STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. **SUPERIOR COURT**

[Filed: April 23, 2019]

CONSERVATION LAW FOUNDATION, INC.,	:	
Plaintiff,	:	
	:	
v.	:	**C.A. No. PC-2017-1037**
	:	***(Consolidated with)***
CLEAR RIVER ENERGY, LLC, TOWN OF JOHNSTON, PROVIDENCE WATER SUPPLY BOARD, CITY OF PROVIDENCE, TOWN OF SCITUATE, CITY OF CRANSTON, KENT COUNTY WATER AUTHORITY, TOWN OF NORTH PROVIDENCE, TOWN OF SMITHFIELD, BRISTOL COUNTY WATER AUTHORITY, CITY OF EAST PROVIDENCE, TOWN OF LINCOLN, PASCOAG UTILITY DISTRICT, HARRISVILLE FIRE DISTRICT, NASONVILLE WATER DISTRICT, CITY OF WARWICK, EAST SMITHFIELD WATER DISTRICT, GREENVILLE WATER DISTRICT, LINCOLN WATER COMMISSION, TOWN OF BRISTOL, TOWN OF WARREN, TOWN OF BARRINGTON, TOWN OF EAST GREENWICH, TOWN OF WEST WARWICK, TOWN OF NORTH KINGSTOWN, TOWN OF COVENTRY, and TOWN OF WEST GREENWICH,	:	
Defendants.	:	

TOWN OF BURRILLVILLE,	:	
Plaintiff,	:	
	:	
v.	:	**C.A. No. PC-2017-1039**
	:	
CLEAR RIVER ENERGY, LLC, TOWN OF JOHNSTON, PROVIDENCE WATER SUPPLY BOARD, CITY OF PROVIDENCE, TOWN OF SCITUATE, CITY OF CRANSTON, KENT COUNTY WATER AUTHORITY, TOWN OF NORTH PROVIDENCE, TOWN OF SMITHFIELD, BRISTOL COUNTY WATER AUTHORITY, CITY OF EAST PROVIDENCE, TOWN OF LINCOLN, PASCOAG	:	

UTILITY DISTRICT, HARRISVILLE FIRE DISTRICT, NASONVILLE WATER DISTRICT, CITY OF WARWICK, EAST SMITHFIELD WATER DISTRICT, GREENVILLE WATER DISTRICT, LINCOLN WATER COMMISSION, TOWN OF BRISTOL, TOWN OF WARREN, TOWN OF BARRINGTON, TOWN OF EAST GREENWICH, TOWN OF WEST WARWICK, TOWN OF NORTH KINGSTOWN, TOWN OF COVENTRY, and TOWN OF WEST GREENWICH,
Defendants.

DECISION

SILVERSTEIN, J. (Ret.) Before the Court in these consolidated matters are Defendants'—Clear River Energy, LLC (CRE) and Town of Johnston (Johnston) (collectively Defendants)—Motions for Summary Judgement as to the Second Amended Complaints brought by Plaintiffs Conservation Law Foundation, Inc., (CLF) and the Town of Burrillville (Burrillville) (collectively Plaintiffs). At issue is whether the Water Supply and Economic Development Agreement (the Water Supply Agreement) between CRE and Johnston is valid under P.L. 1915, ch. 1278, § 18 as amended from time to time (the 1915 Act), and specifically whether performance under it will constitute an "ordinary municipal water supply purpose." Defendants argue that the Water Supply Agreement is valid under the 1915 Act, and that Summary Judgment is proper in their favor. Plaintiffs object to Defendants' motions. Jurisdiction is pursuant to G.L. 1956 §§ 9-30-1, *et seq.* and Super. R. Civ. P. 56.

I

Facts and Travel

On October 29, 2015, CRE filed an application with the Rhode Island Energy Facility Sitting Board (EFSB) seeking its approval to construct an energy generation facility (Clear River Energy Center or the Power Plant) in Burrillville, Rhode Island. The permitting process is

governed by the Energy Facilities Sitting Act, which requires, *inter alia*, an analysis of the support facilities for proposed power plants including water supply. EFSB Rule 1.6(b)(11). In order to obtain a sufficient water supply for the Power Plant, CRE and Johnston entered into the Water Supply Agreement, by the terms of which Johnston agreed to supply the Clear River Energy Center with water. The Water Supply Agreement proposes that CRE purchase or lease a parcel of real property in Johnston and construct a Water Transport Facility on that land, which will become Johnston and CRE's designated point of delivery. Johnston will deliver the water to the Water Transport Facility, then CRE will transport the water by truck to the Power Plant. *See* Compl. Ex. A, Mar. 6, 2017. Johnston purchases its water from the Providence Water Supply Board (PWSB) at wholesale prices.

