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September 20, 2013

Ms. Luly Massaro, Clerk  
Rhode Island Public Utilities Commission  
89 Jefferson Boulevard  
Warwick, RI 02888

**Re: *Providence Water Supply Board***  
***Docket 4406***

Dear Ms. Massaro:

Enclosed please find an original and nine copies of the following documents:

1. Bristol County Water Authority's Motion To Strike Objection And Objection To Motion For Protective Order Regarding Bristol County Water Authority's 4th Set Of Data Requests

Please note that an electronic copy of these documents has been provided to the service list and a copy has been mailed to those parties who requested a hard copy.

Thank you for your attention to this matter.

Sincerely,



Joseph A. Keough, Jr.

JAK/kf

Enclosures

cc: Service List (*via electronic mail*)  
Robert A. Watson, Esquire (*via first-class mail*)  
Peter Ruggiero, City Solicitor (*via first-class mail*)

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

**IN RE: PROVIDENCE WATER SUPPLY BOARD:**

**DOCKET NO. 4406**

**BRISTOL COUNTY WATER AUTHORITY’S MOTION TO STRIKE OBJECTION AND  
OBJECTION TO MOTION FOR PROTECTIVE ORDER REGARDING BRISTOL COUNTY  
WATER AUTHORITY’S 4<sup>TH</sup> SET OF DATA REQUESTS**

**I. INTRODUCTION**

Evidently the Bristol County Water Authority (“BCWA”) struck a nerve in this Docket by having the temerity to ask the Providence Water Supply Board (“Providence”) questions about its proposed revenue increase, Cost of Service Study (“COS”), and Central Operations Facility (“COF”). Regarding the latter, Providence requests \$2,450,000.00 per year to fund the COF, yet it has not definitively provided the total cost of the project or the method of financing. The only thing the parties know is that the COF will cost more than \$39 million dollars. To evade answering any further questions about the COF, Providence seeks to strike the BCWA’s Fourth Set of Data Requests (“BCWA DR4”), which contains seven specific questions about the COF. Providence also seeks to prevent the BCWA from issuing any more data request without approval from the Rhode Island Public Utilities Commission (“Commission”).

To support its objection and motion, Providence distorts the record in this Docket and recklessly speculates on the BCWA’s motives for issuing data requests. No support can be found in the Commission’s Rules of Practice and Procedure for limiting data requests or requiring a party to seek permission before issuing data requests.

Furthermore, the BCWA issued its data requests solely to obtain relevant information about Providence's proposed rate increase, including Providence's COF funding request, not to "harass, annoy or oppress" Providence.

Providence's request for relief seeks to radically alter the practice before this Commission, and if granted, will have a far reaching precedential impact on the conduct of discovery in future Dockets. As such, and for the reasons set forth more specifically herein, the BCWA requests that the Commission strike Providence's objection and deny its motion.

## II. ARGUMENT

### 1. THE COMMISSION SHOULD ORDER PROVIDENCE TO ANSWER THE BCWA'S 4<sup>TH</sup> SET OF DATA REQUESTS.

Providence advances two main arguments in support of its request to strike BCWA DR4: (1) The Commission's Rules of Practice and Procedure and the Superior Court Rules of Civil Procedure support its request to limit the number of BCWA data requests and, (2) The BCWA issued DR4 to harass, annoy and oppress Providence Water. The BCWA addresses each of these arguments herein below.

#### ***A. Neither The Commission's Rules Nor The Superior Court Rules Of Civil Procedure Support Providence's Request To Limit The Number Of Data Requests.***

Providence begins its motion by bemoaning the fact that the Division of Public Utilities and Carriers ("Division") and interveners have issued numerous data requests in this Docket. Conveniently, Providence ignores the numerous errors in their rate filing that required the parties to issue these requests. Furthermore, had it not been for these data requests, many of these serious errors would not have been uncovered.

Providence's rate filing – especially as it affects wholesale customers – has been a moving target from the beginning. On March 29, 2013, Providence submitted its original rate filing. On April 17, 2013, Providence submitted a supplemental filing, with a modified COS, to correct several errors in its initial filing. When Providence filed its supplemental filing, it sought a 32.8% increase in wholesale rates.

Thereafter, the Division and intervening parties began issuing data requests. In response to these requests, Providence corrected several more errors in its COS. These corrections alone lowered the wholesale customer increase from 32.8% to 23.6%. Yet, even now, the parties cannot be sure what rates Providence will ultimately request. When Providence made its COS corrections, it stated that “considering the considerable cost shifts and rate impacts” of the changes to its COS, it “retains the right to investigate the same, and propose further changes to [its] study in [its] rebuttal testimony in an effort to mitigate rate shock...” (See Providence response to Div. 3-1).

