STATE OF RHODE ISLAND
PUBLIC UTILITIES COMMISSION

IN RE: INVESTIGATION OF UTILITY MISCONDUCT OR FRAUD BY THE NARRAGANSETT ELECTRIC COMPANY RELATING TO PAST PAYMENT OF SHAREHOLDER INCENTIVE	:	**DOCKET NO. 22-05-EE**
	:	**DOCKET NO. 5189**

ORDER DENYING MOTION TO DISMISS

This Order addresses a Motion to Dismiss filed by the Division of Public Utilities and Carriers (Division) in the above-referenced proceeding. This case pertains to a Commission-initiated investigation of utility misconduct relating to the manipulation of out-of-period invoices by utility employees which affected performance incentive payouts to The Narragansett Electric Company (Narragansett Electric or Company) within energy efficiency programs over which the Commission has oversight authority pursuant to the provisions of R.I. Gen. Laws § 39-1-27.7. The potential period over which the invoice manipulation occurred spanned the years 2012 through 2020.[1]

The Commission's inquiry began in late 2021 in Docket No. 5189, when the Commission was reviewing the Company's proposed energy efficiency program for 2022. During those proceedings, the Commission learned of the misconduct and began to inquire further. After receiving a report from the Company in June 2022 which provided greater detail of employee misconduct and an admission by the Company that the misconduct resulted in the Company miscalculating its earned incentives,[2] the Commission issued an order formally opening the investigation within a separate Docket No. 22-05-EE, incorporating all relevant evidence already

[1] Report filed by Rhode Island Energy on June 7, 2022, entitled: "Review of Invoices within the Energy Efficiency Program," at 1 (June 7, 2022 Report), which can be found at: https://ripuc.ri.gov/sites/g/files/xkgbur841/files/2022-06/5189-RIEnergy-Energy%20Efficiency%20Invoices%20Update%20to%20PUC%20%28PUC%206-7-22%29.pdf
[2] *Id.*

submitted in Docket No. 5189 related to the issues.[3] The Division was a party in Docket No. 5189 and continued as party in Docket 22-03-EE.[4]

The Division participated in the Commission's investigation in its statutory role as ratepayer advocate for many months and issued discovery in the form of numerous sets of data requests. Then, six months after the Commission's order opening a separate investigation and over a year after the Commission and the Division learned of the misconduct by utility employees in Docket No. 5189, the Division filed a Motion to Dismiss the Commission's investigation on January 19, 2023. The Attorney General filed an objection to the Motion to Dismiss. Oral arguments were held on March 28, 2023. On April 14, 2023, the Commission held an open meeting to rule on the Division's Motion to Dismiss. For the reasons given in this Order, the Division's Motion to Dismiss is denied.

I. The Energy Efficiency Programs and Shareholder Performance Incentive

This case arises in the context of the Commission's review, approval, and regulatory oversight over the annual energy efficiency program plan (Annual Plan) of Narragansett Electric. The primary goal of the Annual Plan is to create energy and economic cost savings for Rhode Island consumers through electric and natural gas energy efficiency measures, as required by the least cost procurement statute in R.I. Gen. Laws § 39-1-27.7. Each Annual Plan contains proposed savings goals, implementation plans, budgets, funding plans, and a proposed performance-incentive earning opportunity for shareholders of the utility. Each Annual Plan also contains a suite

[3] *In Re: Investigation of Utility Misconduct or Fraud by the Narragansett Electric Company Relating to Past Payment of Shareholder Incentive*, order No. 24441, Docket No. 22-05-EE (July 11, 2022) (Order of July 11, 2022), which can be found at: https://ripuc.ri.gov/sites/g/files/xkgbur841/files/2023-03/2205-InvestigationOrd24441_7-11-22.pdf

[4] The Division continued to issue discovery requests through October. The Division's ninth set was issued October 17, 2022.

of programs.[5] There are programs for customers in the residential, low-income residential, and commercial and industrial sectors served by the utility. The Commission is assigned by statute the role to oversee all of these energy efficiency programs under the least cost procurement statute.

The Annual Plan identifies the energy savings goals for the applicable program year and describes the detailed strategies, programming, and investments the Company proposes to undertake to achieve these goals.[6] By directive of the statute, each Annual Plan contains a fully reconciling funding mechanism which allows the utility to reconcile its actual program cost incurrence against revenues received from the energy efficiency rate that is charged to all electric and gas distribution customers. Because the costs and revenues are reconciled, the utility is virtually guaranteed cost recovery, subject to prudently implementing the plan as approved by the Commission.

The Commission's statutory authority over the program and its components is more than simply approving a rate to recover costs. Rather, it entails a comprehensive program review to assure that each Annual Plan complies with the Commission's standards. *See* R.I. Gen. Laws § 39-1-27.7 (b)&(c). By statute, the Commission is required to establish those standards which provide principles for the Commission's review of the Annual Plan.[7]

---

[5] The 2022 proposed Annual Plan (Annual Energy Efficiency Plan for 2022, October 2021) which was being reviewed in Docket No. 5189 can be found at: https://ripuc.ri.gov/sites/g/files/xkgbur841/files/eventsactions/docket/5189-NGrid-Energy-Efficiency-Plan-2022-%28PUC-10-1-21%29.pdf

[6] *See id.*, Annual Energy Efficiency Plan for 2022 (October 21, 2021).

[7] The standards can be viewed at: https://ripuc.ri.gov/sites/g/files/xkgbur841/files/eventsactions/docket/5015_LCP_Standards_05_28_2020_8.21.2020-Clean-Copy-FINAL.pdf

The issue in this case relates directly to the shareholder performance incentive. Specifically, the distribution company has an opportunity to earn a shareholder incentive that is dependent on its performance in implementing the programs. The least cost procurement law directs the Commission to "conduct a contested case proceeding to establish a performance-based incentive plan that allows for additional compensation for each electric distribution company and each company providing gas to end-users and/or retail customers based on the level of its success in mitigating the cost and variability of electric and gas services through procurement portfolios." R.I. Gen. Laws § 39-27.7(f). While there have been some variations over the years for measuring success, the general principle of the shareholder incentive is that the utility is rewarded for meeting or exceeding annual net savings targets, up to a Commission-approved cap. In other words, subject to the formulaic components of the mechanism, the higher the value of the net electric and gas cost savings that are achieved, the higher the payout to shareholders of the utility. Net savings have generally been measured annually by comparing the costs of implementing the programs to the value of the savings achieved during the program year.

The issue that arose in the Commission's investigation in this docket relates to the Commission's discovery that employees of the utility managing the programs – while under the ownership of National Grid – were holding back invoices in certain instances that were used to measure both the annual costs of the program and to determine the amount of net savings from the types of efficiency measures installed, as reflected in the invoices.[8] By holding back invoices in years where performance was already exceeding expectations and/or the incentive cap and treating them as applicable to the following program year, it affected the calculation of the earned shareholder incentive. As a result, the utility earned higher shareholder incentives in some years

[8] *See* PUC 5-4.

that were charged through rates to ratepayers than would have been allowed by the Commission if the invoices had been properly tracked.

The mechanics of what occurred are complicated, but can be illustrated by using a baseball analogy. One can imagine a team playing a doubleheader. In game one, the team wins the game by a score of 10-0. But when the team does the score sheet, the winning team takes runs from game one and applies them to the first inning of game two. Thus, if 3 runs are carried over, the score of game one is recorded as 7-0 instead of 10-0, and game two starts with the team leading 3-0. While this analogy is imperfect for describing precisely what has been admitted and alleged in this case, it is a simple way to show the net effect of holding back invoices from a year when performance was excellent and applying them to the next year as a head start for the following year.

