

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

**IN RE: PAWTUCKET WATER SUPPLY BOARD**

**DOCKET NO: 3674**

**PAWTUCKET WATER SUPPLY BOARD’S OBJECTION TO THE TOWN OF  
CUMBERLAND’S MOTION FOR SUMMARY DISPOSITION**

**I. INTRODUCTION**

The Town of Cumberland (“Cumberland”) has filed a Motion for Summary Disposition pursuant to Rule 1.15 of the Rules of Practice and Procedure for the Rhode Island Public Utilities Commission (“Commission”). In its Motion, Cumberland claims that there is no genuine material issue of fact regarding the request of the Pawtucket Water Supply Board (“PWSB”) to impose a surcharge on its customers in Cumberland. The PWSB disagrees with this position and states that:

1. The Doctrine of Administrative Finality does not apply to decisions rendered by the Rhode Island Public Utilities Commission; and
2. Assuming Arguendo That The Doctrine Of Administrative Finality Governs Decisions of The Rhode Island Public Utilities Commission, The PWSB’s Request For A Surcharge Would Not Be Barred, and;
3. Material issues of fact exist regarding the taxation of water pipes as tangible property by other municipalities in Rhode Island.

**II. LEGAL STANDARD**

The Town of Cumberland seeks relief pursuant to Rule 1.15 of the Commission’s Rules of Practice and Procedure, which allows for summary disposition if the “Commission determines that there is no genuine issue of fact material to the decision...” This rule is akin to a motion for summary judgment as provided for in Rule 56 of the Rhode Island Superior Court Rules of Civil

Procedure. Under Rule 56, a party may make a motion for summary judgment on the basis that there exists no genuine issue of material fact to be resolved, and the trial justice may make a determination of whether the moving party is entitled to judgment as a matter of applicable law. Ludwig v. Kowal, 419 A.2d 297 (R.I.1980). However, summary judgment is extraordinary relief. A trial justice must view the evidence in a light most favorable to the party against whom the motion is made, drawing from that evidence all reasonable inferences in support of the party's claim but not resolving facts. Mullins v. Federal Dairy Co., 568 A.2d 759 (R.I. 1990); Rustigian v. Celona, 478 A.2d 187 (R.I. 1984). It is only after the Court determines there is no factual dispute and ambiguity as a matter of law, that judgment may be granted. Lennon v. MacGregor, 423 A.2d 820 (R.I. 1980).

However, if after canvassing the material presented, the court finds that genuine factual issues remain, whose resolution one way or another could affect its outcome, the court must deny the motion. Lipsett v. University of Puerto Rico, 864 F.2d 881 (1<sup>st</sup> Cir. 1988). A genuine issue is one that must be decided at trial because the evidence, viewed in the light most flattering to the non-movant, would permit a rational factfinder to resolve the issue in favor of either party. Medina-Munoz v. R.J. Reynolds Tobacco Co. 896 F.2d 5 (1<sup>st</sup> Cir. 1990). The plaintiffs have a right to a trial where there is the slightest doubt as to the facts. Gottlieb v. Isenman 215 F.2d 184 (1<sup>st</sup> Cir. 1954).

The test under Rule 56 remains “a fairly rigorous one.” Lipsett v. University of Puerto Rico, 864 F.2d at 895. It is rigorous enough that even undisputed facts do not always point unerringly to a single, inevitable conclusion. In re Varrasso 37 F.3d 760 (1<sup>st</sup> Cir. 1994). When facts, though undisputed, are capable of supporting conflicting yet plausible inferences, capable of leading a rational factfinder to different outcomes, then the choice between those inferences is not for the court on summary judgment. Id.

It is the PWSB's position that Cumberland cannot meet the legal standard necessary for the extraordinary relief sought.

### **III. ARGUMENT**

#### **1. The Doctrine Of Administrative Finality Does Not Apply To Decisions Rendered By The Rhode Island Public Utilities Commission.**

The Town of Cumberland argues that the Doctrine of Administrative Finality, as set forth by the Rhode Island Supreme Court in *Johnston Ambulatory Surgical Associates Ltd. v. Nolan*, 755 A.2d 799 (RI 2000), bars the PWSB from requesting a surcharge in Docket #3674.

