STATE OF RHODE ISLAND
PROVIDENCE COUNTY

SUPERIOR COURT

CONSERVATION LAW FOUNDATION, INC.,
Plaintiff,
v.
CLEAR RIVER ENERGY, LLC, and
TOWN OF JOHNSTON, et al.,
Defendants.

C.A. No. PC 17-1037

Consolidated

TOWN OF BURRILLVILLE,
Plaintiff,
v.
CLEAR RIVER ENERGY, LLC, and
TOWN OF JOHNSTON, et al.,
Defendants.

C.A. No. PC 17-1039

MEMORANDUM OF LAW OF CONSERVATION LAW FOUNDATION IN SUPPORT OF ITS OBJECTION TO DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT

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INTRODUCTION

Conservation Law Foundation (CLF) respectfully submits its Memorandum of Law in support of its Objections to Clear River Energy, LLC's (Invenergy's) and the Town of Johnston's respective Motions for Summary Judgment.

Invenergy and Johnston (together, Defendants) raise several issues in their Memoranda: (1) the correct interpretation of the 1915 Act, particularly the phrase that communities such as Johnston may receive water "for use for domestic, fire, and other ordinary municipal water supply purposes" (CLF refers to this phrase herein as the Purposes Clause); (2) whether a 1936 amendment to the 1915 Act that introduced a wholesale/retail distinction into water sales is of any moment; (3) whether the practice of some municipalities in re-selling water is of any moment; (4) the matter of Chevron deference; (5) the canon of statutory interpretation to avoid absurd results; and (6) issues of public policy. Defendants also re-assert the question of whether this Honorable Court has subject-matter jurisdiction over this case, an issue already decided by the Court in its Decision dated June 20, 2017, and they raise several wholly irrelevant matters.

CLF addresses each of the foregoing matters, seriatim.

Defendants are not entitled to summary judgment because, although major facts are not in dispute, the plain language of the 1915 Act does not support Defendants' interpretation, and Defendants' reading of it would impermissibly render the entire Purposes Clause meaningless surplusage. Summary judgment is further inappropriate because, as the Court is well aware, in addressing a motion for summary judgment the Court is obliged to draw all reasonable

inferences in favor of the non-moving parties, here CLF and the Town of Burrillville. DeMaio v. Ciccone, 59 A.3d 125, 130 (R.I. 2013) (reversing grant of summary judgment below).

If this Honorable Court denies Defendants motions for summary judgment, CLF believes that the case will then be ready for decision by the Court on the merits. In that event, the Court would be called upon to interpret the 1915 Act according to standard canons of statutory interpretation, including giving words their plain meanings, avoiding surplusage, and avoiding absurd results.

I. THE WATER SALE AT ISSUE IS NOT PERMITTED BY THE 1915 ACT

Under the 1915 Act, certain municipalities are entitled to purchase water only for specific, enumerated purposes. Specifically, the 1915 Act provides that:

> [Certain municipalities, and certain water and fire districts] shall have the right to take and receive water from said storage reservoir or reservoirs for use for domestic, fire or other ordinary municipal water supply purposes in [those same municipalities and water and fire districts]. [Emphasis supplied.]

The issue before the Court is thus whether Johnston's for-profit sale of water to Invenergy – to cool a 1,000-megawatt, billion-dollar, fossil-fuel power plant located outside of Johnston – constitutes a "use for domestic, fire [or] other ordinary municipal water supply purposes in [Johnston]." It does not.

A. The Water Sale Is Not For Domestic or Fire Purposes.

It is undisputed that Invenergy's proposed use is not by any municipal fire department. Neither Invenergy nor Johnston argues that Johnston's intended water use is for domestic purposes. Nevertheless, CLF examines the meaning of the term "domestic," because the reason

that the term was used in the 1915 Act must inform the Court's interpretation of the remainder of the Purposes Clause.

The proposed use – to cool a 1,000-megawatt, billion-dollar, fossil-fuel power plant – is of course not a domestic use. The English word "domestic" derives from the Latin "domus," meaning "house." The dictionary definition of "domestic" is "[o]f or pertaining to the family or household." Webster's II, New Riverside Dictionary (1984), at 397. First Circuit case law bears out this definition. See Comite Pro Rescate De La Salud v. P. R. Aqueduct & Sewer Auth., 888 F. 2d 180, 184 (1st Cir. 1989) (Breyer, J.) (holding that "the term 'domestic sewage' means sewage that, in fact, comes from residences" (emphasis as in original)). Domestic uses of water, then, include taking showers and cooking dinner, and surely do not include cooling fossil-fuel power plants.

That the legislature did not intend to include cooling fossil-fuel power plants – and, further, intended to exclude it – when it authorized taking water for domestic purposes is made even clearer by the context of the language within the contemporaneous law of riparian rights.

"The meaning of well-defined common law words and phrases often carries over to statutes dealing with the same or a similar subject matter." SUTHERLAND STATUTES AND STATUTORY CONSTRUCTION § 50:3. The law of riparian rights developed largely in response to new, industrial demands on water that had previously been used almost exclusively for domestic purposes.

