

Spring 2001

2000 Survey of Rhode Island Law: Cases: Administrative Law

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Recommended Citation

Cooney, Stephen P. and Bejma, Vicki J. (2001) "2000 Survey of Rhode Island Law: Cases: Administrative Law," *Roger Williams University Law Review*: Vol. 6: Iss. 2, Article 5.

Available at: http://docs.rwu.edu/rwu_LR/vol6/iss2/5

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Administrative Law. *In re Island Hi-Speed Ferry, LLC*, 746 A.2d 1240 (R.I. 2000). The Public Utilities Commission (Commission) has the jurisdiction and power to investigate the initial rate filing of a public utility. In order to overrule a decision made by the Commission, the court must find that the Commission exceeded its authority or its actions were illegal, arbitrary or unreasonable.

In *In re Island Hi-Speed Ferry, LLC*,¹ the Rhode Island Supreme Court considered whether the Public Utilities Commission had the power to investigate the propriety of the initial rate filing of a public utility.² In holding that the Commission does have that power, the court denied the petition for certiorari.³ In doing so, the court noted the Commission's exclusive authority to supervise and regulate public utilities.⁴ The court also noted the limited power of review that the court has in considering decisions made by the Public Utilities Commission.⁵

FACTS AND TRAVEL

Petitioners sought review of a report and order made by the Commission on March 31, 1999.⁶ *Island Hi-Speed Ferry, LLC* (Hi-Speed), *Interstate Navigation Company d/b/a The Block Island Ferry* (Interstate) and the *Town of New Shoreham* (Town) brought separate statutory petitions pursuant to section 39-5-1 of the Rhode Island General Laws.⁷ The petitions were consolidated for briefing and oral argument on May 27, 1999.⁸

The issue arose when Hi-Speed filed an application with the Commission's Division of Public Utilities and Carriers (Division) on February 20, 1998 to operate a passenger ferry service from Galilee in Narragansett to New Harbor in New Shoreham, Block Island.⁹ Following that filing, Interstate and the Town both pro-

1. 746 A.2d 1240 (R.I. 2000).

2. *See id.* at 1243-44.

3. *See id.* at 1247.

4. *See id.* at 1244.

5. *See id.* at 1245.

6. *See id.* at 1241.

7. *See id.*; R.I. Gen. Laws § 39-5-1 (1956) (1997 Reenactment).

8. *See High Speed Ferry*, 746 A.2d at 1244.

9. *See id.* at 1241-42.

tested and filed motions to intervene, which were granted.¹⁰ After hearings conducted concerning the proposed ferry service, the Division issued a report and order on August 25, 1998, approving Hi-Speed's application.¹¹ The Division also required that the proposed rates and charges of Hi-Speed's operations be filed and approved by the Commission.¹²

Hi-Speed did file a proposed rate with the Commission.¹³ They also filed a petition seeking a waiver of the investigation requirements of the rates, tolls and charges that were required under section 39-3-11, pursuant to section 39-3-12.¹⁴ Hi-Speed also filed motions seeking an exemption from the rate filing requirement and also for the rates and schedules to be approved by the Commission, as filed, within thirty days of the filing.¹⁵ Hi-Speed wanted to speed up the process in order to begin operations in time for the 1999 season.¹⁶ In an apparent attempt to frustrate this endeavor, both the Town and Interstate were allowed to intervene and contest the filing.¹⁷

Hearings were conducted in which evidence and arguments were presented to the Commission regarding the proposed rates submitted by Hi-Speed and Interstate.¹⁸ In an order issued on March 31, 1999, the Commission determined that establishing accurate rates would be difficult because of the uncertainty of rider-ship-related revenue for a new company in its first year using conventionally calculated rates.¹⁹ Further, the Commission denied the petition to waive the hearing and investigation requirements of section 39-3-11.²⁰ The Commission did, however, approve in part the filed rates that had been amended for the 1999 season.²¹ Hi-Speed, Interstate and the Town raised several issues pertaining to

10. *See id.* at 1242.

