STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PUBLIC UTILITIES COMMISSION

Petition of the Episcopal Diocese of Rhode Island for Declaratory Judgment on Transmission System Costs and Related "Affected System Operator" Studies	**Docket No. 4981**

THE EPISCOPAL DIOCESE OF RHODE ISLAND'S MOTION FOR RECONSIDERATION

The Episcopal Diocese of Rhode Island moves for reconsideration of the Commission's decision to grant the Division of Public Utilities and Carriers' motion to quash and National Grid's motion to strike the prefiled testimony of Dr. Kenneth Payne, John Farrell and Karl Rábago, Matt Ursillo, Scott Milnes, and Fred Unger under Commission Rules of Practice and Procedure Rule 1.29. The order is of mistake, inadvertence, and there are other reasons justifying relief from the order.

The motions were filed on June 1 and June 2, respectively, and granted upon oral argument on June 2. The Commission's decision to grant the motions for all but the testimony of Dennis Burton was based on deficient procedure and was an abuse of its discretion as the precluded testimony is relevant and has probative value that outweighs either the Division's or National Grid's concerns.

i. The Motion Procedure was Inadequate by Rule.

The motions were decided based on inadequate procedure. The motions were granted no more than one day after they were presented (in the case of National Grid, the same day) without allowing the Diocese an opportunity to research or respond in writing. The Diocese objected to the Commission's hearing and deciding the motions before it had the opportunity to read or

respond to them. Instead, the Commission ruled that it would allow an hour for lunch during which the Diocese could prepare its argument.

Motion practice at the Commission is governed by Rule 1.16. It sates, in pertinent part:

> B. Movant's Certification. The movant shall make a good faith effort to determine whether a motion will be opposed. If the motion will not be opposed, the movant shall so state in the motion. Opposed motions shall state affirmatively that concurrence of other parties has been requested but denied, or shall state why no request for concurrence was made.
>
> C. Delay of Proceeding. Except as otherwise directed by the presiding officer or the Commission, the filing of a motion, either prior to or during any proceeding, and any action thereon, shall not delay the conduct of such proceeding.
>
> D. Objections. Any party objecting to a written motion filed pursuant to this rule shall, within ten (10) days of the service of the motion, file an objection thereto in writing setting forth in detail the grounds for the objection. The time for filing objections may be varied by order of the Commission.

In this case, neither party filing the motion provided the certification required by Rule 1.16(B) and the Diocese was not allowed its ten-day period (or any period) to object in writing. The motions pertain to evidence that was prefiled by May 26 for a hearing the Commission tentatively scheduled for June 9 and 10, as required by Rule 1.21(E).[1] The admissibility of the testimony was not at issue for oral arguments on June 2, it was to be decided in preparation for hearings scheduled no sooner than June 9, so there was no issue about delaying procedure. The motions were filed six and seven days after the testimony was submitted and the Diocese then was not allowed even one day to object. That motion practice did not satisfy the Commission's rules or the Diocese's rights to due process.

[1] National Grid's motion states that the briefing order did not seek prefiled testimony and did not set a time for an evidentiary hearing. That is incorrect. By email dated May 3, 2021, Commission Counsel Patricia Lucarelli notified the parties that "Should the Commission determine another hearing is necessary, one will be scheduled for the following week. Please advise of your availability on June 9 between 9:30 am and 4:30 pm and/or June 10 between 9:30 am and 2:30 pm." On May 4, 2021, Attorney Lucarelli wrote the parties, "Please hold the following dates for scheduling of the above-reference [stet] matter: June 2 – 9:30 am – 4:30 pm; June 9 – 9:30 am – 4:30 pm; June 10 – 9:30 am – 4:30 pm." **Exhibit A**.

Now that the Commission's decision is made, the Diocese is put in the disadvantageous position of having to brief for reconsideration rather than fully contend the motions. That contributes to a further biased Commission process.

ii. The Commission's Decision is an Abuse of Discretion.

National Grid and the Division each made the same two arguments for preclusion of the evidence: 1) that the remand order is narrowly addressed to the evidence submitted in the Burton Affidavit and cannot be expanded beyond that scope; and 2) that all the evidence the Diocese seeks to submit is irrelevant and immaterial to the matter on remand to the Commission. Neither argument is supported, nor is the Commission's resulting decision.