"In the early English common law there was little litigation over the private use of water. Uses of water were limited mainly to withdrawals for domestic purposes and impoundments for

running small grist mills .... With the advent of the Industrial Revolution there came a marked increase in the use of water for powering machinery...." RESTATEMENT (SECOND) OF TORTS (1979), Division Ten, Chapter 41, Topic 3, Introductory Note on the Nature of Riparian Rights and Legal Theories for Determination of the Rights.

In Tyler v. Wilkinson, 24 F. Cas. 472 (C.C.D.R.I. 1827) (Story, Circuit Justice) – the Rhode Island case credited with introducing riparian rights into American jurisprudence – the court held that all owners of land abutting a river had equal rights to the river and that no one "has a right to diminish the quantity which will, according to the natural current, flow to the proprietor below, or to throw it back upon a proprietor above." Id. at 474. This principle, first articulated in Tyler, is known as the natural flow theory of water rights. Tarlock, L. OF WATER RIGHTS AND RESOURCES § 3:5. Most courts in the nineteenth century adopted the natural flow theory or included strong natural flow language in their opinions. Id. at § 3:55.

Importantly, the theory's prohibition against consumptive withdrawals had a major exception – the domestic use preference. "Withdrawals for domestic use were always allowed under the natural flow theory." Id. at § 3:57. In a case decided just twelve years before the passage of the 1915 Act, Roscoe Pound – one of the towering figures of twentieth century American jurisprudence[1] – wrote that the distinction between domestic and other water uses lies "between those modes of use which ordinarily involve the taking of small quantities, and but

[1] Pound was one of the leading progenitors of the Legal Realist movement, see, e.g., William W. Fisher III, Morton J. Horowitz & Thomas A. Reed, American Legal Realism (Oxford Univ. Press 1993), and dean of Harvard Law School from 1916 to 1936.

little interference with the stream, such as drinking and other household purposes, and those which necessarily involve the taking or diversion of large quantities and a considerable interference with its ordinary course and flow, such as manufacturing purposes." Meng v. Coffey, 67 Neb. 500, 93 N.W. 713, 717-18 (1903). Even as adherence to the natural flow theory has waned in favor of the more industry-friendly reasonable use theory (beginning in the late nineteenth century), "the natural flow preference for 'natural wants' is preserved in the form of a preference for domestic uses." RESTATEMENT (SECOND) OF TORTS (1979), Division Ten, Chapter 41, Topic 3, Introductory Note on the Nature of Riparian Rights and Legal Theories for Determination of the Rights.

That is, in the context of the common law of water rights, the term "domestic" not only does not include large-scale industrial uses; "domestic" is defined by its distinction from such uses.

Respectfully, this understanding of "domestic" must inform this Honorable Court's reading of the entire Purposes Clause in the 1915 Act. For the legislature to have authorized the taking of water for large-scale industrial purposes in a clause directly adjacent to where just that use was prohibited would impermissibly render the inclusion of "domestic" meaningless surplusage. R.I. Local 400, Int'l Fed'n of Technical & Prof'l Eng'r v. R.I. State Labor Relations Bd., 747 A.2d 1002, 1005 (R.I. 2000) (Rhode Island adheres to the "canon of statutory interpretation which gives effect to all of a statute's provisions, with no sentence, clause or word construed as unmeaning or suplusage[,]" affirming decision below by Silverstein, J.).

Thus, for the foregoing reasons, this water sale is not for domestic or fire purposes.

B. The Water Sale Is Not for Any "Other Ordinary Municipal Water Supply Purposes."

As the water sale is not for a domestic of fire purpose, it would necessarily have to be for "other ordinary municipal water supply purposes" in order to be permissible under the 1915 Act.

The dictionary definition of ordinary is "[c]ommonly encountered; usual." Webster's II, New Riverside Dictionary, at 827. The dictionary definition of municipal is "[o]f or relating to a city or town or its local government." Webster's Unabridged Dictionary (2d Ed. 1983), at 1182. Taking these terms together, uses of water for "other ordinary municipal water supply purposes" would be usual or commonplace uses that relate to the municipality or its government.

Also instructive is Black's Law Dictionary's definition of "municipal purposes" as "public or governmental purposes, as distinguished from private purposes. It may comprehend all activities essential to the health, morals, protection, and welfare of the municipality." Black's Law Dictionary, 1018, (6th ed. 1990). Accord State ex rel. Harper v. McDavid, 145 Fla. 605, 609 (1941) (citing Black's to interpret "municipal purpose" language in tax provision of state constitution); In re Trust of Brooke, 697 N.E.2d 191, 196 (Ohio 1998) (citing Black's to interpret "municipal purpose" language in trust).

Relatedly, "municipal function" is defined by Black's as "[t]he duties and responsibilities that a municipality owes its members." Black's Law Dictionary, 1113 (9th ed. 2009). The only two examples of "ordinary municipal water supply purposes" provided by the 1915 Act –

providing water to households, and putting out fires[2] – are clearly "municipal purposes" undertaken in furtherance of "municipal functions" as those terms are defined by Black's.

