

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

IN RE: PAWTUCKET WATER SUPPLY BOARD

DOCKET NO: 3674

**PAWTUCKET WATER SUPPLY BOARD'S MOTION TO STRIKE TESTIMONY AND
REQUEST FOR MISCELLANEOUS RELIEF**

I. INTRODUCTION

The PWSB has filed a Motion to Strike the so-called "surrebuttal" Testimony of David Russell and Christopher Collins. In support thereof, the PWSB submits this memorandum of law.

II. FACTS

On May 25, 2005, the Public Utilities Commission ("Commission") entered a scheduling memorandum in this Docket. The applicable deadlines set forth in the memorandum are as follows:

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

As seen in this schedule, the Town of Cumberland's direct testimony was not due until one week after the Division's direct testimony. In addition, the Cumberland was given another week extension to file its direct testimony until August 9, 2005. At that time, the Town of Cumberland submitted testimony from only one witness – Thomas Bruce. On September 2, 2005, the PWSB filed a motion to strike Mr. Bruce's testimony. The PWSB's motion was based on the argument that Mr. Bruce is not an expert on many of the subjects on which he testified. On September 6, 2005, Cumberland submitted "surrebuttal" testimony from Thomas Bruce, and two new

witnesses – David Russell and Christopher Collins. While labeled as “surrebuttal” testimony, this testimony, particularly Mr. Russell’s, is actually direct testimony that Cumberland is attempting to introduce after the deadline for submitting direct testimony has passed.

III. ARGUMENT

It is basic hornbook law that the scope any type of rebuttal testimony is extraordinarily limited. Rebuttal testimony itself is limited to new evidence offered by an opposing party in the way of defense. *Hodosh v. Ford Motor Co.*, 477 A.2d 77 (R.I., 1984). Surrebuttal testimony is limited even further. “As a general rule, a party has no right to reply to evidence given on rebuttal, or, to introduce evidence by way of surrebuttal, unless facts are introduced in the case for the first time on rebuttal offered by an adversary.” *75 Am. Jur. 2d Trial* § 377, *McCormick On Evid. (5th ed.,* § 4 (If new points are brought out in the plaintiff’s rebuttal, the defendant may meet them by evidence in rejoinder or surrebuttal). This basic principal that surrebuttal is only available to reply to new issues raised in rebuttal, and not to raise issues that should have been addressed in direct testimony, has been relied on in legal decisions and case law throughout the United States. *Levin v. Welsh Bros. Motor Service, Inc.*, 164 Ill.App.3d 640, 115 Ill. Dec. 680 (Ill.App. 1 Dist., 1987) (Surrebuttal is a matter of right to deny, explain, or avoid new matters); *In re Kamesar’s Estate*, 81 Wis.2d 151, 259 N.W.2d 733 (Wis. 1977) (Surrebuttal is proper when facts are introduced for the first time on rebuttal); *Donato v. Boutin*, 114 N.H. 65, 314 A.2d 677 (N.H. 1974) (Trial court properly restricted defendant’s surrebuttal to matters introduced in rebuttal.); *Ross v. Danter Associates, Inc.*, 102 Ill.App.2d 354, 242 N.E.2d 330 (Ill.App. 1968) (The purpose of surrebuttal is to permit the defendant to introduce evidence in refutation or opposition to new matters interjected into the trial by the plaintiff on rebuttal.); *State v. Alexander*, 78 Wyo. 324, 324 P.2d 831 (Wyo. 1958) (Surrebuttal may not supply evidence which

could have been given in chief, nor may it be used to cumulate additional evidence or to fortify evidence already given, or to supplement such evidence because it has been impeached upon rebuttal).

The testimony of David Russell and Christopher Collins violates this principal in a very fundamental way. This testimony does not address new issues raised in rebuttal. It is clearly and obviously direct testimony that should have been presented in Cumberland's direct case. Thus, it is the PWSB's position that the Commission should strike this testimony.

