

**STATE OF NEW HAMPSHIRE
PUBLIC UTILITIES COMMISSION**

DW 07-115

FRYEBURG WATER COMPANY, INC.

Petition for Rate Increase

Order Denying Motion for Rehearing

ORDER NO. 24,978

June 12, 2009

I. BACKGROUND

Fryeburg Water Company, Inc. (Fryeburg) is a New Hampshire and Maine regulated public utility with its principal place of business in the town of Fryeburg, Maine, serving approximately 700 customers in that community. Fryeburg also serves approximately 67 New Hampshire customers in the adjacent town of East Conway, and is therefore subject to RSA 362:2 and 362:4 governing the provision of water service within New Hampshire.

On July 9, 2008, the Commission approved permanent rates for Fryeburg's New Hampshire customers by way of Order No. 24,873. In that order, the Commission also approved the terms of a settlement agreement that provided for a step adjustment for capital projects placed in service after November 15, 2007. Fryeburg and Staff anticipated that the capital projects would increase the Company's revenue requirement by \$16,337. The settlement agreement provided that Fryeburg would file its step adjustment request with the Maine Public Utilities Commission in November 2008 and, once approved by the Maine commission, Fryeburg would file its step adjustment request in New Hampshire. Thereafter, New Hampshire Staff would review the filing and make a recommendation to the Commission.

On December 31, 2008, Fryeburg filed its request for a step adjustment. On March 9, 2009, Staff filed its recommendation that the Commission approve Fryeburg's requested step adjustment. Staff stated that it had conducted discovery and an audit of Fryeburg's capital additions to ensure the assets were in service and used and useful for the provision of utility service. On March 20, 2009, the Commission issued Order No. 24,950 approving a step increase to Fryeburg's rates effective March 20, 2009. On April 16, 2009, Fryeburg filed a motion for rehearing and, on April 23, 2009, Staff filed an objection to the motion.

II. FRYEBURG'S MOTION FOR REHEARING

Fryeburg's motion for rehearing involves a request to implement a step adjustment rate increase for its New Hampshire customers effective January 1, 2009, rather than March 20, 2009. Fryeburg states that it is entitled to a step increase under the express provisions of the settlement agreement "[f]ollowing approval and subject to such terms and conditions as may be imposed by the Maine PUC." The Maine PUC approved the step increase with an effective date of January 1, 2009.

In Order No. 24,950, the Commission made the step increase effective for New Hampshire customers on March 20, 2009, which Fryeburg claims denies it the right to charge rates to which it was entitled under the approved settlement agreement. Fryeburg estimates that the amount at issue is approximately two-hundred and twenty-six dollars (\$226.00).

Fryeburg argues that the Commission approved a January 1, 2009 effective date for the step adjustment when it approved the terms of the settlement agreement. The settlement agreement included the following provisions:

Staff and the Company agree that, except as otherwise provided by this Agreement, the Company shall charge rates in accordance with Stipulation No. 2 dated September 13, 2007 approved by the Maine Public Utilities Commission in Docket No. 2006-590, as set forth in Attachment A to this Settlement Agreement.

C. Step Increase

Staff and the Company agree that the Company has placed in service, or plans to place in service, a number of capital improvements to provide service to its customers located in Maine and New Hampshire as set forth in Attachment C. Staff and the Company agree that the Company ought to be allowed to recover the costs associated with capital improvements resulting from plant additions as provided by Stipulation No. 2.

Following approval and subject to such terms and conditions as may be imposed by the Maine PUC, the Company shall be entitled to a Step Increase. The Company agrees to provide a copy of the Maine PUC's order to Staff for its review. Staff shall be entitled to conduct discovery thereon. Staff will provide a recommendation to the NH PUC regarding the Step Increase. It is the expectation of Staff and the Company that at the effective date of the Step Increase, rates to NH customers will then be the same as those charged to Maine customers. In the event that the NH PUC modifies the Step Increase approved by the Maine PUC, the resulting rates to New Hampshire customers shall be adjusted accordingly. Within 10 days of the issuance of an order by the NH PUC, the Company shall file revised tariff sheets reflecting the Step Increase.

Fryeburg contends that these provisions make clear that it was entitled to implement a step increase for both its Maine and New Hampshire customers “[f]ollowing approval and subject to such terms and conditions as may be imposed by the Maine PUC.” According to Fryeburg, in the event that the New Hampshire Commission modified the step increase approved by the Maine PUC, the resulting rates to New Hampshire customers would be adjusted accordingly, but the effective date would remain unchanged.

