



Feb 20, 2019

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

Re: Docket No, 4890

Dear Ms. Massaro,

Please find enclosed an original and 9 copies of:

Motion to Intervene Out of Time of the Providence Apartment Association

Copies have been provided electronically to the Docket Service List

Thanking you for your time,

Brian Bishop, Board Member
Providence Apartment Association

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

IN RE: NARRAGANSETT BAY
COMMISSION GENERAL RATE
FILING

DOCKET NO. 4890

ENTRY OF APPEARANCE

Now comes Matthew L. Fabisch, Esq. and hereby enters his appearance on behalf
of **the Providene Apartment Association** in the above captioned matter.

Matthew L. Fabisch, Esq. (RI Bar #8017)
President and General Counsel,
Stephen Hopkins Center for Civil Rights
26 Gladstone St.
Smithfield, Rhode Island 02917
Tel 401-324-9344
Fax 401-354-7883
E-mail Fabisch@fabischlaw.com

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

IN RE: NARRAGANSETT BAY
COMMISSION GENERAL RATE
FILING

DOCKET NO. 4890

**MOTION TO INTERVENE OUT OF TIME OF THE PROVIDENCE
APARTMENT ASSOCIATION**

Now comes the Providence Apartment Association, a Rhode Island Non-Profit corporation (“PAA” hereinafter) by and through its Attorney to move hereby to intervene out of time in the above captioned docket pursuant to Public Utilities Commission (“Commission” hereinafter) Commission Rules of Practice and Procedure (“Rule[s]” hereinafter) 1.14.

Grounds for Intervention

Fully half of the residential class of housing stock in Providence is multi-family, but this half of dwellings actually shoulders some $\frac{3}{4}$ of the residential burden for the Combined Sewer Overflow and other stormwater abatement investments (“CSO” hereinafter) under the status quo rate structure of the Narragansett Bay Commission (“NBC” hereinafter) due to the apportionment of the flat charge, vastly predominated by the costs of the CSO project, per dwelling unit rather than per dwelling structure. Yet, according to models presented in evidence before the Commission in Docket #3432¹, the stormwater infrastructure required is presumed to be equal on a per dwelling structure basis for single and multi-family homes (up to 3 family, a slightly higher contribution is assumed to stormwater facility use by 4-6 family structures), see, *e.g.*, Attachment 3 to NBCs January 10th response to data requests in Docket #3432.

The PAA is an organization of multi-family homeowners that was formed to combat a similar malformation in the Providence tax code. That effort has been largely one of political communication as the equity of the tax code is a matter of politics. The equity of utility rates, however, is a matter of settled principles of process and substance developed in quasi-judicial proceedings with which the PAA lacks familiarity despite being the most manifestly affected and appropriate intervenor in such a circumstance. This lack of institutional experience explains the late entrance on this stage of the moving party. The PAA comes late to intervene based on public awareness of the issue generated by the proposed late intervention of the General Treasurer, then causing the PAA to comprehend the necessity of its own intervention and the attendant rugby like scrum for counsel and

¹ Docket #3432 is a Commission Initiated Docket on Stormwater Rates. The caption is unknown to moving party. There was no order issued nor any evidence of affirmative closure or termination of the docket present in Commission files related to that docket.

cogent statement of interest and issues which, in light of the late start, we believe to have properly effected in a remarkably short time. In particular, while we thank the General Treasurer for raising awareness of this docket and we wholly embrace and extend the arguments noted as points 9, 10 and 11 in his February 4th filing of his own Motion to Intervene Out of Time in the instant docket, his intervention is neither intended nor sufficient to represent the interests of the PAA in this docket.

The George Wiley Center has also filed a late in time motion for intervention and our thanks extend as well to the added attention this filing has brought to the matter. While the substantive interests of multi-family owners could well be aligned with certain of those the Wiley Center seeks to vindicate in this proceeding, the Wiley Center does not propose to represent multi-family owner interests and is expressly devoted to “social and economic justice” which are not at all the same principles that inform primary equity in setting utility rates which are of concern to multi-family owners, *i.e.*, that user fees are pertinent to the use by the ratepayer of the infrastructure and services provided by the utility and only secondarily focused on the income of said ratepayer or derivatively of said ratepayer’s tenants where ratepayer is a multi-family owner.

