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**

ORDER IN RESPONSE TO REMAND FROM THE SUPREME COURT

This case is before the Public Utilities Commission (Commission), on remand from the Rhode Island Supreme Court (Supreme Court or Court).[1] The case was originated by the Petitioner – the Episcopal Diocese of Rhode Island (Petitioner or Diocese) – in two filings made with the Commission in the fall of 2019.[2] The case relates to disputes that arose between the Petitioner and the Narragansett Electric Company d/b/a National Grid (Narragansett Electric or National Grid)[3] pertaining to the interconnection of Petitioner's proposed solar project to the electric system of Narragansett Electric. The filing in Docket No. 4981 was a Petition for a Declaratory Judgment, based on an agreed set of facts (Agreed Facts). The Commission issued an order on April 14, 2020 (Order No. 23811), making certain conclusions of law, which order was appealed to the Supreme Court by the Petitioner. Prior to the Supreme Court hearing the case, Petitioner filed an Affidavit of New Evidence pursuant to R. I. Gen. Laws § 39-5-5.

Following receipt of the Affidavit of New Evidence the Supreme Court remanded the case to the Commission, issuing two related remand orders. In the first order, the Court remanded the

[1] Order, SU-2020-106-M.P. (Mar. 24, 2021).
[2] The filings were made on September 12, 2019 in Docket No. 4973 and on October 11, 2011 in Docket No. 4981.
[3] In most instances in the text, this Order uses the corporate name "Narragansett Electric," rather than National Grid. The reason is that other entities in the National Grid group of affiliates also use "National Grid" as a d/b/a. Narragansett Electric is the actual regulated entity in Rhode Island. Nevertheless, there are places in the record where "National Grid" is used to mean either or both Narragansett Electric and its affiliate New England Power Company, which may require some discernment to determine which entity is being identified in context.

case so that the Commission could consider the new evidence filed by Petitioner "and confirm, alter, amend, rescind, or reverse the order being appealed."[4] After receiving the Commission's response which had been provided in the form of a letter, with an attached transcript, the Court issued a second remand order on March 24, 2021 finding that the letter was not an appropriate exercise of jurisdiction by the Commission and directed the Commission "to hold a hearing to consider the new evidence and provide findings of fact and citations to the rules upon which the Commission may rest its conclusion."[5]

The issues were briefed, procedural motions and objections were raised, hearings were held, and the Commission decided the matter at an Open Meeting on June 10, 2021. The Commission finds that the new evidence does not alter or effect the Commission's decision and conclusions of law as set forth in Order No. 23811.

I. FACTS AND TRAVEL

A. Initiation of Proceedings at the Commission

On September 12, 2019, the Petitioner filed a Petition for Dispute Resolution with the Commission (Docket No. 4973) which sought to address disputes that arose between Petitioner and Narragansett Electric relating to the interconnection of the Petitioner's solar project to the electric system of Narragansett Electric.[6] Commission staff was assigned to the dispute resolution process, and the parties voluntarily agreed to have a member of the Commission staff mediate the dispute.[7] While Docket No. 4973 continued to proceed in mediation, on October 11, 2019

[4] Order, SU-2020-106-M.P. (Jan. 12, 2021).
[5] Order, SU-2020-106-M.P. (Mar. 24, 2021).
[6] In Re: Petition of the Episcopal Diocese for Dispute Resolution, Docket No. 4973 (Sept. 13, 2019). The Petition for Dispute Resolution was filed pursuant to Section 9.2.b of the Standards for Connecting Distributed Generation.
[7] The mediator was Commission counsel Cynthia Wilson-Frias. *See* Mediator's Interim Report, filed on December 30, 2019 in Docket No. 4973. At this point in the travel of the case, the only parties participating in the mediation in Docket No. 4973 were the Petitioner and Narragansett Electric.

Petitioner filed a Petition for Declaratory Judgment (Petition) which was docketed as Docket No. 4981.[8]

B. Travel of the Case Prior to Remand

On November 2, 2019, the Commission issued a notice soliciting comments and scheduling a deadline for intervention in Docket No. 4981. Narragansett intervened and filed a protest to the Petition. The Division of Public Utilities and Carriers (Division), also intervened in the case in its statutory role as a party representing all ratepayers, as it typically does in cases before the Commission.[9] Briefs were filed by the Petitioner and the intervenors and, at an Open Meeting on December 17, 2019, the Commission scheduled the matter for further consideration. On January 2, 2020, the Commission issued a second notice to solicit comments. Narragansett Electric (also referred to as National Grid in the proceedings) filed further comments, and the Petitioner filed a Reply.[10] The Commission heard oral argument on February 25, 2020. And at an Open Meeting on March 6, 2020 the Commission made its decisions. The Commission issued its written Order No. 23811 in Docket No. 4981 on April 14, 2020.

C. The Access to Public Records Requests and Filing of New Evidence

Pursuant to R.I. Gen. Laws § 39-5-1, the Petitioner filed a Petition for a Writ of Certiorari with the Rhode Island Supreme Court on April 21, 2020. That same day the Petitioner also filed Access to Public Records Act (APRA) requests with the Commission and the Division. The Commission complied and forwarded the requested records to the Petitioner on April 24, 2020. The Petitioner appealed a portion of its request on April 27, 2020 to the Commission Chairperson[11]

[8] The Petition was filed with the Commission pursuant to R.I. Gen. Law § 42-35-8(c) and 810-RICR-00-00-1.11 of the Commission Rules of Practice and Procedure.
[9] *Narragansett Elec. Co. v. Harsch*, 368 A.2d 1194, 1198-1201 (R.I. 1977).
[10] Petitioner objected to Narragansett Electric's comments at this stage but filed a Reply at the same time which was accepted by the Commission.
[11] The Chairperson of the Commission at this point was Chairperson Margaret E. Curran.

who responded by confirming that all of the records requested were provided except for the post decisional documents that are preliminary drafts and constitute work product, and as such are exempt from public disclosure pursuant to R.I. Gen. Laws § 38-2-2(4)(K). The Petitioner chose not to appeal the Chairperson's decision to the Department of the Attorney General.

The Division, however, denied the Petitioner's request on April 22, 2020, stating that the records were exempt from the disclosure requirements pursuant to R.I. Gen. Laws § 38-2-2(4)(E). The Petitioner appealed this decision to the Acting Administrator of the Division who upheld the denial claiming that the records constituted work product and were therefore exempt from the public disclosure requirements. The Petitioner appealed the Division's decision to the Office of the Attorney General. In a decision dated November 9, 2020, the Attorney General found that the Division's failure to provide the records sought constituted a violation of the APRA and ordered the Division to turn the records over to the Petitioner within ten business days, which it did.[12]

On December 18, 2020, the Petitioner filed an "Affidavit of New Evidence" pursuant to R.I. Gen. Laws § 39-5-5. The new evidence consisted of the Attorney General's APRA ruling, and the response from the Division to the ruling which consisted of 13 emails between Division counsel and counsel for Narragansett Electric.[13] Most of the emails related to scheduling. However, others included a sharing of legal analysis between counsel for the Division and counsel for Narragansett Electric regarding the case in Docket No. 4981. On January 12, 2021, the Supreme Court remanded the case to the Commission so that the Commission could "consider the affidavit of new evidence and confirm, alter, amend, rescind, or reverse the order being appealed."[14]

[12] Attorney General Letter PR-20-65 (Nov. 9, 2020).
[13] Because email streams were provided, the 24 pages included repetition of many of the email communications, five of which were repeated six times, the others between 1 and 5 times.
[14] Order, SU-2020-106-M.P. (Jan. 12, 2021).

D. Commission's Initial Response to the First Remand Order

On February 11, 2021, the Commission responded to the Supreme Court's first remand order. However, the Commission misunderstood what it was required to do in order to respond appropriately to the Supreme Court's remand. Specifically, the Commission did not hold any hearings and held an Open Meeting to discuss the affidavit of new evidence. The two Commissioners who participated, former Commissioner Dr. Marion Gold and current Commissioner Dr. Abigail Anthony, noted that the case did not involve fact-finding but instead involved interpretations of law.[15] Both Commissioners found that the new evidence did not change their interpretation of the law and voted to confirm the original order. The Commission notified the Court of its decision in a letter dated March 4, 2021, attaching a copy of the transcript of the Open Meeting discussion which also reflected the vote. By order dated March 24, 2021, the Supreme Court found that the Commission's letter was not a proper exercise of jurisdiction and remanded the matter to the Commission "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."[16]

E. The Procedural Schedule for the Second Remand

The parties were represented on remand by the following counsel:

Petitioner: Seth H. Handy, Handy Law, LLC;

Division: Gregory S. Schultz, Office of the Attorney General; and

[15] Chairman Ronald T. Gerwatowski did not participate in the Open Meeting discussion on February 1, 2021 given that the other two Commissioners were involved in the original decision and his participation responding to the remand was unnecessary at that time. Since the Supreme Court's March 24, 2021 order, the composition of the Commission includes only one Commissioner that participated in the original decision. The current composition of the Commission is Chairman Gerwatowski, Commissioner Anthony, who participated in the original decision, and Commissioner John C. Revens, Jr.

[16] Order, SU-2020-106-M.P. (Mar. 24, 2021).

Narragansett Electric: Adam M. Ramos, Hinkley, Allen & Snyder LLP.

After receiving the Court's directive, the Commission issued a procedural schedule on April 15, 2021 and directed the parties to submit briefs addressing a number of questions regarding the new evidence.[17] The Commission's briefing schedule called for the Petitioner's brief due on April 30, 2021, Response Briefs by May 14, 2021, and Petitioner's Reply by May 26, 2021.[18] The procedural schedule also notified the parties that the Commission was likely to schedule a hearing for the first or second week of June.[19]

F. Discovery Request by Petitioner to the Division

The day before the Commission established the procedural schedule, Petitioner submitted a discovery request to the Division. The request consisted of sixteen "data requests."[20] On April 23, 2021, the Division filed an objection, but responded to the data requests, noting in certain responses that the Division was not waiving its objection by responding.[21]

G. The Briefing Questions Posed by the Commission

The Commission sent five questions to the parties for briefing purposes. The questions posed were intended to assist the Commission in several ways:

- to understand fully the position of the Petitioner,
- to understand how the Petitioner considered the new evidence to be relevant to the Commission's decision,
- to understand why Petitioner believed it should alter the Commission's decision, and

[17] Lucarelli email (Apr. 15, 2021).
[18] *Id.*
[19] *Id.* Subsequently, the Commission established June 2, 2021 for oral argument, reserving June 9 & 10, 2021 for further hearings, if necessary.
[20] In Commission proceedings, the term "data requests" is used when questions similar to "interrogatories" are asked by one party to another, or by the Commission itself. It is the main discovery tool used by the Commission and all parties to obtain information needed in any case. *See* Commission Rule 1.19(C).
[21] Division Objection to Diocese Data Requests (Apr. 23, 2021).

- to determine whether there were any disputed facts arising out of the new evidence which would require evidentiary hearings.

The questions were issued as follows:

1. Among the information contained in the "affidavit of new evidence" referenced by the Supreme Court in its order of January 12, 2021, please identify what the Petitioner believes constitutes new evidence (i.e., evidence that was not before the Commission when it made its decision).

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

3. Of the new evidence identified, please indicate with specificity the extent to which there are any facts (within the new evidence) which the Petitioner believes are now in dispute.

4. Referencing the "Agreed Facts" signed by the Petitioner and National Grid that was used by the Commission in its original decision, please indicate whether the Petitioner believes the facts upon which the Commission based its decision now need to be amended to include facts from the new evidence. If so, please indicate how the Petitioner recommends the new facts would be written in a stipulation.