11. *See id.*

12. *See id.*

13. *See id.*

14. *See id.*; R.I. Gen. Laws § 39-3-12 (1956) (1997 Reenactment).

15. *See High Speed Ferry*, 746 A.2d at 1241-42.

16. *See id.* at 1242.

17. *See id.*

18. *See id.* at 1242-43.

19. *See id.* at 1243.

20. *See id.*

21. *See id.*

the order and the propriety of the order granting the motions to intervene.²²

ANALYSIS AND HOLDING

The first issue the court addressed was whether the review of the Commission's order was moot.²³ An argument was made for mootness because the first season rate approval was for the 1999 season, which had already passed.²⁴ The court disagreed that the issue was moot because of the "administrative gridlock" that had prevented Hi-Speed from operating its ferry for the prior two seasons.²⁵ Therefore, the court concluded that the case was one "that [was] likely both to recur and yet to evade judicial review."²⁶ The court also went on to make the determination that although the rate setting was for the 1999 season, in actuality it was to apply to the initial season, whenever that was to take place.²⁷

The second issue the court considered was the jurisdiction of the Commission to investigate the initial rate filing of a public utility.²⁸ This question was one of first impression for the court, which opined that the "dearth" of new start-up utilities in Rhode Island was the primary reason that this issue had never before been addressed.²⁹ Hi-Speed argued that the statutes in question, section 39-3-10 and section 39-3-11, allowed them merely to file the initial rates and begin operating and that there was no subject matter jurisdiction to investigate a public utility and its first rate.³⁰ It further argued that an investigation was only appropriate when a utility wanted to change its rates.³¹

The court disagreed because it believed the Commission has a "broad mandate" to make decisions involving public utilities.³² Citing *Town of East Greenwich v. O'Neil*,³³ the court wrote of the

22. *See id.*

23. *See id.*

24. *See id.*

25. *See id.*

26. *Id.* (quoting *Sullivan v. Chafee*, 703 A.2d 748, 753 (R.I. 1997)).

27. *See id.*

28. *See id.* at 1243-44.

29. *See id.* at 1244.

30. *See id.*

31. *See id.*

32. *See id.*

33. 617 A.2d 104, 109 (R.I. 1992).

General Assembly's intent to vest the Commission with the exclusive authority to regulate public utilities.³⁴ That power includes the authority to regulate and supervise companies offering energy, transportation and communication services to the public, including the power of investigation.³⁵ The court was satisfied that the Commission could act *sua sponte* in conducting an investigation, particularly in instances where the Commission conditioned its certificate upon approval.³⁶

The third issue discussed was Hi-Speed's contention that granting intervenor status to the Town and Interstate was both unlawful and unreasonable.³⁷ The court has the power to review Commission orders.³⁸ However, findings of fact by the Commission shall be held to be prima facie true, preventing the court from exercising independent judgment unless the Commission exceeded its authority or acted illegally, arbitrarily or unreasonably.³⁹ The court found this statute to limit the court's power of review because of the court's limited ability to review the complex technical issues faced by the Commission.⁴⁰ Though the Commission found the intervenors' motives to be "self-serving and of questionable value," and the court questioned the wisdom and the appropriateness of the Commission's decisions, the court held that those decisions were not clearly wrong and, therefore, neither unlawful nor unreasonable.⁴¹

The court considered the methodology employed by the Commission in adopting Hi-Speed's initial rates.⁴² The court again noted the extremely deferential position that it took when reviewing the Commission's decision because of the expertise and ability of the Commission to assimilate complex social, economical and technical information from many sources.⁴³ It is also the exclusive jurisdiction of the Commission to protect consumers and ensure the economic viability of utilities.⁴⁴ The court reasoned that the

