

# Schacht & McElroy

*Robert M. Schacht  
Michael R. McElroy*

*Attorneys at Law*

*(401) 351-4100  
fax (401) 421-5696*

*Members of Rhode Island  
and Massachusetts Bars*

*21 Dryden Lane  
Post Office Box 6721  
Providence, Rhode Island 02940-6721*

*email: RMSchacht@aol.com  
McElroyMik@aol.com*

September 12, 2005

Luly Massaro  
Clerk  
Public Utilities Commission  
89 Jefferson Boulevard  
Warwick, RI 02888

Re: Pawtucket Water Supply Board – Docket No. 3674

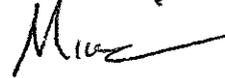
Dear Luly:

As you know, this office represents the Town of Cumberland.

Enclosed for filing in this matter are an original and nine copies of The Town of Cumberland's Objections to (1) Pawtucket Water Supply Board's [Second] Motion to Strike Testimony and Request for Miscellaneous Relief and (2) the Motion to Strike of the Division of Public Utilities and Carriers. Copies have been sent to the service list.

If you have any questions, please feel free to call.

Very truly yours,



Michael R. McElroy

MRMc:ecm  
Cumberland:Massaro13  
cc: Service List

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS  
PUBLIC UTILITIES COMMISSION

IN RE: PAWTUCKET WATER SUPPLY BOARD : DOCKET No. 3674  
GENERAL RATE FILING :

THE TOWN OF CUMBERLAND'S OBJECTIONS TO (1) PAWTUCKET WATER  
SUPPLY BOARD'S [SECOND] MOTION TO STRIKE TESTIMONY AND REQUEST  
FOR MISCELLANEOUS RELIEF AND (2) MOTION TO STRIKE OF THE DIVISION  
OF PUBLIC UTILITIES AND CARRIERS

On Thursday, September 8, 2005, PWSB filed its second motion to strike testimony and request for miscellaneous relief in this matter. This motion seeks to strike the testimony filed for Cumberland by Christopher Collins, Superintendent of the Cumberland Water Department, and David Russell. On Friday, September 9, 2005, the Division filed a motion to strike nearly all of the testimony of Mr. Collins, Mr. Russell, and of Thomas Bruce, Cumberland's Finance Director. Cumberland objects to these motions.

As things currently stand, PWSB has presented five witnesses (direct testimony, rebuttal testimony, and supplemental testimony<sup>1</sup>) totaling 114 pages, plus exhibits. The Division has presented two witnesses (direct and surrebuttal testimony) totaling 61 pages plus exhibits. Cumberland has presented three witnesses (direct and surrebuttal testimony), totaling 60 pages plus exhibits. This is an evenly balanced filing of testimony in accordance with the usual process. To date, all parties have filed direct and rebuttal

---

<sup>1</sup> Nothing in the procedural schedule authorized the filing of supplemental testimony, but Cumberland will not object to this filing which was made on September 7, 2005, without first filing a motion seeking permission to file testimony not contemplated by the procedural schedule.

testimony, yet PWSB and the Division are seeking to strike not only Cumberland's rebuttal testimony, but its direct testimony as well, leaving it without any testimony at all.

### I. THE DIVISION'S MOTION TO STRIKE

The Division's motion to strike is essentially based on a single hyper-technical (and incorrect) argument regarding presentation of rebuttal testimony before the Commission. In the "old days", rate cases were routinely divided into a direct phase and a rebuttal phase. Using this approach, direct testimony would be pre-filed by all parties, and then a hearing would be held at which the witnesses would be cross-examined on their direct testimony. After this hearing on direct testimony, rebuttal testimony would then be pre-filed by all parties, then there would then be a rebuttal hearing at which the witnesses would be cross-examined on their rebuttal testimony. The Commission would then render a decision, often after receiving post-hearing briefs.

In more recent years, this process has been compressed. There is now usually only one set of evidentiary hearings. In most cases, both the direct and rebuttal testimony of all parties are pre-filed prior to the single set of evidentiary hearings. In some cases, rebuttal is not pre-filed but is presented on the stand. The ultimate goal in all cases is the same. The Commission gives all parties the opportunity to present direct testimony, and then all parties are given the opportunity to present rebuttal testimony.

