STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. **SUPERIOR COURT**

(FILED: February 10, 2014)

KENT COUNTY WATER AUTHORITY	:	
v.	:	**C.A. No. PC-2013-0270**
STATE OF RHODE ISLAND DIVISION OF PUBLIC UTILITIES AND CARRIERS and GREGORY M. DECUBELLIS	:	

DECISION

VAN COUYGHEN, J. Kent County Water Authority (KCWA) brings this appeal from a decision of the Rhode Island Division of Public Utilities and Carriers (Division). For the reasons set forth below, this Court affirms the decision of the Division. Jurisdiction is pursuant to G.L. 1956 § 42-35-15.

I

Facts & Travel

Gregory M. DeCubellis (Mr. DeCubellis) purchased his family home at 31 Deer Run Drive, West Greenwich, Rhode Island, designated as Lot 16-4 on Assessor's Plat 2 (Property) in 2005. (Division App. at 50, 67.) The Property is situated at an elevation of approximately 425.9 feet above sea level and is currently supplied water by two wells. Id. at 55, 71.

In May 2005, the developer of Deer Run Estates requested that KCWA provide water service to the curb stop of the Property,[1] as well as the four other homes in the development. Id. at 19, 60. KCWA initially denied the request on the grounds that the lots' water pressures fell

[1] It appears this is referred to as "suspense service" throughout the record.

below its minimum thirty-five pounds per square inch (psi) requirement.[2] Nevertheless, in September 2005, KCWA approved the request with stipulations, including that "[n]o more than 8 houses per year will be connected to the public water system"; and that the developer would "provide deed restrictions acceptable to [KCWA] related to approval of service with individual booster pumps for Lots 16, 17, 18, and 19," as well as "provide suspense service to the 5 existing homes on Deer Run Drive, more specifically delineated as AP-2 Lot Numbers, 16-1, 16-2, 16-3, 16-4, and 16-5." Id. at 107-08. Pursuant to the approval, KCWA installed a water line in front of the Property, leaving a blue plastic tube sticking out of the ground in front of the Property. Id. at 54.

On July 11, 2011, Mr. DeCubellis applied to KCWA for a water meter after retaining a plumber and a contractor to complete the suspense service connection from the curb stop to the Property. Id. at 113. The next day, KCWA denied the request in writing, noting that "[t]he limit elevation for [the Property's gradient] is 410 feet." (Division App. at 169.) Specifically, because the Property is located at 425.9 feet above sea level, the water pressure at the house is approximately twenty-eight psi, which falls below KCWA's minimum mandatory pressure standard of thirty-five psi. Id.

[2] The lots' elevations and estimated pressures are as follows:

Lot	Slab Elevation	Estimated Pressure
16	416.5	34.35
17	427.5	29.59
18	427.5	29.59
19	415.5	34.35

Section 2.2.11.2 of the KCWA Rules and Regulations (KCWA Reg. § 2.2.11.2) states that "[u]nder no circumstances will water service be supplied to any property located in areas of the system in which system pressure at the point of connection is currently less than 35 PSI under the average day condition or currently less than 20 PSI under any system flow condition."

On August 7, 2011, Mr. DeCubellis requested that the KCWA reconsider its decision, and on August 10, 2011, KCWA reaffirmed its decision on the grounds that the Property "is located above the serviceable elevation limits contained in Kent County Water Authority policy."[3] Id. at 171. Subsequently, Mr. DeCubellis appealed KCWA's decision to the Division.

On December 1, 2011, Alberico Mancini, a Division Public Utilities Engineer Specialist (Hearing Officer), sent a letter to KCWA stating that "[t]he Division believes that KCWA is able to satisfy the Division's 20 psi minimum pressure requirement and, therefore, should provide water service to the property." Id. at 172. This opinion was based upon the Division's Rules and Regulations Prescribing Standards for Water Utilities, which provides that water utilities must maintain normal operating pressures of twenty psi at a minimum, as well as Mr. DeCubellis's plan to install a booster pump to increase the Property's pressure to thirty-five psi. Id. KCWA responded to the Division with a letter on December 8, 2011, arguing that the Division should have applied KCWA Rules and Regulations rather than its own guidelines. Id. at 173.

