STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PUBLIC UTILITIES COMMISSION

IN RE:	UNITED STATES DEPARTMENT OF THE NAVY PETITION FOR DECLARATORY JUDGMENT	: : :	DOCKET NO. 3132

REPORT AND ORDER

I. INTRODUCTION

On May 17, 2000, the United States Department of the Navy ("Navy") filed with the Rhode Island Public Utilities Commission ("Commission") a Petition for Declaratory Judgment ("Petition") against the Narragansett Electric Company ("Narragansett"), the successor to Newport Electric Corporation ("Newport"). The Petition sought a declaration that the Navy is entitled to be placed on Narragansett's rate schedule G-62 instead of the new N-01 rate approved by the Commission as a result of the merger settlement of Docket No. 2930. Order No. 16200 (issued March 24, 2000). On June 16, 2000, Narragansett filed an objection to the petition asserting that the Navy participated in Docket No. 2930 and did not object to the settlement that placed the Navy on N-01 rate. Thus, Narragansett asserted that the Navy waived its right to be on any rate other than the N-01, and the Navy's Petition should be denied.

On July 12 and July 17, 2000 the Navy and Narragansett filed rebuttal briefs. On July 19, 2000, the Division of Public Utilities and Carriers ("Division") and the Attorney General of the State of Rhode Island ("Attorney General") filed a motion to intervene, which was unopposed. Simultaneously,

the Division and the Attorney General filed an objection to the Navy's Petition, arguing that the Navy could not collaterally attack the Commission's order in Docket No. 2930 since it had failed to properly appeal.

II. NAVY'S PETITION

In the Petition, the Navy alleged that it had a contract with Newport, under which the Navy had its own rate schedule. Newport merged with Narragansett, whose rate schedule G-62 serves commercial and industrial customers with the largest demand load. Under the terms of its 1961 contract with Newport, the Navy claimed entitlement to the lowest rate available to a customer of its size and usage, which, in the Navy's view, would be G-62.[1] Moreover, if the contract with Newport was terminated by reason of the merger, the Navy claimed that, as a new customer, it should be placed on the G-62 rate. In any case, the Navy argued that under federal law, it is obligated to obtain the lowest rate available.[2]

III. NARRAGANSETT'S OBJECTION

In its objection, Narragansett argued that the N-01 rate is appropriate for the Navy because the "Navy did not object to the settlement placing the Navy on that rate, nor did the Navy appeal the order of the Commission to the Supreme Court."[3] Narragansett noted that in Docket No. 2930, the merger proceeding involving Narragansett, Newport and Blackstone Valley Electric

[1] Navy's Petition at pp. 1-2.

[2] Ibid. at p. 2.

[3] Narragansett's Objection at p. 1.

Company ("BVE"), the Navy intervened and actively participated.[4] In that docket's original settlement, filed on January 31, 2000, and signed by Narragansett and the Navy, the Navy was placed on the N-01 rate, received a rate reduction of $734,000, and the assurance that the Navy would be moved to the G-62 rate at the end of 2005 or receive additional rate reductions.[5]

On February 9, 2000, an amended settlement was filed which granted the option for the Navy of staying on the N-01 rate if it was more beneficial than shifting to the G-62 rate.[6] During hearings on the amended settlement, the Commission circulated language that it desired to include in its order regarding the Commission's authority in approving the settlement and its effect on future commissions.[7] The counsel for the Navy made the following statement regarding the language circulated by the Commission:

> As it was at lunchtime [my client] wasn't at all happy about it, but he did ask me to assure everyone that even if it's not resolved to his satisfaction, that he feels it is something that he can live with, that he has no intention of instructing me to interfere with the settlement in any way. That it would just be the Navy not being able to stay with it, that he had no intention of asking me to try to block it in any way. It will go on.[8]

At the conclusion of the hearings on the merger settlement, the Navy formally withdrew as a party to the settlement, but stated in its March 2, 2000 letter,

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[4] Ibid. at p. 2.

[5] Ibid. at pp. 3-4.

[6] Ibid. at p. 5.

