

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

IN RE: CITY OF NEWPORT, UTILITIES DEPARTMENT, WATER DIVISION

DOCKET NO: 4025

**CITY OF NEWPORT, UTILITIES DEPARTMENT, WATER DIVISION'S
PRE-HEARING BRIEF**

I. INTRODUCTION

The City of Newport, Utilities Department, Water Division (“Newport Water”) hereby submits this brief in response to a request by the Rhode Island Public Utilities Commission (“Commission”/“PUC”) for pre-hearing briefs. During the litigation of the above captioned Docket, the Portsmouth Water and Fire District (“PWFD”) requested that Newport Water be prevented from “paying back” funds owed to the City of Newport as of June 30, 2005. PWFD made this identical request in Docket 3818. As such, on May 18, 2009, the Commission ordered the parties to submit pre-hearing briefs to address the following question:

“Whether the issue of repayment to the City of Newport in the amount \$1,584,171 has been decided by Order No. 19240. If so, can and should the Commission revisit this issue in the instant docket.”

Newport Water addresses these questions in a slightly different order than posed by the Commission, but as set forth below, the ultimate answer is that the issue of repayment *was* addressed by Order No. 19240, and the Commission should not revisit this issue even if it can do so. Newport Water urges the Commission to make a definitive ruling on this topic so that this issue does not become a perennial part of Newport Water’s future rate filings.

II. ARGUMENT

A. Can The Commission Revisit The Issue of Repayment To the City of Newport?

There are three judicial doctrines that require varying degrees of deference to earlier judicial decisions. The doctrine of *stare decisis* dictates that courts should adopt the reasoning of earlier judicial decisions if the same points arise again in litigation. This principle is not absolute, however, and courts may abandon previously adopted rules of law under the right circumstances. *State v. Werner*, 615 A.2d 1010 (R.I.1992). Collateral estoppel is a more rigid doctrine, in that it “bars litigation of an issue when that issue has been determined by a valid and final judgment.” *DeCiantis v. State*, 666 A.2d 410 (R.I.1995). The doctrine of *res judicata* has an even greater preclusive effect, in that “it makes a prior judgment in a civil action between the same parties conclusive with regard to any issues that were litigated in the prior action, or, that could have been presented and litigated therein.” *ElGabri v. Lekas*, 681 A.2d 271, 275 (R.I.1996). Thus, “[a] party defeated in one action cannot maintain a second action based on a ground which could properly have been, but was not, set forth and relied upon in the former action.” *Id.*

For the purposes of this memorandum, Newport will not address the doctrines of collateral estoppel and *res judicata*. Newport recognizes the line of Rhode Island Supreme Court cases holding that the Rhode Island Public Utilities Commission is not absolutely barred from addressing certain issues raised in prior cases. *New England Telephone and Telegraph Company v. Public Utilities Commission*, 118 R.I. 570, 376 A.2d 1041 (1977); *Rhode Island Consumers’ Council v. Smith*, 113 R.I. 384, 322 A.2d 17 (1974); *Narragansett Electric Company v. Kennelly*, 88 R.I. 56, 143 A.2d 709 (1958). Certainly, these decisions can be distinguished from this case. However, Newport believes that its resources, and the Commission’s resources, are better utilized by

examining whether the Commission *should* revisit this issue. It is Newport's position that the Commission should not hear this issue again pursuant to the Doctrine of Administrative Finality.

B. Should The Commission Revisit The Issue of Repayment To the City of Newport?

In addition to the three judicial doctrines cited above, Rhode Island has promulgated another doctrine dealing with deference to earlier decisions – the Doctrine of Administrative Finality. In

Johnston Ambulatory Surgical Associates Ltd. v. Nolan, 755 A.2d 799 (RI 2000), the Rhode Island

Supreme Court held:

“Rhode Island and at least one other jurisdiction have promulgated a doctrine of administrative finality. *Day v. Zoning Board of Review of Cranston*, 92 RI 136, 140, 167 A.2d 136, 139 (1961). See also *Florida Power & Light Co. v. Beard*, 626 So.2d 660, 662 (Fla. 1993) (applying administrative finality to Florida's Public Service Commission). Under this doctrine, when an administrative agency receives an application for relief and denies it, a subsequent application for the same relief may not be granted absent a showing of a change in material circumstances during the time between the two applications. *Audette v. Coletti*, 539 A.2d 520, 521-22 (RI 1988). This rule applies as long as the outcome sought in each application is substantially similar, *May-Day Realty Corp. v. Board of Appeals of Pawtucket*, 107 RI 235, 237, 267 A.2d 400, 401-02 (1970), even if the two applications each rely on different legal theories. *Costa v. Gagnon*, 455 A.2d 310, 313 (RI 1983). (*Id.* at 808)

Administrative Finality differs from the rigid doctrines of collateral estoppel and res judicata, and is more akin to the doctrine of stare decisis. The Doctrine of Administrative Finality provides for a qualified and limited preclusion rather than an absolute bar. Nevertheless, the Doctrine serves a valid and legitimate purpose. As the Rhode Island Supreme Court stated:

“It is our conclusion that the Rhode Island doctrine of administrative finality . . . prevents repetitive duplicate applications for the same relief, thereby conserving the resources of the administrative agency and of interested third parties that may intervene. . . . Administrative finality also limits arbitrary and capricious administrative decision-making, while still preserving the ability of an agency to revisit earlier decisions when circumstances have changed. Finally, by requiring decision-makers to articulate the changed circumstances that support a different decision on a subsequent application, administrative finality provides for effective judicial review of these decisions (*Id.* at 810).”

