

STATE OF NEW HAMPSHIRE

PUBLIC UTILITIES COMMISSION

October 5, 2010 - 10:08 a.m.
Concord, New Hampshire

NHPUC OCT25'10 AM11:32

RE: DW 09-291
FRYEBURG WATER COMPANY, INC.:
Notice of Intent to file rate
Schedules. (Prehearing conference)

PRESENT: Chairman Thomas B. Getz, Presiding
Commissioner Clifton C. Below
Commissioner Amy L. Ignatius

Sandy Deno, Clerk

APPEARANCES: Reptg. Fryeburg Water Company, Inc.:
Justin C. Richardson, Esq. (Upton & Hatfield)

Reptg. PUC Staff:
Marcia A. B. Thunberg, Esq.
James Lenihan, Gas & Water Division
Douglas Brogan, Gas & Water Division
Jayson LaFlamme, Gas & Water Division

Court Reporter: Steven E. Patnaude, LCR No. 52

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P R O C E E D I N G

CHAIRMAN GETZ: Okay. Good morning. We'll open the prehearing conference in Docket DW 09-291. On January 4, 2010, Fryeburg Water Company filed for approval of an approximately 15 percent rate increase with the Maine Public Utilities Commission. And, on April 16th, the Maine PUC approved a stipulation providing for a rate increase of 12.9 percent to Fryeburg's Maine customers.

On August 11th, Fryeburg filed the results of the Maine proceeding with the Commission, along with a Petition for Temporary Rates. Fryeburg seeks approval of temporary rates at the level approved for permanent rates in Maine.

Fryeburg also has submitted a Petition for Authorization to Serve Customers as a Foreign Business Entity pursuant to 374:24. In the alternative, it seeks an exemption from rate regulation pursuant to RSA 362:4.

Can we take appearances please.

MR. RICHARDSON: Good morning, Mr. Chairman. Justin Richardson, from Upton & Hatfield, on behalf of Fryeburg Water Company. Ms. Andrews, the Company's Treasurer, was unable to be here. She is the Director of Crafts for the Fryeburg Fair, which is going

1 on this week, and the Company wanted to proceed in her
2 absence.

3 CHAIRMAN GETZ: Good morning.

4 MS. THUNBERG: Good morning,
5 Commissioners. Marcia Thunberg, on behalf of Staff. And,
6 with me today is Jim Lenihan, Jayson LaFlamme, and Doug
7 Brogan. Thank you.

8 CHAIRMAN GETZ: Good morning. Then, I
9 don't see any petitions to intervene. I note that the
10 affidavit of publication has been filed. So, Mr.
11 Richardson, a statement of the position of the Company.

12 MR. RICHARDSON: Thank you, Mr.
13 Chairman. The Company, according to the schedules that
14 have been filed, has really been losing money for the last
15 three years. The principal reason for that is a decline
16 in sales to Pure Mountain Springs, which is now an
17 affiliate of Poland Springs. I think, since the last rate
18 case, which was based on a 2006 test year, there were
19 sales of \$179,000 per year to Pure Mountain Springs. In
20 2009, that figure dropped to 86,000 in sales to Pure
21 Mountain Springs. In 2009, revenues were approximately
22 483,000. So, that's about almost a 20 percent decrease.
23 So that the Company is really in -- it's had net operating
24 losses in 2007, '08, and '09, the Company is really in

1 dire need for temporary and permanent rate relief.

2 We're hopeful to work out a schedule
3 concerning all of the issues, concerning the Petition
4 Operate as a Foreign Business Entity. It's a bit of a
5 novel legal question. There was a lot of research into
6 the history of the provision. I'm happy to answer any
7 questions or walk through it. It's really the Company's
8 view that this provision was created specifically with
9 places like Conway in mind, according to legislative
10 history, where there really wasn't an ability for New
11 Hampshire to have its own utility, they allowed foreign
12 utilities, which were normally prohibited from serving to
13 cross state lines. And, the testimony before the
14 Legislature was that what the concern was is that the
15 entity providing service be a utility in the state they're
16 originating from and that they charge the same rates.
17 And, that's what the Company is asking for authorization
18 to do.