On March 6, 2017, CLF and Burrillville filed nearly identical Complaints against Defendants seeking declaratory judgments to invalidate the Water Supply Agreement, asserting that it is invalid under Rhode Island law. Specifically, Plaintiffs argued that under P.L. 1915, ch. 1278, § 18, which allows certain municipalities "to take and receive water from [PWSB] for use for . . . ordinary municipal water supply purposes," the sale of water to a power plant located in another municipality does not qualify.

On March 23, 2017, Plaintiffs filed Amended Complaints. Plaintiffs sought (1) a declaration that Johnston has no legal authority to sell water initially purchased from PWSB to the Clear River Energy Center under the 1915 Act, (2) a declaration that Johnston has no legal authority to sell the Power Plant water initially purchased from PWSB under any provision of Rhode Island law, and (3) injunctive relief preventing Johnston from receiving water from the PWSB and reselling it for use in the proposed Power Plant.

On April 3, 2017, Defendants moved to dismiss both actions against them. CRE argued that Plaintiffs lacked standing to seek declaratory judgment or injunctive relief, that Plaintiffs failed to exhaust their administrative remedies, that EFSB has primary jurisdiction over Plaintiffs' actions, and that Plaintiffs failed to join numerous indispensable parties. CRE argued that CLF's claim for injunctive relief must be dismissed because injunctive relief is a remedy rather than a separate cause of action and CLF's claim for injunctive relief failed to meet the necessary threshold requirements. CRE further asserted that Burrillville's Amended Complaint alleging potential impact on PWSB's system is within EFSB's exclusive jurisdiction. Alternatively, CRE moved to stay the case. Johnston argued, *inter alia*, that the 1915 Act was within the jurisdiction of the PUC and that PWSB and PUC tariffs contain no restriction upon Johnston's resale of water.

On April 10, 2017, this Court entered a Consent Order consolidating CLF's (PC-2017-1037) and Burrillville's (PC-2017-1039) actions against CRE and Johnston. On June 20, 2017, this Court issued a Decision on Defendants' motions to dismiss. On the issue of standing, the Court concluded that Burrillville and CLF lacked the requisite injuries in fact, but that they qualified to bring this action under the "substantial public interest" exception to the usual standing requirement. The Court rejected Defendants' argument that the consolidated cases should be dismissed for failure to exhaust administrative remedies. The Court found in favor of Defendants with respect to their argument that Plaintiffs failed to join indispensable parties under Super. R. Civ. P. 12(b)(7), but allowed Plaintiffs twenty days to join those parties.[1] The Court

[1] In response to the Court's June 20, 2017 Decision, Plaintiffs joined Providence Water Supply Board, City of Providence, Town of Scituate, City of Cranston, Kent County Water Authority, Town of North Providence, Town of Smithfield, Bristol County Water Authority, City of East Providence, Town of Lincoln, Pascoag Utility District, Harrisville Fire District, Nasonville Water District, City of Warwick, East Smithfield Water District, Greenville Water District,

denied Defendants' motions with respect to (1) dismissal of Plaintiffs' claims for injunctive relief and (2) staying the case. Finally, the Court *sua sponte* ordered Plaintiffs to file a more definite statement.

On July 14, 2017, CLF and Burrillville moved for a ruling that these consolidated cases present pure questions of law, and that no evidence is relevant or admissible making discovery unnecessary. In response, Johnston asserted that a limited scope of discovery was required for the Court to properly adjudicate the matter. CRE likewise objected to Plaintiffs' motions and argued that the Court should permit Defendants to conduct discovery. On July 26, 2017, Plaintiffs each filed a Second Amended Complaint.

On October 4, 2017, this Court issued a Decision on Plaintiffs' Motion. The Court found that the pertinent language of the 1915 Act, specifically "ordinary municipal water supply purposes," is ambiguous. Accordingly, the Court ruled that limited discovery was necessary in these consolidated actions and denied Plaintiffs' motion for a ruling that the consolidated cases present pure questions of law that do not require discovery.