PWFD's attempt to resurrect the issue of repayments to the City of Newport violates both the letter and spirit of the Doctrine of Administrative Finality.

3. Was The Issue Of Repayment To The City Of Newport In The Amount \$1,584,171 Decided

By Order No. 19240?

The issue of whether Newport Water could pay unreimbursed payroll and other expenses owed to the City of Newport at the conclusion of Docket 3818 was clearly and unequivocally addressed in Order No. 19240:

“The Commission finds that the \$1,584,171 should be paid back to the City. The Commission will not include this repayment to the City in Newport Water’s revenue requirement, but if Newport Water realizes savings from efficiencies, and such funds are not required to expenses included in the revenue requirement, it may use such savings to pay down the account payable balance owed to the City.”

Despite this clear order, PWFD chose to revive this issue in this Docket. Remarkably, PWFD’s direct case completely ignored the Commission’s Docket 3818 Order. This glaring omission was addressed by Ms. Forgue in her rebuttal testimony:

“Mr. Woodcock’s testimony on this topic takes up six pages. In it, he extensively quotes testimony and the Commission’s Order in Docket 3578, which was filed on November 28, 2003 and finalized by Settlement Agreement on June 22, 2004. Mr. Woodcock also quotes pre-filed testimony in Docket 3818. In fact, Mr. Woodcock even refers to a Commission Order from a Providence Water Docket. The one thing Mr. Woodcock never addresses is the above quoted paragraph from the Commission’s Order in Docket 3818.”¹

Thus, Mr. Woodcock finally addressed the Commission’s Order No. 19240 in his surrebuttal testimony. Mr. Woodcock expressed his uncertainty that “all the information was clear when the Commission reported its findings in Docket 3818.”² This uncertainty is difficult to fathom. The issue of Newport Water paying the City for unreimbursed payroll and other expenses was not a

1 Forgue Rebuttal, p. 6.

2 Woodcock Surrebuttal, p.18.

“side” issue or a “tangential” issue in Docket 3818. In fact, it was one of the central issues in Docket 3818. It was the subject of ample direct and cross-examination testimony and a full briefing by the parties. The issue could not have been framed any clearer.

What is clear is that PWFD is unhappy with the outcome of Docket 3818. It should be noted that PWFD did not appeal the Commission’s Order in that Docket. Rather, PWFD – hoping that the Commission would “change its mind” – revived this issue in the current Docket.³ This is a clear violation of the Doctrine of Administrative Finality. It is merely “a repetitive duplicate application for the same relief” PWFD sought in Docket 3818. PWFD has not demonstrated a material change in circumstances. It is simply repeating the same request it made in Docket 3818. Furthermore, PWFD’s resuscitation of this issue has needlessly consumed the resources of all the parties in this Docket. Time, energy, and funds have been expended to address this issue that was already decided by the Commission in Docket 3818.

Furthermore, and without re-litigating the definitions of “borrow” and “loan,” PWFD ignores the fact that the Commission’s Order in Docket 3818 is entirely consistent with the Settlement Agreement in Docket 3578. The Docket 3578 Settlement Agreement held that:

"Newport Water further agrees that it will *not seek to recover in rates* any additional monies that it may borrow from the City of Newport up through and including June 30, 2005." (emphasis added)

In Docket 3818, the Order stated:

“The Commission finds that the \$1,584,171 should be paid back to the City. The Commission will *not include this repayment to the City in Newport Water’s revenue requirement...*” (emphasis added)

Thus, the Commission’s Order No. 19240 did not provide for additional money “in rates” for Newport to pay outstanding payroll and other expenses owed to the City of Newport.

For the reasons set forth herein above, Newport does not wish to re-litigate this issue.⁴ Enough time and resources have been expended to address this already resolved subject. However, Newport does wish to state that it once again completely disagrees with PWFD's interpretation of the Settlement Agreement in Docket 3578. In this Docket, and in Docket 3818, PWFD argues that the Docket 3578 Settlement Agreement essentially directed Newport Water to skip payments to the City of Newport for legitimate expenses approved by the Commission. This punitive interpretation cannot be found in any reasonable reading of the Settlement Agreement.

The Docket 3578 Settlement Agreement was approved on June 22, 2004. In that Docket, Newport was allowed revenue to pay Operation and Maintenance ("O&M") expenses. Among these approved O&M expenses were payroll, payments to Water Pollution Control for Sludge Removal and City Services. Following this approval, Newport Water made payments for these expenses between June 2004 and May 2005. There were no objections to Newport paying these expenses in this eleven month period, and there is no reason Newport should have ignored these same payments in the twelfth month (June 2005).

