STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS
PUBLIC UTILITIES COMMISSION

IN RE: KENT COUNTY WATER AUTHORITY OBJECTION TO REGULATORY FEE ASSESSED PURSUANT TO R.I.G.L. §39-1-23 — DOCKET NO. 3104

REPORT AND ORDER

On March 7, 2000, in accordance with R.I.G.L. §39-1-23[1], the Division of Public Utilities and Carriers ("Division") assessed Kent County Water Authority, a regulated utility pursuant to Title 39 of the General Laws of Rhode Island ("KCWA"), its proportionate share of the aggregate expenses appropriated for the Public Utilities Commission ("Commission"), the Division, and the Department of Attorney General ("Attorney General") for the 2000 fiscal year (July 1, 1999 – June 30, 2000). In accordance with the statutorily mandated apportionment formula, the Division billed KCWA the amount of $16,037.90[2] (the "assessment").

---

[1] "***The administrator shall aggregate the expenses of the division, including expenses incurred by the attorney general... and expenses incurred by the commission for each upcoming fiscal year and shall apportion and assess these expenses among the state's regulated utilities****...The administrator shall...apportion and assess one hundred percent (100%) of such expenses among the several public utility companies... located in this state* ***in the proportion that the gross intrastate utility operating revenues of each public utility company...shall bear to the total gross intrastate utility public utility companies****...The sum so apportioned and assessed shall be in addition to any taxes payable to the state under any other provision of law. R.I.G.L. §39-1-23(a). (Emphasis added)*

*Upon collection from the several public utility companies...operating in the state, assessments and any state appropriations shall be deposited in an account to be known as the public utilities commission funding account. This shall be a restricted receipt account and shall be kept by the general treasurer...****The moneys in the public utilities funds shall be expended by the administrator or the commission as appropriate for meeting expenses of the operation of the commission, the division and those expenses incurred by the attorney general****..." R.I.G.L. §39-1-23(c). (Emphasis added)*

[2] See attachment to KCWA Exh. 2.

On March 21, 2000, KCWA filed an objection to the assessment with the Commission pursuant to R.I.G.L. §39-1-25. (KCWA Exh 2.) The basis of KCWA's objection to the assessment is that R.I.G.L. §39-16-13[3] confers a "unique status" upon KCWA by exempting it from the payment of "taxes or assessments…to the state…upon its [KWCA's] income."[4] KCWA argues that R.I.G.L. §39-16-13 bars the Division's assessment because the assessment is based on the income of KCWA.[5]

On March 28, 2000, the Division submitted a Response and Memorandum of Law (Div. Exh. 1) in response to KCWA's objection. In the memorandum, the Division explains that the assessment authorized by R.I.G.L. §39-1-23 is "an equitable funding mechanism" enacted by the General Assembly to enable the Commission, the Division and the Attorney General to recover from the utilities they regulate the costs incurred by these agencies in carrying out their regulatory duties.[6] The Division contends that the tax exemption conferred upon KCWA by R.I.G.L. §39-16-13 applies "exclusively to taxes and not regulatory assessments"[7] under the Rhode Island Supreme Court's recent decision in Kent County Water Authority v.

---

[3] *"It is hereby declared that the authority [KCWA] and the carrying out of its corporate purposes is in all respects for the benefit of the people of the state and, for the improvement of their health, welfare, and prosperity, and the authority will be performing an essential government function in the exercise of the powers conferred by this chapter, and* ***the state covenants with the holders of the bonds that the authority shall be required to pay no taxes or assessments or sums in lieu of taxes, except as provided in §39-16-14, to the state or any political subdivision thereof*** *upon any of the property acquired by it or under its jurisdiction, control, possession, or supervision or upon its activities in the operation and maintenance of the property* ***or upon any earnings, revenues, moneys or other income derived by the authority****, and that the bonds of the authority and the income therefrom shall be at all times exempt from taxation." R.I.G.L. 39-16-13. (Emphasis added)*

[4] See KCWA Exh. 2.

[5] Id.

[6] These costs including building overhead, personnel, equipment and supplies. Div. Exh. 1, at 3.

[7] Id.

Rhode Island Department of Health, 723 A.2d 1132 (R.I. 1999) (hereinafter, the "DOH case").