This is not to impeach the interests that the Wiley center represents nor to embrace them, but to distinguish those from the PAA in maintaining through this filing that existing or potential parties/intervenors do not represent the interests of the PAA clearly implicated by this docket. The PAA is the quintessentially contemplated intervenor pursuant to Rule 1.14 B (2) that provides cause for intervention to protect “[a]n interest which may be directly affected and which is not adequately represented by existing parties and as to which movants may be bound by the Commission's action in the proceeding”.

Finally, grounds extend further to Rule 1.14 B (3) because the PAA raises issues that the Commission recognized as long ago as the turn of the 21st century when they suggested *in dicta* that the Division would be on guard to insure the equitable distribution of the growing costs of stormwater infrastructure as a component of NBC rates to the extent that the costs of any effort to create stormwater rates were not disproportionate to the benefits of creating that fair allocation, see Transcript of January 14th, 2003 in Docket #3432:

COMMISSIONER RACINE: “ I don’t think we need - - I don’t like to order anybody to do anything. I think the Division has heard us, I think I would toss - - - I would ask , you know, NBC is very good, through that stakeholders group if they would be willing to talk to Mr. Farrell and Mr. Bourque from Brown Rudnick to work with the business group with the Chamber of Commerce, and Mr. Bourque is nodding in the affirmative.”

Said Docket 3432 was entirely focused on equitable fees for stormwater allocation and insofar as can be told from the file, that docket is retained by the Commission and was never closed. Data requests proceeded following the hearing referenced above, but no further action before the Commission was ever engaged, at least as evidenced in the Commission’s docket file.

The Division appears to have been a little harder of hearing than Commissioner Racine imagined; and the NBC, which was thought to be so good at that stakeholder thing, did reconvene several stakeholder meetings but not for more than a decade. When, in recent years, this effort was made, NBC appears to have suffered institutional Alzheimers as to the important function to be served of broad substantive debate on stormwater rates. In fact the process was largely a dog and pony show of what EPA required of the NBC and proffered none of the earnest cost-benefit focus of the original undertaking, nevermind the rate allocation function hoped for by Commissioner Racine.

A member of the PAA participated in these meetings by coincidence and thus we are uniquely able to aver that there was no effort to recruit parties particularly affected by potential stormwater rates as envisioned by the Commission in 3432. Likewise, the Commission itself wrang its hands over more notice and recruitment to dockets on stormwater rates with regard to the business community whose interests might be at stake in a stormwater fee regime, however no Commissioner nor anyone appearing before the commission ever suggested the necessity to seek participants with interests in multi-family housing, or tenants' organization, see, *e.g.*, Transcript of January 14th, 2003 hearing before the Commission in Docket #3432, page 10.

There might be an objection *sua sponte* in the abstract or by a party that stormwater rates is a larger question than posed by the instant docket. The gravamen of the issues raised by PAA, it might thus be averred, is not the impropriety of the approximately 7% rate increase proposed by NBC but the impropriety of allocation of what is approaching 50% of the NBC rates. We beg to differ with this putative point. If, as we allege, stormwater rates are presently unjustly allocated, then unjust allocation is equally reflected in the increase. The first focus on equitable allocation of the NBC costs for the CSO that we have been able to find took place in *In Re: Narragansett Bay Commission General Rate Increase*, Docket # 3162, Report and Order filed Oct. 26, 2001. There was extensive discussion of stormwater rates in a docket when their costs constituted a *de minimus* portion of the NBC rate structure but they threatened an economic sword of Damocles to future rates.² The situation could not be more analogous presently or have been less effectively addressed in the intervening time.

The Commission again grappled with this issue in a simple rate increase case in *Narragansett Bay Commission Abbreviated Rate Application*, Docket #3409, Report and Order filed Dec 17th, 2002 and it was this rate case that resulted in the opening of Docket #3432 referenced above that is more strictly related to stormwater rates but no report or order has yet issued in that topical docket.