As set forth in the response to PWFD 5-2, Newport Water owed \$507,631.04 for payrolls, payments to Water Pollution Control, and 4th quarter FY05 City Services reimbursements as of June 30, 2005.⁵ These expenses were ultimately paid. In FY07, Newport Water suffered a substantial drop in revenue. Thus, by the end of FY07 it owed money to the City of Newport for payroll and other expenses. It was these payables that the Commission allowed Newport to pay, if it was able to do so, *without* including any additional monies in rates. This order is wholly consistent

³ Woodcock Surrebuttal, p.18.

⁴ See Exhibit 1, excerpt from Newport Water's Docket 3818 Post-Hearing Memorandum, which is incorporated by reference.

⁵ See Exhibit 2.

with the Settlement Agreement in Docket 3578. Thus, PWFD's attempt to take a second (and same) bite at the same apple should be precluded in this Docket.

III. CONCLUSION .

For the reasons set forth herein. The City of Newport, Utilities Division, Water Department prays that The Rhode Island Public Utilities Commission apply the Doctrine of Administrative Finality and declare:

1. That the issue of repayment to the City of Newport in the amount \$1,584,171 has been decided by Order No. 19240;
2. That pursuant to the Doctrine of Administrative Finality, the Commission will not revisit this issue in the instant docket; and,
3. All other relief the Commission deems meet and just.

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WATER DEPARTMENT
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CERTIFICATION

I hereby certify that I sent by electronic mail a copy of the within to all parties set forth on the attached Service List on May 26, 2009, and one original to Luly Massaro, Clerk, Rhode Island Public Utilities Commission.

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EXHIBIT 1

3. NWD PAYABLES

As of June 30, 2007 NWD had outstanding payables in the amount of \$1,485,606.¹¹ Originally, NWD sought to reduce these payables by restructuring the \$1,000,000 balance owed to the City of Newport on the \$2,500,000 loan approved in Docket 3578. The City agreed to forgo the \$500,000 June 2007 payment so it could be applied to NWD's payables along with any available balance in the "Repayment to City Account." The \$1,000,000 balance would then be paid over the course of four years at \$250,000 per year. This proposal was made for one simple reason - it would allow NWD to reduce payables that were caused by an under collection of revenue *without* building any new funding into existing rates.

However, on June 22, 2007, the Commission directed NWD to make the \$500,000 installment payment to the City of Newport. This order effectively denied NWD's request to use these funds to reduce its payables. Thus, NWD revised its position and now requests that any increased revenues realized from bi-monthly billing be used to reduce payables. However, the Division and PWFd have taken different positions on this issue.

As set forth above, it is Mr. Catlin's advocates using the one time revenue "bump" to reduce NWD's accounts payable. At the hearing, Mr. Catlin testified that:

"It's - I haven't done a specific calculation. What I did do is look at the amount of unbilled revenues that exist today and assume - if you assume that the unbilled revenues would be reduced by something approaching half by more frequent billing, I estimate it probably might - the additional cash infusion would probably be somewhere in the 7 to 900,000 range." ¹²

NWD's objection to this proposal is twofold. First, it is speculative. The amount of the

¹⁰ Woodcock Surrebuttal, p. 6

“bump” is unknown. Furthermore, if NWD’s consumption continues to decline, the amount may be far less than assumed. Second, this “bump” does not represent excess revenues, it is merely the collection of unbilled revenues. NWD will still collect the same amount of revenue, it will just collect it faster. Therefore, it is not additional discretionary revenue. It must still be used to pay NWD’s ongoing bills. Thus, while this “bump” may help NWD’s ongoing cash deficiency and cash flow problems, it should not be the sole source of reducing NWD’s payables.

PWFD’s position on this issue is contradictory and constitutes more heat than light. Mr. Woodcock’s pre-filed testimony on this issue was both acerbic and conflicting. Initially he argued that *none* of NWD’s payables be brought current.¹³ However, in surrebuttal, he reversed his position and argued that any increased revenue from bi-monthly billing be used to reduce NWD’s payables.¹⁴

At the hearing, Mr. Woodcock once again reversed his position. Without any notice or explanation on direct examination, Mr. Woodcock changed his mind and rescinded his surrebuttal testimony on this issue during cross-examination. In fact, Mr. Woodcock did not have any real substantive explanation for his wholesale change on this critical issue except to say: “I hadn’t given it the full thought I should have...”¹⁵ In addition, at the hearing PWFD seemingly revised its position on the payables by focusing on \$709,420.54 of accrued expenses due to the City of Newport as reflected in NWD’s FY05 annual report. As such, NWD will address Mr. Woodcock’s original position on the reduction of payables and NWD’s FY05 annual report.

In Mr. Woodcock’s pre-filed testimony, his argument against NWD reducing payables was

¹¹ NWD Exhibit 13

¹² Transcript, v.II, p.11

¹³ Woodcock direct, p. 22

¹⁴ Woodcock surrebuttal, p. 6

essentially threefold: (a) the Docket 3578 settlement agreement prohibits NWD from paying expenses incurred with the City of Newport as of June 30, 2005 ¹⁶ (b) The City of Newport should be penalized for its alleged unwillingness “to consider the financial plight of the Water Department.” ¹⁷ (c) NWD did not document payables owed to the City of Newport. ¹⁸ It is NWD’s position that each these arguments should be rejected.

