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June 29, 2005

Luly Massaro
Clerk
Public Utilities Commission
89 Jefferson Boulevard
Warwick, RI 02888

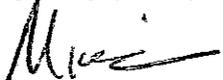
Re: Pawtucket Water Supply Board – Docket No. 3674

Dear Luly:

Enclosed are an original and nine copies of the Town of Cumberland's Motion for Summary Disposition of Pawtucket Water Supply Board's Request for a Cumberland Surcharge.

If you have any questions, please feel free to call.

Very truly yours,


Michael R. McElroy

MRMc:tmg
Cumberland:Massaro2
cc: Service List

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS
PUBLIC UTILITIES COMMISSION

IN RE: PAWTUCKET WATER SUPPLY BOARD :
GENERAL RATE FILING : DOCKET NO. 3674

TOWN OF CUMBERLAND'S MOTION FOR SUMMARY DISPOSITION OF
PAWTUCKET WATER SUPPLY BOARD'S REQUEST FOR A CUMBERLAND
SURCHARGE

"Q. What is the status of the Town of Cumberland Tangible Tax?

*A. The situation has not changed since this was discussed in Docket #3497.
The PWSB has challenged the tax every year, and each year has been denied.
Each claim has been forwarded to Superior Court."*

Pamela M. Marchand, P.E., direct, at 23, emphasis added.

*"Q. In Docket 3497 you proposed a special surcharge for Cumberland as an alternative. Is
that what you are proposing in this docket as well?*

A. Yes it is."

Christopher P.N. Woodcock, direct, at 20.

*"Rhode Island . . . [has] promulgated a doctrine of administrative finality 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 This rule applies as
long as the outcome sought in each application is substantially similar . . . even if the two
applications each rely on different legal theories."*

Johnston Ambulatory Surgical Associates, Ltd. v. Nolan,
755 A.2d 799, 808 (RI 2000)

INTRODUCTION

A. Docket 3497

On February 28, 2003, in Docket No. 3497, Pawtucket Water Supply Board (PWSB) asked this Commission to impose a special surcharge on PWSB's customers in Cumberland because of an increase in PWSB's tax payments to Cumberland. This increase included tangible taxes on PWSB's water pipes in Cumberland. (Cumberland has appealed the taxes each year to Superior Court, and the appeals are pending.) Mistakenly believing that the taxation of water pipes by another municipality was "unique" in Rhode Island, in addition to filing the Superior Court appeals, PWSB asked this Commission to impose a special surcharge on Cumberland's water rates to pay the tangible taxes. However, in Report and Order No. 17574 issued on October 14, 2003, this Commission denied PWSB's request for a Cumberland surcharge, ruling in part as follows:

"The Commission cannot step into the shoes of a Superior Court judge and determine whether the valuation and related tax increase is appropriate. That is exactly what PWSB has asked the Commission to do. PWSB has asked the Commission to implement a rate differential to cover only the disputed valuation and related tax increase without looking at all property taxed by Cumberland.

* * *

The jurisdiction to make this determination lies with the Superior Court." (at 55-56).

B. Docket 3674

Stubbornly and repeatedly insisting in this new docket (in the face of uncontradicted evidence to the contrary), that the tangible taxation of water pipes by another municipality is “unique,” PWSB has once again (for the second time in two years) asked this Commission to impose a special surcharge on Cumberland’s water rates to pay the tangible taxes, which remain on appeal in Superior Court. If approved at the level PWSB is seeking in this docket, the surcharge would result in an increase Cumberland’s water rates by about 37.3%, but all other rates would increase by only 16.7%.

Pursuant to Rule 1.15 of the Commission’s Rules of Practice and Procedure, Cumberland respectfully asks the Commission to dismiss that portion of PWSB’s rate tariff filing which seeks to impose a special surcharge on Cumberland’s water rates.

Rule 1.15 of the Commission’s Rules of Practice and Procedure provides as follows:

“Summary Disposition. The Division or any intervenor may file a motion for summary disposition of all or part of the rate tariff filing. If the Commission determines that there is no genuine issue of fact material to the decision, it may summarily dispose of all or part of the rate tariff filing.”

It is Cumberland’s position that there is no genuine issue of fact material to the decision regarding the requested surcharge. Cumberland submits that the Commission should therefore dismiss that portion of PWSB’s rate tariff filing that seeks to impose a Cumberland surcharge because (1) the Doctrine of Administrative Finality bars PWSB’s current attempt to impose the surcharge because, by PWSB’s own admission, there has been no material change in circumstances regarding the tangible taxes, and (2) the claim

for a Cumberland surcharge has no basis in fact or law because the taxation of water pipes as tangible property by other municipalities is not a unique situation in Rhode Island.