1) The Precluded Evidence is not Beyond the Scope of the Remand and the Commission did not Either Establish or Explain how or why it was Beyond the Scope of the Remand.

The evidence is within both the letter and the spirit of the remand. Sansone v. Morton Mach. Works, Inc., 957 A.2d 386, 398 (R.I. 1986) ("mandate rule" requires the lower tribunal to comply with letter and spirit of the remand order). The letter of this remand is 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." A hearing is defined by Commission Rule 1.21(D): "General. Parties shall have the rights to present evidence, cross-examine witnesses, object, file motions and briefs, and present arguments. The Commission and its staff may examine witnesses and require additional testimony." Neither motion refers to this rule that defines a hearing to include the parties right to present evidence. The letter of the remand is clear—it requires a hearing, allowing the parties there right to present admissible evidence.

The spirit of this second remand also allows admission of the proffered evidence. On first remand the Commission simply held an open meeting and confirmed that the new evidence

did not change its order. Then the second remand called that procedure insufficient and required a hearing to consider the new evidence and "provide findings of fact." Findings of fact are generated based on the production of evidence. The spirit of the remand allows admission of this new evidence.

The Commission denied National Grid's and the Division's argument and accepted the Diocese's argument on this issue by admitting Dennis Burton's testimony and scheduling the hearing. The decision to admit Dennis Burton's testimony indicates that the Commission has decided that the remand contemplated admission of new evidence. Further, the Commission has refused the Diocese request to withdraw the Chair's "Notice of Inclusion of Certain Documents from Docket 4973 Into the Record and Request to Update Information Stated in Petitioner's Brief" issued to the parties. That Notice also indicates the Chair's intent to now supplement the record of docket 4981 in the context of this remand. In light of these developments, the Commission has no basis to prohibit admission of some new evidence and deny the admission of other evidence based on the scope of the remand order. Rule 1.21(D) gives the Diocese its right to present its admissible evidence in the Court remanded hearing.

2) The Precluded Testimony is Relevant and Material and the Commission Erred in Granting the Motion to Strike and Motion to Quash.

The Commission's intrinsic ruling on the scope of the remand leaves one meritless argument from the Division and National Grid as the basis for its order precluding this evidence; that the evidence sought to be admitted is irrelevant and immaterial. On this remand the Commission required briefing on five questions including the following two:

[. . .]

2. Of the new evidence identified, please explain the relevancy of that evidence to the Commission's decision.

[. . .]

5. Describe in detail if and why the Petitioner believes the new evidence should either affect or change the Commission's original decision, including any inferences the Petitioner maintains should be drawn from the new evidence, if any.

The Commission did not explain its reasoning regarding why the precluded testimony was either irrelevant or immaterial to the issues it identified for argument. It is the duty of the Commission "to set forth sufficiently the findings and the evidentiary facts upon which it rests its decisions." R.I. Consumers' Council v. Smith, 302 A.2d 757 (R.I. 1973); see also Narragansett Elec. Co. v. R.I. Pub. Utils. Comm'n, 35 A.3d 925, 931 (R.I. 2012) (citing Newport Elec. Corp. v. Pub. Utils. Comm'n, 624 A.2d 1098, 1101 (R.I. 1993) (The Supreme Court must determine "whether the decision of the commission was fairly and substantially supported by legal evidence specific enough to enable [the Court] to ascertain if the facts upon which the commission's decision is premised afford a reasonable basis for the result reached."). The Commission's failure to consider the precluded testimony and failure to explain their preclusion leaves the record incomplete for the Supreme Court to review. Regardless, the precluded testimony is clearly relevant and material evidence to demonstrate the significance and dangers of the Division's communications claiming a "common interest" included in the remand affidavit.

Commission Rules of Practice and Procedure, Rule 1.23(A), state "the rules of evidence as applied in civil cases in the Superior Courts of this [Rhode Island] shall be followed to the extent practicable." 810-RICR-00-00-1.23(A). Rule 401 defines relevant evidence as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would without the evidence." R.I. R. of Evid., R. 401. Relevant evidence is generally admissible unless otherwise prohibited by law. Accetta v. Provencal, 962 A.2d 56, 60 (R.I. 2009). The standard "favoring the admission of relevant evidence provides that relevant evidence 'may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or

misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.'" Id. (quoting R. 403). As described below, the Diocese has met the burden of relevance established in the Rules of Evidence and the Commission Rules.