On July 5, 2018, CRE and Johnston moved for summary judgment, arguing that the Water Supply Agreement is proper under the 1915 Act, entitling them to summary judgment as a matter of law. Burrillville and CLF objected, arguing that the Water Supply Agreement is impermissible under Rhode Island law, and that public policy supports this Court's denial of Defendants' motions. On August 3, 2018, Rhode Island Attorney General Peter F. Kilmartin submitted a brief as *amicus curiae* in support of Plaintiffs' objections to Defendants' motions for summary judgment, also arguing that the Water Supply Agreement is outside the 1915 Act and

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Lincoln Water Commission, Town of Bristol, Town of Warren, Town of Barrington, Town of East Greenwich, Town of West Warwick, Town of North Kingstown, Town of Coventry, and Town of West Greenwich as defendants in this matter.

pertains to uses that are neither domestic nor ordinary, and that a finding otherwise would be contrary to public policy. This Court heard argument on August 20, 2018.

II

Standard of Review

It is well-settled that "[s]ummary judgment is 'a drastic remedy,' and a motion for summary judgment should be dealt with cautiously." *Estate of Giuliano v. Giuliano*, 949 A.2d 386, 390-91 (R.I. 2008) (citing *Ardente v. Horan*, 117 R.I. 254, 256-57, 366 A.2d 162, 164 (1976)). "[S]ummary judgment is appropriate when, viewing the facts and all reasonable inferences therefrom in the light most favorable to the nonmoving party, the [C]ourt determines that there are no issues of material fact in dispute, and the moving party is entitled to judgment as a matter of law." *Quest Diagnostics, LLC v. Pinnacle Consortium of Higher Educ.*, 93 A.3d 949, 951 (R.I. 2014) (internal quotation marks omitted).

"'[T]he moving party bears the initial burden of establishing the absence of a genuine issue of fact.'" *McGovern v. Bank of Am., N.A.*, 91 A.3d 853, 858 (R.I. 2014) (quoting Robert B. Kent et al., *Rhode Island Civil Procedure* § 56:5, VII-28 (West 2006)). Once this burden is met, the burden shifts to the nonmoving party to prove by competent evidence the existence of a genuine issue of fact. *Id.* The nonmoving party may not rely on '"mere allegations or denials in the pleadings, mere conclusions or mere legal opinions'" to satisfy its burden. *D'Allesandro v. Tarro*, 842 A.2d 1063, 1065 (R.I. 2004) (quoting *Santucci v. Citizens Bank of Rhode Island*, 799 A.2d 254, 257 (R.I. 2002) (per curiam)).

III

Analysis

In these consolidated matters, Plaintiffs seek to invalidate the Water Supply Agreement between Johnston and CRE. Defendants argue that the Water Supply Agreement is permissible under Rhode Island law and seek this Court's dismissal of Plaintiffs' claims in their entirety. Specifically, Johnston argues that (1) the history and context of the 1915 Act support the legality of the Water Supply Agreement; (2) this Court must construe the 1915 Act in harmony with PUC's regulatory structure; (3) bulk water supply by municipalities to major energy generation facilities is "ordinary"; (4) this matter falls under the jurisdiction of the Rhode Island Public Utilities Commission (PUC); and, (5) a finding for Plaintiffs would lead to impractical results. CRE argues that (1) the 1915 Act places no restriction upon a municipality's sale of water purchased from PWSB, and (2) the evidence demonstrates that the 1915 Act has been consistently interpreted to allow municipalities to sell water and that the Court must defer to the PUC's and PWSB's interpretation to avoid an absurd result. Plaintiffs oppose all Defendants' arguments.

