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Finding the Right Level: Viewing the Providence Water Supply from Historical and National Perspectives



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Providence

In 1967, the General Assembly expanded the jurisdiction of the Public Utilities Commission to include municipal water works that sold water to customers outside their territorial limits.¹⁵ In the same session, however, the General Assembly passed a second law authorizing the Providence Water Supply Board to set its own rates.

More than a century ago, the City of Providence made a bold and farsighted investment in the future, building a state of the art water supply that provides the majority of Rhode Islanders with inexpensive, high quality water. As a reward, the General Assembly granted Providence an unusually meager local benefit. In recent decades, the General Assembly and the Public Utilities Commission went further, turning a modest local benefit into a burden. In so doing, the State has deprived Providence of its best available tool to address its serious financial challenges.

Part 1 of this article describes the history of Providence Water's relationship with its host city and nonresident customers since 1871. Part 2 compares that relationship with prevailing arrangements nationally. Part 3 offers a proposal to rebalance that relationship in better accord with the City's prior history and with national norms.

1. The History of Providence Water

In 1871, Providence opened a water supply that drew from the Pawtuxet River in Pettacomsett in Cranston.¹ It was a metropolitan water supply, serving Providence and four neighboring communities.² It ran at a profit, generating the equivalent of \$4 million in today's dollars for the City in 1878.³ Between 1890 and 1910, Providence's population grew from 132,146 to 224,326.⁴ To support this growth, Providence petitioned the General Assembly to condemn land in the watershed of the northern branch of the Pawtuxet River to construct an expanded water supply. In 1915, the General Assembly passed enabling legislation (1915 R.I. Pub. Laws § 1278, referred to below as "the Act") providing, among other things, that the City of Providence would become the owner, in fee simple, of any land it acquired for this purpose.⁵ The Act authorized cities within the affected watershed to purchase water from Providence at "fair" wholesale rates reached by agreement or, in the absence of agreement, through arbitration.⁶ The Act authorized Providence to treat its water supply board as if it were a "department of city government," which would receive municipal appropriations through the budgeting process to meet any necessary expenses.⁷ The Act directed the City to establish a "sinking fund" to receive all

excess revenues to be used to pay future costs and obligations.⁸

Between 1915 and 1929, the City of Providence spent almost \$21 million (the equivalent of more than \$300 million in today's dollars) to build the water supply.⁹ In the decades that followed, Providence Water made further investments in its plant, recently valued at \$390 million net of depreciation.¹⁰ During that time, the General Assembly extended the right to purchase Providence Water to other cities and towns that never had access to the Pawtuxet River watershed, and that never contributed to the water supply's capital costs.¹¹ In 1959, Providence Water implemented a rate increase (for both wholesale and retail customers) that included a 25% discount for Providence residents.¹² Beginning in the late 1960s, the City of Providence allocated surplus revenue from Providence Water into the Emergency Public Improvement Fund (\$1.63 million in 1968)¹³ and the general fund (as much as \$871,000 per year during 1969-74).¹⁴

In 1967, the General Assembly expanded the jurisdiction of the Public Utilities Commission to include municipal water works that sold water to customers outside their territorial limits.¹⁵ In the same session, however, the General Assembly passed a second law authorizing the Providence Water Supply Board to set its own rates.¹⁶ The Governor signed the first of these bills into law on May 24, 1967, and the second one on May 26, 1967.¹⁷

In 1974, Providence Water implemented a rate increase of 25%-29%.¹⁸ In 1977, the Providence Water Supply Board announced further rate increases of upwards of 60%.¹⁹ When neighboring communities threatened to sue, the Providence Water Supply Board requested the Attorney General's opinion as to whether its rates were subject to the Public Utilities Commission's jurisdiction.²⁰ Based on his affirmative opinion, the Providence Water Supply Board submitted its proposed rates to the Public Utilities Commission, which approved an increase of approximately half the amount requested.²¹ In 1980, the Providence Water Supply Board petitioned the Rhode Island Supreme Court to review the Attorney General's opinion.²² In a decision dated April 29, 1980, the Court held that the 1967 statute authorizing

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Providence to set its own water rates controlled, and that the Public Utilities Commission lacked jurisdiction.²³ Three weeks later, the General Assembly passed legislation overruling the Supreme Court.²⁴

