

**STATE OF RHODE ISLAND
PUBLIC UTILITIES COMMISSION**

**In Re: Petition of the Episcopal Diocese of Rhode
Island for Declaratory Judgment on Transmission
System Costs and Related “Affected System
Operator” Studies**

Docket No. 4981

**RESPONSE BRIEF OF THE RHODE ISLAND DIVISION OF PUBLIC
UTILITIES AND CARRIERS**

I. INTRODUCTION

The Rhode Island Division of Public Utilities and Carriers (“Division”), in its role as a statutory party¹ to this proceeding, hereby submits its reply to the brief of Petitioner, the Episcopal Diocese of Rhode Island (“Diocese” or “Petitioner”) pursuant to the April 15, 2021 briefing schedule issued by the Public Utilities Commission (“Commission” or “PUC”).

This matter has been remanded to the Commission pursuant to the Rhode Island Supreme Court’s March 24, 2021 Order (the “Order”). The Order directs the Commission “to hold a hearing *to consider the new evidence* and to provide findings of fact and citations to the rules upon which the Commission may rest its conclusion.” (Emphasis added). As is clear in the Order, the “*new evidence*” means the documents attached to the Affidavit of Dennis Burton filed in the Rhode Island Supreme Court review of this Docket (hereinafter, the “New Evidence”).

The Order is very narrow in scope and Rhode Island Supreme Court case law mandates

¹ “[W]hile the [Public Utilities Commission] exercises a judicial function, the [Division of Public Utilities and Carriers], in addition to its regulatory powers, appears on behalf of the public to present evidence and to make arguments before the commission. *Providence Gas Co. v. Burman*, 376 A.2d 687, 701 (R.I.1977) (citing *Narragansett Elec. Co. v. Harsch*, 368 A.2d 1194, 1199-1200 (R.I.1977)).

that the scope cannot be exceeded, as argued *infra*. Therefore, the Diocese may not seek additional discovery, present additional evidence, nor seek additional testimony of witnesses.

The limited scope of the Order, requiring a hearing to consider the New Evidence, has not stopped the Diocese from rearguing many of the issues that are not part of the remand and submitting other additional evidence. *See* Diocese's Brief at 4-12. Any arguments made by the Diocese beyond those related to the New Evidence and any submission of additional evidence are beyond the scope of the Order and must be disregarded by the Commission.

As argued *infra*, the Diocese's claims of prejudicial administrative process in this matter and violation of R.I. Gen. Laws § 42-35-13 (*Ex Parte* Communications) are not supported by any relevant evidence and should be dismissed.

Regardless of the Diocese's unsupported claims of prejudicial administrative process or violation of R.I. Gen. Laws § 42-35-13, Docket 4981 is limited solely to questions of law involving the interpretation of state and federal statutes, regulations, and applicable tariffs. No substantive facts are in dispute.

II. DISCUSSION

a. The Issue Before the Commission is Clearly Articulated by the Supreme Court Remand Order and the Scope of the Order Cannot be Exceeded

The Rhode Island Supreme Court Order states in part:

This matter is remanded for the Commission to comply with G.L. 1956 § 39-5-5, with directions to hold a hearing *to consider the new evidence* and to provide findings of fact and citations to the rules upon which the Commission may rest its conclusion.

(Emphasis added).

The "*new evidence*" means the documents attached to the Affidavit of Dennis Burton filed

in the Rhode Island Supreme Court review of this Docket² (“Burton Affidavit”). No other issues are before the Commission on this remand.

The Supreme Court’s remand Order is very narrow in scope and cannot be exceeded. Case law in Rhode Island is very clear on this issue. In *Sansone v. Morton Mach. Works, Inc.*, 957 A.2d 386 (R.I.2008) the Supreme Court held that an inferior tribunal may not exceed the scope of the remand or open up the proceeding to legal issues beyond the remand. *Id.* at 398 (citing *Willis v. Wall*, 941 A.2d 163, 166 (R.I.2008); *RICO Corp. v. Town of Exeter*, 836 A.2d 212, 218 (R.I.2003); *Lemek v. Washington Oaks, Inc.*, 524 A.2d 597, 598 (R.I.1987); *Valley Gas Co. v. Burke*, 415 A.2d 165, 165 (R.I.1980). Known as the “mandate rule,” this doctrine “provides that a lower court on remand must implement both the *letter and spirit* of the [appellate court's] mandate, and may not disregard the explicit directives of that court.” *Id.* (internal citations omitted).