However, this argument completely ignores a prominent line of Rhode Island Supreme Court cases holding that the Rhode Island Public Utilities Commission is not bound by determinations made in prior cases. *New England Telephone and Telegraph Company v. Public Utilities Commission*, 118 R.I. 570, 376 A.2d 1041 (1977) ("In any case, any inconsistency between the Commission's decision in that case and the present one is not fatal. The Commission is not bound by determinations made in prior cases."); *Rhode Island Consumers' Council v. Smith*, 113 R.I. 384, 322 A.2d 17 (1974) ("We need only say that today's administrators are not bound by any prior Administrative Orders as to what shall be included in the rate base."); *Narragansett Electric Company v. Kennelly*, 88 R.I. 56, 143 A.2d 709 (1958) ("The administrator had the duty of determining what was a just and reasonable rate base on the facts in evidence here. To require him arbitrarily to follow a course which had been followed in some other case or cases on different facts would place him in a constitutional vise that would deprive him of the freedom to decide what was a just and reasonable rate base on the facts in evidence before him. That freedom is important and indeed necessary to do justice in each case.")

The PWSB has not found, nor has Cumberland cited, any Rhode Island Supreme Court

case that overturns these decisions. In fact, while three pages of Cumberland’s motion address the holding in the *Johnston Ambulatory*, its argument rests on a single footnote. Cumberland argues that the Rhode Island Supreme Court “made it clear” that it was overturning its rulings in the *New England Telephone*, *Rhode Island Consumers’ Council* and *Narragansett Electric* cases because it “cited with approval a Florida Supreme Court case applying the Doctrine of Administrative Finality to Florida’s Public Service Commission.” (*See* Cumberland Motion p.5, footnote 1) While this may be “clear” to Cumberland, it is far from clear to the PWSB. In fact, Cumberland’s argument takes a quantum leap – a leap not ordinarily recognized as being valid.

In fact, “implied overrulings are disfavored in the law.” *U.S. v. Rodriguez*, 311 F.3d 435, (1<sup>st</sup> Cir. 2002). As the United States Supreme Court has ruled: "Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents." *Cooper Industries, Inc. v. Aviall Services, Inc.*, 125 S.Ct. 577 U.S. (2004). There simply is no basis to assert that the Rhode Island Supreme Court - by merely citing a Florida case – overturned its prior doctrine regarding PUC decisions.

**2. Assuming Arguendo That The Doctrine Of Administrative Finality Governs Decisions of The Rhode Island Public Utilities Commission, The PWSB’s Surcharge Request Would Not Be Barred.**

Assuming that the Doctrine of Administrative Finality applied to decisions rendered by the Commission, the first inquiry is whether there was a prior *denial*. The Doctrine only applies to a subsequent application when the prior application has been denied. In the instant case, the Commission did not issue a final denial of the PWSB’s surcharge request in Docket 3497. Rather, a more accurate reading of the Commission’s Order shows that no decision was reached, and at best, the surcharge issue was deferred until a later Docket.

As the Commission clearly stated in its Order: “After reviewing the arguments of both

parties, the Commission agrees that it may set a different rate for customers in different geographical areas.” (*See* Docket 3497 Order, p. 55) This position was again reiterated by the Commission: “However this finding is in no way intended to suggest that the Commission does not believe it could impose a rate differential based on geographic boundaries if a cost of service study or other circumstances were to warrant.” (*Id.*, p. 56) Clearly, the Commission reserved the right to review the Cumberland surcharge issue in a later Docket. Thus, even if the Doctrine applied, there was no final denial of the PWSB’s surcharge request in Docket 3497 that would bar a subsequent application.

Further, even if the Doctrine of Administrative Finality applied to the Rhode Island Public Utilities Commission, the Doctrine is not an absolute bar. The Doctrine merely establishes a rule that provides for deference to prior administrative agency decisions. It only provides for “qualified and limited preclusion” where there has been no material change in circumstances between separate applications for relief. *Johnston Ambulatory Surgical Associates Ltd. v. Nolan*, 755 A.2d at 809. However, the determination of what constitutes a “material change” – in and of itself – is a fact based inquiry, and thus not ripe for summary disposition. As stated in the *Johnston Ambulatory* case:

“What constitutes a material change will depend on the context of the particular administrative scheme and the relief sought by the applicant and should be determined with reference to the statutes, regulations, and case law that govern the specific field.” (*Id.* at 811)

The statutory framework governing changes in utility rates is established in RIGL § 39-3-11. Pursuant to this statute, a utility may change its rate without demonstrating a material change in circumstances. In fact, a utility is free to change its rates upon thirty (30) days notice to the Commission. At that point, the Commission may suspend the change and investigate the

propriety of the change.

However, the Commission's inquiry focuses on whether the rates are fair and reasonable. Pursuant to R.I.G.L. § 39-3-12, any public utility proposing a rate increase has the burden of proving that the increase sought is necessary to achieve reasonable compensation for services rendered. New England Telephone & Telegraph Company v. Public Utilities Commission, 446 A.2d 1376 (R.I. 1982). To satisfy this burden, a utility must prove the overall revenue increase requested is necessary and the proposed rates are nondiscriminatory. Id at 1383. A utility is not required to demonstrate a material change in circumstances since its last filing as prerequisite to instituting new rates. As such, even if the Doctrine of Administrative Finality applied, under the statutory scheme governing the Commission, the PWSB's burden of demonstrating a material change would be satisfied by showing its proposed rates are necessary and nondiscriminatory. Once again, this is fact based inquiry that is not proper for summary disposition.