Both Invenergy and Johnston cite to other examples in which municipalities sell water in an effort to show that such sales are "ordinary." Invenergy Memorandum, at 5-9, 18; Johnston Memorandum, at 3, 4, 14. (CLF addresses this issue more fully in the next section and shows that usage cannot and does not obviate the provisions of a clear statute; see Section II, infra, at 15.) For present purposes it suffices to observe that when interpreting statutory language, the Court's ultimate goal is to give effect to the purpose of the act as intended by the legislature. Grasso v. Raimondo, 177 A.3d 482, 490 (R.I. 2018).[3]

By citing other instances in which water is sold by municipalities, both Johnston and Invenergy myopically focus on whether the proposed use is "ordinary." In doing so, Defendants fail utterly to suggest any plausible interpretation of the full six-word phrase that might be broad enough to include their proposed use. Even if, as Defendants argue, the proposed use has become ordinary in the sense that "everybody does it," (discussed further below), that does not make it an "ordinary municipal water supply purpose." As this Honorable Court has already recognized in this case, "the Court is not seeking to define a word, but rather a phrase of six words in concert within the context of the 1915 Act." October 4, 2017 Decision, at 7.

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[2] The word "other" before the phrase "ordinary municipal water supply purposes" indicates that the preceding terms ("domestic" and "fire") belong to the set (that is, are themselves both "ordinary" and "municipal" purposes).

[3] This assertion is not in dispute. Johnston cites the same case for the same proposition. Johnston Memorandum, at 8.

Selling water for profit to a private, foreign entity, to be used outside of the municipality, is very clearly not an "other ordinary municipal water supply purpose" as the term was understood by the General Assembly.

What then is an "ordinary municipal water supply purpose" according to Johnston and Invenergy? Any purpose that anyone can imagine. Both Defendants actually assert that municipalities currently purchase water from the Providence Water Supply Board (PWSB) with no restrictions whatever, and they urge the Court to endorse this practice. Invenergy Memorandum, at 12 (Johnston can "resell water without restriction"); Johnston Memorandum, at 12 ("There is absolutely nothing . . . that places any restriction on Johnston's resale of water"), 17 (same). Johnston "submits that the phrase 'other municipal water supply purposes' was a catchall that modified the entire phrase," and argues that "[i]t would be manifestly unreasonable to interpret the 1915 Act as limiting Johnston's ability to resell water that it purchases wholesale from the PWSB." Johnston Memorandum, at 9-10; 13-14 (identical language). In Defendants' reading of the 1915 Act, "domestic, fire and other ordinary municipal water supply purposes" is identical to "domestic, fire plus any other conceivable purpose in the universe."

This infinitely broad interpretation renders the phrase – indeed the entire Purposes Clause – completely meaningless, and therefore must be rejected. Pier House Inn, Inc. v. 421 Corp., 812 A.2d 799, 804 (R.I. 2002) ("We presume that the Legislature intended every word, sentence, or provision to serve some purpose and have some force and effect."); State v. Bryant, 670 A.2d 776, 779 (R.I. 1996) ("[T]he Legislature is presumed to have intended each word or provision of a statute to express a significant meaning, and the [C]ourt will give effect to every word, clause,

or sentence, whenever possible."); State v. DeMagistris, 714 A.2d 567, 573 (R.I. 1998) ("[N]o construction of a statute should be adopted that would demote any significant phrase or clause to mere surplusage.").

Refusing to acknowledge any purpose-based limitation whatever on the Town's sale of water, Johnston invokes the doctrine that a legislature does not "hide elephants in mouseholes." Johnston Memorandum, at 10, 20. That doctrine has it that a legislature "does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions." Whitman v. American Trucking Assoc., 531 U.S. 457, 468 (2001) (Scalia, J.). Of course, the elephants-in-mouseholes doctrine cuts strongly against Defendants in this case. Defendants argue that "other ordinary municipal purposes" was actually intended as a "catchall that modified the entire phrase," thereby nullifying the entire Purposes Clause and authorizing any conceivable resale of water to any conceivable foreign entity for any conceivable purpose. Johnston Memorandum, at 9-10. That interpretation would truly be hiding an elephant in a mousehole!

C. The Water That Is Being Sold By Johnston Is Not For Use in Johnston.

When a statute is clear and unambiguous the Court gives the words their plain and ordinary meanings. Shine v. Moreau, 119 A.3d 1, 9 (R.I. 2015). The 1915 Act, in addition to limiting the purposes for which municipalities may purchase water from the PSWB, also limits the geographic area in which municipalities may use the water. The Act provides that:

> [Certain municipalities, and certain water and fire districts] shall have the right to take and receive water from said storage reservoir or reservoirs for use for domestic, fire or other ordinary municipal water supply purposes in [those same municipalities and water and fire districts]. [Emphasis supplied.]

This language clearly limits the area in which municipalities may use water purchased under the 1915 Act to the boundaries of those municipalities themselves. In other words, the 1915 Act states that Johnston has the right to purchase water for use for specific purposes in Johnston. Johnston does not have the right to purchase water for use for any (and all) purposes in Rome, Tokyo, or Burrillville.

This geographic limitation is consistent with the "general and well-established rule that apart from clear legislative authority, a municipal corporation cannot extend its services (except incidentally) beyond its borders." Inhabitants of Boothbay v. Inhabitants of Boothbay Harbor, 88 A.2d 820, 824 (Me. 1952). Accord Taylor v. Dimmitt, 78 S.W.2d 841, 843 (Mo. 1934) ("In rendering electric service to consumers outside their corporate boundaries, they [city officials] perform no municipal function, but depart from the primary objects for which they have existence, and enter a field of private business. Authority for such action, we think, should clearly appear."); Richards v. City of Portland, 121 Or. 340, 345 (1927) (What authority has the city, as a public utility, to supply water to consumers beyond its corporate limits? It is elementary that a municipality, acting either in its governmental or proprietary capacity, can do so only by virtue of express or implied authority conferred upon it. Ordinarily, the jurisdiction of a municipality ceases at its boundaries, and, for it to exercise extraterritorial jurisdiction, its power to do so must be clearly expressed.); Baizen v. Bd. of Pub. Works of Everett, 304 N.E.2d 586 (Mass. App. Ct. 1973) (same).