[7] Ibid. at p. 6.

[8] Id. (citing T. 2/24/00 at p. 123). Emphasis added.

"We have no intention of acting in any way to preclude the merger or to delay the Commission in adopting the settlement".[9] Narragansett noted that only after the Navy withdrew from the settlement was Section 22, the provision granting the Navy the option of taking the G-62 rate in 2005, removed from the Second Amended Settlement agreement filed on March 3, 2000.[10] The Second Amended Settlement, however, retained the immediate $734,000 rate reduction to the Navy, and placed the Navy on the N-01 rate.[11] The Navy received a copy of the revised settlement, but "the Navy took no steps to oppose the settlement."[12] The Commission later approved the Final Settlement, which contained no further revisions relating to the Navy. In the Commission's order approving the Final Settlement, the Commission declared that "by letter dated March 2, 2000 to Narragansett, the Navy indicated it would not object to the approval of the settlement by the Commission."[13] After the order was issued, "the Navy did not take any steps to contradict the Commission and the Company's understanding that the settlement was not contested," and did not appeal the Commission's order to the Rhode Island Supreme Court.[14]

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[9] Ibid. at p. 7. Emphasis added.

[10] Ibid. at pp. 7-8.

[11] Ibid. at p. 9.

[12] Ibid. at p. 10.

[13] Id. (citing Order No. 16200 at p.4). Emphasis added.

[14] Id.

Narragansett argued that the doctrine of *res judicata* prohibits the Navy from seeking to be placed on the G-62 rate. This doctrine makes a decision of the court "binding on all the parties in any subsequent proceeding," and includes any issue that could have been raised in the original proceeding.[15] This doctrine also applies to quasi-judicial administrative agencies, where it is referred to as administrative finality.[16] Narragansett noted that the Navy intervened in the merger proceeding, and although it withdrew from the settlement, notified the parties that the Navy would not "delay the settlement" or appeal the Commission's order in Docket No. 2930.[17] The Navy could have challenged the settlement under the Commission's rules and could have appealed to the Rhode Island Supreme Court, but the Navy instead chose to file a collateral attack prohibited by the principles of administrative finality.[18]

In regards to the Navy's claim that federal law requires that it obtain the lowest rate available, Narragansett argued that the Competition in Contracting Act of 1984 does not obligate either the Narragansett or the Commission to provide the Navy electricity at the lowest price under any tariff unilaterally selected by the Navy. Essentially, federal law does not mandate that the Navy obtain a "rate it failed to get through its participation in Docket No. 2930."[19] In

[15] Ibid. at p. 16.

[16] Id.

[17] Ibid. at p. 17.

[18] Ibid. at pp. 17-18.

[19] Ibid. at p. 20.

fact, Narragansett noted that the Navy failed to raise any such contention in Docket No. 2930.[20] Furthermore, Narragansett argued that in § 8093 of the Continuing Appropriations Act, fiscal year 1988, and the Federal Acquisition Regulation ("FAR"), the Navy is required to "pay for electric service in accordance with any rate change approved by the state regulatory commission", which in this case is N-01.[21]

Narragansett also noted that the Navy's Petition is inappropriate under the Administrative Procedures Act because it seeks to rescind a Commission order rather than determining the applicability of a Commission rule or statute to the Navy.[22] Narragansett also asserted the applicability of the doctrines of equitable estoppel (where one party makes a promise to induce action or inaction by another party), laches (which bars a party from bringing a claim if that party unreasonably delays asserting a right in timely manner to the other party), and waiver (which prohibits a party from asserting a legal right if the party relinquished the right).[23] Lastly, Narragansett alleged that the Navy's petition failed to state a claim because even if the Navy were considered a new customer of Narragansett, the terms of the settlement requiring the N-01 rate for the Navy would be binding.[24] In conclusion, Narragansett requested the

[20] Id.

[21] Ibid. at p. 22.

[22] Ibid. at p. 23.

[23] Ibid. at pp. 23-24.

[24] Ibid. at p. 25.