The Division conducted public hearings regarding Mr. DeCubellis's complaint on August 22 and October 10, 2012. Mr. DeCubellis testified in support of his complaint at the August hearing. June Swallow, Chief of the Office of Drinking Water Quality for the Rhode Island Department of Health (RIDOH), and Timothy Brown, General Manager and Chief Engineer of KCWA, testified in support of KCWA at the August hearing. In addition, Russell Houde, Jr., a professional design engineer, testified as an expert witness for KCWA at both hearings and also submitted written testimony.

[3] Sec. IV(A)(1) of the Division's Rules and Regulations Prescribing Standards for Water Utilities (Division Rule IV(A)(1)) states that "[e]ach water utility shall maintain normal operating pressures of not less than 20 pounds per square inch (psi) nor more than 125 psi at the service connection."

Mr. DeCubellis testified that he purchased the Property in 2005, and that in 2006, KCWA installed suspense service in front of his house and others in the development. (Hr'g Tr. 17-20, Aug. 22, 2012.) In addition, Mr. DeCubellis explained that his Property is currently supplied water by two wells but that the wells tend to "go dry" during the summer, posing a "grave inconvenience" for his family. Id. at 20-22. He described hiring a plumber and contractor to connect the Property to the curb service installed by KCWA and stated that he had assumed his house satisfied any permitting requirements for a connection permit. Id. at 29-31, 33-35.

Ms. Swallow testified regarding RIDOH's licensing system for the state's water utilities. Id. at 55-56. She stated that a license could be suspended or revoked for failing to comply with RIDOH's Rules and Regulations Pertaining to Public Drinking Water (RIDOH Rules and Regulations). Id. at 56. Ms. Swallow noted that § 4.1 of the RIDOH Rules and Regulations states that water systems "should be designed consistent with Ten State Standards and AWWA Standards." Id. Specifically, under the Ten State Standards, water systems should maintain a minimum "operating pressure" of thirty-five psi and a minimum pressure of twenty psi "under all conditions of flow." Id. at 59. In addition, she testified that the Ten State Standards do not allow private booster pumps in individual residences. Id. at 60.

On cross-examination, Ms. Swallow stated that RIDOH does not review individual service connections for compliance. Id. at 68, 70. In addition, Ms. Swallow testified that RIDOH would not consider a private booster pump like the ones KCWA approved at Deer Run Estates a "violation," and that RIDOH was unlikely to get involved unless the booster pumps "created an unsafe condition." Id. at 72-73. Moreover, Ms. Swallow stated that an individual home receiving water at thirty psi would not be "ideal," but it "would be fine." Id. at 74-75. She

noted that health concerns arise when the pressure at an individual home is below twenty psi, and only at that point would RIDOH intervene. Id.

Mr. Brown testified regarding his own interpretation of the Division's Rules, expressing concern that they could theoretically be interpreted to permit a pressure variation down to ten psi, causing significant health problems. Id. at 89-93. In addition, Mr. Brown testified that KCWA's maximum elevation for service, 410 feet, is the highest point at which KCWA would receive thirty-five psi, and, at between 425 and 426 feet, Mr. DeCubellis's home would provide twenty-eight psi "on a good day." Id. at 93-94. Regarding the suspense service installed at Mr. DeCubellis's Property, Mr. Brown testified that it was a "non-use service[]" and that property owners in the development were not guaranteed service. Id. at 93-94. Mr. Brown also testified that KCWA allowed the use of booster pumps in 2005 pursuant to the RIDOH regulations in effect at that time, and that in 2012, the regulations did not permit such booster pumps. Id. at 98-99.

On cross-examination, Mr. Brown stated that although KCWA's minimum pressure requirement in 2005 was thirty-five psi, several lots in Deer Run Estates were granted water service even though they did not satisfy the minimum requirement. Id. at 147-51. He also stated that other homes in KCWA's service area received water service with less than the minimum pressure requirement but did not know how many. Id. at 154-55.

Mr. Houde testified regarding a hydraulic model he created for Deer Run Estates in 2004 to determine various flows and pressures throughout the water system. Id. at 184, 189. At the conclusion of the August 22, 2012 hearing, Mr. Houde prepared prefiled testimony regarding the model, which was accepted into the record at the October 10, 2012 hearing. (Hr'g Tr. 9-10, Oct. 10, 2012.) The purpose of the model, as explained by Mr. Houde in his prefiled testimony, was

to determine if KCWA could provide thirty-five psi to the customer under average demand conditions, and twenty psi under all other demand conditions. (Houde Test. 4, Sept. 18, 2012.) The model assessment report created by Mr. Houde concluded that elevations above 415 feet on the development would not be able to meet the minimum pressure demand of thirty-five psi under average conditions. Id. at 5-6. Thus, Mr. Houde opined that a residential service connection at the Property would have an adverse effect on the entire public water system, potentially causing "pollutants or contaminates to flow back into the public water system." Id. at 6. Mr. Houde further testified that he does not utilize the Division's regulations because they conflict with standard practice and RIDOH regulations, and the twenty psi requirement is "unclear." Id. at 9.

