490-RICR-00-00-9

TITLE 490 – Water Resources Board

CHAPTER 00 – N/A

SUBCHAPTER 00 – N/A

PART 9 – Rules of Procedure for Administrative Hearings

9.1 Authority

This Part is promulgated pursuant to R.I. Gen. Laws §§ 46-15-2(b), 46-15-2.1, 42-35-9, and 42-35-15 ("administrative procedures").

9.2 Purpose and Applicability

A. These "Rules" prescribe procedures and requirements for the Water Resources Board ("Board") to review, and if required, issue decisions and orders from appeals related to the denial of water supply extensions by water suppliers as defined in § 9.3(A)(9) of this Part.

B. This Part shall govern the conduct of adjudicatory proceedings commenced before the Board after their effective date. This Part shall be liberally construed to further the fair, prompt and orderly administration and determination of adjudicatory proceedings. To the extent that any section of this Part is inconsistent with applicable law or the terms of any other rule or regulation promulgated by the Board, the applicable law and/or the terms of such other rule or regulation shall be deemed to apply.

9.3 Definitions

A. When used in this Part, the following words, except as otherwise required by the context, shall have the following meaning:

1. "Board" means the Rhode Island Water Resources Board as established by R.I. Gen. Laws Chapters 46-15 and 46-15.1, as amended.

2. "Board Counsel" means the legal representative of the Board.

3. "Appeal" means an adjudicatory appellate proceeding before the Board to review a prior decision or order from a Supplier as defined by this Part in which the legal rights, duties or privileges of a Party or Parties are determined by the Board.

4. "Appellant" means an aggrieved Party who filed an Appeal with the Board from a decision or order of a Supplier as defined by this Part.

5 "Appellee" means a Party who is the subject of an Appeal pursuant to this Part.

6. "Order" means a final order or a final decision on an appeal to the Board, whether affirmative, negative, or injunctive.

7. "Party" or "Parties" means each Person named or admitted as a Party, or properly seeking and entitled as of right to be admitted as a Party in an Appeal.

8. "Person" means any individual, partnership, corporation, limited liability company, association, governmental subdivision, public or private organization or any other entity however formed.

9. "Reasonable cause" means there exists a set of facts of a type commonly relied upon by reasonably prudent persons in the conduct of their affairs which would induce a reasonably intelligent and prudent person to believe that a violation(s) of law, rule, or regulation has occurred.

10. "Regular business hours" means the regular business hours of the Board from 8:30 a.m. to 4:00 p.m. Monday through Friday except for holidays observed by the State of Rhode Island.

11. "Supplier" means all municipalities, municipal departments and agencies, districts, authorities, or other entities engaged in or authorized to engage in the supply, treatment, transmission, or distribution of drinking water on a wholesale or retail basis and is subject to the requirement to prepare and maintain a Water Supply System Management Plan pursuant to R.I. Gen. Laws § 46-15.3-5.1.

9.4 Appeals

A. Appeals. An Appeal may be filed by an aggrieved Party or their authorized representative to contest the denial of an extension of public water service by a Supplier as defined in this Part.

B. Filing of Appeal. An Appeal is commenced by filing a timely written appeal with the Board either:

1. Within thirty (30) days after mailing notice of the final decision of the Supplier is received by the aggrieved Party; or

2. If a rehearing or reconsideration of a final decision of a Supplier is requested by the aggrieved Party, within thirty (30) days after the final decision of the Supplier on the request for rehearing or reconsideration is received by the aggrieved Party.

3. Copies of the Appeal shall be served upon the Supplier and all other Parties of record by the Appellant in the manner prescribed by this Part within twenty (20) days after it is filed with the Board; Provided, however, that the time for service may be extended for good cause by order of the Board.

C. Within thirty (30) business days upon the receipt of the Appeal, the Board, or a subcommittee of Board members appointed by the full Board, or its staff shall make one (1) of the following initial determinations:

1. Accept the Appeal.

2. Remand the Appeal.

3. Reject the Appeal.

D. The Board may remand or reject an appeal if the Supplier, in its final decision, failed to provide written evidence that it applied the standards of review as set forth in in R.I. Gen. Laws § 46-15-2(B), *et seq*. The Supplier must also provide the Board with a full written assessment of the relevant sections of its current approved Water Supply System Management Plan as it applies to the Supplier's final decision.