Navy's Petition be denied, and that the Navy pay Narragansett for electric service under the N-01 tariff for billings on and after May 1, 2000.[25]

IV. THE NAVY'S REBUTTAL

On July 12, 2000, the Navy filed a response to Narragansett's objection. It argued that it is entitled under the terms of its 1961 contract with Newport to the lowest rate available for a customer of its size and usage.[26] The Navy insisted that its participation in Docket No. 2930 and subsequent withdrawal from the merger settlement does not affect its rights under the 1961 contract.[27] The Navy noted that it withdrew from the merger settlement due to changes made by the Commission that created uncertainty as to whether the Navy would be placed on the G-62 rate.[28] In conclusion, the Navy argued the Commission can not alter the terms of its 1961 contract because the Navy withdrew the support from the merger settlement.[29] As a result, the Navy's 1961 contract is valid and binding, and thus the Navy is entitled to the G-62 rate. If Narragansett, as Newport's successor to the 1961 contract, terminates that contract, then the Navy is entitled the G-62 rate as a new customer of Narragansett.[30]

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[25] Ibid. at p. 26.

[26] Navy's Response to Narragansett's Objection at p. 5.

[27] Ibid. at p. 7.

[28] Ibid. at p. 2.

[29] Ibid. at p. 8.

[30] Ibid. at pp. 9-10.

V. NARRAGANSETT'S RESPONSE

On July 17, 2000, Narragansett rebutted the Navy's response.[31] Narragansett noted that the Navy's arguments "rely on rights under the contract that the Navy's Petition acknowledges was terminated," obviating any contractual rights.[32] Moreover, paragraph 6(b) states:

> Subject to paragraph (a) of the clause, in the event the Contractor during the term of the contract, shall make effective any new rate schedule or amended rate schedule or applicable to the class of service furnished the Government at any service location which may contain a lower rate or conditions more favorable to the Government for such class of service, the Contractor shall forward to the Contracting Officer a copy of such rate schedule...and...shall substitute such rate schedule or amended rate schedule for the rate schedule then in effect...[33]

Paragraph (a) requires any rate approved by the Commission for the Navy be applied to the Navy under its contract with Newport. Therefore, Narragansett concluded, the N-01 rate would be the appropriate rate.[34] Further, FAR §41.402 states, "If a regulatory body approves a rate change any rate change shall be made a part of the contract by unilateral contract modification." Therefore, the Navy would be bound by the Commission's decision to place it

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[31] Narragansett also objected to the Navy's use of statements regarding the settlement provisions not approved by the Commission in Docket No. 2930. Narragansett's objection was based on Rule 1.24(b)(6) of the Commission's Rules of Practice and Procedure, which states that an offer of settlement or the discussion of the parties with respect to an offer of settlement, not approved by the Commission, is not admissible as evidence against any participant who objects to its admission.

[32] Narragansett's Response at pp. 1-2.

[33] Ibid. at p. 4 (citing the Navy's 1961 contract).

[34] Ibid. at p. 4.

on N-01 rate, even under its contract were it still in effect.[35] Finally, Narragansett queried the Navy's failure to explain why issues relating to these alleged contractual rights were not raised in the merger proceeding itself.[36] The Navy's failure to object to the settlement or appeal the Commission's order should not be "cured" by granting it an opportunity to relitigate the matter, according to the utility.[37]

VI. OBJECTION OF THE DIVISION AND ATTORNEY GENERAL

On July 19, 2000, the Division and the Attorney General filed an objection to the Navy's Petition. They argued that granting the Navy's Petition "would set a dangerous precedent regarding the doctrine of administrative finality."[38] Whether or not the Navy agreed to the merger settlement in Docket No. 2930 was immaterial because the N-01 rate was set by the Commission as a result of a "proceeding in which the Navy had a full and fair opportunity to litigate any relevant issue."[39] The Navy had an opportunity to contest the abridgment of its alleged contractual rights in Docket No. 2930 or to raise the issue on appeal.[40] The Division and the Attorney General emphasized that the

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[35] Ibid. at p. 5.

[36] Id.