II. Background and Travel of the Case

A. Relevancy of Sale of Narragansett Electric from National Grid to PPL

In Docket No. 5189, Narragansett Electric filed for approval of its 2022 Annual Energy Efficiency Plan. At the time of the filing, the Company was owned by a subsidiary of National Grid USA, and was doing business as "National Grid." [9] However, approval of the sale of the Company by National Grid USA to a subsidiary of PPL Corporation (PPL), a Pennsylvania utility company, was pending before the Division of Public Utilities and Carriers (Division) pursuant to R. I. Gen. Laws § 39-3-24 and § 39-3-25 which specifically assigns the role of approving mergers and acquisitions to the Division.[10] During the time when the Company was owned by National

[9] For purposes of this Order, the term "National Grid" will refer to The Narragansett Electric Company when it was owned by National Grid USA.

[10] The pending transaction was a proposed sale of 100% of the shares of The Narragansett Electric Company by National Grid USA to "PPL Rhode Island," a wholly owned indirect subsidiary of PPL Corporation. *See* Division Docket No. D-21-09, found at: https://ripuc.ri.gov/eventsactions/docket/D_21_09.html

Grid USA, employees of National Grid USA Service Company were providing operation and management services to the Company, including services relating to the management of the energy efficiency program.[11]

B. Discovery of the Issue of Employee Misconduct by the Commission

While conducting discovery in preparation for hearings in December of 2021 in Docket No. 5189, the Commission learned of regulatory proceedings in Massachusetts involving a National Grid affiliate, in which there were allegations of fraud against vendors involved in providing services in the National Grid energy efficiency program in that state. Upon learning about the particulars of the Massachusetts proceeding, the Commission issued a data request to National Grid with several questions. One of the questions inquired: "As a result of the investigation referenced [in the Massachusetts proceeding] or any other related internal or external investigation, including of National Grid personnel involved in administering the energy efficiency program, was any fraud, misconduct, mistake, or noncompliance with the [Rhode Island] program rules discovered?"[12] The response provided to this question was "yes" and National Grid confirmed that five National Grid employees had already been disciplined. The response went on further to state: "National Gird engaged outside professionals to undertake a comprehensive review of out-of-period invoices for purposes of quantifying the impact, if any, of the actions of the disciplined employees on Rhode Island customers."[13] National Grid then admitted that the misconduct impacted the amount of performance incentives earned by the Company for one

[11] For purposes of this Order, the term "National Grid employees" will refer to employees of National Grid USA affiliates, including employees of the Company prior to the sale and employees of National Grid USA Service Company.
[12] PUC 5-4.
[13] *Id.*

particular program sector within the suite of energy efficiency programs. As a result, the Company proposed a small credit to ratepayers.[14]

During the continuation of the energy efficiency hearings, the Commission asked questions about the internal investigations of employee misconduct to the witnesses of National Grid who were supporting the 2022 program proposal. However, counsel for the Company indicated that none of the witnesses knew enough about the extent and scope of the internal investigation that had been undertaken by the Company to answer the Commission's questions.[15] The Commission inquired whether the Company was investigating other program sectors other than the one in which the misconduct arose, but the Company witnesses could not answer.[16] The Commission then asked for further information to be provided. Division counsel was present at the hearings, but no questions were asked by the Division about the subject.

C. Expansion of National Grid Internal Investigation and Filing of Cooperation Agreement

After National Grid responded to the Commission's questions with some additional information from the internal investigations, the Commission asked follow-up data requests on February 2, 2022, regarding whether the Company had expanded its investigation to other sectors. The Company stated that it had expanded the investigation and indicated that the Company was targeting June 1, 2022, to complete the expanded investigation and that it would provide the Commission with a copy of any final reports. [17]

In the same set of post-decisional data requests asked by the Commission on February 2, 2022, the Commission also asked the following question:

[14] The amount proposed by the Company was $124,135, plus interest. *See* PUC 5-4 at 5.
[15] Docket 5189, Hr'g Tr. at 236 (Jan. 13, 2022).
[16] *Id.* at 242-243.
[17] PUC Post-Decisional 1-1.

> Given the pending sale of Narragansett Electric to PPL, and the fact that employee misconduct may have related to employees of National Grid USA Service Company who will not be moving to the PPL affiliate if the sale is approved and that documents and records relevant to the investigation may be in the possession of National Grid USA Service Company, to what extent, if any, will the Commission be able to retain the ability and cooperation of National Grid should the Commission perform or order its own investigation regarding the past programs?[18]

In response, National Grid referred to certain transitional services agreements that were a part of the pending transaction and represented that National Grid would continue to cooperate with the Commission. No questions were asked by the Division to the Company.

The Commission became concerned that the response from National Grid did not reflect an enforceable legal commitment to cooperate with the Commission's investigation. For that reason, the Chairman held a procedural conference on February 18, 2022, with National Grid, PPL, and the Division's counsel.[19] Following the conference, on February 24, 2022, National Grid and PPL filed a "Cooperation Agreement" between PPL and National Grid. In it, National Grid made the following commitment:

> After the closing of the Transaction, National Grid will allow PPL and its representatives to have reasonable access and reasonable advance notice to any National Grid employees reasonably necessary to (i) complete the internal investigation and prepare the report of that investigation to the PUC by June 1, 2022, and (ii) cooperate in the provision of any additional information that is requested from PPL by the PUC in connection with the PUC's own investigation.[20]

Division's counsel at the procedural conference gave no indication of any intention of the Division to open its own parallel investigation and no request was ever made by the Division to have the Cooperation Agreement apply to any potential Division investigation in the future.

After receipt of the Cooperation Agreement, the Commission made no further inquiries while it waited for National Grid's internal investigation report which was promised for June in

[18] PUC Post-Decisional 1-2.
[19] Other parties were given notice, but no other parties from Docket No. 5189 attended.
[20] PUC Post-Decisional 1-2 Supplemental.

response to the Commission's earlier data request. During this time, the Division made no filings on the matter and asked no discovery requests of the Company.

In the meantime, the sale of The Narragansett Electric by National Grid to PPL was completed on May 25, 2022.[21]

D. Rhode Island Energy Filing of Internal Investigatory Report

On June 7, Narragansett Electric d/b/a Rhode Island Energy (Rhode Island Energy) filed a report entitled "Review of Invoices within the Energy Efficiency Program."[22] The report consisted of 14 double-spaced pages describing the internal investigation, accompanied by 20 pages of Exhibits. On page 8 of the report the Company referred to 29 emails from which "it was concluded that the email explicitly demonstrated that delaying invoices was implemented." The report also gave two estimates for the impact on the overcharges to customers. One method was called the "actuals-average" method, estimating a refund owed of $1,569,887. The other, referred to as the "actuals-highest percentage" method, estimated a refund of $2,194,339. Almost immediately after the report was filed, on June 8, the Commission sent another set data requests to the Company, asking for back-up support from some of the assertions in the report, including copies of the referenced emails.

On June 17, 2022, and June 22, 2022, respectively, the Division sent its first two sets of data requests to the Company inquiring about the issues.

E. The Commission's Open Meeting on June 27, 2022

[21] *See* https://news.pplweb.com/2022-05-25-PPL-Corporation-completes-acquisition-of-Rhode-Islands-primary-electric-and-natural-gas-utility

[22] The Report can be found at: https://ripuc.ri.gov/sites/g/files/xkgbur841/files/2022-06/5189-RIEnergy-Energy%20Efficiency%20Invoices%20Update%20to%20PUC%20%28PUC%206-7-22%29.pdf

On June 27,2022, the Commission held an open meeting to discuss the issues relating to the utility's June 8 report.[23] At the meeting, the Commission discussed the matter, indicating that National Grid had essentially admitted to employee misconduct in the manipulation of invoices. The Chairman stated that he believed that it might eventually become necessary to order an audit supervised by the Division. He also recognized that the Attorney General would have an interest as well in areas which the Attorney General has authority. The Commission then voted to open a separate Docket to formally investigate the matter.[24] On June 29, the *Providence Journal* published a front-page article about the matter, including quotes from the Commission's open meeting.[25]

F. Events Following the June Open Meeting

Below is a list of the events occurring within this docket following the Commission's June 27, 2022, Open Meeting through mid-October:

July 1:	Division issued its Third Set of data requests;
July 5:	Notice is sent to parties in Docket No. 5189;[26]
July 6:	Division issued its Fourth Set of data requests;
July 11:	Commission issued the written order reflecting Open Meeting decision;[27]
July 14:	Attorney General Peter F. Neronha filed a motion to intervene;[28]
July 27:	Division issued its Fifth and Sixth Sets of data requests;
July 29:	Division issued its Seventh Set of data requests;

[23] The video of the 28-minute Open Meeting is available from the Commission's video archive at: https://video.ibm.com/recorded/131895020

[24] The Commission established a new docket to isolate the issues associated with the investigation from the rest of Docket No. 5189, which had voluminous materials relevant to the program review. Evidence relevant to the misconduct issue from Docket No. 5189 was incorporated into this Docket 22-05-EE and published on the Commission website.