Following the October 2012 hearing, both parties submitted memoranda. In his memorandum, Mr. DeCubellis requested that the Division grant him a waiver from KCWA's minimum pressure standard or find KCWA Reg. § 2.2.11.2 to be invalid. In support of his request, Mr. DeCubellis argued that: 1) KCWA unreasonably denied his request for service because it created an expectation of providing water service by connecting "similarly situated" neighbors; 2) RIDOH's recommended thirty-five psi standard is not mandatory; and 3) KCWA violated G.L. 1956 § 39-2-3(a) by subjecting his family to "unreasonable prejudice and disadvantage." Mr. DeCubellis also argued that KCWA Reg. § 2.2.11.2 was invalid because it violates the twenty psi standard of the Division's own Rules, which have regulatory authority over KCWA's rates and conduct.

KCWA argued that Mr. DeCubellis did not present sufficient evidence to rebut the presumption that KCWA's thirty-five psi minimum pressure rule was invalid, and that the Division's Rules were preempted by RIDOH guidelines. KCWA also filed a reply memorandum

arguing that Mr. DeCubellis had not raised a "waiver argument" during the case and, thus, should not be permitted to raise it in closing briefs, and, in the alternative, that the argument should fail.

On December 19, 2012, the Division issued a Report and Order (Order) reversing KCWA's denial of service to Mr. DeCubellis. The Order concluded that the Division possessed sufficient power and rule-making authority to promulgate water pressure standards for the water utilities it regulates. Moreover, the Division found that KCWA's water pressures were in conflict with and thus preempted by the Division's own Rules. The Order also found that RIDOH's thirty-five psi minimum pressure requirement was not a regulatory mandate, and that thirty-five psi was not required to protect the public health, nor did it apply to individual service connections. Finally, the Order concluded that KCWA's denial of Mr. DeCubellis's water request was unjust and unreasonable and ordered KCWA to provide a water connection to the Property "as soon as practicable." KCWA filed an appeal of the Order on January 16, 2013, seeking a reversal of the Division's Order.

II

Standard of Review

This Court's review of the decisions of administrative agencies is governed by the Rhode Island Administrative Procedures Act, as set forth in §§ 42-35-1 et seq. See Rossi v. Emps.' Ret. Sys. of R.I., 895 A.2d 106, 109 (R.I. 2006). The relevant standard of review as set forth in § 42-35-15(g) provides as follows:

> "The court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. The court may affirm the decision of the agency or remand the case for further proceedings, or it may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:

> "(1) In violation of constitutional or statutory provisions;
>
> "(2) In excess of the statutory authority of the agency;
>
> "(3) Made upon unlawful procedure;
>
> "(4) Affected by other error or law;
>
> "(5) Clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or
>
> "(6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion."

Accordingly, this Court defers to an administrative agency's factual determinations provided that they are supported by legally competent evidence. Arnold v. R.I. Dep't of Labor and Training Bd. of Review, 822 A.2d 164, 167 (R.I. 2003). Legally competent evidence is defined as "'some or any evidence supporting the agency's findings.'" Auto Body Ass'n of R.I. v. R.I. Dep't of Bus. Regulation, 996 A.2d 91, 95 (R.I. 2010) (quoting Envtl. Scientific Corp. v. Durfee, 621 A.2d 200, 208 (R.I. 1993)).

"'This Court reviews questions of statutory construction and interpretation de novo.'" Miller v. Saunders, 80 A.3d 44, 50 (R.I. 2013) (quoting Morel v. Napolitano, 64 A.3d 1176, 1179 (R.I. 2013)). "When construing a statute our ultimate goal is to give effect to the purpose of the act as intended by the Legislature." Arnold, 822 A.2d at 168 (quotations omitted). If "'the language of a statute is clear and unambiguous, this Court must interpret the statute literally and must give the words of the statute their plain and ordinary meanings.'" Solas v. Emergency Hiring Council of State, 774 A.2d 820, 824 (R.I. 2001) (quoting Accent Store Design, Inc. v. Marathon House, Inc., 674 A.2d 1223, 1226 (R.I. 1996)). This rule of statutory construction also applies to the rules and regulations of administrative agencies. See Cohen v. Duncan, 970 A.2d 550, 562 (R.I. 2009).