[37] Ibid. at p. 7.

[38] Objection of the Division and the Attorney General at p. 1.

[39] Ibid. at p. 2.

[40] Ibid. at p. 3.

Navy is seeking to "collaterally attack an order it did not oppose in Docket [No.] 2930 and did not appeal within a statutory time frame."[41]

COMMISSION FINDINGS

The Navy's arguments regarding its rights under the 1961 contract with Newport and federal law are novel, but they clearly should have been made during the proceedings in Docket No. 2930. The Petition is simply a collateral attack on the Commission's order in Docket No. 2930. The Navy had ample opportunity to raise the issues related to its 1961 contract or federal law in Docket No. 2930, or to appeal the order. Its failure to do either is inexplicable.

A basic doctrine of law is the principle of *res judicata*. The Rhode Island Supreme Court has declared that the "doctrine of *res judicata* operates as an absolute bar to a cause of action where there exists (1) identity of parties, (2) identity of issues and (3) finality of judgment". Hebert v. Ventetuolo, 480 A.2d 403, 405 (R.I. 1984). The facts of this docket indicate that *res judicata* is applicable: petitioner and Narragansett were parties to both Docket No. 2930 and the instant docket; there was a final judgment in Docket No. 2930; and the appropriate rate of service for the Navy was at issue in Docket No. 2930. In this petition, the Navy is attempting to revisit the Commission's determination of the appropriate rate. Despite the circumstances that clamor for operation of *res judicata*, the Navy makes no effort to explain why it should not apply. The Commission can only conclude that there is no dispute that *res judicata* would

[41] Ibid. at p. 2.

operate to bar this action. The Navy's endless arguments over contractual rights are therefore irrelevant.

The Navy asserts that collateral attack on the Commission's order in Docket No. 2930 is legitimate because, although it did not oppose the settlement, it did not accede to it, either. The Navy cites no case law to support the outlandish notion that a failure to litigate cannot be viewed as a waiver. If the Navy were correct, settlements would become meaningless and there would be endless and unproductive litigation. The Navy's withdrawal from the settlement in Docket No. 2930 is immaterial. Since it failed to press its alleged contractual rights or federal law arguments in that docket, it is precluded from raising them anew. As the Supreme Court has decreed, "The doctrine of *res judicata* makes prior judgments conclusive in regard to any issues that were raised or that could have been raised before the first tribunal." Department of Corrections of the State of Rhode Island v. Tucker, 657 A.2d 546, 549 (R.I. 1995).[42]

Under these circumstances, it is clear that the Navy's Petition must be dismissed. Given our disposition of the threshhold procedural issue, the Commission finds it unnecessary to address the Navy's substantive issues.

Accordingly, it is

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[42] As applied to the decisions of quasi-judicial administrative agencies, the doctrine is referred to as administrative finality. Ibid., 657 A.2d at 549; Burke v. Zoning Board of Review of the Town of North Providence 103 R.I. 404 (1968). Also, the doctrine applies to a party who mounts its collateral attack before the same agency that issued the decision being attacked. City of Providence v. Employee Retirement Bd. of the City of Providence, 749 A.2d 1088, 1088-94 (R.I. 2000).

(16437) ORDERED:

1. The Navy's Petition for Declaratory Judgment is denied.

2. By failing to object to the Final Settlement or appeal the Commission's order in Docket No. 2930, the Navy has waived its right to challenge its assignment to the N-01 rate through 2004.

3. Under the terms of the Final Settlement in Docket No. 2930, the Navy is responsible for paying Narragansett Electric for electric service under the terms and charges specified in the N-01 tariff for billings on and after May 1, 2000 until further order of the Commission.

EFFECTIVE AT PROVIDENCE, RHODE ISLAND ON AUGUST 30, 2000, PURSUANT TO AN OPEN MEETING DECISION. WRITTEN ORDER ISSUED OCTOBER 30, 2000.

PUBLIC UTILITIES COMMISSION

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Elia Germani, Chairman

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Kate F. Racine, Commissioner

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Brenda K. Gaynor, Commissioner