[25] An electronic version of the article can be found at: https://www.providencejournal.com/story/news/2022/06/29/national-grid-misled-ri-regulators-overcharged-customers/7754526001/

[26] One purpose of the notice was to inform those parties who were already intervenors in Docket No. 5189 that there was no need to file new motions to intervene. But the notice requested any parties who were intervenors to file a notice of participation in the investigation if they intended to participate. No notices of participation were received.

[27] Order of July 11, 2022, *supra*.

[28] No objections were filed to the Attorney General's motion. Accordingly, by matter of rule, the intervention was allowed.

August 12: Division issued its Eighth Set of data requests; and
October 17: Division issued its Ninth Set of data requests.

There was then a hiatus in the investigation from October through December, as the Commission considered and held hearings on Rhode Island Energy's request for approval of its first energy efficiency program for the year 2023 since the acquisition by PPL.[29]

G. Division Files Motion to Dismiss on January 19, 2023

On January 19, 2023, the Division filed the Motion to Dismiss which is the subject of this Order. The filing consisted of a one-sentence transmittal letter and a one-page motion. The entire text of the one-page motion was as follows:

> Now comes the Division of Public Utilities & Carriers ("Division") and moves the Public Utilities Commission ("PUC") for an order dismissing this matter, without prejudice. As grounds therefore, the Division submits that sufficient evidence exists in this docket to date to warrant an independent summary investigation by the Division, to include an audit of the Company, pursuant to R.I. Gen. Laws § 39-4-13.
>
> Thereafter, should the Division find sufficient grounds, the Division may proceed to a formal hearing as to the matters under investigation, pursuant [sic] R.I. Gen. Law[s] § 39-4-15. Upon conclusion of its investigative process, the Division will provide the PUC with a report outlining the Division's findings and final decisions.[30]

No legal memorandum or any other materials or explanation was included in the filing to support the Division's position that the Commission's investigation should be dismissed.

H. The Attorney General's Objection to the Motion to Dismiss

On January 30, 2023, Attorney General Peter F. Neronha filed an "Objection to the Division of Public Utilities and Carriers' Motion to Dismiss."[31]

---

[29] Docket No. 22-33-EE, The Narragansett Electric Co. d/b/a Rhode Island Energy - 2023 Energy Efficiency Plan.
[30] The motion can be found at: https://ripuc.ri.gov/sites/g/files/xkgbur841/files/2023-01/2205-DIV-Motion%20to%20Dismiss_0.pdf
[31] The Attorney General's objection can be found at: https://ripuc.ri.gov/sites/g/files/xkgbur841/files/2023-01/2205-RIE-Reply-DIV%201-30-23.pdf

The Attorney General argued that the one-page filing by the Division had "not shown sufficient grounds for dismissal of the Commission's investigation, which has now been underway for more than six (6) months." The Attorney General's response went on to state:

> Docket 22-05-EE has already proven tremendously valuable as an opportunity for the public to track regulators' actions on a matter of great public import, and there is no reason to believe it will not continue to provide value in pursuit of a full understanding of the subject misconduct, and in determining potential remedies and/or penalties. The docket has afforded an opportunity for participation from the Commission, the Division, the Attorney General, and National Grid USA. Moreover, the service list [sic] to receives copies of filings and responses to data requests so that the information being provided by the Company can be directly examined by the public as well. Accordingly, this transparent and effective process should not be abandoned midstream.

I. Response of Rhode Island Energy

Rhode Island Energy filed a letter in response to the Divisions' Motion to Dismiss on January 30, 2023, taking no position on the motion itself, but stating: "Rhode Island Energy respectfully requests that any additional steps by the PUC or the Division be considered only after National Grid completes its ongoing work on its internal investigation report, which is expected to be filed with the PUC on or before March 1, 2023."[32] The letter went on to state: "With informative results expected to be presented to the PUC and the Division in the coming weeks, Rhode Island Energy submits that those results should be known before action is taken on the Division's motion to dismiss."

J. Response of National Grid

[32] Rhode Island Energy's letter can be found at: https://ripuc.ri.gov/sites/g/files/xkgbur841/files/2023-01/2205-RIAG-Objection%201-30-23.pdf

On January 30, 2023, National Grid also filed a letter in response to the Division's Motion to Dismiss.[33] Similar to Rhode Island Energy, National Grid urged the Commission not to rule on the Motion to Dismiss until National Grid filed its investigative report in March. However, National Grid asserted that jurisdiction was lost over National Grid by the Commission and the Division upon the consummation of the sale of Narragansett Electric to PPL, but confirmed its agreement to cooperate in the Commission's investigation through the Cooperation Agreement that was filed with the Commission:

> When National Grid and The Narragansett Electric Company ("Narragansett") first learned of the matter that ultimately became the subject of this docket, Narragansett made prompt and proactive notification to both the Commission and the Division and provided periodic updates thereafter (see, e.g., Division 1-15). Upon the sale of Narragansett to PPL Rhode Island Holdings, LLC ("PPL Rhode Island"), the Commission and Division retained jurisdiction over Narragansett, as provided by law, while authority and control over National Grid or its affiliates was relinquished. Nevertheless, National Grid has remained committed to reasonable cooperation with Narragansett in making information available, as needed, and to providing support to Narragansett in any proceedings, technical sessions, or working group meetings before the Commission (see PUC Post-Decisional 1-2 Supplemental, Docket No. 5189). Effective at the closing of the transaction (May 25, 2022), National Grid also entered into a Cooperation Agreement with PPL Corporation and PPL Rhode Island that supports National Grid's ongoing involvement in this proceeding (see PUC Post-Decisional 1-2 Second Supplemental, Docket No. 5189).
>
> (emphasis added)

National Grid's letter went on to restate the history of its cooperation with the investigation in this Docket since the inception of the proceedings.

In the letter, National Grid also made the following statement regarding the prospect of duplicative proceedings: "The commencement of a parallel or duplicative proceeding will

[33] National Grid's letter can be found at: https://ripuc.ri.gov/sites/g/files/xkgbur841/files/2023-03/2205-NGrid-Reply-Div-Motion_1-30-23.pdf

necessarily divert resources from the ongoing effort, waylaying progress that is designed to yield informative results for the Commission and the Division in the near future."

K. *National Grid's Internal Investigatory Report Filed*

After receiving the responses to the Division's Motion to Dismiss, the Commission delayed setting a date for oral argument in order to wait for receipt of National Grid's internal investigatory report that was due on March 1, 2023, as suggested by both Rhode Island Energy and National Grid. National Grid obtained a short extension for filing of the report and filed it on March 10, 2023, entitled "Report on Investigation of Out-of-Period Invoicing within the Rhode Island Energy Efficiency Program (2012-2021)."[34]

L. Commission Learns of Division's Parallel Investigation Commencing without the Division Notifying the Commission

Sometime after the filing of the March 10 report, counsel for the Commission received a call from counsel from the Attorney General's office inquiring to assure that he had received copies of all documents that had been provided in the Commission's investigation.[35] Counsel for the Attorney General also asked whether there was another docket taking place on the same matter. Counsel for the Commission confirmed that there was no other docket, but agreed to take steps to confirm that the Attorney General had copies of all filed documents.