When a statute is ambiguous, a reviewing court "employ[s the] well-established maxims of statutory construction in an effort to glean the intent of the Legislature." Unistrut Corp. v. State Dept. of Labor & Training, 922 A.2d 93, 98-99 (R.I. 2007). In such a situation, this Court will accord deference to an administrative agency's interpretation "'even when the agency's interpretation is not the only permissible interpretation that could be applied.'" Auto Body Ass'n of R.I., 996 A.2d at 97 (quoting Pawtucket Power Assocs. Ltd. P'ship v. City of Pawtucket, 622 A.2d 452, 456-57 (R.I. 1993)). "[A] reviewing court should accord an agency's decision considerable deference when that decision involves a technical question within the field of the agency's expertise[,]" such as where "Congress has vested the agency with discretion in a technical area[.]" R.I. Higher Educ. Assistance Auth. v. Dep't of Educ., 929 F.2d 844, 857 (1st Cir. 1991) (internal quotations omitted).

III

Analysis

A

Statutory Construction

On appeal, KCWA challenges the Division's statutory interpretation of the regulations at issue in this case. First, KCWA contends that the Division improperly construed the conflict between the two regulations at issue—Division Rule IV(A)(1) and KCWA Reg. § 2.2.11.2—in a manner contrary to the established rules of statutory construction. Second, KCWA argues that it was error of law for the Division to find that its own rule preempted KCWA's Regulations because KCWA Reg. § 2.2.11.2 possesses a presumption of validity, and there was substantial evidence on the record to support the existence of a thirty-five psi minimum water pressure standard.

In response, the Division argues that it possesses exclusive statutory authority to establish water pressure standards, which supersedes KCWA's authority. Moreover, the Division contends that it correctly overruled KCWA Reg. § 2.2.11.2 under the doctrine of field preemption because the General Assembly intended, through Title 39 of the Rhode Island General Laws, for the Division to completely occupy the field of utilities regulation in Rhode Island. The Division contends that Division Rule IV(A)(1) impermissibly conflicts with KCWA Reg. § 2.2.11.2 and is, therefore, unenforceable and invalid. Mr. DeCubellis argues that the Division's broad regulatory authority over KCWA's conduct and operations permits the Division to find that its own rule prevails.

1

KCWA Regulations v. Division Regulations

KCWA attacks the Division's Order as incorrectly applying the standard rules of statutory interpretation. Specifically, KCWA contends that KCWA Reg. § 2.2.11.2 can be read in harmony with Division Rule IV(A)(1) because the Division merely establishes a range of acceptable water pressures and KCWA's requirement of thirty-five psi is within that acceptable range. In the alternative, if this Court finds that the two rules conflict, KCWA argues that established rules of statutory construction require that the more restrictive regulation—here, KCWA Reg. § 2.2.11.2—should prevail over the more general regulation. In response, the Division contends that the two regulations do conflict. In addition, the Division argues that the Legislature intended, through Title 39 of the Rhode Island General Laws, for the Division to completely occupy the field of utilities regulation in the state. Mr. DeCubellis similarly argues that the Division's rules are promulgated pursuant to a specific grant of power from the

Legislature, whereas KCWA's rules are merely for guidance, and, therefore, the Division's rule must prevail.

This Court considers questions of statutory interpretation de novo. See Iselin v. Ret. Bd. of Emps.' Ret. Sys. of R.I., 943 A.2d 1045, 1049 (R.I. 2008); Park v. Ford Motor Co., 844 A.2d 687, 692 (R.I. 2004). If a statute is "clear and unambiguous, we adopt its plain and ordinary meaning." Direct Action for Rights & Equality v. Gannon, 819 A.2d 651, 659 (R.I. 2003). Nevertheless, this Court remains mindful of our directive to "effectuate the Legislature's intent and to attribute to the enactment the meaning most consistent with its policies or obvious purposes." Brennan v. Kirby, 529 A.2d 633, 637 (R.I. 1987).