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.[22]

H. Petitioner's Objection to the Procedural Schedule

On April 21, 2021, Petitioner objected to the procedural schedule, accusing the Commission of issuing questions "which clearly seek to redeem the Commission's position."[23] In addition, Petitioner asserted that not having a procedural conference to establish the scope of the proceeding, identify issues of fact and law, and schedule an appropriate process to address the

[22] Lucarelli email (Apr. 15, 2021).
[23] The Episcopal Diocese of Rhode Island Objection at 1 (Apr. 21, 2021).

issues was inconsistent with Commission policy and procedure.[24] The Petitioner also argued that the "procedural schedule did not contemplate the parties' right to present evidence" at a hearing.[25]

The objection made other comments about the Commission's questions, stating: "It is astonishing and deeply sad that the Commission still has to ask what new facts might change its position in this docket."[26] The objection also made arguments that the Commission failed in its regulatory role, stating: "Here National Grid's undue influence, and the Commission and Division's failure of their regulatory roles resulted in illegal, undue and unreasonable prejudice against the public interest."[27] The Objection noted that the Petitioner intended to provide testimony that would "explore the Division's biased process for researching its legal position, *how it consulted with the Commission on its decision*, who prepared for the Commission and the Commissioners for oral argument, what transpired at the hearing and how the decision was drafted and considered by the Commissioners before it was entered."[28] The objection continued with other arguments unrelated to the Commission's procedural schedule.[29]

In response to the Petitioner's Objection to the Procedural Schedule, Commission counsel notified the parties by email on April 27, 2021 to clarify the Commission's intention with the schedule, stating in part:

> "To be clear, as indicated by the April 15 procedural schedule, a hearing will be scheduled after all the briefs are received in order to hear oral arguments regarding the affidavit of new evidence filed by the Petitioner with the Supreme Court. *After reviewing the briefs and holding this hearing, the Commission will consider the new evidence in the affidavit*

[24] *Id.* Rule 1.17 of the Commission's Rules of Practice and Procedure clearly states that the Commission "**may**… require that all parties attend one or more pre-hearing conferences for the purpose of formulating and simplifying the issues in the proceeding or addressing other matters that may expedite orderly conduct and disposition of the proceeding." (emphasis added). Since the instant proceeding did not require clarification of issues as those had been set forth in the Supreme Court's remand, and there were no issues that would affect the orderly conduct and disposition of the matter, a prehearing conference was determined to be not necessary and thus not scheduled.
[25] *Id.* at 2.
[26] *Id.* at 3.
[27] *Id.* at 4.
[28] *Id.* (emphasis added).
[29] *Id.* at 5-9.

and determine whether any further hearings are necessary to appropriately respond to the Supreme Court's Order of March 24."[30]

The Petitioner then responded with a letter to the Commission Clerk on April 27, 2021, asking questions, including whether the email message from Commission counsel was an "order pursuant to Rule 1.28" of the Commission's Rules of Practice and Procedure.[31] The Clerk of the Commission responded, clarifying in pertinent part:

> "There is no requirement that the Commission issue a formal 'order' to establish a procedural schedule. As indicated in the email of Counsel for the Commission sent on April 27, a hearing will be scheduled to hear oral arguments regarding the affidavit of new evidence filed by the Petitioner with the Supreme Court. After reviewing the briefs and holding this hearing, the Commission will consider the new evidence in the affidavit and determine whether any further hearings are necessary to appropriately respond to the Supreme Court's Order of March 24."[32]

The letter also advised that the Petitioner could raise any objections it had to the procedural schedule in its brief.[33]

I. The Allegation of Ex Parte Communication Involving the Commission

On April 30, 2021, the Petitioner filed a brief as required by the procedural schedule. The brief reiterated its objection to the Commission not conducting a procedural conference and asserted that it was being denied a hearing as ordered by the Supreme Court. The brief, however, also repeated the statement from its objection that the Petitioner would be providing testimony to explore, among other things, how the Division "*consulted with the Commission on its decision*."[34]

Having received two public filings signed by Counsel for the Petitioner which appeared to be alleging *ex parte* communications that occurred between the Division and Commission staff

[30] Lucarelli email (Apr. 27, 2021)(emphasis added).
[31] Episcopal Diocese of Rhode Island Letter (Apr. 27, 2021).
[32] Massaro Letter (Apr. 28, 2021). The Commission notes that even in remand cases in which the Supreme Court has directed the lower court to hold evidentiary hearings, it has not always required literal compliance when holding the evidentiary hearing would not have added anything material to the record. *See RICO Corp. v. Town of Exeter*, 836 A.2d 212, 218-19 (R.I. 2003).
[33] *Id.*
[34] Petitioner's Brief at 2 (Apr. 30, 2021)(emphasis added).

prior to the Commission issuing its Order No. 23811, the Chairman of the Commission[35] became concerned about the seriousness of the allegation that went beyond the new evidence before the Commission.[36] Moreover, the Chairman was aware of the obligations imposed on attorneys practicing before the Commission when they sign pleadings:

> "Effect of Signature. The signature of the person, officer or attorney on any paper filed with the Commission constitutes a certification that the signatory has read the paper being subscribed and filed, and knows the contents thereof; *that to the best of the signatory's knowledge, information, and belief formed after a reasonable inquiry, it is well grounded in fact . . .* ; and that the contents are true as stated, except as to matters and things, if any, stated on information and belief, and that those matters and things are believed to be true."[37]

In this context, the Chairman wrote to counsel for the Petitioner and asked that he "provide more specific disclosure of the details of the *ex parte* communications" that the Petitioner alleged occurred between the Division and the Commission. The Chairman emphasized that the allegations were of such a nature as to be potentially "damaging to the careers and reputations of the individuals" allegedly involved in the *ex parte* communication, and that it was critical for him to obtain more detail regarding the allegations so that he could determine the appropriate action that may be required.[38]

Counsel for the Petitioner responded on May 6, 2021.[39] In the response, Counsel for Petitioner retracted the allegation that Commission staff and the Division had consulted on the Commission's decision, stating: "The Episcopal Diocese of Rhode Island's brief does not allege ex parte communication between the Division and the Commission in docket 4981." The letter

[35] By the time of the second remand, the term of two of the Commissioners had expired. Chairman Gerwatowski and Commissioner John Revens were appointed to replace outgoing Chairperson Margaret Curran and Commissioner Marion Gold, respectively.
[36] Objection at 4 (Apr. 21, 2021); Brief at 2 (Apr. 30, 2021).
[37] Commission Rule 1.6(D).
[38] The May 3, 2021 letter is attached to the Division's Response Brief as Appendix A.
[39] The May 6, 2021 response is attached to the Division's Response Brief as Appendix A. The letter contained a typo which mistakenly dated the letter April 6, 2021.

stated that its brief alleged that *ex parte* communications took place between the Division and National Grid.[40]

J. Petitioner's Motion Requesting the Chairman Recuse Himself from the Case

Since neither Chairman Gerwatowski nor Commissioner Revens had participated in the proceedings prior to the second remand, it was imperative that they conduct a thorough review of the entire record. As a result of this review, the Chairman requested that Commission counsel send a memorandum to the parties, notifying the parties of the Chairman's intent to include certain public records from Docket No. 4973 in the record of the travel of the case, asking if any party had an objection.[41] That docket was referenced in the previous pleadings and in the Petitioner's brief filed in this remand on April 30, 2021. Counsel for the Commission sent the memorandum on May 19, 2021 to the parties.[42] The memorandum also sought an update of information that related to factual assertions made in Petitioner's brief that were not supported by the record of the case, indicating that the request for an update appeared to be outside the scope of the remand, but nevertheless might be important.[43] An update was provided by Narragansett Electric. The Petitioner, however, responded with a motion entitled: "Motion for Recusal, Withdrawal of Notice and Further Assurance Against Bias." The motion asked for the Chairman to recuse himself from the proceeding.[44] The Chairman denied the motion for recusal and issued a written order which is part of the record.[45]

[40] *Id.*
[41] The notice is attached as Exhibit B to Petitioner's Motion for Recusal, Withdrawal of Notice and Further Assurance Against Bias filed by the Diocese on May 24, 2021. Narragansett Electric later indicated it had no objection.
[42] Lucarelli Mem. (May 19, 2021).
[43] *Id.* The memorandum made clear that the parties should not interpret the request as a determination that the information was within the scope of the remand.
[44] Motion for Recusal, Withdrawal of Notice and Further Assurance Against Bias (May 24, 2021).
[45] Order No. 24061 (Jun. 3, 2021).

In addition to the Motion for Recusal, the Petitioner's motion contained two other requests. One was a request that the Commission withdraw the notice sent in the form of the May 19, 2021 memorandum. The other was a request to the two remaining Commissioners, stating: "The Notice is sufficiently prejudicial to question whether the remaining members of the Commission can remain neutral in deciding this matter on reconsideration. The Diocese asks the other two Commissioners to take the necessary time to make that determination in consultation with another independent and appropriate authority and to institute any remedial measures."[46] The request was absent of any reason or rationale as to why Petitioner believed the two Commissioners were not capable of rendering a fair and unbiased decision.[47]

K. Filing of Testimony without Moving for Leave to Do So

As indicated above, the Commission's procedural schedule and its clarifications notified the parties that a decision would be made after the oral argument whether further hearings would be necessary. Yet, without seeking leave to do so, on May 24 and 25, 2021, the Petitioner pre-filed direct written testimony of five individuals, and one pre-filed direct testimony co-sponsored by two individuals.

The Petitioner summarized each of the pre-filed testimonies in its Reply Brief filed on May 26. The summary is quoted verbatim below:

> • Prefiled Testimony of Dennis Burton:
>
> The Chief Financial Officer of the Episcopal Diocese of Rhode Island provides his perspective on the bias he observed in the processing of the Diocese's petition for declaratory judgment in docket 4981 and his view on the impact such prejudice has on Rhode Island.

[46] Motion for Recusal, Withdrawal of Notice and Further Assurance Against Bias at 6 (May 24, 2021).
[47] *Id.*

• Prefiled testimony of Kenneth Payne:

The former administrator of Rhode Island's Office of Energy Resources provides expert testimony on the essential role of the Division and why any compromise in that function is so detrimental to Rhode Island's energy policy and our energy future.

• Prefiled testimony of John Farrell and Karl Rábago:

National energy experts opine on the record of prejudicial utility influence in such affairs across the country and why it has such deleterious impact on the efficient and effective delivery of energy and energy services.

• Prefiled testimony of Fred Unger of Heartwood Group,

on the impact that National Grid's administration of the affected system operator policy for transmission system upgrades has had on their company and its projects.

• Prefiled testimony of Matt Ursillo:

Director of Project Management for Green Development, LLC on the impact of National Grid's administration of interconnection requirements and process and the Division's history of utility-aligned advocacy on the issue on Green Development, its projects and on Rhode Island energy policy.

• Prefiled testimony of Scott Milnes of Econox Renewables

on the impact that National Grid's administration of the affected system operator policy for transmission system upgrades has had on their company its projects.[48]

In response, the Division filed a Motion to Quash the Petitioner's Proposed Submission of Additional Evidence on June 1, 2021, and Narragansett Electric filed a Motion to Strike on the morning of the oral argument, June 2, 2021. Both Narragansett Electric and the Division asserted that the pre-filed testimony was beyond the scope of the proceeding, inconsistent with the Court's mandate rule and irrelevant to the "new evidence".[49]

L. Oral Argument on June 2, 2021

[48] Petitioner Reply Brief at 12 (May 26, 2021).
[49] May 31, 2021 was Memorial Day; with state offices closed. Division Motion to Quash (Jun. 1, 2021); Narragansett Motion to Strike (Jun. 2, 2021).

On June 2, 2021, the Commission held a hearing for oral argument. Prior to the hearing, the Chairman denied the Petitioner's recusal motion finding that the Petitioner had not met its "burden of establishing that the [Chairman] possess[ed] a personal bias or prejudice by reason of a preconceived or settled opinion of a character calculated to impair his or her impartiality seriously and sway his or her judgement."[50] The written order was issued on June 3, 2021.

The three Commissioners then denied the Petitioner's motion for withdrawal of the notice[51], and Commissioners Anthony and Revens denied the Petitioner's request that they consult with "another independent and appropriate authority and institute any remedial measures deemed necessary and warranted as a result of that consultation."[52]

During oral argument, the parties were given the unlimited opportunity to present their positions. The substantive arguments made will be addressed below in Section V of this Order. The oral argument also addressed the issue of the admissibility of the pre-filed testimonies. While Petitioner filed the testimony without leave to do so, the Chairman did not reject it for failing to comply with the procedural schedule. Instead, it was effectively treated as an "offer of proof" in determining whether it should be admitted.