Commission counsel then proceeded to contact the attorneys for the Division, Rhode Energy, and National Grid. It was determined that there were some missing documents, but that was corrected and steps were taken to assure that all documents were made available to the

[34] A version of the report (with some redactions made consistent with a Motion for Confidentiality) can be found at: https://ripuc.ri.gov/sites/g/files/xkgbur841/files/2023-03/2205-NGrid-Report-on-Investigation_310-2023.pdf

[35] What transpired between counsel for the Commission and counsel for the parties was summarized at the oral argument on March 28, 2023, in the presence of all attorneys who had been involved in the discussions. *See* Tr. March 28, 2023, at 17-18.

Attorney General. However, during the course of Commission counsel's conversation with counsel for Rhode Island Energy, counsel for Rhode Island Energy disclosed that the Division had commenced a separate investigation on the same matter that the Commission was addressing in the Commission's docket. The Commission checked the Division's docket listing on the Division's website and found no docket listing that an investigation had been opened.

At the Chairman's direction, the Commission notified the parties that oral argument on the Division's Motion to Dismiss would be scheduled for March 28, 2023. At the same time, on March 17, 2023, the Commission sent a short set of data requests to Rhode Island Energy in order to obtain official confirmation in the record of the existence of the Division's separate investigation before oral argument took place.[36] In addition, the Commission requested Rhode Island Energy provide copies of any documents that may have already been produced to the Division, due on March 27, 2023.

On Friday, March 24, 2023, the Division filed with the Commission an Objection to Discovery, a Motion to Quash, and a Memorandum in Support of Objection and Motion. Because the Commission's rules allow 10 days for parties to respond to any motions, the Commission notified Rhode Island Energy that its response to the Commission's second of data requests due on March 27, 2023, was suspended, and all parties were notified that they had ten days to respond to the Division's filing. The Commission is not ruling upon the Division's Objection and Motion to Quash in this Order. The Objection and Motion to Quash will be addressed following the issuance of this Order and a procedural ruling issued separately.

[36] PUC Second Set of Data Requests to Narragansett Electric.

On March 27, 2023, National Grid responded to one of the Division's pending data requests, Division 9-1. The response included an enormous volume of material consisting of over 3,000 internal emails, invoices, and other material that apparently had been reviewed by National Grid when it conducted its own internal investigations.[37]

III. Oral Argument on the Motion to Dismiss

The Commission held oral argument on the Division's Motion to Dismiss on March 28, 2023. At the commencement of the proceeding, the Chairman reviewed the procedural history of the case to place the matter into context.[38] Then the Chairman asked two practical questions to Division counsel.

First, the Chairman asked counsel for the Division why the Division opened the separate investigation in secret without notifying the Commission and without notifying counsel for the Attorney General's office.[39] Counsel for the Division indicated that she could not answer and was not privy to the decision making.

Second, the Chairman referred to the single-page Motion to Dismiss containing the statement that the Division would provide a report to the Commission with the Division's "findings and final decisions." Specifically, the Chairman asked: "Could you explain to me what the Division was contemplating would take place if this case was dismissed and how that would all proceed and what the form of the report would be?"[40] Counsel for the Division represented that

[37] The response in PDF formats was accompanied by a Motion for Confidential Treatment. The filing was enormous in volume, provided in zip files. Given its size and the confidentiality issues, the response has not been uploaded to the Commission's website.
[38] Docket 22-05-EE, Hr'g Tr. at 5-18 (March 28, 2023).
[39] *Id*. at 18-19.
[40] *Id*. at 21.

the Division would conduct a forensic audit, then move to formal investigation as indicated under the Divisions' rules if the Division found it appropriate to do so.[41]

The questions and answers continued:[42]

> DIVISION COUNSEL: . . . . The Division does not contain any authority to adjust rates or anything of that nature. We would need to file that report and make a recommendation and a request to the Commission that the Commission then open an investigation in regards to the impact as to those rates and using the Division's investigation for the Commission's proceedings in order to be able to make that occur.
>
> CHAIRMAN: What would you be having a hearing about?
>
> DIVISION COUNSEL: As to the nature of whether or not there had been misconduct by the Company.
>
> CHAIRMAN: They already admitted to that, didn't they?
>
> DIVISION COUNSEL: Additional misconduct that has not been revealed to date.
>
> CHAIRMAN: So you have a forensic report. Would the forensic report be filed with a hearing officer upstairs, and the hearing officer would make some decision; and then that would be – her or she would then issue a decision, and then the administrator would sign it?
>
> DIVISION COUNSEL: That's correct.
>
> CHAIRMAN: And so would you be making a decision on what the amount of the refund that's owed?
>
> DIVISION COUNSEL: No, sir.
>
> CHAIRMAN: What would you be –
>
> DIVISION COUNSEL: That is when the Division would approach the Commission in regards to the impact as to the rates.
>
> As the Chairman has referenced earlier, Docket 5189, I believe, is still open. I don't believe it has ever been closed. And that we would come back to the Commission at that particular point in time with those findings, with those decisions

[41] *Id*. at 21-22.
[42] For purposes of this Order, when quoting the transcript, the text herein has used the titles "Division Counsel" and "Chairman" instead of the names of each as appears in the transcript.

from the Division, and rest it in the Commission's authority to undertake what ever adjustment is appropriate in regards to the rates.

CHAIRMAN: I'm trying to figure out what decisions would be made by the hearing officer.

DIVISION COUNSEL: As to misconduct.

CHAIRMAN: And they would say, yes, they did something wrong; or would they say, look, here are the invoices that were done, and we calculate that the refund should be, you know, $5,000,000 higher; and here it is, and that's the finding?

DIVISION COUNSEL: I wouldn't anticipate that the Division would be undertaking those calculations. I can't say for certain, but I don't believe that that would be the case.

I think they would be coming to you with those recommendations as to what the auditors had found in regards to if there were any other, if you will, episodes of misconduct other than the shifting invoices or the out-of-period invoices.

CHAIRMAN: So what's strange to me is why would you have a hearing before the hearing officer before you have a hearing before us? Why wouldn't you just conduct the audit, as you would in that situation, and then bring it here? Why do the hearing twice? Why not let us make the determination, in our view of the whole program, as to the refund amount, what the nature of the conduct was, what the invoices are? Why would you do two hearings?

DIVISION COUNSEL: I believe that the jurisdiction is bifurcated. So the Division has the authority and the responsibility to conduct the investigation, and then, once it's done with that and it finds some misconduct, it comes to the Commission to make the determination as to the impact of the rates, tolls, charges, and – [43]

After the exchange regarding the first two questions, the Chairman posed a question to the parties as to the acceptability of keeping everything within the Commission's proceedings. In such case, a forensic audit would be done, a report prepared in a manner similar to recommendations made to the Commission in a rate case, and it is submitted directly to the Commission, instead of sending the matter for a hearing to the Division.[44]

[43] Docket 22-05-EE, Hr'g Tr. at 22-24 (March 28, 2023).
[44] *Id*.

Counsel for Rhode Island Energy indicated that type of process would not be objectionable.[45] The Attorney General agreed that the process would be acceptable.[46] And National Grid raised no objection to such a process indicating they shared the same concerns as Rhode Island Energy not to have duplication of efforts.[47] However, counsel for the Division would not agree that such a process would be acceptable, but gave no legal support for the position.[48]

Division's counsel then was given an opportunity to provide a legal argument in support of the Motion to Dismiss. The Chairman asked counsel if it was the Division's position that the Commission lacks jurisdiction and the authority to do the investigation. The answer was, "Not entirely." She was asked to clarify.