The remand Order explicitly provides that “[t]his matter is remanded for the Commission to hold a hearing *to consider the new evidence* and to provide findings of fact and citations to the rules upon which the Commission may rest its conclusion.” (Emphasis added).

By the clause “*to consider the new evidence*,” the Supreme Court clearly is referencing the documents attached to the Affidavit of Dennis Burton filed in the Rhode Island Supreme Court review of this docket. The Supreme Court also explicitly required the Commission “to provide findings of fact and citations to the rules upon which the Commission” relied rather than forwarding the Supreme Court a transcript of its open meeting decision.³ Nowhere in its Order

² The New Evidence contained in the Burton Affidavit consists of twenty-four (24) pages of emails (mostly repetitive) between counsel and representatives of the Division and National Grid from October 30, 2019 – November 14, 2019. The approximately twelve (12) emails relate to scheduling a meeting between National Grid and the Division (and the Division’s outside consultant) to discuss each party’s legal positions in this Docket. *See* Burton Affidavit at 15-38.

³ On January 12, 2021, the Rhode Island Supreme Court entered an Order directing the Commission to confirm, alter, amend, rescind, or reverse the Order being appealed after

did the Supreme Court authorize the Diocese to seek additional discovery, present additional evidence, or seek additional testimony of witnesses in the remand proceeding.

The Diocese does not possess any right and the Commission cannot allow for further discovery, presentation of additional evidence, or additional testimony of witnesses in the remand proceeding, which is confined to the record that is currently before the Commission and the New Evidence.

b. The Diocese Improperly Attempts to Submit Additional Evidence and Argues Issues Well Beyond the Scope of the Supreme Court's Order

Despite the clear direction of the Supreme Court's remand Order, the Diocese improperly attempts to reargue many of its original arguments before the Commission and improperly attempts to submit voluminous additional purported evidence, none of which is relevant to the Diocese's claims of prejudicial administrative process in this matter or violation of R.I. Gen. Laws § 42-35-13. *See* Diocese's Brief at 4-12. The Diocese improperly argues that the Commission's Order 23811 was incorrect, citing to additional studies regarding economic consequences (*Id.* at 4); proposed new State legislation (*Id.*); other Commission Dockets making similar claims (*Id.*); National Grid's profitability (*Id.* at 5); and the alleged conflict of interest between National Grid and its affiliates New England Power Company and Narragansett Electric Company. *Id.* at 5.

The Diocese further criticizes the Commission for "condoning National Grid's abuse of discretion in Docket 4981" (*Id.* at 4) and states that "the Division (and consequently the Commission) completely lost site of the legislative declaration of the beneficial impacts of net metering, fabricating

consideration of the New Evidence contained in the Burton Affidavit. On February 11, 2021, pursuant to a properly noticed Open Meeting, the Commission considered the Burton Affidavit and, after discussion, voted 2-0 to affirm the Order. The Commission responded to the Supreme Court's Order with a letter dated March 4, 2021, noting that the additional evidence did not change its interpretation of the law and attaching a transcript of the February 11, 2021 Open Meeting.

an unsupported theory of transmission system cost causation to allow the extraction of huge new transmission system bills for National Grid's collection." *Id.* at 6-7.

The Diocese's improper submission of these arguments and additional purported evidence should be disregarded as beyond the scope of the remand Order. The Diocese's comments about the conduct of the Commission in this matter are even more disturbing, are not supported by any relevant evidence, and should not be condoned.

c. **The New Evidence Does Not Support the Diocese's Claims of Prejudicial Administrative Process or Improper *Ex Parte* Communications**

The Diocese's claims of prejudicial administrative process in this matter and violation of R.I. Gen. Laws § 42-35-13 (*Ex Parte* Communications) are not supported by any relevant evidence and should be dismissed.