In the DOH case, KCWA similarly argued that an annual approval fee charged to KCWA by the Rhode Island Department of Health ("RIDOH") pursuant to R.I.G.L. §46-13-2.1(c) was barred by R.I.G.L. §39-16-13. The Supreme Court upheld the RIDOH approval fee, however, finding that it was not merely a tax designed to raise revenue but a valid licensing charge designed to defray the costs incurred by RIDOH in regulating public water supply systems in Rhode Island.[8] The Division concluded that, since the regulatory assessment charged to KCWA under R.I.G.L. §39-1-23 is "incontrovertibly used to defray the costs incurred by the Division, the Commission and the Attorney General in connection with their regulation of public utilities in Rhode Island," the assessment is "indistinguishable" from the RIDOH approval fee upheld as a valid licensing fee in the DOH case.

Following notice, a hearing was conducted at the offices of the Commission, 100 Orange Street, Providence, Rhode Island on April 10, 2000. The following appearances were entered:

FOR KCWA:	Joseph McGair, Esq. Petrarca & McGair
FOR THE DIVISION:	Elizabeth Kelleher, Esq. Special Assistant Attorney General
FOR THE COMMISSION:	Steven Frias Senior Legal Counsel

At the hearing, Mr. McGair attempted to distinguish between the licensing fee upheld in the DOH case and the assessment charged pursuant to R.I.G.L. §39-1-23. Mr. McGair argued that RIDOH's licensing fee was utilized for water safety such as "lab tests, field tests, sanitary surveys,

[8] Id. at 4-5.

investigations of purification" and "examinations of distribution systems."[9] In contrast, Mr. McGair asserted the Division's assessments are "administrative costs that are geared towards revenue."[10] Mr. McGair emphasized that the Division had historically treated KCWA as exempt from the assessment under R.I.G.L. §39-1-23.[11]

In contrast, Ms. Kelleher argued that under the DOH case, in order for §39-16-13 to bar the Division's assessment under R.I.G.L. §39-1-23, KCWA had the burden of demonstrating that the Division's assessment was not a charge utilized primarily to defray the costs of regulation.[12] Although, as Ms. Kelleher noted, RIDOH's charge is called an approval or licensing fee while the Division's charge is referred to as an assessment, the critical point is that both fees are "primarily a regulatory imposition and not primarily a revenue raising measure."[13]

Ms. Kelleher also explained the difference between R.I.G.L. §39-1-23 and R.I.G.L. §39-1-26. She noted that the fees imposed by the Division under R.I.G.L. §39-1-26 are strictly for the purpose of reimbursing the Division and Commission for their expenses in a rate case, whereas the fees assessed by the Division under R.I.G.L. §39-1-23 are necessary to cover the regulatory expenses of the Division, Commission and Attorney General which fall outside the scope of a rate case.[14] Ms. Kelleher emphasized that RIDOH's licensing fee and the Division's assessment are both regulatory in nature because RIDOH's fee is to ensure "safe and potable water," whereas the Division's assessment is to ensure the "water system operates properly, delivers the product to the consumers and does so at just and reasonable rates."[15] In closing, Ms. Kelleher stated that KCWA had failed to show that

[9] T. 10.
[10] T. 11.
[11] T. 15-16.
[12] T. 18-19.
[13] T. 19.
[14] T. 20.
[15] T. 21.

the Division's assessment under R.I.G.L. §39-1-23 is not related to regulation.[16] She further noted that the Division's failure to assess KCWA under R.I.G.L. §39-1-23 in prior years was irrelevant now that the Supreme Court, in the DOH case, had interpreted the nature of KCWA's "tax exemption" under R.I.G.L. §39-16-13.[17]

Under questioning by the Commission, Mr. McGair emphasized his belief that R.I.G.L. 39-1-23 is "revenue raising" but stated he suspected that statute is geared "towards regulation."[18] He subsequently acknowledged, however, that in addition to incurring rate case expenses which are recoverable under §39-1-26, the Commission and the Division incur costs and expenses in connection with other ongoing (but not rate case-related) regulatory activities related to KCWA. [19]

In response to questioning regarding the legislative history of KCWA's tax exemption under R.I.G.L. §39-16-13, Mr. McGair explained that in 1946 the Rhode Island General Assembly, at the behest of the legendary Colonel P.H. Quinn, enacted legislation merging several water companies into the KCWA.[20] Mr. McGair theorized that the Rhode Island General Assembly enacted the tax exemption provision of R.I.G.L. §39-16-13 to protect the bondholders of KCWA from state and municipal taxation.[21] Ms. Kelleher pointed out, however, that in KCWA's last rate case, the Commission approved the annual recovery from ratepayers of $23,000 to fund the Division's annual assessment to KCWA under R.I.G.L. 39-1-23; consequently, KCWA bondholders are not "placed in a position of peril"[22] by the assessment.

