

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS
PUBLIC UTILITIES COMMISSION

IN RE: INVESTIGATION INTO THE :
ADEQUACY OF THE PAWTUCKET : Docket No. 3452
WATER SUPPLY BOARD'S :
TREATMENT PLANT :

REPORT AND ORDER

I. Introduction

Pursuant to the broad authority granted to the Commission under Title 39, the instant docket was initiated by the Public Utilities Commission (“Commission”) *sua sponte* for the purpose of investigating the delay in construction of the Pawtucket Water Supply Board’s (“PWSB”) water treatment plant. During the pendency of PWSB’s general rate case, Docket No. 3378, it became apparent that due to issues of differing interpretations of the Pawtucket City Charter, there would be a delay in the construction of a new water treatment plant, a project that the Commission found was necessary.¹

In June 2002, three months following the Commission’s open meeting decision in Docket No. 3378, the Commission sought an update from PWSB.² PWSB responded through counsel, indicating that the Pawtucket City Council and the Mayor (with the Purchasing Board) were in the process of seeking a Declaratory Judgment from the Rhode Island Superior Court to determine the appropriate interpretation of the Pawtucket City Charter, namely, which entity in the City’s government had the right to choose the Design/Build/Operate (“DBO”) vendor.³

¹ Order No. 17349 (issued January 23, 2003).

² Letter to Pamela Marchand from Cynthia G. Wilson, June 20, 2002.

³ Letter from Frances X. Flaherty to Cynthia G. Wilson, July 9, 2002.

On July 18, 2002, the Commission opened the instant docket to investigate the delay in the construction and its impact on ratepayers.⁴ On September 12, 2002, after notice, the Commission held a hearing in the City of Pawtucket for purposes of taking public comment.⁵ At that time, counsel for PWSB advised the Commission that the decision from the Superior Court should be issued before the end of 2002. As a result, the Commission decided to hold any action and await the decision from the Superior Court. Unfortunately, after the decision was issued, the parties did not agree on the proper interpretation of the decision. Neither party appealed and the issue remained unresolved.

In response to the deadlock, on February 4, 2003, at its open meeting, the Commission expanded its inquiry under R.I.G.L. § 39-4-2, to investigate the adequacy of PWSB's water treatment plant to provide a safe and adequate water supply to PWSB customers.⁶ On February 13, 2003, a pre-hearing conference was held at the Commission's offices to set the schedule. At the conference, Commission Legal Counsel indicated that the scope of the instant proceeding would be strictly limited to whether the PWSB water treatment plant is inadequate, insufficient or unsuited to the provide the ratepayers with safe and potable water. Likewise, the public notice stated, "[t]he scope of

⁴ Open Meeting Minutes, July 18, 2002.

⁵ At the hearing for public comment, the Commission heard from PWSB, members of the public and US Filter. The Commission also read a letter from a member of the PWSB. However, as the author was not available, the Commission made it clear that the letter did not reflect the Commission's position in the instant docket. Furthermore, the Commission provided US Filter with an opportunity to provide any response it felt necessary to the letter. US Filter took advantage of this offer and a copy of its response is contained in the file together with the initial letter. The Commission also ruled to grant the Town of Cumberland's Motion to Intervene subject to the limitations of the parameters of the Commission's docket.

⁶ R.I.G.L. § 39-4-2 states: "Whenever the commission shall find upon a hearing and an investigation that the plant of equipment of any public utility is inadequate, insufficient, or unsuited to the public needs, or that repairs, improvements, or changes in the plant or equipment ought reasonably to be made, or that an addition to, alteration, or extension of, the plant or equipment of any public utility ought reasonably to be made, the commission shall order that the repairs, improvements, changes, additions, alterations, or extensions to the plant or equipment be made within a reasonable time and in the manner specified."

this investigation and hearing is to take evidence and determine whether the PWSB treatment plant is inadequate, insufficient and unsuited to the public's need.”

II. US Filter's Motion to Intervene

On February 26, 2003, US Filter filed a Motion to Intervene in the instant docket, arguing that it was entitled to intervene pursuant to Commission Rules of Practice and Procedure 17(b)(2)-(3) for three reasons: (1) that US Filter is the superior bidder for the DBO project to construct the treatment plant; (2) that notwithstanding the limited jurisdiction of the instant docket, it was inevitable that the Commission would address the merits of the leading bidders for the project; and (3) that the interests of the PWSB ratepayers in obtaining the short-term and long-term qualitative benefits of the system proposed by US Filter is not adequately represented by any of the other parties to the docket.