1. David Russell Testimony

As set forth above, Mr. Russell's testimony is openly and obviously direct testimony. Even a cursory review of his testimony reveals that it is not limited to new issues raised in the PWSB's rebuttal.¹ Mr. Russell is clearly testifying on subjects that were addressed in Cumberland's direct testimony. This memorandum will not exhaustively examine Mr. Russell's testimony as the PWSB has had a limited time to respond to this testimony. However, the most obvious examples of Mr. Russell's failure to limit his testimony to new issues raised in the PWSB's rebuttal are as follows²:

1. Page 11 of Mr. Russell's testimony clearly indicates that the first eleven pages of his testimony addresses to subjects other than Mr. Woodcock's testimony. It is not until page 11 that Mr. Russell focuses on Mr. Woodcock's testimony. The question posed at lines 8-10

¹ The Division's Motion to Strike addresses the issue Cumberland's improper "surrebuttal" to the Division's rebuttal testimony. As such, the PWSB does not address this issue in its memorandum.

² This list is by no means exhaustive, it is merely illustrative. The PWSB will submit a proposed redaction at hearing.

states “*Turning to Mr. Woodcock’s rebuttal testimony, Do you agree that it is relevant what other communities are doing with respect to this issue.*” (emphasis added). A review of these first eleven pages further confirms that Mr. Russell is testifying on issues that were raised, or should have been raised, in Direct Testimony:

- On page 1 lines 18-23 Mr. Russell states that he is providing surrebuttal testimony on one issue – “the ratemaking treatment portion of the property tax expense incurred by the Pawtucket Water Supply Board (PWSB) for some of its assets located in the Town of Cumberland.” Clearly, this is not a new issue raised by the PWSB in rebuttal. This is one of the central issues in this case. It is an issue that was raised by the PWSB, and Cumberland for that matter, in direct testimony.
- On page 5 lines 17 – 24. Mr. Russell clearly states that he reviewed the “entire” testimony of Mrs. Woodcock and Catlin, and the data responses in this Docket. Thus, his testimony is not based solely on rebuttal testimony in this Docket.
- On page 6, lines 8-11, Mr. Russell states that “The issue I have focused on addresses the question – what is the best way to recover a specific expense incurred by the PWSB (tangible property tax)?” Once again, this is not a new issue raised by the PWSB in rebuttal. It is a central issue in this case, and is one that Mr. Bruce attempted to address in his direct testimony.
- On page 8, lines 22-24 and page 9, lines 1-2, Mr. Russell states that “The record in this case demonstrates that the taxing of tangible assets owned by water utilities in Rhode Island is not unique. In fact, several communities currently have such taxes in effect and have for many years, and the cost of these taxes have been spread to all customers of the

utility, not a small group.” This issue was actually raised by Mr. Bruce on page 5 of his direct testimony. This is not a new issue raised by the PWSB in rebuttal.

- On page 9, lines 21-22 of his testimony, Mr. Russell states that “Under the surcharge proposal, the property tax would not be paid by the property owner (PWSB in this case).” Obviously, the PWSB’s surcharge proposal was raised in its direct testimony, not in surrebuttal.
- On page 10, lines 19-22, Mr. Russell addresses issues raised in “Mr. Bruce’s testimony.” Clearly, these are issues that Mr. Russell should also have addressed in his direct testimony.

2. On Page 12 of his testimony, Mr. Russell is asked whether the surcharge will open a “Pandora’s box.” This phrase (“Pandora’s box”) is the exact terminology used by Mr. Bruce in his direct testimony (page 16, line 22). It is not an issue that Mr. Woodcock or any other PWSB witness raised for the first time in rebuttal.

3. On page 13 of his testimony, Mr. Russell discusses Providence Water Docket 2048. This Docket is not discussed anywhere in the PWSB’s rebuttal.

4. On page 16 of his testimony Mr. Russell discussed the valuation study performed by Cumberland’s Assessor, Michael O’Leary. This alleged valuation study was included as an exhibit to Mr. Bruce’s Direct Testimony. It is not a new issue raised in the PWSB’s rebuttal.

5. On pages 19-27, Mr. Russell sets forth his findings and reasons why the surcharge proposal should be rejected. At the risk of sounding repetitive, the proposed Cumberland surcharge is one of the central issues in this Docket. The proposal was raised in the PWSB’s direct testimony. It is not a new issue raised in the PWSB’s rebuttal. If Cumberland sought to have Mr. Russell testify against the surcharge, and set forth his opinions why it should be

rejected, it should have done so in Direct testimony. Instead Cumberland labeled his extensive direct testimony as “surrebuttal” and submitted it seven days before hearings are set to start.