A

History and Context of the 1915 Act

Johnston submits that the purpose of the 1915 Act was to allow the City of Providence to establish a reservoir system outside of Providence's geographic limits while providing other communities with a water source, and that this purpose aligns with the use proposed in the Water Supply Agreement. Johnston argues that the Court must not artificially limit the use of this water by municipalities outside Providence, as doing so would be contrary to legislative intent. Furthermore, according to Johnston, when the 1915 Act was amended in 1980, it placed the

wholesale supply of water by what is now the Providence Water Supply Board (PWSB) under the exclusive jurisdiction of the PUC, making the PUC responsible for the accompanying regulatory structure. *See* G.L. §§ 39-1-1 *et seq.* Johnston cites a 1986 amendment to the 1915 Act that provided Providence with the choice of selling water to end-users outside Providence at retail prices, or to municipalities at wholesale prices pursuant to tariffs set by PUC. *See* Johnston Mem. Ex. C, July 5, 2018. However, Johnston asserts that nothing in the Rhode Island General Laws, or the PUC tariffs, restricts its ability to resell water purchased from PWSB at wholesale prices, save for volumetric requirements and occasional restrictions put in place during times of drought.[2]

CRE additionally argues that the 1915 Act's retail/wholesale provision places no restrictions on a municipality's sale of water. Although CRE acknowledges that the 1915 Act limits municipalities' sale of PWSB water to uses related to domestic, fire, or "ordinary municipal water supply purposes," CRE notes that the retail/wholesale provision gives PWSB *carte blanche* to sell water "at wholesale rates" to municipalities, limited only by the volumetric restrictions discussed *supra*. *See* P.L. 1915, ch. 1278, § 18.

In response, CLF asserts that the plain language of the 1915 Act prohibits municipalities from reselling water from PWSB for use outside the boundaries of those municipalities themselves. CLF additionally distinguishes the retail/wholesale language of the 1915 Act from the "Purposes Clause," arguing that Johnston incorrectly focuses on the retail/wholesale language, whereas this Court already determined that the case will hinge on the interpretation of "ordinary municipal water supply purposes." *See* P.L. 1915, ch. 1278, § 18; *see also* Decision 7,

[2] The 1915 Act states that "[s]uch town, city or water or fire district, water company or water users or consumers shall have the right to take such water as aforesaid to any extent each month *not exceeding an average per day of one hundred fifty gallons per capita of the number of inhabitants of such parts of its territory* . . . ." P.L. 1915, ch. 1278, § 18 (emphasis added).

Oct. 4, 2017 (Silverstein, J.). According to CLF, Johnston is purchasing water from PWSB at wholesale prices and is therefore bound to resell the water within the terms of the Purposes Clause. *See id.* Burrillville likewise objects to Johnston's interpretation of the 1915 Act and its amendments, asserting that the 1915 Act does not grant Johnston the right to take and resell unlimited quantities of water.

In its October 4, 2017 decision at p. 6, the Court stated that these consolidated matters present "a discrete issue concerning an interpretation of the 1915 Act." The Court defined the issue as "whether Johnston's sale of water from the PWSB to CRE is 'for use for domestic, fire and other ordinary municipal water supply purposes' under P.L. 1915, ch. 1278, § 18, as amended." (Decision 6, Oct. 4, 2017.) Accordingly, the Court accepts CLF's argument that the relevant language at issue is the Purpose Clause, which sets forth parameters for Johnston's uses of water. The Court is unpersuaded by Defendants' arguments that the retail/wholesale provision of the 1915 Act places no limit upon Johnston's use of water purchased from PWSB.

B

Statutory Construction of the 1915 Act in Conjunction with PUC's Regulatory Structure

Defendants additionally assert that this Court must not view the 1915 Act in a vacuum, but rather must consider the entire statutory scheme to determine the intent of the legislature. Johnston notes that the 1915 Act has changed since its original passage with the 1936 amendment that included Johnston as a municipality permitted to purchase water from PWSB; the 1980 amendment that granted the PUC regulatory power over PWSB's sale of water to municipalities; and the 1986 amendment that allowed PWSB to extend its infrastructure to provide water at retail prices outside its existing service territories. CRE argues that the evidence demonstrates that the 1915 Act has consistently been interpreted as permitting municipalities to

resell water without any restrictions (absent the aforementioned volumetric requirements), and that this Court must defer to or at least be guided by the PUC's and PWSB's interpretations of the 1915 Act to avoid an absurd result.

