

**DW 04-020**

**FRYEBURG WATER COMPANY**

**Investigation into Quality of Service**

**Order Denying Reparations**

**O R D E R N O. 24,559**

**December 9, 2005**

**Appearances:** Upton & Hatfield, LLP by Russell Hilliard, Esq. for Fryeburg Water Company; Rorie Hollenberg, Esq. for the Office of Consumer Advocate; and Suzanne Amidon, Esq. for Commission Staff.

**I. PROCEDURAL BACKGROUND**

On March 11, 2004, the New Hampshire Public Utilities Commission (Commission) opened this docket to investigate water quality and service issues raised by several New Hampshire customers of Fryeburg Water Company (Fryeburg). Fryeburg is a water company located in Maine which serves approximately 67 customers in East Conway, New Hampshire. Fryeburg's East Conway customers complained about the water quality received through an 1883 cast iron pipe from the Maine Fryeburg facility.

In the first phase of this docket, the Commission issued Order No. 24,407 (November 4, 2004) which, among other things, ordered Fryeburg to place all revenues received from East Conway customers after the date of the Order into an escrow fund to be used only for the rehabilitation or replacement of the cast iron pipe. Order No. 24,407, slip op. at 6-8. In the next phase of the docket, which focused on the engineering options addressing the problems with the pipe, the Commission issued Order No. 24,471 (June 2, 2005). In Order No. 24,471, the Commission found, among other things, that the water service provided by Fryeburg was "wholly inadequate" and that Fryeburg was not in compliance with Order No. 24,407. Consequently, it

ordered Fryeburg to pay fines pursuant to RSA 365:42. Order No. 24,407, slip op. at 17. Order No. 24,407 also scheduled a prehearing conference on the issue of reparations to the East Conway customers be held on July 19, 2005.<sup>1</sup> On July 22, 2005, the Office of Consumer Advocate (OCA) filed a Rate Complaint for Petition for Reparations, which was amended on July 26, 2005. The procedural schedule proposed by Commission Staff (Staff) and Parties was approved by Secretarial Letter dated August 2, 2005.

Subsequently, the Commission modified the procedural schedule to allow for the Parties to submit legal briefs on the issue of reparations by October 14, 2005. Order No. 24,512 (September 9, 2005). The remainder of the procedural schedule was suspended by Secretarial Letter dated September 16, 2005.

In Order No. 24,512, the Commission identified the issues for briefing as follows:

- Whether RSA 365:29 authorizes the Commission to order reparations for inadequate water service;
- Assuming that reparations are permissible, when does the two-year recovery period under the statute begin (e.g. the date the customers' complaint was filed (January 14, 2004), the date the Commission noticed a prehearing conference on reparations (June 2, 2005), the date OCA filed its Petition (July 22, 2005), or some other date); and
- Assuming that reparations are permissible, must they be made to individual customers or may they be placed in an account for improvements to the system.

Pursuant to Order No 24,512, Staff and the OCA filed briefs on reparations on October 14, 2005. Fryeburg filed its brief on October 17, 2005.

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<sup>1</sup> Order No 24,407 was subsequently clarified through Order No. 24,500 (August 2, 2005) regarding Fryeburg's obligation to provide bottled water to its East Conway customers.

## II. POSTIONS OF THE PARTIES AND STAFF

### A. Fryeburg Water Company

Fryeburg argues that the Commission's authority under RSA 365:29 was limited to ordering reparations when the company's rates are illegal or discriminatory. Fryeburg states that "where a petition seeks reparations under RSA 365:29, the issue is not whether the Company's service is inadequate, but whether the company's rates are 'illegal or unjustly discriminatory.'" Fryeburg contends that the reparations phase of this docket is therefore not concerned with the adequacy of service, but whether Fryeburg has collected an illegal or unjust rate, fare, charge or price.