[16] T. 22.
[17] T. 22-23.
[18] T. 23.
[19] T. 44-45. Examples of ongoing regulatory activities relating to KCWA which fall outside of ordinary rate case expenses are monitoring the progress of IFR plans and RIDOH submissions.
[20] T. 24-25.
[21] T. 26.
[22] T. 27.

COMMISSION FINDINGS

The issue before the Commission is whether R.I.G.L. §39-16-13 exempts KCWA from the Division's regulatory assessment pursuant to R.I.G.L. §39-1-23. When interpreting Rhode Island statutes, the Commission will first look for guidance from the Rhode Island Supreme Court. Fortunately, in the DOH case, the Rhode Island Supreme Court has recently interpreted the application of R.I.G.L. §39-16-13 to annual regulatory fees assessed by our sister state agency, RIDOH.

In the DOH case, the Court declared that in order for KCWA to claim entitlement to its tax exemption, it "carries the burden of proving that the assessment in question" is "in fact a tax."[23] The Court explained that the distinction between a tax and a fee is that a tax "is primarily a revenue-raising measure" while a fee "is primarily a regulatory imposition."[24] Consequently, KCWA had the burden of showing a fee is "unrelated to the cost of … regulation."[25] The Court found that RIDOH's fee "is primarily … to defray the costs … in connection with … regulation of water supply systems in this state", and therefore, held that KCWA "failed to carry its burden of showing that the $25,000 licensing fee …was unrelated to the costs of DOH's regulation."[26]

In light of the DOH case, the Commission must determine whether RIDOH's licensing fee under R.I.G.L. §46-13-2.1(c) is distinguishable from the Division's assessment pursuant to R.I.G.L. §39-1-23. We agree with the Division that it is not. KCWA asserts that RIDOH's licensing fee and the Division's assessment are as different as an apple and a pear.[27] In the Commission's view, however, RIDOH's licensing fee and the Division's assessments are both fruits and KCWA is simply asserting a distinction

[23] 723 A.2d at 1135.
[24] Id.
[25] Id. at 1136.
[26] Id. at 1135-36.
[27] T. 33.

without a difference.[28] RIDOH's licensing fee and the Division's assessment are both used to regulate the state's water supply. RIDOH's licensing fee is utilized to ensure that water is safe and potable, whereas the Division's assessment is utilized to ensure the water system properly delivers water to its customers at just and reasonable rates.[29] The distinction KCWA has attempted to demonstrate between RIDOH's licensing fee and the Division's assessment is that the Division's assessment is geared towards revenue "to recover administrative costs."[30] The Commission finds this distinction to be unpersuasive. The licensing fee of RIDOH is authorized by R.I.G.L. §46-13-2.1(c). R.I.G.L. §46-13-2.1(c) clearly states that the licensing fee is designed to recover costs relating to "administrative, personnel, equipment". Also, the Supreme Court noted in the DOH case that "all regulatory fees are necessarily aimed at raising 'revenue' to defray the cost of the regulatory program in question, but that fact does not automatically render those fees 'taxes'."[31] Therefore, KCWA's assertion that R.I.G.L. §39-1-23 is designed to raise revenue for administrative costs, assuming it is factually true, is of no legal consequence because R.I.G.L. §46-13-2.1(c) allows for the recovery of administrative costs as well.

The Commission finds that KCWA cannot draw a meaningful legal distinction between the fees assessed by RIDOH under R.I.G.L. §46-13-2.1(c) and by the Division under R.I.G.L. §39-1-23. Consequently, KCWA is squarely faced with the "burden of showing" that the Division's assessment is "unrelated to the costs of" the Division's "regulation".[32] Based on evidence presented to the Commission, KCWA has failed to meet its burden of proof. KCWA did not rebut the evidence presented by the Division that the assessment under R.I.G.L. §39-1-23 is utilized "to recover fixed costs" such as

[28] T. 35.
[29] T. 21.
[30] T. 33.
[31] 723 A.2d at 1135 (citing Sinclair Paint Co. v. State Bd. of Equalization, 15 Cal. 4th 866, 64 Cal. Rptr. 2d 447, 937 P.2d 1350, 1358 (Cal.1997)).