As an initial matter, KCWA Reg. § 2.2.11.2 is in direct conflict with Division Rule IV(A)(1). KCWA Reg. § 2.2.11.2 provides that "under no circumstances will water service be supplied to any property located in areas of the system in which system pressure at the point of connection is currently less than 35 psi." Division Rule IV(A)(1) provides that "each water utility shall maintain normal operating pressures of not less than 20 pounds per square inch (psi) nor more than 125 psi at the service connection." Therefore, at service connections with water pressure between twenty psi and thirty-five psi, KCWA Reg. § 2.2.11.2 does not permit water service, whereas Division Rule IV(A)(1) does. The Division's Hearing Officer found that there is an "obvious conflict that exists between [these two] minimum water pressure standards." This Court defers to, and agrees with, the agency's interpretation that these two regulations are in conflict with each other. See Auto Body Ass'n of R.I., 996 A.2d at 97 (deferring to an administrative agency's interpretation of a statute even when that interpretation is not the sole viable interpretation when the question is a technical one within the agency's expertise).

KCWA urges this Court to apply general rules of statutory construction to this conflict to determine which rule prevails, including the rule that a more specific statute must prevail over a conflicting general statute. See Whitehouse v. Moran, 808 A.2d 626, 630 (R.I. 2002). However, this argument fails to recognize the "existing dichotomy of administrative regulations" which separate KCWA Reg. § 2.2.11.2 and Division Rule IV(A)(1). See Great Am. Nursing Ctrs., Inc. v. Norberg, 567 A.2d 354, 356 (R.I. 1989). The Rhode Island Supreme Court has noted that:

> "[a]dministrative rules are divided into two classifications: legislative rules and interpretive rules. Legislative rules are promulgated pursuant to the specific statutory authority provided by the Legislature. Conversely, an interpretive rule is not specifically authorized by a legislative enactment; rather, it is promulgated by an administrative agency for the purposes of guidance and definition. The distinction is important because an administrative regulation that is characterized as a legislative rule has the force and effect of law. Furthermore, a presumption of validity attaches to a legislative rule that a challenger must rebut. An interpretive rule enjoys no such presumption, and moreover, a court considering enforcement of such a rule may substitute its own judgment for that of the administrative agency's judgment." Id. at 356-57 (citations omitted).

In determining whether an administrative rule is legislative or interpretive, this Court looks to the "power assigned to the administrative agency." Lerner v. Gill, 463 A.2d 1352, 1358 (R.I. 1983). If the Legislature has granted an agency the power to "interpret and define certain legislation," resulting regulations pursuant to that power are legislative rules. Id. Alternatively, if the Legislature has not granted such power to the agency, any agency regulations are interpretive. Id.

In this case, the Division has been vested with the authority to establish service connection water pressure standards pursuant to §§ 39-3-7, 39-3-33, and 39-1-38. The Division is explicitly authorized to "make such reasonable rules as will aid in the administration and enforcement of chapters 1 – 5 of" Title 39. See § 39-3-33. This includes § 39-3-7, which

provides that the Division "shall . . . determine and fix by order the standard amount, quality, pressure, initial voltage, and character of each kind of product or service to be furnished or rendered by each public utility, and standard condition or conditions pertaining to furnishing or rendering the same . . . ." (Emphasis added.) Finally, the Legislature included a directive in § 39-1-38 that the Division's powers "shall be interpreted and construed liberally" and grants the Division "all additional, implied, and incidental power which may be proper or necessary to effectuate [its] purpose[]." Therefore, the rules promulgated by the Division to effectuate Title 39, including Division Rule IV(A)(1), are considered "legislative rules" with the "force and effect of law [and] . . . a presumption of validity" because they were specifically authorized by statute. See Great Am. Nursing Ctrs. Inc., 567 A.2d at 356-57; accord United States v. Southern Union, 643 F. Supp. 2d 201, 211 (D.R.I. 2009) ("Rules promulgated by an agency through its legislative rule making authority carry with them the force and effect of law.").

In comparison, KCWA regulations are characterized more accurately as interpretive rules. See Great Am. Nursing Ctrs. Inc., 567 A.2d at 356-57. Title 39 grants KCWA certain "powers of authority," but this grant is neither as broad nor as explicit as its grant of rulemaking powers to the Division. See §§ 39-16-1 et seq. KCWA simply possesses the power to "make bylaws for the management and regulation of its affairs." Sec. 39-16-8(7). Although KCWA is granted a number of other powers, such as the ability to own property, borrow money, and fix water rates, the Legislature chose not to empower the KCWA to establish water pressure rates or promulgate any rules other than "bylaws." See id. "Bylaws" are generally defined as provisions "adopted by an organization for its internal governance and its external dealings." Black's Law Dictionary (9th ed. 2009). Thus, the bylaws promulgated pursuant to this authority are simply "for the purposes of guidance and definition," as the Legislature did not specifically authorize