The 1915 Act, by its plain language, prohibits municipalities from reselling water they take from the PWSB beyond their own borders.

D. A 1936 Amendment to the 1915 Act Introducing a Wholesale/Retail Distinction Does Not Save the Water Contract Because Johnston's Right To Take and Receive Water Is Governed by the Purposes Clause of the 1915 Act.

In an effort to save its water contract, Invenergy incorrectly argues that a wholesale/retail distinction created by the General Assembly in a 1936 amendment to the 1915 Act takes this entire case out of the ambit of the Purposes Clause of the 1915 Act. Invenergy Memorandum, at 10-12. Specifically, Invenergy says, "The retail/wholesale provision is the operative provision in this case . . . Because the retail/wholesale provision governs, the meaning of the phrase 'ordinary municipal water supply purposes' is simply immaterial to the outcome of the case." Invenergy Memorandum, at 11.

Invenergy ignores the fact that this Court has already determined that the outcome of this case will hinge on "an accurate assessment" of the meaning of the phrase "other ordinary municipal water supply purposes." October 4, 2017 Decision, at 7; id. at 9. However, an accurate assessment of the Purposes Clause would necessarily determine the outcome of this lawsuit even if the Court had not already decided that this is true (which it has). This is apparent from the language of the original 1915 Act and the language of the 1936 amendment.

The 1915 Act, as originally enacted, stated in pertinent part that certain municipalities, and certain water and fire districts:

> [S]hall have the right to take and receive water from said storage reservoir or reservoirs... for use for domestic, fire and other ordinary municipal water supply purposes in [those same municipalities and water and fire districts] ...
>
> Proper connections with said water supply source or sources, including the installation of proper meters or other devices for ascertaining the quantity of water so taken, shall be made at such suitable location or locations as shall be approved by [the PWSB] ... and

> subject to such reasonable rules and regulations as from time to time may be made by [the PWSB] ...
>
> Such town, city or water or fire district shall have the right to take such water as aforesaid to any extent each month not exceeding an average per day of one hundred gallons per capita of the number of inhabitants of such parts of its territory or territories as are served from such water supply source or sources ...
>
> Such town, city or water or fire district shall pay to said City of Providence such fair wholesale rates or charges for the quantity of water taken by it as aforesaid ... [Emphasis supplied.]

Respectively, these portions of the 1915 Act: (1) gave certain municipalities (and water and fire districts) the right to purchase water from the PWSB for specified purposes within those same municipalities (and water and fire districts); (2) granted the PWSB authority over the location and process of delivery; (3) separately limited the amount of water municipalities could purchase on a per capita basis; and (4) provided for payment to the PWSB at fair wholesale rates.

The General Assembly has amended the relevant section of the 1915 Act on multiple occasions,[4] giving additional communities and water districts the right to purchase water from the reservoir, and on one occasion providing for an alternate manner of sale to municipalities not included in the original act. In 1936, the legislature provided that:

> [A]s to [certain municipalities, including Johnston] as were not entitled to water under chapter 1278 of the public laws of 1915 as originally enacted, [the PWSB] shall have the right to determine whether it shall sell water directly to prospective water users or

[4] *See* P.L. 1931, ch. 1815 (adding North Providence); P.L. 1932, ch. 1966 (adding Warwick and Kent County Water Authority); P.L. 1936, ch. 2316 (adding Johnston, Smithfield, East Smithfield Water District, and Greenville Water District); P.L. 1947, ch. 1897; P.L. 1963, ch. 158 (adding East Providence); P.L. 1964, ch. 91; P.L. 1966, ch. 5; P.L. 1967, ch. 162 (adding Bristol County Water Authority, Barrington, Bristol, and Warren); P.L. 1985, ch. 442 (adding Lincoln); P.L. 1985, ch. 54; P.L. 1986, ch. 84 (adding Burrillville).

consumers at retail or to the city or town water or fire district therein at wholesale rates. [Emphasis supplied.]

In other words, with respect to certain municipalities including Johnston, the PWSB can now either sell to the municipality at wholesale rates as described under the original act, or alternatively it can bypass the municipality and sell water directly to the consumers in that municipality at retail.[5]

In the case of Johnston, the PWSB has chosen the former. The PWSB has not exercised its option to sell directly to Johnston residents at retail. Instead, the PWSB today sells water to Johnston at wholesale; as such, the Purposes Clause of the 1915 Act controls. Thus, this case must be determined by an accurate assessment of the meaning of the phrase "other ordinary municipal water supply purposes" – as this Court has already determined.

