

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS
PUBLIC UTILITIES COMMISSION

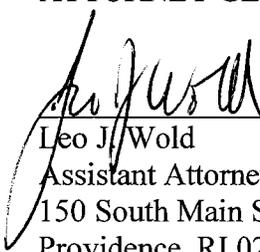
COMMISSION INVESTIGATION RELATING)
TO STRAY AND CONTACT VOLTAGE OCCURRING) DOCKET NO. 4237-A
IN NARRAGANSETT ELECTRIC TERRITORIES)

DIVISION'S OBJECTION TO MOTION TO INTERVENE OF
POWER SURVEY COMPANY

The Division of Public Utilities and Carriers ("Division") hereby objects to the Motion to Intervene of Power Survey Company. In support of its objection, the Division submits the accompanying memorandum of law.

DIVISION OF PUBLIC UTILITIES
AND CARRIERS
By its attorneys,

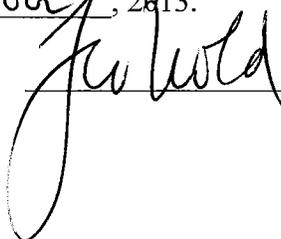
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CERTIFICATE OF SERVICE

I certify that a copy of the within objection was forwarded to the Service List in the above matter on the 15th day of October, 2013.



**STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS
PUBLIC UTILITIES COMMISSION**

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TO STRAY AND CONTACT VOLTAGE OCCURRING) DOCKET NO. 4237-A
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**DIVISION'S MEMORANDUM OF LAW IN SUPPORT OF ITS
OBJECTION TO THE MOTION TO INTERVENE OF
POWER SURVEY COMPANY**

I. INTRODUCTION

Power Survey Company (“Power Survey” or “Company”) seeks to intervene in the pending matter, contending that the Company satisfies all three requirements of Rule 1.13(b). Power Survey Motion at 1.¹ Before discussing the merits of these alternate grounds, the Division will address the threshold issue of whether Power Survey possesses standing to participate in the pending matter as a full party. As will be seen, Power Survey does not have standing here.

Even if Power Survey could overcome this initial threshold issue (which the Division contends it cannot), Power Survey’s claim of intervention must be denied since the Company fails to satisfy any of the criteria of Rule 1.13(b). In applying that rule, the

¹ Rule 1.13(b) of the Commission’s Rules of Practice and Procedure identifies the standard that “any person claiming a right to intervene or an interest that of such nature that intervention is necessary or appropriate” must satisfy in order to be granted intervenor status in a Commission proceeding. In pertinent part, Rule 1.13(b) provides that an intervention will be granted when the person possesses: (1) a right conferred by statute, (2) an interest which may be directly affected and which is not adequately represented by existing parties and as to which the movants may be bound by the Commission action in the proceeding, or (3) any other interest of such nature that movant’s participation may be in the public interest.

Commission has taken a “more cautious” approach to granting intervention motions ever since the Rhode Island Supreme Court’s decision in Island Hi-Speed Ferry, LLC, 746 A.2d 1240 (R.I. 2000). Narragansett Electric Company d/b/a National Grid Proposed Standard Offer Service Rate Reduction, Docket No. 3739, Order No. 18794 at 12 (2006). In that case, the Court questioned the wisdom and appropriateness of permitting a competitor to intervene to contest an applicant’s rate application. Island Hi-Speed, 746 A.2d at 1246. The same concerns expressed by the high Court in Hi-Speed and the Commission in Narragansett Electric apply equally as well to the pending matter.

II. ARGUMENT

A. **POWER SURVEY DOES NOT POSSESS STANDING TO PARTICIPATE AS A FULL PARTY IN THE PENDING MATTER.**

In order for a litigant to participate in a proceeding as a full party, the litigant must possess standing, *i.e.*, the litigant must have sustained injury in fact, economic or otherwise. Newport Elec. Corp. v. Public Utilities Comm’n, 454 A.2d 1224 (R.I. 1983). Only “actual” or “threatened legal injury” is sufficient to satisfy this threshold legal requirement. Blackstone Valley Chamber of Commerce v. Public Utilities Comm’n, 452 A.2d 931, 934 (R.I. 1982). Thus, a plaintiff claiming only a “[m]ere ‘interest in a problem,’ no matter how longstanding the interest and no matter how qualified the organization is in evaluating the problem, is not sufficient by itself to render the organization ‘adversely affected’ or ‘aggrieved.’” In Re: Town of New Shoreham Project, 19 A.3d 1226, 1227 (R.I. 2011). When a litigant lacks standing, no matter how well-intentioned, it will be error for the deciding body to permit the litigant to intervene. ABAR Assoc. v. RIGP, 870 A.2d 990, 997 (R.I. 2005); In Re: Stephanie B., 826 A.2d

985, 991 (R.I. 2003); West Warwick School Committee v. Souliere, 626 A.2d 1280, 1284 (R.I. 1993).