ARGUMENT

I.

The Doctrine of Administrative Finality bars Pawtucket Water from making a request for a special surcharge in this docket, because there has been no material change in circumstances regarding the tangible taxes.

The Doctrine of Administrative Finality was adopted by the Rhode Island Supreme Court in the case of Johnston Ambulatory Surgical Associates Ltd. v. Nolan, 755 A.2d 799 (RI 2000). In Nolan, Johnston Ambulatory filed an application for a Certificate of Need (CON) for a surgical center in 1994. The 1994 application was denied by the Department of Health (DOH) and the denial was appealed to the Superior Court.

While the appeal of the denial of the 1994 application was still pending, Johnston Ambulatory filed a second application for a CON in 1995. This 1995 application was essentially identical to the 1994 application. In the interim between the two applications, a new director of the DOH had been appointed. This time, DOH approved the 1995 CON application.

The 1995 approval was also appealed to Superior Court. Both the 1994 and 1995 appeals were consolidated. After hearing the consolidated appeals, the Superior Court upheld DOH's denial of the 1994 application. The Court then found that the 1995 application was essentially identical to the 1994 application, and ruled that "under the doctrine of administrative finality, a subsequent application could be granted only if

there had been a substantial change in circumstances since the first application.” (at 804).

The Superior Court therefore vacated DOH’s approval of the 1995 application.

The matter was then appealed to the Supreme Court, which affirmed the decision of the Superior Court. In doing so, the Supreme Court firmly established the Doctrine of Administrative Finality and used the case to set forth guidance to all administrative agencies regarding “the general rules that govern the deference that an administrative agency owes to earlier decisions.” (at 807). The Supreme Court held as follows:

“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). (at 808)¹

* * *

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,

¹ Note that the Supreme Court made it clear in this paragraph that the Doctrine of Administrative Finality applies to the Public Utilities Commission, because the Supreme Court cited with approval the Florida Supreme Court case applying the Doctrine of Administrative Finality to Florida’s Public Service Commission.

administrative finality provides for effective judicial review of these decisions (at 810)

* * *

Further, it is our opinion that there is no inherent reason that the rule should not be generally applicable to most areas of administrative regulation. The purpose of the doctrine is to promote consistency in administrative decision-making, such that if the circumstances underlying the original decision have not changed, the decision will not be revisited in a later application. (at 810).

* * *

As we have noted, the doctrine of administrative finality requires that when an administrative agency receives an application and denies it, the same subsequent application may not be granted absent a showing of a material or substantial change in circumstances in the time intervening between the two applications. Audette, 539 A.2d at 521-22. This rule places a burden on the applicant to identify the substantial changes since the prior application.” (at 811).

PWSB has made no attempt to demonstrate a change in material circumstances. Instead, PWSB has honestly admitted that there has been no change in circumstances surrounding the tangible tax issue. Pamela Marchand, Chief Engineer of PWSB, testified in her prefiled direct testimony as follows:

“Q. What is the status of the Town of Cumberland Tangible Tax?

A. The situation has not changed since this was discussed in Docket # 3497. The PWSB has challenged the tax every year, and each year has been denied. Each claim has been forwarded to the Superior Court.” (at 23, emphasis added).

Similarly, PWSB’s consultant, Christopher P.N. Woodcock, concedes that the same relief is being sought as was previously rejected by this Commission:

“Q. In Docket 3497 you proposed a special surcharge for Cumberland as an alternative. Is that what you are proposing in this docket as well?

A. Yes it is.” (at 20).²

The arguments made by PWSB in an attempt to persuade the Commission to impose the surcharge are the same as PWSB made in the last docket. For example, Mr. Woodcock has testified in this new Docket 3674 that the Cumberland tangible tax “is a unique cost” (at 20, line 5), and that it provides an allegedly “unique benefit” to Cumberland (at 20, line 28). Mr. Woodcock also claims that the pipes being taxed “do not provide a general benefit or use to all the system rate payers.” (at 21, line 3-4).