In support of its interpretation, Fryeburg attached to its motion a series of e-mail communications regarding offers of settlement exchanged between Fryeburg and Staff during April and May of 2008. Fryeburg asserts that these emails indicate Staff represented that Fryeburg would be entitled to the step increase upon its approval by the Maine PUC. Finally, Fryeburg contends that Order No. 24,873 is unjust and unreasonable because it denies Fryeburg a return on its investment and is thus a violation of its constitutional right to earn a reasonable rate of return.

III. STAFF'S OBJECTION TO FRYEBURG'S MOTION FOR REHEARING

In its objection, Staff contends that Fryeburg has not shown good reason for a rehearing or reconsideration as required by RSA 541:3 and recommends that the Commission deny the motion. Staff agrees that, in Order No. 24,873, the Commission approved a settlement agreement which provided for a step increase to Fryeburg's permanent rates in consideration of capital improvements made after November 15, 2007. Staff acknowledges the provisions cited by Fryeburg, but notes that the settlement agreement further stated that Staff would be provided with a copy of the Maine PUC's order to review, would have an opportunity to conduct discovery thereon, and would provide a recommendation to the Commission regarding the step increase. The settlement further required that "[w]ithin 10 days of the issuance of an order by the NH PUC, the Company shall file revised tariff sheets reflecting the Step Increase."

In support of its objection, Staff stated that Fryeburg failed to include in its December 31, 2008 step increase filing any revised New Hampshire tariff pages, in compliance with New Hampshire law. Specifically, RSA 365:25 provides that the rates of a public utility fixed and allowed by the Commission "shall remain in effect until altered by a subsequent order of the commission or until a new schedule of rates... shall have been filed or published by the utility in accordance with RSA 378:3." In turn, RSA 378:3 states:

"[u]nless the commission orders otherwise, no change shall be made in any rate... which shall have been filed or published by a public utility in compliance with the requirements hereof, except after 30 days' notice to the commission and such notice to the public as the commission shall direct."

RSA 378:1, requires every public utility to file with the Commission schedules showing the rates for any service rendered.

Staff contends that neither the settlement approved in Order No. 24.873, nor the attached Stipulation No. 2, expressly provided that the step increase would automatically become

effective in New Hampshire on the same date it became effective in Maine, as a result of action by the Maine PUC. Staff asserts that express language is required in order to cede the Commission's authority to establish rates for New Hampshire customers to the Maine PUC. Absent such clear and express language, Staff argues that in Order 24,873 the Commission did not provide for the step increase to become automatically effective in New Hampshire on the same date it became effective in Maine. Staff thus concludes that the Commission was free to choose March 20, 2009, the date Order No. 24,950 was issued, as the effective date for the Step Increase.

With respect to Fryeburg's inclusion in its motion of e-mails between Staff and Fryeburg, Staff states that the e-mails do not establish that Staff agreed to an effective date for the step increase. Staff avers that the express language of the settlement agreement that "[w]ithin 10 days of the issuance of any order...the Company shall file revised tariff sheets reflecting the Step Increase" supports the interpretation that Fryeburg would not begin to charge for the step increase before the revised tariff sheets were filed with the Commission.

Lastly, Staff states that Fryeburg's inclusion of settlement emails in its motion is contrary to N.H. Code Admin. Rules Puc 203.20(a) which states:

"[a]ll participants in settlement conferences shall treat discussions at settlement conferences as confidential and shall not disclose the contents of such discussions to third parties or seek to introduce them into evidence."

Staff states Fryeburg's disclosure of the emails is also contrary to the express terms of the settlement agreement entered into by Fryeburg and Staff:

"[t]he discussions which have produced this Agreement have been conducted on the explicit understanding that all offers of settlement relating thereto are and shall be confidential, shall be without prejudice to the position of any party or participant representing any such offer or participating in any such discussion, and are not to be used in connection with any future proceeding or otherwise."

IV. COMMISSION ANALYSIS

Pursuant to RSA 541:4, a motion for rehearing must “set forth fully every ground upon which it is claimed that the decision or order complained of is unlawful or unreasonable.”

Pursuant to RSA 541:3, the Commission may grant rehearing or reconsideration when the motion states good reason for such relief. Good reason may be shown by identifying specific matters that were either “overlooked or mistakenly conceived” by the deciding tribunal. See *Dumais v. State*, 118 N.H. 309, 311 (1978). In circumstances where new evidence is presented, the petitioner for such relief must explain why new evidence could not have been presented in the underlying proceeding. *O’Loughlin v. N.H. Personnel Comm’n*, 117 N.H. 999, 1004 (1977).