Additionally, US Filter argued that its participation was necessary because the Commission was attempting to use this docket to influence the City of Pawtucket's decision on its choice of vendors. In support of its allegations, US Filter argued that reading a letter into the record during a public comment hearing in a prior phase of the instant docket, despite any disclaimers, was an attempt to influence the decision over which vendor is superior. Next, US Filter pointed to comments by counsel that the continuation of the instant docket would probably become unnecessary if the City Council and the Purchasing Board resolved their differences.⁷ US Filter also pointed to comments by counsel that it was unclear whether R.I.G.L. § 39-4-2 gave the Commission

⁷ US Filter's Motion to Intervene, pp. 4-6.

the authority to select a company to build a water treatment plant.⁸ According to US Filter, the article also indicated that Commission counsel stated that the Commission has the ability to enforce its orders in Superior Court, for example, if the Commission directs PWSB to begin “construction and the City Council balks” at authorizing the funds. According to US Filter, each of these comments shows bias on behalf of the Commission against US Filter.⁹

On March 5, 2003, PWSB filed an Objection to US Filter’s Motion arguing that US Filter has no standing to intervene in the instant docket. Specifically, PWSB argued that “[w]hile it is true that US Filter may be an interested party, that interest does not rise to the level such that there would be a public interest to be served which would justify US Filter’s intervention.” PWSB noted that in its order in Docket No. 3378, the Commission expressed approval of the process undertaken by PWSB to construct a new water treatment plant.¹⁰

Furthermore, PWSB argued that allowing US Filter to intervene would confuse the issues because US Filter would attempt to broaden the narrow scope as announced by the Commission. PWSB stated that US Filter would only be representing its own interests. To the extent that US Filter argued that the PWSB ratepayers would not be adequately represented in this docket, PWSB noted that the Division of Public Utilities and Carriers (“Division”) would be able to adequately represent their interests. Finally,

⁸ Although cited as an exhibit to its Motion, US Filter failed to provide the Commission with a copy of the cited article from the Providence Journal.

⁹ Again, although cited as an exhibit to its Motion, US Filter failed to provide the Commission with a copy of the cited article from the Providence Journal.

¹⁰ PWSB’s Objection to US Filter’s Motion to Intervene, p. 1.

PWSB reiterated the fact that the issues in this docket were about the current condition of the treatment plant and not about the identity of the appropriate DBO vendor.¹¹

On March 13, 2003, the Commission granted US Filter's request for oral argument. On March 20, 2003, the Commission heard oral argument at the Commission's offices, 89 Jefferson Boulevard, Warwick, Rhode Island. The following entered appearances:

FOR PWSB	Francis X. Flaherty, Esq. Joseph E. Keough, Jr., Esq.
FOR THE DIVISION:	Leo Wold, Esq. Special Assistant Attorney General
FOR THE COMMISSION:	Cynthia G. Wilson, Esq. Senior Legal Counsel

US Filter reiterated the arguments set forth in its Motion and Memorandum. The theme of US Filter's argument was that it needs to be involved in the case in order to keep the Commission from making mistakes in the docket. Specifically, US Filter referred to the statement read into the record at the September 12, 2002 hearing. US Filter conceded that it was provided with the opportunity to respond and did, in fact, respond to the letter. Furthermore, US Filter acknowledged that the PWSB and City Council had both made their positions clear with regard to the vendor selection months before the September hearing.¹²

PWSB argued that US Filter's allegations regarding the letter that was read into the record was a red herring. PWSB noted that the Commission, as a public body, has

¹¹ *Id.* at 2-3.

¹² US Filter also argued that the burden of proof on this Motion may not necessarily be on US Filter, stating, "I have tried as an attorney in the Superior Court to keep lots of intervenors out of case and the judge typically responds it's not – the judge doesn't put the pressure on the intervenors to say 'You've got

provided every opportunity for the public to provide comment to the Commission. PWSB stated that this docket is not about the letter and it is not about who should be the vendor. According to PWSB, US Filter's arguments centered on the merits of its technology versus the technology of another vendor, which is outside of the scope of the Commission's docket.¹³

Finally, PWSB argued that the decision for the Commission was whether it would draw a distinction between an "interested party" and "a party in interest." PWSB agreed that US Filter was an interested party. However, the interest US Filter was asserting was what it would do with regard to the future condition of the plant, whereas the Commission's docket is about the current condition of the plant. Therefore, US Filter's interest was outside the scope of the docket.¹⁴

The Division noted that it was acting in its capacity to bring all relevant evidence before the Commission. The Division agreed that it was acting as the advocate for the ratepayers, specifically focusing on the treatment plant, in accordance with Commission directive.¹⁵

At its open meeting on April 1, 2003, the Commission denied US Filter's Motion to Intervene, finding that US Filter is not a party in interest. The Commission agrees that US Filter has an interest in the construction of a new treatment plant. However, US Filter's interest in being considered as a vendor on the project is not the subject of the instant docket. Therefore, US Filter's interest does not fit within the scope of the Commission's docket because US Filter's rights and obligations as a potential vendor

to come up with some wonderful reason to getting here;' instead the judge says, 'What's wrong with these additional parties helping me to do my job...' Tr. 3/20/03, p. 25.