These procedures allow all parties to present both direct and rebuttal testimony, and they satisfy basic principles of due process. Each party is given the opportunity to present its direct evidence, and then to rebut the evidence presented by each party.

The procedural schedule in this matter was drawn up by counsel for the Commission at a pre-hearing conference on May 11, 2005, with the consent of the parties. It gives all parties the opportunity to file both direct testimony and rebuttal testimony. Unfortunately, the Division's motion to strike is grounded in the single argument that Cumberland was somehow barred by the wording of the procedural schedule from rebutting the Division's direct testimony. This would be completely contrary to past Commission practice, was never discussed during the pre-hearing conference, and could not have been the intent of the procedural schedule.

The Division's only support for its argument that Cumberland should not be allowed to rebut the Division's testimony is a hyper-technical reading of one line of the memorandum from Commission counsel confirming the procedural schedule which states that September 6, 2005, is the deadline for "filing of Division's & Intervenor's surrebuttal testimony". The Division argues that the use of the word "surrebuttal" by Commission legal counsel meant that the intervenor Cumberland was only allowed to rebut PWSB's rebuttal testimony, and that Cumberland was allegedly barred from rebutting the Division's direct testimony. This is not the case and would clearly never have been agreed to.

It would make no sense for one party to be barred from rebutting the direct testimony of the Division. PWSB was given the opportunity to rebut the Division's direct testimony, and the Intervenors were similarly given the opportunity to rebut the Division's

direct testimony. We respectfully submit that the Division's motion seeking to strike all of the testimony of Cumberland's witnesses that rebuts the Division's direct testimony should be rejected. To grant the motion would deny Cumberland the opportunity to present a complete case in the same manner as the other parties to this matter.

The Division points out that the date for the filing of Cumberland's direct testimony was approximately a week after the Division filed its direct testimony. This is true. However, the initial schedule drawn up by counsel for the Commission had both the Division and the Intervenors simultaneously filing their direct testimony on July 26, 2005. Because this date would have been in the middle of the vacation scheduled for Cumberland's counsel, it was agreed by all parties at the first pre-hearing conference that the Division would file on July 26, 2006, so that PWSB could begin reviewing the Division's testimony, and then Cumberland could file approximately a week later when counsel for Cumberland returned from vacation.

This approximately one week differential in the filing of the Division's direct testimony and the Intervenor's direct testimony was not scheduled for the purpose of somehow requiring Cumberland to simultaneously file both its direct case and its rebuttal testimony to the Division's case only a week after the Division filed its direct case and only days after Cumberland's counsel returned from vacation. As stated in the scheduling memorandum, the testimony to be filed by the Intervenors was "direct testimony", not rebuttal testimony.

It was always the understanding of counsel for Cumberland that the September 6, 2005, date for the filing of "Division's and Intervenor's surrebuttal testimony" meant that

after this final filing (1) the Division would have rebutted PWSB's rebuttal testimony and the Intervenors' direct testimony, and (2) the Intervenors would have rebutted PWSB's rebuttal testimony and the Division's direct testimony. Therefore, from a technical standpoint, the Intervenors would be filing "surrebuttal" to PWSB's rebuttal testimony and "rebuttal" to the Division's direct testimony. This is exactly what was done and Cumberland submits it is in accordance with what was intended, what is usual practice before the Commission, and what satisfies due process. To adopt the Division's argument would foreclose the Intervenors from rebutting the direct testimony of the Division by way of a procedural scheduling memorandum confirming a conference at which the issue was never discussed. This could not possibly have been intended.

If the Division feels that it does not have sufficient time to conduct discovery from Cumberland due to the time constraints imposed by the current schedule (which the Division agreed to), Cumberland is agreeable to delaying the evidentiary hearing on the issue of the proposed Cumberland surcharge to provide the Division and PWSB with more time to conduct discovery and prepare for the cross-examination of Cumberland's witnesses.