KCWA to promulgate any rules. See Great Am. Nursing Ctrs. Inc., 567 A.2d at 356-57. As KCWA Reg. § 2.2.11.2 is interpretive while Division Rule IV(A)(1) is legislative, any conflicts between the two must be resolved in the Division's favor. See Southern Union, 643 F. Supp. 2d at 211 (holding that legislative rules are binding and must be upheld unless arbitrary); Great Am. Nursing Ctrs., Inc., 567 A.2d at 356-57 (administrative rules do not enjoy a presumption of validity and "a court considering enforcement of such a rule may substitute its own judgment for that of the administrative agency's judgment").

KCWA also attacks the Division's ruling on the grounds that it disregards RIDOH regulatory authority over "minimum standards for the location, construction, and sanitary quality of all drinking water supplies" and "minimum standards consistent with human health for the quality of public drinking water." See G.L. 1956 § 23-1-18. Essentially, KCWA contends that a general implementation of the Division's twenty psi water pressure minimum would endanger water quality within KCWA's borders and would subject KCWA to RIDOH sanctions, including a possible revocation of its license. However, aside from citing to a number of statutes which grant RIDOH the ability to regulate water supply as it relates to public health, KCWA does not cite to a specific RIDOH rule or regulation which prescribes a minimum water pressure standard. See Wilkinson v. State Crime Lab. Comm'n, 788 A.2d 1129, 1131 n.1 (R.I. 2002) (noting that "[s]imply stating an issue for appellate review, without a meaningful discussion thereof or legal briefing of the issues, does not assist the Court in focusing on the legal questions raised . . .").

Moreover, at the Division hearing, Ms. Swallow testified on behalf of RIDOH and stated that the Department has indicated in its rules and regulations that "waterworks *should* be designed consistent with Ten State Standards." (Hr'g Tr. 56, Aug. 22, 2012 (emphasis added).) She testified that RIDOH does not regulate water services at the individual household level, and

that although a house with water pressure at thirty psi would not be "ideal," it would be "fine" as long as the pressure did not drop below twenty psi. Id. at 68-75. Therefore, the Division's Order does not disregard RIDOH's regulatory authority over public health and the Order does not subject KCWA to a potential revocation or suspension of its license.

2

Preemption

KCWA also argues that the Division should not have found that Division Rule IV(A)(1) preempted KCWA Reg. § 2.2.11.2, and such a finding was error of law. Specifically, KCWA contends that § 39-16-8 grants water districts, including KCWA, the power to promulgate its own rules and regulations, which enjoy a presumption of validity. KCWA contends that Mr. DeCubellis has not presented sufficient evidence to rebut this presumption. In response, the Division contends that it possesses statutory authority to completely occupy the field of utilities regulation, and thus, any inconsistent KCWA regulation is preempted. Similarly, Mr. DeCubellis argues that the Division has broad regulatory authority over KCWA, and the Division's rules preempt any conflicting KCWA regulations.

"Pre-emption works as a limitation on the exercise of inherent police powers by a governmental body when the purported regulation relates to subject matter on which superior governmental authority exists." Town of E. Greenwich v. O'Neil, 617 A.2d 104, 109 (R.I. 1992). It is well established in Rhode Island that the Division has "'the exclusive power and authority to supervise, regulate, and make orders governing the conduct of public utilities.'" Town of E. Greenwich v. Narragansett Elec. Co., 651 A.2d 725, 729 (R.I. 1994) (quoting In re Woonsocket Water Dep't, 538 A.2d 1011, 1014 (R.I. 1988)); accord O'Neil, 617 A.2d at 109-110; S. Cnty. Gas Co. v. Burke, 551 A.2d 22 (R.I. 1988). In its grant of this authority to the

Division, "the General Assembly has expressed its intent to entirely preempt . . . regulatory activity" in the regulation of public utilities even if the regulatory activity is not "disruptive or otherwise inconsistent with the state's regulatory scheme." Town of E. Greenwich v. Narragansett Elec. Co., 651 A.2d at 729; accord Southern Union Co. v. Lynch, 321 F. Supp. 2d 328, 335-36 (D.R.I. 2004).