Providence then singles out the BCWA for asking too many questions. Providence claims the BCWA has issued 227 data requests. It appears Providence engaged in creative accounting to arrive at this figure as the BCWA's first three sets only contained 61 requests combined. For instance, Providence claims the BCWA asked “34 new data requests” in BCWA DR4. This is incorrect. Many of the requests in BCWA DR4 are follow-up questions to data requests Providence did not fully answer. Even if the Commission were to count subparts as separate questions, BCWA DR4 would total 29 requests at most.

Furthermore, simply counting subparts without further analysis, runs contrary to the accepted practice in discovery disputes governed by the Rules of Civil Procedure. Courts generally agree that “interrogatory subparts are to be counted as one interrogatory ... if they are logically or factually subsumed within and necessarily related to the primary question.” *Trevino v. ACB American, Inc.* 232 F.R.D. 612 (N.D. California 2006), citing *Safeco of America v. Rawstron*, 181 F.R.D. 441, 445 (C.D. Cal. 1998), and *Kendall v. GES Exposition Services*, 174 F.R.D. 684 (D. Nev. 1997). Once again, using BCWA DR 4 as an example, the Commission will see that the BCWA prefaced several of its questions (4-5 through 4-9 in particular) with references to Providence’s previous responses and documents it produced. This was done so Providence would know the *exact* reference point for the BCWA’s questions. Furthermore, although the requests contain subparts, they are logically, factually and necessarily related to the primary subject matter of the question.

Providence’s request for relief also willfully ignores the fact that rate cases before the Commission follow a procedure that is unique among the Courts and Quasi Judicial Agencies in the State of Rhode Island. A utility seeking a rate increase must file voluminous and detailed financial information in support of its request. The Division and interveners must then examine and probe a utilities’ rate increase request, and each party files two rounds of written testimony.

Data requests play a vital role in the process (as it has in this Docket). Data requests help to fully and transparently examine each party’s position and limit the

number of issues presented to the Commission at hearing. Rule 1.18 of the

Commission's Rules states:

“The Commission favors prompt and complete disclosure in exchange of information and encourages informal arrangements among the parties for this exchange. It is further the Commission's policy to encourage the timely use of discovery as a means towards effective presentations at hearing and avoidance of the use of cross-examination at hearing for discovery purposes.”

Providence knows full well the importance of data requests and that the Commission's Rules do not limit the number or timing of data requests. Nevertheless, Providence attempts to limit BCWA's data request by invoking Rule 33 of the Rhode Island Superior Court Rules of Civil Procedure. This is misguided for many reasons, several of which are examined below.

First, data requests are a hybrid of interrogatories and requests for production of documents. In fact, they more resemble requests for production of documents than interrogatories. Rule 34 of the Rhode Island Superior Court Rules of Civil Procedure does not limit the number of data requests.

Second, while parties in a Superior Court case can only issue thirty interrogatories, the main tool for asking questions is depositions. Although the Commission's Rules do allow for depositions, they are rarely conducted for a number of reasons. To begin with, depositions would add considerable costs to a rate case, and the rate payers ultimately bear these costs. For instance, there are numerous witnesses, including experts, and multiple attorneys representing the parties in this matter. To have each counsel attend a witness deposition would be costly, and expert depositions would add even more cost as they have to be compensated for their time.

In addition, because testimony is filed on different dates over the course of a Docket, it would be nearly impossible to conduct a single deposition of each witness. For instance, Providence Water filed direct testimony on March 29, 2013, supplemental testimony on April 17, 2013, and it will file rebuttal testimony on September 27, 2013. To effectively narrow the areas of dispute, the parties would have to depose Providence's witnesses each time they submitted testimony. The same would hold true if Providence deposed the Division and interveners' witnesses. This would lead to multiple costly depositions.

The Commission's Rules seemingly acknowledge these drawbacks to deposition practice because data requests are unlimited in number, and no deadline exists for issuing data requests. In fact, as Providence knows, data requests and record requests are routinely asked up to and including the time of hearings. (See Commission Rule 1.18(c)(2))

***B. The BCWA's Data Requests Are Not Unreasonable, Oppressive Or Burdensome.***

Providence raises a number of objections to BCWA DR4. However, there is one glaring omission. Providence does not claim that BCWA DR4 is irrelevant. In fact, Providence *knows* that BCWA DR4 is relevant, and thus it relies on shameless, reckless and baseless speculation about the BCWA's motivation in this Docket. Providence's pleading includes the following footnote:

"We do not know why BCWA has chosen this rate case as a forum to harass, annoy, and oppress Providence Water with these voluminous ill-timed data requests. However, (1) Providence Water's undersigned legal counsel has represented Providence Water in approximately 40 DPUC and PUC proceedings over the course of over 20 years, and BCWA has never, to the best of the

knowledge of the undersigned counsel, asked a single data request in any of these dockets, (2) Pamela Marchand, the new BCWA Executive Director was terminated in 2011 by Providence Water, and (3) upon information and belief, Pamela Marchand has filed a lawsuit against the City of Providence.”