¹³ Id. at 14-16.

¹⁴ Id. at 16-17

will not be determined by the Commission. Furthermore, the Commission finds that the Division is able to adequately represent the interests of PWSB's ratepayers. Thus, US Filter is not a party in interest under the Commission's Rules of Practice and Procedure.

With regard to US Filter's argument that the Commission has attempted to use the instant docket to influence the decision-makers in Pawtucket by improperly allowing public comment, the Commission finds that US Filter's arguments have no merit. The instant docket was opened approximately *six months after* the PWSB, the Purchasing Board and the City Council asserted their respective positions. Furthermore, the first public hearing was held approximately *eight months following* these entities' decisions.

Finally, with regard to US Filter's contention that allowing a letter to be read into a transcript was inappropriate, this Commission, as a public agency, responsible for rendering decisions that affect ratepayers, has a practice of permitting members of the public to fully participate in the public comment process. As the Bench indicated at the March 20, 2003 hearing:

We really believe that it's very important that the public feels that when they have something to say [that we] listen to it. This has been a practice we've adopted; it's not that we're advocating or adopting the position of any person that comes to speak, we just believe in giving people the opportunity to speak. That's been a long practice of the Commission.¹⁶

Not only does the Commission have a statutory mandate to take public comment in a traditional rate hearing, the Commission also has a policy of providing opportunity to the public to comment on any proceeding before the Commission, the outcome of which, could affect their rates in a future proceeding. The Commission does not quash comments from the public simply because they do not comply strictly with the rules of

¹⁵ Id. at 18-19.

¹⁶ Id. at 29.

evidence or even if they do not address an issue directly related to the specific case. Rather, the Commission allows input and, when appropriate, attempts to direct the person to the proper person or entity to address the issue. Furthermore, the Commission is cognizant of the fact that public comment is just that – comment. It is rare that a member of the public providing verbal comment is put through cross-examination, despite the fact that parties could ask questions.¹⁷ The Commission is fully capable of balancing the weight of the comment against all of the evidence contained in the record, even without the participation of US Filter as a full party.

III. Independent Report

On April 3, 2003, the Division filed an “Evaluation Report Pawtucket Water Supply Board Water Treatment Facility Mill Street Cumberland, Rhode Island,” (“Evaluation Report”) prepared by C&E Engineering Partners, Inc., a specialized environmental engineering firm serving the southern New England area from its main headquarters in Woonsocket, Rhode Island.

The scope of the Evaluation Report was designed to “ascertain whether the continued use of [PWSB’s] facilities, for at least the next 3 to 5 years (the earliest a new treatment plant could reasonably be expected to be brought on line), has the real potential to jeopardize the potable water supply of the approximately 100,000 PWSB service customers.”¹⁸ The conclusions were based on document research, interviews with PWSB

¹⁷ Cross-examination during the public comment period has occurred in the past, but the commenter usually possesses a unique level of experience or background that could assist the Commission in understanding a complex or technical issue. See Commission Docket No. 3402 (examining Mr. Robert Stoddard, retained by the Rhode Island General Assembly to provide comment on a particular rate-setting principle) and Commission Docket No. 3508 (questioning Mr. Henry Shelton of the George Wiley Center for purposes of clarifying the source of the information he was providing through comment).

¹⁸ Division Exhibit 1 (Evaluation Report), p. 2.

staff, facility inspections and onsite investigations (evaluations of the water treatment mechanical/process, the structural/foundation integrity, and the electrical systems).