1. The Diocese's Allegation of Prejudicial Administrative Process is Wholly Unfounded and Not Supported by Any Relevant Evidence

The Diocese's Brief is unclear as to how the New Evidence is relevant to its claims of prejudicial administrative process in Docket 4981. *See* Diocese's Brief response to Question 2 at 3-13. The Diocese argues that the New Evidence "demonstrates that National Grid subjected the Diocese and all Rhode Island customers to undue and unreasonable prejudice in violation of R.I. Gen. Laws § 39-1-35⁴." *See* Diocese's Brief at 7. The Diocese also claims that the New Evidence "demonstrates that [National Grid] had prejudicial influence on the Division and that the

⁴ Rhode Island Gen. Laws § 39-1-35 provides as follows: "Conflict of interest. – A person or his or her or dependent child, spouse, of any person, who is, or has been in the past one year, in the employ of or holding any official relation to any company subject to the supervision of the commission, or engaged in the management of the company, or owning stock, bonds, or other securities thereof, or who is, or has been in the past one year, in any manner, connected with the operation of the company in this state, shall not be a commissioner or clerk of the commission; nor shall any commissioner or clerk of the commission, personally or in connection with a partner or agent, render professional service for or against or make or perform any business contract with any company subject to the supervision, relating to the business of the company, except contracts made with them as common carriers, or in regular course of public service."

Division's express utility bias impacted the presentation of positions, the deliberations and the resulting Order 23811 in ways that are fundamentally illegal and unreasonable." Diocese Brief at 13-14.

There has been no relevant evidence offered to support the Diocese's allegation of prejudicial administrative process in this matter. *See* Diocese's response to Question 2 at 3-13.

The Diocese is wrong in its claim that because the Division asserted a "common interest privilege" in response to the Diocese's Access to Public Records Act ("APRA") request the Division's actions and arguments before the PUC are "rank prejudice" and correspondingly renders the PUC's order illegal and unreasonable. The fact that both the Division and National Grid agreed on the legal posture of the Diocese's petition and theories to be argued to the PUC is not evidence of "rank prejudice." It is not prejudice at all for *parties* to a pending matter to discuss legal theories and positions.

What is apparent from the New Evidence is that the Division retained an outside consultant to advise it on the issues in Docket 4981, prepared its own brief in the matter, and discussed its legal position with a co-party. *See e.g.*, Burton Affidavit at 19, 33-38.

The Diocese's additional purported evidence of prejudicial administrative process in this matter is beyond the scope of the remand Order, as discussed in section II.b. *supra*, and cannot be considered by the Commission. Further, R.I. Gen. Laws §39-1-35 is clearly not a claim that can be asserted against the Division in this matter, as the statute applies to "a commissioner or clerk of the [C]ommission."

The Diocese's claims of prejudicial administrative process are wholly unfounded, not supported by relevant evidence, have no basis in fact, and should be summarily dismissed.

2. The Diocese's Reliance on R.I. Gen. Laws § 42-35-13 is Misplaced and Inapplicable

The Diocese's assertion that the Division of is an agency charged with making findings of fact and conclusions of law in Docket 4981⁵ is perplexingly curious at best, and utterly lacking in a fundamental legal understanding of the nature of the proceeding, at worst.

It is the Commission that is statutorily empowered to serve as the quasi-judicial tribunal for declaratory judgment matters, not the Division of Public Utilities and Carriers.⁶ The Division's participation in Docket 4981 was not as an administrative agency tasked with deciding a contested case; the Division was a statutory party. *See* Fn 1.

R.I. Gen. Laws § 42-35-13 provides:

Unless required for the disposition of *ex parte* matters authorized by law, ***member or employees of an agency assigned to render an order or to make findings of fact and conclusions of law in a contested case*** shall not, directly or indirectly, in connections with any issue of fact, communicate with any person or party, nor, in connection with any issue of law, with any party or his or her representative, except upon notice and opportunity for all parties to participate; but any agency member: (1) may communicate with other members of the agency, and (2) may have the aid and advice of one or more personal assistants.