² There was an equally vigorous consideration of directing the adoption of an overseer for the CSO project given its size as the largest infrastructure project in RI history, the complicated cost benefit questions spread across many phases, and distinct rate interests, all of which were contemplated to require close monitoring. The Commission, sadly, did not proceed with that recommendation of the Attorney General, which might have obviated the 15 years in the wilderness that this issue of just user fee allocations has spent amongst anticipated regard for the public interest and the ratepayers purse.

It is fair to conclude from these dockets that the representation of interests concerned about just stormwater rate allocation in the general rate cases was necessary for the issue to percolate, and indeed that broader intervention by classes of rate payers might have propelled this issue to a swifter and more just conclusion. The same notion is advanced here in support of this motion of the PAA for intervention late in time.

Further, the inadequacy of even well intentioned Division and Commission staff to guard the interests of the class of ratepayers of which the PAA is representative is baldly on display when the NBC's own expert Matt Travers under Cross-examination by Commission Counsel Steven Frias teed up the very issues the PAA seeks to raise, testifying that the scale of reallocation of rates as between residential and the industrial/commercial sector under a stormwater fee regime was obscured because of the significant contemporaneous reallocation that the drainage unit algorithm effected as between single and multi-family homes. The focus of the NBC, the Division and the Commission itself on the shifting of rates between residential and business/commercial sector and/or between rate bases in particular municipalities was so loud as to drown out this clear testimony on the intra-residential user shift that was inherent in adoption of more equitable stormwater rates.³ Mover avers that the lack of encouragement for intervention in that docket to represent multi-family interests has led to a miscarriage of justice in the sense of equitable allocation of CSO costs on a scale of tens of millions of dollars over the intervening years, see Transcript of the January 14th hearing for Docket #3432, Cross-examination of Matthew Travers, pages 9,10.

In sum, the failure of the extant processes and watchdogs to retain a focus on equity in stormwater rates indicates the grounds, and in fact the need as a matter of broader public interest, for the intervention of the PAA.

Substance of Intervention

While plausibly implicated and incorporated by the grounds of this motion for intervention out of time, certain of the substantive points we intend to raise would, if delayed in their disclosure, plausibly fall victim to Rule 1.14 F that controls "broadening of issues", limiting such action to that required by the public interest and that which would not result in "undue prejudice or hardship to other parties". That is the reason for the hasty preparation and submission of this motion contemporaneously with the submission of testimony which will be only the beginning of the establishment of issues for this docket that are not yet settled or even explicated. We think this rushed submission a preservation that prevents the consideration of these issues as "broadening" despite the errors and minor lacking citations that we will no doubt need to correct.

For these purposes, our statement of substantive concerns is meant to raise issues in time that this intervention out of time shall not broaden issues but shall result in organic

³ In fact mover PAA calculates with reference to Attachment 3 of NBC's January 10th, 2003 response to data requests in Docket #3432 that this intra-residential equity issue actually resulted in as large or larger aggregate reallocation of CSO cost recovery than the potential residential to commercial shift based on examination of 28,000 Providence residential tax records.

adoption of these issues from the commencement of substantive action on the docket. But, to the extent that there be any suggestion or objection that any issues raised by an out of time intervener are, *ipso facto*, broadening, while we maintain logic is to the contrary, the substantive statements of issues here would equally facilitate a limitation of prejudice or hardship from the raising of said issues in an out of time intervention.

The predominate issues to be raised by the PAA, independent of those put forward by other parties, are:

1. the lack of equity in rate allocation as a matter of the user fee principle.
2. the lack of consideration in previous dockets (whose evidence is already on record of the Commission to be cited both in brief and cross-examination) of the intra-residential equity to be effected by a stormwater rate regime, as well as realleging the already recognized equity concerns as between commercial and residential user rates associated with stormwater infrastructure.
3. data requests for updating an understanding of the proportion of the sewer rates related to stormwater infrastructure and the updating of at least the existing model already constructed for NBC and used in Dockets #3409 and 3432 with current presumed CSO spending arc including phase 3 (as proposed) to examine the scale of reallocations that would be effected were stormwater rates adopted at present and as predicted for the next decade⁴.
4. data requests to update costs estimated for Docket #3409 and #3432 of establishing a stormwater fee regime and whether consideration of alternatives such as use of tax records which already contain spreadsheet ready lot and building coverage and might be updated for paving during the arc of a stormwater fee adoption or adjusted with a median allowance for paving other than for a small number of large parcels could reduce those costs.
5. data requests regarding the potential scale of future costs for stormwater abatement in NBC district areas with separated sewers and information on who operates the separate stormwater collection systems and would be responsible for those costs and their recovery to inform concerns of equity of stormwater rates as applied to said portions of the NBC district.
6. data requests regarding the number of NBC multi-family dwelling bills in the various municipalities within the district, inquiring whether the intra-residential shift might in fact alleviate some of the concern the Commission expressed during the January 14th, 2003 hearing in Docket #3432 as to whether stormwater rates would charge more economically challenged communities a higher proportion of CSO costs as a secondary consideration beyond the actual “use” made by varying ratepayers in varying communities of the CSO infrastructure.

⁴ previous contemplation of this distinct question related to the cost benefit of establishing a stormwater rate regime, to our understanding, having been limited to knowledge of predicted rates only so far as 2008 per record in Docket #3432, see, *e.g.*, NBC January 10th, 2003 response to data requests in Docket #3432.

7. Reference may be anticipated to previous Division testimony and cross-examination of Division witnesses in Dockets #3162, 3409 and 3432 and submissions anticipated in the instant docket related to the appropriateness of creating stormwater rates whether or not so called “freeriders” can be captured or charges extended to NBC ratepayers resident in portions of the service area where separated sewers exist (see also issues 5 and 6.).

8. Whether the State itself is such a “freerider” in the several contexts including the rates charged to sewerage state facilities and educational, cultural and medical campuses or constructs serving notably broader constituencies than the residents of the NBC district where such rates take no cognizance of contribution to stormwater run off; the extent of contribution of interstate highways, state roads and major arterial municipal roads demonstrated to be utilized to a notable degree by other than NBC District residents to the CSO costs, bearing in mind but not conceding the questions of whether such freeriding can be captured by rates under the Commission’s jurisdiction or are more appropriately the subject of statutory address inspired perhaps by Commission findings as to these putative effects.

9. We anticipate, as well, to brief in opposition to the reigning theory of both NBC and the Division, never decided by the Commission, that NBC is without statutory authority to capture “freeriders” under a stormwater rate regime as averred by NBC and the Division on the basis that stormwater flows are not meant to be captured by reference to indirect connection to the NBC “project” (or even potentially existing ratepayers whose stormwater connection is often, although not exclusively, similarly indirect, for that matter) discussed in Dockets #3162, 3409 and 3432 and with the attendant memoranda based for the most part on analogy to circumstances in other states with differing Constitutions and Statutes.

10. The extension of our embrace of the General Treasurer’s cited ground 9-11 on the affordability of NBC CSO capital plans to include a mandate for Cost Benefit consideration in any rate increase or future NBC spending presuming recovery and associated with CSO plans; and whether the overseer model rejected in Docket #3162 might be an effective prosecutor of cost benefit, project streaming and rate design for CSO cost recovery independent of NBC and more sensitive to equity among users.

11. The appropriateness of continuing the collection of 25% reserve in excess of debt service on the theory that virtually unlimited and unending CSO expenditures make such a large capital reserve appropriate irrespective of collection history and debt rating.

12. (a) Whether there are efficiencies of service provision and administration of both the CSO related and other sanitary sewer driven costs of the NBC rates that suggest rates for multi-family homes should reflect those efficiencies; and/or (b) should a practice be developed of providing meters and billing for sewer and water rates to each dwelling unit which is paying the flat charge given that these costs for water and sewer, without proposed increase, amount to approximately 12.5% of average rent (w/o East Side) and over 20% of median renter’s salary in Providence according to the 2017 Housing Fact Book published by HousingworksRI -- such billing to the actual users rather than the building owner being a more classic undertaking of true user fees where costs and understandings of use efficiencies are transparent to the user providing the proper incentive for use decisions and factional awareness of and participation in ratemaking.