A. Docket 3578 Settlement Language

PWFD’s central argument focuses on the settlement language in Docket 3578. As set forth in Mr. Woodcock’s surrebuttal testimony:

“All the parties, including Newport, agreed that the rates approved in Docket 3578 were sufficient for FY 2005. To assure that no additional requests would be made, the settlement agreement approved by the Commission said: “Newport *Water further agrees that it will not seek to recover in rates any additional monies that it may borrow from the City of Newport up through and including June 30, 2005.*” ¹⁹

This argument is flawed for several reasons.

At the outset, it is important to closely examine the context of this language and the reason for its inclusion in the settlement agreement. As the Docket 3578 Order states, NWD had not been consistently funding its restricted accounts as required by the Commission in Docket 2985.²⁰ When the problem was discovered by NWD, it “endeavored to correct the problem by transferring unrestricted cash to the restricted accounts.” ²¹ “The result of the cash transfers was to put the unrestricted cash account in a negative position.” ²² This negative position was reversed by

¹⁵ Transcript, v.II, p. 101

¹⁶ Woodcock direct, p. 22

¹⁷ Woodcock direct, p.14, 20, 28; Woodcock surrebuttal, p.26, 27.

¹⁸ Woodcock direct, p. 24

¹⁹ Woodcock surrebutal, p. 24

²⁰ Order #17992, p. 7

²¹ Id.

²² Id.

transferring money from the City's general fund to the water department.²³ Thus, NWD sought to repay the City of Newport for monies transferred from the general fund to the water department. PWFD and the Division initially objected to this request.

PWFD argued that NWD could not accurately account for the \$2,500,000 general fund transfer.²⁴ Furthermore, PWFD argued that the general fund transfer was caused by NWD spending more on operating expenses than was allowed in Docket 2985.²⁵ "Therefore, Mr. Woodcock argued that Newport Water be held accountable for its own "uncontrolled spending" and thus, should not be authorized to repay the City through future rates. He argued that it was the Newport Water and not the Navy or Portsmouth who caused the Newport to overspend."²⁶

The Division also objected that NWD had not accurately accounted for the general fund transfers and that they were caused in part by NWD's improper funding of its restricted accounts.²⁷ The Division also agreed with PWFD that NWD had exceeded its allowed O&M expenses.²⁸ Thus, the Settlement Agreement and Commission Order contained provisions to address these concerns.

First, the Commission noted that "Non-compliance with prior Commission Orders contributed to the necessity for the City of Newport to cover the Water Department's expenses."²⁹ Thus, stringent financial reporting requirements were instituted to ensure NWD's compliance with the Commission's orders. Second, the Commission ordered NWD to fund its restricted accounts at full dollar amounts rather than a percentage of collections. "This method would hold the required funding amount constant at the levels agreed to in the settlement. During future reviews of the

23 Id.

24 Id. at p. 43

25 Id.

26 Id.

27 Id. at 31

28 Id. at 61

restricted funding, it will be easy to determine if the accounts are being funded properly as the funding should not fluctuate.”³⁰ Third, NWD would “not seek to recover in rates any additional monies that it may borrow from the City of Newport up through and including June 30, 2005.”

Since the entry of the Order in Docket 3578, NWD has complied with each of these directives. It is uncontested that NWD has fully funded its restricted accounts and complied with each and every reporting requirement. More importantly, NWD is not seeking “to recover in rates any additional monies that it may borrow from the City of Newport up through and including June 30, 2005.”

In Mr. Woodcock’s testimony he seeks to define the word “loan”.³¹ However, the most obvious and applicable definition is “an amount of money given to somebody on the condition that it will be paid back later.”³² Certainly, given the issues in Docket 3578, this was the intent of the settlement language. As Mr. Woodcock argued in Docket 3578, NWD was to be accountable for spending. Thus, NWD was prohibited from accepting money from the City’s general fund to cover unauthorized expenses, and then seek to recover funding in rates to repay the City. NWD has abided by this agreement.

The City of Newport has not transferred any money from the general fund to the water fund to cover unauthorized expenses, and NWD has not exceeded the expenses authorized in Dockets 3578 or 3675. Thus, NWD is not seeking rates to repay the City of Newport for money advanced from the general fund to cover “uncontrolled spending.” There simply was no transfer of money from the general fund to the water fund, and there was no loan.

29 Id. at 67

30 Id. at 68

31 Woodcock Surrebuttal, p. 24

32 Encarta North American Dictionary

Thus, NWD is not seeking “additional” revenue to reimburse the general fund for transfers used to meet unauthorized expenses. Rather, NWD is seeking to pay approved expenses that would have already been paid had it collected the agreed upon revenues. NWD is simply seeking to pay legitimate approved expenses that have gone unpaid due to a lack of revenue. If the outstanding payables were owed to outside vendors this would not even be debated.