Since that time, the Public Utilities Commission has transformed Providence Water from a municipal water supply that also serves nonresidents to a State resource that burdens its founder and sponsor for the benefit of nonresidents. The Public Utilities Commission promptly ended the City's practice of appropriating surplus water revenues for general operations.²⁵ In the early years, the Commission approved Providence's practice of charging higher rates to nonresidents,²⁶ but in later years it eliminated the City's home-town discount.²⁷ The Commission prevented the City of Providence from charging Providence Water property tax for its holdings located within the City, even as it authorized every other Rhode Island city and town to charge property tax for Providence Water assets within their jurisdictions, adding those charges to the water rates paid by all customers (including Providence residents).²⁸ Notwithstanding these Commission policies, the Rhode Island Supreme Court held, in *R&R Associates v. Providence Water Supply Board*, 724 A.2d 432 (R.I. 1999), that the City of Providence, acting through its Water Supply Board, is solely responsible for any liability resulting from its condemnation activities without the right to indemnity from the communities and water districts that purchase Providence water and enjoy its benefits.

2. The State's Unusual Treatment of Providence Water

In addressing the tension between the interests of Providence taxpayers/customers and nonresident customers, Providence Water and the State of Rhode Island face an issue that is common in many states. A law journal article described the competing concerns this way:

A city's purchase of a utility plant is made on behalf of its citizens, who then become both consumers and owners. The requirement of serving non-residents at the same rates as residents partly defeats the purpose of the purchase by decreasing the benefit derived from the resident consumers' ownership. Utility service is only one phase of a prevalent situation in which non-residents adjacent to cities enjoy the economic and other advantages of city life without being subjected to all the responsibilities of citizens. Thus, in many instances, cities serve fringe areas at the expense of the municipal taxpayers. The obvious solution to the problem is annexation of these fringe areas; the lever of higher utility rates might serve as a means of persuading non-residents to favor annexation. In the meantime higher rates would relieve to some extent the burden on city residents incurred in supporting adjacent non-residents in other ways.

To resolve both the economic and political considerations many states have made the extraterritorial sale of municipal utility service subject to rate regulation by the state public utilities commission. Thus the nonresidents are afforded protection against exorbitant rates, and the cities are allowed a fair profit from sales beyond their corporate boundaries. Where, as in Texas, there is no utilities commission, the courts can achieve the same desirable result by setting aside unreasonable rates to the non-residents.

Note, *Municipal Utilities – Rate Discrimination in Sale of Water to Non-Residents*, 101 U. PA. L. REV. 160 (1952).²⁹

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The prevailing practice nationally³⁰ balances these competing interests by authorizing municipalities to establish water works (or other utilities) that generate a “reasonable” profit to pay for other municipal operations;³¹ recognizing the right of municipally-owned water works to impose a “reasonable” rate surcharge on non-resident customers;³² and upholding determinations by public utility commissions that municipalities confer these local benefits in favor of municipal utilities serving nonresidents.³³

Rhode Island’s Public Utilities Commission did not follow the prevailing practice of recognizing Providence’s right to a reasonable rate of return for building the State’s water system. Instead, it took away Providence Water’s authority to realize a profit for the City, and/or to charge lower rates to residents. Indeed, the Public Utilities Commission penalized Providence even further, denying the City the authority to tax Providence Water for its Providence property, in contrast to every other Rhode Island city and town, which charge Providence Water and its ratepayers millions of dollars of taxes every year.

3. A Fair Rebalancing for Providence

Why did the General Assembly decide to limit Providence’s local benefit (when compared to national norms) when Providence built one of the nation’s best water supplies? We must leave that question to the historians, but two salient facts appear on the surface. First, Providence negotiated with a General Assembly that was unfairly stacked against it. In those days, the Rhode Island Senate had a “rotten borough” apportionment of one member per city or town without regard to population, meaning that while Providence housed around 40% of the State’s residents, it was represented by a single Senator out of 39.³⁴ Second, Providence, in 1915, was a wealthy City that was more concerned about accommodating its rapid growth than about protecting its financial well-being. Notwithstanding that, Providence Water, for many years, provided City residents with a 25% hometown discount, and also realized a modest surplus from water sales to fund general operations until neighboring cities petitioned the General Assembly to retract its prior arrangement, and subject Providence to the harsh edicts of the Public Utilities Commission. The historical explanation for this change

lies beyond this article’s scope, but one triggering event appears to have been Providence’s attempted implementation of significantly higher water rates in a single shot in the late 1970s.

