DE 97-255

BIRCHVIEW BY THE SACO, INC.

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

Order Denying Motion for Rehearing

O R D E R N O. 23,649

March 7, 2001

On January 10, 2001, the New Hampshire Public Utilities Commission (Commission) entered Order No. 23,616, concerning rates and fees to be charged in 2001 in connection with Birchview by the Saco, Inc. (Birchview), a water utility in Bartlett that is operating in receivership pursuant to RSA 374:47-a. The January 10 determination was an order nisi, which provided an opportunity for parties to file comments and/or to request a hearing. Intervenors George and Karen Weigold filed a timely hearing request, which the Commission denied in Order No. 23,628 (January 29, 2001).

Now pending is a pleading submitted by Mr. and Ms. Weigold, captioned as an "appeal" of Order No. 23,628 denying their hearing request.[1] Inasmuch as the Commission does not have jurisdiction to hear appeals of its own orders, we will treat the filing of Mr. and Ms. Weigold as a request for

[1] Although the pleading and accompanying certificate of service bear a date of January 16, 2001, they were not received by the Commission until February 16, 2001.

rehearing under RSA 541:3.

Pursuant to RSA 541:3, we may grant a request for rehearing if "good reason for the rehearing is stated in the motion." For the reasons that follow, we conclude that the movants have failed to state good reason for rehearing and we will deny their request.

The Commission's January 10 and January 29 orders authorize recovery by F.X. Lyons, Inc. (Lyons), in its capacity as Receiver, of certain expenses associated with the detection and repair of leaks that have compromised the quality of Birchview's service in recent months. As Mr. and Ms. Weigold point out, Lyons has dual roles here: as the Receiver, operating Birchview under Commission supervision pursuant to RSA 374:47-a, and as operator of the Lower Bartlett Water Precinct (LBWP) system, which is being expanded into the Birchview by the Saco subdivision so that can assume the Birchview franchise as previously approved by the Commission. *See Birchview by the Saco, Inc.*, 84 NH PUC 359 (1999).

In their rehearing motion, Mr. and Ms. Weigold allege that Lyons, in its capacity as operator of the LBWP system, was actually responsible for the leaks in question. The motion does not directly allege that Lyons caused the

leaks. Rather, it alleges that Lyons was a "party to the destruction of Birchview's water mains at various locations in the area of the Precinct's water line installation." Appeal of Order No. 23,628 (Rehearing Motion) at 1. According to Mr. and Ms. Weigold, Lyons' superintendent was "on site during the construction project and in charge of directing the equipment contracted by LBWP for the project." Mr. and Ms. Weigold allege that Lyons has "purposely misrepresented" the cause of the leaks in the Birchview system. *Id*.

These contentions are essentially a reprise of the allegations previously made by Mr. and Ms. Weigold and rejected by us in Order No. 23,628. We therefore discern no basis for rehearing. As we pointed out in Order No. 23,628, regardless of what has caused the leaks to the Birchview system the Receiver has an obligation to provide safe and reliable service to the utility's customers and, under traditional ratemaking principles, the expenses associated with such efforts are properly charged to Birchview's customers.

In effect, Mr. and Ms. Weigold ask us to disallow the expenses in question as imprudently incurred by the Receiver. We have the authority under RSA 365:5 to open a separate investigation for that purpose. By our order today,

we do not intend to foreclose the possibility of such an investigation, which could lead to disallowances that would ultimately be credited to Birchview customers. But we will not institute such an investigation in response to speculative allegations about the ongoing construction project the Precinct has undertaken to provide service in the Birchview subdivision. In their rehearing request, Mr. and Ms. Weigold refer to the Receiver's "blatant conflict of interest" that has caused it to ignore its "responsibility to identify the cause of the Birchview damage and to attempt to recover the cost of repairs from the responsible parties." Rehearing Motion at 1. The Commission has long since considered and rejected the contention of Mr. and Ms. Weigold that it is inappropriate, on conflict-of-interest grounds, for the same entity to serve as Receiver of Birchview and the operator of the Precinct. *See Birchview*, 84 NH PUC at 368. Read carefully, the filing of Mr. and Ms. Weigold is an effort to cause us to revisit their conflict-of-interest argument and assume, based on the Receiver's dual roles, that the Receiver bears some or all the responsibility for the leaks the Receiver was then obliged to repair. Mr. and Ms. Weigold are invited to present colorable evidence to the Commission from which a factfinder could determine that the Receiver acted in

such an imprudent manner. Absent such a showing, we will not exercise our discretionary authority under RSA 365:5 to open a formal investigation. In any event, Order No. 23,628 – in which we authorized the rates and fees applicable in the waning months of Birchview's operations and explained why it was necessary to implement them in January 2001 – is not subject to rehearing based on the instant contentions about leak detection and repair.

The next issue raised by Mr. and Ms. Weigold concerns our approval of the Receiver's legal expenses incurred in connection with the lawsuit Mr. and Ms. Weigold have filed in Superior Court against the Commission, the Precinct and the Receiver. The position they state here is identical to the one we considered and rejected in Order No. 23,628. Accordingly, there is no basis for rehearing with regard to litigation expenses.

