

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

NARRAGANSETT BAY COMMISSION)
APPLICATION TO CHANGE RATES)

DOCKET NO. 3905

**POST-HEARING MEMORANDUM OF LAW OF THE DIVISION OF
PUBLIC UTILITIES AND CARRIERS**

I. INTRODUCTION

The Division of Public Utilities and Carriers (“Division”) submits this memorandum of law in support of the recommendation of its expert, Thomas S. Catlin, to eliminate the 7.5% cap on non-union employee contributions toward health insurance premiums—a downward adjustment to NBC’s claimed Rate Year Premiums of \$50,000. See Schedule TSC-4 (Updated 4/17/2008). With respect to the two other contested issues in the docket (the Regulatory Assessment¹ and funding the Operating Reserve² through the Restricted Cost Carry Forward), NBC has accepted the Division’s positions (Transcript dated April 29, 2008 at 65). As for all of the other issues contained in the docket, the Division and NBC are in accord (Transcript dated April 29, 2008 at 65). See generally Direct Testimony and Surrebuttal Testimony of Thomas S. Catlin.

¹ Mr. Edge: “...due to the fact that the amount of difference between us and the Division is minor [\$12,500], NBC is prepared to accept the Division’s position” (Transcript dated April 29, 2008 at 12).

² “It appears that Mr. Catlin would prefer the funding mechanism . . . for the establishment of an Operation & Maintenance (O & M) Reserve Fund funded from the debt service coverage carry-forward at the same level of \$1,500,000. NBC believes that either approach will address the problem that NBC faced in FY 2007...” (Rebuttal Testimony of Walter E. Edge Jr., MBA CPA at 4).

In support of its position regarding the 7.5% cap, NBC cites two cases, United Transit Co. v. Nunes, 209 A.2d 215 (R.I. 1965) and Rhode Island Consumers' Council v. New England Telephone and Telegraph Co., 302 A.2d 757 (R.I. 1973). NBC contends these cases stand for the proposition that the Commission is precluded from revising a public utility's estimate of a projected expense if the projection falls within a putative "range of reasonableness."

The Division disagrees with NBC's interpretation of United Transit and Rhode Island Consumers' Council, as well as the manner NBC applies the holdings of both cases to the facts of the pending docket. As will be seen below, both United Transit and Rhode Island Consumers' Council stand for the proposition that the Commission, without invading the province of management, may find any projected expense of a public utility is "unreasonable" as long as the Commission's ruling regarding the expense's "reasonableness" (or lack thereof) is supported by the substantial evidence on the record as a whole.

In the pending docket, the Division's recommendation, that the Commission should eliminate the 7.5% cap on non-union employee contributions,³ is supported by the overwhelming record evidence. NBC's contention that United Transit and Rhode Island Consumers' Council serve as a bar to the recommended adjustment, without examination or reference to the evidentiary record, is without merit.

³ NBC "agree[s] with Mr. Catlin's adjustment to reflect the most current health insurance premium rates which were provided by NBC," as well as "his adjustment to reflect the average annual employee levels in his calculation on Schedule TSC-4" (Rebuttal Testimony of Walter E. Edge Jr., MBA CPA at 4).

II. ARGUMENT

A. The Commission Is Empowered To Determine Whether NBC's Rate Year Claim For Employee Health Insurance Costs Is "Reasonable" Based Upon The Evidentiary Record.

In United Transit, the Administrator⁴ found that “the amount projected by the Company for executive salaries, expense accounts and legal fees was unreasonable.” United Transit, 209 A.2d at 221. Accordingly, the Administrator deducted \$25,000 from the company’s estimate of operating expenses. Id. In assessing the propriety of the Administrator’s decision on appeal, the Rhode Island Supreme Court observed that “ordinarily, the determination of what shall be expended in the areas under consideration is a function of management and should not be interfered with *absent evidence tending to prove the projected expenditures unreasonably and unjustly affect the ratepaying public*” (Emphasis added). Id. at 222. The Court proceeded to note that the Administrator’s conclusion was based “solely on the reason that the company may “owe an obligation to the fare-payers to pare these expenses as the system shrinks,” without specifying “*those circumstances which are relevant under recognized standards to a determination of what is a reasonable salary, or legal fee, or expense account*” (Emphasis added). Id. Based on the complete absence of evidentiary support for the Administrator’s conclusion, the Court held that the Administrator acted arbitrarily in deducting \$25,000 from the estimated general and administrative expenses and remanded the matter for a “supplementary decision” that “avert[s] to circumstances” that show the expenses are “unreasonable.” Id.

⁴ When United Transit was decided in 1965, the Administrator (like the Commission today) was authorized by statute to determine whether the rates of public utilities were “just and reasonable.”

Rhode Island Consumers' Council stands for the same legal proposition. In that case, the Commission had deducted \$71,000 from the company's operating expenses. Rhode Island Consumers' Council, 302 A.2d at 766. "Its sole substantiation for that deduction [was] found in the two-line conclusory statement: '...that on the basis of what has been presented that amount appears to be fair under circumstances.'" Id. Citing United Transit, the Rhode Island Supreme Court, again held that "[a]djustments in rate cases cannot rest on conjecture, and we cannot permit the commission to 'roam the unfenced fields of speculation.'" Id. at 767. Without any evidentiary basis to support the \$71,000 deduction, the Court remanded the matter to the Commission for a supplementary decision. Id.