Prior to making his arguments on the issue, the Petitioner claimed that he did not have adequate time to review the motions and requested time to file a written response. The Chairman indicated that the motions and objections could have been made orally at the oral argument.[53] Prior to considering the motions, the Commission recessed for lunch. After a lunch break, counsel for the Petitioner indicated that he was able to read an electronic copy of Narragansett Electric's

[50] Hr'g Tr. at 17 (Jun. 2, 2021); Order No. 24061 at 6 (Jun. 3, 2021)(citing *State v. Howard*, 23 A.3d 1133, 1136 (R.I. 2011)).
[51] Hr'g Tr. at 35-36 (Jun. 2, 2021).
[52] *Id.* at 36-38 (Jun. 2, 2021). Since the third request was directed at two of the Commissioners, the Chairman abstained from that vote.
[53] *Id.* at 129-130 (Jun. 2, 2021).

motion and did not press his objection regarding time to respond. Since Petitioner did not press his objection that he was not given adequate time to respond and presented his position, the Commission considered that objection waived.[54]

With the exception of the pre-filed testimony of Dennis Burton, the Commission granted the Motion to Strike and the Motion to Quash filed by Narragansett and the Division respectively and found that the content of all of the other pre-filed testimony was beyond the scope of the Supreme Court's remand order and irrelevant to the new evidence.[55] As for the Burton testimony, while the Commission was skeptical that Mr. Burton's testimony was properly within the scope of the remand, it found that portions of Mr. Burton's testimony could be construed to tangentially relate to the new evidence.[56] Thus, the Commission ruled that it would allow the testimony of Mr. Burton to be presented at the evidentiary hearing scheduled for June 9, 2021 and allow him to be cross-examined by the parties. The Chairman noted that the Commission was capable of discerning those portions of the testimony that were not within the scope of the remand.[57]

M. Petitioner's Motion for Reconsideration

On June 7, 2021, the Petitioner filed a Motion for Reconsideration of the Commission's decision at the June 2, 2021 hearing which had granted the Division's Motion to Quash and Narragansett Electric's Motion to Strike all of the pre-filed testimonies except for that of Dennis Burton. The motion re-argued what already had been addressed at oral argument, maintaining that all of the testimony was relevant to the new evidence should be considered by the Commission.[58]

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[54] *Id.* at 134-38; 144-45 (Jun. 2, 2021). The Commission notes the rapid pace at which pleadings were filed by all parties as the hearing dates approached. This made it impractical to give the parties more time to respond unless, in the presiding Commissioner's judgment, there was a significant prejudice that was articulated (of which there were none). In any event, Petitioner, five days later, filed a Motion for Reconsideration again raising the arguments and his response in writing, which the Commission considered before denying the motion.
[55] Hr'g Tr. at 162-65, 168 (Jun. 2, 2021).
[56] *Id.* at 163-64 (Jun. 2, 2021).
[57] *Id.* at 154-55 (Jun. 2, 2021).
[58] Motion for Reconsideration (Jun. 7, 2021).

The Petitioner's motion also raised an objection relating to the process for hearing the motions, claiming that the Commission denied due process at oral argument because Petitioner did not have enough time to read and respond to the filed motions and objections of Narragansett Electric and the Division.[59] The morning of the hearing on June 9, 2021, Narragansett Electric filed an objection to Petitioner's Motion for Reconsideration.

N. The June 9 Evidentiary Hearing

On June 9, the Commission held an evidentiary hearing. Before beginning the evidentiary proceedings, the Commission considered Petitioner's Motion for Reconsideration, asking for any further arguments.[60] Petitioner indicated that he would essentially rest on what had been filed.[61] Narragansett Electric and the Division briefly summarized their positions, with both reiterating their objections to the admission of the testimony of Mr. Burton.[62] After a discussion, the Commission denied Petitioner's motion.[63]

The Chairman noted that the pre-filed testimony of Mr. Burton would be marked as an exhibit and entered into the record in full. He then indicated that the other pre-filed testimony was not entered in full but would be marked for identification and included in the record that would be sent to the Supreme Court with the final order.[64] Petitioner then raised the question whether the Commission would rule upon the objection to the data requests that had been sent by Petitioner to the Division in April. Petitioner indicated that he did not file a motion to compel, because he was

[59] *Id.* The Commission notes that the Petitioner's counsel did respond after a break in oral argument. (Hr'g Tr. at 134-38, 144-50 (Jun. 2, 2021)) In addition, the filing of the Motion for Reconsideration on June 7, 2021 contained arguments against the motions, five days following the oral argument in which Petitioner asserts that he was prejudiced by not having enough time. The Commission read the entire motion and considered the arguments anew when it denied the motion at the evidentiary hearing on June 9, 2021.
[60] Hr'g Tr. at 4 (Jun. 9, 2021).
[61] *Id.* at 4-8.
[62] *Id.* at 5-6.
[63] *Id.* at 8-10.
[64] *Id.* at 10.

willing to accept the response that was given, but wanted to be assured that it was placed into the record.[65] Narragansett Electric and the Division objected to the responses being included in the record, but the Commission overruled the objection and allowed the response to be entered in the record as a full exhibit.[66]

After the initial matters were addressed, Petitioner brought forward Mr. Dennis Burton as a witness, who was sworn in and adopted his pre-filed testimony.[67] No party had any questions for Mr. Burton, nor did the Commission.[68] Mr. Burton was dismissed and final closing arguments were heard from the parties.[69]

O. Final Votes at Open Meeting on June 10

On June 10, 2021, the Commission held an Open Meeting and made its decision in response to the Supreme Court's remand. After deliberations, the Commission voted unanimously as follows:

> The Commission finds that the Burton Affidavit and the New Evidence has no effect on the Commission's decision and conclusions of law, and the Commission hereby confirms Order No. 23811 based on the Agreed Facts that were before the Commission at the time of issuance of that order.

The findings of fact and citations to the rules and cases upon which the Commission rested its conclusion are set forth in the remaining body of this Order below.

[65] *Id.* at 11.
[66] *Id.* at 11-12, 14-15.
[67] *Id.* at 16-17.
[68] *Id.* at 18-19.
[69] *Id.* at 18-19, 27-34.

II. THE MANDATE RULE – THE RHODE ISLAND SUPREME COURT'S PRECEDENT ON THE SCOPE OF THE REMAND

There is significant case law setting forth the standard that governs the scope of proceedings when a case has been remanded by the Supreme Court. For example, the Court has stated:

> We consistently have held that, on remand, the lower courts may not 'exceed the scope of the remand or open up the proceeding to legal issues beyond the remand.' . . . 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.' . . . Indeed, 'the opinions of this Court speak forthrightly and not by suggestion or innuendo' and it is therefore 'not the role of the trial justice to attempt to read 'between the lines' of our decisions.[70]

This mandate rule not only applies to lower courts, but also to administrative bodies.[71] The Supreme Court has been unequivocal, stating: "Our cases make clear that the lower courts and administrative bodies that receive our remand orders may not exceed the scope of the remand or open up the proceeding to legal issues beyond the remand."[72]

The Supreme Court has interpreted its own authority to be limited by the provisions of R.I. Gen. Laws § 39-5-5, barring it from considering new evidence on appeal from a Commission decision unless the provisions of R.I. Gen. Laws § 39-5-5 are followed to introduce the new evidence.[73] Given this clear standard, the Commission is prohibited from expanding its decision and conclusions beyond the limited boundaries of the remand order issued by the Supreme Court.

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[70] *Sansone v. Morton Machine Works, Inc.*, 957 A.2d 386, 398 (R.I. 2008)(citations omitted) (emphasis in original). This quote from the *Sansone* case cited *Willis v. Wall*, 941 A.2d 163, 166 (R.I. 2008); *RICO Corp. v. Town of Exeter*, 836 A.2d 212, 218 (R.I. 1987); and *Valley Gas v. Burke*, 415 A.2d 165, 165 (R.I. 1980), among others.
[71] *See Valley Gas Co. v. Burke*, 415 A.2d 165 (R.I. 1980).
[72] *Willis v. Wall*, 941 A.2d 163, 166 (R.I. 2008)(citations omitted).
[73] *See East Greenwich Fire Dist. V. Penn Central Co.*, 302 A.2d 304, 310 (R.I. 1973).

III. THE SCOPE OF THE REMAND IN THIS CASE

The scope of the remand in this case is very narrow. The Court's directive came from the first remand order, which stated in pertinent part:

> "Upon consideration of the affidavit, this Court finds the newly discovered evidence to be of such character and sufficient importance to warrant reconsideration of the matter by the Commission. . . .
>
> "All proceedings in this Court shall be stayed so that the Commission may *consider the affidavit of new evidence* and confirm, alter, amend, rescind, or reverse the order being appealed."[74]

As written, the plain language of the remand directs the Commission to "consider the affidavit of new evidence." It does not direct the Commission to consider additional policy matters, consider what is happening in the industry, or consider what is happening to distributed generators. It very clearly, unambiguously, and plainly states that the Commission consider the Burton affidavit and the new evidence to determine whether, knowing those facts, the Commission's decision in Order No. 23811 should be altered.[75]

IV. THE NEW EVIDENCE TO BE CONSIDERED

Not only was the scope of the remand narrow in its focus, but the Affidavit of New Evidence which the Supreme Court directed the Commission to consider was very narrow in its subject matter. It consisted of an affidavit of Dennis Burton. The text of the affidavit included: (i) Mr. Burton identifying himself, (ii) a one-sentence description of his role in a dispute with National Grid (i.e., Narragansett Electric), (iii) a one-sentence statement that an access to public records request had been filed with the Division on April 21, 2020, and (iv) the following statement:

> "After multiple refusals to produce and appeals of those refusals, on November 9, 2020, the Rhode Island Attorney General's office ruled that the Division had violated APRA and ordered production of the requested records. That decision is attached as Tab A."

[74] Order, SU-2020-106-M.P. (Jan. 12, 2021)(emphasis added).
[75] The Burton Affidavit and 24 pages of emails were included with the Supreme Court's January 12, 2021 remand.

Attached to the affidavit were copies of emails that had been produced by the Division in response to the APRA request on November 12, 2020. As stated above, the email evidence consisted of 24 pages of 13 emails between Division counsel and Narragansett counsel, most of which consisted of arranging meetings; but the last of which was a sharing of legal analysis between Narragansett and the Division.

The Attorney General's letter was a well-reasoned decision finding that the Division had violated APRA by not producing the requested documents. According to the letter, the Division had made a claim of work product privilege. The key foundation for the Division's claim appears to have been based on a defense that the communications sought allegedly involved a shared work product privilege based on the "common interest doctrine." Among other reasons given in the decision of why the work product privilege did not apply was a rejection of the applicability of the "common interest doctrine." According to the decision, the doctrine was not a privilege itself, but an exception to waiver.[76] The letter explains that the exception is applicable to "communications that were made 'in the course of a joint defense effort.'"[77] The letter then concludes that the Division had failed to provide evidence that "it was engaged in such a joint defense effort with National Grid at the time when these emails were exchanged."[78] Accordingly, the Attorney General found that the Division had no basis to withhold the requested documents. While finding a violation of APRA, the letter nevertheless noted: "We were not presented with evidence that the violations found herein were willful and knowing, or reckless."[79]

[76] Attorney General Letter PR-20-65 at 8 (Nov. 9, 2020).
[77] *Id.*
[78] *Id.*
[79] *Id.* at 9.

Most of the emails involved scheduling. The communications appear to have been initiated by counsel for the Division on October 30, 2019, sent to outside counsel for Narragansett Electric. The message stated:

> Hi Jack
>
> I am reviewing the DJ Petition of Seth Handy and I would like to get together with you if possible, to understand your position with respect to the case. Perhaps we could meet [sic] Division, if you have time.
>
> Thanks
> Jon

The subsequent emails continue in a string, with additional individuals added to the chain, attempting to schedule a meeting, which appears to have eventually occurred on November 12, 2019.

An email sent from counsel for Narragansett Electric to counsel for the Division was then sent on November 12, stating in the first sentence: "Thank you for the opportunity to discuss this matter today. As I mentioned, I am providing reference to some of the cases we intend to rely upon and a brief overview of our position." The remainder of the email contains a lengthy description of counsel's reasoning, including case law references, describing why counsel for Narragansett Electric believed that the study costs and system modification costs should be the responsibility of the interconnecting customer.

The penultimate email in the chain was one sent by counsel for the Division to counsel for Narragansett Electric on November 13, 2019, stating:

> Matt
>
> Thanks for sharing the case law with me. I agree with your analysis of the subject matter [sic] there is clearly an obligation on the part of National Grid pursuant to ISO Tariff I.3.9 to notify ISO of the development plans renewable generators of 1MW and 1 to 5 MW to determine their impact on the transmission system and

> creates a relationship to pass through the study costs including system modification costs. I also agree that the DG Interconnection tariff 2180 provides sufficient authority to charge back the costs in question here. I will be taking a similar position on this case. I appreciate you taking the time on this matter.

The last email was a response from counsel for Narragansett Electric on November 14, 2019, stating: "Thank you Jon. We appreciate the Division's input in this docket."

This evidence can be summarized in a simple way:

(1) The Division resisted turning over emails in response to an APRA request by the Petitioner, believing the Division had a work product privilege based on the "common interest doctrine;"

(2) The Attorney General found that the Division's assertion of privilege was not valid and ordered the emails to be provided to the Petitioner; and

(3) The emails show communications between the Division's counsel and counsel for Narragansett Electric, through which legal analyses of the case were shared, which analyses supported a conclusion to oppose the Petitioner's petition.