34. See *High Speed Ferry*, 746 A.2d at 1244.

35. See *id.* (citing R.I. Gen. Laws § 39-1-1(c) (1956) (1997 Reenactment)).

36. See *High Speed Ferry*, 746 A.2d at 1244.

37. See *id.*

38. See R.I. Gen. Laws § 39-5-4 (1956) (1997 Reenactment).

39. See R.I. Gen. Laws § 39-5-3 (1956) (1997 Reenactment).

40. See *High Speed Ferry*, 746 A.2d at 1245.

41. *Id.*

42. See *id.* at 1246.

43. See *id.*

44. See *id.*

Commission was faced with the difficult choice between leaving Hi-Speed in a position to possibly have a revenue shortfall, and the alternative of charging the consumer too much and creating inappropriate, excessive profits.⁴⁵ Though the rate determination methodology was unusual, the factual situation presented was unique.⁴⁶ Setting a revenue ceiling was a practical and prudent course of action even if the methods utilized were somewhat divergent from the norm.⁴⁷ Therefore, the court concluded that it was well within the discretion of the Commission to employ the methods that were used.⁴⁸

Finally, the court held that the Commission did not err in excluding expert testimony regarding unfair competition.⁴⁹ The court reasoned this way because the testimony would have been outside the scope of the investigation.⁵⁰ The investigation only concerned the propriety of the rates and not the impact upon competitors like Interstate.⁵¹ Therefore, there was no error in the exclusion of that evidence.⁵²

CONCLUSION

In *In re Island Hi-Speed Ferry, LLC* the court reviewed decisions of the Public Utilities Commission concerning the initial rate filing of a public utility. The court assumed a deferential posture when reviewing decisions made by the Commission because of the Commission's broad power and expertise in that field. The Rhode Island Supreme Court has made it clear that decisions reached by the Public Utilities Commission in initial rate settings and other matters will not be overturned unless the Commission acts in an unlawful or unreasonable manner.

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45. *See id.*

46. *See id.*

47. *See id.*

48. *See id.*

49. *See id.* at 1247.

50. *See id.*

51. *See id.*

52. *See id.*

Administrative Law. *In re Review Pursuant to 39-1-30 of Ordinance Adopted by the City of Providence*, 745 A.2d 769 (R.I. 2000). Under section 39-1-30 of the Rhode Island General Laws, the Rhode Island Public Utilities Commission (PUC) lacks the jurisdiction to nullify or substantially amend municipal ordinances and regulations governing the excavation and restoration of roads unless those ordinances and regulations are “unduly burdensome and adversely affect the ability of the utility to service its customers.”¹ The PUC must review such municipal ordinances and regulations under the “public interest” standard.² Furthermore, a challenging utility bears the initial burden of persuasion as to whether the municipal ordinance or regulation unduly or unreasonably burdens or restricts the operation of the utilities.³

FACTS AND TRAVEL

In November 1997, the petitioner, City of Providence (City) enacted an ordinance designed to balance the need for the “installation and maintenance of utility services and the maintenance of safe and aesthetically pleasing roadways and sidewalks.”⁴ Specifically, the ordinance provided that every person who wished to perform excavations or lay pipe, wire, line, conduit or cable on or under any roadway must obtain a permit by the city’s director of public works.⁵ Permit applicants were required to post performance bonds and secure liability insurance.⁶ Applicants were also required to pay an administration and engineering (A & E) fee of \$40.00, with an additional A & E fee of \$.25 per square foot for excavations larger than fifty square feet.⁷ Applicants were also required to pay a “pavement degradation index fee” ranging from \$.25 to \$1.00 per square foot, depending on the age of the street.⁸

The ordinance also authorized the director of the city department of public works to promulgate rules and regulations to effectuate the purpose of the ordinance.⁹ As promulgated in December

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1. *In re Review Pursuant to 39-1-30*, 745 A.2d 769, 777 (R.I. 2000).
 2. *Id.* at 772.
 3. *See id.*
 4. *Id.* at 771 (citing Providence, RI, Ordinances ch. 23, art. 5 (1968)).
 5. *See id.*
 6. *See id.*
 7. *See id.*
 8. *Id.*
 9. *See id.*

1997, these rules specified the techniques and materials to be used in excavation and reconstruction of streets.¹⁰ The rules also required permit applicants to obtain a "Dig Safe" number.¹¹ Finally, the regulations forbade street excavation from November fifteenth to April fifteenth of every year unless the materials necessary for "hot patch" reconstruction were available, or if there were an emergency that endangered life or property.¹²