From a Providence resident’s point of view, it would have been fairer to allow the City to realize a reasonable rate of return on its investment from the beginning, following the prevailing national practice. Providence then could have used part of the surplus it earned each year to pay for system’s maintenance and expansion, while using the remaining surplus to fund municipal operations, putting to rest the current dispute concerning “who owns the Providence water supply?” While a demand for retrospective relief may be unrealistic, fairness calls, at a minimum, for a reasonable prospective remedy. More specifically, it would be fair for the Public Utilities Commission to follow the national norm by allowing Providence to realize a reasonable rate of return prospectively (based on a fair calculation of its historical investment), allowing it to charge a reasonable price differential in favor of residents and allowing the City to incorporate a reasonable tax on Providence Water property into water rates. Also, Providence should be placed on an equal footing with other Rhode Island cities and towns that collect property taxes from Providence Water holdings. Given the fact that Providence Water is the least expensive publicly owned water supply in Rhode Island today,³⁵ it is only fair to charge nonresident water customers a modest rate increase that would bring Providence Water more in line with other municipal water works across the country.

ENDNOTES

1 “History of Providence Water,” available online at Providence Water’s website.

2 *Id.* The 1871 system also served Cranston, Warwick, North Providence and Johnston.

3 See Wayland Ingham, *THE PROVIDENCE WATER WORKS, 1869-1969* (manuscript available at the Hope Adult Library in North Scituate), pp. 117-19 (noting \$160,000 profit in 1878). See also U.S. Bureau of Labor Statistics (Consumer Price Index comparison).

4 U.S. Census data.

5 *Id.*, §§ 18, 24.

6 *Id.*, § 18.

7 *Id.*, § 27.

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8 *Id.*, § 28.

9 Providence began acquiring land in 1915 in anticipation of the General Assembly's passage of enabling legislation. See *Wayland Ingham*, n. 3, *supra*, p. 19. For a tabulation of these expenses, see *Fifteenth and Final Report of the Providence Water Supply Board* (1929). See also U.S. Bureau of Labor Statistics (price levels).

10 Providence Water Supply Board, *Financial Statements for the years ended June 30, 2017 and 2016*, p. 8.

11 See, 1931 R.I. Pub. Laws Ch. 1815 (North Providence); 1931 R.I. Pub. Laws Ch. 1966 (Warwick, Kent County Water Authority); 1936 R.I. Pub. Laws Ch. 2316 (Johnston, Smithfield, East Smithfield Water District and Greenville Water District); 1963 R.I. Pub. Laws Ch. 158 (East Providence); 1967 R.I. Pub. Laws Ch. 162 (Bristol County Water Authority, Barrington, Bristol and Warren); 1985 R.I. Pub. Laws ch. 442 (Lincoln); 1986 R.I. Pub. Laws Ch. 84 (Burrillville).

12 *Ingham*, n. 3, *supra*, p. 117.

13 Providence Water Supply Board, 1968 Annual Report.

14 See Providence Water Supply Board, *Annual Reports of 1967, 1968, 1969, 1971, 1974*.

15 1967 R.I. Pub. Laws Ch. 156.

16 1967 R.I. Pub. Laws Ch. 162.

17 See *City of Providence by and through Water Supply Board v. Public Utilities Commission*, 414 A.2d 465, 466 (R.I. 1980).

18 Providence Journal, Feb. 22, 1974, p. A1; March 1, 1974, p. B1.

19 Providence Journal-Bulletin, July 2, 1977, p. 5.

20 Providence Journal, July 21, 1977, p. A3.

21 Providence Journal, September 8, 1977, p. B1; Providence Journal, August 4, 1978, p. A1.

22 *City of Providence*, n. 17, *supra*.

23 *Id.*

24 1980 R.I. Pub. Laws ch. 335.