Fryeburg points out that the Commission affirmed this principle in Order No. 24,440 (March 4, 2005), when it stated that its "authority under the reparations statutes, RSA 365:3 and RSA 365:29, is limited to complaints 'covering any rate, fare, charge or price demanded and collected by any public utility' and an 'order for reparation shall cover only payments made within 2 years before the date of filing the petition for reparation.'" *See* Fryeburg Brief at 3. Because the complaints against Fryeburg relate to water quality and not rates, Fryeburg concludes that the Commission cannot order reparations to Fryeburg's customers.

Fryeburg rejects the argument that its East Conway customers pay an unjust rate for water service because the East Conway customers paid the same rates for "inadequate" water service as Fryeburg's Maine customers who receive adequate water service. Fryeburg points out that no party has contended that the water service received by East Conway customers violates New Hampshire's primary drinking water standards or any laws related to water quality. Fryeburg insists that the problem consumers find with the water is not that it fails water quality

standards, but that the water delivered through the 1883 cast iron main is inconsistent with “modern aesthetic expectations” for bottled water quality from the tap. Fryeburg insists that to bring the water to consumers’ expectations would cost \$480,000 or more, and that the fundamental issue in this docket since its initiation in February, 2004, has not been whether Fryeburg is unwilling to provide a higher level of service, but whether and how customers should pay for the costs of such service without exposing Fryeburg to an unreasonable risk that it will not recover its capital investment in the necessary facilities plus a reasonable return. Fryeburg concludes that there is no evidence or basis for the Commission to find that Fryeburg’s rates are illegal or unduly discriminatory under RSA 365:29, and the petition for reparations should be dismissed as a matter of law.

#### **B. Office of Consumer Advocate**

The OCA argues that the Commission’s authority to order reparations for inadequate water service arises expressly and impliedly from RSA 365:29. The OCA contends that the legislature granted the Commission powers to award reparations if, in the exercise of its judicial function, the Commission finds that a utility has been unjustly enriched at the expense of the ratepayers. Because the courts have indicated that a remedial statute should be construed liberally in order to give the broadest reasonable effect to its remedial purpose, the Commission may award reparations for inadequate water service to the East Conway customers of Fryeburg. *See* OCA Brief at 3.

The OCA points out that it filed a Rate Complaint and Petition for Reparations on July 26, 2005, which triggered the Commission’s express authority under RSA 365:29 to investigate the complaint and make a finding as to whether Fryeburg’s East Conway customers

have paid unjustly discriminatory rates for inadequate water service. The OCA contends that the courts have also recognized that the Commission has implied authority to order reparations on its own motion. *See* OCA Brief at 5. Therefore, the OCA concludes that the Commission has authority to initiate an inquiry into the appropriateness of reparations as it did in Order No. 24,471 (June 2, 2005).

The OCA argues that the Commission has authority to order reparations for inadequate water service because the law requires utilities to provide adequate service at just and reasonable rates. RSA 374:1-2. Because a complaint about inadequate service concerns the rates paid for those services, the OCA insists those rates may have been unjust or discriminatory because the utility has been unjustly enriched at the expense of its customers. The OCA concludes that the Commission may find that Fryeburg was unjustly enriched at the expense of the East Conway customers, and that an order of reparations is consistent with the Commission's authority.

As to when the two-year recovery period begins under RSA 365:29, the OCA did not make any specific recommendation but stated that the Commission could use the date of the OCA's Petition (July 22, 2005), the date on which it ordered a proceeding on reparations (June 2, 2005) or the date the original customer complaint was filed (January 14, 2005). Finally, the OCA stated that in the event the Commission should order reparations, the reparations should be paid to the individual customers rather than the escrow account as advocated by the OCA in its initial Petition.

### **C. Commission Staff**

Staff argues that the Commission has broad authority pursuant to RSA 365:29 to order reparations to customers for inadequate water service. Staff also insists that, consistent with judicial holdings, the Commission may initiate a reparations proceeding on its own motion. Staff Brief at 4-5. Staff contends that the statute clearly authorizes the Commission to order reparations if, after an investigation or hearing, the Commission determines that a utility has collected an unjust, unreasonable or discriminatory rate.