19 Marcia has reminded me that there is
20 also a waiver request for -- to allow the Company to
21 proceed in this case based upon its Maine PUC filings, as
22 opposed to all of the schedules that are specified under
23 the Commission's own rules. We've agreed to work with the
24 PUC Staff to submit, you know, any information that is

1 requested that may differ between what's filed in Maine
2 and what's filed in New Hampshire, and that that seems
3 like a good basis for proceeding.

4 CHAIRMAN GETZ: Thank you.

5 Ms. Thunberg.

6 MS. THUNBERG: Thank you, Commissioners.
7 The Commission Staff has a prepared statement that I will
8 read in.

9 As indicated by Attorney Richardson, the
10 assented to motion for waiver of Rule 1604.01 still has
11 not been ruled upon, and just wanted to bring that to the
12 Commission's attention. Staff assented to that motion.
13 We feel that the information can be obtained through
14 discovery that would otherwise be provided in the 1604
15 filing.

16 With respect to Staff's review of the
17 rate case, it historically has been a brief review, given
18 that the State of Maine conducts its review of the
19 permanent rates and conducts a thorough audit of the books
20 and records of the Company. The Company has provided
21 those, the filings to Maine, to New Hampshire, and so
22 Staff will be reviewing those.

23 Staff has already worked out a proposed
24 procedural schedule with the Company. We expect to file

1 that with the Commission later today. That procedural
2 schedule provides for an opportunity for discovery, an
3 opportunity for Staff and intervenor testimony, should
4 there be any intervenors, and should there be a need for
5 Staff testimony. Fryeburg is seeking temporary rates in
6 this proceeding. A temporary rate hearing is provided in
7 this proposed procedural schedule.

8 With respect to past issues that have
9 come up with this company, water quality has been a past
10 concern, but Staff is not aware that water quality is a
11 concern in this present docket. Although the State of
12 Maine has approved a 12.9 percent increase in permanent
13 rates, the Company is not charging its New Hampshire
14 customers those rates. This has been a slight problem in
15 the past. And, it is not a problem in this instant
16 docket, because the Company is not charging the rates and
17 is waiting for New Hampshire approval first.

18 The biggest issue that Staff sees with
19 this case is the Petition for Authority to Serve Customers
20 as a Foreign Business Entity. Staff has not yet done a
21 legal -- done the legal research to come up with a
22 position at this time. On that request, there is an
23 alternate argument that is made for a request for
24 exemption under 362:4. Staff's position on that

1 permissive exemption is that at this time it is not likely
2 to support it, given the water quality concerns that have
3 occurred with the Company in the past. But Staff will
4 keep an open mind and listen to the Company's arguments on
5 both of those; the exemption under 362:4 and the Foreign
6 Business Entity option under RSA 374:24.

7 Other than that, Staff looks forward to
8 working with the Company. And, there don't appear to be
9 any intervenors, but, if there are any, Staff will work
10 with them as well with the procedural schedule. Thank
11 you.

12 CHAIRMAN GETZ: Okay. Thank you.

13 CMSR. BELOW: Well, just a question.
14 Apparently, at some point, the OCA said they took no
15 position on the waiver request. But they haven't actually
16 indicated an intent to participate in this proceeding, is
17 that correct?

18 MR. RICHARDSON: I spoke with
19 Ms. Hollenberg at the time of our filing, and shared with
20 her a draft motion. And, she indicated to me that OCA was
21 unlikely to participate in this case. But I haven't heard
22 anything, you know, just beyond e-mail exchanges and phone
23 conversations to that effect. So...

24 CMSR. BELOW: Okay. Thank you.

1 CHAIRMAN GETZ: Just a couple of
2 questions for both counsel. In looking at the Petition
3 for Authorization to Serve under 374:24, which, as I take
4 it, there's some legislative history from 1967, seems to
5 be the relevant date. And, I think, when Mr. Richardson
6 was making his initial comments, it seems like the
7 situation here is somewhat analogous to the way
8 municipalities are treated today; New Hampshire
9 municipalities serving outside their boundaries. But was
10 there a thought about how to address this legal issue?
11 Briefs? I just want to try to get an idea of where you
12 might be going on that. And, the other question, I guess,
13 is on the alternative with exemption, I guess would be for
14 rate regulation, but, even if it were for rate regulation,
15 I assume that we could still retain jurisdiction over
16 issues regarding quality of service and customer
17 protection type issues, which leads me to even another
18 question, of what's the -- what is the current state of
19 those issues in Fryeburg, if we need to get that on the
20 record?