Next Mr. and Ms. Weigold contend that our decision not to conduct a hearing infringes their right to due process. We disagree. Due process requires a "meaningful opportunity to be heard," i.e., a hearing, "[w]here issues of fact are presented for resolution by an administrative agency." *Appeal of Londonderry Neighborhood Coalition*, ___ N.H. ___, ___, 761 A.2d 426, 429 (2000). As we explained, *supra*, there are no

issues of fact raised by this latest series of filings by Mr. and Ms. Weigold, which upon careful analysis represent simply a reiteration of their previous allegations, fully heard, that Lyons suffers from a conflict of interest in working for both the Precinct and Birchview. The only new fact alleged is the existence of the leaks themselves at a time when the Precinct's construction project was progressing through the Birchview subdivision under Lyons' supervision. This is insufficient to require the Commission to conduct a new hearing, absent any colorable evidence or even the suggestion of any factual allegations from which we could determine that the Receiver actually caused the leaks. *See, e.g., Illinois Central R.R. Co. v, Norfolk & Western Ry. Co.*, 385 U.S. 57, 70-74 (1966) (holding that second administrative hearing unnecessary on due process grounds when appellant pressed "same arguments and contentions" adjudicated in original hearing). As we have already noted, we would consider invoking our discretionary authority under RSA 365:5 to open a formal investigation should Mr. and Ms. Weigold present us with a reasonable basis for doing so. Absent such a basis, there is no reason to conduct another hearing in this docket.

Next Mr. and Ms. Weigold restate their previously asserted view that a reference to the Birchview "franchise,

system and works" in Order No. 23,253 makes the Precinct and not the Birchview ratepayers responsible for the costs of shutting down the Birchview system. We discern no basis for revisiting our previous determination.

The next issue raised by Mr. and Ms. Weigold concerns the one-time $89.29 system shutdown fee we imposed on each Birchview customer in Order No. 23,616. According to Mr. and Ms. Weigold, the Commission deliberately withheld from Birchview customers the fact that such a charge would be necessary, in an effort "to keep the true costs of service by the Precinct from the Birchview customer." Rehearing Motion at 3. Mr. and Ms. Weigold further allege that the Commission is without authority to destroy or to remove any of the Birchview system's physical assets, given that the Superior Court has been asked to determine whether they enjoy a perpetual right to receive service from the Birchview system pursuant to a covenant in the deed by which they took title to their property in the Birchview subdivision. In these circumstances, according to Mr. and Ms. Weigold, it is premature for the Commission to assess a system shutdown fee.

We have already explained, in Order No. 23,628, that we are assessing shutdown expenses against all Birchview ratepayers at this time because some of them – the customers

in the first group to be converted to Precinct service – were to receive their final bills in January. Should Mr. and Ms. Weigold prevail in their judicially asserted contention that the Birchview system cannot be shut down legally, and should such an outcome reduce the system shutdown expenses chargeable to Birchview customers, we will conduct the appropriate reconciliation and direct the Receiver to issue refunds to all Birchview customers accordingly. The remainder of Mr. and Ms. Weigold's contentions regarding shutdown expenses require no response and comprise no basis for rehearing.

Finally, Mr. and Ms. Weigold object to the determination in Order No. 23,628 that the Receiver had not committed perjury. We noted that this has been a recurring allegation from these intervenors, and we rejected it summarily. Mr. and Ms. Weigold concede that they have accused the Receiver of perjury previously in this docket, but they point out that Order No. 23,628 was the first time we have commented on the claim. Therefore, they contend, we are required to provide a "complete basis" for our "findings" on this issue. Rehearing Motion at 3.

The New Hampshire Criminal Code provides that a person is guilty of perjury if he or she "makes a false material statement under oath or affirmation, or swears or

affirms the truth of a material statement previously made," when the person "does not believe the statement to be true." RSA 641:1, I(a). A person is also guilty of perjury if he or she "makes inconsistent material statements under oath or affirmation, both within the period of limitations, one of which is false and not believed by him [or her] to be true." RSA 641:1, I(b). Testimony offered in proceedings before the Commission is subject to prosecution for perjury. *See* RSA 365:17.

We do not have jurisdiction to adjudicate violations of RSA 641:1. However, we note that no tribunal with such jurisdiction would be in a position to find the Receiver guilty of perjury in connection with the matters discussed in Order Nos. 23,616 and 23,628 for the simple reason that neither the Receiver nor anyone connected with it provided any statements under oath or affirmation with respect to the rates and fees imposed by those orders. Our observation in Order No. 23,628 that we "remain convinced that the Receiver has not committed perjury" was intended to make plain what had been implicit in previous orders: that we have never had reason to believe that anyone testifying on behalf of the Receiver has done so falsely. To the extent that Mr. and Ms. Weigold's request for the "complete basis" of our findings on the

perjury issue implicates those prior orders, we decline to address them because the time for rehearing those orders has long since run. To the extent that Mr. and Ms. Weigold question our reliance on the data and reports submitted by the Receiver in connection with the rates and fees established in Order Nos. 23,616 and 23,628, it suffices to note that the Receiver has diligently complied with Staff's request for reports and data and has never given the Commission any reason to doubt the reliability of this information.

Based upon the foregoing, it is hereby

ORDERED, that the motion for rehearing submitted by intervenors George and Karen Weigold is DENIED.

By order of the Public Utilities Commission of New Hampshire this seventh day of March, 2001.

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

Attested by:

Thomas B. Getz
Executive Director and Secretary