13. Finally, we are seeking the services of an expert witness or witnesses on the public interest grounds cited as secondary support for the instant motion, *i.e.*, that owners of multi-family property have economic interests aligned with their tenants and thus serve as an indirect representative of tenant interests in these proceedings, especially to the extent that those interests are associated with the affordability of NBC rates in particular and affordable housing as a general public interest. We would anticipate testimony on the relation of landlord costs and apartment rents, and where inelasticity in one form or another might govern those rents or costs that short supply of apartments is at least partly a function of high costs, including sewer rates. If possible we would also obtain expert testimony on the extent to which stormwater rates would be classic user fees from an economic perspective (and see issue 12 (b)).⁵

We understand and respect that there can be disagreement over the power of the Commission to effect the outcomes we impliedly recommend through preservation of these issues for consideration in this docket, but believe that their adoption or rejection from practical and legal perspective as well as equity/merit determinations is for the substantive work of the docket and not the procedural axe.

Respectfully Submitted,
Providence Apartment Association
by Counsel

Matthew L. Fabisch, Esq. (RI Bar #8017)
President and General Counsel,
Stephen Hopkins Center for Civil Rights
26 Gladstone St.
Smithfield, Rhode Island 02917
Tel 401-324-9344
Fax 401-354-7883
E-mail Fabisch@fabischlaw.com

⁵ Of course the mention of this potential testimony is not meant as any form of *ipse dixit*, but to preserve the possibility to present that substance through direct testimony rather than solely on cross-examination and give notice to parties of these “issues”. Of course testimony of experts for other parties would precede this, but we are determined that our experts not use any testimony earlier submitted for this docket to inform any expert testimony we adduce other than in preparation of our own rebuttal where applicable. We believe the period allowed for data requests and rebuttal testimony would provide some accommodation for this effort without undue hardship to other parties.

We would move as expeditiously as possible to identify such expert(s) and file their testimony such that data requests and rebuttal to them and preparation for cross examination could be fairly made by the parties to this docket. We would presume nothing short of legitimate objection if such a standard were not maintained, but anticipate the Commission’s ability to entertain this possibility with regard to real prejudice late filed testimony may threaten rather than purely technical procedural sufficiency. We state here unequivocally that we have no intention to construe the acquiescence of any party or failure now to object to the general principle stated as in any way thereby admitting of a general principle on the subject in other dockets or the waiver of any objection to sufficiency of any specific testimony submitted pursuant to these representations of the moving party anticipating lack of prejudice.

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

IN RE: NARRAGANSETT BAY
COMMISSION GENERAL RATE
FILING

DOCKET NO. 4890

CERTIFICATION of SERVICE and RULE 1.16 B GOOD FAITH EFFORT

I hereby certify that on February 20th, 2019 I did deliver an original and 9 hard copies of the foregoing Motion of PAA to Intervene Out of Time in the captioned docket and I did delivery electronic copies of said motion to the Service List for the said docket.

I further certify that mover by and through administrator of intervention and board member Brian Bishop did, pursuant to Commission Rule 1.16 B, make good faith efforts to communicate our intention to file this motion and the general thrust of its content to parties and other movers for intervention but have not received specific approval from any of those contacts for this filing nor have I received specific opposition. The Division was not forthcoming and we imagine they need time to study the specifics of our motion. The NBC Counsel is not presently available. The Treasurer appears generally friendly to the notion but we don't wish to inappropriately impute outright approval. We have had no response from Counsel for the Wiley Center.

To the extent that the results of the good faith effort is required by rule to be included in the motion itself, please consider that portion of this certification which is appended to said motion to be incorporated therein as amendment should form so require.

Matthew L. Fabisch, Esq. (RI Bar #8017)
President and General Counsel,
Stephen Hopkins Center for Civil Rights
26 Gladstone St.
Smithfield, Rhode Island 02917
Tel 401-324-9344
Fax 401-354-7883
E-mail Fabisch@fabischlaw.com