

State of Rhode Island and Providence Plantations

Public Utilities Commission

Minutes of Open Meeting Held January 30, 2003

Attendees: Chairman Elia Germani, Commissioner Kate Racine, Commissioner Brenda Gaynor, Steve Frias, Cindy Wilson, Alan Nault, Douglas Hartley and Luly Massaro.

Commissioner Racine called an emergency open meeting to order at 9:42 A.M. in the first-floor hearing room of the Public Utilities Commission. A quorum was present.

Commissioner Racine moved that the Commission call an emergency open meeting to order as being in the public and ratepayer welfare pursuant to R.I.G.L. 42-46-6, for the purpose of addressing urgent concerns relating to matters that had occurred in New England Gas Company Docket 3459. Commissioner Gaynor seconded the motion. Chairman Germani dissented. **Vote 2-1.**

3459 – New England Gas Co.: Discussion related to urgent concerns expressed by Commissioners Racine and Gaynor as to the basis for and manner in which Chairman Germani had granted the Division an extension of time, from January 31 to February 4, 2003, to respond to the Commission's Data Request No. 1 propounded on January 23, 2003. The Commissioners expressed concern that the Division had not filed a motion for extension of time to respond, which is required by the Commission's Rules of Practice and Procedure, and that the *ex parte* rules governing communications between Commissioners and parties in a pending proceeding before the Commission may have been violated. (*See attached transcription.*)

Commissioner Racine moved that the Division be directed to file its response to Commission Data Request No. 1 by noon on Friday, January 31st, and further moved that all motions for any purposes, whether procedural or substantive, be filed in writing with the Commission and distributed to all Commissioners for appropriate action. Commissioner Gaynor seconded the motion. Chairman Germani dissented. **Vote 2-1.**

The open meeting adjourned at 10:10 A.M.

A certified transcript of the tape recording made of this open meeting is attached hereto.

I, Patricia Rossi, Administrative Secretary to the Rhode Island Public Utilities Commission, received a tape recording of the January 30, 2003 Open Meeting of the Commission. I transcribed the tape recording and circulated the transcription to the Commissioners and Executive Counsel Frias for review. Commissioner Gaynor and Counsel Frias submitted typographical edits which I made to the transcription. To the best of my knowledge, the attached "Transcription of Tape Recording of Public Utilities Commission Open Meeting January 30, 2003" is a true and accurate transcription of the tape recording of said open meeting.

TRANSCRIPTION OF TAPE RECORDING OF PUBLIC UTILITIES COMMISSION
OPEN MEETING JANUARY 30, 2003

COMMISSIONER RACINE: Good morning. It is January 30, 2003. I am Kate Racine, a Commissioner at the RIPUC. It was my understanding that on January 29 when I left the building that in fact legal counsel Steve Frias had requested from the Division that they would have Data Request No. 1 due here at the Commission on Friday, January 31st and that they were granted until February 4, 2003 to respond to Data Requests 2 and 3. When I entered the building this morning -- and it was really just open discussion in the foyer to the Commission offices -- I believe it was Commission secretary that told me in fact that had all changed, and that the Chair had granted a further extension to the Division. I was very concerned about it for a number of reasons, but I believe at this point I have set out why I am asking for this emergency hearing upon §42-46-6, and I believe that because the hearing with the gas company is scheduled for February 6th that Data Request 1 as requested by Mr. Frias is in fact testimony that is now within the hands of the Division. It does not require any more than to allow that testimony to go forward to the Commission. In terms of the meeting you may say -- does it constitute the necessity to come with such short notice -- and I believe that it does. I think that the Commission going forward certainly needs that in order to prepare for the February 6th hearing. There have been missives between counsel, certainly they have been circulated to the Commission, and ultimately requests of the Division. I see no reason why that can't come forward. I think there is harm, and ultimately it is harm to the welfare of the ratepayers as I see it, because we don't have all of the information or there is a delay in us having the information to prepare for that very important hearing. In terms of the Chair, I will go on record that counsel did confirm that in fact it had been granted by the Chair. I asked what motions had been made by the Division to the Commission that I might see. I do not have any at this point in time. I was then told that Mr. Bill Lueker from the Division did e-mail Luly Massaro. The Commission was not e-mailed. The Commission at this point in time has no idea that any of this has taken place except through the courtesy of the Commission secretary and then Mr. Frias certainly. I did ask before we came in if counsel would speak with the Chair because if the Chair wanted to rescind the ruling I was perfectly comfortable with that, so that the Commission could have the Data Request 1 as asked for by counsel. That did not take place, and so I believe I would certainly await any evidence that you have, Chair, or terms, or give you the opportunity, if you wish to or if not, that is up to you, but as to how you decided to grant the request of the Division -- nothing from counsel who has worked steadfast, numerous hours going through everything and to the exclusion of the other two Commissioners. If you want to address me that is fine and, very respectfully, and if not, I would just move on to my bottom line which is I believe that as a Commissioner, I should receive motions and requests from the Division as well as the Chair; that they would then be acted upon: if they were procedural that is one thing, and if they are substantive, which I believe this is, because it is the very testimony that we are going to take into that case. Number three, I believe as a Commissioner that the courtesies are extended. You go in and you say, I have granted this I am going to do it procedurally. This is a substantive issue, which is the withholding of information -- testimony now in the possession of the Division. Another thing that I am very huge on is that when I work with counsel, is to support