The surcharge issue does not have any bearing on the dollars that PWSB will be allowed to collect in rates. It only affects how those dollars will be paid by the ratepayers. The decision in this case is not due until November 10, 2005. The rate year in this case does not commence until January 1, 2006. No briefing schedule has yet been established. We could go forward with the evidentiary hearings on PWSB's revenue

requirements issues as scheduled and then delay the separate day which has been set aside for the surcharge evidence for a few days.

In essence, the parties already agreed to this procedure in the second pre-hearing conference that was held in this matter by setting aside Friday, September 16, 2005, for testimony solely on the surcharge issue. This was done to accommodate witnesses and to isolate this issue. If it is necessary to slide the surcharge testimony date to give the Division and PWSB more time to take discovery to more fully prepare to cross-examine Cumberland's witnesses, Cumberland has no objection to that process. In the meantime, the case can go forward as currently scheduled on the revenue requirements issues.

It should be noted, however, that PWSB has already issued 22 data requests to Cumberland regarding the testimony of Mr. Russell as it relates to the proposed surcharge. Cumberland expects to have its responses filed prior to the currently scheduled surcharge hearing on Friday, September 16, 2005.

The proposed Cumberland surcharge issue is a single issue. Moreover, it is an issue that was litigated at length only two years ago through examination and cross-examination of witnesses, arguments of counsel, and filing of briefs in PWSB's last full PWSB rate Docket No. 3497. All counsel and witnesses involved in the last docket for the Division and PWSB are also involved in this docket. It would seem that a short delay of the testimony only on the surcharge issue would provide the Division and PWSB with whatever additional time they feel is necessary to fully prepare themselves to cross-examine Cumberland's witnesses on this limited issue. Certainly, Cumberland should not be deprived of the right to rebut the Division's direct testimony.

For the foregoing reasons, Cumberland respectfully submits that the Division's motion to strike should be denied.

## II. PWSB'S MOTION TO STRIKE

PWSB has filed a motion to strike the testimony of Mr. Russell and Mr. Collins. PWSB complains that the filing of surrebuttal testimony by Cumberland from Mr. Collins, the Superintendent of the Cumberland Water Department (5 pages), Mr. Russell (27 pages), and Mr. Bruce (11 pages) prejudices PWSB's ability to prepare its case for the evidentiary hearings.<sup>2</sup> The suggestion Cumberland has made concerning separating the surcharge issue and setting aside a new date for litigating that single issue, which does not affect revenue requirements, should alleviate PWSB's concerns in this regard. Moreover, as pointed out above, PWSB has already issued 22 data requests regarding Mr. Russell's testimony, and Cumberland expects to have those responses in PWSB's hands before Friday, September 16, 2005.

---

<sup>2</sup> PWSB's motion argues that Mr. Bruce's filing is 167 pages long. Mr. Bruce's surrebuttal testimony is only 11 pages long. It does have a complete copy of the valuation analysis performed by the Tax Assessor, as well as Mr. Bruce's resume, attached as Exhibits 1 and 2 to his testimony, and these two exhibits do total approximately 150 pages. However, the valuation analysis was previously attached as Exhibit 1 to the direct testimony of Mr. Bruce when he filed it over a month ago on August 5, 2005. Unfortunately, Cumberland discovered during the discovery phase that, due to a copying error, certain pages of the valuation analysis had been inadvertently omitted from the exhibit. Also, because PWSB and Cumberland have been involved in Superior Court litigation concerning the valuation analysis, we believed that PWSB had access to the valuation analysis in its complete form. Because that would not be true for the other parties, Mr. Bruce apologized for the copying error that led to the attachment of the incomplete valuation analysis to his direct testimony and he attached the complete valuation analysis to his surrebuttal testimony to Exhibit 1. Because PWSB has now clearly conceded that the legality and amount of the valuation imposed on the tangible property are not at issue before the Commission, but are only at issue before the Superior Court, there is little in the valuation analysis that goes directly to the issues in this matter, except for the identification of tangible property being taxed.

PWSB's litigation approach, as well as the timing of its litigation moves, has had a direct bearing on Cumberland's filing of testimony by Mr. Russell. It was Cumberland's original intention to file its case utilizing only the testimony of Thomas Bruce, its Finance Director. Cumberland could not anticipate that PWSB would wait for a month after Mr. Bruce's testimony was filed to then file a motion to strike his entire testimony on the ground that he is not the right kind of expert and should not be allowed to testify at all in this matter.

