

DE 97-255

BIRCHVIEW BY THE SACO, INC.

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

Order Nisi Concerning 2001 Rates and Fees

O R D E R    N O.   23,616

January 10, 2001

This order concerns certain rate adjustments and fees that it has become necessary to authorize in order to assure the orderly wind-down and termination in mid-2001 of Birchview by the Saco, Inc. (Birchview), a water utility in the Town of Bartlett that has been operating in receivership pursuant to RSA 374:47-a since August 1998. The history of Birchview by the Saco, and in particular the reasons this utility is in receivership, are set forth in *Birchview by the Saco, Inc.*, 84 NH PUC 359 (1999), a July 1999 decision in which we concluded that Birchview's franchise to serve approximately 112 customers in the Birchview by the Saco subdivision should be transferred to the Lower Bartlett Water Precinct (Precinct) as soon as the Precinct completes the necessary construction.

In our July 1999 order, we concluded that Birchview's customers "would be best served through the abandonment of the existing system and the provision of

service by the Precinct." *Id.* at 367. Four months later, in *Birchview by the Saco, Inc.*, 84 NH PUC 585 (1999), we gave detailed consideration to the issue of what rates should apply to Birchview's customers during the period of transition to the assumption of the franchise by the Precinct. We determined that it was appropriate in the circumstances to continue to use the previously determined annual revenue requirement of \$18,988, but we noted a "significant possibility that such rates might prove inadequate to guarantee reliable service during the receivership." *Id.* at 588-89. We also allowed the receiver, F.X. Lyons, Inc., to recover from ratepayers certain regulatory expenses it had incurred in connection with the receivership as well as certain expenses of the utility that antedated the receivership. *See id.* at 589-90.

On October 16, 2000, the receiver wrote to the Commission seeking direction concerning the winding down of the utility. The receiver advised the Commission that (1) construction of the Precinct's expansion project, necessary to provide service in the Birchview subdivision, was under way and was expected to be complete in the Spring of 2001, and (2) the Water Supply Engineering Bureau of the Department of Environmental Services (DES) had identified a potential health hazard associated with the construction project.

Specifically, according to a letter from DES appended to the receiver's October 16 communication,

a portion of the old galvanized water main in the Birchview by the Saco subdivision isn't only in poor condition but passes on private property beneath one or more existing septic systems or leachfields. The likelihood of interruptions of service in conjunction with installations of new mains by the Lower Bartlett Water Precinct poses a heightened and significant risk of backflow of contaminated water into the system during times of low or no pressure.

Accordingly, the receiver recommended a two-phased shutdown of the Birchview system, with the 23 customers served via the main identified by DES terminated on November 30, 2000 ("Phase I" customers) and the entire utility being shut down by June 30, 2001. In all instances, given the progress of the Precinct's construction project, water service by the Precinct would be available to any terminated Birchview customer requesting it.

By secretarial letter issued on October 20, 2000, the Commission approved the receiver's request. The Commission instructed the receiver to inform the "Phase I" customers of the impending shutdown by certified mail and the remaining customers, scheduled for June 30, 2001 shutdown, by regular mail. This was accomplished.

On November 1, 2000, Birchview customers George and

Karen Weigold instituted a lawsuit in Carroll County Superior Court, naming as defendants the Precinct, the receiver, the Commission and the DES. In connection with the litigation, the Court on the date the lawsuit was commenced entered an *ex parte* temporary restraining order against the Commission and the other defendants, enjoining them from "interfering with the petitioners' use of the water of the Birchview by the Saco water system" as well as from "disrupting the access of the petitioners to this source of water or from compromising its quality in any way." On motion of the Commission, DES and the Precinct, the Court dissolved the restraining order on November 29, 2000. The Court noted a lack of irreparable harm to the petitioners, a precondition for injunctive relief, and also noted the petitioners' failure to show "by a balance of the probabilities" that their lawsuit would ultimately be successful. The lawsuit, however, remains pending; in it, Mr. and Ms. Weigold contend that the Precinct's assumption of the Birchview franchise violates a covenant in the deed by which they took title to their home in the Birchview subdivision. Because the receiver, although an agent of the Commission, is not eligible for legal representation by the New Hampshire Department of Justice, the receiver has had to incur the expense of obtaining private counsel to defend it in

connection with the litigation.

The receiver provided the Commission on December 20, 2000 with a summary of the utility's balance and its projected expenses during the remaining period the utility is expected to operate. The receiver noted that the utility had an available balance of \$3,315.29 as of December 19,<sup>1</sup> with quarterly bills to be rendered in arrears in early January.