21 MR. RICHARDSON: Sure.

22 CHAIRMAN GETZ: So, I'll give you at
23 least three things to talk about.

24 MR. RICHARDSON: All right. In terms of

1 the quality of service, that's very important to the
2 Company. And, there was actually a -- I spoke with
3 Ms. Andrews, the Company's Treasurer this morning, and
4 there was a main break about a week ago. It was actually,
5 I think, a service cap came off, I'm not sure what that
6 means from a technical standpoint. But what was
7 interesting was is she told me that she spoke with not Bob
8 Swett, but another member of, I guess, the same family,
9 who had been involved in the prior complaints from, you
10 know, seven years ago. And, his comment was is that they
11 were very pleased with the Company's response. That, you
12 know, all of the service issues that were associated with
13 the main that's been replaced have really been taken care
14 of. And, the Company has really been making an effort to
15 make sure that everything's in order. And, you know, the
16 problems that were fixed related to water quality were
17 very expensive, but those have been addressed now, and
18 that, really, the Company has really put its -- a good
19 foot forward in that regard.

20 Looking at the request to serve as a
21 foreign business entity, a couple things come to my mind
22 is it requires approval of this Commission in order to do
23 that. And, I think that, if we reached a point, and I
24 don't think that that would ever happen, but, if it did

1 reach the point where, for example, the Company's rates
2 were, you know, unreasonable. If there were some
3 improvements, you know, that were just so large and so
4 unnecessary and out of proportion to what was needed to
5 serve the New Hampshire customers, I would assume that
6 this Commission could rescind its approval and retain
7 authority to do that. So, unlike a municipal utility,
8 where there are certain statutory exemptions that exist in
9 the laws of New Hampshire, this is an exemption that
10 exists but for the approval issued by the Commission. In
11 other words, there is a flat out exemption or prohibition
12 for foreign business entities to serve in New Hampshire.
13 The origin of that requirement was -- goes back to the
14 early days of the Commerce Clause, the Attleboro gap,
15 those type of legal doctrines.

16 But what's interesting about Fryeburg is
17 is that Fryeburg predates even the establishment of the
18 New Hampshire Public Service Commission in 1911. And, the
19 reason all this comes to play is, basically, this is a
20 company that's uniquely situated. It straddles the state
21 lines. It's clearly subject to the rates that are
22 provided to local service -- excuse me, to local customers
23 by default. So, if the Commission were to decide, you
24 know, "jeez, we exempted Fryeburg Water Company from

1 having to get rate approvals on a condition, for example,
2 that service was adequate, that the rates were the same as
3 charged to Maine PUC customers." What I'm trying to say
4 is this is not an irrevocable decision. It's something
5 that could be revisited at a later time.

6 And, in terms of the schedule for
7 resolving it, which I think was your last issue, I think
8 it makes sense to see, we've kind of submitted our brief,
9 as it were, in the petition, our understanding of what the
10 history is. And, if Staff is -- wants to take a contrary
11 position, and we see that, I think that we resolve that at
12 the time of resolving permanent rates.

13 And, that's -- I think touches on all
14 your questions.

15 CHAIRMAN GETZ: Thank you.

16 MS. THUNBERG: I'll start with water
17 quality. Staff is not aware that there are any other
18 water quality problems. I know Attorney Richardson had
19 mentioned the main break. But, as far as any chronic
20 problems, such as the old pipe that was under the river a
21 few years ago, Staff is not aware that there is any water
22 quality concerns of that kind of nature. So, Staff is
23 pleased with the water quality.

24 CMSR. BELOW: Excuse me. But I think

1 part of the question was, in light of the Petition for
2 Exemption, if water quality and customer service issues
3 would be -- might be preserved as a New Hampshire PUC
4 jurisdictional issue, even if we granted the petition with
5 regard to foreign business and accepting the rates
6 established by the Maine PUC?

7 MS. THUNBERG: Correct. With respect to
8 the permissive exemption alternative requested under
9 362:4, it is permissive in nature. And, as Attorney
10 Richardson had said, if it's an exemption that's offered,
11 it's an exemption that can be retracted, if a change in
12 circumstances, such as water quality, occurs.