It is this evidence which the Commission must review to determine whether to alter Order No. 23811.

V. POSITIONS OF THE PARTIES

A. Petitioner's Position

(1) Summary of Petitioner's Argument and Theory of the Case

Considering all of the filings made by Petitioner on remand, and the oral argument, the Commission is able to condense and summarize Petitioner's broad theory, claims, and position in this case as follows:

(i) That Petitioner is greatly concerned that the regulatory processes employed to review decisions impacting renewable generators is biased, based on the belief that

the utility exercises "undue influence" on the state's ratepayer advocate, the Division;[80]

(ii) That the Petitioner "respects the authority and integrity of the State Agencies that have managed and advocated in this dispute," and Petitioner "[does] not question the integrity or ethics of any individuals," but it was the "process and outcome in resolving mediation" that raised Petitioner's concern;[81]

(iii) That there is a biased process caused by a phenomenon which Petitioner describes as "regulatory capture," through which the utility has had unreasonable and inappropriate influence over the regulatory processes;[82]

(iv) That the Petitioner appealed the Commission's decision because it considered itself to be an "advocate for renewable energy that results in a lower carbon footprint" and wanted to use the appeal "as a vehicle to hopefully engage more substantive consideration of [Petitioner's] concerns raised in Docket No. 4981;[83]

(v) That Petitioner did not actually incur additional costs from the transmission study that was at issue in the case, but experienced delays and remains concerned that the PUC's decision will "thwart Rhode Island's energy goals;"[84]

(vi) That after the decision in Docket No. 4981 and before Petitioner filed the appeal with the Supreme Court, Petitioner was informed that it would not actually incur transmission expenses, but nevertheless "appealed out of concern for the integrity

[80] Hr'g Tr. at 47-48 (Jun. 2, 2021).
[81] Burton Pre-filed Test. at 7 (May 25, 2021).
[82] Hr'g Tr. at 49-50, 80 (Jun. 2, 2021); Motion for Reconsideration at 6-7 (Jun. 7, 2021).
[83] Burton Pre-filed Test. at 8, 10 (May 25, 2021)
[84] Burton Pre-filed Test. at 8 (May 25, 2021).

of the regulatory advocacy process and the grave underlying implications for its future projects;"[85]

(vii) That the correspondence of emails reflected in the Affidavit of New Evidence indicates the bias which is a concern of Petitioner;[86]

(viii) That the communications reflected in those emails is evidence that the Division violated *ex parte* rules prohibited under R.I. Gen. Laws § 42-35-13 of the Administrative Procedures Act;[87]

(ix) That the Division must be held to a higher standard of independence than that of any other party in interest and refrain from *ex parte* contacts;[88]

(x) That the communications reflected in those emails is evidence that the utility, Narragansett Electric, violated its duty under Rhode Island law not to unduly prejudice or disadvantage the Petitioner in the case that proceeded at the Commission;[89]

(xi) That the Division is not carrying out its duties properly as a public interest advocate under Title 39;[90]

(xii) That the Division's assertion of "common interest" work product defense during the APRA process is evidence that the Division has not been carrying out its proper role as a regulatory advocate;[91]

[85] Hr'g Tr. at 48-49 (Jun. 2, 2021).
[86] Hr'g Tr. at 81 (Jun. 2, 2021).
[87] Petitioner's Reply Brief at 2-4 (May 26, 2021).
[88] *Id.* at 3.
[89] Petitioner's Brief at 7-8 (Apr. 30, 2021)
[90] Petitioner's Reply Brief at 2, 4 (May 26, 2021).
[91] Petitioner's Brief, at 9-10 (Apr. 30, 2021).

(xiii) That the improper influence that the utility had over the Division is reflected in the communications and resulted in the process that unfolded in the case before the Commission to be biased and led to a one-sided decision;[92]

(xiv) That, while the Commission itself did not proceed with bias, the Division's bias and its legal brief improperly influenced and led to the Commission reaching an incorrect result in its Order, as reflected by the Commission citing the Division's position in the Commission's Order No. 23811;[93]

(xv) That the Petitioner maintains that it has the right to an evidentiary hearing to put forward expert witnesses that can explain "regulatory capture," explain how important the role is of the Division, and provide facts that show how developers of distributed generation projects have been prejudiced by the regulatory processes and decisions relating to transmission upgrades; and

(xvi) That because of the biased process caused by the utility's undue influence that pervades the regulatory processes, the Commission should reconsider its decision.

(2) Petitioner's Initial Brief

The Commission asked the Petitioner to address five questions in its Initial Brief. Below is a summary of Petitioner's responses:

> *Question 1*: Among the information contained in the "affidavit of new evidence" referenced by the Supreme Court in its order of January 12, 2021, please identify what the Petitioner believes constitutes new evidence (i.e., evidence that was not before the Commission when it made its decision).
>
> Petitioner's Response to Q1:
>
> "The new evidence includes, but is not limited to, the fact that the Division of Public Utilities and Carriers: 1) claimed a "common interest privilege" with National Grid in docket 4981 that made its documented correspondence with National Grid attorney work

[92] Reply Brief at 4 (May 26, 2021).
[93] Hr'g Tr. at 80-83 (Jun. 2, 2021),

product, protected against disclosure, 2) consulted extensively with National Grid's legal counsel, Keegan Werlin, LLP, in the development of its legal position in docket 4981, and 3) received an email from National Grid's counsel which was reproduced as the Division's comments in docket 4981."[94]

It is important to note that during oral argument, Petitioner clarified point number 3, stating that when the brief claimed that the Division "reproduced" the email from Narragansett Electric, Petitioner did not mean copying the text. Petitioner meant that the Division made similar arguments.[95]

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

Summary of Petitioner's Response to Q2:

The first sentence of Petitioner's response to this question places in context the argument of Petitioner. It stated: "In order to understand relevance, the Commission may need to appreciate the great economic and policy weight of the issue put to the Commission in docket 4891."[96] The next three and a half pages of the brief addressed broad policy implications and revisited the arguments that were made in the original proceedings before the Commission issued Order No. 23811.[97] None of the discussion directly discussed the connection to the new evidence. The discussion included policy implications of costs of development, National Grid's practices in charging customers under its federal tariffs, complaints about the way National Grid administers its tariffs, the profits National Grid makes in the system, the size of energy bills to consumers, the pending transaction where Narragansett Electric is proposing to be sold to a Pennsylvania company, the state's net metering laws, and the application of principles of cost causation.[98]

[94] Petitioner's Brief at 3 (Apr. 30, 2021).
[95] Hr'g Tr. at 117 (Jun. 2, 2021).
[96] Petitioner's Brief at 3 (Apr. 30, 2021).
[97] *Id.* at 3-7.
[98] *Id.*

The response to Question 2 also argues that the Division's "collaboration with National Grid" demonstrated a failure of the Division in carrying out its statutory duties, and the Division's actions created an illegal and unreasonably biased decision-making process.[99] The brief goes on to assert that the Division was not doing its statutory job.[100]

The arguments then turned to an allegation that Narragansett Electric violated R.I. Gen. Laws § 39-1-35, which Petitioner maintained prohibits undue or unreasonable prejudice.[101] Petitioner asserted that "National Grid exerted undue influence, reflected in the "obvious symmetries in the position papers filed by National Grid and the Division."[102] The brief then asserts that the Commission saw "no cause to address such apparent prejudice."[103]

The Petitioner criticizes the Division's assertion of a "common interest" defense during the APRA process. The brief makes the statement: "The fact that the State's advocate believed that it shared National Grid's economic interest in the resolution of docket 4981 exposes the rank prejudice that renders docket 4981 and the Commission's order illegal and unreasonable."[104] The brief then turns to Rhode Island law on *ex parte* communications, alleging that the Division's collaboration with National Grid violated the administrative procedures acts prohibition against *ex parte* communications. According to the Petitioner, "[t]he Division is an agency that was assigned to make findings of fact and draw conclusions of law in a contested case."[105]

> *Question 3*: Of the new evidence identified, please indicate with specificity the extent to which there are any facts (within the new evidence) which the Petitioner believes are now in dispute.

[99] *Id.* at 7.
[100] *Id.* at 7-12.
[101] *Id.* at 7. R.I. Gen. Laws § 39-1-35 cited by Petitioner (presumably by mistake) actually does not address undue or unreasonable prejudice. It is a conflict of interest provision applying to Commissioners and the Commission clerk.
[102] Petitioner's Brief at 8 (Apr. 30, 2021).
[103] *Id.* at 9.
[104] *Id.* at 10.
[105] *Id.* at 12.

Summary of Petitioner's Response to Q3:

The Petitioner did not answer this question, asserting that [t]he Commission's question is off point."[106] According to the Petitioner, "'New evidence' does not have to put facts in dispute to be relevant to the Commission's decision."[107]

> *Question 4*: Referencing the "Agreed Facts" signed by the Petitioner and National Grid that was used by the Commission in its original decision, please indicate whether the Petitioner believes the facts upon which the Commission based its decision now need to be amended to include facts from the new evidence. If so, please indicate how the Petitioner recommends the new facts would be written in a stipulation.

Summary of Petitioner's Response to Q4:

The Petitioner asserted again that [t]he Commission's question is off point."[108] The Petitioner repeated, "'New Evidence' does not have to put facts in dispute to be relevant to the Commission's decision.[109] Then Petitioner asserted: "The evidence of prejudice and the Division's dereliction of its duty presented here is overwhelmingly relevant to the Commission's disposition of docket 4981, whether it involves disputes of fact or not."[110]

> *Question 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.

Summary of Petitioner's Response to Q5:

The first sentence in Petitioner's brief in response to this question places in context the Petitioner's perspective: "It is disturbing that the Commission persists with its questioning of how this new evidence might impact its position in docket 4981, after a second remand from the Supreme Court."[111] Much of the remainder of the response to this question then addresses other

[106] *Id.* at 13.
[107] *Id.*
[108] *Id.* at 14.
[109] *Id.*
[110] *Id.*
[111] *Id.* at 14.

dockets that were before the Commission, at least two of which post-dated the Commission's Order No. 23811. Much of what followed consisted of other policy issues and complaints about how transmission cost allocation issues were being handled in the regulatory processes in Rhode Island.[112]

In the "Conclusion" of the brief, Petitioner quotes the enabling act from Title 39, and asserts a complaint that "we can no longer afford unwarranted obstructions to our new energy economy."[113] According to the Petitioner, the Commission's Order No. 23811 "ignored Rhode Island policy for the benefit of the utility's worldview and profit."[114]

B. Position of Narragansett Electric

Narragansett Electric's brief in response to the Petitioner's initial brief asserts that the new evidence "has no relevance whatsoever to any of the issues considered and decided by the PUC in this docket."[115] According to the utility, the new evidence did not affect the Agreed Facts to which the law was applied by the Commission.[116] The brief also maintains that the Petitioner "evaded the PUC's questions because it is clear the 'new evidence' advanced by [Petitioner] has no relevance to the Agreed Facts or the legal questions that were before the PUC when it issued the Order."[117]

Narragansett Electric also argued that the scope of review in this remand is "limited strictly to the remand order."[118] The utility also maintained that all of the communications between Narragansett Electric and the Division were permissible and appropriate.[119] Citing *Narragansett*

[112] *Id.* at 15-20.
[113] *Id.* at 21.
[114] *Id.* at 21,
[115] Narragansett Electric Response Brief at 1 (May 14, 2021).
[116] *Id.*
[117] *Id.* at 3-4.
[118] *Id.* at 4.
[119] *Id.* at 4-6.