Moreover, evidence of the Legislature's express directive to preempt any regulatory activity outside of the Division is evidenced throughout Title 39. See O'Neil, 617 A.2d at 110 ("Title 39 is replete with examples of the broad reach of the commission's authority."). As noted above, § 39-3-8 grants the Division the power to "fix adequate and serviceable standards for the measurement of . . . pressure" for all public utilities regulated by the Title. This power is supplemented by § 39-1-38, which grants the Division any "additional, implied, and incidental power" necessary to effectuate its purpose. Finally, the Division is empowered to make any rule which "will aid in the administration and enforcement of chapters 1 – 5 of" Title 39. Sec. 39-3-33.

It is clear that the Division is vested with both an express and implied grant of power to "cover the field of public-utilities regulation." O'Neil, 617 A.2d at 110. Therefore, a KCWA regulation that attempts to regulate water pressure, which is in conflict with the rules of the Division, must yield under the doctrine of field preemption. See id. (holding that a town's ordinance was preempted by Title 39 "because it invaded a field that the state has intentionally occupied").[4] The Division's findings with respect to this issue, therefore, did not constitute error of law. Sec. 42-35-15(g).

[4] This Court notes that Appellant's argument—that KCWA Reg. § 2.2.11.2 is a "legislative rule" which must be presumed valid and possesses the force of law—is inapplicable, as KCWA

B

Division's Findings and Conclusions

KCWA also argues that the Division's decision ordering KCWA to provide Mr. DeCubellis with a water connection was clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record. Appellant raises three challenges to the Division's action: 1) the Division does not possess the authority to grant a waiver from an otherwise valid rule or regulation of a water utility; 2) Mr. DeCubellis was not similarly situated to other Deer Run Estates properties; and 3) Mr. DeCubellis raised this issue for the first time in post-hearing briefs, and therefore, there is no evidence on the record to support the grant of a waiver. In response, Mr. DeCubellis and the Division argue that there was substantial evidence on the record that KCWA's refusal to provide Mr. DeCubellis with a water connection was unjust and unreasonable pursuant to § 39-4-10.

1

Division's Authority to Grant Relief

KCWA argues that the Division did not possess the authority to grant a waiver from KCWA regulations, and only KCWA could have granted a waiver from its own regulations. In response, the Division and Mr. DeCubellis both argue that the Division may review the regulations of any public utility under § 39-4-10 and invalidate any such regulation it finds to be "unreasonable, preferential, or unjustly discriminatory."

The Division based its authority to order KCWA to provide Mr. DeCubellis water service on § 39-4-10. Section 39-4-10 provides:

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regulations are, in fact, interpretive rules. Rather, Division Rule IV(A)(1) is a legislative rule and is thus presumed valid.

> "[i]f, upon a hearing and investigation had under the provisions of this chapter, the division of public utilities and carriers shall find that any regulation, measurement, practice, act, or service or any public utility is unjust, unreasonable, insufficient, preferential, unjustly discriminatory, or otherwise in violation of any of the provisions of chapters 1 - 5 of this title, or that any service of any such public utility is inadequate or that any service which can be reasonably demanded cannot be obtained, the division shall have power to substitute therefor such other regulations, measurements, practices, service, or acts, and to make such order respecting, and such changes in the regulations, measurements, practices, service, or acts, as shall be just and reasonable . . . ."

The Rhode Island Supreme Court has had occasion to interpret § 39-4-10 and has concluded that it is "unambiguous" in permitting the Division to "issue orders regulating carriers if it finds that any practice, act or service is unjust, unreasonable, insufficient, preferential, unjustly discriminatory, or otherwise in violation of chapters 1—5 of Title 39." Interstate Navigation Co. v. Div. of Pub. Utils., 824 A.2d 1282, 1289 (R.I. 2003) (quotations omitted).

In this case, the Division explicitly found KCWA's refusal of water service "to be unjust and unreasonable." (Order at 44.) Moreover, it cited to § 39-4-10 in concluding that "KCWA's denial of water service to the Complainant warrant a reversal of KCWA's decision under the authority granted the Division." Id. Therefore, the Division did not grant Mr. DeCubellis a "waiver" as defined by KCWA; instead, it took action pursuant to its own statutory powers in ordering KCWA to provide water service to Mr. DeCubellis.

2

Substantial Evidence to Support the Division's Order

KCWA argues that the Division should not have granted Mr. DeCubellis a waiver because there was no evidence on the record to show that Mr. DeCubellis was "similarly situated" to properties located in Deer Run Estates, which had been granted water service. In response, both Mr. DeCubellis and the Division maintain that there was legally competent

evidence in the record to prove that KCWA's denial of water service was unreasonably prejudicial in violation of § 39-4-10.