(Emphasis added).

In *Arnold v Lebel*, 941 A.2d 813, (R.I.2007), the Rhode Island Supreme Court thoroughly addressed the issue of *ex parte* communications in connection with a state agency's actions in deciding a contested case such as Docket 4981. The Court held that in a contested case: (1) § 42-35-13 prohibits *ex parte* communication by the decisionmaker with anyone about contested or material adjudicatory facts or opinions concerning the merits of an applicant's pending appeal.

⁵ Diocese's Brief at 12.

⁶ "The [C]ommission shall serve as a quasi-judicial tribunal with jurisdiction, powers, and duties to implement and enforce the standards of conduct under § 39-1-27.6 and to hold investigations and hearings involving the rates, tariffs, tolls, and charges" R.I. Gen. Laws § 39-1-3.

The function of this requirement is to prevent litigious facts from reaching the decision-maker off the record in an administrative hearing. (2) § 42-35-13 authorizes hearing officers to engage in *ex parte* communication with agency staff members about general matters pertaining to the discharge of his or her duties. (3) in accordance with § 42-35-9 (e) and § 42-35-10 (4), the hearing officer must provide notice to the parties before a hearing if he or she intends to consult any documentary source or person concerning facts or opinions about the merits of an appeal. (4) all evidence that is received or considered must be on the record. *Id.* at 820-822.

Plain and simple, the Division is a party in Docket 4981 and not acting as a decisionmaker. It is the Commission that is held to the standard set forth in *Arnold v Lebel*, 941 A.2d 813 (R.I.2007). The Division is serving the Commission by bringing forth evidence in order to assist the Commission in coming to a decision.⁷ There was absolutely nothing improper about the conduct of the Division in this case and the Commission should not give any legitimacy to the reckless, misguided, uninformed arguments set forth by the Diocese.⁸

⁷ See *Providence Gas v. Burke*, 419A.2d 263, 270 (R.I.1980) (“[I]t is the function of the [D]ivision to serve the [C]ommission in bringing to it all relevant evidence, facts, and arguments that will lead the [C]ommission in its quasi-judicial capacity to reach a just result.”).

⁸ Reference to the Diocese’s arguments as “reckless” cannot be over-stated. Indeed, the accusations and allegations of *ex parte* communications by the Division, and by the Commission, are not only baseless, but extremely damaging. The Diocese’s accusations of Division *ex parte* conversations with National Grid – the basis for which the instant proceeding was initiated at the direction of the Supreme Court upon the Diocese’s R.I.G.L. § 39-5-5 filing – are predicated on, and perpetuated by, the erroneous and misleading representation that the Division was acting in a decisional role. See April (*sic* - should be May) 6, 2021 Diocese Letter, Exhibit A, attached. The Division was not; it was a party to the proceeding. More alarming is the suggestion that the Division “consulted with the Commission on its decision.” Diocese Brief at 2. Although the Diocese wavers on this allegation when pressed, *see* Exhibit A, what is clear is that it has no basis or evidence to support such harmful statements. Instead of properly advancing its legal arguments on appeal, the Diocese seeks to undermine the Commission Order 23811 at the expense of time, process and reputation. Advancing claims without proper foundation is sanctionable pursuant to Rhode Island Superior Court Rules of Civil Procedures Rule 11 and Article V, Rule 3.1 of the Rules of Professional Conduct based on the notion that representations lacking in good faith cause tangible harm. *See generally, Huntley v. State of Rhode Island et al.*, 109 A.3d 869, 874-5 (R.I.

d. This Matter Pertains Solely to Questions of Law Involving the Application of State and Federal Statutes, Regulations, and Applicable Tariffs to Undisputed Facts

Although the Diocese seeks to argue that the parties to this docket acted improperly in violation of state law, there are no relevant facts in dispute. This matter pertains solely to questions of law involving the application of the complex and inextricable interplay between the local electric generation and distribution system, which is subject to state law and Commission regulation, with the regional, broader transmission system, subject to federal law and Federal Energy Regulatory Commission (“FERC”) or ISO-NE, the regional transmission operator’s regulations. Notwithstanding, the issues are not new or complex.