Karl Rábago and John Farrell are well-established national experts on utility regulation and policy. Mr. Rábago has engaged as an advisor and expert witness in more than 120 regulatory proceedings across the country, including many relating to distributed energy resources of all kinds, rates and tariffs, low-income energy issues, grid modernization, return on equity, and other issues. He served as a contributing author and advisor in the writing and publication of the National Standard Practice Manual for Benefit-Cost Analysis of Distributed Energy Resources ("NSPM-DER"), published by the National Energy Screening Project. Mr. Farrell has written several reports on the economics and policy of distributed energy and distributed solar, and particularly the relationship between utilities and customers. Together they have provided testimony that explains the Diocese response to Commission question number two, using their expertise to explain why the evidence of utility influence on the Division is so troublesome in the context of a monopoly utility that is intended to be regulated by the Commission based, in significant part, on public interest advocacy conducted by the Division. Their testimony addresses recent examples of the challenges of maintaining integrity in utility policy development and decision making, the challenges of "regulatory capture" under conditions of monopoly regulation, and the special problem of controlling monopoly utility charges on competing non-utility customer generators. They address the import of the General Assembly's recognition that "Supervision and reasonable regulation by the state of the manner in which the businesses construct their systems and carry on their operations within the state are necessary to protect and promote the convenience, health, comfort, safety, accommodation, and

welfare of the people" and how that gives the Division and the Commission a special duty regarding our monopoly business providing electric service. In order to preserve the public interest and the critical confidence of citizens and business in the justness and reasonableness of rates and services, the entities charged with protecting and preserving the public interest must assume the highest standards of conduct and the most transparent of practices. The Division's presentation of the public interest case is a special responsibility, intended to rise above the self-interested positions of parties with a cause or an objection, and to embody the outcome interests that ultimately represent the broader policy of the jurisdiction. A public interest party that conducts secret discussions and negotiations with the regulated entity is putting itself at grave risk of regulatory capture and creates an unavoidable impression that it values the opinions and potentially, the interests, of one party above those of the people at large. When there is only one party statutorily charged with representing the public interest in advocacy before the Commission, the appearance of bias must be scrupulously avoided through adherence to course of conduct that is beyond reproach or suspicion. They explain the phenomenon of "regulatory capture" where a special interest is prioritized over the general interests of the public, leading to a net loss for society. Their testimony explains why the Division simply could not fulfill its duty as ratepayer advocate for the public interest when it perceives that it has a "common interest" with the utility and collaborates as if to act on that perceived "common interest." Farrell and Rábago provide examples of such let downs of public duty from across the country and explain why such failures are particularly harmful in the context of ruling on a monopoly utility's right to assess charges on generating customers that compete with the utility's economic interests. Given the Commission's question of why the evidence of influence is relevant and how it might

impact the Commission's decision, this testimony is centrally relevant and material to the remand.

Dr. Payne is an expert in Rhode Island government, having served as Director of the Rhode Island League of Cities and Towns, as Commissioner of the Office of Energy Resources, and Chair of the Distributed Generation Board. His testimony addresses Commission questions 2 and 5 by explaining why the Division's deference to the utility worldview on such important policy matters so deeply threatens the achievement of Rhode Island policy. He explains the impact of utility biased advocacy resisting the short term incremental costs of implementing state policy goals while disregarding the need to make investments that will serve our long term interests. He elucidates why the utility focus on high shareholder return and keeping short term rates low by charging such local distributed generation projects for transmission costs castigates greenhouse gas goals as merely negative externalities and engenders hostility to the distributed energy solutions and smart grid investments that must happen to reach Rhode Island's climate and energy goals.

The prefiled testimony of Matt Ursillo, Scott Milnes, and Fred Unger speaks directly to Commission question 5. As participants in the renewable energy industry, each provide detailed factual accounts of how and why the Division's bias toward the utility position on "affected system operator" transmission system costs has allowed the utility free reign to impose anticompetitive charges that impact their projects and businesses in concrete ways that the Order 23811 could not have contemplated. In its recent decision of docket 5145, the Commission reconsidered and reversed its declaratory judgment because it claimed not to have understood the repercussions of its decision for renewable energy interests. In discussing its reconsideration, the Chair cautioned advocates not to assume that the Commission knew things that it might not

know. The evidence in question here does just that; explaining impact of which the Commission may not be aware so that the Commission might reconsider impact it did not anticipate. In just one material part, that impact includes the lack of administrative standards for the utility's assessment or allocation of transmission system costs which gives the utility unfettered and unregulated discretion to impose very substantial system costs on these competing and policy-preferred interests. This developer testimony also describes the history of renewable energy industry advocacy on interconnection cost issues, wherein the Division has consistently sided with the utility against the industry. This testimony illustrates the Diocese point that the Division advocates for the utility at a significant cost to Rhode Island's forward thinking energy policies. The testimony is centrally relevant to the Commission's questions and to this reconsideration on remand.