At best, Providence’s musings are a reckless cheap shot attempt to discredit a former Providence employee. At worst, Providence’s counsel submitted a pleading that violates Commission Rule 1.5 and RIGL §9-29-21 which require that “the signature of the...attorney on any paper filed with the Commission constitutes the certification that the signatory has read the paper being subscribed and filed, and knows the contents thereof; that to the best of the signatory’s knowledge, information, and belief formed after reasonable inquiry it is well grounded *in fact... (emphasis added)*).

To satisfy Providence’s curiosity, and to provide it with some comfort for the remainder of this Docket, the BCWA will reveal its motivation in issuing data requests. Undersigned counsel states in writing - as a licensed attorney, member of the Rhode Island Bar, and signatory to the BCWA’s data requests - that the data requests in this Docket have not been filed to harass, annoy, oppress or burden Providence. While counsel does not know why the BCWA did not actively participate in past Dockets, its full participation in this Docket was prompted by Providence’s request to increase wholesale rates by 32.8%. Further, the BCWA’s motive has been, and will continue to be, a desire to understand Providence’s need for increased revenue and COS, in general,

and the true cost and financing mechanism of Providence's COF and its impact on the BCWA, in particular.<sup>1</sup>

**2. THE BCWA SHOULD NOT HAVE TO SEEK LEAVE OF THE COMMISSION TO ISSUE FURTHER DATA REQUESTS.**

Providence's request that the BCWA seek leave of the Commission to file further data requests is nothing more than a naked attempt to chill the BCWA's participation in this Docket. Once again, Providence's real objection seems to be that the BCWA is asking questions it does not want to answer. It is interesting to note that Providence has not asked for this form of relief against any other party in this case.<sup>2</sup> There is absolutely no basis in the Commission's Rules to grant this relief and it should be denied.

**3. THE BCWA DOES NOT OBJECT TO PROVIDENCE SEEKING CONFIDENTIAL TREATMENT OF INFORMATION.**

The BCWA does not object to Providence seeking a Protective Order in accordance with Commission Rule 1.2(g) for confidential information protected by the Rhode Island Access to Public Records Act ("APRA"), RIGL §38-2-1, et. seq. In fact, Providence's attorney asked counsel for the BCWA to draft a Confidentiality Order for Providence's review to protect confidential information in this Docket. BCWA's counsel happily complied with this request (See Exhibit 1). The proposed agreement would allow

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<sup>1</sup> The Commission should note that the BCWA, and Ms. Marchand in particular, has not questioned the *need* for a new Administration and Operations Building, but rather the cost, form of ownership and financing of this project. (See P. Marchand Direct Testimony, p. 5, lines 15-26)

<sup>2</sup> Although Providence objects to the number of data request (by Providence's count) issued by the BCWA, the volume of data Providence produced to the BCWA pales in comparison to that provided to the Division and the Kent County Water Authority ("KCWA"). Providence's responses to the Division's six sets of data requests total 379 pages; its responses to the KCWA's six sets of data requests total 176 pages; while its responses to the BCWA's three sets of data requests total 102 pages.

Providence to submit information to the Commission which it believes is protected by the APRA. The Commission can then determine whether this information is protected.

However, Providence was not happy with this agreement as it required them to file a Motion for Protective Order with the Commission pursuant to Rule 1.2(g). (See Exhibit 2) In its Objection and Motion to Strike, Providence again seeks to sidestep this requirement. Providence seeks an order that “even if BCWA’s Set 4 is not stricken in its entirety, Providence Water is not required to disclose any confidential business or financial information with regard to the COF that is identifiable to any specific site under consideration.” While the APRA may protect information requested in BCWA DR4, the Commission should make this determination not Providence. The Commission should not relieve Providence of the duty to submit un-redacted information to the Commission to determine whether or not it meets the requirements of the APRA.

