

**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 Town of Cumberland's recent history in rate cases before the Rhode Island Public Utilities Commission ("Commission") is one of non-compliance with the Commission's rules. Once again, history has repeated itself. As such, the Pawtucket Water Supply Board ("PWSB") prays that the Commission strike the testimony of Thomas Bruce, and that it invoke its authority under Rule 1.13 and terminate the party status of Cumberland as an intervenor in this Docket.

In support thereof, the PWSB states as follows:

II. FACTS

The Town of Cumberland's recent history of non-compliance in rate cases filed by the PWSB began in Docket 3378. In that Docket, the Town of Cumberland did not file a motion to intervene and did not participate in the litigation or ultimate settlement of the case. Nevertheless, on March 13, 2002, representatives from the Town of Cumberland appeared at the Commission's settlement hearing to object to the settlement agreement. The Town asked that the Commission disallow the PWSB's request for funds for a new treatment plant because the PWSB proposed to build the facility in Pawtucket rather than Cumberland. (See Docket 3378 Order #17349, p. 28)

On the day of the hearing, Cumberland's representatives sought to present a power point presentation to the Commission, which would demonstrate that Cumberland was a better site

than Pawtucket for the new plant. Cumberland sought to make this presentation even though the siting of the new treatment plant was not an issue in the Docket. Objections were raised to Cumberland's eleventh hour appearance and non-compliance with the Commission's Rules of Practice and Procedure. As a result, the Commission did not allow Cumberland to participate in the settlement hearing other than to allow limited public comment. Nevertheless, Cumberland's last minute attempt to scuttle the settlement agreement wasted a considerable amount of time on the hearing day. Cumberland would repeat this pattern again in Docket 3497.

So that this memorandum may be accurately referred to as a "brief," a complete recounting of Cumberland's noncompliance in Docket 3497 will be avoided. However, the record in that Docket reveals that Cumberland's noncompliance included failure to file testimony and failure to properly respond to data requests. Then, in a virtual repeat of its Docket 3378 performance, Cumberland appeared on the first day of hearings with new legal counsel who attempted to submit the data responses that Cumberland previously refused to file. The Commission's order in Docket 3497 accurately summarized Cumberland's transgressions:

This case was supposed to be over in one day, two at the most. In reviewing the transcript, much of the delay was caused by Cumberland's participation at the hearings through extended arguments...Cumberland filed no testimony throughout the entire case, did not comply with Commission discovery rules and should not be allowed to benefit from its inaction. Normally, significant discovery issues do not arise in the Commission's dockets...Therefore, any procedural delay of a party has the potential to cause a substantive delay in the case and the potential to cause harm to the parties. Unfortunately, this case is indicative of what can occur when a party does not comply with the Commission's rules.

As a result of Cumberland's noncompliance, the Commission took steps to prevent a similar occurrence in future Dockets when it ruled:

Therefore, in the future, full intervention will only be allowed to a movant if that movant makes an affirmative showing that it will be filing pre-filed testimony.

Unfortunately, it appears the Commission's Order did not achieve its desired goal. While the language of this order seems clear enough, evidently it should have explicitly directed all future movants to submit pre-filed testimony that complies with the Commission's Rules of Practice and Procedure. For despite this seemingly clear order, the Town of Cumberland has once again disregarded the Commission's Rules of Practice and Procedure.

In the instant Docket, Cumberland only submitted testimony from one witness - its Director of Finance, Thomas Bruce. In reviewing Mr. Bruce's testimony, he does not challenge the PWSB's consumption projections or revenue request, and he only challenges a small portion of the PWSB's proposed rate design and cost allocation – specifically the proposed Cumberland surcharge.¹ Unfortunately, a review of Mr. Bruce's testimony and his resume indicates that he has insufficient qualifications, knowledge, skill, experience, training and education in the areas of water rates and charges, utility rate design, utility rate making principles and traditional utility rate regulation.

