

RHODE ISLAND PUBLIC UTILITIES COMMISSION

IN RE: REVIEW OF AMENDED POWER :
PURCHASE AGREEMENT BETWEEN : DOCKET NO. 4185
NARRAGANSETT ELECTRIC CO. :
D/B/A NATIONAL GRID AND DEEPWATER :
WIND B.I., LLC, :

SUPPLEMENTAL MEMORANDUM WITH RESPECT TO MOTION TO DISMISS
(INTERVENTING AUTHORITY)

I. CITIZENS FOR CONSTITUTIONAL FAIRNESS V. JACKSON COUNTY HAS BEEN REVERSED BY THE NINTH CIRCUIT.

In candor, the Attorney General follows up on his earlier citation to the District Court case of Citizens for Constitutional Fairness v. Jackson County, 2008 WL 4890585 (D.Or. Nov 12, 2008) (*cited in AG Brief at 22-23*), with the news of a reversal on appeal. Simultaneously, the Attorney General takes this opportunity to explain that the reversal is not significant.

Very recently, on July 20, 2010, the Ninth Circuit reversed Jackson County in an unpublished two-paragraph disposition. See Citizens for Constitutional Fairness v. Jackson County, No. 09-35653 (9th Cir. Jul. 20, 2010). However, the disposition is “not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.” Id. Circuit Rule 36-3 provides that the disposition is not precedent, “except when relevant under the doctrine of law of the case or rules of claim preclusion or collateral estoppel.” 9th Cir. R. 36-3. None of these exceptions is present in the current case.

The disposition was two paragraphs long, and the portion addressed to the separation-of-powers issue was one sentence. The sentence read: “Nor does Measure 49 implicate separation of powers doctrine. The waivers were administrative decisions, not court judgments.” Jackson County, No. 09-35653 at *1.

However, this reasoning is inapposite in the current case. The administrative agency issuing the decision in Jackson County was the equivalent of a zoning board. See Jackson County, 2008 WL 4890585. (D.Or. Nov 12, 2008). The PUC, however, possesses judicial power: it has “the powers of a **court** of record . . . It may make orders and render **judgments** and enforce the same by any suitable process issuable by the superior court.” R.I. Gen. Laws § 39-1-7 (emphasis added); see generally AG Brief at 11-12. Consequently, the logic of the Ninth Circuit – that the local board did not possess judicial power – does not apply. This is reinforced by the discussion below.

II. CONTRARY TO THE EXAMPLE PROFERRED AT ARGUMENT BY GRID/DEEPWATER, THE PRECLUSIVE EFFECT OF A ZONING BOARD DECISION IS WEAKER THAN, AND DISTINCT FROM, THE PRECLUSIVE EFFECT OF A PUC DECISION.

A. Decisions of Zoning Boards are Only Entitled to Administrative Finality.

This brings us to the fact that, at oral argument, National Grid and Deepwater Wind used a hypothetical involving a zoning board. This is not pertinent.

The preclusion doctrine that operates in the zoning context (“as briefed before, this is called administrative formality”) is very circumscribed. “When a zoning board hears an application for relief and denies it, the doctrine of administrative finality bars a subsequent application for the same relief absent a showing a change in material circumstances in the time intervening between the two applications.” Audette v. Coletti, 539 A.2d 520, 521-22 (R.I. 1988). However, in the zoning context, an applicant is not forever barred from making the same application. In fact, so long as there has been a “change in material circumstances,” the *very same application* that was previously denied may be accepted. Id.

B. Decisions of the PUC are Entitled to *Quasi-Judicial Res Judicata* Effect.

By contrast, decisions of the PUC are, however, entitled to *quasi-judicial res judicata* effect. See New Shoreham v. Burke, 519 A.3d 1127, 1130 (R.I. 1987); In re Narragansett Elec. Co., 1989 WL 1110237 at *1 (R.I.Super. Feb 21, 1989); Verizon New England v. John Rocchio Corp., 2007 WL 3236723 (R.I.Super. Oct. 12, 2007) (trial order) (Gibney, J.) (*res judicata* “extends to the decisions of . . . the PUC”). This is because, in Rhode Island, the decisions of *quasi-judicial* tribunals (such as the PUC) are entitled to full *res judicata* effect. Department of Corrections v. Tucker, 657 A.2d 546, 549 (R.I. 1995).

RESPECTFULLY SUBMITTED
INTERVENOR,

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CERTIFICATE OF SERVICE

I hereby certify that on the 5th day of August, 2010, that I transmitted an electronic copy of the within document to the service list and to Luly Massaro, Commission Clerk via electronic mail.