In response, CLF argues that the PUC is not entitled to the *Chevron* deference that Defendants urge this Court to apply. *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 743 (1984). CLF argues that application of *Chevron* requires (1) an ambiguous statute, (2) a permissible agency interpretation under that statute, and (3) a formal and deliberate determination of the statute promulgated by the agency. Since neither the PUC nor PWSB has issued formal rules related to the interpretation of the Purpose Clause, CLF asserts that *Chevron* deference does not apply. Burrillville concurs with CLF's argument, adding that any PUC or PWSB interpretation of the Purpose Clause or the 1915 Act, generally, is irrelevant. Burrillville submits that the General Assembly did not delegate broad authority to the PUC or PWSB to interpret the 1915 Act, but rather tasked these agencies with the limited responsibility of setting wholesale and retail rates for water municipalities purchase from the PWSB. Therefore, Burrillville argues, this Court owes them no deference with respect to their interpretation of the Purpose Clause.

After reviewing the statute in its October 4, 2017 Decision, this Court found that the 1915 Act was ambiguous with respect to the phase, "other ordinary municipal water supply purposes." When a statute is "ambiguous, [the Court] must 'establish[] and effectuate[] the legislative intent behind the enactment.'" *Morse v. Employees Ret. Sys. of City of Providence*, 139 A.3d 385, 391 (R.I. 2016) (quoting *Pawtucket Transfer Operations, LLC v. City of Pawtucket*, 944 A.2d 855, 859 (R.I. 2008)). Courts "give deference to an agency's interpretation of an ambiguous statute that it has been charged with administering and enforcing, provided that the agency's

construction is neither clearly erroneous nor unauthorized." *Arnold v. Rhode Island Dep't of Labor & Training Bd. of Review*, 822 A.2d 164, 168-69 (R.I. 2003); *see also Labor Ready Northeast, Inc. v. McConaghy*, 849 A.2d 340, 344 (R.I. 2004). "Our ultimate interpretation of an ambiguous statute, however, is grounded in policy considerations and we will not apply a statute in a manner that will defeat its underlying purpose." *Arnold*, 822 A.2d at 169 (citing *Pier House Inn, Inc. v. 421 Corp., Inc.*, 812 A.2d 799, 804 (R.I. 2002)). However, courts are mindful, "under no circumstances . . . [to] construe a statute to reach an absurd result." *Berman v. Sitrin*, 991 A.2d 1038, 1043 (R.I. 2010).

In these consolidated matters, the Court is satisfied that *Chevron* deference does not apply. Indeed, "*Chevron* deference should be applied when it appears that [the legislature] delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of such authority." 2 Am. Jur. 2d *Administrative Law* § 469 (Feb. 2019 update) (citing *Rhinehimer v. U.S. Bancorp Invs., Inc.*, 787 F.3d 797, 809 (6th Cir. 2015)). Here, the PUC and PWSB have not promulgated formal rules interpreting the Purpose Clause of the 1915 Act, nor has the General Assembly delegated the authority to them to do so, and therefore this Court is not bound by *Chevron* deference in its interpretation of the Purpose Clause. Accordingly, this Court shall not defer to—but more accurately will take into account—PUC's and PWSB's interpretations of the 1915 Act to the extent that such interpretations are not clearly erroneous or outside the law. *Arnold*, 822 A.2d at 168-69. However, the Court "is the ultimate arbiter of law." *Id.* at 169.

The PUC and PWSB have seemingly endorsed the Water Supply Agreement by permitting similar sales of water. For instance, the PWSB confirmed in its deposition that it had never restricted its wholesale customers' water use or their ability to resell PWSB water. (CRE

Mem. 6, July 5, 2018.) Interrogatories of Barrington, Bristol, Cranston, Providence, Lincoln, North Providence, Scituate, Smithfield, Burrillville, Warren, Warwick, and West Greenwich also demonstrated that none of these towns interpreted the 1915 Act to restrict sales or use of PSWB water by wholesale customers beyond the volumetric limitations in the 1915 Act and certain restrictions imposed during drought. P.L. 1915, ch. 1278, § 18; CRE Mem. 6; *see also* CRE Mem. Exs. E-Q, July 5, 2018.

Furthermore, the PUC came to the same conclusion when faced with this issue. In R.I. PUC Docket No. 3121, the Woonsocket Water Division (WWD) submitted a petition to the PUC, pursuant to § 39-3-11, to detariff water truck sales, so that Woonsocket would no longer sell water to water trucks, who then took water to end-users beyond the territorial limits of the municipality who cannot get adequate water supply from existing water distribution facilities. The PUC denied the WWD's petition to de-tariff water truck sales, disagreeing with WWD's argument that Woonsocket could not sell water outside its municipal limits.