Rule 1.23(A) provides that, "when necessary to ascertain facts not reasonably susceptible of proof under the rules, evidence not otherwise admissible may be submitted, unless precluded by statute, if it is of a type commonly relied upon by reasonably prudent persons in the conduct of their affairs." A reasonably prudent person can discern the value of this testimony from industry experts, a former official, and industry representatives seeking to deconstruct the nature and significance of the Division's unfounded declaration of "common interest" and advocacy based upon that misperceived interest.

It stands to reason that the utility that engaged in regulatory capture and the agency that succumbed to it in this docket would claim that evidence related to the significance of such capture and its impact is irrelevant and immaterial. Yet, that does not make it so. The Diocese has demonstrated the relevance of the precluded testimony and the Commission provided no explanation of its decision that the proffered evidence is irrelevant to the questions directed to

the parties to address on remand nor how its admission is substantially outweighed by the concerns of undue delay. There is no basis for the claims of irrelevance and immateriality and the testimony should be admitted.

CONCLUSION

The Diocese respectfully asks for the Commission's reconsideration of its decision to preclude the presentation of such probative evidence. It is unreasonable to limit the Diocese to the presentation of the testimony of Dennis Burton at this "hearing." The Commission has asked about the relevancy of the Burton Affidavit and whether it should impact Order 23811. The Commission would clearly benefit from expert testimony on the significance of this evidence of regulatory capture and its grave impact on the local renewable energy industry. The Diocese and its counsel does not have the expertise or the actual experience to fully apprise the Commission of the answers to its questions based on oral argument. It relies on experts and renewable energy developers to help make that case based on witness experience. The Diocese cannot rightly be denied its opportunity to make that case.

THE EPISCOPAL DIOCESE OF RHODE ISLAND

By its attorneys,

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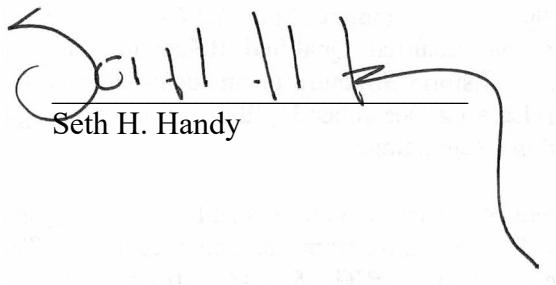
CERTIFICATE OF SERVICE

I hereby certify that on June 7, 2021, I delivered a true copy of the foregoing document to the service list by electronic mail.



Seth H. Handy

EXHIBIT A

Commission Counsel's Scheduling Orders

Lucarelli, Patricia (PUC)
Docket No. 4981
May 3, 2021 at 8:21 AM
, Hagopian, Jon (DPUC) ,
Hetherington, Christy (DPUC) ,

Good morning:

As previously indicated in prior communications, the Commission will be scheduling the above-reference matter for hearing in order to hear oral arguments. Please advise of your availability for the following dates during the times specified:

June 2 9:30 am - 4:30 pm
June 3 9:30 am - 4:30 pm
June 4 1:00 pm - 4:30 pm

Should the Commission determine another hearing is necessary, one will be scheduled for the following week. Please advise of your availability on June 9 between 9:30am and 4:30pm and/or June 10 between 9:30am and 2:30pm. Thank you for your immediate attention to this matter.

Best,
Patti

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Lucarelli, Patricia (PUC)
Docket No. 4981
May 4, 2021 at 4:41 PM
Ramos, Adam M. , , Gregory Schultz ,
, Hetherington, Christy (DPUC)

Hi All:

Please hold the following dates for scheduling of the above-reference matter:

June 2 – 9:30am-4:30pm
June 9 – 9:30am-4:30pm
June 10 – 9:30am-2:30pm

The 9th and 10th are being held in case additional dates are necessary.

Thanks!

Best,
Patti

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