The Evaluation Report concluded that:

[t]he continued reliance upon this facility for an extended period of time (i.e. 3 to 5 years), without implementation of substantive improvements to increase this system reliability is not prudent....This is not based upon the anticipated failure of a single piece of equipment or component but rather the general degraded condition of the facilities as a whole and the fact that there exists several critical components, without redundancy, that were identified as having the potential for failure, any of which could curtail or interrupt water service entirely for extended periods.¹⁹

The Evaluation Report listed seven areas of concern, any of which could potentially cause a prolonged water outage in PWSB's service area. Each component which could fail would affect the treatment flow. These areas of concern included: (1) the potential for pipeline failure of the raw water intake, (2) the potential for pipeline failure of the raw water pump header, (3) the potential for pipeline failure in the effluent pipe gallery backwash piping, (4) the potential for an electrical short circuit or equipment failure of major electrical components/wiring; (5) the piping in the filter buildings; (6) the potential for pipeline failure of the gravity conduit on Spring Street, and (7) the potential for pump failures at the Branch Street Pump Station.²⁰

IV. Hearing

Following public notice, a hearing was conducted at the Commission's offices, 89 Jefferson Boulevard, Warwick, Rhode Island on May 1, 2003. The following parties entered appearances:

FOR PWSB: Joseph A. Keough, Jr., Esq.

FOR CENTRAL FALLS: Matthew T. Oliverio, Esq.

¹⁹ Div. Ex. 1, p. 15.

FOR CUMBERLAND: Richard Kirby, Esq.
FOR DIVISION: Leo Wold, Esq.
Special Assistant Attorney General
FOR COMMISSION: Cynthia Wilson, Esq.
Senior Legal Counsel

The Division presented Mr. Thomas B. Nicholson, P.E., Senior Principal/Chief Engineer to defend the Evaluation Report. At the request of the Commission, PWSB presented Ms. Pamela Marchand, P.E., its Chief Engineer, for questions.

At the outset, Ms. Marchand advised the Commission that on April 23, 2003, the Pawtucket City Council voted to end the deadlock between the Mayor (with the Purchasing Board) and itself by voting to move forward with the vendor, EarthTech, to design, build and operate the new water treatment plant.²¹ She testified that PWSB had already begun negotiations with EarthTech and would need the approval of the Purchasing Board and the Division prior to executing the contract. Additionally, PWSB will need to address all of the financial requirements.²² She expected that the contract would be finalized by October 2003 and that completion of the new treatment plant will be approximately one and a half years behind schedule.²³

Ms. Marchand indicated that prior to the transfer of operations to EarthTech, PWSB will be bypassing the aerator feed main, the 48-inch main which has recently been found to be in serious condition. The funding will be provided through the last of the bonds that were available through the Public Buildings Authority. The expected

²⁰ Id. at pp. 10-15, Table 6-1.

²¹ Tr. 5/1/03, p. 8.

²² Id. at 9.

²³ Id. at 11. Because the original proposal from EarthTech had anticipated construction to begin in the spring, allowing for a full summer's construction to start, Ms. Marchand opined that it may take longer than two years to complete. However, she indicated that negotiations are ongoing. Id. at 20-21.

completion date is late June 2003.²⁴ Ms. Marchand also testified that an electric transformer was recently replaced. PWSB will be replacing the rotating elements of several pumps and will be replacing the GAC filters as testing has shown that the filtration is at the end of its useful life.²⁵

Turning to the cracking in the effluent pipe gallery, Ms. Marchand explained that in February 2003, the plant personnel noticed some widening of existing cracks and the development of new cracks in the filter building. Additionally, ground water was rising through the floor of the effluent end of the filter building. PWSB contacted CDM Engineers who indicated that the structure had most likely shifted as a result of high groundwater. Subsequent sonic testing revealed voids, possibly caused by washout from groundwater. Ms. Marchand expected that the voids would be filled with grout prior to the groundwater receding in order to avoid further movement. This is especially important so that the building will not shift further and cause pipes to break.²⁶ Despite the structural problems PWSB has been facing, Ms. Marchand testified that the water quality had not been affected and that PWSB has been consistently within allowable standards set by the Environmental Protection Agency.²⁷

Mr. Nicholson provided testimony regarding the Evaluation Report. He testified that:

Our basic conclusions were that the plant, though the plant today produces an adequate quantity and quality of water, there were some real concerns that we had regarding just overall plant reliability and whether it may be prudent to rely on this as a sole source water supply for a population of over 100,000 people. There

²⁴ Id. at 11. In response to questioning from the Bench, Ms. Marchand acknowledged that this repair would cost approximately \$500,000 to be paid for by ratepayers over thirty years and would only be in use for two to three years. Id. at 52-53.

²⁵ Id. at 12.

²⁶ Id. at 14-16.