A number of utilities petitioned the Rhode Island Public Utilities Commission for review of the ordinance and regulations pursuant to section 39-1-30 of the Rhode Island General Laws.¹³ Others filed motions to intervene.¹⁴ Eventually, these petitions were consolidated.¹⁵ Providence Gas Company had previously filed a petition challenging a similar ordinance enacted by the City of Cranston, and other utilities had intervened in this action as well.¹⁶ The PUC therefore held joint hearings on the ordinances of the two cities.¹⁷ The City of Cranston, however, entered into a settlement agreement with the utilities, which was incorporated into the PUC decision and final order.¹⁸

The PUC ruled that it had jurisdiction to review the Providence ordinance and regulations under section 39-1-30 of the Rhode Island General Laws.¹⁹ The PUC, however, found that any A & E fees over \$40.00 and any pavement degradation fee were both unreasonable and not sufficiently related to the City's costs.²⁰ Additionally, the PUC found that some aspects of the permit process and the regulations interfered with the ability of the utilities to install and maintain their equipment.²¹ Furthermore, the PUC found that the annual moratorium interfered with the ability of new utilities to establish and provide service.²² Therefore, the PUC nullified all of the ordinances and regulations except for the

10. *See id.*; R.I. Gen. Laws § 39-1-30 (1956) (Reenactment 1997).

11. *See id.*; R.I. Gen. Laws § 39-1-30 (1956) (Reenactment 1997).

12. *See In re Review*, 745 A.2d at 771.

13. *See id.*

14. *See id.*

15. *See id.* at 772.

16. *See id.*

17. *See id.*

18. *See id.*

19. *See id.*

20. *See id.*

21. *See id.*

22. *See id.*

\$40.00 A & E fee.²³ The City of Providence filed for review of this ruling under writ of certiorari.²⁴

ANALYSIS AND HOLDING

Granting certiorari, the Rhode Island Supreme Court quashed the PUC's decision and order.²⁵ The Rhode Island Supreme Court began with a de novo review of the PUC's jurisdiction under section 39-1-30 of the Rhode Island General Laws.²⁶ This statute granted the PUC jurisdiction to review municipal ordinances "affecting the mode or manner of operation or the placing or maintenance of the plant and equipment of any company under the supervision of the commission."²⁷ When reviewing such ordinances, statute commanded the PUC to "determine the matter giving consideration to its effect upon the public health, safety, welfare, comfort and convenience."²⁸

The PUC's argument gave great weight to the Rhode Island Supreme Court's earlier holding in *Town of East Greenwich v. O'Neil*,²⁹ which had invalidated a municipality's attempt to regulate the construction of high-voltage power lines.³⁰ The court, however, held that *O'Neil* was clearly distinguishable. The PUC had been given exclusive statutory authority over the conduct of utility companies, and therefore had exclusive jurisdiction over the construction of high-voltage power lines.³¹ The municipalities of Rhode Island, however, had been given statutory authority over the maintenance of roads since 1822.³² In 1997, the Rhode Island General Assembly had required that any person, including utilities, who performed excavations, must restore the road to the same or better condition.³³ Since this statute supplied no standards for the restoration, the court reasoned that the 1997 Rhode Island General Assembly had intended that such work be supervised by

23. *See id.*

24. *See id.*

25. *See id.* at 777.

26. *See id.* at 772.

27. *Id.* (citing R.I. Gen. Laws § 39-1-30 (1956) (1997 Reenactment)).

28. *Id.* at 773 (citing R.I. Gen. Laws § 39-1-30 (1956) (1997 Reenactment)).

29. 617 A.2d 104 (R.I. 1992).

30. *See O'Neil*, 617 A.2d at 106.

31. *See In re Review*, 745 A.2d at 775 (citing *O'Neil*, 617 A.2d at 106).

32. *See id.* at 774.

