 12, 2023, Lamprey indicated that it was withholding funds provided by the Residents to purchase and install new pumps. Lamprey had declined to install pumps until the Residents paid the outstanding hauling and disposal costs. Lamprey asserted that it seeks payment of what it claims to be fair and reasonable charges totaling \$53,862.50. Lamprey recognizes an offset of \$9,200 to the accrued hauling and disposal charges was paid by some of the Colonial Drive homeowners, leaving a balance due to Lamprey of \$44,662.50.

III. PARTY/PARTICIPANT POSITIONS

A. Residents Motion to Stay

In January 2023, the Residents, with the consent of Agape, paid to have a contractor replace the failed sewer pumps at the pump station on Colonial Drive. As a result, the Residents have eliminated the most serious aspect of the emergency. The Town of Moultonborough recently conducted a video inspection of the sewer mains in the Colonial Drive subdivision; the Residents are awaiting the results of that Town inspection. Nonetheless, initial comments from the company that performed the inspection indicate that the sewer mains appear to be largely sound, except for two remaining repair issues. The Residents are waiting for a final inspection report and quotes on the necessary additional repairs. The Residents and Agape intend to discuss a transfer of the sewer assets from Agape to the Residents.

According to the Residents, if they purchase the sewer system assets, then under RSA 362:4, VII, as a system serving its owners, the Colonial Drive system would be exempt from Commission regulation, and this outcome would render the present receivership request moot. The Residents and Agape therefore request that the Commission stay this docket for 90 days. The Residents claim that the Commission has authority under RSA 365:28 to alter and amend orders and under RSA 541-A:31 to oversee the procedural schedule of an adjudicative proceeding. Accordingly, the Residents request a 90-day stay to allow the Residents and Agape to resolve the remaining repair issues and discuss a transfer of the sewer assets. The Residents stated that DES and the New Hampshire Department of Energy (DOE) support their motion.

The Residents assert that the costs of services owed to Lamprey should not be resolved in this proceeding. In support of their assertion, the Residents claim that: the Town of Moultonborough directed the pumping; Lamprey had worked previously on the Colonial Drive sewer system at the request of the Town and had been paid by the

Town; and Lamprey knew from Mr. Solomon, a resident of Colonial Drive, that the Residents did not own the sewer system. For these reasons the Residents assert that Lamprey's requests for payment are not relevant to this docket.

B. Lamprey Objection

Lamprey objects to any stay of the proceedings because, in Lamprey's view, a stay would further delay resolution of the outstanding charges for pumping and transport. Lamprey argues that the pumping and transport charges are relevant to this proceeding and should be handled through the proposed receivership.

Lamprey reiterates its request that the Commission join other necessary parties, specifically the Town of Moultonborough, DES, the Bay District Sewer Commission (BDSC), and the Winnepesaukee River Basin Program (WRBP). According to Lamprey, joinder of those parties to this docket, along with the Residents and Agape, would allow the Commission to determine, as part of this receivership, who has responsibility to pay Lamprey for the services rendered to prevent the sewer system from overflowing and causing an environmental catastrophe.

C. DES Response to Lamprey Objection

DES requested limited intervention for the purpose of responding to Lamprey's objection. DES claims that any sums owed to Lamprey are not relevant to this receivership proceeding. Further, DES asserts the Commission has no ability to adjudicate any claim by Lamprey against DES. To make a claim against the State, DES states that Lamprey must either follow the process established for the N.H. Board of Claims or file suit in Superior Court as described in RSA 541-B. *See* RSA 541-B:9 (giving the N.H. Board of Claims or the N.H. Superior Court "original and exclusive" jurisdiction over such claims).

Further, given the disagreement over facts, in order to resolve any disputes with Lamprey, DES would require a forum capable of adjudicating all applicable forms of relief, including a request for attorney's fees for frivolous claims, should it become necessary. According to DES, the Commission is not suited or empowered to grant any of the relief requested by Lamprey against DES or for any claims by DES against Lamprey.