> DIVISION COUNSEL: So what I mean is that – it made perfect sense for the Commission to go down the road that it did in the beginning, both in Docket 5189 and at the commencement of this particular investigation in 22-05-EE to ask those questions.
>
> At some point in time, however, the Division's authority to conduct and audit and investigation –
>
> CHAIRMAN: It preempts the Commission's ability to continue the investigation?
>
> DIVISION COUNSEL: No, sir.
>
> CHAIRMAN: Do we [ever lose] jurisdiction and authority to investigate these issues? That's not – I'm wondering, is that the basis or legal basis, that we lose at some point – it triggers – the Commission loses jurisdiction authority, and the Division preempts –
>
> DIVISION COUNSEL: I don't think there's a bright line there, Mr. Chairman.
>
> CHAIRMAN: So there's concurrent authority?
>
> DIVISION COUNSEL: To some degree.

[45] *Id*. at 27-28.
[46] *Id*. at 28.
[47] *Id*. at 29.
[48] *Id*. at 26

> CHAIRMAN: To some degree? It's either concurrent or its not. Is there concurrent authority, or is it – does one have authority and one doesn't have authority?
>
> DIVISION COUNSEL: I think there becomes a point in time where the Commission needs to defer to the Division's investigative processes . . . .[49]

Divisions' counsel then referred to § 39-4-13 of Title 39 to support the argument that the Commission needed to defer to the Division, quoting language from the statute, where it states that whenever the Division believes that an investigation of "any matter relating to a public utility should, for any reason be made . . . [the Division] shall summarily investigate. . . ."[50]

As the questions continued, the Chairman asked again: "But what I'm trying to figure out is your argument. You haven't – I haven't quite got an answer there that is clear. I'm trying to understand if your argument is, is the Commission divested of its jurisdiction and authority to investigate at some point in time?"[51] Counsel answered: "I did not say that the Division – pardon me – the Commission was divested of jurisdiction at any particular point in time."[52]

The Chairman later asked counsel for the Division whether Title 39 assigns to the Commission the authority to supervise, review, and oversee the energy efficiency program, including the performance incentive. Division counsel agreed that it did.[53] Then the Chairman asked counsel about § 39-1-3(b) of Title 39 that defines the authority of the Administrator compared to the Commission, where it says: "The administrator shall be a person who is not a commissioner and who shall exercise the jurisdiction, supervision, powers, and duties not specifically assigned to the commission. . . ."[54] (emphasis added) The next question and answer that followed was:

---

[49] *Id*. at 42-43.
[50] *Id*. at 44-45.
[51] *Id*. at 47-48.
[52] *Id*. at 48.
[53] *Id*. at 51.
[54] *Id*. at 51-52.

> CHAIRMAN: . . . We've been assigned the oversight authority of the energy efficiency program, including the performance incentive mechanism. That was not assigned to the Division, and so here you have a situation where, if we're talking about jurisdiction, it's arguable that the Division doesn't have any jurisdiction to do that because we started the docket. We have it open. Every single question that we ask relates to the PIM, the performance incentive mechanism.
>
> Every single question we ask ultimately flows up to the rates, which we have jurisdiction over, and now the Division is saying, 'Oh no, time out. That's not right. You have to defer to us . . . .'
>
> How do you respond? How do you interpret out that language that I just gave and the admission that you gave that we have the authority over the program?
>
> DIVISION COUNSEL: I don't have a response for you, Mr. Chairman.[55]

The questioning continued, and the Chairman asked: "[W]hat about the issues that I'm talking about that those duties that are not specifically assigned to the Commission, if we have the oversight authority over the energy efficiency? Doesn't that provision leave the matter with the Commission?" Counsel for the Division responded by saying that she did not "believe it leaves an issue of an audit or things of that nature to the Commission."[56] The Chairman then cited § 39-1-7 of Rhode Island General Laws which states in pertinent part, "The commission shall have the power to do a complete audit of the books of all public utilities doing business in the state."

> CHAIRMAN: . . . So, we could actually order an audit, we could hire an outside group to do it that is qualified, and go do the audit and report back to us.
>
> I think it's far better to have the Division do it, with the experience that you have; but, if you decide to quit the docket, we can order [it in] the docket, or we can order it with you participating.
>
> DIVISION COUNSEL: I don't have a response to that.[57]

The questioning of Division counsel ended with one more inquiry:

---

[55] *Id*. at 52.
[56] *Id*. at 54.
[57] *Id*. at 54-55.

> CHAIRMAN: So, just to be clear, and it's hard to be clear when it's kind of murky, I still never got to a point where I could understand whether you would maintain that there was a legal requirement, as a matter of law, we had to – we had to quit right now and give it to you or whether we had some discretion to decide, one way or the other.
>
> DIVISION COUNSEL: I believe the Commission has some discretion, yes.[58]

At the end of oral argument, counsel for the Attorney General reiterated his position that the case before the Commission should not be dismissed, indicating that there is concurrent jurisdiction. He ended by saying: "With that said, it's unclear why the Division, after participating for so long in this docket, is seeking dismissal rather than simply pursuing a parallel investigation on its own or seeking to conduct the referenced audit within the context of these proceedings."[59]

Rhode Island Energy concluded by emphasizing three points. First, that customers be made whole from the impacts. Second, that the procedural path does not overwhelm the Company staff, as well as staff of the agencies. And, third, that Rhode Island Energy needs the cooperation of National Grid.[60]

National Grid did not conclude with any legal argument regarding the Motion to Dismiss, but took issue with the Division's argument that there might be more misconduct.[61] Counsel for National Grid concluded by stating: "We're committed to working with you. We have been throughout. We're serious about this, but I did just want to clarify that one piece for the record."[62]

IV. Practical Considerations for Moving Forward with the Investigation

Before addressing matters of law regarding the jurisdictional differences between the Commission and the Division which drive a conclusion under the law, it is important to address

[58] *Id*. at 55.
[59] *Id*. at 56.
[60] *Id.* at 57-58.
[61] *Id.* at 59-60.
[62] *Id.* at 61.

the practical considerations relating to the two agencies having separate investigations. In that regard, there are compelling practical reasons that support the continuation of the Commission's investigation in this Docket.

First, is the matter of transparency. The issue of the misconduct by the utility and its employees is not a secret. It has been on full display and was the subject of an article on the front page of the *Providence Journal* in June of 2022. The Attorney General, who also has an interest in this matter in protecting the public, is a participant with full access to all materials, the right to cross-examine the witnesses, and a right to conduct depositions under the Commission's rules, if needed. In contrast, the Division is proposing to conduct an investigation out-of-sight of the public, with no legal right of the Attorney General to participate in that process unless the Division consents. Stated simply, the Commission's proceeding is transparent, while the Division's proposal is to investigate in secret. The Division's closed investigation might be appropriate in other circumstances, depending upon the issues being investigated. But here, the wrongdoing has been admitted and the investigation is addressing the extent of the wrongdoing and the implications which flow from it. For this matter, the Division's proposed investigatory path is in conflict with objectives of transparency and the Division offers no support or justification for it to be hidden from public view.

Second, the Commission's process is very flexible. There are no investigatory tools that the Division would be precluded from utilizing in the Commission's process that the Division would be using in a separate inquiry. The Division indicates that an audit is warranted. The Commission has the statutory authority to order such an audit[63] and assign supervision of the audit

[63] The Commission has authority to order an audit under § 39-1-7(b): "The Commission shall have the power to do complete audit of the books of all public utilities. . . ."

to the Division or an independent party.[64] The Division need only file an appropriate request for the Commission to authorize the audit. Of course, due process would allow the utility an opportunity to respond, but the Commission would not hesitate to authorize the audit if the Division provides substantial support for its request. Moreover, the Commission does not need a request, support, or consent from the Division to do so. It may do so on its own initiative or by a request through a motion filed by the Attorney General.[65]

Third, the process through which the Division retains its role as ratepayer advocate is identical to every case that comes before the Commission and has come before the Commission for numerous decades. It is analogous to a general distribution rate case. In those cases which last for many months, the Division and its team of experts dive deeply into all operational issues of the utility, examine countless accounting records, and eventually file a comprehensive case with recommendations to the Commission. The discovery process is extensive, with hundreds of pages and files of documents being reviewed by the Division's experts. What follows are transparent and public evidentiary hearings before the Commission where all parties freely cross examine witnesses for the utility and the utility has the opportunity to cross examine the Division's or other parties' experts. To the extent that the Division believes that a specific witness for the utility needs to be questioned, the Commission has subpoena power to require the presence of the utility employees.[66] The parties also each have a right to conduct depositions.[67] While depositions are not often used in Commission proceedings, they are readily available as a means of inquiry in this