C

Prevalence of Municipal Bulk Water Supply to Energy Generation Facilities

Defendants further argue that the Water Supply Agreement is valid under the 1915 Act because the supply of water from municipalities to an energy generation facility is a common practice and therefore "ordinary." Johnston defines ordinary as, "of no special quality or interest; commonplace; unexceptional," then points to discovery demonstrating that numerous cities and towns in Rhode Island engage in this practice. Johnston submits that municipalities have been supplying power plants with water since the 1990s, and that every electric generation facility in Rhode Island is supplied with water by a public entity, including Burrillville. CRE additionally argues that according to Defendants' discovery, municipalities subject to the 1915

Act, including Burrillville, (1) do not place restrictions on their customers' uses of water; (2) do not prohibit sale of water to energy facilities; and, (3) do not prohibit sale of water to water transport facilities. Finally, CRE notes that every major energy generation facility in Rhode Island obtains its water from a municipality or municipal water district.

CLF objects, asserting that the fact that other Rhode Island municipalities resell water purchased from PWSB at wholesale prices does not make it legal or right. CLF cites *Bd. of Purification of Waters v. Town of E. Providence*, which states, "[w]hat other cities have done or are doing . . . is entirely immaterial." 47 R.I. 431, 133 A. 812, 815 (1926). Burrillville adopts CLF's argument, adding that many Rhode Island municipalities do not resell water purchased at wholesale prices from PWSB, despite the fact that some do.

To determine whether the Water Supply Agreement is valid under Rhode Island law, this Court must interpret the language of the 1915 Act, specifically the portion that allows certain municipalities to "have the right to take and receive water [from PWSB] for . . . ordinary municipal water supply purposes." P.L. 1915, ch. 1278, § 18. Having concluded that this language is ambiguous, the Court shall consider the legislative intent to determine the proper statutory construction, while remaining mindful of agency interpretations of the statute and avoiding an absurd result or one contrary to public policy. *Arnold*, 822 A.2d at 168-69.

In its October 4, 2017 Decision, this Court noted that "there have been substantial advancements in technology, science and manufacturing" since the original passage of the 1915 Act, more than 100 years ago. Decision 6 (Silverstein, J.). Therefore, the Court required discovery concerning how the undefined phrase "other ordinary municipal water supply purposes" has been interpreted by municipalities subject to the statute. *Id.* at 9. The Court noted that courts often "apply a common meaning [of an undefined word in a statute] as provided by a

recognized dictionary." *Id.* at 7 (citing *In re Review of Proposed Town of New Shoreham Project*, 25 A.3d 482, 513 (R.I. 2011)). Indeed, Merriam-Webster defines "ordinary," as "the regular or customary condition or course of things." *See* MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/ordinary (last visited Apr. 2, 2019). Therefore, looking to common practices of other municipalities is instructive here.

Under certain circumstances, courts may also look to *communis opinion*, the general opinion or prevailing doctrine, in determining legislative intent with respect to an ambiguous statute. *See* Michael P. Healy, *Communis Opinio and the Methods of Statutory Interpretation: Interpreting Law or Changing Law*, 43 Wm. & Mary L. Rev. 539, 541 (2001). As the United States Supreme Court has explained:

> "Both officers, lawmakers, and citizens naturally adjust themselves to any long-continued action of the Executive Department, on the presumption that unauthorized acts would not have been allowed to be so often repeated as to crystallize into a regular practice. That presumption is not reasoning in a circle, but the basis of a wise and quieting rule that, in determining the meaning of a statute or the existence of a power, weight shall be given to the usage itself,[]even when the validity of the practice is the subject of investigation." *United States v. Midwest Oil Co.*, 236 U.S. 459, 472-73 (1915).