33. *See id.* (citing R.I. Gen. Laws § 24-5-1.1 (1956) (1997 Reenactment)).

the municipalities ultimately responsible for the maintenance of the road.³⁴

In further support of its position, the court also observed that since 1844, the Rhode Island General Assembly had also imposed liability on municipalities for damages caused by improper maintenance of the roads.³⁵ In fact, in 1898, the court had held a municipality liable for resulting damages to a plaintiff after a utility failed to properly repair a road.³⁶ Since the municipality could not effectively protect itself from liability without the authority to regulate road repairs, the court reasoned the Rhode Island General Assembly must have also intended for the municipalities to have the authority to supervise excavation activities performed by utilities.³⁷

Accordingly, the court held that PUC's jurisdictional review of ordinances affecting utilities must be construed to accommodate for this municipal responsibility.³⁸ The court therefore expressly commanded the PUC to give "due deference to the authority of the municipality to regulate the maintenance of its highways when it evaluates the effect of an ordinance upon a public utility."³⁹ Consequently, the PUC has no jurisdiction to nullify or substantially modify a municipal ordinance or regulation relating to road maintenance and repair unless the ordinance or regulation is "unduly burdensome and adversely affects the ability of the utility company to service its customers."⁴⁰

The court then considered the standard of review used by the PUC when reviewing the Providence ordinance. The City argued that the PUC should have used the "arbitrary and capricious" standard of review.⁴¹ However, the court disagreed, noting that the specific language of the statute required that the PUC "determine the matter giving consideration to its effect upon the public health, safety, welfare, comfort, and convenience."⁴² Therefore, the PUC had correctly enunciated the "public interest" standard when re-

34. *See id.*

35. *See id.*

36. *See id.* (citing *Seamons v. Fitts*, 40 A.3d 3, 3-4 (R.I. 1898)).

37. *See id.*

38. *See id.* at 775.

39. *Id.*

40. *Id.*

41. *Id.* at 776.

42. *Id.* (citing R.I. Gen. Laws § 39-1-30 (1956) (1997 Reenactment)).

viewing ordinances.⁴³ However, the court clearly indicated that it felt that the PUC had not applied that standard. The court sharply criticized the PUC's wholesale nullification of virtually every City attempt to regulate road repair—including the simple permit requirement—noting that the PUC had given virtually no effect to the municipality's authority to maintain the roads.⁴⁴ In fact, the court observed, given that the PUC's settlement with the City of Cranston accepted very similar regulations, the PUC had clearly had not considered the public interest when nullifying the City ordinances.⁴⁵

Finally, the court agreed with the City's argument that the PUC had improperly placed the burden of persuasion on the City.⁴⁶ The court reiterated that under section 39-1-30, the PUC's role was to determine whether an ordinance unreasonably affected "the public health, safety, welfare, comfort, and convenience."⁴⁷ A municipal ordinance is presumed to be valid.⁴⁸ Therefore, the utility bore the initial burden of proving by a fair preponderance of evidence that the ordinance was unreasonable or an undue burden.⁴⁹ If the utility succeeded, the burden then shifted to the City to rebut.⁵⁰

Based on the foregoing, the Rhode Island Supreme Court remanded the case for consideration by PUC, encouraging the parties to attempt to settle this matter.⁵¹ Until then, the ordinances and regulations were to remain in effect.⁵²

CONCLUSION

In re Review Pursuant to 39-1-30 held that the PUC's ability to review and nullify municipal ordinances and regulations affecting the operation of utilities must be construed to accommodate a municipality's clear, longstanding responsibility to maintain roads. Unless a challenging utility succeeds in showing that a municipal

43. *See id.*

44. *See id.*

45. *See id.*

46. *See id.* at 777.

47. *Id.* (citing R.I. Gen. Laws § 39-1-30 (1956) (1997 Reenactment)).

48. *See id.*

49. *See id.*

50. *See id.*

51. *See id.*

52. *See id.*

ordinance or regulation regarding road excavation and repair is unreasonable or imposes an undue burden on the utility's ability to serve customers, the PUC may not nullify or substantially modify those municipal ordinances and regulations. Furthermore, when reviewing the ordinance, the PUC must employ the "public interest" standard. The court implied that a flat nullification of virtually any and all attempts at such regulations would not satisfy this standard.

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