counsel and I feel that Steve Frias is excellent counsel to the Commission. He made the data requests; he wasn't even brought into the loop to say do you have an issue with it and I think that is very unjust. And also I believe that we need a piece of evidence from the record to indicate it and I don't have that piece of evidence. I believe that further, there have been discussions, I have had people tell me that there were discussions going on about this case. The Commission and the Division are separate entities. They do not have ex parte discussions. One does not take the other in a room and ask for requests, grant or deny. There are three of us. Three of us that work diligently on these cases. Do we disagree at times on material? Absolutely. Should we? Sure. But we must have courtesy and information shared among the three so that in the end we can make very knowledgeable decisions. I think that hasn't occurred in this situation and I think it is very unfair. Is the Chairman very busy? I am sure he is, but we have counsel--he has two--that that could be given to. But I will tell you now I have enough respect for both of them, tremendous respect, that they are consulted in these matters, that they render an opinion, and that all three Commissioners get an opportunity to weigh in on a substantive issue like this. It is not just procedural, it is far more than that. It slows up the process. Mr. Frias was very fair in granting the other requests of the Division and said we can go forward, and he felt that it was necessary for the information and the testimony to be transferred. And so based on that, at the appropriate time and I will wait to hear from you, I am going to make a motion on Data Request 1 that it is still due on Friday January 31, 2003. I would ask for your support Commissioner Gaynor and yours, too, Chairman, if in fact you feel that the possibility of overlooking or communicating. But I absolutely demand, as a sitting Commissioner, that the Division put in writing what it asks for from this Commission. That it not do a side-bar, that it not do a telephone call, because that puts us all in jeopardy, every last one of us. And all I ask is the respect of the Division to the Commission, because I certainly as a Commissioner respect the Division. And if we've got that flow of information we are all better for it. There is an injustice here. When it is done, I'll bring it in. Everybody knows that the Chairman does want to accommodate, but there is a fairness issue here and it is going to be done fair and square, up front, three Commissioners. And not take them aside and however and a good guy and he says, sure, and you got two left out in the cold. It is an injustice to him as far as I am concerned. It doesn't take five seconds. And this is not the first time since the first of January that I have said, "in writing", so that we have a paper trail, that is all. Should the Company say, "when did this all come about?" We can say, "here is a motion, here is a consideration, and here is how it happened," that is all. And that is why I am absolutely furious, and I am more furious that my counsel Frias was not brought into the loop in terms of this because I think he is bright as a button, he has worked this case. Yes, has there been pulling and tugging back and forth? Yes, I think that's fairly true. And you know what that is? Healthy. What is not healthy is getting it from the side as to blanketing all three. So based on that, Commissioner, I feel that the rules say procedural for the Chair to preside --I think the statue covers it. And I feel have said what I feel, which is "Division up front, out front, do it in writing", and I hold that Data Request 1 is still due on Friday.

CHAIRMAN GERMANI: No, I want to hear it from you.

COMMISSIONER GAYNOR: No, no, this is now--the bar has been tossed, I am waiting to hear now. She has thrown the issue out on the table and I have asked for your response.

CHAIRMAN GERMANI: I'll respond. I see nothing here which justifies an open meeting for this purpose, okay. However, since obviously I am being attacked here I will say this. What I did was a matter of a courtesy of giving an extension to the Division because their counsel was away. Paul Roberti is away. That is my right under the rules. There is no ex parte communication. It did not deal with an issue of fact or law. There was no decision involved here whether or not this matter going to be provided. They were given until next Tuesday to respond yea or nay. I have heard nothing from counsel that this will interfere with the operation of the case. I have heard nothing from counsel that the matter that was related to here was other than procedural. This is my authority. As Commissioner, presiding Commissioner, I don't have to consult. This is an attack

COMMISSIONER GAYNOR: Can you site to where your authority is not to consult with us on what is apparently, although we have not seen it, a motion for an extension of time?

COMMISSIONER RACINE: Where is the motion?

COMMISSIONER GAYNOR: We need to know first of all, where the motion is, and secondly, where you find your authority as presiding Commissioner. You refer to it, but I would like to know what it is.

CHAIRMAN GERMANI: You know this is a

COMMISSIONER GAYNOR: no--that you can make this without a consultation with your fellow Commissioners and colleagues who, by the way have always consulted with you as a matter of courtesy, collegiality, whatever you want to call it. We have always gone the distance.

CHAIRMAN GERMANI: Yup, that's for sure.

COMMISSIONER GAYNOR: Thank you for recognizing that.

CHAIRMAN GERMANI: You don't think I am serious do you?.

COMMISSIONER RACINE: I am going to rule out of bounds. You are being asked a question. You respond and you stay with the issues, there will be no editorial comments.