Mr. Woodcock conceded, as he did in the last case, that “normally property taxes should be recovered from all users.” (at 21, lines 18-19, emphasis in original). However, Mr. Woodcock once again argues, as he did in Docket 3497, that “in this case, we have a rather unique tax on the tangible property on pipes in the ground within Cumberland . . . The tangible property tax levied by Cumberland is not the ‘normal’ situation.” (at 21, line 22-26). These are the exact arguments made by Ms. Marchand and Mr. Woodcock in Docket 3497, almost verbatim. Moreover, Ms. Marchand admits that the Cumberland

² Of course, PWSB’s appeals regarding the taxation of its water pipes by Cumberland will be decided by the Superior Court and not by this Commission. It is also interesting to note, however, that PWSB has not limited its challenge to the taxation of its water pipes to the Superior Court. Attached as Exhibit 1 are two bills, House bill H-5373 and Senate bill S-0167, which have been introduced by legislators from the City of Pawtucket. These bills would exempt PWSB’s water pipes from taxation. The fact that PWSB felt these bills were necessary is an indication that they concede that, as the law is currently written, their pipes are in fact subject to taxation. In fact, the Supreme Court ruled many years ago that utility piping is subject to taxation by municipalities, and that case is still good law. In Providence Gas Co. v. Thurber, 2 RI 15 (1851), the Supreme Court held that “. . . the tax has . . . been assessed . . . upon their pipes as real estate . . . we think they are fixtures and rightfully assessed” (at 26, emphasis added).

tangible tax “situation has not changed since this was discussed in Docket 3497.” (Marchand, at 23, line 16).

Accordingly, by PWSB’s own admission, because there has been no change in circumstances occurring between Docket 3497 and Docket 3674 regarding the tangible taxes, and because the same surcharge relief is being sought, under the Doctrine of Administrative Finality, this Commission’s ruling in Docket 3497 controls. A second request for the same relief is barred. Accordingly, we respectfully submit that this Commission should summarily dispose of that portion of PWSB’s rate tariff filing that seeks to impose a surcharge on Cumberland.

II.

The requested surcharge has no basis in fact or law—The undisputed facts show that tangible property taxation of water pipes is not unique in Rhode Island and is always collected uniformly from all water ratepayers.

In Docket 3497, this Commission issued a series of data requests to the regulated water utilities in the State of Rhode Island. These data responses made it clear that water pipes are taxed as tangible property on a regular basis in the State of Rhode Island and the cost is uniformly collected from all water ratepayers, even if the pipes benefit only a limited area. For example, the Providence Water Supply Board’s response to Commission data request 1-4, attached hereto as Exhibit 2, makes it clear that (a) the Town of Scituate taxes Providence Water’s pipes as tangible property, (b) The City of Cranston taxes Providence Water’s pipes as tangible property, and (c) The Town of North Providence taxes Providence Water’s pipes as tangible property.

Moreover, the water pipes taxed by North Providence to Providence Water relate to the Longview Reservoir and Fruit Hill Pump Station, which this Commission knows serves those North Providence residents in the Fruit Hill “high service” area. That piping is of little or no benefit to the other customers in the Providence Water system. Yet the taxes on that piping are uniformly charged to all Providence Water ratepayers.

In the face of this evidence (which was produced two years ago) it is surprising that PWSB has continued to argue that the tangible taxation of water pipes by municipalities is “unique.” It clearly is not unique, and even though pipes that are taxed may benefit only one community, this Commission has never enacted the type of surcharge being proposed by Pawtucket Water.³

Accordingly, the underlying basis for PWSB’s argument that a surcharge upon Cumberland water ratepayers should be imposed because the Cumberland has taxed PWSB’s water pipes as tangible property has no basis in fact or law. There is no issue of fact that water pipes are routinely taxed as tangible property, nor is there any issue of fact that the surcharge being proposed has no legal precedent in the State of Rhode Island.

Mr. Catlin testified in Docket 3497 that to impose such a surcharge would result in opening “a Pandora’s box.” (Id.) Mr. Catlin’s statement is quite true. If such a surcharge were imposed, then in every future rate case, every cost item would be open to scrutiny by those ratepayers who receive no benefit from a particular cost item. They would argue that a surcharge should be imposed only on the ratepayers who get the benefit from that

³ In fact, in Docket 3497, both Mr. Woodcock and Mr. Catlin admitted that the surcharge being proposed by PWSB had never before been utilized in the State of Rhode Island (September 10, 2003, at 179-182, August 21, 2003, at 100-101).

item. This would make the establishment of just and reasonable rates difficult, if not impossible.

As Mr. Catlin explained in Docket 3497, the general rule of ratemaking as it relates to taxes as follows:

“it would be inappropriate to recover the property taxes assessed by a given municipality only from the customers located in that municipality . . . instead it is normally appropriate that all property taxes be recovered from all customers as part of base rates. . . . we learn when we go to NARUC school is somebody sitting with their house right next to a distribution plant . . . is very cheap to serve, the one that may be 20 or 30 miles away it costs a lot more, but you average it out and charge the same base rate.” (August 21, 2003, at 90-91).

