DE 97-255

BIRCHVIEW BY THE SACO, INC.

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

Order Denying Request for Hearing on 2001 Rates and Fees

O R D E R N O. 23,628

January 29, 2001

I. INTRODUCTION

On January 10, 2001, the New Hampshire Public Utilities Commission (Commission) entered Order No. 23,616, concerning the rates and certain fees to be charged in 2001 in connection with Birchview by the Saco, Inc. (Birchview), a utility operating in receivership pursuant to RSA 374:47-a. Located in Bartlett, Birchview is a utility with approximately 112 customers in the Birchview by the Saco subdivision. As noted in Order No. 23,616, the Lower Bartlett Water Precinct (Precinct) is in the process of assuming the Birchview franchise and, thus, the Receiver, F.X. Lyons, Inc., expects to discontinue the operation of Birchview itself by mid-2001. The Commission therefore adopted the recommendation of its Staff concerning rates and fees to be charged Birchview customers so as to permit the Receiver to recover its expenses and to assure an orderly winding down of the Birchview operation.

Specifically, the Commission ordered *nisi* that (1) a quarterly rate of $52.16 (compared to the current rate of $42.38, an increase of $9.78) would be effective with bills rendered on or after January 1, 2001, (2) a surcharge of $40.18, to cover litigation expenses incurred by the Receiver, would be included in all quarterly bills rendered in January 2001, and (3) a one-time system shut-down fee of $89.29 should be assessed against each Birchview customer, due and payable with the final bill rendered by the Receiver.[1] The Commission directed its Executive Director and Secretary to serve a copy of Order No. 23,616 on all Birchview customers, and established January 19, 2000 as the deadline for filing comments and requesting a hearing.

The Commission received two written filings in response. George Weigold and Karen Weigold, intervenors and Birchview customers, filed a request for a hearing. Owen Teevan, a Birchview customer, filed comments requesting certain modifications to Order No. 23,616. For the reasons that follow, we deny both requests.

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[1] The Commission also ordered the Receiver to negotiate payment plans with customers who would have difficulty in paying the one-time charges in a lump sum, and to credit or charge customers for any over- or under-recovery of system shut-down costs upon approval of its final accounting presented to the Commission.

II. HEARING REQUEST OF MR. AND MS. WEIGOLD

Mr. and Ms. Weigold state several bases for requesting a hearing on the rates and charges imposed by Order No. 23,616.

As noted in the Order, in the second half of 2000 the Birchview system experienced significant problems related to water main leaks, causing the Receiver to incur an estimated $4,200 in expenses. These expenses are reflected in the rates and charges established by Order No. 23,616. According to Mr. and Ms. Weigold, Birchview ratepayers should not be responsible for these expenses. Mr. and Ms. Weigold contend that the leak problems coincide with the construction project initiated by the Precinct to extend its mains into the Birchview subdivision and that recent leaks have been discovered on private property.

It is further the contention of Mr. and Ms. Weigold that the Receiver cannot recover its litigation expenses from the Birchview ratepayers. Mr. and Ms. Weigold, who brought the Superior Court lawsuit that gives rise to these expenses, contend that the Receiver "has been sued primarily due to his role as Superintendant [sic] of the [Precinct]." George and Karen Weigold's Request for Hearing on Order Nisi Concerning 2001 Rates and Fees at 2. The person to whom Mr. and Ms.

Weigold refer is Francis Lyons, principal of the Receiver, F.X. Lyons, Inc.

In support of their position on litigation expenses, Mr. and Ms. Weigold further take the position that the Receiver has violated a fiduciary duty to the ratepayers. They make several allegations in this regard. First, they contend that the Receiver did not provide accurate information about the location of Birchview mains in the Spruce Drive area of its franchise territory. Second, they contend that the Commission was mistaken in its determination that the New Hampshire Department of Environmental Services (DES) identified a health hazard in the Spruce Drive area. According to Mr. and Ms. Weigold, it was the Receiver that made this allegation. Finally, according to Mr. and Ms. Weigold, "[t]he receiver's early perjury in this matter demonstrates his determination to put his own monetary interests above the interests of the Birchview customers. There is no evidence to substantiate that receiver notified all Birchview creditors of the last rate hearing." *Id*.

Next Mr. and Ms. Weigold contend that the cost of shutting down the Birchview system is not the responsibility of its customers. In support of their position, Mr. and Ms. Weigold cite a previous Order in this docket, No. 23,353, 84

NH PUC 359 (1999), in which the Commission approved the transfer of "the franchise, system and works" of Birchview to the Precinct. *Id*. at 368. Mr. and Ms. Weigold further allege that Thomas Caughey, the Precinct's chairperson, recognized that the Precinct would take responsibility for the Birchview water system.

Finally, according to Mr. and Ms. Weigold, there is no pending emergency to justify the increased rates and new fees described in Order No. 23,616.