Elec. Co. v. Harsch, 368 A.2d 1194 (R.I. 1977), the utility maintained that the Division was acting as a party before the Commission.[120] Further, the brief asserted that "[t]he Division was not a decision-making body in this case, nor did it serve a regulatory function" with respect to Narragansett Electric or the Petitioner.[121] The Company also argued that the *ex parte* rules did not apply to the Division in this case, because the Division was a party, not the regulator.[122]

Narragansett Electric then maintained that the Petitioner failed to answer the Commission's questions, addressing each of the responses that Petitioner gave in its initial brief.[123] In sum, the utility maintained that all the communications were permissible and none of the facts contained in the new evidence affect the Agreed Facts or the interpretation of the law.[124]

C. The Division's Position

The Division's brief in response to Petitioner argued that the scope of the remand was very limited and cannot be exceeded.[125] According to the Division, the case law from the Supreme Court requires the Commission only to consider the affidavit of new evidence, maintaining that the Supreme Court did not authorize the Petitioner "to seek additional discovery, present additional evidence, or seek additional testimony of witnesses in the remand proceeding."[126]

The Division argued that Petitioner is improperly attempting to re-argue many of the original arguments that were before the Commission.[127] The Division also took issue with Petitioner's claim that the Division's communications violated the *ex parte* rules set forth in R.I. Gen. Laws § 42-35-13 of the Administrative Procedures Act (APA).[128] Further, the Division

[120] *Id.* at 4.
[121] *Id.* at 5.
[122] *Id.* at 6.
[123] *Id.* at 8-10.
[124] *Id.* at 10.
[125] Division Response Brief at 1-2 (May 14, 2021).
[126] *Id.* at 4.
[127] *Id.*
[128] *Id.* at 7.

maintained that it was not an agency charged with making findings of fact and conclusions of law in Docket No. 4981.[129] The Division cited *Arnold v. Lebel*, 941 A.2d 813 (R.I. 2007), and maintained that the APA rule against *ex parte* communications applies only to the decision-maker, and the Division was not the decision-maker in Docket No. 4981.[130] The Division also argued that Petitioner's assertion of prejudicial administrative process in reliance on R.I. Gen. Laws § 39-1-35 was not a claim that can be asserted against the Division.[131] The Division pointed out that the statute relates to a Commissioner or clerk of the Commission and therefore does not apply in this instance.[132]

The Division emphatically argued that "[t]here 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 [Petitioner]."[133] Related to this comment, the Division added a footnote on page 8 (footnote 8) which was an emphatic criticism of the Petitioner's allegations and its counsel's advocacy:

> 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,

[129] *Id.*
[130] *Id.* at 7-8.
[131] *Id.* at 6.
[132] *Id.* at 5 n.4, 8 (May 14, 2021).
[133] *Id.* at 8.

> 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. 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.[134]

In conclusion, the Division asserted that Petitioner's allegations of prejudice and disadvantage have no basis in fact.[135]

D. Petitioner's Reply Brief

In reply to the briefs of Narragansett Electric and the Division, Petitioner asserted: "The Diocese is not surprised that National Grid's brief neglected to address the incongruity of what happened here with the Division's enabling act, but it was surprising that the attorney general does so as well."[136] The Petitioner asserted that the question posed by the Supreme Court's second remand was for the Commission to determine "whether the Division could have done its job properly in this dispute where it consulted extensively with National Grid in the development of its legal position and then claimed a common interest with the utility that made their communications attorney work product."[137]

The Petitioner accused the Division of "obfuscation of its responsibility to the people of Rhode Island" with respect to its responsibilities set forth in Title 39.[138] It referred to the Division's arguments relating to the *ex parte* issue as "perplexing," maintaining that neither the utility nor the Division "rebut that the Division's interactions with National Grid were prohibited *ex parte* consultations."[139] In response to the Division's and Narragansett Electric's argument that the

[134] *Id.* at 8-9, n. 8.
[135] *Id.* at 10.
[136] Petitioner's Reply Brief at 1 (May 26, 2021).
[137] *Id.* at 2.
[138] *Id.*
[139] *Id.*

Division was a party in the case, Petitioner maintained that the Division was "still charged with assisting the Commission in making conclusions of law," asserting that "the Division must be held to a higher standard of independence than that of any other party in interest and refrain from *ex parte* contacts."[140] The Petitioner alleged that the Division's "exclusive consultation and collaboration had a clear and substantial impact on the Commission's decision."[141] According to Petitioner, this led to a "one-sided decision" by the Commission.[142] The Petitioner criticized the Division because "[i]t did not consult with the Diocese regarding the merits of its position" and for not taking into account many policy issues which were important to the Petitioner.[143]

In a subsection of the brief entitled: "The Division has an Ongoing Track Record of Not Fulfilling its Duty to Independently Represent the Public's Interest on These Matters That Causes Severe Systemic Imbalance and Harms all Ratepayers," the Petitioner's Reply brief again criticized how the Division has exercised its regulatory role.[144] Amidst the multiple criticisms, Petitioner asserted "when the Division does not explore all sides of such an issue, it leaves entities like the Diocese with the obligation to advocate for the public good."[145]

Petitioner's brief next addresses its claim of a right to an evidentiary hearing, stating: "The Diocese stands by its objection to the Commission's procedure. The questions put forth by the Commission for briefing *are patently designed* to support a repeat, summarily reached second confirmation that no new relevant factual evidence warrants reconsideration and reversal of the Commission's legal conclusions."[146] After accusing the Commission of deliberately setting up a

[140] *Id.* at 3.
[141] *Id.* at 4.
[142] *Id.*
[143] *Id.* at 5-6.
[144] *Id.* at 7-11.
[145] *Id.* at 9.
[146] *Id.* at 11 (emphasis added).

process to improperly exclude new relevant factual evidence, Petitioner inexplicably agrees with the Division's argument that the questions in Docket No. 4981 "were issues of law, not of fact," arguing that "[t]he focus on whether new evidence raises any new questions of fact is plain distraction."[147] The Petitioner goes on to maintain that it was "procedurally anomalous to require oral argument as a 'hearing' before the presentation of relevant evidence."[148]

The brief provided a description of pre-filed testimony for seven witnesses who would testify about many facts that Petitioner maintains are important to include in the record.[149] Petitioner also provided a list of several dockets, all of which commenced after the appeal from Order No. 23811 was taken, requesting the Commission take "judicial notice," including a complaint filed at the Federal Energy Regulatory Commission apparently filed in 2021.[150]

Finally, Petitioner's Reply brief asserted that the "new evidence of prejudice and administrative indiscretion requires the Commission's reconsideration of all eight requests."[151] Following this argument, Petitioner expressed doubt about whether the Commission itself had remained "sufficiently independent to reconsider Order No. 23811," restating the issues argued in the Petitioner's "Motion for Recusal, Withdrawal of Notice and Further Assurance Against Bias."[152] In conclusion, the brief stated: "The Diocese *asks the State of Rhode Island and any authority assigned the reconsideration* of Order 23811, to require National Grid to meet its burden of proof that these new transmission system charges on local renewable energy projects that do not use the transmission system are authorized by federal law are just and reasonable, even if such

[147] *Id.*
[148] *Id.* at 12.
[149] *Id.*
[150] *Id.* The cases were: Docket No. 5090, filed in November 2020; Docket No. 5013, filed in January 2021; Docket No. 5128, filed in February 2021; Docket No. 5149, filed in April 2021; and FERC Docket EL21-47, filed in February 2021.
[151] *Id.* at 14.
[152] *Id.* at 14-16.

proof must be sought through an open and transparent proceeding initiated at the Federal Energy Regulatory Commission."[153]

E. Oral Argument

On June 2, 2021, oral argument was held. The facts and travel of the case as described earlier in this Order addressed some of the procedural issues, which will not be repeated here. In addition to the procedural issues, the parties were given unlimited time to make their arguments. Below is a summary of the main arguments made by each party relating to their overall positions.[154]

(1) Petitioner

The Petitioner was given the first opportunity to present his case. According to Petitioner, the "remand was on evidence of utility influence on the state's advocate . . . and for a hearing to reconsider the decision."[155] Counsel for Petitioner explained that the reason for Petitioner's appeal was because of the issue of utility influence, "regardless of whether [Petitioner] was charged for transmission system costs."[156] Counsel also disclosed for the first time: "After the decision in Docket No. 4981 and just before they took their appeal, National Grid informed the Diocese that it would not actually incur transmission system expenses, but the Diocese still appealed out of concern for the integrity of the regulatory advocacy process and the grave underlying policy implications for its future projects."[157]

[153] *Id.* at 16 (emphasis added). It is not clear why Petitioner states in its brief to the Commission that it is asking "the State of Rhode Island and any authority assigned" for relief, instead of the Commission itself.
[154] Other comments by the parties made during argument in response to specific questions raised by the Commission are noted and addressed in separate sections of this Order where the relevant substantive issues are discussed.
[155] Hr'g Tr. at 47-48 (Jun. 2, 2021).
[156] *Id.* at 48.
[157] *Id.* at 48-49.

Petitioner argued that the Division's claim of "common interest" and its consultation with the utility was "incongruous with Rhode Island's charge to keep the public interest."[158] Petitioner then accused the Division of not fulfilling its statutory charge to protect the public interest when it consulted "solely with the utility" and adopted its position.[159] Petitioner reiterated its position that the Division was an agency "charged with a duty to reach legal conclusions." Thus, argued counsel, the Division is subject to the *ex parte* rules of the APA.[160]

Petitioner proceeded to allege "bias" on Order No. 23811, pointing out that the utility had presented its position to the Division and the Division's position was actually cited by the Commission in its order.[161] Petitioner criticized the Division and the Commission for not having considered certain policy implications of its decision, maintaining that this impact was why it was important for the Commission to hear the testimony of other developers.[162]

Petitioner restated its concern about utility influence and admonished the Commission, stating that '[t]he Commission's refusal to commit to an evidentiary hearing is just one manifestation of that injustice with clear evidence of the influence wielded on the people's advocate placed right before it."[163] Counsel made other remarks, expressing that "[t]he Diocese should not need to use its limited resources" for its advocacy.[164] Counsel asserted that harm was being created for "homegrown" renewable projects.[165] Counsel then accused the utility of collecting "unauthorized charges" and maintained that as a result of National Grid selling its

[158] *Id*.
[159] *Id.* at 50.
[160] *Id.*
[161] *Id.* at 51.
[162] *Id.* at 51-52.
[163] *Id.* at 54.
[164] *Id.*
[165] *Id.* It is mystifying to the Commission that the Diocese would use its "limited resources" to fund and advocate for what it characterizes as a tragedy when it was informed prior to its appeal that it would not incur any transmission system upgrade expense. *See* Burton Pre-filed Test. at 8 (May 25, 2021).

distribution business, the Company was "now well-positioned with its new arm Geronimo, National Grid Ventures, to compete against Rhode Island's wrongfully stalled, but policy preferred local renewable energy options."[166] Counsel finished the summary of his client's case by stating: "The consequences of this regulatory capture are not inconsequential nor are they pretty."[167]

(2) Narragansett Electric

Narragansett Electric's summary of its position stated its view that the docket addressed precise legal questions based on an agreed set of facts, "and at the conclusion of that proceeding the Commission issued Order 23811 independently after its own consideration of the legal arguments and facts before it and set forth what is . . . a well-reasoned, thorough, thought-out decision that answered those legal questions."[168] Now, according to the utility, the Petitioner is trying to "expand the proceeding into a broader inquiry into the propriety of the existing regulatory and legal structures that regulate utilities in this state and, in fact, in this country."[169]

Counsel for the utility noted the Supreme Court's two remands, stating, "while I can understand that perhaps some confusion may have arisen from the initial action and then a subsequent remand, I would submit to the Commission that that is a procedural issue and it was in the form of the response that the Commission provided to the Supreme Court regarding its previous decision and not the substance and scope of the inquiry that it undertook on the initial remand."[170] Regarding the issues in the remand, Narragansett Electric asserted that the Division was a party, just as it is now a party on this remand, and the communications at issue on this remand were

[166] *Id.* at 54-55.
[167] *Id.* at 55.
[168] *Id.* at 55-56.
[169] Id. at 57-58. The transcript appears to contain either a mistype or misstatement indicating that it was the "Commission" which is trying to expand," but the context was clear that counsel intended to say the "Petitioner."
[170] *Id.* at 58-59.

consistent with the rules.[171] "In no way does National Grid in any of those communications in any way urge or attempted to influence the Division to adopt its position. It's merely communicating what its position was at the request of Division counsel."[172] Noting that this type of communication between parties is "unremarkable," Narragansett Electric asserted that it is the way parties operate before administrative bodies and the courts across the country and "really around the world." *Id*. According to the utility, the evidence of those communications had "no impact on any of the facts that were before the Commission on the narrow questions of law that were presented to it in this docket."[173]

Citing the principle that the scope of a remand cannot be expanded under Rhode Island law, Narragansett Electric argued that the Commission should reject the Petitioner's request to introduce what Narragansett refers to as "collateral evidence focused on the process before the Commission."[174]

(3) The Division

The Division's argument led with the principle that the scope of the remand was "extremely clear and precise."[175] The Supreme Court could have issued an order that was much more expansive, but they did not.[176] Asserting that the new evidence is limited to the affidavit of new evidence and its content, including the emails, the Division argued that "there was no evidence in those documents that showed any undue influence by National Grid to the Division.[177] It was

[171] *Id.* at 59-60.
[172] *Id.* at 60.
[173] *Id.*
[174] *Id.* at 61.
[175] *Id.* at 64.
[176] *Id.*
[177] *Id.* at 65.