25 Providence Journal, October 13, 1988, p. D6.

26 Providence Journal, October 13, 1988, p. D6.

27 See, e.g., Rhode Island Public Utilities Commission Docket No. 4618 (approving uniform rates for 2017).

28 See *City of Providence v. Hall*, 49 R.I. 230, 142 A. 156 (1928) (establishing that Scituate and all other communities have the right to tax Providence Water property).

29 Court decisions have provided these and other rationales. See, e.g., *Platt v. Town of Torrey*, 949 P. 2d 325, 333 (Ut. 1997).

30 There are a minority of states that mandate municipal utilities to charge equal rates for nonresidents. See, e.g., *Jung v. City of Phoenix*, 160 Ariz. 38, 770 P.2d 342 (1989).

31 See, e.g., *Campbell v. Water Works and Sanitary Sewer Bd. of City of Montgomery*, 270 Ala. 33, 115 So. 2d 519 (1959); *Hansen v. City of San Buenaventura*, 42 Cal. 3d 1172, 233 Cal.Rptr. 22, 729 P. 2d 186 (1986) (70% surcharge on water fees for nonresidents is reasonable, where municipal water works' rate of return for residents is 3.0% versus 8.67% for nonresidents, and surplus is transferred to general fund); *Bennett Bear Creek Farm Water and Sanitation District v. City and County of Denver*, 928 P.2d 1254 (Col. 1996); *Barr v. First Taxing Dist.*, 151 Conn. 53, 192 A.2d 872 (1963) (upholds water rate for "outer district" that is twice the rate for "inner district" stating "[a] reasonable rate for nonresident users should include fair compensation for the services rendered and should yield a fair return to the municipal supplier on the value of the property as a going concern used for the public"); *Messenheimer v. Windt*, 211 Ga. 575, 87 S.E. 2d 402 (1955); *Shawnee Hills Mobile Homes, Inc. v. Rural Water District No. 6*, 217 Kan. 421, 537 P.2d 210 (1975); *City of Henderson v. Young*, 119 Ky. 224, 83 S.W. 583 (Ky. App. 1904) (City operating electric plant can extend service to points outside the city limits "in such a way as to advantage the city and its inhabitants"); *General Textile Printing & Processing Corp. v. City of Rocky Mount*, 908 F.Supp. 1295 (E.D.N.C. 1995); *Shirk v. City of Lancaster*, 313 Pa. 158, 169 A. 557 (1933) (upholds price structure whereby city makes profit on water sales to nonresidents to subsidize sewer system that serves only residents); *Travaillie v. City of Sioux Falls*, 59 S.D. 391, 240 N.W. 336 (1932) (permitting city to transfer profits on water sales into general fund); *Killion v. City of Paris*, 192 Tenn. 446, 241 S.W.2d 524 (1951) (city may appropriate profits from sale of water to fund other municipal purposes); *Handy v. Rutland*, 156 Vt. 397, 598 A.2d 114 (1990) (non-resident sewer hookup fee exceeding \$10,000 is reasonable); *City of Newport News v. Warwick County*, 159 Va. 571, 166 S.E. 570, 579 (1932), amended and *aff'd*, 159 Va. 571, 167 S.E. 583 (1933); *Faxe v. Grandview*, 48 Wash.2d 342, 351, 294 P.2d 402; *City of West Allis v. Public Service Commission*, 42 Wis. 2d 569, 167 N.W. 2d 401 (1969) (upholding Public Service Commission determination that city of Milwaukee water utility could realize a return on

its investment, charge higher rates to non-resident customers and realize a higher rate of return on its service to nonresident customers).