Furthermore, NWD is not seeking to repay money it borrowed from the City of Newport as of June 30, 2005. All of the current unpaid expenses owed to the City of Newport are FY07 expenses. ³³ In framing its argument, PWFD asks this Commission to look at a single snapshot – the FY05 annual report. NWD, on the other hand, asks the Commission to view the whole movie – NWD Exhibit 13. The FY05 annual report merely shows that on a particular date in time, June 30, 2005, NWD had accrued \$709,420.54 in expenses to the City of Newport. It does not show that NWD borrowed this money. It simply shows that as of June 30, 2005 NWD had received “bills” from the City. NWD Exhibit 13 shows that after these bills were received, they *were* paid. Like any company, bills are routinely paid 30 to 60 days after receipt. NWD is no different. As set forth in NWD Exhibit 13, the cash deficit shrank from \$919,761 in June 2005 to \$54,069 in August 2005.

There is nothing in the Docket 3578 Order or Settlement Agreement that prohibits NWD from engaging in this practice. There was no requirement that NWD’s obligations to the City of Newport be brought current or zeroed out as of June 30, 2005. The settlement language simply sought to address the parties’ concern that NWD not accept transfers from the City’s general fund that were not properly accounted for to cover “unauthorized” expenses. If NWD had any inkling that PWFD would argue for such a strained interpretation of the Docket 3578 settlement agreement, then

³³ Transcript v. I, p. 164

it certainly would have ignored outside vendors and operating expenses to ensure that the City's invoices were zeroed out.

The expenses owed to the City of Newport do not result from "uncontrolled spending" at all. Rather, the unpaid expenses clearly stem from the under collection of revenue. In viewing the whole "movie" in NWD Exhibit 13, it is clear that the payable balance fluctuates considerably between June 2005 and June 2006. It is also evident that the balance was cleared and Newport was in the black as of July 2006. Thus, all of NWD's current payables are FY 07 expenses.

In examining NWD 13 it is clear that the current deficit was established in FY 07. This coincides with decreased consumption in the fiscal year as set forth in NWD's response to Commission 2-1. Between July 2006 and June 2007, NWD went from a positive cash balance of \$439,949 to a negative balance of \$1,485,606.³⁴ This is the deficit that NWD seeks to erase – the deficit caused by lowered consumption in FY07 that resulted in NWD's inability to remain current on its ongoing expenses with the City of Newport.

B. Penalizing the City of Newport

It should not escape notice that Portsmouth is the only party arguing against NWD reducing its payables. The Division, which represents the interest of all the ratepayers, does not object to NWD's payment of overdue expenses to the City of Newport. While NWD disagrees with the Division's proposed funding source, at least the Division recognizes the need to reduce these payables. As Mr. Catlin testified: "I tried to make a constructive recommendation as to how one way might be to deal with some of the problems that Newport Water is facing..."³⁵ "My

³⁴ NWD Exhibit 13

³⁵ Transcript v. II, p. 26

recommendation was to make a first step and then evaluate where we stand in 18 month..."³⁶

While the Division represents the ratepayers as a whole, PWFD only represents their interest, which in this case is to penalize NWD and the City of Newport. This position is narrow, short sighted and certainly not in the best interest of the rate payer. As set forth above, PWFD isolated one line in the Docket 3578 Settlement Agreement, without any context, to achieve its own goal. The most telling portion of Mr. Woodcock's testimony regarding the settlement language is that which precedes the language itself:

"All the parties, including Newport, agreed that the rates approved in Docket 3578 were sufficient for FY 2005. To assure that no additional requests would be made, the settlement agreement approved by the Commission said: "Newport *Water further agrees that it will not seek to recover in rates any additional monies that it may borrow from the City of Newport up through and including June 30, 2005.*"³⁷

Mr. Woodcock is correct that all the parties agreed that the rates approved in Docket 3578 were sufficient. In fact, all the parties – NWD, PWFD, the Division and the Navy – set the projected consumption to produce the appropriate revenues. NWD did not set consumption by itself. Furthermore, NWD did not exceed the expenses provided for in Dockets 3578 or 3675. Unfortunately, the consumption projections set by all the experts in Docket 3578 and Docket 3675 did not come to fruition. This led to a \$5,329,576 difference between allowed revenues and collected revenues.

Given the clear evidence that NWD did not collect the proposed revenues, Mr. Woodcock still argues that the payables – which are comprised of legitimate expenses approved in Dockets 3578 and 3675 – should not be reimbursed:

³⁶ Transcript v. II, p. 38

³⁷ Woodcock surrebutal, p. 24

“As discussed above, nearly 70% of the increase in payables from June 30, 2005 to June 30, 2006 was due to sales that were lower than projected. I do not know of a situation where the Commission has granted additional revenues to a Rhode Island water utility because sales were lower than projected. Certainly this situation is not unique in Rhode Island.”³⁸

Thus, it would appear that under *no* set of circumstances would Portsmouth endorse the payment of legitimate expenses that have gone unpaid due a lack of consumption by NWD’s customers, which ironically includes PWFD. It is also apparent that PWFD has taken this position for punitive reasons. In reviewing Mr. Woodcock’s testimony there can be no mistaking PWFD’s motives:

“This problem was caused by Newport. Perhaps if the City budget is forced to pay for the mess it will give some needed attention to the Water Department in the future.”³⁹

“If Newport citizens get angry enough perhaps the voters will get the attention of the City Manager and the City Council.”⁴⁰

Essentially, Mr. Woodcock wants the City of Newport, the City Manager and the City Council to “pay” because of lower consumption by NWD’s customers. In reality, NWD’s “mess” is the result of a \$5,329,576 under collection of revenue since Docket 3578 caused by decreased consumption. It is patently unfair to penalize the City of Newport, the City Manager and the City Council for decreased water consumption, which was clearly beyond its control. It is also patently unfair to penalize the City of Newport for attempting to help the water department through this financial crisis.