It is certainly PWSB's prerogative to file such a motion, but Cumberland submits that PWSB should have filed that motion shortly after having received Mr. Bruce's testimony instead of waiting a month to do so. This delay pushed the briefing of PWSB's motion (and the oral argument on that motion) directly into the path of the hearings. For whatever reason, PWSB chose to file its motion at the last minute, only a few days before Cumberland's surrebuttal testimony was due. Because Cumberland could not know whether or not the Commission would grant or deny the motion until after the surrebuttal date had passed, Cumberland had no choice but to attempt to hire an expert with the "right kind" of expertise so that if the Commission upheld PWSB's last minute motion to strike, Cumberland would not find itself without any testimony to support its case. Had PWSB filed its motion sooner, this matter would have been resolved much earlier. If the Commission denied PWSB's motion, there would have been no need for Mr. Russell's testimony. If the Commission granted PWSB's motion, Cumberland would have had time to put PWSB on advance notice that it intended to seek another expert such as Mr. Russell, and the timing problem that we are facing would have been averted.

PWSB wants to have its cake and eat it too. PWSB is asking the Commission (1) to strike the testimony of Mr. Bruce because he is allegedly not the right kind of expert, and then (2) to also strike the testimony of Mr. Russell, who is admittedly the right kind of expert, because Mr. Russell allegedly came in too late for PWSB to fully prepare for his cross-examination. PWSB also wants to strike Mr. Collins. PWSB, in essence, wants the Commission to summarily dispose of this matter by striking Cumberland's entire evidentiary case, leaving Cumberland without the opportunity to have any evidence heard by the Commission. All of this last-minute procedural litigation could have been averted if PWSB had simply filed its motion to strike Mr. Bruce's testimony earlier.

On the other hand, the solution is simple. We have already separated out the surcharge issue. A relatively short continuance for litigation of the surcharge issue would solve any timing problem that the Division or PWSB have. In light of the fact that the decision is not due until November 10, 2005, there is no reason why this option could not be used to allow all parties to fully present all their evidence on the surcharge issue to the Commission so that the Commission can make a fully informed decision, based on evidence from all parties, on this very important issue.

### III. PWSB'S COMPLAINT THAT CUMBERLAND HAS NOT COMPLIED WITH THE COMMISSION'S RULES IS WITHOUT BASIS IN FACT

PWSB continues to argue that Cumberland has not complied with the Commission's Rules. PWSB attempts to use this argument to both strike Cumberland's testimony and to ask the Commission to terminate Cumberland's status as an Intervenor (despite the fact

that Rule 1.13(e) only allows such a motion to be made by the Commission; it cannot be made by a party).

The following chronology will demonstrate Cumberland's compliance with the Commission's Rules in this matter, as well as its cooperation with counsel and the Commission in an attempt to expedite this decision to the maximum extent possible for PWSB:

1) March 21, 2005 – PWSB filed a motion asking the Commission for an exemption under Rule 2.6(a) to delay the rate year from November 1, 2005, to January 1, 2006. Cumberland did not object to the motion, and it was granted.

2) April 11, 2005 – PWSB filed its case with the testimony of five witnesses.

3) May 24, 2005 – Cumberland filed its motion to intervene two days before the May 26, 2005, intervention deadline. The motion was granted without objection.

4) June 15, 2005 – PWSB made a supplemental filing to make its filing fully comply with the Commission's rules. Cumberland made no objection to this supplemental filing.

5) June 29, 2005 – Cumberland moved for summary disposition on the surcharge issue. PWSB's response was due in 10 days under the Commission's Rules. At the request of counsel for PWSB, and as a professional courtesy, counsel for Cumberland agreed to an extension of time for the filing of PWSB's response. PWSB's response was therefore filed 15 days after Cumberland's motion was filed.