Invenergy even argues that the Purposes Clause of the 1915 Act does not apply in this case because the 1915 Act only applies to the waters of the Scituate Reservoir and Johnston is instead taking water from the PWSB! "As an alternative to municipalities obtaining water from the reservoir(s) themselves," Invenergy argues, referring to the language in the original Act, "municipalities can purchase water from the PWSB under the 1915 Act." Invenergy Memorandum, at 10-11. In such a case, Invenergy claims, the Purposes Clause of the 1915 Act just does not apply. Invenergy Memorandum, at 11 ("[T]he rights of certain municipalities,

[5] Note that when the PWSB sells water to the Town of Johnston, the PWSB is obligated to sell at the wholesale rate. In contrast, when Johnston resells to Invenergy, Johnston believes it is free to set any price it wishes. In this context, the volumetric restriction on PWSB wholesale sales to municipalities becomes important.

water districts, and fire districts, to take water from certain reservoir(s) . . . does not mention the PWSB at all.")

Invenergy's argument in this regard fails for a very simple reason: the water being sold by the PWSB is the water of the Scituate Reservoir.

Invenergy's reading grows still more absurd when one considers that not all the municipalities authorized to take and receive water under the 1915 Act are included in the retail/wholesale clause enacted in 1936. Specifically, the clause only applies to municipalities added in subsequent amendments to the Act. It therefore follows from Invenergy's reading that municipalities – including Scituate and Cranston – included in the original 1915 Act: (1) have no right to purchase water from the PWSB; and (2) are alone in being bound by the Purposes Clause. But such municipalities were included in the original enactment of the 1915 Act because they "suffered a partial loss of Pawtuxet River flow as a result of" the creation of the Scituate Reservoir. R & R Assoc. v. City of Providence Water Supply Bd., 724 A.2d 432, 435 (R.I. 1999). Under Invenergy's strained interpretation, the legislature placed limitations exclusively on those municipalities harmed by the construction of the reservoir – that is, those with the strongest entitlement to the water – and allowed special, unfettered access to later additions to the Act who suffered no harm. This makes no sense at all.

The retail/wholesale clause exists only to introduce direct retail sales as an alternative manner of sale[6] to the already-provided-for sale at wholesale rates (and at the election of the

[6] The clause is in fact labeled "Manner of sale" in the margins of subsequent amendments to the 1915 Act. *See, e.g.*, P.L. 1947, ch. 1897.

PWSB). All municipalities entitled to take water under the 1915 Act – including Johnston[7] – are covered by the Purposes Clause, and therefore may only purchase water from the PWSB "for use for domestic, fire and other ordinary municipal water supply purposes in" their own borders.

II. THE FACT THAT OTHER RHODE ISLAND MUNICIPALITIES SOMETIMES RE-SELL WATER DOES NOT MAKE IT LEGAL OR RIGHT

The second major argument made by Defendants is, in effect, "But everybody does it."

In the Introduction to its Memorandum, Invenergy states: "The PWSB and the municipalities subject to the 1915 Act consistently have interpreted the Act as permitting municipalities to resell water without any restrictions." Invenergy Memorandum, at 3.

Johnston agrees: "PWSB has construed the operative phrase in a manner that does not place any limits of the wholesale customer's resale." Johnston Memorandum, at 12.

An entire section of Invenergy's brief is devoted to the proposition that "[t]hrough discovery it became apparent that the relevant municipalities and water authorities interpret and apply the 1915 Act in a manner consistent with the Agreement." Invenergy Memorandum at 5-6. But this fact did not become apparent through discovery; CLF's counsel stipulated in open court, on the record, that many municipalities violate the Act. The stipulation was made on August 24, 2017, when the Court was considering whether or not to allow discovery. For

[7] Johnston itself acknowledges that the PWSB "has the option to sell water directly to end-users within certain service territories outside the City of Providence at retail, or sell water to such municipalities/water authorities at wholesale," though Johnston wrongly asserts that this language was added in 1986. Johnston Memorandum at 4, 10-11.

approximately a year since August 2017, Defendants have squandered time, effort and money "proving" what CLF stipulated to before discovery commenced.

But the fact that the law is often violated does not make it right; and a statute does not cease to exist by dint of frequent violations. Bd. of Purification of Waters v. Town of E. Providence, 47 R.I. 431, 133 A. 812, 815 (1926) ("What other cities have done or are doing, however, is entirely immaterial").

This is not just the rule in Rhode Island. As the Supreme Court of Iowa put it:

> It is settled law * * * in a majority of * * * states, that a custom or usage repugnant to the express provisions of a statute is void, and whenever there is a conflict between a custom or a usage, and a statutory regulation the statutory regulation must control * * *.

Lemke v. Mueller, 166 N.W.2d 860, 867 (Iowa 1969) (ellipses as in original, citing 25 C.J.S. Customs and Usages and 21 AmJur.2d Customs and Usages).

Many state Supreme Court decisions are in accord. 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[.]"); Wood v. Melton, 179 Kan. 128, 132-133 (1956) ("It is well settled by the law of this state, and generally, that the alleged custom, practice and usage which is contrary to existing law cannot be used either to establish or defeat an action and evidence thereof cannot be received."); Allen v. Mack, 345 Pa. 407, 412, 28 A.2d 783, 786 (1942) ("A custom or usage repugnant to the express provisions of a statute is void."); Davidson Grocery Co. v. Payette Equity Exchange, 51 Idaho 423, 6 P.2d 149, 150 (1931) (same).