The United States Supreme Court has additionally stated, "when there has been a long acquiescence in a regulation, and by it rights of parties for many years have been determined and adjusted, it is not to be disregarded without the most cogent and persuasive reasons." *Robertson v. Downing*, 127 U.S. 607, 613 (1888) (citing *United States v. Hill*, 120 U.S. 169, 182 (1887); *United States v. Philbrick*, 120 U.S. 52, 59 (1887); *Brown v. United States*, 113 568, 571 (1884). Lastly, "a construction so long and publicly prevailing, and this by the sanction of the local officers, and without any dissent by the treasury department, through instruction, correspondence

or circulars, operates strongly in its support." *United States v. The Reindeer*, 27 F. Cas. 758, 762 (C.C.D.R.I. 1848) (citing 3 Atk. 576; 10 Ves. 338).

Defendants' discovery following the October 4, 2017 Decision disclosed that municipalities subject to the 1915 Act do not place restrictions upon their customers' use of the water, on the sale of water to energy generation facilities, or on the sale of water to transport companies. Indeed, every major energy facility in the state obtains its water from a municipality or municipal water district. *See Robertson*, 127 U.S. at 613 (explaining that courts should give deference to well established acquiescence to a regulation). For example, Burrillville is home to an energy generation facility, the Ocean State Power Plant, that "has its water supply augmented by bulk suppliers that transport water from other municipalities to a . . . retention pond that Ocean State Power constructed for this very purpose in North Smithfield, Rhode Island." Johnson Mem. 15, July 5, 2018; *see also* Johnston Mem. Ex. E. Johnston is also home to a power plant that obtains a large portion of its cooling water supply pursuant to an effluent supply contract with the City of Cranston. *See* Johnston Mem. Ex. A, July 5, 2018. Finally, as discussed *supra*, Defendants produced interrogatories from numerous municipalities that purchase water from PWSB, stating that they are not subject to any restrictions regarding their use of that water save for volumetric or drought limitations.

The Court is mindful that evidence of other municipalities' activities is not determinative in considering the specific matter before the Court. *See, e.g.*, *Smith v. Cox*, 301 P.2d 649, 651 (Okla. 1956) ("a custom or usage repugnant to the express provisions of a statute is void, and whenever there is a conflict between a custom or usage, and a statutory regulation the statutory regulation must control"). However, other municipalities' uses of bulk water are not repugnant to the statute, as "ordinary municipal water supply purposes" is undefined in the 1915 Act.

Rather, this Court may properly consider the common practices of other municipalities to determine the meaning of "ordinary municipal water supply purposes," and of legislative intent. *The Reindeer*, 27 F. Cas. at 762 ("a construction so long and publicly prevailing, and this by the sanction of the local officers, and without any dissent . . . operates strongly in its support") (citing 3 Atk. 576; 10 Ves. 338). Having determined that it is customary for municipalities to purchase water from PWSB and resell it to energy generation facilities, the Court finds that the Water Supply Agreement constitutes an ordinary municipal water supply purpose under P.L. 1915, ch. 84, § 18 and is therefore valid under Rhode Island law.

D

Jurisdiction of the Rhode Island Public Utilities Commission

Defendants further maintain that when the 1915 Act was amended in 1980, it placed the wholesale supply of water by PWSB under the exclusive jurisdiction of the PUC. *See* P.L. 1980, ch. 335. The PUC is responsible for establishing the regulatory structure, including regulations related to the sale of water under applicable tariffs, which Defendants argue enables Johnston to sell the water at issue without restriction. Secs. 39-1-1, *et seq.* According to Defendants, there is nothing in these regulations that restricts Johnston's ability to sell the water. Citing *State v. Swindell*, 895 A.2d 100, 104 (R.I. 2006), CRE argues that the interpretations of PUC and PWSB are "entitled to great weight" from this Court, and that the Court should follow such interpretations even if such interpretations are not the only permissible ones. CLF responds that the Court has jurisdiction over the case and cites this Court's June 20, 2017 Decision.

Defendants previously argued that this Court lacked jurisdiction over these consolidated matters. Decision 4, June 20, 2017 (Silverstein, J.). Specifically, Defendants argued that Plaintiffs' cases must be dismissed because Plaintiffs failed to exhaust their administrative

remedies with the EFSB and that the EFSB has primary jurisdiction. The Court disagreed, finding jurisdiction proper under §§ 9-30-1, *et seq.* Decision 17, June 20, 2017 ("[s]imply put, this Court is the appropriate forum to interpret P.L. 1915, ch. 1278, § 18"). Indeed, as CLF argues, this finding is now law of the case. *See Salvadore v. Major Elec. & Supply, Inc.*, 469 A.2d 353, 355-56 (R.I. 1983) (stating that the Supreme Court has adopted the "law of the case" doctrine, under which an interlocutory decision should not be disturbed if the issue arises in subsequent matters in the same case). Defendants now submit that these consolidated matters are within the jurisdiction of the PUC, rather than their original argument that jurisdiction lay with the EFSB. Nevertheless, this Court remains the proper forum for the interpretation of the 1915 Act; therefore, Defendants' jurisdictional argument is of no moment.

