

STATE OF RHODE ISLAND
PUBLIC UTILITIES COMMISSION

IN RE: REVIEW OF PROPOSED
TOWN OF NEW SHOREHAM PROJECT
PURSUANT TO R.I. GEN.
LAWS § 39-26.1-7

Docket No. 4185

**CONSERVATION LAW FOUNDATION'S SUPPLEMENTAL
MEMORANDUM OF LAW IN SUPPORT OF CLF'S MOTION TO DISMISS**

I. PUC Consideration of CLF's Constitutional Issues

CLF recognizes that the PUC does not have subject-matter jurisdiction to address and decide CLF's Constitutional arguments. However, CLF hereby respectfully reserves for appeal its argument that courts should not reach constitutional issues unless it is absolutely necessary to do so for the disposition of the case. State v. Lead Indus. Ass'n, Inc., 898 A.2d 1234, 1238 (R.I. 2006) (citing Laurence H. Tribe, American Constitutional Law, § 3-7 at 313 (3d ed. 2000) for the "deeply rooted commitment not to pass on questions of constitutionality unless adjudication of the constitutional issue is necessary."); Irons v. Ethics Comm'n, 973 A.2d 1124, 1135 (R.I. 2009) (citing the Court's "long-standing policy of not reaching constitutional issues that prove unnecessary for the disposition of the case at bar."); In re Brown, 903 A.2d 147, 150 (R.I. 2006) (courts should not decide constitutional issues unless it is absolutely necessary to do so). See Ashwander v. Tennessee Valley Auth., 297 U.S. 288, 247, 56 S. Ct. 466, 483, 80 L.Ed. 688 (1936) (Brandeis, J., concurring) ("The Court will not pass upon a constitutional question

although properly presented by the record, if there is also present some other ground upon which the case may be disposed of.”).

In this case, it would not be necessary for the reviewing Court to reach or decide CLF’s constitutional arguments, because this entire Docket can, should, and must be dismissed for the non-constitutional reasons of res judicata and/or administrative finality.¹

II. Relationship of Administrative Finality To Res Judicata

CLF is aware that the PUC may be accustomed to applying the doctrine of administrative finality rather than res judicata. See, e.g., PUC Order No. 18198 (April 6, 2005, Docket No. 3445A), at 23 (discussing administrative finality). However, the Rhode Island Supreme Court has made unequivocally clear that, just as the doctrine of administrative finality applies to the decisions of administrative agencies, “the final results of proceedings before such [agencies] are also subject to the effect of other preclusive doctrines, such as res judicata.” Town of Richmond v. Wawaloam Reservation, Inc., 850 A.2d 924, 933-934 n.4 (R. I. 2004) (emphasis supplied). Res judicata applies to “administrative agency decisions, as long as the tribunal acted in a quasi-judicial capacity.” Id. at 933-934. There can be no doubt that in Docket # 4111, the PUC was acting in its

¹ The Attorney General cites Hometown Properties, Inc. v. Fleming, 680 A.2d 56, 60 (R.I. 1996), for a related, but distinct, point. See Attorney General’s July 6, 2010 Memorandum in Support of Motion To Dismiss, at 16. Hometown stands for the proposition that, in construing statutory language, a reviewing court will, wherever possible, choose an interpretation that will avoid a finding of constitutional infirmity. CLF neither cites Hometown nor relies on this proposition, because CLF believes that there is no interpretation of the 2010 amendments to Section 7 of the LTC Statute that would avoid a finding of unconstitutionality.

quasi-judicial capacity: there were witnesses, evidentiary rules and objections, cross-examination.

That is, the Commission's historic familiarity with administrative finality does not prevent the additional application of res judicata in this circumstance; indeed, such application is required.

III. Res Judicata and Agency Discretion

It is beyond cavil that the PUC has wide discretion. see, e.g., Narragansett Elec. Co. v. Burke, 475 A.2d 1379, 1385 (R.I.1984).

In addition, there are cases that suggest that "the [PUC] is not bound by determinations in prior cases." New England Tel. & Tel. Co. v. PUC, 118 R.I. 570, 592, n.9, 376 A.2d 1041, 1052 (1977). See also Rhode Island Consumers' Council v. Smith, 113 R. I. 384, 391, 322 A.2d 17, 21 (1974) (PUC is not bound by its prior orders).

This language, however, most certainly does not bar the application of res judicata to this case. The cases cited in the preceding paragraph are examples of a pedestrian rule of utilities law that does not touch upon the application of res judicata. That rule is that the PUC is always concerned with setting rates that are just and reasonable; but the PUC is never bound in one case to determine just and reasonable rates by exactly the same methodology as it used in a prior case. Narragansett Elec. Co. v. Burke, supra, 475 A.2d at 1385 (setting forth the "basic rule that the commission is not bound to employ one particular method used in a prior proceeding when ruling upon a rate request currently before it." (Case citations omitted; emphasis supplied.)). Many cases follow this rule.

Rhode Island Consumers' Council v. Smith, *supra* (treatment to be given a tax credit can vary from docket to docket); Narragansett Elec. Co. v. Kennelly, 88 R.I. 56, 72-73, 143 A.2d 709, 719 (1958) (because end-of-the-year rate base was used in prior case does not require that it be used in this case).

That is, it is important to distinguish between two entirely different propositions. The first proposition is that the PUC must always set rates that are just and reasonable, but the precise methodology it employs can (and does) vary from docket to docket. That is a far, far cry from the second proposition -- suggesting that, having litigated and lost a case once (and failing to appeal), the same party can come back to re-litigate the same issue before the PUC again.

CONSERVATION LAW FOUNDATION,
by its Attorneys,



Jerry Elmer (# 4394)
Tricia K. Jedele (# 5958)
CONSERVATION LAW FOUNDATION
55 Dorrance Street
Providence, RI 02903
Telephone: (401) 351-1102
Facsimile: (401) 351-1130
E-Mail: JElmer@CLF.org
E-Mail: TJedele@CLF.org

CERTIFICATE OF SERVICE

I hereby certify that, pursuant to PUC Rules, an original and 12 copies of the within Supplemental Memorandum were hand-delivered to the PUC Clerk, Public Utilities Commission, 99 Jefferson Blvd., Warwick, RI 02888. In addition, electronic copies were transmitted via e-mail to all the persons on the PUC's Service List for this Docket, which list was transmitted by PUC Clerk Luly Massaro on Monday, July 12, 2010. I hereby certify that all of the foregoing was done on the 15th day of July 2010.