9.5 Procedures

A. Notice. In any Appeal, all Parties shall be afforded an opportunity for a hearing after reasonable notice.

B. Contents of Notice: The Notice shall comply with R.I. Gen. Laws § 42-35-9(b) and shall include:

1. A statement of the time, place, and nature of the Appeal;

2. A statement of the legal authority and jurisdiction under which the Appeal is filed;

3. A reference to the particular section(s) of the applicable statutes and rules;

4. A short and plain statement of the nature of the Appeal. If the Supplier or aggrieved Party is unable to state the nature of the Appeal in detail at the time the notice is served, the initial notice may be limited to a statement of the relevant issues involved. A more detailed statement of the nature of the Appeal shall then be filed with the Board no later than thirty (30) days from the date the notice is served.

C. Opportunity shall be afforded all Parties to respond and present evidence and argument on all issues deemed relevant by the Board.

D. Prehearing. If deemed necessary and relevant by the Board, and/or requested by one (1) or more of the Parties, a Prehearing may be conducted by one (1) or three (3) Board members or a staff member duly appointed by the full Board. At the Prehearing, the Prehearing board shall be represented by legal counsel. If a Prehearing is conducted, once same is commenced, the Prehearing must be conducted and heard by a majority of the members present at the commencement of the Prehearing. The results of same and/or any proposed resolution of the Appeal must be brought before the full Board for adoption and/or approval. If the Parties request a Prehearing, said request must be in writing and approved by the full Board.

E. Within thirty (30) days after the filing of the Appeal, or within additional time as may be permitted by the Board, the Supplier shall transmit to the Board the original or a certified copy of the entire record of the proceedings heard by the Supplier. By written stipulation of all Parties, and with written consent of the Board, the record of the Supplier proceedings on appeal to and under review by the Board, may be truncated and/or condensed. The Board may, in its sole discretion direct the Parties to provide a truncated and/or condensed record of the proceedings before the Supplier. The Board may require or permit subsequent corrections or additions to the record.

F. The record in an Appeal shall include:

1. All pleadings, motions, intermediate rulings;

2. Evidence received or considered;

3. A statement of matters officially noticed;

4. Questions and offers of proof and rulings thereon;

5. Proposed findings and exceptions;

6. Any decision, opinion, or report by the Board member(s) presiding;

7. All memoranda or data submitted to the Board in connection with its' consideration of the case

8. Oral proceedings or any part thereof conducted under the provisions of this Part shall be recorded and may be transcribed pursuant to § 9.6(E)(1) of this Part. Stenographic services provided by state employees shall be subject to the requirements of R.I. Gen. Laws § 42-35-9(f).

9. Findings of fact shall be based exclusively on the evidence, applicable law, and matters officially noticed by the Board.

9.6 Conduct of Appeals

A. General. Appeals shall be as informal as may be reasonable and appropriate under the circumstances. All Parties, witnesses and other Persons at an Appeal shall conduct themselves in a manner consistent with the standards of decorum commonly observed in any courtroom. Where such decorum is not observed, the Board may take appropriate action including ejectment or adjournment, if necessary.

B. The Board shall conduct all Appeals in the manner prescribed pursuant to this Part, except as is authorized to conduct a Prehearing under § 9.5(D) of this Part. The Board shall conduct Appeals and proceedings pursuant to this Part provided there exists a quorum of the Board. All Appeals and proceedings before the full Board shall be conducted and heard by a quorum of the same Board members who commenced hearing the initial Appeal or proceeding. An Appeal or proceeding is commenced upon the receipt by the Board of substantive evidence, to include but not be limited to exhibits and sworn testimony. The Board shall make all decisions regarding admission or exclusion of evidence or any other procedural matters and shall administer oaths to all witnesses or request that the stenographer do so. The Board may rely upon legal counsel for advice on any matter and/or legal question presented to the Board by the Parties and/or by Board members.

C. Order of Proceedings. Except as otherwise required by law, it shall be the usual practice that the Board or the Appellant shall commence the proceedings. Where evidence is peculiarly within the knowledge of one Party, or in matters in which Appeals have been consolidated or where there are multiple Parties, the Board may, in its sole discretion, direct which Party shall open and shall further designate the order of presentation.

D. Rights of Parties. Parties shall have the right to present evidence, cross-examine witnesses, object, make motions and present arguments.

E. Record of Proceedings.

1. A complete record of the proceedings shall be recorded, or in the discretion of the Board, by stenographic record. All Parties shall, upon request, receive a copy of the recorded proceedings. In the event the Board authorizes a stenographic record, the Board shall declare which Party or Parties shall bear the cost thereof. Any Party may on his, her or its own initiative order a stenographic record be taken of the proceedings with the prior permission of the Board. The requesting Party shall incur all costs associated therewith. The Board shall be provided, at no cost, with an original or duplicate copy of the stenographic record. In addition, the Board's legal counsel shall also be provided with a copy of same at no cost.