**4. THE BCWA DOES NOT OBJECT TO PROVIDENCE’S REQUEST FOR A REASONABLE EXTENSION OF TIME.**

Providence requests an extension of time to answer BCWA DR4 until October 4, 2013. The BCWA does not object if concessions are made to the surrebuttal testimony filing deadlines as needed.<sup>3</sup> Providence indicates its response on October 4, 2013 would “still give BCWA (and all interveners) three weeks to study the responses and incorporate the information into their surrebuttal testimony.” However, the BCWA does not know how Providence will respond to BCWA DR4. Providence may indicate that all information responsive to the request is confidential. This will necessitate the

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<sup>3</sup> Providence states that the BCWA rejected its extension request. While this is true, Providence did not reveal the full nature of its request or the BCWA’s reasons for its position. Primarily, the BCWA rejected the request because of the conditions Providence sought and potential time constraints. (See Exhibit 2)

filing of further motions before the Commission. The resolution of these motions may not provide the BCWA with enough time to file its surrebuttal testimony. Thus, if the Commission grants an extension to Providence, the BCWA requests an accommodation to deal with any issues that may arise after receiving Providence's response on October 4, 2013.

### III. CONCLUSION

For the reasons set forth herein, the Bristol County Water Authority prays that the Rhode Island Public Utilities Commission strike the Providence Water Supply Board's Objection and deny its Motion For Protective Order, and that it grant all other relief it deems meet and just.

The Bristol County Water Authority  
By its attorney,



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**CERTIFICATION**

I hereby certify that on September 20, 2013, I sent a copy of the within to all parties set forth on the attached Service List by electronic mail and copies to Luly Massaro, Commission Clerk, Robert A. Watson, Esquire and Peter D. Ruggiero by electronic mail and regular mail.

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**EXHIBIT 1**

## Joseph Keough

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**From:** Joseph Keough  
**Sent:** Monday, September 09, 2013 3:50 PM  
**To:** 'Michael@McElroyLawOffice.com'  
**Subject:** Confidentiality Agreement  
**Attachments:** Confidentiality Agreement (00089844).doc

Mike

Attached is a proposed confidentiality agreement.

Joseph A. Keough Jr., Esquire  
Keough & Sweeney, Ltd.  
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**STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS  
PUBLIC UTILITIES COMMISSION**

**IN RE: PROVIDENCE WATER SUPPLY BOARD:**

**DOCKET NO. 4406**

**PROTECTIVE AGREEMENT**

This Agreement is entered into by and among The Bristol County Water Authority (“BCWA”) and the Providence Water Supply Board (“Providence”). (Providence and the BCWA are sometimes referenced herein as “Party” and collectively as “Parties” as the context requires.)

WHEREAS, the BCWA has requested that Providence provide certain information to it in the above matter; and

WHEREAS, Providence considers some of the documents and information sought to be privileged under the Rhode Island Access to Public Records Act (“APRA”), RIGL §38-2-1 et seq.; and

WHEREAS, Providence desires to prevent privileged information from becoming part of the public record in the above matter, in any other proceeding, in any other proceeding before any regulatory or judicial body or from any other public disclosure; and

WHEREAS, Providence desires to eliminate the possibility of privileged information being disclosed; and

WHEREAS the Parties desire the sealed and public records to be as complete as possible;

NOW, THEREFORE, the Parties subscribing hereto agree as follows:

1. All documents, data, information, studies and other materials furnished pursuant to any data requests or requests for information, subpoenas, depositions, or other modes of discovery pertaining to this Docket that are claimed by Providence to be privileged under the APRA (hereinafter referred to as “Confidential Information”) shall be furnished pursuant to the terms of this Agreement, and shall be treated as confidential by all persons accorded access thereto, and access shall be limited to those persons who have a need to know the Confidential Information. No person accorded access to any Confidential Information by reason of this Agreement shall use such information for any purpose other than the purpose of preparation for the conduct of this proceeding, and then solely as contemplated herein. Every person accorded access to Confidential Information shall keep the Confidential Information (and all copies thereof) secure and shall not disclose it or accord access to it to any person not authorized by this Agreement.

2. Providence shall provide the BCWA with the Confidential Information as follows: the original set of Confidential Information to the Clerk of the Commission under seal, along with a Motion For Protective Order pursuant to Commission Rule 1.2(g) and R.I.G.L. §38-2-2 and one unsealed copy thereof to legal counsel for the BCWA.

3. The Confidential Information and the copy shall be marked “Contains Privileged Information – Do Not Release” and shall be subject in all respects to the terms of this Protective Agreement. The BCWA agrees that it will only afford access to the Confidential Information to such employees, consultants and other representatives who

have a need to know the Confidential Information, and who have agreed to the terms of this Protective Agreement.

4. Documents to be offered at hearing may be copied as necessary for that purpose. The BCWA may also take notes of Confidential Information for the purpose of preparing for hearing.

