State of Rhode Island and Providence Plantations

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Re: In Re Petition of Sara McGinnes for Declaratory Relief
Division Docket: D-18-24

Dear Attorneys Russo and Hagopian:

The Division of Public Utilities and Carriers ("Division") acknowledges receipt of the "Petition of Sara McGinnes for Declaratory Relief and for Investigation of Proposed Utility Asset Sale" dated August 31, 2018. Upon careful review and consideration, and for the reasons enunciated below, **the Division declines to issue a declaratory order pursuant to R.I.G.L. §42-35-8(c) or to open an investigation pursuant to R.I.G.L. §39-4-13**.

Declaratory Relief Pursuant to R.I.G.L §42-35-8:

The Division declines to render a R.I.G.L. §42-35-8 declaratory order regarding R.I.G.L. §39-3-24, the provision governing transactions between utilities that require Division approval, because the Block Island Utility District ("BIUD") presently is not a public utility. Rhode Island General Laws §45-67-4(b), of the "Block Island Utility District Act of 2017" ("District Enabling Act"), clearly articulates that BIUD "shall not function as an electric utility" unless and until the Block Island Power Company ("BIPCo") and the utility district have agreed on price, terms and conditions of the sale of personal property and "assumption of such obligations" are complete. By directive of this statute, BIPCo remains the electric utility until such time as this transaction is complete; once the transaction is consummated, BIUD assumes BIPCo's powers, duties and obligations and, by practical necessity, BIPCo ceases to be a utility. See generally, R.I.G.L. §45-67-8. Considering that only one of these entities can exist as a public utility at any given time, Division approval as contemplated and provided in R.I.G.L. §39-3-24(2) and (3) is simply inapplicable to the matter at hand. Accordingly, the Division is without jurisdiction and hereby

declines to issue a declaratory order pursuant to R.I.G.L. §42-35-8 and the Division Rules or Practice and Procedure Rule 1.13.

Furthermore, and notwithstanding the above analysis, this agency's grant of declaratory relief is wholly discretionary. It is well settled that R.I.G.L. §42-35-8 is an administrative counterpart of the Uniform Declaratory Judgments Act, (Chapter 30 of Title 9 of the R.I. General Law), see Liguori v. Aetna Cas. & Sur. Co., 384 A.2d 308 (R.I. 1978). The grant of declaratory relief pursuant to these authorities is a discretionary act by the court, see Lombardi v. Goodyear Loan Co., 549 A.2d 1025 (R.I. 1988), and by the administrative agency. As such, courts and agencies consider many of the same factors when deciding whether declaratory relief should be granted. These factors include the existence of another remedy, the availability of other relief and the fact that another proceeding with the same parties and issues is currently pending. See Berberian v. Travisano, 332 A.2d 121 (R.I. 1975). Moreover, given that a primary purpose of declaratory action is to resolve controversies, courts and agencies will consider whether the grant of declaratory relief would resolve the controversy, or whether such a ruling would require further litigation in some forum. Applying these factors to the instant petition, even were the Division to consider BIUD a public utility at this point in time, which it does not, the Division will not exercise its discretion in favor of declaratory relief for Ms. McGinnes. The Division is mindful of, and deferential to, the pending Superior Court matter of Sara McGinnes v. Town of New Shoreham, et al., WC 2018-0212, for which the issues and parties are essentially the same. Further, even were it jurisdictionally appropriate for the Division to order a conditional hold on the sale or distribution of the assets of BIPCo, such an order would not bring finality, but would be contingent upon future determinations by the Superior Court on fair value of minority shareholder assets. Even more concerning, any Division declaration stands to possibly conflict with Superior Court determinations on issues already pending in that forum. The Division finds it wholly imprudent and inappropriate to inject itself into the fray of what is already pending in Superior Court.

Summary Investigation Pursuant to R.I.G.L §39-4-13:

The Division declines to investigate pursuant to R.I.G.L. §39-4-13 the alleged unjust and unreasonable acts of BIPCo relative to the minority rights of Ms. McGinnes, nor will the Division order remedies pursuant to R.I.G.L. §39-4-10. Although the Division has broad investigatory and remedial statutory authority, the general purpose and policy of these statutes differ greatly from the protections and relief sought by Ms. McGinnes.

Ms. McGinnes' petition does not satisfy any of the requirements of R.I.G.L. §39-4-13 because it does not concern "the rates, tolls, charges, … demanded, exacted, or collected by any public utility [and whether they] are in any respect unreasonable, or unjustly discriminatory, or otherwise in violation" of title 39, nor does it raise any issue "affecting or relating to the production, transmission, delivery, or furnishing of … light … or power, or any service in connection therewith." Although this statute does give the Division authority to investigate "any matter relating to a public utility" if it believes it is appropriate, this statute clearly focuses on inequities or problems with providing utility services in a fair, reasonable, efficient and nondiscriminatory manner to ratepayers rather than investigating disputes involving utility shareholders; shareholder rights and responsibilities are not areas of particular expertise for the Division. The Division defers such matters to the courts which do have such expertise.

Moreover, because the petition fails to identify any issues within the ambit of R.I.G.L. §39-4-13, but does identify as its core issue a dispute between shareholders that falls generally under R.I.G.L. §7-1.2-1 *et seq.*, jurisdiction to address Ms. McGinnes' concerns rests with the Superior Court and not with the Division. Further, the petition concerns appropriate valuation of the assets of BIPCo, with an appropriate share from the sale of corporation assets being offered to Ms. McGinnes. These types of issues are better suited for Superior Court given that it has the power to liquidate the assets and business of a corporation, similar to the underlying issues presented here. See e.g., R.I.G.L. §7-1.2-1314. For these reasons, the Division must defer to the litigation already well underway before the Superior Court Business Calendar, a court of most-competent jurisdiction for these issues.

Finally, although R.I.G.L. §39-4-10 grants the Division the broad power to investigate any "act" of a public utility, it is clear from a reading of this statute that the primary focus is on providing just, reasonable, sufficient, non-preferential, non-discriminatory and otherwise legal services to utility ratepayers, including, when appropriate, providing relief under R.I.G.L. §39-3-13.1 to any individual or class of individuals injured by a prohibited or unlawful act, "by way of a cash refund, billing credit or rate adjustment, or any other form of relief which the Division may devise to do equity to the parties." The intended purpose of this statute is to resolve billing or service disputes between the utility or ratepayer. Deciding the rights or obligations of shareholders among themselves falls far outside the boundaries of this statute and outside the core competencies of the Division.

Respectfully submitted,

Division of Public Utilities and Carriers,

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