The Rhode Island Supreme Court has previously commented on the procedure for review of the interpretation of utilities regulation in Rhode Island. “Inasmuch as the entire field of utilities regulation is governed by statute, the resolution of these questions lies in [the] reading of the pertinent provisions of the general laws.” *Narragansett Elec. Co. v. Harsch*, 368 A.2d 1194, 1198 (RI1977). The issues before the Commission are questions of law.

III. CONCLUSION

The Supreme Court remand Order is very narrow in scope, directing the Commission “to hold a hearing *to consider the new evidence* and to provide findings of fact and citations to the rules upon which the Commission may rest its conclusion.” (Emphasis added). Rhode Island case law mandates that the scope of the Order cannot be exceeded. The Diocese does not possess any right and the Commission cannot allow for further discovery, presentation of additional evidence, or additional testimony of witnesses in the remand proceeding, which is confined to the record that

2015); *Pleasant Management, LLC v. Carrasco et al.*, 918 A.2d 213 (R.I.2007). Given the serious and frivolous nature of the Diocese’s allegations, the credibility and competency of its counsel in any future Commission proceeding is undermined and should be closely examined.

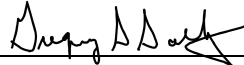
is currently before the Commission and the New Evidence. Any arguments made by the Diocese beyond the scope of the Order and any additional evidence submitted beyond the New Evidence must be disregarded by the Commission.

The Diocese's allegations of prejudicial administrative process and violation of R.I. Gen. Laws § 42-35-13 regarding *ex parte* communications are wholly unfounded and recklessly confound the respective roles and obligations of the parties and the decisionmaker to this matter. The Diocese's serious allegations of prejudice and disadvantage have no basis in fact. The Division prays that the Comm uphold Order 23811 and take such other actions as it deems warranted.

Respectfully submitted,

RHODE ISLAND DIVISION OF PUBLIC
UTILITIES AND CARRIERS,
By its Attorney,

PETER F. NERONHA
ATTORNEY GENERAL



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Office of the Attorney General
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gschultz@riag.ri.gov

Dated: May 14, 2021

CERTIFICATE OF SERVICE

I hereby certify that on the 14th day of May, 2021, that I transmitted an electronic copy of the within Response Brief of the Division of Public Utilities and Carriers to the attached service list and to Luly Massaro, Commission Clerk, via email.

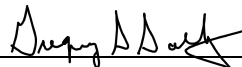


Exhibit A

April 6, 2021

42 Weybosset Street
Providence
Rhode Island 02903
401 626.4839
401 753.6306 FAX

Ms. Luly Massaro, Clerk
RI Public Utilities Commission
89 Jefferson Blvd.
Warwick, RI 02888

RE: Docket 4981 Episcopal Diocese Petition for Declaratory Judgment on Transmission System Costs

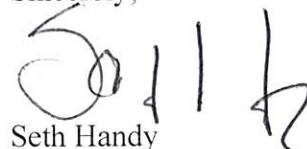
Dear Ms. Massaro:

This responds to Chairman Geratowski's attached letter dated today. Please file these letters in the docket.

The Episcopal Diocese of Rhode Island's brief does not allege ex parte communication between the Division and the Commission in docket 4981. The brief does argue, on pages 12 and 13, that the Division of Public Utilities and Carriers itself is an agency that was charged to make findings of fact and conclusions of law in this contested case and, in doing so, the Affidavit of Dennis Burton shows that it had ex parte consultations with one party, National Grid, in violation of the administrative procedures act. The brief reads, "The Division is an agency that was assigned to make findings of fact and draw conclusions of law in a contested case. . . In the context of this contested case, the evidence is now clear that the Division directly communicated with one party in connection with issues of fact and law, without providing notice and opportunity for all parties to participate."

If you refer to the content about areas the Diocese would "explore" if granted a hearing on page 2, that is not an allegation, but subject matter for the requested evidentiary hearing the Commission has not offered yet.