In its motion to intervene, Power Survey contends “the survey equipment” “missed seven times as many contact voltage risks as it discovered and repaired” and “only ten energized objects in Providence...” Power Survey Motion at 4. These purported “misses,” Power Survey contends, raise “public safety” concerns. Id. at 6. Power Survey also questions the geographical scope and percentage area to be tested in the next round of testing. Id. at 4. If it is allowed to intervene, Power Survey opines that it “will assist the Commission and other parties, in taking a ‘hard look’ at the data accumulated by the testing contractor” in order to further the Commission’s goal of preventing risks of serious injury and death associated with underground electrical systems. Id. at 5.

Public safety concerns, as well as the issues of geographical scope and percentage area of testing, do not constitute injuries in fact, economic or otherwise, that are unique or specific to Power Survey. Nor for that matter is the assistance that Power Survey contends it will render to the Commission from interpolating accumulated data if it is granted intervenor status. Id. at 5. Rather, these assertions reflect issues of general public concern which Power Survey seeks to use to justify its request to re-hear a matter that has already been decided, *i.e.*, Docket No. 4237. Much more, however, “is needed” to establish standing when an alleged injury from government inaction is asserted, not by the regulated entity, but by “someone else.” Lujan v Defenders of Wildlife, 504 U.S. 555, 562 (1992):

Thus, when the plaintiff is not himself the object of the government action or inaction he challenges, standing is . . . ordinarily ‘substantially more difficult’ to establish . . . It goes beyond the limit, however, and into pure speculation and fantasy, to say that anyone who observes or works [on contact voltage issues] anywhere in the world, is appreciably harmed by a single project [impacting one of those issues] with which he has no more specific connection.

See id. at 567.

Power Survey can hardly disguise its true motives in seeking to pontificate on these topics. By its own words, the Company’s intervention in the pending matter will merely ensure that “any ruling” of the “majority of the Commission newly appointed” is “made with full knowledge” of the facts that “many not have been previously apparent to the Commission and National Grid.” Power Survey Motion at 5. Intervention for the sole purpose of allowing a litigant to re-hash the Record and argument raised in a prior proceeding to a newly composed agency, hardly reflects “injury in fact” to that litigant. Newport Elec., 454 A.2d at 1225. Worse yet, intervention for such a purpose constitutes the most brazen form of judge shopping that the Supreme Court has repeatedly condemned. See e.g., In Re: Antonio, 612 A.2d 650, 654-55 (R.I. 1992). Power Survey’s generalized public interest concerns hardly possess the necessary concreteness so as to afford the Company standing in the pending matter. See e.g., New Shoreham, 19 A.3d at 1227.

B. POWER SURVEY DOES NOT SATISFY ANY OF THE CRITERIA OF RULE 1.13.

1. Power Survey Does Not Possess A Right To Intervene Conferred By Statute.

In its Motion to Intervene, Power Survey has not claimed a right to intervene conferred by statute. For obvious reasons, Power Survey cannot satisfy this criterion, and no further discussion of its merits is required.

2. Power Survey Does Not Possess An Interest Which May Be Directly Affected And Which Is Not Adequately Represented By Existing Parties.

a. No Interest Directly Affected

Power Survey contends that it should assume the same role in the pending matter that it played in Docket No. 4237 (which ironically Power Survey characterizes as a “more prevalent role”) even though superficially “the only issue before the PUC in this Docket is a routine ‘compliance filing.’” Power Survey Motion at 3-4. Power Survey’s concession—that the pending docket is a compliance filing only—and its initial contention regarding its role in the prior related docket, conclusively show the complete absence of an interest Power Survey possesses which may be directly affected by the adjudication of the pending docket.

No debate exists that Power Survey was not a party in Docket No. 4237. Rather, instead of participating as a full party in that docket, Power Survey chose to advance its interests before the Commission through public comment marked for identification only. See Docket Sheet identifying Public Comments of Power Survey for September 24, 2012 Hearing in Docket No. 4237.

A compliance filing is a filing that an applicant makes after the merits of its application has been adjudicated via a Commission final decision or order which executes of terms of that decision or order. For example, a “compliance filing might confirm whether the final agreements are materially consistent with the original application that was approved by the commission in [a] securitization order.” See e.g. G.L. 39-1-46(e). Alternatively, an approved compliance filing’s rates and tariffs will supersede the rates and tariffs included in a settlement agreement approved by the Commission in a final order. See e.g., In Re: Application of The Narragansett Electric Company d/b/a National Grid for Approval of Change in Electric and Gas Base Distribution Rates, Docket No. 4323, Order No. 21011 n. 736 (2013).