[64] *See In Re Narragansett Bay Com'n General Rate*, 808 A.2d 631 (R.I. 2002)(Commission has authority to appoint an independent auditor).
[65] *See id*. at 633-34 (Division opposed appointment of an auditor, but Commission made the appointment at the urging of the Attorney General – upheld by the Supreme Court).
[66] R.I. Gen. Laws § 39-1-13: "The commissioners are . . . authorized and empowered to summon and examine witnesses and compel the production of papers, books, accounts. . . ."
[67] R.I. Gen. Laws R.I. Gen. Laws § 39-1-16: "In any investigation or hearing conducted by virtue of this title, the person designated to conduct the hearing may cause the deposition of witnesses. . . ."

investigatory Docket. Further, if the Division is authorized to conduct an audit, the Commission would order that the Division be given complete access to all the utility employees involved to ask questions during the audit process, including National Grid employees who are subject to the Cooperation Agreement relating to the Commission's proceeding.[68]

Fourth, National Grid is a party to the Commission's proceedings, through a motion to intervene that it voluntarily filed. In addition, National Grid made a binding agreement with Rhode Island Energy to fully cooperate in the Commission's investigation under the terms of the Cooperation Agreement. That agreement makes no mention of any potential investigation conducted independently by the Division.

Fifth, there are many complex factual issues that are implicated within the Commission's docket, including the review of invoicing practices, internal communications at the utility, how the utility has calculated what it believes it owes to ratepayers, the extent of misconduct, the manner that the utility has been managing its programs in light of the incentive, and how the utility conducted its own internal audits. All of these issues are relevant to the final decision of the Commission which would address not only the extent to which the utility may owe a refund to ratepayers, but also potential modifications that may need to be made to the utility management of energy efficiency programs in the future. In contrast to the powers of the Commission, the Division has no authority to order remedial changes to the program. That authority only resides with the Commission.

What may be one of the most important issues of all – apparently overlooked by the Division – is that closing off the Commission's ability to hear all the testimony and judge the credibility of the utility witnesses in our traditional fact-finding role could have a material impact

[68] PUC Post-Decisional 1-2 Supplemental.

on the effectiveness of the Commission's regulation of the program. It is common knowledge that the performance incentive being earned by the utility for hitting its program targets has been controversial. The Commission has been engaged in a significant effort in our recent annual program approval proceedings, evaluating the effectiveness of the incentive mechanism, along with its impact on Company behavior. Depriving the Commission of first-hand examination of the utility witnesses and, instead, receiving a *fait accompli* order with binding findings of fact, written by a single hearing officer from the Division who has had little or no experience in the review of energy efficiency programs, provides no discernible benefit. Instead, it removes a significant opportunity for the Commission to address programmatic issues and enhance its ability to regulate, oversee, and evolve this annual $150 million program in the future.[69]

Sixth, it makes no practical sense for two duplicative investigations to be conducted when all issues can be addressed in one process without creating due process concerns.

Finally, the Commission also has the authority to impose penalties if the evidence supports such a result.[70] The Division and the Attorney General will have ample opportunity to evaluate this issue and make recommendations to the Commission, subject to the due process rights of the utility to defend itself.

Given all these considerations, there are compelling reasons for (i) the Commission continuing its proceedings, (ii) the Division continuing in its role as ratepayer advocate, (iii) the

[69] The proposed program budgets for 2022 exceeded $150 million. *See* Annual Energy Efficiency Plan for 2022, filing letter, page 2.

[70] See R.I. Gen. Laws § 39-1-22 ("A company subject to the supervision of the commission or division that furnishes it with a sworn or affirmed report, return, or statement, that the company knows or should know contains false figures or information regarding any material matter lawfully required of it, and any company that fails within a reasonable time to obey a final order of the commission or division, shall be fined not more than twenty thousand dollars ($20,000)"); and § 39-2-8 ("Any public utility which shall violate any provision of chapters 1 — 5 of this title, or shall do any act herein prohibited, or shall fail or refuse to perform any duty enjoined upon it for which a penalty has not been provided, shall be subject to a penalty of not less than two hundred dollars ($200) nor more than one thousand dollars ($1,000), and in the case of a continuing violation of any of the provisions of the chapters, every day's continuance thereof shall be deemed to be a separate and distinct offense.")

Attorney General continuing to be actively involved in the investigation, and (iv) the Division withdrawing its separate duplicative investigation into the same matter.

In addition to practical considerations, however, the provisions of Title 39 drive the same conclusions, as such laws have been interpreted by the Supreme Court.

V. Supreme Court Precedent Defining the Jurisdiction and Authority of the Agencies

In order to reach a decision based on legal principles, it is imperative to address the state of the law relating to the jurisdiction and authority of the Commission and the Division, as well as the differences between the two agencies. This involves a complex legal analysis.

Title 39 of the Rhode Island General Laws is the enabling legislation which created the Commission and the Division and sets forth all the requirements applicable to utilities, over whom the Commission and the Division have respective authority. Section 39-1-3 of Title 39 defines the two agencies along with the jurisdiction, powers, and authority of each. The pertinent language for the Commission reads:

> The commission shall serve as a quasi-judicial tribunal with jurisdiction, powers, and duties to implement and enforce the standards of conduct . . . and to hold investigations and hearings involving the rates, tariffs, tolls, and charges, and the sufficiency and reasonableness of facilities and accommodations of railroad, gas, electric distribution, water, telephone, telegraph, and pipeline public utilities . . . ."

The Division is defined through its Administrator. The pertinent language of the definition is as follows:

> The administrator shall be a person who is not a commissioner and who shall exercise the jurisdiction, supervision, powers, and duties not specifically assigned to the commission, including the execution of laws relating to public utilities and carriers and all regulations and orders of the commission governing the conduct and charges of public utilities who shall perform other duties and powers as are hereinafter set forth. (emphasis added)

The Commission has three appointed Commissioners and the Division has one appointed Administrator. When the Commission and the Division were created in Title 39 in 1969,[71] the chair of the Commission held the dual function of being both the chair of the Commission and the Administrator of the Division simultaneously. In 1996, Title 39 was amended to separate the Commission and Division, leaving in place much of the 1969 regulatory provisions and dual structure, but creating a separate position for the Administrator.

In 1977, the Rhode Island Supreme Court had occasion to address the structure of utility regulation under Title 39 in the case of *Narragansett Electric Company v. Harsch*, 368 A.2d 1194 (R.I. 1977). In addressing the differences in purpose and authority between the Commission and the Division, the Supreme Court in *Harsch* noted an interpretive challenge in discerning the differences between the agencies, commenting:

> Inasmuch as the statute is not entirely clear in its delineation of the powers of the commission and division respectively, we must attempt herein to ascertain the legislative intention from a consideration of the legislation in its entirety, viewing the language used therein in light, nature, and purpose of the enactment thereof. . . . In so doing, it is our belief that the only meaningful way in which to read the present statute and specifically, the above-quoted provision, is the General Assembly intended by its enactment to segregate the judicial and administrative attributes of ratemaking and utilities regulation and to vest them separately and respectively in the commission and administrator (or division).[72]

The Court went on to describe the functions of each of the agencies, comparing the judicial powers of the Commission to the administrative powers conveyed to the Administrator and the Division. In doing so, the Court made the following observation contrasting the Commission from the Division:

> In contrast to the aforementioned judicial powers enjoyed by the commission are the general and administrative powers conveyed to the administrator and the division as set forth in chapter 3 of title 39. Of particular relevance to this case, though is the

[71] *See Narragansett Electric Company v. Harsch*, 368 A.2d 1194, 1198-99 (R.I. 1977). As described by the Court, the prior law vested authority solely in the Division within the Department of Business Regulation.
[72] *Id*. at 1199.