Even further assuming that the PWSB was required to carry a higher burden of demonstrating a material change, such a showing can be made. Once again, the existence of "material change" is a fact based inquiry. As set forth in Johnston Ambulatory, the changed circumstances can be internal to the application "as when the applicant seeks the same relief but makes important changes in the application to address concerns in the denial of its earlier application," or the changes may be external. Johnston Ambulatory Surgical Associates Ltd. v. Nolan, 755 A.2d at 811.

It is the PWSB's position that there have been a number of material changes, both internal and external, since its filing in Docket 3497 as set forth herein below:

A. In Docket 3497 the Town of Cumberland failed to file testimony, present witnesses or properly respond to data requests. The PWSB will not rehash the tortured

history of Cumberland's hindrance of Docket 3497. Yet, it is noteworthy that Cumberland's blatant noncompliance caused the Commission to rule that any utility seeking full intervention in the future would be required to make "an affirmative showing that it will be filing pre-filed testimony." (See Docket 3497 Order, p. 57). Cumberland's Motion To Intervene in the present Docket contains an affirmation that it will file pre-filed testimony. This is a major, and material change, in the circumstances that existed in Docket 3497.

Yet, Cumberland seeks to reap a windfall from its prior misconduct by requesting Summary Disposition based on ruling from Docket 3497 where they flouted the Commission's rules and procedures. As the Commission ruled in Docket 3497: "Cumberland filed no testimony throughout the entire case, did not comply with Commission discovery rules and should not be allowed to benefit from its inaction." Similarly, Cumberland should not be allowed to benefit in Docket 3674 with the granting of summary disposition.

B. As a result of Cumberland's failure to file testimony, present witnesses or properly respond to data requests, the parties in Docket 3497 were not able to fully address the issues related to the surcharge. This included the Division of Public Utilities and Carriers, whose expert, Thomas Catlin, testified:

"...it is normally appropriate that all property taxes be recovered from all customers as part of base rates. In this proceeding, however, it is not clear: with what assets the taxes on tangible property in Cumberland are associated; what the bases for the large increase in valuation and taxes are; or whether those taxes are associated with property which benefits all customers (or are comparable to taxes assessed by other jurisdictions). Unless the Town of Cumberland provides information and documentation which address these concerns, it may be appropriate to make an exception in this case to allow recovery of the increase in property taxes on tangible property directly from customers in the Town of Cumberland." (See Docket 3497, Direct Testimony of Thomas S. Catlin, page 6)

In the instant Docket, these issues can now be properly addressed assuming Cumberland files appropriate testimony and properly responds to data requests. This would certainly constitute a material change in circumstances, as Cumberland did neither in Docket 3497.

C. Cumberland's noncompliance in Docket 3497 also shifted the focus on the exact nature of the PWSB's requested relief, and the issue became extremely muddled.

The Commission's Docket 3497 Order contained the following statements:

"...the Commission...may set a different rate for customers in different geographical areas. However, the Commission still has to have justification for the rate differential. In other words, 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."

"PWSB has not made the argument that Cumberland rate payers should be responsible for all taxes on real and tangible property assessed on PWSB by Cumberland."

"For PWSB to ask the Commission to impose a rate differential on only the increase because Cumberland has not provided PWSB with information that would support its appeal in State Court is to ask the Commission to determine whether the valuation and subsequent tax is appropriate. The jurisdiction to make this determination lies with the Superior Court."

In supporting its argument that there has been no change since the Commission's Order in Docket 3497, the first page of Cumberland's Motion for Summary Disposition selectively cherry picks quotations from the Docket 3674 testimony of Pamela Marchand and Christopher Woodcock. This is similar to a movie add that uses the quote "It's amazing..." from a review that actually says "It's amazing anyone could make a movie this bad." A complete reading of Ms. Marchand's and Mr. Woodcock's testimony reveals that they have been quoted out of context.

The testimony of Ms. Marchand and Mr. Woodcock clearly shows that to the extent the Commission felt the PWSB requested a ruling on whether Cumberland's tangible property valuation was correct in Docket 3497, the surcharge request has changed. Ms. Marchand's testimony sets forth the PWSB's position:

"Mr. Woodcock has addressed the reasoning behind this surcharge more fully in his testimony, and I will supplement the reasoning herein. Unfortunately, the dispute over the surcharge focused on whether the assessed value of the PWSB's tangible property in Cumberland was proper. As the Commission knows, there were significant discovery disputes between the PWSB and Cumberland, and the

battles over discovery and the Town of Cumberland's participation obscured the real issues.