As set forth above, since NWD was required to fully fund its restricted accounts, the only place it could choose among competing expenses was in O&M. The City of Newport could have

38 Woodcock direct, p. 23

39 Woodcock surrebuttal, p. 26

insisted that payroll and city services be paid first, and if NWD is not able to pay its outstanding payables to the City, this will happen. The City will be well within its right to insist on the immediate payment of all future payrolls and city service expenses. While NWD is a municipal department, the City should not have to provide unreimbursed subsidies when collections are low.

PWFD has argued that NWD should have filed this rate case sooner. While this is a seemingly attractive argument, it is more heat than light. First, Mr. Woodcock cited conflicting dates by which NWD should have filed – early calendar year 2006, spring 2006 and fall 2006 – after the completion of Docket 3675.⁴¹ Starting with the first date suggested by Mr. Woodcock, a filing in early 2006, using calendar 2005 as a test year, would have been impractical. Docket 3675 had just been decided in November 2005 and rates had barely begun to take effect. Similarly, as Mr. Woodcock acknowledged, by spring 2006, NWD was not yet able to evaluate the impact of summer consumption at the new rates.⁴² By June 2006 it was clear that the increased rates from Docket 3675 would not be sufficient to help NWD due to declining consumption. ⁴³ As such, NWD began preparing a rate case using FY06 as a test year. ⁴⁴

Mr. Woodcock made much ado about the timing of the City Council's approval of the new rate filing, but once again his argument is more heat than light. The simple fact is that the FY06 test year audit was not complete until December 2006. Thus, at most, there was a two month delay between audit completion, Council approval and filing. Certainly, NWD concedes that it is preferable for any water utility to file a rate case in the fall preceding the proposed rate year. With the seven month lag between filing and decision, a fall filing ensures that new rates are in effect

⁴⁰ Id. at 27

⁴¹ Woodcock direct, p. 25, surrebuttal p. 22

⁴² Transcript v. II, p. 122

⁴³ H. Smith rebuttal, p. 23-24

during the summer months at the beginning of the rate year. However, as the Commission knows, not every water utility filing is made in the fall.

Furthermore, as demonstrated during Mr. Woodcock's cross examination, a fall filing would have had no substantial impact on the deficit. In fact, a filing on October 1, 2006 would have been decided by April 30, 2006, at which time the deficit would have been \$1,570,582, which is higher than it was in June 2006. The regulatory process is simply too slow to address to address a problem such as NWD's caused by under collection of revenue.

Mr. Woodcock's position is also disingenuous. It strains credibility to say Portsmouth's position would have been different had NWD filed this case three or four month earlier. No matter when this case was filed, Portsmouth would have objected to NWD reducing its payables. Thus, the Commission would have been faced with the same arguments.

Mr. Woodcock also suggested that NWD could have sought emergency relief.⁴⁵ However, as the Commission knows, the emergency relief standard in R.I.G.L. §39-1-32 is stringent. Furthermore, given the changing nature of NWD's debt prior to FY07, an emergency petition would not have been warranted. If NWD had filed an emergency filing in early 2006 with a calendar year 2005 test year, the deficit would have been \$311,509 as of December 31, 2005. Furthermore, the new rates from Docket 3675 would have been in place for only two to three months. Clearly, this would not constitute an emergency. Also in July 2006, NWD's deficit had been cleared and in the following months, August through October 2006, the deficit was manageable at \$209,738, \$161,718 and \$124,986 respectively.⁴⁶ Again, this would not have constituted an emergency.

If PWFD advocates emergency petitions every month when NWD runs a deficit, then NWD

⁴⁴ Id.

will adopt this procedure. In fact, NWD may *have* to do so if payroll and city services are given priority from this point forward. However, this would seem contrary to the ratepayers' best interest as it will simply escalate rate filing costs.

Without an operating reserve, municipal water utilities like NWD are often faced with difficult choices when consumption decreases and revenues decline. In NWD's case, the City allowed outside vendors to be paid ahead of payroll and city services. However, if these expenses go unreimbursed, this practice will no doubt end immediately. The City will no longer allow NWD to delay payroll reimbursement so that outside bills can be paid. This will put NWD in a precarious position. In fact, it is not hard to imagine NWD coming to the Commission on monthly basis if expenses such as payroll are given first priority and there is no money to pay outside vendors and services.