simply two parties discussing the merits of some fairly complex and somewhat novel or new issues before the Commission."[178]

With respect to the *ex parte* claim under R.I. Gen. Laws § 45-35-13, the Division argued that it is "clearly unfounded," as it does not apply to the Division.[179] The Commission, according to the Division, is the entity serving in a quasi-judicial capacity to which it applies, not the Division.[180]

The Division then addressed Petitioner's request to have the pre-filed testimony admitted in the record, asserting that it is irrelevant and immaterial to the issues currently before the Commission.[181] With respect to the Petitioner's claim of administrative prejudice and undue influence, the Division argued that it was outside the scope of the remand.[182] Moreover, the Division argued, that the claim is unfounded, stating that "[t]he claims of undue influence by National Grid to the Division and then an even further unsupported argument that the Division somehow was able to improperly influence the Commission and the Commissioners who reviewed and voted and prepared the order is clearly unfounded and should not be allowed here."[183]

(4) Petitioner's Response

After Narragansett Electric and the Division made their summary arguments, and before the Commission began to ask questions of the attorneys for the parties, Petitioner briefly responded, reiterating that Petitioner believed that the pre-filed testimony is relevant, but requested if not admitted as evidence, that the documents at least be included in the record that is given to

[178] *Id.*
[179] *Id.* at 66-67.
[180] *Id.* at 67.
[181] *Id.*
[182] *Id.* at 68.
[183] *Id.* at 69.

the Supreme Court.[184] Petitioner also clarified one point regarding the claim of improper influence stating:

> "We never made an argument that there was improper influence on the Commission. I thought I've been clear on that. There is impact of bias on the order, that is clear. The order quotes the Division's policy. It's not an issue of direct influence from the utility on the Commission. It's a fact that the direct influence on the Division and that that influence on the Division had impact on the order that issued in the case. That's what the Supreme Court asked for consideration of."[185]

Petitioner concluded this phase of the oral argument by arguing that the Commission's rules define a hearing.[186] According to Petitioner, "[t]he hearing definition clearly contemplates the parties' right to present evidence. It's a due process right."[187]

VI. ROLE OF THE DIVISION

The core issue that permeates this remand relates to the actions of the Division in communicating with Narragansett Electric about the facts and conclusions of law that were pending before the Commission. In that context, it is very important to address the role of the Division in cases before the Commission.[188]

There has been historical confusion outside of the building in which both the Commission and the Division have offices, about which agency is which, or whether there is more than one agency at all. The names "Public Utilities Commission" and the "Division of Public Utilities and Carriers" (also referred to as the "PUC" and the "DPUC") create confusion. Nevertheless, despite the similarities in names and acronyms, and the fact that both agencies are located in the same

[184] *Id.* at 71.
[185] *Id.* at 71-72.
[186] *Id.* at 72.
[187] *Id.*
[188] The Division has its own regulatory authority over the utility that is not assigned to the Commission which was not applicable in this case. *See* R.I. Gen. Laws § 39-1-3(b).

building at 89 Jefferson Blvd. in Warwick, the Commission and the Division are, in fact and in law, two separate and distinct agencies.

The history of the agencies has been no less confusing. In 1969, the General Assembly created the Public Utilities Commission and the Division of Public Utilities and Carriers within the Department of Business Regulation (DBR),[189] and even though within the DBR, both were independent agencies. The Commission, comprised of three individuals, was created to serve as a quasi-judicial tribunal with the power to conduct investigations and hearings on rates, tariffs, tolls, and charges imposed by public utilities.[190] The Division, led by an Administrator, was given the authority over what was not specifically assigned to the Commission.[191]

In its quasi-judicial capacity, the Commission holds hearings and weighs the evidence submitted by parties, balances the interests of the utility and ratepayers, and renders an impartial, unbiased decision based on the evidence submitted to it by the Division (almost always a party) and other parties.[192] The Division, as the ratepayer advocate, appears as a party before the Commission advancing evidence and arguments that it believes are in the best interest of *all* ratepayers. The Division, like any other party, can issue discovery, present expert testimony, and engage in all of the activities that any other party has the right to engage in. Unlike other parties, however, the Division is prohibited from appealing a decision of the Commission.[193]

The Court has long recognized the roles of the Commission and the Division. In *Narragansett Elec. Co. v. Harsch*, *supra*, the Court stated that "the General Assembly intended by its enactment to segregate the judicial and administrative attributes of ratemaking and utilities

[189] P.L. 1969, ch 240, §1.
[190] R.I. Gen. Laws § 39-1-3(a).
[191] R.I. Gen. Laws § 39-1-3(b); *see e.g. Harsch* at 401-402.
[192] R.I. Gen. Laws § 39-1-11.
[193] *See e.g., Providence Gas Co. v. Burke*, 419 A.2d 263, 270 (1980).

regulation and to vest them separately and respectively in the [C]ommission" and the Division.[194] Even though at the time of *Harsch* the Chairman of the Commission and the Administrator of the Division were the same individual, the agencies were still separate agencies. The Court described the judicial powers of the Commission comparing them to those of a trial justice in the courts.[195] It contrasted those powers with the duties of the Administrator of the Division as set forth in R.I. Gen. Laws § 39-3-1 *et seq.*[196] Referring to other sections of the statute that supported its interpretation that the General Assembly intended the Commission to be a quasi-judicial tribunal, the Court stated that the "Legislature perceived that, in matters brought for hearing before the [C]ommission, the [D]ivision would assume a role not unlike that of a party in interest."[197] The Division appears "on behalf of the public to present evidence and make arguments before the Commission" as an adversary participant in the Commission's hearings.[198]

In 1996, the independence and separation of the two agencies was made even clearer when Title 39 was amended to create a separate position for the Administrator of the Division.[199] While prior to that time, the Chairman of the Commission and the Administrator of the Division were the same person, the law created a clear divide in leadership. Although the two agencies have some degree of overlapping jurisdiction when there is no case before the Commission, the two agencies are and remain legally separate. Since the passage of the 1996 amendments, subsequent cases have continued to cite *Harsch*.[200] The Division is the public advocate in proceedings before the

[194] 117 R.I. 395, 402, 368 A.2d 1194, 1199 (1977).
[195] *Id.* at 402-403.
[196] *Id.*
[197] *Id.* at 404.
[198] *Id.* at 404-406.
[199] P.L. 1996, ch. 316, § 1.
[200] *In re A & R Marine*, 199 A.3d 533, 535 n. 3 (R.I. 2019); *Southern Union Co. v. Rhode Island Public Utilities Com'n*, 2006 WL 319282 (D.R.I. 2006)(where the Court stated that the Division is a party in all hearings before the Commission); *In re Island Hi-Speed Ferry, LLC*, 746 A.2d 1240 (R.I. 2000); *Providence Gas Co. v. Burman,* 119 R.I. 78, 106, 376 A.2d 687, 701(1977)(where the Court identified the Commission as the arbitar and the Division as the adversary).

Commission. "[I]t is the function of the division to serve the commission in bringing to it all relevant evidence, facts, and arguments that will lead the commission in its quasi-judicial capacity to reach a just result."[201]

In addition to the case law, the Commission's Rules of Practice and Procedure make numerous references to the Division in its role as a party participating in proceedings before the Commission. Most significant is Rule 1.2(20) of the Commission's Rules of Practice and Procedure, which defines "Party" as "*the Division* and each person named or admitted as a party to a proceeding before the Commission."[202]

Given the separation of the agencies as two entities, the case law, and the Commission's rules, there is no ambiguity about the role of the Division in Commission proceedings. The Division is one of the litigating parties. This is a matter of law and of fact. For that reason, this background presents an important foundational principle for addressing the claims of Petitioner who has alleged violations of statutes by both the Division and the utility, premised on either a lack of understanding or deliberate redefining of the Division's role in the regulatory proceedings that take place before the Commission. Each of those arguments will be addressed in the sections that follow.

VII. PETITIONER'S CLAIM OF *EX PARTE* COMMUNICATION BETWEEN THE DIVISION AND NARRAGANSETT ELECTRIC

One of the primary allegations Petitioner makes to support its position that the communications contained in the Affidavit of New Evidence reflect unlawful activity that requires Commission reconsideration of its decision, is that the Division violated the provisions of R. I.

[201] *Providence Gas Co. v. Burke*, 419 A.2d 263, 270 (1980).
[202] Rule 1.2(20)(emphasis added). *See also* Rules 1.2(10), 1.8(A), 1.10(C)(2), 1.10(D)(2), 1.16(E), 1.18(D), 1.19(D)(5), 1.21(E)(4), 1.21(K).

Gen, Laws § 42-35-13 of the Administrative Procedures Act (APA) pertaining to the prohibition against *ex parte* communications. That section states:

> "§ 42-35-13. *Ex parte consultations*.
>
> Unless required for the disposition of ex parte matters authorized by law, members 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 connection 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."

There is no dispute that the communications between counsel for the Division and Narragansett Electric involved the exchange of information about conclusions of law that were at issue in the case. As Petitioner agreed during oral argument (and neither the Division nor Narragansett Electric disputed), the email exchange speaks for itself, factually.[203] The issue before the Commission is whether the provisions of R.I. Gen. Laws § 42-35-13 apply to the Division.

According to Petitioner, the Division is an agency that was required to make conclusions of law in the case that was before the Commission.[204] Therefore, Petitioner argues, the Division violated the law when it exchanged legal analyses with Narragansett Electric without notifying the Petitioner and including Petitioner in the communications.[205] The Commission disagrees.

It is undisputed that the Division was and is a party to this case.[206] It also is undisputed that in litigation generally, there is nothing inappropriate about parties talking individually with each other.[207] The Petitioner, however, asserts that the Division, even though a party, has

[203] Hr'g Tr. at 116 (Jun. 2, 2021).
[204] *Id.* at 101.
[205] *See e.g.,* Diocese Reply Brief at 3-4 (May 26, 2021).
[206] Hr'g Tr. at 111-112 (Jun, 2, 2021).
[207] *Id.* at 112 (Jun. 2, 2021).

additional duties that trigger the *ex parte* rules.[208] According to the Petitioner, since it is the function of the Division to bring relevant evidence and conclusions of law to the Commission, the duty to make conclusions of law subjects the Division to the *ex parte* provisions of the Administrative Procedures Act.[209]

The Petitioner provides no legal citation or other evidence to support its proposition that the Division, even though it is not the decision-maker whose decision directly affects the rights of the parties in the case, is subject to the *ex parte* requirements. It is clear to the Commission that the *ex parte* rules apply to the ultimate decision maker, not a party who performs an adversarial role required by statute. The cases of *Arnold v. Lebel*, 941 A.2d 813 (R.I. 2007) and *Champlin's Realty v. Tikonian*, 989 A.2d 427, 440-441 (R.I. 2010) support this common-sense understanding that the prohibition set forth in the rules apply to the ultimate decision maker and do not prohibit the parties appearing before the decision maker from communicating with each other. Here, the Division was not the decision maker. And the Division is not staff of the Commission. Moreover, the Commission's rules regarding *ex parte* communications apply only to parties communicating with the Commission or its staff.[210] Those very rules define the Division as a party.[211]

The Commission finds the Petitioner's position and argument to be completely unpersuasive, without merit, and inconsistent with the general intent of the APA. It provided no case law, rule, or other evidence in support of its interpretation that this rule applies to the Division when it is acting as a party in a proceeding before the Commission. Petitioner's interpretation collides with a common sense reading of the clear and unambiguous law. Moreover, Petitioner's

[208] *Id.* at 100-101 (Jun. 2, 2021).
[209] *Id.* at 101 (Jun. 2, 2021).
[210] Commission Rules Rule 1.3(I).
[211] See n. 202, *supra.*

strained interpretation is inconsistent with the Commission's rules. The Division's communication with Narragansett did not create a legal defect and there was nothing illegal or improper about it.

For all of these reasons set forth above, the Commission rejects the argument of Petitioner and finds as a fact that there was no violation of *ex parte* rules by the Division in this case.