The PWSB is not asking the Commission to rule whether the assessed value of its tangible property in Cumberland is proper. Issues concerning the proper valuation will be settled by the Providence Superior Court. In addition, the PWSB is not asking the Commission to determine whether the tax itself is proper. The PWSB does not dispute that the Town of Cumberland may tax tangible property if the tax is based on a fair and legal valuation. If the Town of Cumberland's assessed valuation of the PWSB's tangible property were legal, the PWSB would likely have no grounds, or reason, to challenge the tax. The tax itself is the real issue at hand.

No matter how the Providence Superior Court rules on the *valuation* used by Cumberland, the *tax itself* will always exist, unless Cumberland stops the taxation altogether. Therefore, as long as Cumberland continues to charge this tax, there will be a difference in the cost of service at the point of delivery in Cumberland. This differential is a factor in ratemaking. The amount of the tax may change based on the amount of the assessed value, and therefore, the amount of the tax, but the tax itself will continue to exist, thus creating an increased cost of service based on geographical boundaries." (*See* Testimony of Pamela Marchand, Docket 3674, p. 23)

Thus, even if the Doctrine of Administrative Finality applied, the PWSB's filing in Docket 3674 constitutes a material change pursuant to the mandates of the *Johnston Ambulatory* case as it contains changes designed to "address concerns in the denial of its earlier application."

D. The PWSB's filing in Docket 3497 did not contain a formal cost of service study. In Docket 3674, Mr. Woodcock has prepared a complete cost of service study that also addresses the Cumberland surcharge. This constitutes a material change and addresses the Commission's order in Docket 3497, which stated: "This finding is in no way intended to suggest that the Commission does not believe it could impose a rate differential based on geographic boundaries if a cost of service study or other circumstances were to warrant."

E. On September 4, 2003 (one month prior to the Commission's open meeting decision in Docket #3497) the Commission issued a request for information regarding the taxation of real and tangible property owned by regulated water utilities in Rhode Island. In particular, the Commission posed questions as to whether the distribution pipes of

other regulated water utilities were taxed as tangible property in the communities where they were situated. For the most part, the responses to this information request were not available when the Commission rendered its order in Docket 3497, and they were clearly not part of the record in Docket 3497. This information is now available and constitutes a change in circumstances as it is available for the Commission's consideration in deciding whether PWSB should be allowed to institute the requested Cumberland surcharge.

**3. Material issues of fact exist as to the taxation of water pipes as tangible property by other municipalities in Rhode Island.**

Cumberland argues that according to the responses to the Commission's September 4, 2004 information requests, "the undisputed facts show that tangible property taxation of water pipes is not unique in Rhode Island and is always collected uniformly from all ratepayers." Yet, Cumberland's motion engages in factual arguments regarding the information provided in these responses. In particular, Cumberland argues that property owned by the Providence Water Supply Water Board, and taxed by North Providence, "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." This is a completely factual argument, and demonstrates that genuine issues of material fact exist.

Further, Cumberland states "There is no issue fact that water pipes are *routinely* taxed as tangible property..." (emphasis added) Notably, Cumberland does not state that water pipes are *always* taxed as tangible property. In response to the September 4, 2003 information request, the Commission received responses from seven utilities (Providence, Pawtucket, Newport, Woonsocket, Kent County Water Authority, United Water and Narragansett Bay Commission). A review of the responses indicates that two of the utilities – Kent County Water Authority and

Narragansett Bay Commission – are tax exempt. The remaining five utilities pay taxes in approximately twenty-eight cities, towns and fire districts. Of the twenty-eight taxing authorities, it appears that only two – Cranston and Cumberland – tax distribution pipes as tangible property. Two more taxing authorities – North Providence and Scituate – tax only a small portion of distribution pipes.

Yet, the Town of Cumberland selectively attached *one* page from the Providence’s response to the September 4, 2003 information request. This attachment is cited by the Town of Cumberland in support of their proposition that taxation of distribution pipes is not unique. However, the Providence Water Supply Board’s complete response to the September 4, 2003 requests shows that of the eleven cities, towns and fire districts where Providence pays taxes, only three tax pipes as property. As such, there is a factual dispute as to whether this tax is unique.

### **III. CONCLUSION**

For the reasons set forth herein The Pawtucket Water Supply Board prays that The Rhode Island Public Utilities Commission deny the Town of Cumberland’s Motion for Summary Disposition and that the Commission grant all other relief it deems meet and just.

PAWTUCKET WATER SUPPLY BOARD  
By its attorney,

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**CERTIFICATION**

I, the undersigned, hereby certify that a true copy of the within was mailed on July ,  
2005 by first class mail to the to the service list attached hereto.