Sincerely,


Seth Handy

Enc.



STATE OF RHODE ISLAND

Public Utilities Commission

89 Jefferson Boulevard
Warwick, Rhode Island 02888
(401) 941-4500

Chairman Ronald T. Gerwatowski
Commissioner Abigail Anthony
Commissioner John C. Revens, Jr.

May 3, 2021

Seth Handy, Esq.
Handy Law, LLC
42 Weybossett Street
Providence, RI 02903

Re: Investigation Regarding Allegations of Ex Parte Communications
Occurring in Docket 4981

Dear Mr. Handy:

In reviewing pleadings that have been recently filed in Docket 4981 on behalf of your client, the Episcopal Diocese of Rhode Island, I noted statements that appear to indicate that you are personally aware or have been made aware through others of *ex parte* communications that occurred in the proceedings in Docket 4981 prior to the appeal being taken.

If I understand your statements correctly, it appears that you are indicating that prior to the Commission issuing its order on April 14, 2020 in Docket 4981, staff of the Commission had *ex parte* communications with an employee or employees of the Division of Public Utilities and Carriers (Division) who you maintain "consulted with the Commission on its decision." (page 4 of "The Episcopal Diocese of Rhode Island Objection," dated April 21, 2021; and page 2 of "The Episcopal Diocese of Rhode Island Brief," dated April 30, 2021) As Chairman of the Public Utilities Commission, it is my duty to investigate the extent to which any statutory or other rules may have been violated by the Commission staff or parties participating in a Commission docket. For that reason, I am seeking further information.¹

Accordingly, I am asking you to provide more specific disclosure of the details of the *ex parte* communications to which you are referring in your pleadings. An allegation of such kind is an extremely serious matter which implicates ethics rules and has the potential to be damaging to the careers and personal reputation of the individuals that are alleged to be involved, as well as

¹ Given the statement you made in footnote 6 to your recently filed brief on April 30, I believe it may be helpful and important to clarify that I have never been involved in any way for or with the Division in Docket 4981, including without limitation the period when I had a consulting contract with the Division. Nor have I ever had any dealings or communications whatsoever with National Grid on Docket 4981 or anything that could reasonably relate to it. In fact, I retired from National Grid nearly seven years ago in 2014. The reason I did not participate in the open meeting discussion on February 1, 2021 was not a recusal, but simply a practical consideration, given that my two fellow Commissioners were involved in the original decision and, therefore, my participation responding to the remand was unnecessary at that time.

the agency itself. For that reason, it is critical for me to obtain the specific details of any *ex parte* events. Depending upon the circumstances and details, the information would be needed to determine appropriate disciplinary or other actions that I may need to take in response, acting in my capacity as Chairman.

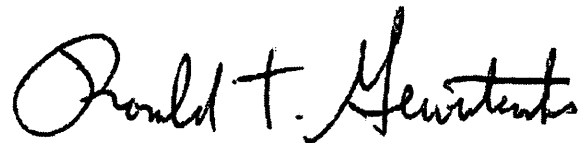
In this context, I respectfully request that you please provide the following information:

- (1) Indicate the dates between October 9, 2019 and April 14, 2020 when the *ex parte* communications occurred,
- (2) Identify the individual(s) from the Commission who participated in the *ex parte* communications and the individuals with whom the communications occurred, and
- (3) Provide a description of the substantive content of the *ex parte* communications (Note: including as much detail as possible would be very helpful and appreciated).

At this time, I am not asking for your statement to be put into the form of an affidavit. Rather, a letter will suffice. However, I may at some point need to request that the information be confirmed under oath.

Thank you in advance for your cooperation regarding this matter which I take very seriously. Please provide a response as soon as possible, but no later than the close of business on May 7.

Sincerely,



Ronald T. Gerwatowski
Chairman

ec: Commissioner Abigail Anthony
Commissioner John Revens
Patricia Lucarelli, Esq.
Christy Hetherington, Esq.,
Adam Ramos, Esq.
Gregory Schultz, Esq.