Rule 1.20 of the Commission's Rules states that "All direct testimony shall be presented in writing, unless otherwise allowed by the Commission. Written testimony, when properly authenticated by the witness under oath, may be transcribed into the record or admitted as an exhibit." Rule 1.21 states that "written testimony of an expert witness may be received as provided in Rule 1.20, where properly supported by the oral testimony of its author on direct examination, subject to cross-examination and motions to strike." In his testimony of Thomas

¹ While there is much testimony regarding the tangible property valuation and methods - (a) this is not an issue in this docket, and (b) Mr. Bruce is not the Town Assessor, and Mr. Bruce did not prepare the assessment that is attached to his testimony as an exhibit. It is unclear if he is qualified to provide testimony on assessment methods, valuations, etc.

Bruce testifies on the subjects of rate design, cost allocation, assessment methodology, and legal issues related to assessment appeals. Yet his testimony cannot be properly supported as expert testimony on these subjects.

Rule 1.22 of the Commission's Rules states that the Superior Court Rules of Evidence are to be followed to the extent practicable. Rule 702 of the Rules of Evidence provides that: "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of fact or opinion." Clearly, Mr. Bruce does not have the necessary background or foundation to testify in the form of fact or opinion in the areas of water rates and charges, utility rate design, utility rate making principles traditional utility rate regulation, and many of the other areas included in his testimony.

Furthermore, it would appear from their answers to the PWSB's and the Division's first set of data requests (in particular Div. 1-3, attached hereto) that Cumberland is acutely aware of this problem. Each of the PWSB's data requests sought further information and support for issues raised by Mr. Bruce in his testimony. Yet, each of the answers is provided solely by Cumberland's attorney. While it may be customary for legal counsel to occasionally respond to data requests, it is usually to lodge objections or to address legal issues raised in the question. However, in this instance, Cumberland's counsel is addressing substantive issues. Thus, if Mr. Bruce were allowed to testify, he could not be cross examined on the responses to the data requests. Rather, Cumberland's legal counsel would have to be called as a witness.

Certainly, it is not the PWSB's position that Cumberland is barred from voicing an objection to the proposed surcharge. In every rate case, the Commission holds public hearings where the public is free to voice objections. In addition, Rule 1.14 allows for the filing of a written protest. However, written protests are not evidence. It is the PWSB's position that Mr. Bruce's testimony should be treated as a written protest, and should not be received as evidence in this Docket.

However, this should not be the sole remedy in this instance. This is now the third Docket in as many years where Cumberland's noncompliance has caused needless complications in litigating the relevant issues. In fact, Mr. Bruce's testimony acknowledges "Cumberland's inexcusable disregard of this Commission's rules" in Docket 3497. And while Mr. Bruce assured the Commission that he took steps to ensure Cumberland's compliance with the Commission's rules, it is clear that his measures were insufficient.²

Once again, the parties to this Docket, and the Commission, are confronted with a situation where Cumberland's noncompliance threatens to delay the hearing process and waste the Commission's resources. Certainly, precious hearing time will have to be devoted to this issue. Furthermore, Cumberland's attempt to fully participate as an intervenor without a witness who is an expert in the field of the testimony offered, and without properly responding to data requests, unfairly tips the process its favor. In many ways, striking Mr. Bruce's testimony benefits Cumberland. As in Docket 3497, Cumberland will once be able to question witnesses and challenge evidence without having to face any scrutiny of their position.

² See Thomas Bruce testimony page 2, lines 5-8.

Certainly, every party would love to come before the Commission without having to proffer an expert witness who is subject to cross examination on their opinion, the basis thereof and accepted principles in their field of expertise. Parties would also relish the opportunity to have counsel respond to data requests so that witnesses can avoid further cross examination and possible impeachment. However, this type of full participation at hearing should not be afforded to a party who has avoided full participation prior to the hearing by skirting the Commission's Rules. To paraphrase the Commission's Order in Docket 3497, Cumberland should not benefit from its noncompliance with the applicable Rules of Practice and Procedure. As such, the PWSB requests that the Commission invoke its authority under Rule 1.13 and terminate the party status of Cumberland as an intervenor in this Docket.

II. 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 Thomas Bruce and prohibit its introduction as evidence in this Docket.
- 2) That the Commission invoke its authority under Rule 1.13 and terminated 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 2nd day of September 2005.