III. COMMISSION ANALYSIS

A. Motion to Stay

Pursuant to RSA 541-A:31 and N.H. Code of Admin. R. Puc 203.13 and 203:15, the Commission has authority to direct the timing and process of an adjudicatory proceeding. That authority includes the power to stay or suspend activity in an adjudication when doing so would promote the efficient resolution of issues before the Commission.

Notwithstanding the objection by Lamprey we find that a stay of 90 days to permit the parties to negotiate a resolution of the service quality and ownership issues concerning the Colonial Drive sewer system will promote an efficient resolution of the issues raised in the Complaint. The evidence presented by the Residents regarding Agape's ownership of the sewer system is limited to copies of deeds recorded in the registry of deeds for Carroll County. To establish title to real estate in this docket, the Commission would require, at a minimum, a title opinion from a title professional. If such an opinion were not available, the parties would need to establish title through judicial proceedings with a court of competent jurisdiction. Negotiation of a resolution to these title issues could save the Residents and other parties time and expense.

It appears that the Residents have replaced the two failed pumps and thus have resolved the emergency service issues. Further, the Residents state that they are in

the process of surveying the sewer system and addressing additional, less serious deficiencies, and, therefore, the immediate need for a receivership is alleviated, and the ongoing negotiations may obviate the need for the Commission to address any further service issues.

The Motion further asserts that, if the Residents purchase the Colonial Drive sewer system, the system would become exempt from Commission regulation pursuant to RSA 362:4, IV, and the issues related to a receivership would be moot. Based on these facts we find that a 90-day stay of the docket will promote the efficient resolution of issues before the Commission and we grant the motion.

B. Pumping and Disposal Charges Owed to Lamprey

Based on the record before the Commission, it appears that Lamprey provided pumping and removal of sewage from the Colonial Drive sewer system from early August 2022 until mid-January 2023. An emergency sewer discharge occurred in early August 2022 in close proximity to Lake Winnepesaukee, one of the State's largest lakes and a popular summer tourist attraction. It took many months for DES, Bay District Sewer, and the Town of Moultonborough to establish ownership and responsibility for this system. During the delay due to confusion over what party owned the system, significant additional costs were incurred.

We note that, had the potentially responsible parties met and negotiated a fair and equitable resolution of pumping and hauling costs and a replacement of pumps in August 2022, most of the \$45,000 now owed to Lamprey could have been avoided. This is a complicated factual scenario and implicates more parties than just the Residents and Agape. The Commission does not regulate DES, the Bay District Sewer system, or the Town of Moultonborough. As a result, as DES has argued, the

Commission does not have authority to resolve the dispute over payment due to Lamprey.

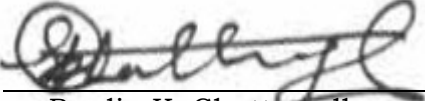
Nonetheless, we strongly suggest that all of the potentially responsible parties involved in this matter work together to negotiate a fair and equitable resolution of this outstanding debt.

Based upon the foregoing, it is hereby

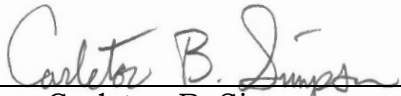
ORDERED, that the Commission GRANTS a stay of 90 days in this proceeding, and it is

FURTHER ORDERED, that the parties inform the Commission in writing of the status of their negotiations no later than 90 days of date of issuance of this order.

By order of the Public Utilities Commission of New Hampshire this eighth day of June, 2023.



Pradip K. Chattopadhyay
Commissioner



Carleton B. Simpson
Commissioner

Service List - Docket Related

Docket#: 22-082

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Email Addresses

ClerksOffice@puc.nh.gov
cboldt@dtclawyers.com
kelvin.a.brooks@doj.nh.gov
mab@nhbrownlaw.com
Energy-Litigation@energy.nh.gov
paul.b.dexter@energy.nh.gov
jayson.p.laflamme@energy.nh.gov
anthony.j.leone@energy.nh.gov
ocalitigation@oca.nh.gov
agapehomestead@yahoo.com
Matthew.C.Young@energy.nh.gov
Kerry.d.barnsley@des.nh.gov
mserge@dwmlaw.com