²⁷ Id. at 16-17.

wasn't any one thing that we could put our finger to, but we came up with seven basic elements, that maybe one of the things to be concerned with knowing that the plant would only last for a couple years you wouldn't be concerned, but we found seven different things of concern, any one of these seven that could put the plant out of service and leave the service area without a water supply and...the conclusion was that it was not prudent to continue to rely on this plant.²⁸

He further indicated that despite the fact that the vendor had been chosen, there are still reliability issues that need to be addressed until the new treatment plant is completed. However, he indicated that he was aware of the repairs that PWSB has planned and it is his opinion that "the Pawtucket Water Supply Board is taking some prudent steps to increase the reliability."²⁹ With regard to certain concerns listed in the Evaluation Report, Mr. Nicholson testified that it would not be prudent to undertake the repairs, such as replacing the entire electrical system. Additionally, with the exception of the bypass header and the valve on the effluent pipe gallery backwash piping, the other five items listed in the report should just be observed and managed.³⁰

Addressing concerns regarding continuation of water supply in the event of a failure, Ms. Marchand testified that PWSB has several interconnections in its system with Seekonk, North Providence, East Providence and Lincoln. PWSB has been evaluating the systems and looking at ways of improving them. However, even with the interconnections, severe water restrictions would have to be imposed.³¹ Additionally, Ms. Marchand explained that because the water would be received from outside sources,

²⁸ Id. at 30-31. The seven items were not ranked in order of severity, but rather, were ranked based on how the water moves through the treatment plant. Id. 31. Mr. Nicholson also explained that failure of one component would not necessarily cause another critical component to fail, but rather, the loss of one component could damage other plant equipment and prolong an outage. Id. at 132-33.

²⁹ Id. at 32-33.

³⁰ Id. at 40-47.

³¹ Id. at 55-60. Ms. Marchand explained that serving the hospitals and providing enough water to serve the fire systems would be of primary concern. Id.

the flow of the water would be reversed and the quality of the water could be a greater concern than the quantity.³²

Finally, Mr. Nicholson testified: “It’s my opinion that I believe the projects that Miss Marchand explained that they are carrying out do constitute substantive improvements.” He agreed that monitoring of certain areas of concern constitute substantive improvements. He also stated:

[t]his opinion is made with the understanding that some of these critical items identified can’t practically be improved because these improvements would take the length of time it would take to build a new treatment plant. And the other thing that allows me to make this opinion is knowing that the stalemate has been broken and that progress is now being made with the new plant and that it’s going to be closer to the three years than the five years. So I think all these factors, the improvements being made and that hopefully the treatment plant is now on the way, I think they have significantly reduced the risk of loss of water to the service customers.³³

V. Commission Findings

The Commission is pleased that the deadlock over the choice of a vendor has come to an end. This would have been a much different case and the findings could have been vastly different. However, rather than being faced with a treatment plant in need of repairs to carry it through an indefinite period of time, the Commission has before it an independent Evaluation Report and an expert witness providing analysis and opinions within a discrete period of time.

The Commission is very concerned with the adequacy of the current water treatment plant to supply water to the PWSB ratepayers. In fact, the Commission finds that without the appropriate repairs and/or monitoring suggested by Mr. Nicholson, the

³² Id.

³³ Id. at 94-95. The Commission also addressed other issues of worker safety and fire codes relative to some of the concerns raised in the Evaluation Report, such as potential flooding if pipes were to fail in the basement or sub-basement areas of the existing treatment plant. Id. at 61-92.

PWSB treatment plant is inadequate, insufficient, or unsuited to the public needs. However, the Commission is persuaded by Mr. Nicholson's testimony that PWSB is addressing the areas of concern contained in the Evaluation Report. Furthermore, a vendor for a new treatment plant has been chosen, providing some closure to one of the overall impediments to fully addressing all of the deficiencies in the current treatment plant. Therefore, the Commission finds that no further action is required within this docket. All other matters pertaining to the treatment plant may be adequately addressed in the General Rate Case, Docket 3497.

Accordingly, it is

(17515) ORDERED:

1. The Commission finds that the Pawtucket Water Supply Board's water treatment plant is inadequate for continued reliance on it to provide potable drinking water to the Pawtucket Water Supply Board's ratepayers for the next three to five years.
2. The Commission finds that Pawtucket Water Supply Board is taking adequate measures to maintain its water treatment plant until the DBO vendor commences operation.
3. The Commission finds that no further action is required within this docket.
4. The Commission finds that all other issues relative to the Pawtucket Water Supply Board's water treatment plant may be adequately addressed in Docket No. 3497 and subsequent dockets.

5. The Commission orders this docket to be closed.

EFFECTIVE AT WARWICK, RHODE ISLAND, ON MAY 22, 2003,
PURSUANT TO AN OPEN MEETING DECISION. WRITTEN ORDER ISSUED ON
JULY 21, 2003.

PUBLIC UTILITIES COMMISSION

Elia Germani, Chairman

Kate F. Racine, Commissioner

*Brenda K. Gaynor, Commissioner

*Commissioner Gaynor concurs but is unavailable for signature.