III. COMMISSION ANALYSIS

Upon a careful review of Mr. and Ms. Weigold's filing, we conclude that no hearing is necessary. All of the issues they raise can either be resolved as a matter of law, and thus do not require the introduction of any additional evidence, or relate to issues that have been fully litigated at previous stages of this docket and need not be revisited.

With regard to the question of expenses arising out of leak detection and repair, the necessity of reflecting these expenses in rates remains even assuming the factual contentions of Mr. and Ms. Weigold to be true. In essence, Mr. and Ms. Weigold blame the Precinct for causing the leak problems that have plagued the Birchview system in recent months. RSA 374:47-a makes clear that the purpose of the

receivership is to assure continued safe and reliable service; to that end, the Staff of the Commission is "authorized 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 principles." Thus, regardless of the cause, the Receiver, working under the direction of Staff, was obligated to correct the leaks in question so as to maintain adequate service. The statutory reference to "generally accepted ratemaking principles" reflects a legislative acknowledgment that it is appropriate for customers to bear these expenses, just as the customers of any utility would ultimately be responsible for emergency repair expenses.

The same principle resolves Mr. and Ms. Weigold's argument about the litigation expenses. Regardless of whether the Receiver has been sued primarily in its role as superintendent of the Precinct, the fact remains that the Receiver was individually named in the lawsuit and must defend itself. The Precinct and the Commission are also named defendants in the litigation, with separate counsel; it appears that the central issue in the Superior Court proceeding is whether the Precinct is obligated (pursuant to a

covenant in the deed by which Mr. and Ms. Weigold took title to their property in the Birchview subdivision) to continue to maintain the Birchview system (as opposed to providing water service in the subdivision through its own system). While it appears at least arguable that it was not necessary to sue the Receiver directly in order to pursue such a claim, the Receiver has been named as a party. Thus, the Receiver is incurring legitimate legal expenses and, according to generally accepted ratemaking principles, these expenses are appropriately charged to the ratepayers.[2]

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[2] The issue of whether the Receiver breached a fiduciary duty to the Birchview ratepayers is irrelevant to the determination of whether it should recover expenses related to the Weigold litigation. It is not completely clear why Mr. and Ms. Weigold advance an argument about fiduciary duty in this context. Presumably, their view is that, although the Receiver is being sued primarily in connection with its separate role as operator of the Precinct's water system, the Receiver is also somehow liable in Superior Court by virtue of neglecting certain duties it owes directly to Birchview's customers in its capacity as Receiver. It is not the Commission's role in this docket to construe the claim or claims Mr. and Ms. Weigold have made in the Superior Court; indeed, to the extent the Commission has positions on such issues we advance them exclusively through counsel in Court. However, we have reviewed the pleadings Mr. and Ms. Weigold have submitted to the Superior Court and, for purposes of applying generally accepted ratemaking principles to the Receiver's legal expenses, conclude that nothing about the litigation justifies failing to pass these expenses through to ratepayers.

Finally, even if the three specific allegations made by Mr. and Ms. Weigold about the Receiver's alleged breach of fiduciary duty were somehow relevant, we would not conduct a

The next contention of Mr. and Ms. Weigold concerns the legal effect of our July 1999 Order. The Order speaks for itself. Nothing in that determination makes the Precinct responsible for Birchview shutdown expenses, as suggested by Mr. and Ms. Weigold.

Finally, we take up the contention of Mr. and Ms. Weigold that no pending emergency justifies an increase in rates or the imposition of fees at this time. The issue is not whether an emergency exists. Under plans previously approved by the Commission, a significant number of Birchview customers are about to receive their final bill from the Receiver, having been converted to service from the Precinct. The remaining customers will be in the same situation by midyear, with Birchview completely ceasing operations at that time. The appropriate juncture for fixing the obligation of

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hearing to explore them. We are convinced that we have accurate information about the location of water mains in the Spruce Drive area of the Birchview subdivision and that it would be a misuse of the parties' resources (and needlessly drive up the Receiver's recoverable expenses) to convene a hearing on the subject. We reject outright the suggestion of Mr. and Ms. Weigold that the DES did not identify a potential health hazard arising out of the Precinct's construction in the Spruce Drive area of the subdivision; the letter to that effect the Commission received from DES speaks for itself. Finally, Mr. and Ms. Weigold have been fully heard on more than one previous occasion with regard to their recurring allegation that the Receiver has committed perjury. We will not allow an opportunity to relitigate this issue and we remain convinced that the Receiver has not committed perjury.

all Birchview customers to share in shutdown expenses and other common obligations is the present, before the first of the final bills have been rendered. We stress, however, that in Order No. 23,616 we noted that the Precinct's actual expenses will be reconciled against these estimates – with any excesses or deficiencies ultimately to be credited or charged to all current ratepayers as well, regardless of when they discontinued their Birchview service.