VIII. PETITIONER'S CLAIM OF UNDUE INFLUENCE AND PREJUDICE

In its Initial Brief, Petitioner alleges that Narragansett Electric subjected it to an "undue or unreasonable prejudice" in violation of R. I. Gen. Laws § 39-1-35. Petitioner cited this statutory reference twice in its brief.[212] This statute does not – as asserted by Petitioner – pertain to any prohibition against utilities. It relates to " "conflict of interest" rules applicable to the Commission clerk and Commissioners, as was correctly noted in the Division's response brief.[213]

Not in any of the filings made with the Commission nor at oral argument, did Petitioner correct this error. During oral argument, when the Chairman questioned Petitioner's counsel about the assertions of undue preference, the Chairman was referring to Petitioner's brief and incorrectly assumed that Petitioner's citation was accurate, thinking it pertained to the provisions that actually appear in §39-2-3 – not in §39-1-35. R.I. Gen. Laws § 39-2-3 states:

> § 39-2-3. Unreasonable preferences or prejudices.
>
> (a) If any public utility shall make or give any undue or unreasonable preference or advantage to any particular person, firm, or corporation, or shall subject any particular person, firm, or corporation to any undue or unreasonable prejudice or disadvantage in any respect whatsoever, the public utility shall be guilty of a misdemeanor and, upon conviction thereof, shall be fined not less than two hundred dollars ($200) nor more than five hundred dollars ($500) for each offense.
>
> (b) Nothing in this section or any other provision of the law shall be construed to prohibit the giving by any public utility, of free or reduced-rate service to an elderly person as defined by the division.

[212] Petitioner's Brief at 7-8 (Apr. 30, 2021).
[213] Division Response Brief at 5 n.4, 6 (May 14, 2021).

The Petitioner's incorrect citation and failure to respond to the Division's brief on this point likely constituted a waiver of any claim under R.I. Gen. Laws § 39-2-3. It is not the role of opposing parties to guess the statutory citation being relied upon by the opposing side. Since the Petitioner never cited a statute that relates to "undue prejudice or disadvantage," it certainly explains why neither Narragansett Electric nor the Division addressed R.I. Gen. Laws § 39-2-3 in their briefs. However, we draw no conclusion about such a procedural issue at this time, because the issue of waiver was never raised, nor did the parties have the occasion to raise it since the statutory provision was never identified by anyone, even during oral argument. In any event, for purposes of assessing Petitioner's claim, we assume that Petitioner intended to refer to R.I. Gen. Laws § 39-2-3, and address the claim in that context.

The Commission finds Petitioner's assertion of a statutory violation here to be very similar to its claim that the *ex parte* rules applied to the Division. Their similarity lies with the fact that in neither instance did Petitioner cite any case law or other authorities for the proposition being argued. In that regard, we note that the Commission is familiar with the provisions of R.I. Gen. Laws § 39-2-3. However, the Commission cannot recall any circumstances where that statutory provision has been interpreted in any context other than in the context of the provision of service, the terms of service, or the rates charged to customers. In other words, it prohibits the utility from giving unreasonable preferences or imposing unreasonable conditions related to service or rates for one customer that are different than what is given or imposed upon other similarly situated customers.[214]

In fact, R.I. Gen. Laws § 39-2-5 refers to the preceding series of sections in that chapter (R.I. Gen. Laws §§ 39-2-2 through 39-2-4) together, setting forth exceptions to the rules in those

[214] Of course, there are exceptions when different treatment is specifically authorized by approved tariffs, orders, law, or regulations.

sections, all of which pertain to non-discrimination in various services and rates. The Supreme Court, in a case involving claims of rate discrimination, interpreted those sections of chapter 2, stating: "Chapter 2 of Title 39 of the General Laws then goes on to provide for the duties of utilities and carriers. Included in those duties are provisions prohibiting discrimination by utilities and carriers. *See* §§ 39-2-2, 39-2-3, and 39-2-4."[215] Similarly, the Court viewed the same group of statutes in Chapter 2 and stated that "the pertinent statutory provisions merely prohibit varying rates for a like and contemporaneous service provided under substantially similar circumstances or rates that confer an undue or unreasonable preference or advantage upon a customer group."[216]

The view that R.I. Gen. Laws § 39-2-3 applies only to the services or rates provided to customers (as opposed to conveying due process rights in Commission proceedings) is quite logical when considered in the context of paragraph (b) of the section which authorizes a type of service preference for the elderly. Further, given that R.I. Gen. Laws § 39-2-3 is a provision that assesses criminal penalties and fines for violations, it also may mitigate against sudden, unprecedented expansion after over 100 years of apparent existence, with the last amendment made 50 years ago in 1971.[217]

Nevertheless, according to Petitioner's claim, Narragansett Electric had a duty not "to wield prejudice" against Petitioner in the way it engaged with the Division in this case.[218] Frankly, it was very difficult for the Commission to discern how Petitioner applies any statutory provision to its claim in the context of what transpired in this case, but it appears that Petitioner is claiming that Narragansett Electric violated the portion of the statute which states that a utility "shall [not]

[215] *In Re A&R Marine Corp*., 199 A.3d 533, 539 (R.I. 2019).
[216] *Energy Council of Rhode Island v. Public Utilities Commission*, 773 A.2d 853, 861-862 (R.I. 2001).
[217] P.L. 1912, ch. 795; G.L. 1923, ch. 253 § 40; G.L. 1938, ch. 122 § 37; G.L. 1956, § 39-2-3; P.L. 1971, ch. 256 § 2.
[218] Hr'g Tr. at 90-91(Jun. 2, 2021); Petitioner Brief at.8 (Apr. 30, 2021).

subject any particular person, firm, or corporation to any undue or unreasonable prejudice or disadvantage in any respect whatsoever." While Petitioner never said this, we assume that Petitioner is interpreting the words "in any respect whatsoever" to mean that it creates customer rights akin to due process in cases before the Commission. But even that is unclear and would be extremely expansive in application.

At oral argument, the Chairman – though unknowingly referencing the wrong statute that he saw in Petitioner's brief – probed the question of interpretation.[219] In response, the Petitioner failed to link any statute to what transpired, and more importantly, Petitioner never drew any connection to the communications contained in the Affidavit of New Evidence. Petitioner only repeated the assertion that Narragansett Electric was prohibited from prejudicing customers but provided nothing more.[220] From there, Petitioner takes a great leap to say that the entire regulatory process was infected by illegal "undue utility influence."[221] Petitioner also stretches that statement into an allegation that "our state agencies allowed prejudicial influence in their administrative law."[222]

In asserting this claim, the Petitioner cited the wrong statute, and provided no explanation of how any statute applicable to the utility prohibited Narragansett Electric's counsel from communicating with the Division as it did. Further, the Petitioner never drew a coherent link between any statutory prohibition applicable to the utility and the communications that occurred. It is apparent that counsel for Petitioner failed to properly examine the statute and offer any legal reasoning to support his claim. Petitioner failed to respond to the Division's brief which sited the provisions of R.I. Gen. Laws § 39-1-35 to illustrate how it applied only to the Commission and the

[219] Hr'g Tr. at 90-97 (Jun. 2, 2021).
[220] Hr'g Tr. at 90, 91, 94, 96 (Jun. 2, 2021).
[221] *Id.* at 48.
[222] Petitioner Reply Brief at.1 (May 26, 2021).

Commission's clerk, since no reply was provided to explain it. For all of these reasons, the Commission finds the Petitioner's argument unpersuasive and without merit.

IX. PETITIONER'S PRE-FILED TESTIMONY

The Commission next addresses why the exclusion of most of the pre-filed testimony from the record was not only proper but required by the Supreme Court's mandate rule.[223]

As explained in the Travel of the Case, the Commission established a procedural schedule through which the Commission would have oral argument after briefing.[224] After oral argument, the Commission intended to determine whether further hearings, including evidentiary hearings, were necessary. While a provisional date was set for possible hearings, no provision was made for filing pre-filed testimony. And while pre-filed testimony is referenced in the Commission's rules as a requirement when the Commission conducts an evidentiary hearing, the Commission's rules also leave the discretion to the Commission to forgo that step in the process, and recognizes that time may have an impact on any requirements.[225] In fact, the Commission regularly exercises its discretion to allow direct testimony without it being provided in writing when the timing for an order makes it necessary or convenient to do so.

The Commission was not convinced that an evidentiary hearing would be required if there were no disputed facts, as long as a proper hearing was held for each party to present their positions and arguments. Even in remand cases in which the Supreme Court has directed the lower court to hold evidentiary hearings, it has not always required literal compliance when holding the evidentiary hearing would not have added anything material to the record.[226] The Commission

[223] *See Sansone, supra*.
[224] Lucarelli email (Apr. 15, 2021); Lucarelli email (Apr. 27, 2021); Massaro Letter (Apr. 28, 2021).
[225] Commission's Rules of Practice and Procedure 1.21(E): "All direct testimony shall be presented in writing, unless otherwise allowed by the Commission. . . . Where time permits, direct testimony shall be prefiled at least fourteen (14) days prior to a scheduled hearing."
[226] *See RICO Corp. v. Town of Exeter*, 836 A.2d 212, 218-19 (R.I. 2002).

issued the briefing questions to determine whether there were any disputed facts that would require an evidentiary phase to the hearings. The Commission's notices to the Petitioner attempted to make it clear that oral argument would occur first to determine if further hearings were required.[227] Yet, Petitioner continued to assert that he was entitled to an evidentiary hearing in which he could put on witnesses about the subjects he believed were important for the Commission to consider.[228]

If Petitioner's counsel was confused about the process and believed he needed to pre-file testimony before oral argument, he never communicated this to the Commission or Commission counsel. Instead, Petitioner unilaterally filed six pre-filed testimonies without requesting leave to do so. While the Commission could have ruled the pre-filed testimony out of order, it instead, treated them as offers of proof in the context of Petitioner's request for an evidentiary hearing. In its deliberations, however, the Commission never had to reach the question whether the Supreme Court's directive to hold a "hearing" was a requirement to hold evidentiary hearings, because an evidentiary hearing took place.[229]

After receiving the pre-filed testimony, the Commission used the oral argument process to determine whether the testimony being proposed for admission was relevant to the case. Each of the testimonies are summarized in the Travel of the case set forth above. Other than the testimony of Mr. Dennis Burton, who signed the Affidavit of New Evidence, the Commission finds as a fact that none of the testimony was relevant to the narrow scope of the proceeding, because the content exceeded the scope of the remand. Moreover, given the Commission's rejection of Petitioner's statutory arguments that (i) the Division was subject to the *ex parte* rules and (ii) that Narragansett

[227] *See* n. 224, *supra.*
[228] Hr'g Tr. at 149-150 (Jun. 2, 2021).
[229] As noted, *supra*, even in remand cases in which the Supreme Court has directed the lower court to hold evidentiary hearings, it has not always required literal compliance when holding the evidentiary hearing would not have added anything material to the record. *See RICO Corp. v. Town of Exeter*, 836 A.2d 212, 218-19 (R.I. 2002).

Electric had a statutory duty that rendered illegal its communications with the Division, it is apparent that the testimony was irrelevant to the remand.

Each of the testimonies will be briefly addressed below:

(1) Pre-filed testimony of Kenneth Payne:

There is no link between the Affidavit of New Evidence and the testimony of this witness on climate change and his personal view of the applicability to the Commission and the Division of the Act on Climate which was not passed until 2021. While Mr. Payne is a well-respected former public official, the Supreme Court's mandate rule that does not allow this agency to exceed the scope of the remand bars its admission. The Commission finds as a fact that the testimony both exceeds the mandate rule and is not relevant.

(2) Pre-filed testimony of John Farrell and Karl Rábago:

This expert testimony regarding alleged prejudicial influence by utilities across the country far exceeds the scope of the remand. For reasons similar to the Payne testimony, the Supreme Court's mandate rule bars its admission. It also is not relevant.

(3) Pre-filed testimony of Fred Unger

(4) Pre-filed testimony of Matt Ursillo

(5) Pre-filed testimony of Scott Milnes

These three testimonies are addressed together because they all suffer from the same defect of irrelevancy. According to Petitioner's Reply Brief, two of them (Unger and Milnes) relate to the alleged impact that National Grid's administration of the affected system operator policy for transmission system upgrades has had on their company and projects. The testimony of Ursillo relates to the alleged impact of National Grid's administration of interconnection requirements and

process and the Division's alleged history of utility-aligned advocacy on his projects and on Rhode Island energy policy.

These testimonies have absolutely nothing to do with the limited issues before the Commission in this remand. They are beyond the scope of the remand and clearly barred by the Supreme Court's mandate rule not to exceed the scope of the remand. They make absolutely no connection between the communications reflected in the Affidavit of New Evidence and, therefore, are irrelevant to these proceedings on remand. Moreover, the Commission finds that even if it had allowed the pre-filed testimony of these witnesses and Mr. Payne, the content of the testimony would not have had any altered the legal findings in the Commission's April 14, 2020 decision in Order No. 23811.