The point was put succinctly by the Missouri Supreme Court: "Usage cannot alter the law." State v. Williams, 346 Mo. 1003, 1014, 144 S.W.2d 98, 104 (1940).

The proposition is not novel, and was recognized long ago by the United States Supreme Court: "[I]n the case of conflict between a local custom and a statutory regulation, the latter, as of superior authority, must necessarily control." Basey v. Gallagher, 87 U.S. (20 Wall.) 670, 684 (1874).

CLF's Complaint in this case asks the Court to interpret the meaning of the 1915 Act, and CLF stipulated a year ago that the Act is often violated. Respectfully, Defendants should not be heard to argue, "But everybody does it." Courts (including the Rhode Island Supreme Court) uniformly – and rightly – reject the everybody-does-it argument.

III. THE PWSB'S AND PUC'S INTERPRETATIONS OF THE 1915 ACT ARE NOT ENTITLED TO CHEVRON DEFERENCE

Next, Defendants make a broad Chevron deference argument.

Invenergy argues that "this Court must defer to the PUC's and the PWSB's interpretation of the 1915 Act." Invenergy's Memorandum, at 12-15. Invenergy primarily relies on the interpretation of the PWSB.

Johnston cites Chevron and says, "The PUC's interpretation and application, in itself carries great weight." Johnston's Memorandum, at 13. Where Invenergy relies mostly on the PWSB's interpretation, Johnston relies mostly on the PUC's interpretation.

There are three reasons why Defendants are mistaken as to both the PWSB and the PUC.

First, both Defendants concede, as they must, that Chevron deference only applies in cases where a statute is ambiguous. Invenergy Memorandum at 12-13 "When a statute is ambiguous, the Court gives deference to an agency's interpretation . . ."); Johnston Memorandum, at 13 ("deference is due to an agency's interpretation of an ambiguous statute . . . ."). In this case, for those reasons discussed supra, in Section I (at 2), the Act at issue in this case is not ambiguous.

Second, in order to be accorded Chevron deference, Defendants' interpretation of the statute must be a permissible one under the ambiguous language. Again, in this case that requirement is unsatisfied.

Third – and perhaps most crucially – Chevron deference only applies in the context of the administrative agency having made a formal, deliberate determination of the precise matter at issue, something that has not occurred here. "[A]dministrative implementation of a particular statutory provision qualifies for Chevron deference when it appears that Congress 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 that authority." United States v. Mead Corp., 533 U.S. 218, 226-27 (2001). Thus, agency interpretations qualify for Chevron deference if "arrived at after, for example, a formal adjudication or notice-and-comment rulemaking. Interpretations such as those in opinion letters – like interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law – do not warrant Chevron-style deference." Christensen v. Harris Cnty., 529 U.S. 576, 587 (2000).

In this case, neither the PWSB nor the PUC has ever squarely addressed, much less answered, the precise question presented in this case: what the correct interpretation is of the Purposes Clause of the 1915 Act. Neither the PWSB nor the PUC has engaged in formal rulemaking to address this question, applying all of the requirements of the Administrative Procedures Act, including formal notice and comment. Neither the PWSB nor the PUC has issued a formal decision purporting to interpret the Purposes Clause.

As to the PWSB, Invenergy has shown (as CLF stipulated) that the PWSB sells water without use or volume restrictions; Invenergy has not shown that the PWSB has made a formal finding that the 1915 Act is ambiguous, nor made a formal finding that the ambiguity ought to be resolved as Invenergy would wish. Indeed, based on the PWSB deposition, it appears that those questions have never even occurred to the PWSB. The transcript of Invenergy's deposition of the PWSB's witness reveals just how vague the PWSB's understanding of the 1915 Act is:

> Q: At this time the City of Warwick, is that your largest wholesale customer?
>
> A: Yes.
>
> Q: For any of these wholesale accounts does Providence Water put any restrictions on the amount of water that Providence Water sells to the wholesale accounts?
>
> A: To the best of my knowledge, no.
>
> Q: Do you put any restrictions in terms of volume of sales to any of the wholesale accounts?
>
> A: To the best of my knowledge, no.

November 17, 2017 Deposition of Ricky Caruolo, at 27, lines 14-24.

Invenergy itself acknowledges, as it must, that the 1915 Act contains an express limitation on the volume of water sales to municipalities. Invenergy Memorandum, at 9. Yet, this appears to be a matter that the PWSB deponent was completely unaware of.

The short of it is that there is no evidence in the Record that the PWSB has ever been asked to interpret the meaning of the "domestic, fire and other municipal water supply purposes" portion of the 1915 Act. There is no evidence in the Record that the PWSB has ever made a formal determination that that section of the 1915 Act is ambiguous. And there is no evidence in the Record that the PWSB has decided that the ambiguous statute ought to be interpreted in the manner urged by Invenergy.

What is in the Record is that the PWSB – which does not even acknowledge the volume restrictions in the law acknowledged by Invenergy – also does not observe purpose restrictions. This is not the type of clear, deliberate, formal agency determination that is entitled to Chevron deference.

Similarly, as to the PUC, neither Defendant has cited any evidence that these questions have been squarely put to the PUC, nor that the PUC has addressed them, nor that the PUC has addressed them in a way that is favorable to Defendants. Again, there is no formal ruling from the PUC to which this Court can give Chevron deference.

