

DE 97-255

BIRCHVIEW BY THE SACO, INC.

**Investigation into Quality of Service and Continued Operation as
a Viable Public Utility**

Order on Rehearing Concerning Rates During Receivership

O R D E R N O. 23,339

November 8, 1999

APPEARANCES: Karen Weigold, *pro se*; Francis X. Lyons and Marilyn Lyons for F.X. Lyons, Inc., receiver; and Donald M. Kreis, Esq. for the Staff of the New Hampshire Public Utilities Commission.

I. PROCEDURAL HISTORY

This matter began in 1997 as an investigation of certain customer complaints concerning Birchview by the Saco., Inc. ("Birchview"), a water utility providing service to approximately 110 customers in part of the Town of Bartlett. Staff received the initial complaint from customers on July 17, 1997; this docket was formally opened on December 23, 1997; and, on August 3, 1998 the Commission placed Birchview in receivership after determining that the utility's owner, Mr. Carlton Bacon, failed to pay the system operator, failed to pay the New Hampshire Department of Environmental Services for required testing and failed to address significant system failures. By Order No. 22,992, the Commission determined that Birchview was providing inadequate and unreasonable service, threatening the customers' health and welfare, and the Commission therefore exercised its authority under RSA 374:47-a to appoint the

utility's operator, F.X. Lyons, Inc., as the receiver of Birchview's water distribution system.

The Lyons receivership has been extended and remains in effect. On May 18, 1999, the Commission entered a *nisi* order (No. 23,218), effective on June 25, 1999, establishing rates to be charged during the receivership. The Commission approved Staff's recommendation of a \$42.38 quarterly rate, based on the previously determined revenue requirement of \$18,988, established using a 1988 test year. The basis of Staff's recommendation for continuing to rely on such historic data was the inability to develop an adequate record for revising the revenue requirement because Birchview had kept inadequate records of its operations.

The Commission further approved two surcharges. The first, \$16.93 over four quarters beginning with bills rendered on July 1, 1999, was designed to permit the receiver to recover \$7,584 in regulatory expenses. The second, \$19.72 over four quarters beginning with bills rendered on July 1, 1999, was designed to facilitate payment of \$8,833 in Birchview accounts payable associated with operation of the system prior to receivership. F.X. Lyons, in its capacity as the operator of the system just prior to the receivership, is one of the two creditors involved. The other creditor is E.C. Holmes, a prior system operator.

The Commission received two timely requests for hearing in connection with the *nisi* order. The first request was from Mrs. Constance L. Holmes on behalf of E.C. Holmes. Mrs. Holmes later withdrew her request after Staff recommended Commission approval of an additional \$480 for payment on the invoices submitted by E.C. Holmes in connection with services rendered to Birchview. The second hearing request came from a Birchview customer, Mr. George J. Weigold. Mr. Weigold questioned (1) the reasonableness of the revenue requirement, (2) the appropriateness of charging regulatory expenses to ratepayers as opposed to other entities involved in issues arising out of Birchview's receivership, (3) the legitimacy and verifiability of the \$8,833 in approved pre-receivership accounts payable, (4) the appropriateness of requiring ratepayers to pay these invoices given that they covered periods prior to the receivership and (5) whether a conflict of interest required the removal of F.X Lyons as receiver. By Order No. 23,235 (June 15, 1999), the Commission denied Mr. Weigold's request for a hearing but approved the additional \$480 in reimbursements to E.C. Holmes.

The Commission entered Order No. 23,253 on July 7, 1997, ruling on the question of Birchview's existence post-receivership. The Commission approved a proposed transfer of the Birchview franchise to the Precinct, a municipal water system that is presently providing service in other areas of the Town of

Bartlett. The order provided that F.X. Lyons shall continue as receiver until such time as the Precinct has extended its mains into Birchview's territory. The Precinct's effort to obtain the necessary financing, which turns on the Precinct's ability to sign up a sufficient number of Birchview customers, is ongoing, according to information provided to the Commission by the Precinct as required by Order No. 23,253.

In response to two motions for rehearing submitted by Birchview customers George and Karen Weigold, submitted on July 2, 1999 and August 6, 1999, respectively, the Commission ruled on September 7, 1999 (Order No. 23,296) that it would allow a limited rehearing on the issue of the rates to be in effect during the receivership, and denied all other grounds requested for rehearing. Accordingly, the Commission conducted a hearing on September 29, 1999 at which Ms. Weigold appeared to present evidence. Also testifying were two members of the Commission Staff, Assistant Finance Director Stephen Frink and Water Engineer Douglas Brogan, as well as Mr. Francis X. Lyons and Ms. Marilyn Lyons on behalf of the receiver.