The Commission did allow the testimony of Dennis Burton to be admitted. While it appeared that the vast majority of the Burton testimony was outside the scope of the remand, a portion of it could arguably be interpreted to have some relationship to the new evidence. For that reason, the testimony was allowed. Further, since Mr. Burton had sponsored the original Affidavit of New Evidence and he is an employee of the Episcopal Diocese, the Commission permitted his testimony in the record to allow him to tell his story. However, his testimony was allowed with the caveat that the Commission, when rendering its decision, would not rely on any of the testimony which appeared to be outside of the scope of the remand.[230]

X. FINDING THAT THE NEW EVIDENCE HAD NO EFFECT ON THE COMMISSION'S ORDER NO. 23811

Having determined that the Petitioner's two claims of statutory violations are meritless, the Commission considered the Affidavit of New Evidence to determine whether the Commission would confirm, alter, amend, rescind, or reverse the order being appealed.

[230] Hr'g Tr. 154-155 (Jun. 2, 2021).

The Commission evaluated the Petitioner's case and found most of the allegations and assertions to be completely outside of the scope of the remand. Almost nothing raised by the Petitioner during this remand related to consideration of the new evidence, which consisted of the Attorney General's APRA decision and the emails that were included in the APRA response. To the extent the Petitioner did arguably address the new evidence directly, however, the arguments of the Petitioner are not persuasive.

As summarized earlier, the Petitioner filed its appeal in a self-designated role as an "advocate for renewable energy." According to the Petitioner, this arose out of a belief held by Petitioner that the utility exercises improper influence on proceedings relating to renewable generation, resulting in bias regulatory processes. Petitioner also held an opinion that the Division has not been carrying out its duty to represent the public interest properly. When Petitioner obtained the emails through the APRA process, Petitioner apparently interpreted the communications as supporting Petitioner's opinion. As a result, Petitioner sought to open an investigative-like inquiry into the regulatory processes to examine and explore its theory of "regulatory capture," in an effort to persuade the Commission to reconsider the case.

The fact that Petitioner holds a jaundiced view of the regulatory processes, believing that the regulatory processes are somehow biased, is not relevant to the question whether the new evidence provided to the Commission would change the Commission's decision reflected in Order No. 23811. Contrary to Petitioner's belief, this remand was not about making a finding that either confirms or rejects Petitioner's subjective opinion about the regulatory proceedings and its concerns about "regulatory capture." It was whether the Commission – after seeing the communications between the Division and the utility of which it was not aware at the time it issued

its decision – would reconsider its decision in light of that new information. The answer to that question is unequivocally "no."

Once the conclusion is clearly drawn that there were no statutory violations or other prohibitions against the Division and the utility's lawyers sharing legal analyses prior to the matter being briefed, there is nothing further to consider. The communication reflects a lawful exchange of views between two parties who simply agreed on the same legal conclusions.

The Commission is an independent body, impartial and unbiased, when making decisions and drawing its own legal conclusions based on the facts and its knowledge of the law. The Commission's review was completely independent of what took place between the Division and the utility, completely independent of what Petitioner thinks of the Division and the utility, completely independent of whatever the Division thinks or believes about the utility, and completely independent of how the Division and the utility may have interacted. The communication between the Division and the utility have nothing and had nothing to do with the Commission's analyses of the legal issues and the conclusions it drew when making its decision in Order No. 23811.

For all the reasons set forth in this Order, the Commission finds as a fact and beyond the remand that the new evidence does not change the Commission's decision and conclusions of law, and the Commission hereby confirms Order No. 23811.

The Commission hereby directs the Commission Clerk to submit this Order to the Supreme Court, along with the record of this remand.

(24087) ORDERED:

Order No. 23811 is confirmed.

EFFECTIVE AT WARWICK, RHODE ISLAND ON JUNE 10, 2021 PURSUANT TO AN OPEN MEETING DECISION. WRITTEN ORDER ISSUED JULY14, 2021.

PUBLIC UTILITIES COMMISSION

Ronald T. Gerwatowski, Chairman*

Abigail Anthony, Commissioner

John C. Revens, Jr., Commissioner

*The Chairman also wrote a concurring opinion which follows the body of this Order.

*Concurring Opinion of the Chairman:

I concur with the opinion of my fellow Commissioners, but I am compelled to write this separate concurrence as Chairman of the Commission, because I am concerned that the integrity of the adjudicatory process that took place before this quasi-judicial agency prior to my appointment as Chairman has been maligned by counsel for the Petitioner.

This concurrence is independent of the decision itself and is largely outside of the scope of the remand. But counsel for the Petitioner propounded numerous allegations that called into question the integrity, ethics, or competency of the opposing parties, and implicated the integrity of the Commission's adjudicatory processes. This flurry of allegations and opinion, if unanswered in the public record, creates the potential to undermine public confidence in how the Commission conducts its proceedings, particularly in those relating to the important task of renewable energy development.

I have absolutely no doubt that Dennis Burton, the witness who appeared for the Petitioner, and works for the Episcopal Diocese, is completely sincere in his passion for advancing renewable energy projects. I also do not doubt his personal frustration with these proceedings. My comments are not in any way directed at him or the Episcopal Diocese itself. He is not a lawyer, and the way legal processes take place is not always logical to non-lawyers, particularly in a case that related solely to an issue of law applied to an already agreed-upon set of facts as was the case here. I note with appreciation that he testified that he was not questioning the integrity or ethics of any individuals. On behalf of the Episcopal Diocese, he expressed his respect for the state agencies and individuals involved in the dispute.[231]

[231] Burton Testimony at 7 (May 25, 2021).

Nevertheless, the allegations that were made by counsel for the Petitioner about the Division of Public Utilities and Carriers (Division) either directly or indirectly questioned the competency and integrity of the Division and were far outside of the scope of this proceeding. Relying upon an unprecedented claim that the communications between the Division and the Narragansett Electric Company were illegal *ex parte* discussions, counsel for the Petitioner tried to stretch this remand into an inquiry that went far beyond the Supreme Court's Order. The Division could not respond to the substance of the allegations without violating the very rule that it was maintaining could not be violated – a clear legal principle not to expand the remand. Throughout the proceedings, counsel for Petitioner repeatedly asserted his opinions. With the exception of one footnote raising concerns about counsel's conduct, the Division was compelled to remain silent as the agency's reputation and the reputation of its employees was severely criticized in the public record.[232]

The new evidence that was the subject of this remand consisted of communications by counsel for the utility through which the utility's lawyers were simply answering a reasonable question from the Division. Counsel for the Petitioner took this exchange and used it as a basis to allege illegal influence over the adjudicatory processes at the Commission. This leap of argument was inappropriate and baseless.

Further, counsel's claim that my two fellow Commissioners were not capable of rendering an unbiased opinion during these remand proceedings and needed outside counseling in order continue hearing the case was disrespectful.[233]

[232] The Division did insert a footnote in its brief, indicating that the allegations were damaging, and cited the Rules of Professional Conduct, but did not address the allegations substantively. Division Brief at 8, n. 8 (May 14, 2021).
[233] Petitioner's Reply Brief at 15 (May 26, 2021).

Petitioner's statements in this case also frequently repeated that the process before the Commission during the prior proceedings was biased. During oral argument in the remand, counsel for Petitioner appeared to disclaim that he was alleging that the Commission had been biased when issuing the original Order No. 23811, but getting that answer required asking counsel three times.[234] Even then, the apparent half-hearted walk-back remains uncontradicted by the other statements that now are in the public domain asserting the Commission's alleged inability to act independently.

Similarly, counsel filed two pleadings with claims that an objective reader could only interpret as an allegation that there had been *ex parte* communications between the Commission and the Division in preparing the decision:

> If granted a hearing, the Diocese would present evidence that would demonstrate the pernicious nature of undue influence the utility exerted *over this regulatory process*. . . . The testimony would explore the Division's biased process for researching its legal position, *how it consulted with the Commission on its decision*, who prepared for the Commission and the Commissioners for oral argument, what transpired at the hearing and how the decision was drafted and considered by the Commissioners before it was entered.[235] (emphasis added).

On its face, these were *not* musings about what might have happened. Counsel stated that he wanted to explore "how" the Division consulted with the Commission on its decision – not "whether" the Division consulted with the Commission on its decision. Certainly, counsel knew the significant difference between the words "how" and "whether." These allegations were stated twice.[236] It was an attack on the processes that had been conducted by the Commission, without foundation. Yet, when counsel walked back that allegation, no explanation was ever given. He just moved on to his next theory unapologetically.

[234] Tr. at80-83 (Jun. 2, 2021).
[235] Petitioner's Brief at 2 (Apr. 30, 2021); Petitioner's Objection at 4 (Apr. 21, 2021).
[236] *Id*.

Petitioner's arguments also ventured outside the scope of the remand with opinions about significant policy debates regarding interconnection issues and cost responsibility for system upgrades,[237] all of which counsel for the Petitioner acknowledged had already been part of the policy considerations addressed in the original proceedings.[238] It may be that there are renewable developers who are frustrated with the interconnection processes and costs. The allocation of costs arising from impacts of their projects on an electric power system that was never designed to accommodate generation sources spread around the local distribution network does create debate. But those issues were not before the Commission on the remand.

Petitioner turned the remand into a disparaging accusation of a flawed regulatory proceeding that led to the Commission's decision in 2019-2020. The implications of Petitioner's allegations were that the opposing parties were either improperly self-interested, derelict in their duties, or incompetent. Petitioner also alleged that its opponents flouted the rules under the law and improperly influenced the Commission. In turn, the implication was that the Commission was naively and illegally duped into drawing incorrect legal conclusions by the Division – all because it read the Division's 6-page brief and heard the Division's words at oral argument (which consisted of fewer than 3 pages of the 96-page transcript).[239] The presumption that the three Commissioners were so naïve as to be persuaded by the Division to draw incorrect legal conclusions is groundless and disrespectful to the tribunal. It was an implicit attack on the abilities of the three Commissioners who heard the case at that time, without foundation: (i) my fellow Commissioner Dr. Abigail Anthony, who formally worked for an environmental advocate and works tirelessly to search for solutions based on the evidence here at the Commission, (ii)

[237] Petitioner's Brief at 17-19 (Apr. 30, 2021).
[238] Tr. at 87 (Jun. 2, 2021).
[239] *See* the transcript of the prior proceedings: Tr. at 66-68 (Feb. 25, 2020).

my predecessor, Margaret E. Curran, who is a well-respected lawyer and former U.S Attorney for Rhode Island now working for the Conservation Law Foundation, and (iii) the equally well-respected former Commissioner of the Office of Energy Resources, Dr. Marion Gold, who has long supported the growth of renewable energy. All of this denigrates the Commission and can have the effect of undermining public confidence in the regulatory process.[240] As Chairman of the Commission, I could not ignore these attacks and allow them to remain in the public domain without response.

Finally, it is important to point out that the issues arising today in the arena of public utility regulation are becoming extremely complex, not only from an engineering point of view, but also in the context of regulators trying to find the right balance for cost responsibility. The question is: From whom does the utility recover the costs? Do they charge the costs to the generators who are interconnecting? Or do they recover the costs from the wide body of ratepayers? The need for a ratepayer advocate defending against an allocation of costs to the ratepayers in debates such as these is apparent. If renewable developers never have to worry about the costs of significant transmission upgrades that may be caused by their projects, they can size and locate their projects anywhere that is most convenient, without regard to their impact on the transmission system and the wide body of ratepayers.

Cost allocation in ratemaking can give rise to weighty policy issues. In the context of renewable generation development, it presents a question of finding the fairest and most effective way to carry out the important initiatives that are intended to move our energy systems away from reliance on fossil fuels and toward reliance on renewable resources, *at reasonable cost to ratepayers*. During that challenging trek, someone has to pick up the cost. The Commission is

[240] *See* Tr. at 77-85 (Jun. 2, 2021).

aware that there are hundreds of megawatts of renewable energy projects in the interconnection queue that are proposed to be located in Rhode Island. The incremental costs of these initiatives are being funded by ratepayers, even without unexpected system modification costs added. It should, therefore, come as no surprise that the Division – in its role of ratepayer advocate for the wide body of ratepayers – would take a position which supports an allocation of those additional costs to the investors of the distributed generation projects instead of adding costs to the ratepayers. That is not opposition to clean energy that shirks a duty, it is defending ratepayers consistent with the role of a ratepayer advocate.

As for the Commission's decisions in this case, it is worth noting Order No. 23811 has now been confirmed by five Commissioners – the three Commissioners who sat on the original case, and two new recent appointees, including myself and Commissioner Revens.

Again, I join with my colleagues in concurring with the decision that unanimously found that the "new evidence" remanded by the Supreme Court did not affect the legal conclusions drawn in Order No. 23811 and thereby confirm that decision.

Ronald T. Gerwatowski
Chairman