13 With respect to the last issue of
14 briefing perhaps on RSA 374:24, the procedural schedule
15 that we have initially proposed calls for testimony,
16 doesn't specifically call for legal briefs to be
17 submitted. I think it's fair that, if the issue, the
18 legal underpinnings of their argument need to be explored,
19 that it could be explored with a petition and a --
20 testimony, excuse me, and in an accompanying legal memo,
21 or the Commission could ask for legal briefs, you know, in
22 addition to the procedural schedule.

23 CHAIRMAN GETZ: Well, I guess, at this
24 point, I take it from Mr. Richardson's comments, that they

1 put forth their position.

2 MS. THUNBERG: Uh-huh.

3 CHAIRMAN GETZ: So, I guess, at some
4 point, to hear something more from Staff as a response
5 would be useful. And, I assume that these are things that
6 can go in parallel. We're going to look at the rate issue
7 and look at these other alternatives parallel with that.
8 So, I don't think I -- I don't think we have any
9 preference about how it plays out as a matter of
10 procedure. So, if you can reach some agreement in the
11 procedural schedule, that's fine.

12 MS. THUNBERG: And, indeed, we do have
13 the opportunity for testimony, a opportunity for a
14 settlement agreement. And, usually, these kind of serious
15 legal issues get shaken out in those documents.

16 CHAIRMAN GETZ: Okay.

17 MS. THUNBERG: Thank you.

18 CHAIRMAN GETZ: All right. Anything
19 else?

20 MR. RICHARDSON: If I may, just to
21 clarify one issue. And, that is the -- my comments about
22 revocation of the exemption or approval under 374:24.
23 It's the Company's expectation that this Commission would
24 grant it subject to a requirement that the Company

1 continue to provide service that is reasonably safe and
2 adequate under RSA 374:1, and other quality of service
3 type issues. So that we wouldn't -- we would never ask
4 the Commission to kind of turn its back on the New
5 Hampshire customers. All we're really hoping to do is to
6 avoid the costs of going through rate reviews, the costs
7 for, you know, financing approvals, that would increase
8 significantly the cost of New Hampshire customers, because
9 there's only 67 of them. And, so, the idea is, if we can
10 proceed on that basis, continue to be subject to this
11 Commission's jurisdiction over service, but be able to
12 move more quickly and less expensively to the financial
13 rate approvals, to the authority to incur debt, without
14 having to seek prior authorization, then that would really
15 be a significant benefit to the Company's customers. And,
16 that's really, I think, something that I hope that the
17 Commissioners will understand.

18 In our last rate case, there were about
19 \$20,000 in expenses that were approved for 67 customers.
20 I forget what that works out to per customer, but we had
21 to amortize it over a long time. We did it, I think, over
22 three years without interest. The total change across all
23 of the Company's New Hampshire customers was \$130 per
24 year. So, it was a really significant and expensive

1 process for the Company and its customers to go through
2 this, obtain New Hampshire rate approval, and then have to
3 charge the customers the cost for doing that. And, that's
4 really what we're hoping to avoid in this.

5 CHAIRMAN GETZ: And, it sounded like you
6 were contemplating in such a process there still be some
7 reasonable notice/informational steps that would be taken
8 by the Company?

9 MR. RICHARDSON: Uh-huh. Yes. I
10 anticipate the Company would be subject to the requirement
11 that it file its tariffs with this Commission, so it
12 wouldn't charge anything until, you know, it obtained
13 Maine PUC approval. It would provide notice to its New
14 Hampshire customers, it would provide notice of any
15 changes to its tariffs that would remain here. Anything
16 concerning quality of service, any customer complaints,
17 even complaints related to rates, could be investigated by
18 this Commission and -- under RSA 365 and addressed
19 accordingly.

20 CHAIRMAN GETZ: Okay.

21 MR. RICHARDSON: Thank you.

22 CHAIRMAN GETZ: Anything further,
23 Ms. Thunberg?

24 MS. THUNBERG: No thank you.

1 CHAIRMAN GETZ: All right. Then, we
2 will close this prehearing conference and await a
3 recommendation on the schedule for the proceeding. Thank
4 you.

5 MS. THUNBERG: Thank you.

6 **(Whereupon the prehearing conference**
7 **ended at 10:28 a.m.)**

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