United Transit and Rhode Island Consumers' Council do not stand for the proposition cited by NBC, that the Commission must invariably accept claimed expense projections of the entities the Commission regulates, even if those projections "appear" reasonable. Rather, consistent with the Commission's statutory authorization, see G.L. § 39-1-1(c) (duty to protect the public against "improper and unreasonable rates"); § 39-2-1 (a public utility's rates must be "reasonable and just"), both cases stand for the proposition that the Commission may determine that a utility's expense projection is "unreasonable" or "unjust" as long as that conclusion is supported by substantial evidence or "relevant circumstances" as reflected in the record a whole. Narragansett Electric Co. v. Harsch, 368 A.2d 1194, 1207 (R.I. 1977) ("Commission has broad discretion in making pro forma adjustments to test-year data provided that there is substantial evidence in the record warranting its action"). The same holds true for policies or practices that cause or produce "unreasonable" expense projections. See New

England Telephone & Telegraph Co. v. Public Utilities Comm'n, 446 A.2d 1376, 1389 (R.I. 1982) (“although Commission is free to alter past standards and practices, it must provide an explanation for such departures”).

B. The “7.5% Cap” Is Unreasonable And Produces An Unreasonable Expense Projection For NBC’s Rate Year Health Care Premiums.

In the pending matter, virtually all of the evidence supports the Division’s recommendation. In his Direct Testimony, Mr. Catlin testified:

In its filing, NBC has recognized a 7.5 percent cap on the percentage of the total premium that must be paid by all employees. While the 7.5 percent cap is a contractual limit for bargaining unit employees, the same limitation does not apply to non-union employees. *Based on my experience elsewhere, it is not unusual for employers to require employees to bear much more than 7.5 percent of their health insurance premiums.* Eliminating this cap increases contributions by \$50,000.

(Direct Testimony of Thomas S. Catlin at 9) (emphasis added). At hearing, in response to questioning by Chairman Germani, Mr. Catlin expounded upon his “experience elsewhere” for “employees to bear much more than 7.5 percent of their health insurance premiums.”

Q. Your recommendation to eliminate the cap for non-union employees, what’s that based on?...

A. ...My recommendation is based on the fact that—a contribution, I think it’s currently seven-and-a-half and it’s scheduled to go to ten toward overall medical costs under that cap, and under the method that they use now it’s actually less than the cap, but to move to that level is when—is still a very low level of contribution. The level of contributions I think within the—I believe within the state, for example, I think yours are or were 25⁵ or 30 percent⁶, I don’t

⁵ The Transcript of Hearing dated April 29, 2008 erroneously reflects this percentage as “1.25.”

⁶ The FY 2009 health co-share for all state employees, who pay on a percentage of premium basis, ranges from 12% to 15% of the premium, except for employees with family coverage who have a salary level under \$35,000, in which case the co-pay is 8% of the premium. [See www.employeebenefits.ri.gov](http://www.employeebenefits.ri.gov).

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know if they've increased more, but that level is consistent. I think in general employers require a much higher contribution than that, particularly in light of the escalating cost of medical insurance.

Q. Do you think that the benefit structure for union and non-union employees should be equivalent in value...

A. ...I think that there are a lot of differences in the benefits that union and non-union employees receive and if there's a difference in contribution levels, I don't think it's unreasonable. I think, in fact, in the last case, the Commission's decision was one of the motivating factors that got NBC to start moving toward a higher cap on the contributions . . . The percentage of premiums paid by non-union employees if you eliminate the cap would still only be somewhere in the 10 to 12 [percent range]

(Transcript dated April 29, 2008 at 75-77).

Mr. Catlin's Direct Testimony, along with his testimony at hearing, reflect the "relevant circumstances" or evidence on the record, which shows that the 7.5% cap is "not reasonable." The 7.5% cap is "unreasonable" when compared to the higher burden that is currently borne by state employees. It is also "unreasonable" when compared to the burden that employees in the private sector are typically expected to bear—"much more than 7.5% of their health insurance premiums." Lastly, much like the expectation, in the not too distant past, that employees were not required to pay for health insurance, the "7.5% cap" today is unreasonable in light of the "ever escalating cost of medical insurance" (Direct Testimony of Thomas S. Catlin at 76). See In Re: Narragansett Bay Commission for Abbreviated Application for Rate Relief, Docket No. 3707, Order No. 18709 at 18 ("reducing health care costs is becoming more prevalent throughout the public sector" and that it is "expected that employee co-sharing of health care premiums will occur").

Rather than precluding the Commission from adopting the Division's position, United Transit and Rhode Island Consumers' Council permit the Commission to reject the cap when the record "evidence" shows that the projected expenditures are unreasonable. The substantial evidence presented by the Division supports just such a conclusion in the pending docket.

III. CONCLUSION

For the foregoing reasons, the Commission should adopt the recommendation of the Division to eliminate the 7.5% cap on non-union employee contributions toward health insurance premiums. Elimination of the cap results in a \$50,000 downward adjustment to NBC's claimed rate year health insurance premiums.

DIVISION OF PUBLIC UTILITIES AND
CARRIERS,
By their attorneys,

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CERTIFICATE OF SERVICE

I certify that a copy of the within memorandum of law was forwarded by e-mail to the docket's service list on the 29th day of May, 2008.