The receiver noted that Birchview by the Saco has experienced significant problems related to water main leaks in recent weeks. Specifically, according to the receiver, the utility's storage tank had been completely emptied of water on November 26, 2000, necessitating an emergency temporary interconnection with the Precinct's water system. The ensuing leak detection and repair caused the receiver to incur a reported \$4,200 in expenses. Additionally, the receiver reported that the system was still leaking an estimated 25 to 30 gallons of water per minute; it estimated an additional \$5,000 in leak detection and repair expenses. Finally, the receiver estimated \$10,000 in system shutdown expenses to be incurred in 2001, covering, *inter alia*, the removal of

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<sup>1</sup> The utility's available balance had been significantly reduced by an expenditure of \$2,760.00 in November to replace the pump connected to the utility's well, which failed on November 8, 2000.

components and piping from pump houses, the removal of storage and pressure tanks, the removal of pumps, the plugging of wells, the removal of pump house structures and the leveling and seeding of grounds. The receiver estimated no salvage value in the removed components. Finally, the receiver estimated that it would incur \$4,500 in expenses associated with the Weigold litigation pending in Superior Court.

The Commission's Finance Department reviewed the receiver's December 20 report and has made the following recommendations to the Commission:

- A. A one-time, \$40.18 surcharge per customer to cover actual and projected legal expenses of the receiver in connection with the Weigold litigation, to be included in the quarterly bills to be rendered in January 2001 covering the last quarter of 2000.
- B. An one-time system shut-down fee of \$89.29 per customer, to cover the estimated shut down expenses of \$10,000, to be included on the final bill rendered to each Birchview customer upon terminating service by the utility, including the 21 "Phase I" customers whose service was terminated in late 2000.
- C. A quarterly rate of \$52.16 effective on December 1, 2000, representing an increase of \$9.78, or 23 percent, in comparison to the current rate of \$42.38.

Staff recommends that, in connection with these increased

rates and additional fees, the Commission track the receiver's actual expenses and, if necessary, refund any surplus to customers paying the charge related to the surplus. In particular, Staff recommends such treatment for any proceeds that may be derived from the sale of the utility's assets, including its realty, should that become possible.

We believe that adoption of Staff's recommendation is appropriate and reasonable. Pursuant to the receivership statute, "[a]ny costs incurred by the commission, its staff or appointed receiver under this section shall be the responsibility of the utility or its customers." RSA 374:47-a. In our view, the expenses identified by the receiver were either prudently incurred or represent reasonable, responsible estimates of expenses that will be necessary in order to continue to provide service during the winding down period. Imposing responsibility for these expenses on the utility would be fruitless because its assets have been fully depleted and the utility itself has been abandoned by its owner, who has since died. Moreover, as we previously noted in connection with this receivership proceeding, "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." *Birchview*, 84 NH PUC at

589. This is precisely what has come to pass - in the context of a utility whose established revenue requirement was already inadequate to fund safe and reliable service prior to the receivership - arguably the very state of affairs that caused the utility to be placed in the care of a receiver in the first place.

Ordinarily, retroactive ratemaking is impermissible because "customers of a utility have a right to rely on the rates which are in effect at the time that they consume the services provided by the utility, at least until such time as the utility applies for a change." *Appeal of Pennichuck Water Works*, 120 N.H. 562, 566 (1980). However, the notion of retroactive ratemaking is "rooted in traditional ratemaking concepts," *Statewide Electric Utility Restructuring Plan*, 82 NH PUC 122, 233 (1997), and, here, the question is not what contractual terms ought reasonably to be deemed to exist between a regulated utility and its customers but, rather, how to apportion in an equitable manner the costs of operating a utility that it has become necessary for the Commission to operate through its receiver in order to maintain safe and reliable service. This principle was implicit in our previous determination that it was consistent with our authority under RSA 374:47-a to permit the receiver to collect from Birchview



ratepayers certain pre-receivership expenses. *See Birchview*, 84 NH PUC at 590 (invoking Commission's mandate under RSA 374:47-a to manage utilities in receivership so as to "restore or maintain an acceptable level of service").

We stress that we will scrupulously credit ratepayers with any offsets to the estimated expenses for the remainder of Birchview's operations, either in the form of savings achieved by the receiver or otherwise. We will expect the receiver to operate the utility in as efficient a manner as is possible, consistent with its obligation to provide safe and reliable service. We also are sensitive to the burden that these charges may impose on some customers. We, therefore, will order the receiver to negotiate payment plans with customers who have difficulty paying the one-time fees as a lump sum.