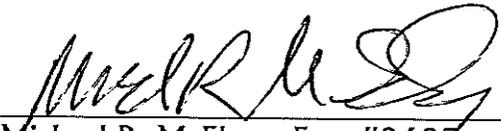
Accordingly, because other municipalities are assessing and collecting tangible taxes on water pipes and those taxes are being uniformly spread to all water ratepayers, the factual and legal underpinning for this second surcharge request does not exist. There is therefore no basis for departing from the general rule that requires the spreading of all municipal taxes to all ratepayers uniformly in base rates.

CONCLUSION

For the foregoing reasons, because (1) Ms. Marchand admits that nothing has changed regarding the tangible taxes, and (2) Mr. Woodcock admits that PWSB is seeking the same surcharge relief that was denied in Docket 3497, the Town of Cumberland respectfully requests that the Commission dismiss that portion of PWSB’s rate tariff filing which seeks to impose a surcharge on the Town of Cumberland water ratepayers.

Respectfully submitted,
Town of Cumberland
By its attorney

Date: 10/29/05



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CERTIFICATE OF SERVICE

I hereby certify that on the 29th day of June 2005, I mailed a true copy of the foregoing by first class mail to the following:

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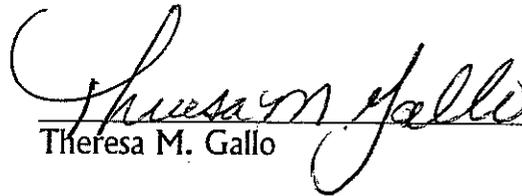
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2005 -- H 5373

LC01168

STATE OF RHODE ISLAND

IN GENERAL ASSEMBLY

JANUARY SESSION, A.D. 2005

A N A C T

RELATING TO TAXATION -- PROPERTY SUBJECT TO TAXATION

Introduced By: Representatives E Coderre, San Bento, O'Neill, Rose, and Kilmartin

Date Introduced: February 08, 2005

Referred To: House Finance

It is enacted by the General Assembly as follows:

- 1 SECTION 1. Chapter 44-3 of the General Laws entitled "Property Subject to Taxation" is
- 2 hereby amended by adding thereto the following section:
- 3 44-3-60. Tax exemption -- Pawtucket water supply board. -- All water pipes owned
- 4 by the Pawtucket water supply board and/or by the city of Pawtucket for the purpose of providing
- 5 drinking water shall be free and exempt from all taxation.
- 6 SECTION 2. This act shall take effect upon passage.

LC01168

EXPLANATION
BY THE LEGISLATIVE COUNCIL
OF

A N A C T
RELATING TO TAXATION -- PROPERTY SUBJECT TO TAXATION

- 1 This act would exempt from all taxation all water pipes owned by the Pawtucket Water
- 2 Supply Board and/or by the city of Pawtucket for the purpose of providing drinking water.
- 3 This act would take effect upon passage.

LC01168

LC01077

STATE OF RHODE ISLAND

IN GENERAL ASSEMBLY

JANUARY SESSION, A.D. 2005

AN ACT

RELATING TO TAXATION – PROPERTY SUBJECT TO TAXATION

Introduced By: Senators McBurney, and Doyle

Date Introduced: February 02, 2005

Referred To: Senate Commerce, Housing & Municipal Government

It is enacted by the General Assembly as follows:

- 1 SECTION 1. Chapter 44-3 of the General Laws entitled "Property Subject to Taxation"
- 2 is hereby amended by adding thereto the following section:
- 3 44-3-60. Tax exemption – Pawtucket water supply board. – All water pipes owned by
- 4 the Pawtucket water supply board and/or by the city of Pawtucket for the purpose of providing
- 5 drinking water shall be free and exempt from all taxation.
- 6 SECTION 2. This act shall take effect upon passage.

LC01077

EXPLANATION
BY THE LEGISLATIVE COUNCIL
OF
A N A C T
RELATING TO TAXATION – PROPERTY SUBJECT TO TAXATION

- 1 This act would exempt from all taxation all water pipes owned by Pawtucket Water
- 2 Supply Board and/or by the city Pawtucket for the purpose of providing drinking water.
- 3 This act would take effect upon passage.

LC01077

Commission Data Request 09/04/03

Issue One: Property Taxes

Q. 1-4. Please specifically indicate whether the tax assessment for each year includes pipes and if so, whether they have been taxed as real or tangible property (whether or not the assessment/valuation has been challenged).

Answer: Scituate does tax Providence Water for the 78" and 90" aqueducts which leave the treatment plant. These "pipes" are taxed as tangible property.

Cranston does tax Providence Water for pipes as tangible property.

North Providence does tax Providence Water for piping at the Longview Reservoir and Fruit Hill Pump Station as tangible property.

For status of tax challenges, please see our response to Commission 1-3.