C. Documentation of Payables

PWFD contends that NWD also violated the Docket 3578 settlement agreement directing NWD to provide "appropriate documentation" for loans made by the City of Newport after June 30, 2005 and to "monitor and track its costs and properly account for how the loan proceeds are applied." Once again, this language provides context to the Docket 3578 settlement agreement. The main concern was that NWD not accept any money from the general fund, and if it did, that the transferred "proceeds" be tracked. However, no money has been transferred from the general fund to the water fund, and NWD has not accepted or "applied" loan proceeds either before or after June 30, 2005. Furthermore, the unpaid payroll and city services invoices have been properly documented and monitored.

45 Woodcock direct, p. 24-25

Each month NWD submits cash flow reports and a trial balance as approved by the Commission. Each of these reports documents the exact amount of unpaid expenses due to the City of Newport on a monthly basis. In fact, these reports have enabled the Commission and all the parties to monitor the fluctuations in the amounts due to the City. Through these reports, NWD has been clearly able show the amount of unpaid expenses and that the deficit was caused by uncollected revenue, not unapproved expenses or uncontrolled spending.

4. CAPITAL/DEBT SERVICE FUNDING

After reviewing the parties' surrebuttal testimony, and following the Commission's June 22, 2007 decision denying NWD's restructure of the \$1 million dollar balance owed to the City, NWD revised its revenue request. The biggest change was the proposed funding of Capital and Debt Service. As set forth above, NWD moved the remote radio read program funding from Capital to Debt Service. In addition, NWD reduced its rate year request for Debt Service. NWD was able to do this by using Capital funds previously earmarked for the radio read program and moving them to Debt Service. In addition, because NWD is no longer requesting restructuring of \$1 million balance owed to the City, \$250,000 per year will remain in Debt Service when the loan is retired in FY 08. At the time of hearing, all the parties agreed with NWD's plan for funding these accounts.

The only area of disagreement was between NWD and Portsmouth, and it revolved around the use of excess capital funds in FY09, FY10 and FY11. Because NWD moved the radio read program out of capital, there will be balances of \$632,819, \$467, 916 and \$452,696 in these respective fiscal years, even after the transfer of funds to debt service.⁴⁷ PWFD has requested that

⁴⁶ NWD Exhibit 13

⁴⁷ Transcript v. II, p. 91-92

EXHIBIT 2

STATE OF RHODE ISLAND PUBLIC UTILITIES COMMISSION
DOCKET NO. 4025
City Of Newport - Utilities Division - Water Department
Response to
Portsmouth Water & Fire District's Data Requests
Set 5

PWFD 5-2: Regarding lines 14-15 of page 8 of Ms. Forgue's rebuttal testimony:

- (a) What is the amount of the deficit built up in FY 07 that Ms. Forgue refers to; and
- (b) What would that deficit (for FY 2007) have been if Newport Water did not pay the City for unreimbursed payrolls, payments to Water Pollution Control, and 4th quarter FY05 City Services reimbursements due as of June 30, 2005?

Response:

(a) On page 6, lines 11 through 18 of my rebuttal testimony, I cited the Commission's Order allowing Newport to pay \$1,584,171 in unreimbursed expenses to the City. It is my assumption that this figure was taken from Newport's Exhibit NWD 13 from Docket 3818. This exhibit showed that in July 2006, the beginning of Fiscal Year 2007, Newport Water had outstanding payroll owed to the City of Newport in the amount of \$126,585 (which is roughly the equivalent of one payroll), and \$113,812 for other transfers to the City. In June 2007, the end of Fiscal Year 2007, Newport Water had \$1,259,496 in outstanding payroll and \$324,674 in other transfer to the City. The total of these two figures is \$1,584,171. This is the build up to which I was referring to on page 8 of my testimony: Outstanding Payroll increasing from \$126,585 to \$1,259,496 in FY07 and other transfers to the City increasing from \$113,812 to \$324,674 in FY07.

Response: Julia Forgue

(b) This question is very difficult to answer as it is hypothetical; it does not account for a number of variables; it is unclear; and, it requires a number of assumptions.

First, it is unclear what amount is referred to in this question. On page 25, line 7, of Mr. Woodcock's testimony, he refers to a figure of \$709,421, which was reported on Newport's 2005 Annual report. However, as was established in Docket 3818, this total figure is not comprised entirely of "unreimbursed payrolls, payments to Water Pollution Control, and 4th quarter FY05 City Services reimbursements due as of June 30, 2005."

In the 2005 Annual Report, Newport listed \$356,081 for unreimbursed payroll and \$353,340 for payments due to "Other Funds." During the hearing in Docket 3818, Newport provided a breakdown of these numbers. (See for example, Harold Smith Testimony, July 25, 2007 transcript, pp 200-201). In addition, Newport provided this

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information in a response to the Commission's Post Hearing Record Request. (See Enclosed).