2. Christopher Collins Testimony

The only portion of Mr. Collins’ testimony that can accurately be labeled as surrebuttal is that which specifically addresses Mr. Bebyn’s rebuttal testimony and is found on pages 1-3 (up to line 6). The remainder of his testimony addresses the relative benefits of piping in the PWSB system. It also incorrectly states that some water flows from Cumberland back to the PWSB’s Pawtucket Customers. This issue of the relative benefits of the PWSB’s pipes was raised by Mr. Bruce in his testimony. Therefore, it cannot be characterized as a new issue raised in rebuttal.

Cumberland’s improper submission of Mr. Russell’s and Mr. Collins’ testimony should not be condoned, and it should not be taken lightly. To begin with, Cumberland cannot profess ignorance of the Rules as it did in Docket 3497. As set forth in Cumberland’s response to PWSB Data Request 2-7, in this Docket, it “hired an attorney with 24 years of experience practicing before the Rhode Island Public Utilities Commission and the Rhode Island Division of Public Utilities and Carriers...” In addition, Cumberland has acknowledged the adverse effect of its noncompliance in Docket 3497. As stated by Mr. Bruce in his testimony “I would like to apologize to the Commission for Cumberland’s inexcusable disregard of this Commission’s rules in that docket [3497]. I have taken steps to ensure that this will not happen again.”

Unfortunately, these words ring hollow.

Several conclusions can be drawn from Cumberland’s submission of Mr. Russell’s and Mr. Collin’s testimony. First, Cumberland acknowledges that Mr. Bruce’s testimony was improper and that he was not qualified to render the opinions set forth in his testimony.

However, in light of Cumberland's objection to the PWSB's motion to strike, which states that Mr. Bruce is amply qualified to submit testimony in this Docket, this is unlikely. Second, Cumberland sought to avoid the expense of hiring an expert, and faced with the PWSB's motion to strike Mr. Bruce's testimony, it was forced to hire Mr. Russell in an effort to hedge its bet. However, this would not excuse Cumberland's failure to file Mr. Collins' testimony as he is employed by Cumberland. Third, Cumberland deliberately shielded these witnesses from the scrutiny of data requests and sought to limit the PWSB's ability to prepare for their testimony. Under any of these scenarios, Cumberland should not be allowed to benefit.

If the Commission allows this testimony, it will set a dangerous precedent. The Commission's Rules of Practice and Procedure encourage an open process in the litigation of Dockets. In fact, the Commission's Rules on discovery clearly state that it favors "prompt and complete disclosure and exchange of information." The Commission's Rules are designed to avoid "the use of cross examination at hearing for discovery purposes."

If intervenors are allowed to withhold direct testimony witnesses until seven days before hearings are to begin, the litigation of Dockets before this Commission will turn into trials by ambush. Furthermore, the only way to combat this tactic would be for a utility to ignore the Commission's scheduling orders in future dockets. In these orders, the Commission usually sets a deadline for rebuttal testimony. In the instant Docket, this deadline was August 23, 2005. However, Rule 1.20 only requires that rebuttal testimony be filed seven days in advance of the hearings. Therefore, a utility seeking a rate increase can avoid being waylaid by last minute "surrebuttal" witnesses by ignoring the Commission's scheduling order and complying with the exact letter of Rule 1.20. Clearly, this is not the preferred method of litigating Dockets, and it does not foster an open and transparent process, but it may be the only way to avoid the type of

unfair prejudice faced by the PWSB in this Docket

IV. CONCLUSION

For the reasons set forth herein The Pawtucket Water Supply Board prays that The Rhode Island Public Utilities Commission order the following relief:

- 1) That the Commission strike the testimony of David Russell and Christopher Collins and prohibit their introduction as evidence in this Docket.
- 2) That the Commission invoke its authority under Rule 1.13 and terminate the party status of Cumberland as an intervenor in this Docket.
- 3) That the Commission grant all other relief it deems meet and just.

PAWTUCKET WATER SUPPLY BOARD
By its attorney,

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CERTIFICATION

I, the undersigned, hereby certify that I mailed a true copy of the within to the individuals listed on the attached service list on this 12th day of September 2005.