In determining whether a rate is unjust or discriminatory, Staff points out that RSA 378:10 prohibits utilities from giving undue preference, or imposing undue disadvantage in the provision of service. Staff notes that the courts have interpreted RSA 365:29 as giving the Commission authority to order reparations to customers where a utility has received the benefits of rates that are prejudicial or disadvantageous to customers. Because East Conway customers of Fryeburg have been disadvantaged by inadequate water service, Staff contends that reparations are warranted.

Staff acknowledges that it is unusual to request reparations on the basis of quality of service, but insists that there are several factors that support an award in this case. First, Staff notes there is ample testimony on the record indicating that the East Conway customers have experienced poor water quality for several years. Second, the East Conway customers have been disadvantaged by having to buy filters and bottled water, and replacing fixtures damaged by the water. Finally, Staff points out that Fryeburg had adequate notice of the water quality problem but failed to offer any ameliorative alternatives to its East Conway customers. Staff concludes that the Commission should require Fryeburg to make reparations to its East Conway customers.

Staff contends that the two-year recovery period under RSA 365:29 should begin on July 19, 2005. On July 19, 2005, the Commission held a prehearing conference on the issue of reparations and at the conclusion of the hearing, ordered the parties and Staff to meet and discuss how to proceed on the issue. *See* Staff's Brief at 6. The parties and Staff submitted a procedural schedule to the Commission which was subsequently ordered in a secretarial letter dated August 2, 2005. Therefore, Staff concludes that the two-year recovery period should begin on July 19, 2005. Finally, Staff argues that if the Commission determines that reparations are due, the Commission must follow the requirements of RSA 365:29 and order reparations be paid to the customers who paid the unjust rates.

### **III. COMMISISON ANALYSIS**

#### **A. Reparations Pursuant to RSA 365:29**

In Order No. 24,512, we requested briefs in order to assist us in determining whether reparations are permissible in this case. After consideration of the arguments, we conclude that we do not have the statutory authority to order reparations for the inadequate quality of the water provided by Fryeburg. While we agree with the OCA and Staff that the Commission may initiate a reparations proceeding on its own initiative, we find that the Commission's authority under RSA 365:29 is limited to ordering reparations when an "illegal or unjustly discriminatory rate, fare, charge or price has been collected," which is not the case in this proceeding.

There are few New Hampshire Supreme Court cases that discuss RSA 365:29. In *Granite State Transmission Co. v. State*, 105 NH 456 (1980), the Court, in ruling on a case concerning the propriety of passing utility company refunds on to customers, found that under

RSA 365:29 there was no doubt that the Commission had the authority to order refunds in proper circumstances. The Court also opined that RSA 365:29, in combination with RSA 378:10, which prohibits “any undue or unreasonable preference or advantage to any person, corporation, or to any locality, or to any particular description of service,” “gives the Commission authority to prevent unreasonable prejudice or disadvantage to customers.” In support, the Court cites *Public Service Co. v. State*, 102 NH 150 (1959), which dealt with the reasonableness of certain rate design classifications. The Court also made reference to RSA 365:29 in *Appeal of Granite State Electric Company*, 120 NH 536 (1980), in which it held that “the PUC may order a public utility, which has collected charges at rates which are not final and which are later found to be unlawful, to make due reparation.”

Reading RSA 365:29 in the light of the Court’s discussion of the statute, it is plain that there are two separate inquiries at play. One concerns whether the rate is illegal and the other concerns whether the rate is unjustly discriminatory. For the reasons discussed below, we cannot conclude that the inadequate service provided by Fryeburg constitutes either an illegal rate or an unjustly discriminatory rate under the relevant statute.