6) August 1, 2005 -- Due to personal reasons related to Cumberland's counsel just having returned from vacation, Cumberland moved to extend the date for the filing of

its direct testimony from August 2, 2005, to August 9, 2005. Counsel for PWSB and the Division graciously consented to this extension as a professional courtesy (as Cumberland had consented to PWSB's request for an extension to respond to Cumberland's motion for summary disposition).

7) August 5, 2005 – Four days before the August 9, 2005, due date, Cumberland filed its direct case with the testimony of a single witness – Thomas Bruce, Finance Director (17 pages).

8) August 10, 2005 – The Commission issued its first data request to Cumberland. Cumberland answered this request on August 11, 2005, 20 days before its due date.

9) August 10, 2005 – PWSB issued its first set of data requests to Cumberland. Cumberland answered those requests on August 30, 2005, one day before the due date.

10) August 17, 2005 – The Division issued its first set of data requests to Cumberland. Cumberland answered these data requests on August 30, 2005, eight days before the due date.

11) August 18, 2005 – PWSB issued its second set of data requests to Cumberland. Cumberland answered these data requests on September 7, 2005, one day before the due date.

12) September 6, 2005 – Cumberland filed its surrebuttal testimony on the due date.

13) September 9, 2005 – The Commission issued its second set of data requests to Cumberland (styled as its first set of data requests). Cumberland responded on that same day, 21 days before the due date.

14) September 9, 2005 – On this Friday, after 5:00 p.m., PWSB emailed its third set of data requests to Cumberland (consisting of 22 data requests directed to Mr. Russell's testimony). Cumberland will respond to these data requests prior to the September 16, 2005, hearings on the surrebuttal issue in this case.

Accordingly, Cumberland has met or exceeded every filing requirement in this docket. When asked, Cumberland has agreed to minor extensions and exceptions for PWSB, and PWSB and the Division have also agreed to a minor extension for Cumberland. This is as it should be in these cases. All counsel involved are experienced professionals, all are officers of the Court, and all have obligations not just to their clients, but to this Commission, to make their best efforts to cooperate with each other to move this case along so that the Commission can accomplish its dual role of giving the utility a full, fair and timely hearing on its rate increase request, while at the same time giving the ratepayers of the utility a full and fair opportunity to also present their evidence regarding the rate increase request.

CONCLUSION

For the foregoing reasons, Cumberland respectfully requests that the motions to strike and for other relief filed by the Division and PWSB be denied.

Respectfully submitted,  
Town of Cumberland  
By its attorney.



Date: September 12, 2005

---

Michael R. McElroy, Esq. #2627  
Schacht & McElroy  
21 Dryden Lane  
P.O. Box 6721  
Providence, RI 02940-6721  
Tel: (401) 351-4100  
Fax: (401) 421-5696  
E-mail: McElroyMik@aol.com

CERTIFICATE OF SERVICE

I hereby certify that on the 12th day of September, 2005, I mailed a true copy of the foregoing by first class mail to the following:

Joseph A. Keough, Jr., Esq.  
Keough & Sweeney  
100 Armistice Boulevard  
Pawtucket, RI 02860

Andrea Crane  
The Columbia Group  
PO Box 810  
Georgetown, CT 06829

David Bebyn  
B&E Consulting  
21 Dryden Lane  
Providence, RI 02904

Thomas S. Catlin  
Exeter Associates, Inc.  
5565 Sterrett Place, Suite 310  
Columbia, MD 21044

Pamela M. Marchand  
Chief Engineer  
Pawtucket Water Supply Board  
85 Branch Street  
Pawtucket, RI 02861

John T. Gannon, Esq.  
Central Falls Law Department  
580 Broad Street  
Central Falls, RI 02863

Leo Wold, Esq.  
Dept. of Attorney General  
150 South Main Street  
Providence, RI 02903

John Spirito, Esq.  
Division of Public Utilities and Carriers  
89 Jefferson Boulevard  
Warwick, RI 02888

  
Erin C. McElroy

Tom Bruce, Finance Director  
Town of Cumberland  
P.O. Box 7  
Cumberland, RI 02864-0007

Christopher Woodcock  
Woodcock & Associates, Inc.  
18 Increase Ward Drive  
Northborough, MA 01532