> interrelationship which the statute has established between the commission and the administrator (or division) in matters dealing with rates, tariffs, tolls and charges. Section 39-1-11 requires that the commission's adjudications be based upon law and upon the evidence 'presented before it by the division and by the parties in interest.' It would appear, therefore, that the Legislature perceived that, in matters brought for hearing before the commission, the division would assume a role not unlike that of a party in interest. (emphasis added)[73]

The Court went on to say in the subsequent paragraph of the same decision:

> [I]t seems manifest that, in pursuit of the public interest set forth in section 39-1-1, the Legislature has conceived a system whereby the Division of Public Utilities and Carriers, in addition to its broad regulatory powers, appears on behalf of the public to present evidence and to make arguments before the commission.[74]

The Supreme Court has been unequivocal regarding the statutory role of the Division when the Commission is holding hearings and investigations. The Court restated it simply in a 1980 case: "In our opinion it 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." (emphasis added)[75] The implications are clear. The Division's function is "to serve the commission" in Commission proceedings, in its role as ratepayer advocate. In 1998, the Court reiterated this statutorily assigned role of service to the Commission, stating again that "[t]he Rhode Island Division of Public Utilities and Carriers . . . was established pursuant to G.L.1956 § 39-1-3(a) '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. . . .'"[76]

In 1992, the Supreme Court had another occasion to describe the broad regulatory authority of the Commission over public utilities. In the case of *Town of East Greenwich v. O'Neil*, 617 A.2d 104 (R.I. 1992), the court observed:

---

[73] *Id*. at 1200.
[74] *Id*.
[75] *Providence Gas Co. v. Burke*, 419 A.2d 263, 270 (R.I. 1980).
[76] *Providence Water Supply Board v. Public Utilities Commission*, 708 A.2d 537, 539 (R.I. 1998).

> We have recently recognized the intent of the General Assembly to vest the commission with exclusive authority to regulate public utilities. Our decision in *South County Gas v. Burke*. . . and *In re Woonsocket Water Department* . . ., are particularly instructive.
>
> In both [cases] we examined the Legislature's intent in § 39-1-1. We noted "[t]he commission has the '*exclusive* power and authority to supervise, regulate and make orders governing the conduct' " of public utilities. (Emphasis added [in original]) . . . . In each case we underscored the comprehensive approach that the commission brings to resolving collective-action problems concerning public utilities. As set forth in title 39, "the Legislature intended to establish a qualified administrative body to evaluate technical evidence, address the myriad of complex problems associated with regulatory proceedings, and render intelligent decisions."[77]

While the Supreme Court has consistently recognized the broad supervisory authority of the Commission over public utilities, the Court has been equally consistent in recognizing the ratepayer advocacy role of the Division in proceedings before the Commission. This has remained true, even after the positions of the chair of the Commission and the Administrator of the Division were separated in 1996.

> In a high-speed ferry case in 2000, the Court restated the authority of the Commission:
>
> "[Title] 39 is replete with examples of the broad reach of the commission's authority. . . . General Laws 1956 § 39-1-1(c) vests the Commission with the "exclusive power and authority to supervise, regulate, and make orders governing the conduct of companies offering [utility services] to the public' for the purpose of protecting the public against improper and unreasonable rates. Additionally, § 39-1-3(a) provides the Commission with the "jurisdiction, powers, and duties . . . to hold investigations and hearings involving the rates, tariffs, tolls, and charges" of a public utility.[78]

In that same decision, the Court included a footnote which stated: "The Division . . . is statutorily charged with representing the interests of the public, as its advocate, in rate proceedings before the Commission."[79]

In a water utility case in 2010 involving Kent County Water Authority, the Court again restated the distinction between the Commission and the Division, noting how the statutory scheme

[77] *Town of East Greenwich v. O'Neil*, 617 A.2d 104, 109-10 (R.I. 1992)(citations omitted)(emphasis in original).
[78] *In Re Island Hi-Speed Ferry, LLC*, 746 A.2d 1240, 1244 (R.I. 2000).
[79] *Id*. at n.6.

defines the jurisdiction of the Division as beginning where the Commission's assigned jurisdiction leaves off, stating:

> We begin by noting the distinction between the Division of Public Utilities and Carriers (division) and the PUC. The division is legally and functionally separate from the PUC. As set forth in G.L. 1956 § 39-1-3, the General Assembly established the PUC and the division, designating the PUC as a quasi-judicial tribunal and the division, which exercises powers not specifically assigned to the PUC.[80] (emphasis added)

Citing the *Narragansett v. Harsch* case, the Court quoted from that 1977 decision, stating:

> "[T]he General Assembly intended by its enactment to segregate the judicial and administrative attributes of ratemaking and utilities regulation to vest them separately and respectively in the [PUC] and the [division]. Other provisions in title 39 support this interpretation. For instance, the [PUC] is clothed with the 'powers of a court of record' in determining an adjudicating matters within its jurisdiction. . . . It is further empowered to make orders and render judgments and to enforce the same by suitable process. . . ."[81]

In that 2010 water utility decision, the Court cited the hi-speed ferry case of 2000 in which the Court had defined the Division's statutorily mandated role, stating that the Division "is statutorily charged with representing the interests of the public, as its advocate, in rate proceedings before the [PUC]."[82]

There are three salient principles that arise out of this history of Rhode Island Supreme Court decisions interpreting Title 39, relating to the Commission's jurisdiction and the role of the Division. First, the Commission's has broad authority on matters that relate to rates, and other public utility matters. Second, the jurisdiction of the Division is subordinate to the jurisdiction of the Commission when jurisdiction is assigned to the Commission. As the statutory definition states, "The administrator shall . . . exercise the jurisdiction, supervision, powers, and duties not specifically assigned to the commission. . . ."[83] (emphasis added) – a principle that was quoted by

[80] *In Re Kent County Water Authority Change Rate Schedules*, 996 A.2d 123, 125-26 (R.I. 2010).
[81] *Id*. at 126.
[82] *Id.*
[83] R.I. Gen. Laws § 39-1-3(b)

the Supreme Court in the 2010 water company case cited above.[84] In other words, the Division's jurisdiction picks up where the Commission's jurisdiction leaves off.

This principle is significant for this case. The language which clarified that the Division's jurisdiction begins where the Commission's jurisdiction leaves off was separately added to the General Laws in 1973 under the title which began with the words "An Act Clarifying the Areas of Jurisdiction as Between the Public Utilities Commission and the Division of Public Utilities and Carriers . . ."[85] This language was clearly clarifying the jurisdiction between the Commission and the Division that likely became an issue after Title 39 was revamped in 1969 to create both the Division and the Commission.

Finally, the Supreme Court has made it clear that when the Commission is exercising its jurisdictional authority in the investigations and hearings before it, the role of the Division is to "serve the commission" by participating as an active ratepayer advocate, presenting evidence. This is consistent with § 39-1-11 which states explicitly that "The commission shall sit as an impartial, independent body, and is charged with the duty of rendering independent decisions affecting the public interest and private rights based upon the law and upon the evidence presented before it by the division and by the parties in interest." (emphasis added) In fact, as a legal and practical matter, the Commission cannot effectively carry out its statutory duty without parties presenting evidence for a decision.

VI. The Commission's Jurisdiction and Authority in this Matter

The investigation before the Commission relates to rates and the Commission's exclusive authority to assure that the rates charged by the utility for the energy efficiency program are just

[84] *Kent County Water Authority*, at 125-26.
[85] P.L. January Session, 1973 – Chapter 199.

and reasonable. However, in this case, there are two other sections of Title 39 which assign explicit authority and responsibility to the Commission for the oversight of the energy efficiency program itself and, most important, responsibility for the incentive mechanism which the Company admittedly manipulated through the mismanagement of out-of-period invoices to enhance the payout of incentives.