Since Power Survey could have, but did not participate in Docket No. 4237, and, therefore, did not possess an interest which may be directly affected in that docket, no reason exists for Power Survey to possess a greater role as a full party in the pending compliance proceeding, which merely serves to ensure the terms of the final Commission order or decision have been executed. Any other conclusion would produce the anomaly of enabling Power Survey to collaterally attack or re-litigate the merits of a matter already concluded before the Commission. It would also enable Power Survey to seek review of a Commission Order at the appellate level—as it has already done in SU-13-48 M.P.—without the requisite evidentiary presentation before the Commission in the first instance. Neither result is contemplated by existing legal precedent. See e.g., Furia v. Rhode Island Comm’n for Human Rights, 1988 WL 101611 (“A non-party may not re-open the case and re-litigate the merits anew; neither may he destroy the validity of the judgment between the parties”). Town of Narragansett v. Malachowski, 621 A.2d 190,

197 (R.I. 1993) (petitioner must intervene and present sufficient evidence before the Commission in order to create a reviewable issue in the Rhode Island Supreme Court). Power Survey does not possess an interest which may be directly affected in the pending proceeding because it possessed none to begin with, having chosen to forego raising them in Docket No. 4237.

b. Adequate Representation by Existing Party

Regardless of Power Survey's claim to possessing an interest which may be directly affected, the Company never contends that the Division cannot adequately represent these interests before the Commission. Power Survey Motion at 4. No debate exists that the Division retained an independent consulting firm and proffered expert testimony regarding each of areas that Power Survey now opines requires the firm's intervention in this matter, *e.g.*, testing equipment, geographical scope and percentage area of testing. By way of example, Mr. Booth and Mr. White discussed the general types of testing equipment, mobile, *etc.*, Direct Testimony of Gregory L. Booth, P.E. and Micheal W. White at 26-27, the geographical scope of testing, *id.* at 27-28, and the percentage area of testing. *Id.* at 28. Should the Commission believe compliance with its past Order is an issue, no bar would exist to prevent the Commission from instructing the Division to review and opine regarding the areas of compliance it believes in question. These could include none, some or additional areas of addressed by Power Survey in its intervention papers. The point is that the Division is an existing party that can adequately represent the interests that Power Survey advocates in the pending docket. Intervention by Power Survey, then, does not survive application of the second criterion of Rule 1.13(b)(2). See Narragansett Electric Company d/b/a National Grid Proposed Standard

Offer Service Rate Reduction, Docket No. 3739, Order No. 18794 at 11-12 (2006). See also Island Hi-Speed Ferry Tariff Filing, Docket No. 3599, Order No. 17819 at 4 (2004).

3. **Power Survey's Intervention In This Proceeding Is Not In The Public Interest.**

The only remaining rationale that could conceivably support intervention in the pending proceeding is that such participation “may be in the public interest.” While Rule 1.13(b)(3) does not define what matters the Commission should deem “in the public interest,” legal precedent makes it abundantly clear that the mere assertion of laudable public interest ends does not necessarily sanction that litigant’s participation in a Commission proceeding as a full party. Under Rule 1.13(b)(3), participation that is in “public interest” must do more than achieve the same result that the Commission could arrive at with the assistance of existing parties or through its own reasoned decision-making. In Re: Island Hi-Speed Form of Regulation and Review of Rates, Docket No. 3495, Order No. 17452 at 8 (2003). Vague and non-specific calls for additional review that will further “the public interest” do not demonstrate the requisite interest that would support intervention under Rule 1.13(b)(3). Narragansett Electric Company d/b/a National Grid Proposed Standard Offer Service Rate Reduction, *supra* at 12.

In the pending matter, Power Survey identifies three areas of inquiry which it contends will vindicate the Commission’s granting the Company’s motion to intervene: the assessment of testing equipment, geographical scope and percentage of areas to be tested. Power Survey Motion at 4. The interests of Power Survey, however, do not significantly differ from those that would impact members of the public in general. See St. Joseph’s Hill Infirmary, Inc. v. Mandl, 682 S.W.2d 821, 824 (R.I. 1985) (participation

of every citizen in the administrative process would prevent the agency from functioning efficiently). The Division, moreover, can adequately investigate and/or represent these issues in the pending proceeding. Narragansett Electric Company d/b/a National Grid Proposed Standard Offer Service Rate Reduction, *supra* at 12. Power Survey's claim of intervention under Rule 1.13(b)(3) fails to survive the applicable legal tests that define participation as a full party on public interest grounds.

III. CONCLUSION

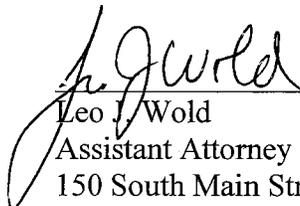
For the foregoing reasons, the Division requests that the Commission deny Power Survey's Motion to Intervene.

Respectfully submitted,

DIVISION OF PUBLIC UTILITIES
AND CARRIERS

By its attorneys,

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