As noted previously, this Court must defer to the Division's findings of fact which are supported by "substantial evidence." Arnold, 822 A.2d at 167. In this case, the Division reviewed and analyzed the evidence presented relative to Mr. DeCubellis's argument that his lot was similarly situated to other lots with KCWA water connections. (Order at 42.) Specifically, the Division stated that the record reflected that Lots 16-19 in Deer Run Estates "were approved for water connections in 2005 despite the fact that these lots are at an elevation above 410 feet and that water pressure to the service connections would be less than 35 psi." Id. In comparing Lots 16-19 with the Property, the Division noted that Mr. DeCubellis "live[s] in close proximity, and at a comparable elevation, to Lots 16-19."

In addition, the Division listed a number of grounds it relied upon in finding that KCWA's refusal to provide service was neither just nor reasonable:

> "[T]he Decubellis' [sic] two wells run dry in the summer; . . . a suspense service was installed on the Decubellis' [sic] property in 2005 with KCWA's knowledge and approval; . . . the Town of West Greenwich approved the work done at the Decubellis [sic] home to facilitate the water connection; . . . KCWA admits to possibly having 'thousands' of customers within its water system with pressures below 35 psi using booster pumps; . . . RIDOH's stated policy is not to micro-manage water suppliers on their decisions to connect individual customers at connection pressures below 35 psi; . . . none of the Division's other regulated water suppliers support a minimum 35 psi pressure standard." Id.

This Court will not disturb the findings of the Division on this factual issue. There was substantial evidence on the record to support the Division's conclusion that Mr. DeCubellis's Property was similarly situated to other lots in Deer Run Properties. All of the lots in question were located above KCWA's limit elevation of 410 feet and had water pressures below thirty-

five psi, facts squarely reflected in the record. The Division certainly had competent evidence of both of these facts, and its conclusion that the Property was similarly situated to Lots 16-19 was supported by the reliable, substantial, and probative evidence of record. Arnold, 822 A.2d at 167; Auto Body Ass'n of R.I., 996 A.2d at 95. As such, the Division had ample evidence from which to conclude that KCWA's refusal to provide water service to Mr. DeCubellis while providing service to similarly situated properties was unjust and unreasonable. Sec. 39-4-10.

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Timeliness

Finally, KCWA argues that the Division should not have granted Mr. DeCubellis a "waiver" because he did not raise the issue or request a waiver on the record. Instead, KCWA argues that he raised this issue for the first time in post-hearing briefs submitted after the record was declared complete. However, as noted above, the Division granted Mr. DeCubellis relief pursuant to § 39-4-10 and did not grant a "waiver" as defined by KCWA. In addition, as noted above, the Division took into consideration a significant amount of evidence from the record in its determination that KCWA's actions were unjust and unreasonable. Therefore, even if Mr. DeCubellis raised this issue for the first time in his post-hearing brief, the Division's decision was not clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record. Moreover, KCWA does not present any legal basis for its theory that arguments not raised at an administrative hearing should be deemed waived. See Wilkinson, 788 A.2d at 1131 n.1 (a mere statement of an issue on review without meaningful discussion or legal support "does not assist the Court in focusing on the legal questions raised").

IV

Conclusion

After review of the entire record, the Court finds that the Division's decision contains reliable, probative, and substantial evidence to support its findings. Further, this Court concludes that the Division's decision was not in violation of constitutional or statutory provisions; in excess of its statutory authority; affected by error or law; or clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record. Substantial rights of the Appellant have not been prejudiced. Thus, the decision of the Division is affirmed. Counsel for the prevailing parties shall submit the appropriate judgment for entry.

RHODE ISLAND SUPERIOR COURT
Decision Addendum Sheet

TITLE OF CASE:	**Kent County Water Authority v. State of Rhode Island Division of Public Utilities and Carriers, et al.**
CASE NO:	**PC-2013-0270**
COURT:	**Providence County Superior Court**
DATE DECISION FILED:	**February 10, 2014**
JUSTICE/MAGISTRATE:	**Van Couyghen, J.**
ATTORNEYS:	
For Plaintiff:	**Patrick J. Sullivan, Esq.**
For Defendant:	**John A. Pagliarini, Jr., Esq.** **Leo J. Wold, Esq.**