We further note that, although we lack the authority to quiet title to the utility's real estate, it is at least possible in these circumstances that New Hampshire law would deem the receiver to have acquired title to the utility's realty for purposes of liquidating it and devoting the proceeds to charges otherwise payable by the ratepayers, *see, e.g., Petition of Keyser*, 98 N.H. 198, 200 (1953) (noting that judicially appointed receiver of corporation holds title to

corporation's property, deemed in *custodia legis*), or that the proceeds from the sale of Birchview's real estate would be available to offset customer-paid rates and charges under some other legal theory. We therefore will request the New Hampshire Department of Justice to explore the possibility of asserting title to Birchview's real property on behalf of the Commission, for the benefit of the Company's ratepayers. Should that exploration bear any fruit, Birchview ratepayers can expect the Commission to provide them with corresponding relief, in the form of refunds if appropriate.

We will leave this docket open until such time as the receiver has fully wound up the operation of the utility and all of its property has been duly disposed of, either through judicial proceedings or otherwise. At that time, we will reconcile the utility's assets and expenses and refund any remaining balance to the utility's ratepayers in an equitable manner.

When a utility in an RSA 374:47-a receivership is in the process of winding down its operations, it is appropriate for the Commission to exercise its authority to "direct all customers to pay what is rightfully owed for service received" and to warn that the Commission will "apply every legal enforcement action available to the State of New Hampshire

against all non-paying customers for the duration of Staff's operation of the system, through its agent" the receiver. See *Beaver Village Realty Trust*, 79 NH PUC 715, 716 (1994). In this case, the receiver has operated Birchview by the Saco, Inc. for more than two years in a diligent and responsible manner, often in conditions of adversity. The receiver is therefore entitled to payment for the services it has rendered and will render, and the only available source of such payment is revenue received by the utility in rates and charges. In exchange for the payment of such rates and charges, the customers of Birchview by the Saco, Inc. can expect an orderly transition to water service from the Lower Bartlett Water Precinct, should they desire to continue to avail themselves of public water supply.

**Based upon the foregoing, it is hereby**

**ORDERED NISI**, that a quarterly rate of \$52.16 shall be applicable to customers of Birchview by the Saco, Inc., effective with bills rendered on or after January 1, 2001; and it is

**FURTHER ORDERED NISI**, that a surcharge of \$40.18 shall be included in all quarterly bills rendered in January 2001, to cover litigation expenses incurred by the receiver of Birchview by the Saco, Inc.; and it is

**FURTHER ORDERED NISI,** that an one-time system shut-down fee of \$89.29 shall be assessed against each customer of Birchview by the Saco, Inc., due and payable with the final bill rendered to such customer by the receiver; and it is

**FURTHER ORDERED,** that the receiver shall negotiate reasonable payment plans with customers who would have difficulty paying the one-time charges in a lump sum; and it is

**FURTHER ORDERED,** that the receiver will credit or charge all such customers for any over- or under-recovery of system shut-down costs upon approval of its final accounting presented to the Commission; and it is

**FURTHER ORDERED,** that the Executive Director and Secretary shall serve a copy of this Order Nisi via First Class mail on each customer of Birchview by the Saco, Inc. and to all intervenors in this proceeding, such service to be accomplished no later than January 12, 2001; and it is

**FURTHER ORDERED,** that all persons interested in responding to this petition be notified that they may submit their comments or file a written request for a hearing on this matter before the Commission no later than January 19, 2001; and it is

**FURTHER ORDERED,** that any party interested in

responding to such comments or request for hearing shall do so no later than January 25, 2001; and it is

**FURTHER ORDERED,** that this Order Nisi shall be effective February 1, 2001, unless the Commission provides otherwise in a supplemental order issued prior to the effective date; and it is

**FURTHER ORDERED,** that the Staff of the Commission shall file a compliance tariff with the Commission on or before February 9, 2001, in accordance with N.H. Admin. Rules, Puc 1603.02(b).

By order of the Public Utilities Commission of New Hampshire this tenth day of January, 2001.

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Douglas L. Patch  
Chairman

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Susan S. Geiger  
Commissioner

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Nancy Brockway  
Commissioner

Attested by:

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Thomas B. Getz  
Executive Director and Secretary