II. POSITIONS OF THE PARTIES AND STAFF

A. George and Karen Weigold

The Weigolds do not challenge the \$18,988 revenue requirement as established by the Commission, but believe the Commission should provide explicit instructions to the receiver

on how the funds should be expended. In particular, the Weigolds contend that the receiver should be required to set aside funds to purchase an alarm system for the utility, that any upgrades in the system be monitored to assure their compatibility with the Precinct's water system and that the cost of such upgrades should not necessarily be borne by ratepayers. The Weigolds ask the Commission to provide direction to the receiver on how to distribute any surplus operating funds. They also ask the Commission to direct the receiver to liquidate idle Birchview assets, citing a backhoe in particular.

With regard to the surcharge for regulatory expenses, the Weigolds ask that the sum to be recovered from ratepayers be revised downward to \$4,963. In particular, the Weigolds object to charging ratepayers in connection with certain hearings and meetings attended by Mr. Lyons and/or Mrs. Lyons and for charging ratepayers in connection with the receiver's preparing responses to certain discovery requests in connection with the instant proceeding. In particular, the Weigolds object to (1) the expense of Mr. Lyons' attendance at the Commission's hearing in this matter on July 16, 1998 and Mrs. Lyons' attendance at the Commission's hearing in this matter on August 18, 1998; (2) charging ratepayers for Mr. Lyons' attendance at a meeting on October 14, 1998 at the offices of the North Country Council; and (3) allocating more than 50 percent of the receiver's costs, relative to hearings and discovery responses, to the ratepayers.

In the Weigolds' view, these expenses should be "allocated equitably" because Mr. Lyons has sometimes represented the interests of the ratepayers and sometimes sought to advance his own pecuniary interests as a creditor of Birchview and as the Precinct's system operator.

The Weigolds regard the entire \$8,833 surcharge, as previously approved for payment of accounts receivable, as unjust and unreasonable. According to the Weigolds, imposing such a surcharge is tantamount to imposing on the ratepayers an obligation to prove that the revenues collected pre-receivership were adequate to cover Birchview's expenses. In the view of the Weigolds, the Commission has abdicated a responsibility to verify how the utility spent its revenue prior to the imposition of receivership. The Weigolds contend there is a discrepancy between two sets of records provided to Staff by Mrs. Holmes and, therefore, that the Commission should reject the Holmes invoices as invalid. Finally, the Weigolds draw the Commission's attention to a discrepancy between the \$8,447 in property taxes Birchview listed in its 1997 annual report and the \$817 payment that appears in the Town of Bartlett's tax records. This discrepancy, according to the Weigolds, should lead the Commission to decide it is unable based on the present record to establish the legitimacy of Birchview's accounts payable with sufficient certainty to surcharge the ratepayers.

The Weigolds contend that they are prejudiced by a

failure of the Commission to suspend Order No. 23,235, which denied their previous request for a hearing on rates, because the receiver has paid \$1,000 in past-due sums to E.C. Holmes that the Weigolds now anticipate will be charged to ratepayers. Finally, the Weigolds express the concern that certain other Birchview creditors will come forward with requests to surcharge the ratepayers for past-due payables unless the Commission determines now that such claims are time-barred.

B. F.X. Lyons, Inc.

The receiver did not take a formal position on the Weigolds' rehearing motion. However, through the testimony of Mr. and Mrs. Lyons, the receiver articulated its views that the regulatory expenses as previously approved by the Commission are reasonably charged to the ratepayers; that Mr. Lyons attended meetings or hearings only at the request of the Commission or individual Staff members and, thus, that the expenses associated with those appearances are legitimate reimbursable expenses of the receiver; that Mrs. Lyons attended hearings only when it was necessary for her to do so as the receiver's financial officer so that the receiver could account for its financial affairs; and that, despite its different roles in connection with the Birchview system it has always conducted itself as receiver in a manner that does not suggest any conflict-of-interest. Mr. Lyons testified that he is unaware of any backhoe that Birchview may

own. He further stated that installation of an alarm system would be a desirable improvement, but that it would cost approximately \$500, and that present revenues do not support such an expenditure.

C. Staff

Staff's position is that the Commission's previous order setting rates during the receivership should be reaffirmed, subject only to revising the "accounts payable" surcharge upward slightly to reflect the additional \$480 Staff deems appropriate for reimbursement to E.C. Holmes. Staff is willing to provide guidance to the receiver concerning the expenditure of revenues, as suggested by the Weigolds, and is of the view that such oversight is already in place. Staff does not oppose the installation of an alarm system or other expenditures designed to assure the reliability of the system, but is of the view that such efforts are not possible without raising rates further.