As set forth in Docket 3818, the unreimbursed payroll in the June 2005 Annual Report is broken down as follows:

A. Due to payroll:

Pay date 06-30-05	\$109,474.70
Pay date 06-16-05	\$104,629.10
Pay date 06-02-05	\$ 98,037.68
June monthly payroll	\$ 174.56
Accrual carried back to June 2005 required by GAAP (5 days)	\$ 43,764.96

Total due for payroll expense **\$ 356,081.00**

B. Due to Other funds/Classified as required by GAAP (Generally Accepted Accounting Principles):

Legal and administrative allocation 4 th qtr 2005	\$ 48,450.00
Engineering Division (Permits)	\$ 300.00
WPC Quarterly sludge bill	\$147,784.45
Electronic Fund Transfer (Navy Payment) – Water Pollution Control	\$146,864.90
Fleet maintenance cost Year end adjustment	\$ 9,940.19

Total due to vendor for other expenses **\$ 353,339.54**

It should be noted that the Annual Report requires Newport to report any accrued liabilities as of June 30, 2005. Thus, Newport reported five days of accrued liability for the July 7, 2005 payroll even though this amount was not yet owed to the City on June 30, 2005. In addition, the WPC and Fleet maintenance expenses were accrued as of June 30, 2005, but would not have been known by the Water Division as of June 30, 2005. The Water Division would have received the bills for these expenses during the summer of 2005, but after June 30, 2005.

It should be noted that the Electronic Fund Transfer was not a liability owed to the City. When the Navy pays its water and sewer bill, it does so through a single electronic payment. A full payment of both water and sewer charges went into the water account, and the amount properly owed to the Sewer Department had to be transferred into their account. Thus, it was not a "bill" the Water Department owed, but since the money did have to be transferred, it was reported as an accrued liability.

In addition, the question calls for Newport to assume there would not be a reason to pay the expenses listed in the request. This assumption is contrary to the Commission's prior

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Orders. Newport was never prohibited from reimbursing the City of Newport for payroll; it was never prohibited from making payments to Water Pollution Control; and, it was never prohibited from paying the City of Newport for City Services approved by the Commission.

The Docket 3578 Settlement Agreement was dated June 2, 2004 and contained the following language:

“Newport Water further agrees that it will not seek to recover in rates any additional monies that it may borrow from the City of Newport up through and including June 30, 2005.”

There was nothing in this language that prohibited Newport from reimbursing the City for routine payroll and City Services or paying Water Pollution Control fees. In fact, all three of these expenses were approved by the Commission. Thus, between the settlement date of June 2, 2004 and May 30, 2005, Newport made these reimbursements, and there is no reason Newport would not pay the June 2005 expenses as well. The language in the Docket 3578 settlement agreement did not prohibit Newport from making these payments and there was no requirement that Newport Water “zero out” expenses owed as of that date.

Thus, for the purposes of answering this question, Newport will use the figure \$507,631.04 for the “unreimbursed payrolls, payments to Water Pollution Control, and 4th quarter FY05 City Services reimbursements due as of June 30, 2005” as referenced in this data request. This amount is comprised of the following:

Pay date 06-30-05	\$109,474.70
Pay date 06-16-05	\$104,629.10
Pay date 06-02-05	\$ 98,037.68
June monthly payroll	\$ 174.56
Sludge Removal – Water Pollution Control	\$146,865.00
4 th Quarter FY05 City Services Charges –City of Newport	\$ 48,450.00
Total	\$507,631.04

Also, we will have to assume that somehow the payment of this amount could be isolated as a lump sum figure, which is not realistic because these expenses, especially payroll reimbursements, are made on a rolling basis. Furthermore, as set forth above, these three categories of expenses are legitimate Commission approved expenses. Thus, if they weren't paid as of June 30, 2005, they would have to be paid at a later date.

Therefore, and based on the assumptions listed hereinabove, if Newport had \$507,631.04 available as a lump sum as of June 30, 2005, and assuming it was not used to make payroll, City Services and Water Pollution Control payments, the deficit referenced in

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subsection (a) above would have been larger as there would have been additional funds owed to the City for payroll, City Services and Water Pollution Control expenses.

Response: Julia Forgue and Harold Smith

CITY OF NEWPORT – UTILITIES DIVISION - WATER DEPARTMENT
Docket No. 3818
Response to Hearing Requests 07-25-07

1. Pursuant to the live rebuttal testimony of Harold Smith, enclosed is the source of the testimony provided by Mr. Smith.

The breakdown of June 30, 2005 balances set forth in the FY 2005 Annual report is as follows:

A. Due to payroll:

Pay date 06-30-05	\$109,474.70
Pay date 06-16-05	\$104,629.10
Pay date 06-02-05	\$ 98,037.68
June monthly payroll	\$ 174.56
Accrual carried back to June 2005 required by GAAP (5 days)	\$ 43,764.96
Total due to vendor for payroll expense	\$ 356,081.00

B. Due to Other funds/Classified as required by GAAP (Generally Accepted Accounting Principles):

Legal and administrative allocation 4 th qtr 2005	\$ 48,450.00
Engineering Division	\$ 300.00
WPC Quarterly sludge bill	\$147,784.45
Receipt deposited into Water Acct from Navy EFT for sewer payment due to WPC fund	\$ 146,864.90
Fleet maintenance cost Year end adjustment	\$ 9,940.19
Total due to vendor for other expenses	\$ 353,339.54

Prepared by: Laura Sitrin, Finance Director, City of Newport