2. If a Party appeals a final Board decision to the Superior Court, pursuant to R.I. Gen. Laws § 42-35-1 *et seq*. and the Superior Court requires a transcript of the hearing, said Party shall be responsible for having the transcript prepared by a recognized independent or Superior Court approved stenographer at their own expense within twenty (20) days of the filing of the appeal.

F. Public Meetings. All proceedings before the Board shall be open to the public, except as may otherwise be required by law.

G. Close of Proceedings. At the conclusion of the evidence, the Board may, in its discretion, permit the Parties to argue orally and/or to submit written briefs. The Board may, within its sole discretion, direct that proposed findings of fact and conclusions of law be submitted by the Parties. The record in the proceeding shall close after oral argument is completed or upon such date as may be set by the Board. The Board may extend the proceedings for the filing of briefs. No evidence shall be admitted thereafter, unless otherwise ordered by the Board. The Board may in any case require either Party, with appropriate notice to the other Party, to submit additional evidence in any matter relevant to the hearing.

H. Waiver of Hearing. In any Appeal, if the Parties agree to waive a hearing with the concurrence of the Board, the Board may dispose of the Appeal solely upon the pleadings and other submissions of the Parties.

I. Dispositions. Unless otherwise precluded by law, disposition may be made of any Appeal at any time by stipulation, consent agreement, consent settlement, consent order, default, or dismissal by the Board. A joint request for a stay of the Appeal for the purpose of preparing documents relevant to the above shall be forwarded to the Board and may be granted within the sole discretion of the Board.

J. Consent Agreements and Consent Orders. The Board may enter into a consent agreement and/or a consent order with the Parties at any time prior to the conclusion of the Appeal. Every consent order shall contain an admission of all jurisdictional facts and an express waiver of further procedural steps before the Board including but not limited to the right to appeal to the Superior Court. Consent Agreements and Consent Orders are considered public records pursuant to the Access to Public Records Act, R.I. Gen. Laws § 38-2-1 *et seq*.

1. Upon receiving a proposed consent order, the Board may:

a. Accept the consent order; or

b. Remand the consent order; or

c. Deny the consent order and state the reasons therefore in writing and take such other appropriate action as the Board may deem necessary or required.

d. If the Board denies or remands the proposed consent order, the Parties may, within seven (7) days of the Board's denial or remand of the proposed consent order, file a motion for reconsideration. The Board shall notify the Parties in writing of its decision on the Parties' motion for reconsideration within twenty (20) days from the filing of same.

e. A consent agreement and/or consent order is valid if signed by the Chairperson of the Board, or their designee, after approval of same in accordance with § 9.6(B) of this Part.

f. If a consent agreement or consent order is approved at a prehearing in accordance with § 9.5(D) of this Part, the consent agreement and/or consent order becomes final- if approved in accordance with § 9.6(B) of this Part.

9.7 Standard of Review

A. Any Party, as defined herein, who has exhausted all administrative remedies available to them by the Supplier, and/or who is aggrieved by a final order of the Supplier, is entitled to an Appeal pursuant to this Part.

1. This section does not limit utilization of or the scope of administrative review available under other means of review, redress, relief, or trial de novo as may be provided by law.

2. A preliminary, procedural, or intermediate Supplier order, act, or decision is reviewable by the Board:

a. In any case in which review of a Supplier order and/or decision does not provide an adequate remedy to the aggrieved Party; or

b. If the Supplier has not issued a timely final order and/or decision and said failure may affect substantial rights of the aggrieved Party.

B. The filing of an Appeal does not stay enforcement of the Supplier decision and/or order. However, upon written request of the aggrieved Party the Board may order a stay.

C. If, before the date set for the Appeal, application is made by a Party or the Parties to the Board for leave to present additional evidence, and it is shown to the satisfaction of the Board that the additional evidence is material and that there were good reasons for failure to present it in the proceeding before the Supplier, the Board may order that the additional evidence be taken before the Supplier upon conditions determined by the Board. The Supplier may modify its findings and decision by reason of the additional evidence and shall file that evidence and any modifications, new findings, or decisions with the Board. The Board may at any time throughout the Appeal require either Party to produce

evidence and/or additional evidence the Board determines necessary for it to conduct its review of the record on appeal.