On the issue of regulatory expenses, Staff believes that the Commission was correct when it previously determined that all of the expenses for which the receiver has sought recovery were legitimately incurred on behalf of Birchview ratepayers. In particular, Staff notes that Mr. Lyons attended the October 14, 1998 meeting at the headquarters of the North Country Council because he was asked to do so by Mr. Brogan. According to Staff, the purpose of the meeting was to allow those

with relevant information about Birchview's operations to share that information in advance of a then-imminent public meeting to discuss the future of the water system.

Finally, Staff believes it would be inappropriate to revisit the Commission's previous determination that a surcharge to cover Birchview's legitimate and verifiable operations-related accounts payable is appropriate to ensure the long-term viability of the water system at issue. At hearing, Staff noted that it has been able to verify that an additional \$480 of invoices submitted by E.C. Holmes were legitimate. Accordingly, Staff asks the Commission to revise the surcharge to reflect this additional sum.

III. COMMISSION ANALYSIS

After careful consideration of the additional evidence and arguments adduced at the September 29, 1999 hearing, we find no basis for revisiting our previous determination as to the rates to be effective while this utility is in receivership.

As we noted in Order No. 23,218, applying a revenue requirement to Birchview that is based on a test year more than a decade old is not an ideal solution. Using the previously determined \$18,988 revenue requirement allows us to determine, in the face of what would otherwise be an inadequate record, that the rates based on such a revenue requirement are just and reasonable. However, as we noted, there exists a sufficient

possibility that such rates might prove inadequate to guarantee reliable service during the receivership - in part because the rates do not include any reserve for capital expenditures. This reality informs our view of the Weigolds' assertion that certain additional expenditures, e.g., the provision of an alarm system, are appropriate.

We agree with Staff that such capital expenditures would be welcome here, but we cannot agree with the Weigolds that we should order the receiver to make the requested improvements at this time. Such improvements would require an increase in rates. The record reflects that the rates we have previously approved are adequate only to permit day-to-day operation of the system. For this reason, and in light of the pending acquisition of the system, at this time we will not order the receiver to make additional improvements. We reiterate our previously expressed caveat that customers should be prepared for further increases in rates - especially if the process of connecting the Birchview system to the Precinct takes longer than expected.

On the subject of what have been referred to in this proceeding as "regulatory expenses," we begin by noting that - in the context of a normal rate case, it has long been our practice to permit a utility to recover via a surcharge its reasonable expenses associated with pursuing the rate case itself. See, e.g., *Lakes Region Water Co.*, 75 NH PUC 89 (1990); *Walnut Ridge*

Water Co., 72 NH PUC 69 (1987). In such a proceeding, these costs are "a proper operating expense unless found excessive or improper." *Lakes Region Water Co.*, 75 NH PUC at 92 (citing *State v. Hampton Water Works*, 91 N.H. 278, 296 (1941)). In the context of a receivership, the Commission Staff is authorized by statute "to expend existing company utility revenues for labor and materials and to commit additional expenditures as are essential to providing an acceptable level of service, such expenditures to be funded in accordance with generally accepted ratemaking practices." RSA 374:47-a. There can be no doubt that it is in accordance with generally accepted ratemaking practices, and thus well within the explicit statutory authority granted the Commission, to permit a receiver to recover the same expenses a utility would recover if we were not setting rates in the context of a receivership. This includes the cost of creating an appropriate transcript of proceedings before the Commission.

Therefore, the only question remaining on this score is whether the regulatory expenses for which the receiver seeks recovery are excessive or improper. We believe they are not. The hourly rates charged by the receiver are reasonable and, because Mrs. Lyons is the receiver's financial officer, we cannot agree with the Weigolds that expenses associated with her attendance at hearings were excessive, given that financial matters were at issue on those occasions. Nor can we agree with

the Weigolds that it is appropriate either to disallow expenses related to the so-called "North Country Council" meeting, or view the receiver's effort to reply to the intervenors' discovery requests as somehow outside the scope of the receivership or generally to assess ratepayers for only some portion of the receiver's regulatory expenses. Although the receiver plays additional roles that have some relevance to Birchview's present and future operations - most notably as a creditor of Birchview and as the operator of the Precinct's water system - nothing in the factual record of this case suggests that any of the charges submitted by the receiver involve work that was not done to further the interest of providing "adequate and reasonable service" as mandated by the receivership statute, RSA 374:47-a.