CHAIRMAN GERMANI: Look, look, Commissioner Racine, I am personally being attacked, my integrity is being attacked, and I am offended by it.

COMMISSIONER RACINE: I am not attacking you at all.

COMMISSIONER GAYNOR: We are looking at the rules, we are looking at the law. We are protecting and upholding the law here, and we would like to know under what authority you are able to make a ruling without consulting the rest of us or counsel, and on what basis and on what motion, because we always do business a certain way.

CHAIRMAN GERMANI: Except as otherwise provided, whenever by any Commission rule, regulation, or order, or any notice given thereunder, an act is required or allowed to be done at or within a specified time, the time fixed or the period of time prescribed may, for good cause, be extended by the presiding officer upon request made before expiration of the period originally prescribed or as previously extended.

COMMISSIONER GAYNOR: Can you give me the page or the cite?

CHAIRMAN GERMANI: Yes, Page 9. 1.6b.

COMMISSIONER RACINE: And how was that request made Chairman?

CHAIRMAN GERMANI: By Mr. Ahern.

COMMISSIONER RACINE: Oh, the Administrator. Is that normal that one would approach you in that fashion for an extension?

CHAIRMAN GERMANI: Not only is it normal, but

COMMISSIONER GAYNOR: Actually, I have a concern, because we do have a provision in our rules about ex parte communications. And those prohibit communications from parties in any proceeding pending before the Commission. Obviously, the Administrator is the representative of the Division and they shall “not communicate ex parte with any Commissioner about or in any way relating to the proceeding and no Commissioner shall request or entertain any such ex parte communication.” There is even a minor exception to that which says it “does not apply to a communication from a party or its counsel or agent if the communications relates solely to general matters of procedure or scheduling and is directed to the clerk or the Commission counsel. In any case, a Commissioner cannot be contacted directly by any party to a pending proceeding for any matter, procedural, scheduling, substantive, regardless. And that takes precedence over everything, which is why we are here -- because our rules are here to protect the integrity of the process. And I don’t believe that the integrity of this process was protected by the actions that were taken.

CHAIRMAN GERMANI: Well, I am reading our own rules and ex parte means direct or indirect communication outside of a hearing in connection with any issue or fact of law in any pending proceeding. This is not an issue of fact of law.

COMMISSIONER GAYNOR: But then it says, “about or in any way related to the proceeding.” That is much broader.

COMMISSIONER GERMANI: You know, look, I am a lawyer, have been one for forty years. This is my decision.

COMMISSIONER GAYNOR: Can you as a sitting Commissioner hearing evidence in this case, have a contact with a party in the case without notice or consultation with the other Commissioners? Who would have pointed out that it needed to be done on a noticed basis by motion, noticed with due process protection as Commissioner Racine referred to earlier, for all concerned with integrity of the process, the integrity of the Commission and of everything that we do here, so that everything is done with due process, in a publicly noticed fashion. And this simply does not amount to that and in fact violates that in my view. I will also point out that we have not heard one word from the Division whether it intends to object and that it needs extra time to determine whether it is going to object or provide documents that it has in its possession. You are talking about extending time to them, which is what the discussion would have taken place had we gone to the usual process we did, which would be to handle it at an open meeting and

discuss whether it was appropriate to grant an extension not knowing whether they are simply holding off to file an objection on that date, with a hearing two days later, alright, when the rules say they must file objections to relevancy or whatever privilege as soon as possible. And there is no reason that I can see that this issue with regard to the Request No. 1 made on January 23 could not have been responded to already in my view. But I was going along with counsel Frias who had granted them until the 31st. At this point I would second Commissioner Racine's motion and, as an action of this Commission, order that Data Request No. 1 dated January 23, 2003 as set forth by counsel Frias be responded to on or before this Friday January 31st at noon, which is tomorrow, so that we will have sufficient time to prepare for the case which is scheduled next week. All in favor?

COMMISSIONER RACINE: For discussion: I would direct the Division to refrain from any conversation direct or otherwise with the Chair or any Commissioner, and that all requests are in writing through the Commission, procedural, substantive or otherwise, as we continue 3459. All in favor? Aye.

COMMISSIONER GAYNOR: Aye.

MR. FRIAS: Before you leave, you have to make a motion to say that this was an emergency open meeting.

COMMISSIONER RACINE: Aye, certainly, and upon all the discussion we had it decidedly was. There was a basis for us to be here under §42-46-6.

COMMISSIONER GAYNOR: Aye, which calls it in the public welfare, and it is in the ratepayers welfare.

COMMISSIONER RACINE: Thank you.

I, Luly Massaro, the Clerk of the Commission, was present at the open meeting conducted on January 30, 2003. I utilized a tape recording device to record the open meeting. I delivered the tape recording to the Commission Secretary, Patricia Rossi.

I, Alan Nault, Fiscal Analyst for the Commission, was present at a meeting with Commissioners Racine and Gaynor at which typographical edits were made to the transcript while the Commissioners heard the tape recording. These edits were presented to Patricia Rossi.