Johnston's Memorandum does include a lengthy discussion of the so-called Woonsocket Water Division case decided by the PUC in PUC Docket 3121 (Johnston Memorandum at 17-18) and even provides this Court with the full text of the PUC's decision in that case. Johnston Memorandum, Exhibit F. Johnston's discussion here tracks its discussion of the same case in its

April 28, 2017 Reply Memorandum on its Rule 12(b) Motion To Dismiss (to which Johnston also appended the full text of the PUC decision). CLF responded to Johnston's inapposite citation to the Woonsocket Water case in a footnote of its Sur-Reply:

> Johnston also presents a lengthy discussion of [Woonsocket Water Division], PUC Docket 3121, in support of its argument "that it is an ordinary practice for regulated public utilities to establish a tariff to sell water to water transport companies who then resell water to customers located both within an outside the public utility's service territory." Johnston Reply at 14-17. CLF need not address Johnston's assertion, as Woonsocket does not take water from Providence and therefore is not covered by the 1915 Act. Whatever Woonsocket may or may not do simply has no bearing on this case.

CLF May 5, 2017 Sur-Reply Memorandum, at 8, n.5.

IV. DENYING SUMMARY JUDGMENT WOULD NOT LEAD TO ABSURD RESULTS

Both Invenergy and Johnston cite the canon of statutory interpretation that supports avoiding interpretations that would lead to absurd results.

Invenergy asserts that this Court "should grant summary judgment in [Invenergy's] favor because to do otherwise would lead to absurd results." Invenergy Memorandum, at 12. An entire section of Invenergy's Memorandum is entitled "An interpretation that voids the Agreement would lead to absurd results." Invenergy Memorandum, at 15-18.

Johnston cites authority for the proposition that "the Court will not impute to the Legislature an intent that would bring about an unreasonable result." Johnston Memorandum, at 13.

While Defendants are correct that courts do not interpret statutes to yield absurd results, Ryan v. City of Providence, 11 A.3d 68, 71 (R.I. 2011), it is Defendants' reading of the 1915 Act

that would yield absurd results. At the May 31, 2017 hearing of Defendants' motions to dismiss, Johnston's counsel made the following statement in open court, on the record:

> [T]his is something we do every day. We sell water at retail to commercial and industrial users . . . That's about as vanilla or ordinary as you can get . . . [F]rankly, we don't really care. Why should we? If you turn on a spigot, the water goes into a truck, we don't care whether it goes into a truck, it goes into a bottle, what it goes into. The spigot is in the town of Johnston and they turn it on. We bill it. We bill them for it. And that's the end of the process for us.

Transcript of May 31, 2017 Hearing, at 26, lines 7-18.

If the interpretation of the 1915 Act urged upon this Court by Johnston's counsel were correct, then it would be an "ordinary municipal" use to turn on the spigot in Johnston; fill a truck with water; drive the truck to Cape Canaveral, Florida; put the water onto to a rocket; launch the rocket to Mars; and build an artificial lake on Mars with Johnston water from the Scituate Reservoir. Such an interpretation would not only be absurd, Ryan, supra, but would also impermissibly render the entire phrase, "for use for domestic, fire and other ordinary municipal water supply purposes" within the same municipality as meaningless surplusage. State v. DeMagistris, supra, 714 A.2d at 573 (no surplusage).

V. PUBLIC POLICY CONSIDERATIONS DO NOT SUPPORT DEFENDANTS' ARGUMENTS

In the same section of Invenergy's brief in which Invenergy discusses absurd results, Invenergy urges the Court to take account of "policy considerations." Invenergy's Memorandum, at 17. Invenergy urges that "[A] decision in Plaintiffs' favor would have far-reaching consequences and create an absurd policy that discourages commercial use of water and unjustifiably raises the cost of doing business in the state." Id.

Johnston plies a similar policy argument: "[E]very energy facility that generates electricity requires a water supply." Johnston Memorandum, at 6. And: "The result of CLF and Burrillville's argument would severely stifle economic development . . ." Johnston Memorandum, at 19.

Respectfully, there are two things that are wrong with Defendants' public-policy arguments.

First, the actual, real-world result of a decision in favor of CLF and Burrillville in this case is that Invenergy would be required to find a legal source of water. In the current proceeding before the EFSB, Invenergy has already provided evidence of a "back-up" contract whereby Invenergy would obtain water from Fall River, Massachusetts, an option that does not run afoul of the 1915 Act (and which has not been challenged by CLF or Burrillville). There are multiple Rhode Island municipalities from which Invenergy could take water without running afoul of the 1915 Act, including both Woonsocket and Pawtucket.

Ironically, Invenergy's own Memorandum drives home the point that there are legal alternatives to the illegal option selected by Invenergy. As Invenergy tells the Court, the Manchester Street electricity facility in Providence takes cooling water from the Providence River, and Ocean State Power (in Burrillville!) takes water from the Blackstone River. Invenergy's Memorandum, at 16.

The parade of horrible outcomes posited by Defendants if CLF prevails is just not supported by the facts.

Second, the kind of broad-sweeping public-policy decisions urged upon this Court by Defendants are best made by the political branches of government, and not by the judiciary. Ulrich v. Mane, 383 F. Supp.2d 405, 413 (E.D.N.Y. 2005) ("[P]ublic policy concerns are ordinarily and properly the responsibility of the political branches of government . . ." and not the judiciary; allowing statute to be enforced according to its plain meaning in the face of a public policy challenge).