D. The Board's review shall be confined to the record of the proceeding before the Supplier, unless as otherwise authorized and/or ordered by the Board pursuant to this Part. In cases of alleged irregularities in procedure before the Supplier, not shown in the record, proof thereon may be admitted and considered by the Board. The Board, upon request, shall hear oral argument and receive written briefs.

E. The Board shall not substitute its judgment for that of the Supplier as to the weight of the evidence on questions of fact. The Board may affirm the decision of the Supplier or remand the case for further proceedings, or it may reverse or modify the decision if substantial rights of the Appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions of the Supplier are:

1. In violation of constitutional or statutory provisions;

2. In excess of the statutory authority of the Supplier;

3. Made upon unlawful procedure;

4. Affected by other error of law;

5. Clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or

6. Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

9.8 Decision

A. All decisions or orders rendered by the Board shall be in writing and shall comply with the requirements of R.I. Gen. Laws § 42-35-12. The decision and order shall be delivered to all Parties with a notice indicating the right to take an appeal of the decision and order to the Superior Court pursuant to R.I. Gen. Laws § 42-35-15.

B. At any time after the issuance of a final decision or order of the Board, any Party may, for good cause shown, by written motion petition the Board to reconsider its' final decision or order. The petitioner shall file their motion within twenty (20) days of the issuance of the final decision or order of the Board and shall set forth the grounds upon which they rely. The Board, in its sole discretion, may grant or deny the motion for reconsideration and may order such relief as it deems appropriate under the circumstances.

C. The Board shall not entertain a motion for reconsideration filed more than twenty (20) days after entry of the final decision or order of the Board unless the Board finds good cause to entertain said motion.

9.9 Judicial Review

Any Party aggrieved by a final written decision or order of the Board may file an appeal to the Superior Court pursuant to R.I. Gen. Laws § 42-35-15. In the absence of a timely appeal to the Superior Court, the order or decision of the Board shall become final and no further administrative appeal may be taken.

9.10 Default

If any Party to an Appeal fails to answer the Appeal, or otherwise fails to prosecute or defend an Appeal as provided by this Part, or fails to appear at any proceeding before the Board, the Board may enter a default judgment against the defaulting Party, or take such action based on the pleadings or other evidence submitted by the non-defaulting Party, as the Board deems appropriate in its sole discretion. A challenge to such an order shall be made as a written motion for reconsideration pursuant to this Part.

9.11 Dismissal Stipulation

If the Parties settle the matter, the Parties shall file with the Board a written stipulation of dismissal requesting that the stipulation of dismissal be approved by the Board. If the Board does not accept the stipulation of dismissal by the Parties, the Appeal shall continue in accordance with this Part.

9.12 Public Information

A. Access to public records shall be governed in accordance with R.I. Gen. Laws § 38-2-1 *et seq*. All hearings and appeals are conducted pursuant to the Administrative Procedures Act, R.I. Gen. Laws § 42-35-1 *et seq*. Except where the Board directs otherwise, or when the documents in question are governed by R.I. Gen. Laws § 27-13.1–5(f), upon the opening of a prehearing conference all pleadings, orders, communications, exhibits, and other documents filed with the Board shall become public records. Any claim of privilege shall be governed by the policy underlying the Access to Public Records Act, with the burden of proof resting on the Party claiming the privilege.

B. Any Party may request a preliminary finding that some or all of the information is not a public document under the Access to Public Records Act. A preliminary finding that some documents are privileged shall not preclude the Board from later determining that those documents are public in accordance with R.I. Gen. Laws § 38-2-1 *et seq*.

C. Claims of privilege shall be made by filing a written request with the Board. One copy of the original documents, boldly indicating on the front page, "Contains Privileged Information – Do Not Release," shall be filed specifically identifying the information for which the privilege is sought, along with a description of the grounds upon which the Party is claiming a privilege. If a document is filed electronically, it shall contain a statement that the information has been redacted; however, the original document must be filed as delineated above.

D. The Board shall retain the documents for which privilege is asserted to exist in a secure, non-public file until a determination is made as to whether to grant the request for privileged treatment.

E. Any person, whether or not a Party to the Appeal, may apply to the Board for release of the information, pursuant to R.I. Gen. Laws § 38-2-1 *et seq*., the Access to Public Records Act. Such requests shall be governed by R.I. Gen. Laws § 38-2-1 *et seq*. and any regulations thereunder.

9.13 Severability

If any section, term, or provision of this Part should be adjudged invalid for any reason, that judgment shall not effect, impair, or invalidate any remaining section, term, or provision, which shall remain in full force and effect.