IV. COMMENTS OF MR. OWEN TEEVAN

Owen Teevan, a Birchview customer who has appeared at many of the hearings that have been conducted in this docket, filed written comments but did not specifically request a hearing. However, Mr. Teevan makes four specific requests.

First, Mr. Teevan asks the Commission to amend Order No. 23,616 to delete any references to the lawsuit filed by Mr. and Ms. Weigold. Mr. Teevan suggests that the discussion of this litigation in Order No. 23,616 was not balanced and, thus, was calculated to create discord in the Birchview community. According to Mr. Teevan, it is appropriate for the Commission to provide a balanced account of the Weigold litigation in any orders it issues, including facts relating to the leaks that have occurred in the Birchview system and

the Receiver's concession that construction of the Precinct's expansion project has not been delayed by the lawsuit.

Next, Mr. Teevan asks for a delay in the January 19, 2001 deadline established by the Commission for filing comments and/or seeking a hearing. According to Mr. Teevan, the Commission did not give adequate time for Birchview customers to assess their options.

Mr. Teevan's third request is that the Commission reject Staff's recommendation that the Receiver recover its legal expenses associated with a November 27, 2000 hearing held in Superior Court in connection with the Weigold litigation. Mr. Teevan points out that Mr. Lyons appeared on behalf of the Receiver on that date without counsel. Mr. Teevan asks the Commission to permit the Receiver to recover only those legal expenses that it has actually incurred.

The fourth and final request of Mr. Teevan is that the Commission provide detail as to how the quarterly rate increase of $9.78 was determined. Mr. Teevan asks that the Commission supply the basis for the estimated expenses and the number of homes to share in the increased cost.

V. COMMISSION DISCUSSION

The Commission is well aware that the Weigold litigation has the potential to be a divisive issue for

residents of the Birchview subdivision. Mr. and Ms. Weigold have been outspoken and persistent in their opposition to transferring the Birchview franchise to the Precinct and to the termination of service by Birchview by the Saco. It is well established that many residents of the subdivision do not share this view. Our references to the Weigold litigation in Order No. 23,616 were not intended to foment discord or to express any views as to the merits of the claims Mr. and Ms. Weigold press in Superior Court. As noted, *supra*, the Commission is itself a party to the Superior Court litigation and expresses its views about the litigation solely through counsel, appearing in the judicial forum. Unfortunately, for the reasons already set forth, the pendency of the Weigold litigation has implications for Birchview ratepayers because of the legitimate legal expenses being incurred by the Receiver in connection with the lawsuit. Thus we were unable to avoid referring to the Weigold lawsuit in our Order discussing the rates and fees to be applicable during the remainder of Birchview's operation.

With regard to Mr. Teevan's concern about the January 19 deadline for filing comments or requesting a hearing, we are unable to grant the request for an extension. For the reasons already noted, this is the appropriate

juncture for establishing, subject to reconciliation, the rates and charges that will apply to all Birchview customers, including those who are about to receive their final bill. Certain issues have been an ongoing concern for those who do not agree with the course of action the Commission has approved with regard to Birchview; these concerns are reprised in the two filings we discuss in this Order. We are confident that these concerns have already received a full hearing. Moreover, Mr. Teevan does not himself request a hearing or set forth what additional issues he has been unable to explore or articulate by the January 19 deadline. We have received no other requests for such an extension of time, e.g., from other Birchview customers who believe they have not had a sufficient opportunity to prepare an objection to Order No. 23,616. We believe that interested persons were given adequate time to file comments and to request a hearing.

Mr. Teevan's third request has merit. As he notes, Mr. Lyons appeared without counsel at the November 27, 2000 hearing in Superior Court in connection with the Weigold litigation. The Receiver thus did not incur any legal expenses related specifically to what transpired in the courtroom on that occasion. We will, as Mr. Teevan suggests, permit the Receiver to recover from ratepayers only those

legal expenses that are actually incurred. As we have already stated, we will monitor and audit the Receiver's expenses and make appropriate reconciliations. Thus, Mr. Teevan's request is consistent with the relevant determinations we made in Order No. 23,616 and no change to that Order is necessary.

With regard to Mr. Teevan's final request, we note that the rates and charges we approved in Order No. 23,616 were based on documents and estimates provided by the Receiver to the Commission's Finance Department, which then made the appropriate calculations to apportion the charges equitably among Birchview's approximately 112 customers pursuant to the authority contained in RSA 374:47-a. Because the requested information is not exempt from public disclosure, we will direct our staff to provide it to Mr. Teevan.

Based upon the foregoing, it is hereby

ORDERED, that the pending request for hearing is denied and that the rates and charges described in Order No. 23,616 shall take effect on February 1, 2001, as described therein.

By order of the Public Utilities Commission of New Hampshire this twenty-ninth day of January, 2001.

Douglas L. Patch	Susan S. Geiger	Nancy Brockway
Chairman	Commissioner	Commissioner

Attested by:

Thomas B. Getz
Executive Director and Secretary