5. If the BCWA desires to use or place any Confidential Information on the public record in this proceeding, then counsel for the BCWA shall notify Providence as soon as practicable in advance of hearing, and in any event no less than ten (10) days in advance of hearing as to which documents it desires to so use or place on the public record. The BCWA may place documents in a sealed record without advance notice if it does not wish to contest that the documents contain Confidential Information. Provided however, if Confidential Information is produced by Providence within fifteen days of the hearing and the BCWA desires to use or place any Confidential Information on the public record in this proceeding, then counsel for the BCWA shall give notice as soon as practicable.

6. Providence will notify the BCWA prior to the proposed introduction of the documents as soon as practicable which portion, if any, of the Confidential Information identified above should be placed in a sealed record. Documents or information, or any portion thereof, not designated to be placed in a sealed record shall be available for use in the public record.

7. This Agreement shall in no way constitute any waiver of the rights of any party at any time to contest any assertion or to appeal any finding that specific

information is or is not Confidential Information or that it should or should not be subject to the protective requirements of this Agreement. In particular, the BCWA reserves the right to object to any Motion For Protective Order filed by Providence pursuant to Commission Rule 1.2(g) and R.I.G.L. §38-2-2. The Parties also retain the right to question, challenge, and object to the admissibility of any and all Confidential Information furnished under this Agreement on any available grounds, including but not limited to competency, relevancy, and materiality.

8. In the event that the Rhode Island Public Utilities Commission should rule that any Confidential Information provided by Providence is not appropriate for inclusion in a sealed record, the Parties agree that, at the request of Providence and to enable the Providence an opportunity to seek a stay or other relief, they will not include such information or documents in the public record until such time as Providence has exhausted all available administrative and judicial remedies.

9. Confidential Information that is sealed and is made part of the record in this proceeding shall continue to be subject to the protective requirements of this Agreement unless the Confidential Information is made part of the public record in this proceeding by the appropriate authority consistent with the terms of this Agreement.

10. Each party to this Agreement warrants that it will act in good faith and will not do anything to deprive the other Party of the benefit of this Agreement.

11. Providence will identify records as “confidential” only to the extent that it holds a good faith basis for believing such treatment comports with the intent and provisions of the Access to Public Records Act.

The parties named below, by the signatures of their representatives, hereby enter this Protective Agreement.

The Bristol County Water Authority  
By its attorney,

Joseph A. Keough, Jr., Esquire # 4925  
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Providence Water Supply Board  
By Its Attorney

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DATED: September , 2013

**EXHIBIT 2**

## Joseph Keough

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**From:** Joseph Keough  
**Sent:** Wednesday, September 11, 2013 11:24 AM  
**To:** 'Mike McElroy'  
**Subject:** RE: BCWA - Providence Water

Mike

See below.

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**From:** Mike McElroy [<mailto:Michael@McElroyLawOffice.com>]  
**Sent:** Tuesday, September 10, 2013 6:09 PM  
**To:** Joseph Keough  
**Subject:** BCWA - Providence Water

Joe:

I met with my client this afternoon. I have a request.

Providence Water's rebuttal testimony is due on 9/27.

Could we agree to an extension until 10/4 for Providence Water to (1) respond to (and hopefully work out by agreement) the BCWA motion to compel, and (2) respond to BCWA data set 4? **This is too much of an extension. This is not a complicated issue, and. I don't think your client needs an extension to respond. However, lawyer to lawyer, if you are swamped, I can extend the response date one week to 9/20 to give us time to work out an agreement.**

BCWA's surrebuttal is not due until 10/25 so BCWA should still have plenty of time to review Providence Water's responses and incorporate them into testimony. **This won't give us enough time. If you submit your response on 10/4, I don't know when the Commission will decide the motion. I don't want to be bumping up against our testimony deadline.**

On the motion to compel re 2-3, we are inclined to produce the documents provided they are treated confidentially, but your draft agreement (which I appreciate) requires us to file a motion. I would like it to only require a motion for future requests in this case, but for the 2-3 request, I would like it to agree that what we furnish will be treated confidentially without the need for a motion. **I can't agree to this. We disagree that the information is confidential. We are willing to treat it as such pending a Commission ruling.. However, the Commission ultimately has to decide if it's confidential or not.**

Also since KCWA joined in your motion, we should get them to sign on as well, but I wanted to approach you first. If you agree, I will contact KCWA and if they agree, I will prepare the stip and redraft the confidentiality agreement for your review. **I agree that KCWA should be a signatory to any confidentiality agreement we can agree on.**

I sure hope you are starting to feel a bit better. Thanks, still in the prone position, but I like your idea about a recliner in the office.

**Mike McElroy**

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