

**STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS
PUBLIC UTILITIES COMMISSION**

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

**MOTION TO STRIKE OF THE DIVISION OF
PUBLIC UTILITIES AND CARRIERS**

I. INTRODUCTION

On May 25, 2005, the Public Utilities Commission (“Commission”) entered a scheduling “Memorandum.” In pertinent part, the Commission established the following dates on which filings were to be made in Docket No. 3674:

07/26/05	Filing of Division’s direct testimony
08/02/05	Filing of Intervenor’s direct testimony
08/23/05	Filing of PWSB’s rebuttal testimony
08/30/05	Pre-hearing conference at 9:30 A.M.
09/06/05	Filing of Division’s & Intervenor’s surrebuttal testimony

In attempting to comply with the 09/06/05 date, Intervenor, the Town of Cumberland (“Cumberland”), filed “Surrebuttal Testimony” of three individuals:

Thomas Bruce, David Russell and Christopher Collins. Under the terms of the scheduling “Memorandum,” significant portions of each individual’s “Surrebuttal Testimony” cannot remotely be characterized as proper surrebuttal testimony. By the explicit terms of the scheduling “Memorandum,” the Commission only permitted the Intervenor to file surrebuttal testimony to **“PWSB’s rebuttal testimony.”** (Emphasis added). Even where Cumberland couched its putative “Surrebuttal Testimony” in terms of responding to “PWSB’s rebuttal testimony,” much of the “Surrebuttal Testimony” is actually direct testimony that should have been filed in Cumberland’s direct case. The Commission, therefore, must strike all of the portions of each individual’s “Surrebuttal

Testimony” that responds to the Division’s direct testimony, or that cannot reasonably be characterized as surrebuttal testimony but is actually direct testimony. (Copies of each individual’s testimony showing those portions that should be stricken is attached hereto.) A more thorough explanation for the basis of striking the applicable portions of each individual’s testimony is set forth below.

II. ARGUMENT

A. THE SURREBUTTAL TESTIMONY OF CHRISTOPHER COLLINS: PAGE 3, LINES 8-23; AND PAGE 4, LINES 1-23 SHOULD BE STRICKEN

Although this portion of Mr. Collins’ “surrebuttal testimony” is couched as a response to the rebuttal testimony of David Bebyn, seeking an explanation for a purported credit from Cumberland from the PWSB, it is actually nothing more than direct testimony. The sole, ulterior purpose of this portion of Mr. Collins’ testimony is to show that some water flows from Pawtucket’s system through Cumberland’s system and then back into Pawtucket’s system. According to Cumberland, given such a flow of water to PWSB’s Pawtucket customers through Cumberland’s pipes, Cumberland’s pipe system must benefit the Pawtucket customers as well as its Cumberland customers.

Thomas Bruce in his direct testimony, however, addressed this issue or certainly had an opportunity to do so. On Page 7, lines 7-11 and lines 17-21, Mr. Bruce was asked about benefits of certain assets to the system of the whole and to Cumberland. Mr. Bruce attempted to supply an answer to this question. Cumberland should not be given an opportunity to supplement its direct testimony in the guise of “surrebuttal testimony.” All of Mr. Collins “surrebuttal testimony” in this vein, therefore, should be stricken from the record.

Striking these portions of Mr. Collins' testimony on this ground is particularly appropriate since Cumberland was permitted to file direct testimony eight days *after* the Division filed its direct testimony. Cumberland had ample opportunity to carefully review the Division's direct testimony so as to be able to present its own direct testimony in as comprehensive manner as possible. Under these circumstances, Cumberland does not have any excuse for filing incomplete or deficient direct testimony with the Commission. The Commission should not allow Cumberland to utilize the surrebuttal phase of the Commission's administrative process to cure patent deficiencies with its direct testimony.

B. THE "SURREBUTTAL TESTIMONY" OF THOMAS BRUCE¹

- 1. Page 3, Lines 28-29; Page 4, Lines 1-9; Page 6, Lines 7-23; Page 7, Lines 1-23; Page 8, Lines 1-21; And Page 9, Lines 1-17 Should Be Stricken.**

In the places identified above, Mr. Bruce seeks to respond to statements purportedly made by Mr. Catlin in his direct testimony.² The Division's position for striking these sections of Mr. Bruce's "surrebuttal testimony" is based on the very nature and definition of the word "surrebuttal." The word "surrebuttal" consists of the noun "rebuttal," meaning "refutation by evidence or argument" and the prefix "sur" meaning "upon" or "on the basis of." "Surrebuttal," then, is argument "upon" or "on the basis of"

¹ The Division's reserves all of its rights to object to the direct testimony of Mr. Bruce as filed or as proffered to the Commission including the wholly irrelevant and immaterial exhibits attached to both his direct testimony and "surrebuttal testimony."

² On Page 3, line 28, Mr. Bruce erroneously identifies Mr. Catlin's direct testimony as "Pre Filed Rebuttal Testimony."