"The courts' role in the constitutional scheme consists of deciding highly particularized disputes between individual litigants and avoiding broad public policy determinations that are more appropriately made by the political branches." Melcher v. Fed. Open Market Comm., 644 F. Supp. 510, 513 (D.D.C. 1986). In this case, CLF (and Burrillville) are asking the Court to decide a highly particularized dispute about one specific contract. That is a fit matter for resolution by a court. In contrast, Defendants appeal to the Court to apply broad (but undefined) theories of "public policy."

This Honorable Court has already decided that that this case presents – and should properly be decided – on narrow grounds related to the particular dispute at issue, and not on broad "public policy" grounds:

> These consolidated cases do not involve thorny questions of constitutional importance, see Watson, 44 A.3d at 138-39, or generalized interests of environmental problems like climate change, see In re Town of New Shoreham Project, 19 A.3d at 1228-29. Rather, here, Plaintiffs present the Court with a concrete issue of statutory interpretation . . . .

June 20, 2017 Decision, at 15.

Plaintiffs and Defendants hold diametrically opposite views of where the "public interest" lies. Fortunately, the Court need not sort out those differing views in order to resolve this case. Plaintiffs' Complaints ask the Court to interpret the meaning of the 1915 Act, not make any broad public-policy determinations. Lacey v. Reitsma, 899 A.2d 455, 458 (R.I. 2006) ("[W]e are cognizant of the fact that our judicial role is to interpret and apply statutes and not to legislate").[8]

VI. THIS CASE IS NOT AN END-RUN AROUND EFSB JURISDICTION

Both Invenergy and Johnston assert that this lawsuit is an attempt at an impermissible end-run around the jurisdiction of the Energy Facility Siting Board (EFSB). Invenergy Memorandum at 3 ("Plaintiffs seek to thwart the permitting process mandated by the Energy Facilities [sic] Siting Act"); Johnston Memorandum, at 3 ("Burrillville and CLF . . . filed the above-captioned cases trying to wrongfully and improperly circumvent the EFSB proceedings.").

This is an old argument that Invenergy presented well over a year ago in its Motion to Dismiss. Invenergy's April 17, 2017 Motion To Dismiss, Section C, at 24-26. Specifically, Invenergy stated, "The Superior Court lacks subject matter jurisdiction over issues arising out of EFSB proceedings" (id. at 24) and "Under the [Energy Facility Siting Act], the EFSB – and the EFSB alone – decides whether to issue a license to a major energy facility." Id. at 25.

As CLF explained last year:

[8] Moreover, even if the General Assembly were later to disagree with the Court's interpretation of the 1915 Act, the legislature would be able to correct the judicial error. See, e.g., the very first bill signed into law by the newly inaugurated President Obama, the Lilly Ledbetter Fair Pay Act of 2009, Pub. L. 111-2, amending 42 U.S.C. 2000a, overturning Ledbetter v. Goodyear Tire & Rubber Co., 550 U.S. 618 (2007).

> In this Declaratory Judgment lawsuit, CLF asks the Court to declare the meaning of an unambiguous Act originally enacted in 1915 and most recently updated in 1986. In a separate proceeding before the Energy Facility Siting Board (EFSB), Invenergy seeks a permit to build a fossil-fuel power plant in Burrillville, pursuant to the Energy Facility Siting Act, enacted in 1986. These are two different causes of action, arising under two different laws that properly belong in two different forums. Invenergy confuses the issue when it inappropriately conflates these two matters.

CLF's April 19, 2017 Memorandum in Opposition to Motions To Dismiss, at 1.

In this Court's Order denying Defendants' Motions To Dismiss, the Court squarely rejected Defendants' argument that this action is an end-run around EFSB jurisdiction and agreed with CLF: "[T]he contested policy issues clouding the proposed power plant's impending hearing before the Energy Facility Siting Board – specifically those of licensing and permitting – are of no moment to this Court." June 20, 2017 Decision, at 2.

The Court's prior ruling on this exact issue is law of the case. Salvadore v. Major Elec. & Supply, Inc., 469 A.2d 353 (1983). Invenergy tried unsuccessfully a year ago to confuse these distinct issues, and it should not have done so again.

VII. THE COURT SHOULD IGNORE IRRELEVANT MATTERS

Johnston's Memorandum contains several irrelevant statements that should be disregarded by the Court. For example, Johnston states:

- "[Invenergy] invested in technology that significantly reduced water demand . . ." Johnston Memorandum, at 2.
- "There exists a considerable economic development opportunity for public and private water suppliers within a certain proximity to the Project." Id.
- "There is no question that Rhode Island needs facilities that produce electricity." Id. at 19.

To address only the last statement, one of the issues that is properly (that is, by law) before the EFSB is whether or not the New England electricity grid (including Rhode Island) does or does not need the electricity from this plant. In any event, none of these matters is before this Court, and the Court should ignore all such irrelevant side references.

CONCLUSION

For the foregoing reasons, Defendants are not entitled to summary judgment, and their motions for summary judgment ought to be denied. Discovery has been completed. CLF respectfully urges the Court to set a briefing schedule on the merits, after which the Court can render an appropriate declaratory judgment.

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