"building, overhead personnel, equipment and supplies" incurred in conducting "regulatory activities."[33] KCWA admitted the Division and Commission incur expenses for ongoing regulatory activities related to KCWA outside of a rate case, and provided no meaningful response to inquiries as to how the Division and Commission should otherwise recoup these non-rate case related regulatory expenses.[34] Finally, we note that KCWA has implicitly acknowledged that R.I.G.L. §39-1-23 involves "regulation" of public utilities.[35]

Based on this evidence presented in this case and the DOH case, which is controlling, the Commission can only conclude that the Division's assessment pursuant to R.I.G.L. §39-1-23 is primarily a fee to defray the costs incurred by the Division, the Commission and the Attorney General in connection with their regulation of water supply systems in this state.[36] Thus, KCWA cannot rely upon its tax exemption under R.I.G.L. §39-16-13 to avoid the payment of the Division's assessment.

The argument of KCWA that the Division had historically not assessed KCWA any charges under R.I.G.L. §39-1-23 is of no consequence. The fact that the Division has not in the past exercised its prerogative to charge KCWA an assessment under R.I.G.L. §39-1-23 does not thereby waive the authority to do so in the present or in the future. The Division's interpretation of R.I.G.L. §39-16-13 in prior years does not prevent the Division from presently adopting the Supreme Court's recent interpretation of R.I.G.L. §39-16-13 and requiring KCWA henceforth to pay a regulatory assessment under R.I.G.L. §39-1-23. In any case, KCWA has historically paid other regulatory fees and expenses to the Division. Indeed, KCWA does not dispute that it is obligated to pay the Division for regulatory expenses

---

[32] 723 A.2d at 1136.
[33] Div. Exh. 1, at 3.
[34] T. 44-45.
[35] T. 23.
[36] 723 A.2d at 1135.

incurred during rate cases pursuant to R.I.G.L. §39-1-26.[37] To require KCWA to pay regulatory rate case expenses under R.I.G.L. §39-1-26 while allowing KCWA to be exempt from a regulatory assessment under R.I.G.L. §39-1-23 is not logically consistent to the Commission.

Moreover, the Commission can discern no rational basis to exempt only KCWA from a regulatory assessment which is required to be paid by all other utilities in this state whose gross annual revenues exceed $100,000. The legislative intent behind KCWA statutory tax exemption, as explained by KCWA's counsel, was to protect KCWA's bondholders and thus make KCWA's bonds attractive to investors.[38] The Commission sympathizes with KCWA's desire to "jealously guard" its tax exemption, but R.I.G.L. §39-16-13 was not enacted to shelter KCWA from the costs of regulation.[39] As the Division pointed out, KCWA bondholders will not pay for any regulatory assessment under R.I.G.L. §39-1-23 because it has been allocated to KCWA's ratepayers in KCWA's last rate case.[40] The mighty Colonel Quinn need not awaken from his golden slumber to stir up another bloodless revolution; his beloved bondholders are not in peril if the Division assesses KCWA a regulatory fee.

At an open meeting held on April 13, 2000, the Commission considered the arguments and evidence presented by KCWA and the Division, and found the Division's argument more persuasive and consistent with Rhode Island Supreme Court precedent.

[37] T. 44.
[38] T. 26.
[39] T. 41.
[40] T. 27.

Accordingly, it is

(16239) ORDERED:

1. Kent County Water Authority's objection to the FY2000 assessment by the Division of Public Utilities and Carriers pursuant to R.I.G.L. §39-1-23 is hereby denied and dismissed.

2. Kent County Water Authority is directed to immediately pay the Division of Public Utilities and Carriers the amount of $16,037.90 which it was assessed pursuant to R.I.G.L. §39-1-23.

EFFECTIVE AT PROVIDENCE, RHODE ISLAND, PURSUANT TO AN OPEN MEETING DECISION ON APRIL 13, 2000. WRITTEN ORDER ISSUED APRIL 17, 2000.

_____

Commissioner Kate F. Racine

_____

Commissioner Brenda K. Gaynor