“rebuttal.” The Random House Dictionary of the English Language (1966) (unabridged edition).

The aforementioned portions of Mr. Bruce’s “surrebuttal testimony” are not true surrebuttal testimony. Under the May 25, 2005 scheduling “Memorandum,” the Commission only permitted PWSB, not the Division or Intervenors, to file “rebuttal testimony.” Argument filed to refute *that testimony* or “*upon*” *that rebuttal*, then, could only address the contentions contained in PWSB’s rebuttal testimony. It is completely improper for Cumberland, in each of the aforementioned sections of Mr. Bruce’s “surrebuttal testimony,” to address portions of Mr. Catlin’s direct testimony. By the explicit terms of the Commission’s scheduling “Memorandum,” these passages must be stricken from the record.³

2. Page 1, Lines 19-23; Page 2; Page 3, Lines 1-13; Page 9, Lines 19-22; And Page 10, Lines 1-14 Should Be Stricken.

These portions of Mr. Bruce’s “surrebuttal testimony” suffer from a similar infirmity to the deficient portions of Mr. Collins’ “surrebuttal testimony” identified above. Mr. Bruce had an opportunity in his direct testimony to discuss the general benefit to PWSB from the maintenance of distribution pipes located in Cumberland, as well as other putative tangible property. Mr. Bruce in fact filed direct testimony

³ The Division, moreover, did not agree (nor ever would have agreed) to a docket schedule that would allow a party to attack the Division’s direct case via surrebuttal testimony. To do so would expose the ratepayer to a gross inequity that could materially impact the outcome of the proceeding. The Division is precluded from all discovery of Cumberland’s experts due to time constraints imposed by the schedule itself. Just as importantly, the time-period between the deadline for the filing of Cumberland’s “surrebuttal testimony” and the first hearing date (7 days) is wholly inadequate given the ever-expanding horizon of Cumberland’s case. Lastly, given this brief time-period, it is unlikely that the Commission, itself, believed Cumberland’s surrebuttal phase could legally mushroom into an attack of the Division’s direct case or constitute a re-presentation of town’s direct case.

discussing the alleged benefit of a host of assets located in Cumberland to PWSB. See Bruce Direct Testimony, Page 7. It is wholly improper in surrebuttal testimony to attempt to supplement a prior deficient response or to provide testimony via surrebuttal that should have been set forth in direct testimony. Again, the nature of the testimony is not “surrebuttal testimony” by any reasonable definition of that term. The Commission must strike these portions of Mr. Bruce’s “surrebuttal testimony” as well.

C. THE “SURREBUTTAL TESTIMONY” OF DAVID RUSSELL

1. Page 15, Lines 20-25; Page 16; Pages 17-18; And Page 19, Lines 1-5 Should Be Stricken.

These portions of Mr. Russell’s “surrebuttal testimony” are legally defective for the same reason that those of Mr. Bruce in Part II(B)(1) above are defective. By the plain terms of the Commission’s scheduling “Memorandum,” the surrebuttal phase in this case is limited to addressing issues raised in PWSB’s rebuttal case, not the Division’s direct testimony. Like the applicable portions of Mr. Bruce’s “surrebuttal testimony,” all of Mr. Russell’s “surrebuttal testimony” that addresses Mr. Catlin’s direct testimony must be stricken from the record.

2. Pages 6, 7, 8, 9 and 10 and Page 11, Lines 1-6; Page 13, Lines 3-24; Page 19, Lines 7-25; And Pages 20-27 Should Be Stricken.

These portions of Mr. Russell’s “surrebuttal testimony” suffer from the same legal deficiency as those portions of Mr. Collins’ and Mr. Bruce’s “surrebuttal testimony” in Part II(A) and Part II(B)(2), respectively. Mr. Russell’s “surrebuttal testimony” does not rebut any issue raised in PWSB’s rebuttal case. Rather, it consists of general facts, opinions and conclusions, all of which could and should have been raised in

Cumberland's direct case. For the reasons discussed above, these portions of Mr. Russell's surrebuttal testimony, too, should be stricken from the record.

III. CONCLUSION

The Commission should not permit, Cumberland, or any party for that matter, to broaden the surrebuttal phase to such a degree that it renders the direct and rebuttal phases wholly meaningless. To condone such a practice will impose undue burden on the Commission and Division in preparing for and digesting the complex positions of the litigants. It will also present manifold opportunities for parties to engage in "ambush" litigation tactics that can result in substantial unfairness to litigants who have chosen to conform their participation to the letter and the spirit of the Commission's Rules of Practice and Procedure, Orders, Scheduling Memoranda, etc. For these and the foregoing reasons, the Commission should grant the Division's motion to strike.

**Oral Argument Is Requested
On This Motion**

DIVISION OF PUBLIC UTILITIES AND
CARRIERS

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CERTIFICATE OF SERVICE

I certify that a copy of the within memorandum of law was forwarded by regular mail, postage prepaid, to the individuals designated on the Docket's Service List on the September __, 2005.