We discern no basis for disallowing any portion of the court reporter's expenses. And the ratepayers may also appropriately be surcharged for the receiver's expenses associated with the September 29, 1999 hearing. Accordingly, consistent with our previous order establishing rates to be charged during the receivership, the previously submitted regulatory expenses of \$7,584.21, including costs of \$2,094.50 associated with preparation of hearing transcripts, and as supplemented by the receiver's expenses associated with the September 29, 1999 hearing, are approved for recovery via a quarterly surcharge over a period of one year beginning with bills rendered on or after July 1, 1999. Based on documentation

submitted by the receiver following the September 29, 1999 hearing indicating an additional \$481.60 in regulatory expenses, Staff has done the necessary calculation and determined that the previously ordered regulatory expenses surcharge should be increased by \$2.15 per customer for the two quarters remaining in the surcharge period.

We share the Weigolds' concern for keeping Birchview's rates during receivership as low as possible, and we have provided great latitude to the intervenors because of their lack of utility expertise. However, one way to assist the Commission in achieving that objective is, when possible, to minimize contentiousness and formal litigation in receivership proceedings. We urge the intervenors to pursue all avenues of discussion with Commission Staff and the receiver before resorting to further formal litigation concerning the water utility.

The last major issue raised by the rehearing motion concerns the recoverability, via an additional surcharge, of the \$8,833 in pre-receivership accounts payable, and the additional \$480 subsequently deemed by Staff to be legitimate and verifiable. As an initial matter, we reaffirm our previously expressed agreement with staff that the additional \$480, covering additional sums payable to E.C. Holmes, is legitimate and verifiable. Staff has done the necessary calculation and determined that the previously ordered past due accounts payable

surcharge should be increased by \$2.14 per customer for the two quarters remaining in the surcharge period.

Although, on occasion, the Weigolds have made a variety of arguments concerning the legitimacy and verifiability of some or all of the individual invoices involved, we understand their present position to be a challenge to the general question of whether these expenses can be assessed to ratepayers based on the present record. The details of the Weigolds' position are not completely clear. At times they appear to be arguing that the Commission lacks adequate assurances that these invoices were not already paid and is improperly requiring the intervenors to prove non-payment of these obligations; at others, they appear to be contending simply that the pre-receivership revenues were adequate to cover pre-receivership expenses.

Our view of the problem is grounded in the Commission's statutory mandate, cited above, to manage utilities in receivership in such a manner as to "restore or maintain an acceptable level of service," as well as the Commission's authority to "commit additional expenditures as are essential to providing an acceptable level of service." RSA 374:47-a. The failure to meet the kind of obligations represented by the accounts payable at issue here is precisely the kind of state of affairs that leads to receivership; generally, a utility that is meeting its obligations is unlikely to require this sort of intervention. Therefore, it is entirely logical that the

Commission has the authority under RSA 374:47-a to cure a receivership-inducing disease by addressing the symptoms, i.e., by requiring a utility in receivership to meet its pre-receivership obligations and thereby restore itself to a state of orderly operation. We are unable to agree with the Weigolds' arguments to the contrary.

Nor can we agree that we have improperly allocated to the intervenors the burden of proving that the accounts in question were not already paid by the utility prior to receivership. We are simply crediting the evidence, adduced by Staff and obtained via direct communication with the creditors involved, that these accounts remain outstanding. To rebut this evidence, the Weigolds present only their speculation, based on certain alleged and unrelated inconsistencies between tax records and annual reports, that these creditors have already been made whole.

The remaining issues raised by the Weigolds do not require extensive discussion. Any failure to suspend the previous order setting rates is harmless. The question of whether claims by other Birchview creditors would be barred by the applicable statute of limitations is, at this point, only a hypothetical one and we decline to decide the ratemaking treatment of these claims on that basis.

Based upon the foregoing, it is hereby

ORDERED, that Order No. 23,218, setting rates to be applied during the utility's receivership, as further modified by Order No. 23,235, is AFFIRMED upon rehearing; and it is

FURTHER ORDERED, that F.X. Lyons, Inc., as Receiver of Birchview by the Saco, Inc., is authorized to recover an additional \$2.15 per customer in regulatory expenses during the two quarterly billing cycles following the date of this order; and it is

FURTHER ORDERED, that F.X. Lyons, Inc., as Receiver of Birchview by the Saco, Inc., is authorized to recover an additional \$2.14 per customer, in connection with past due accounts payable, during the two quarterly billing cycles following the date of this order; and it is

FURTHER ORDERED, that, within 20 days of this order, the Receiver shall file a compliance tariff with the Commission, reflecting the revised surcharges for regulatory expenses and accounts payable, in accordance with N.H. Admin. Rules, PUC 1603.02(b).

By order of the Public Utilities Commission of New
Hampshire this eighth day of November, 1999.

Douglas L. Patch
Chairman

Susan S. Geiger
Commissioner

Nancy Brockway
Commissioner

Attested by:

Claire D. DiCicco
Assistant Secretary