In *Granite State Transmission Co.* and *Appeal of Granite State Electric Company*, the Court addressed the issue of whether rates were illegal. In the former case, the Commission sought to pass on to customers the full value of a refund that the utility received from its supplier and in the latter the Commission required a refund to customers with interest to account for the inclusion of customer deposits in rate base that the Court had found improper. In the case before us, Fryeburg has permanent rates in place and there has been no judicial finding that those rates are unlawful. Accordingly, there is no basis for ordering reparations in these circumstances for



an illegal rate under the reasoning in *Granite State Transmission* or *Granite State Electric*.

In *Public Service Company v. State*, the Court addressed whether the Commission had set rates for a particular class of customers in a way that created an undue or unreasonable prejudice or advantage, that is, whether the rates were unjustly discriminatory as compared to other customers. In the case before us, it is the regrettable circumstance that the body of Fryeburg's New Hampshire customers are receiving the same inadequate quality of water. Accordingly, there is no statutory basis for ordering reparations in these circumstances for an unjustly discriminatory rate under the reasoning in *Public Service Co.*<sup>2</sup>

### **B. Further Proceedings**

On September 16, 2005, we granted the OCA's assented-to motion to suspend the procedural schedule in this proceeding pending the October 14, 2005 filing of briefs on the reparations issue and a Commission decision on the relevant legal issues. In light of our decision on reparations above, it is now necessary to establish a revised procedural schedule for the completion of this investigation.

In this proceeding, the Commission has sought to address quality of service shortcomings by, among other things, imposing penalties on the Company and its management. The Commission continues to press for an engineering solution to the inadequate water quality provided by Fryeburg to its New Hampshire customers, but the cost and complexity of the proposed solutions has thus far posed significant obstacles to a resolution. In order to establish a

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<sup>2</sup> The OCA would have us find that the rates to New Hampshire customers are unjustly discriminatory as compared to rates for customers in Maine who do not have the same water quality problems. The rates for the company overall are set by the Maine Public Utilities Commission, and filed with this Commission for the New Hampshire customers. We do not read our statutes as authorizing reparations for discriminatory rates between customers within two jurisdictions.

revised procedural schedule to, among other things, address such an engineering solution, we will hold a prehearing conference on January 23, 2006, at which we expect the following issues as well to be addressed.

In Order No. 24,471 (June 2, 2005), the Commission directed Fryeburg to evaluate alternatives for curing the water quality issues that are the subject of this proceeding and to “submit detailed and definitive testimony as to how to implement a solution.” There is a serious question as to whether the resulting testimony, filed on August 1, 2005, complies with the Commission’s directive. The parties should therefore be prepared at the prehearing conference to address the sufficiency of the August 1, 2005 testimony.

Order No. 24,471 also spoke to the Commission’s intention to keep informed regarding “developments related to the creation of a water district...or other activity regarding a transfer of responsibilities.” It appears that a vote will be held in Fryeburg on January 17, 2006, on the creation of a water district by the Town of Fryeburg, Maine. Fryeburg should be prepared to convey the results of that vote at the prehearing conference and to explain the status and potential relevance of this vote or other similar Town or governmental actions to this proceeding.

In his testimony on August 1, 2005, Mr. Hastings indicated that “the company has entered into a letter of intent to sell the operation west of the Saco River to Pennichuck Corporation.” Fryeburg shall submit a copy of that letter and any other related documents to the Commission by January 6, 2006. Fryeburg should also be prepared to give an update at the prehearing conference on the status of this or any other effort to transfer the company.

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

**ORDERED**, that the Complaint and Petition for Reparations is DENIED; and it is

**FURTHER ORDERED**, that Fryeburg file information with the Commission by January 6, 2006 regarding the status of its negotiations with Pennichuck Corporation; and it is

**FURTHER ORDERED**, that a prehearing conference will be held at 10:00 a.m. on January 23, 2006, to address the issues discussed herein.

By order of the Public Utilities Commission of New Hampshire this ninth day of December, 2005.

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Thomas B. Getz  
Chairman

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Michael D. Harrington  
Commissioner

Attested by:

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Debra A. Howland  
Executive Director & Secretary