32 See, e.g., *Delony v. Rucker*, 227 Ark. 869, 302 S.W. 2d 287 (1957); *Hansen v. City of San Buenaventura*, 43 Cal. 3d 1172, 233 Cal.Rptr. 22, 729 P.2d 186 (1987), n. 25, *supra*; *Durant v. City of Beverly Hills*, 39 Cal. App. 2d 133 (1940) (upholding 15% water rate differential); *Bennett Bear Creek Farm Water and Sanitation District v. City and County of Denver*, 928 P.2d 1254 (Col. 1996), n. 25, *supra*; *Barr v. First Taxing Dist.*, 151 Conn. 53, 192 A.2d 872 (1963), n. 25, *supra*; *Messenheimer v. Windt*, 211 Ga. 575, 87 S.E. 2d 402 (1955); *Keeven v. City of Highland*, 294 Ill. App. 3d 345, 228 Ill. Dec. 599, 689 N.E. 2d 658 (5th Dist. 1998) (upholds 75% rate differential); *Usher v. City of Pittsburg*, 196 Kan. 86, 410 P.2d 419 (1966) (upholding 100% increase in rates for nonresident customers); *Louisville & Jefferson County Metropolitan Sewer Dist. v. Joseph Seagram & Sons*, 307 Ky. 413, 211 S.W. 2d 122 (1948) (upholding 50% differential in sewer rates for nonresidents); *Bleick v. City of Papillion*, 219 Neb. 574, 365 N.W. 405 (1985); *Fulghum v. Town of Selma*, 238 N.C. 100, 76 S.E. 2d 368 (1953); *City of Bedford v. City of Cleveland*, 1975 Oh. App. LEXIS 6025 (Oh. Ct. App. 8th Dist. Cuyahoga Cty. April 3, 1975) (municipality can charge suburban customers higher rates, but must dedicate surplus revenue to maintenance of system); *Shirk v. City of Lancaster*, 313 Pa. 158, 169 A. 557, 563 (1933); *City of Altoona v. Penn. Public Utility Commission*, 168 Pa. Super. 246, 77 A.2d 740 (1951) (reversing Public Utilities Commission, holding that town has right to realize a reasonable profit on water service provided to nonresidents while providing water at cost to residents); *Childs v. City of Columbia*, 87 S.C. 566, 70 S.E. 296 (1911); *Town of Terrell Hills v. City of San Antonio*, 318 S.W.2d 85 (Tex. Ct. Civ. App. – San Antonio, 1958) (upholds rate differential of 29%-39% in water rates); *Platt v. Town of Torrey*, 949 P. 2d 325 (Ut. 1997) (higher rate for nonresidents is presumptively reasonable, but subject to judicial review); *Handy v. Rutland*, 598 A.2d 114 (Vt. 1990); *Faxe v. Grandview*, 48 Wash.2d 342, 351, 294 P.2d 402 (1956) (upholding city's charging water rates for nonresidents that are 50% higher than for residents); but see *City of Asheville v. State*, 192 N.C. App. 1, 665 S.E.2d 103 (2008) (upholding constitutionality of State legislation mandating that city of Asheville provide water service to neighboring towns within Buncombe County at same rates charged to Asheville residents).

33 See, e.g., *Re Linton*, P.U.R. 1921E, 295 (Ind. Pub. Serv. Comm'n) (7.5% return); *City of Covington v. Public Service Commission*, 313 S.W. 2d 391 (Ky. 1958) (upholds rate ruling by public service commission that allows city water department a return on investment and different rates for residents versus nonresidents, but differential is based on different costs and rate base); *City of Hagerstown v. Public Service Commission*, 217 Md. 101, 141 A.2d 699 (1958) (upholds rate ruling by public service commission allowing city water department a return on investment and different rates for residents versus nonresidents, but differential is based on different costs and rate base); *City of Novi v. City of Detroit*, 433 Mich. 414, 446 N.W. 2d 118 (1989); *Botts v. Brookfield*, P.U.R. 1917D 224 (Mo. Pub. Serv. Comm., 1917 (approving 7% rate of return); *Ambridge Borough v. Pennsylvania Public Utility Commission*, 137 Pa. Super. 50, 8 A.2d 429 (Pa. Super. 1939); *City of Altoona v. Penn. Public Utility Commission*, 168 Pa. Super. 246, 77 A.2d 740, 743 (1951), n. 25, *supra*; *City of West Allis v. Public Service Commission*, 42 Wis. 2d 569, 167 N.W. 2d 401 (1969).

34 In 1915, Providence was represented by 25 members in the Rhode Island House of Representatives out of a total delegation of 100, which also was significantly less than its share of the State's population.

35 Comparative water rates in February, 2017 for publicly owned water supplies regulated by the Public Utilities Commission were as follows:

Newport Water	\$809.74
Kent County Water Authority	\$641.24
Pawtucket Water	\$545.44
Woonsocket, RI	\$473.28
Providence Water	\$434.98

Source: Providence Water website. ◇

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