E

Public Policy Considerations

Defendants finally argue that a finding in favor of Burrillville and CLF would lead to an impractical result. Johnston submits that should this Court so find, any wholesale customer of PWSB seeking to supply a new commercial enterprise with water would require a court determination as to whether such use was an "ordinary municipal water supply purpose." Johnston further asserts that a finding for Plaintiffs would stifle economic development, which the General Assembly could not have intended when passing the 1915 Act.

CRE similarly characterizes the potential results of a ruling in Plaintiffs' favor as absurd. Specifically, CRE asserts that finding for Plaintiffs would discourage commercial use of water and unreasonably raise the costs of conducting business in Rhode Island. CRE argues that if supply of water to a power plant is not an ordinary use, then other businesses that did not exist in 1915—such as computer companies or soda factories—would also not qualify to purchase

PWSB water from a municipality. CRE adds that restrictions upon sale of water to water transportation facilities would prevent common uses of transported water, such as use in swimming pools.

CLF, on the other hand, argues that public policy concerns favor the denial of Defendants' motion. CLF argues that a decision in Plaintiffs' favor would merely require CRE to identify an alternate source of water, which CLF submits that CRE has already done. Burrillville adopts CLF's arguments and opposes Defendants' statement that economic hardship would result from a decision in favor of Defendants.

Having determined that the Water Supply Agreement is valid under the 1915 Act, this Court is unpersuaded by Plaintiffs' arguments. Public policy considerations regarding the use of water purchased from PWSB and resold by a municipality are better left to the province of the legislature. *Barrett v. Barrett*, 894 A.2d 891, 898 (R.I. 2006) ("[I]t is not this Court's place 'to substitute for the will of the Legislature [our] own ideas as to justice, expediency, or policy of the law.'") (citing *Blais v. Franklin*, 31 R.I. 95, 77 A. 172, 177 (1910)); *see also Furia v. Furia*, 638 A.2d 548, 552 (R.I. 1994) ("[I]t is not the Supreme Court's function to rewrite or amend statutes that the General Assembly enacted.") (citing *Rhode Island Fed'n of Teachers, AFT, AFL-CIO v. Sundlun*, 595 A.2d 799, 802 (R.I. 1991)). If not the Supreme Court's function, then *a fortiori* it is not the function of the Superior Court. The Court finds no genuine issue of material fact that the Water Supply Agreement is valid under the 1915 Act. Therefore, Defendants are entitled to judgment as a matter of law.

IV

Conclusion

For the reasons stated herein, Defendants' Motions for Summary Judgment are granted. The Court finds no genuine issue of material fact with respect to the legality of the Water Supply Agreement under the 1915 Act and accompanying regulations. Specifically, the Court finds that the Water Supply Agreement and performance pursuant to it constitute an "ordinary municipal water supply purpose" under P.L. 1915, ch. 1278, § 18.

Accordingly, an Order granting the Summary Judgment motions of Clear River Energy, LLC and the Town of Johnston may enter. Prevailing counsel shall present an appropriate Order for entry.

RHODE ISLAND SUPERIOR COURT

Decision Addendum Sheet

TITLE OF CASE:	Conservation Law Foundation, Inc. v. Clear River Energy, LLC, et al.
CASE NO:	PC-2017-1037 (consolidated with) PC-2017-1039
COURT:	Providence County Superior Court
DATE DECISION FILED:	April 23, 2019
JUSTICE/MAGISTRATE:	Silverstein, J. (Ret.)
ATTORNEYS:	
For Plaintiff:	John M. Greeene, Esq.; Jerry H. Elmer, Esq.
For Defendant:	*SEE ATTACHED LISTS

Conservation Law Foundation, Inc. v. Clear River Energy, LLC, et al.
PC-2017-1037

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PC-2017-1039

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