

DW 04-020

FRYEBURG WATER COMPANY

Investigation into Water Quality

Order on Motion for Rehearing

ORDER NO. 24,656

August 18, 2006

The Office of Consumer Advocate (OCA) seeks rehearing pursuant to RSA 541:3 of Order No. 24,647, issued by the New Hampshire Public Utilities Commission (Commission) on July 18, 2006, in connection with Fryeburg Water Company (Fryeburg). Fryeburg is a water utility serving approximately 67 customers in East Conway, New Hampshire, although the majority of the Company's customers are located in Maine. Order No. 24,647 approved a plan to address the water quality issues raised in this docket by replacing a cast iron water main that is more than a century old.

The rehearing motion was filed on July 28, 2006. Fryeburg filed an objection to the motion on August 2, 2006.

OCA opposes an aspect of the provision of Order No. 24,647 releasing monies previously held in escrow pursuant to Order No. 24,407 (November 19, 2004). The Commission released the funds for the purpose of "paying engineering and construction services related to implementation of [the] water main replacement project, legal and engineering costs related to this proceeding, or such other purpose as is reasonably related to the water main replacement." Order No. 24,647, slip op. at 10. According to OCA, Fryeburg should not be allowed to use the previously escrowed funds to pay legal costs associated with this proceeding.

Citing the record in this docket, OCA asserts that Fryeburg has failed to provide adequate water service to its New Hampshire customers, ignored lawful orders of the Commission and frustrated resolution of the water quality problems. According to OCA, allowing Fryeburg to use the escrowed funds to pay its lawyers in these circumstances would be tantamount to forcing ratepayers to underwrite the Company's efforts to defend its bad conduct.

In opposing the motion, Fryeburg characterizes OCA's concerns as "largely unwarranted" because the Company intends to use the escrowed funds for engineering and construction costs associated with the new main. Fryeburg Objection at 1. Fryeburg further contends that the Commission's order with respect to legal fees is lawful because it is consistent with the Uniform System of Accounts. Further, Fryeburg takes the position that, to the extent OCA is seeking a determination that the Company cannot recover legal costs associated with the main replacement from customers, it would be a violation of Fryeburg's due process rights as well as its right not to have property taken without just compensation.

RSA 541:3 authorizes the Commission to grant a rehearing motion when "good reason for rehearing is stated in the motion." In the first instance, the motion is arguably moot given that Fryeburg does not intend to use the escrowed funds to pay legal costs. In addition, we discern no good reason for revisiting our previous determination.

In Order No. 24, 407, reported as *Fryeburg Water Co.*, 89 NH PUC 667 (2004), the Commission directed Fryeburg to escrow "all of the revenues received from its East Conway customers" as of the date of the order. *Id.* at 669. The order recites that the purpose of this requirement was to provide an "appropriate incentive . . . to ensure that Fryeburg solves the water quality problems that have plagued the East Conway customers and gave rise to this proceeding." *Id.* In Order No. 24,647, it was determined that the purpose of the escrow had

been achieved inasmuch as a “reasonable proposal” for solving the water quality problems had been placed before the Commission. Order No. 24,647, slip op. at 9.

In other words, the escrow requirement was not designed as a punishment or sanction. It is therefore not appropriate for the release of these funds to be limited in a manner designed to punish or sanction either Fryeburg or its attorneys. We note in this context the lack of any suggestion in OCA’s motion that our decision on the escrow funds will jeopardize the main replacement project. In fact, progress toward replacing the main continues with engineering and permitting nearly complete and construction well under way.¹

Traditional cost-of-service rate regulation such as that applied to Fryeburg does not ordinarily involve direct Commission oversight over the actual disbursement of funds received by a utility from its customers. Our limited departure from that principle in this docket, with respect to the escrow funds, was made to help assure that the main replacement project moved forward. The issues OCA raises here would only be appropriate for consideration if Fryeburg were seeking a rate change, or a rate surcharge, specifically to recover legal costs associated with this proceeding. Furthermore, as OCA itself points out at footnote 5 on page 2 of its motion, Fryeburg handles its legal costs “as part of normal overhead and through [existing] rates.” Therefore, Fryeburg could properly pay its legal costs either from the escrowed account or other sources. In fact, the funds available to pay legal costs are fungible and preventing payment from a specific account would be an empty exercise. Finally, even if there were some conceptual basis for prohibiting use of the escrowed funds for legal costs, the reality is that the approximately \$18,000 in escrowed funds represents less than 10 percent of the projected cost of

¹ See Doug Brogan’s update filed in this docket on August 18, 2006.

the main replacement project, most of which will be debt financed, and there would be no practical advantage in restricting how the escrowed monies can be used. Accordingly, it is appropriate under the circumstances to deny the motion for rehearing.

Based upon the foregoing, it is hereby

ORDERED, that the motion of the Office or Consumer Advocate for rehearing of Order No. 24,647 is DENIED.

By order of the Public Utilities Commission of New Hampshire this eighteenth day of August, 2006.

Thomas B. Getz
Chairman

Clifton C. Below
Commissioner

Attested by:

ChristiAne G. Mason
Assistant Executive Director & Secretary