Fryeburg contends that our decision in Order No. 24,950 is contrary to our earlier Order No. 24,873. According to Fryeburg, Order No. 24,873 approved a method of establishing a step increase to rates pursuant to which the Maine PUC would, for all intents and purposes, set the rate and effective date for the step increase for both Maine and New Hampshire customers. Fryeburg states that following the effective date for the step increase, the New Hampshire Commission would adjust customer rates based upon Staff’s subsequent review and recommendation. Fryeburg argues that this intent can be discerned from the settlement agreement and is confirmed by the additional evidence submitted with its motion.

We do not agree that Order No. 24,873, or the settlement agreement it approved, provided that rates would automatically take effect in New Hampshire as of the date of approval in Maine. Instead, Order No. 24,873 contemplated that rates for New Hampshire customers would go into effect pursuant to certain procedures. Specifically, it was stated that the Company would provide a copy of the Maine Order to Staff, that Staff would review the Maine Order, that Staff would conduct discovery, that Staff would make a recommendation to the Commission,

that the Commission would act on the recommendation by either approving or modifying the rate, and that the Company would file tariff sheets within 10 days of a Commission order.

There is no dispute that Fryeburg is entitled to a step increase subject to certain conditions. It is not entitled, however, to a specific effective date for such a step increase. The step increase could, arguably, have been made effective on January 1, 2009, but it was not. The step increase was instead made effective as of the date of our order approving it, which is a common ratemaking practice. Furthermore, we do not agree that approval of Fryeburg's step increase for effect March 20, 2009, rather than January 1, 2009, violates Fryeburg's constitutional right to earn a return on its investment. As discussed above, the Commission has the discretion to choose among these dates and a range of others in selecting an effective date for a step increase. At the same time, while the Company acted prematurely in assessing the step increase, we do not find that it acted in bad faith in doing so.

We next turn to the issue of the additional evidence Fryeburg proposes for consideration in determining the meaning of the settlement agreement approved in Order No. 24, 873. Order No. 24,873 speaks for itself and approves the terms of the settlement "as discussed" *Id.* at 7. We described the approval process for the step increase as follows:

Staff will review Fryeburg's step adjustment filing, as well as the decision of the Maine commission, and will file a recommendation for our consideration. We consider this proposal for reviewing recently-made plant additions in the context of a step increase to customer rates to be sound and we therefore approve it. Customers will be protected by the fact that plant additions will be reviewed to ensure that they are prudent, used, and useful and costs associated with those additions will be audited before any change in rates is considered. *Id.* at 6.

We note that the additional evidence offered by Fryeburg includes e-mails between Staff and Fryeburg concerning offers of settlement. N.H. Code Admin. Rules Puc 203.20(a) and the express terms of the settlement agreement prohibit disclosure of these types of communications. Fryeburg did not request confidential treatment before submitting this evidence for our

consideration. We will treat the parties' communications as confidential, pursuant to Puc 203.20(a), and we will require the parties to protect this evidence from public disclosure. We do not address here the propriety of filing such materials in the first instance.

The confidential material does not inform our decision on Fryeburg's motion. Communications between the Company and Staff, confidential or otherwise, may show what the Company and/or Staff may have intended, but those communications do not show what the Commission intended in its decision. Ultimately, the Commission has significant latitude, within certain constitutional and statutory bounds, as to the timing of rate increases and Order No.24,950 reflects a permissible exercise of such discretion. Accordingly, we have based our decision in this case on the findings and rulings in Order Nos. 24,873 and 24,950. Having considered Fryeburg's motion for rehearing and Staff's objection, we find that Fryeburg has not demonstrated that Order No. 24,950 is unlawful or unreasonable. Accordingly, we deny the motion for rehearing.

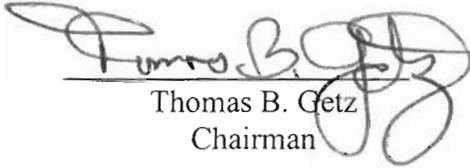
Based upon the foregoing, it is hereby

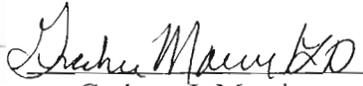
ORDERED, that Fryeburg Water Company's motion for rehearing is denied; and it is

FURTHER ORDERED, that Fryeburg Water Company, Inc. shall file with the Commission, within ten (10) days from the date of this order, a reconciliation report detailing how it proposes to refund customers the amount it has over-collected from customers on account of using a January 1, 2009 effective date; and it is

FURTHERED ORDERED, that the email communications between Fryeburg and Staff attached to Fryeburg's motion for rehearing are confidential and shall not be disclosed to the public.

By order of the Public Utilities Commission of New Hampshire this twelfth day of June,
2009.


Thomas B. Getz
Chairman


Graham J. Morrison
Commissioner


Clifton C. Below
Commissioner

Attested by:


Debra A. Howland
Executive Director