Specifically, R.I. General Laws § 39-1-27.7, entitled "System reliability and least-cost procurement," sets forth requirements for the development, filing, and approval of annual and triennial energy efficiency program proposals. As confirmed by counsel for the Division during oral argument, this section of Title 39 assigns to the Commission oversight authority over the energy efficiency programs.[86] In addition, subparagraph (b) of this section assigns the responsibility to the Commission to establish standards for system reliability and energy efficiency and conservation procurement. Subparagraph (f) of this section of the law also expressly assigns to the Commission the responsibility to establish the performance incentive mechanism within the energy efficiency program which relates to the core subject of this investigation. Moreover, R.I. Gen. Laws § 39-2-1.2(b) also states that the account which is set up by the utility for the energy efficiency program (also referred to as "demand-side management") is "subject to the regulatory reviewing authority of the commission."

The Division is not assigned any responsibility for supervising or overseeing the program, or the applicable account related to the program. Given the fact that the investigation in this case not only relates to the justness and reasonableness of the energy efficiency rates, but also relates squarely to the program, incentive mechanism, and account over which the Commission is given

[86] Docket 22-05-EE, Hr'g Tr. at 51 (March 28, 2023).

unambiguous and broad statutory oversight, there can be no dispute that the Commission has the authority and jurisdiction to pursue the investigation.

Moreover, in this case, the core issue being investigated relates to how the utility accounted for its invoices. The Commission has authority to investigate rates, even apart from its assigned authority to oversee the energy efficiency programs. When determining the justness and reasonableness of rates, review of accounting practices is foundational and has always been a subject matter over which any public utility commission across the United States has had the authority and duty to examine.[87] This case is no different.

The Legislature has very clearly assigned to the Commission the duty to oversee the energy efficiency programs and assure that rates are just and reasonable. Further, in the statutory definition of the Administrator, authority has been given to the Division only where the jurisdiction, supervision, powers, and duties have not been "specifically assigned to the commission." Thus, there is no jurisdictional basis for the Division to step out of its role of serving the Commission as ratepayer advocate to assume a role similar to an impartial quasi-judicial authority in this case where the Commission is exercising its assigned authority over the subject matter in that role. Neither the Division nor the Commission are authorized to avoid or abdicate their respective statutory responsibilities in those cases where the Commission has indisputable jurisdiction to conduct an investigation and hearings relating to the subject matter.

VII. The Division's Argument Regarding the Summary Investigation Provision

Despite the jurisdictional basis for the Commission's ongoing proceeding, the Division appears to be arguing that R.I. General Laws § 39-4-13, entitled "Summary investigation by

[87] *See* 73B *C.J.S. Public Utilities*, § 182 Accounts and Accounting Systems (March 2023)("Matters of accounting are peculiarly within the province of the commission as an expert rate-making body.").

division" (Summary Investigation Provision) should take precedence over the Commission's duly commenced investigation.[88] At best from what can be determined by its one-page Motion to Dismiss and oral argument,[89] the Division appears to maintain that – even though this investigation has been ongoing for over a year with the Division performing its statutory obligation to serve the Commission in its role as ratepayer advocate – the Commission should step aside and defer to the Division to take over the investigation, make findings, and issue final decisions, as specifically referenced in the limited text of the Division's motion to dismiss.

The Summary Investigation Provision was enacted into law over 100 years ago, in the year 1912, with nearly identical language to the law in existence today.[90] This occurred in conjunction with the creation of the commission. In 1923, the law was amended to eliminate the commission from the entire statutory structure and substitute a division of public utilities in its place.[91] The language of the Summary Investigation Provision remained materially unchanged except for the reference to the commission being changed to the division. In 1969, a public utilities commission was reconstituted without eliminating the division, with the chair of the commission also serving as administrator of the Division.[92] The language of the Summary Investigation Provision again

---

[88] **§ 39-4-13. Summary investigation by division.** Whenever the division shall believe that any of the rates, tolls, charges, or any joint rate or rates, charged, demanded, exacted, or collected by any public utility are in any respect unreasonable or unjustly discriminatory or otherwise in violation of this title, or that any regulation, measurement, practice, or act whatsoever of the public utility, affecting or relating to the conveyance of persons or property, or any service in connection therewith, or affecting or relating to the production, transmission, delivery, or furnishing of heat, light, water, or power, or any service in connection therewith, or the conveyance of telephone or telegraph messages, or any service in connection therewith, is in any respect unreasonable, insufficient, or unjustly discriminatory; or that any service of the public utility is inadequate or cannot be obtained, or is unsafe, or the public health is endangered thereby; or that an investigation of any matter relating to a public utility should, for any reason be made, it shall summarily investigate the same with or without notice as it shall deem proper. The summary investigation as provided under this section shall be in addition to the hearings conducted pursuant to the provisions of §§ 39-3-7 and 39-3-11.

[89] Docket 22-05-EE, Hr'g Tr. at 44-45 (March 28, 2023).
[90] P.L., 1912, Ch. 795, § 26..
[91] P.L., 1923, Ch. 253, § 23.
[92] P.L., 1969, Ch. 240, § 7.

remained materially unchanged from the language in the 1912 version. There was another amendment in 1997, but such amendment was a non-substantive wording change.[93]

For over 100 years, the Summary Investigation Provision has contained the same long sentence with many subparts. The Division in this case is essentially relying upon a clause within that long sentence which is quoted below (with the unrelated provisions removed for the convenience of readability):

> Whenever the division shall believe that . . . an investigation of any matter relating to a public utility should, for any reason be made, it shall summarily investigate the same with or without notice as it shall deem proper.[94]

This provision is so broad that – taken literally and out of context – it would swallow whole all of Title 39 investigatory authority expressly delegated and assigned elsewhere to the Commission. If the Division believes that it may for any reason, on any matter relating to public utilities, open a parallel proceeding, without regard to pending Commission proceedings, such belief is contradicted by the explicit separation of authority now present in Title 39. Or, if the Division believes that the legislature intended that the two agencies have concurrent jurisdiction and both can engage in the same investigatory task at the same time, it completely disregards the framework of Title 39.

When viewed in the context of the Commission's investigation in this case, the Division is interpreting the statute in a manner that authorizes the Division to undertake an investigation at any time, for any reason, effectively overriding every other provision in Title 39 that assigns jurisdiction and authority to the Commission. And, according to the Division, this authority exists even if (i) the Commission has already opened an investigation precisely on the same subject

[93] The last sentence of the section was merely amended in 1997 to delete the word "herein" and add the words "as" and "under this section." P.L. 1997, ch. 326, § 107.
[94] *See* R.I. Gen. Laws § 39-4-13; Docket 22-05-EE, Hr'g Tr. at 44-45 (March 28, 2023); and Motion to Dismiss, first paragraph.

matter, (ii) the Division has already participated in the Commission's investigation in its assigned role as the ratepayer advocate in service to the Commission for over a year, and (iii) the subject of the investigation pertains to a matter over which the Commission has been expressly assigned under the law.

The implications of the Division's interpretation of its authority arising out of the Summary Investigation Provision would mean that any time the Division wishes to halt a Commission proceeding on any subject relating to public utilities, the Division may do so by simply commencing a duplicative investigation with or without notice to the Commission. Instead of the three-Commissioner quasi-judicial agency hearing the evidence, making findings, and issuing final binding decisions over the subject litigated among the parties, a single hearing officer assigned by the Administrator would take over the duties of hearing the case, make the findings, and issue a final decision, subject to the final consent of the Administrator whose signature would be necessary to effectuate the order.[95] Such a result is inconsistent with a sensible interpretation of the current modern-day regulatory framework in Title 39 which grants broad authority to the Commission to investigate rate matters and other issues under its jurisdiction, with the Division serving the Commission as a party in those proceedings.[96]

At oral argument, Division counsel referred to an investigation that was performed by the Division in 2019 relating to the causes of the gas system outage on Aquidneck Island. The Division maintained that the Division summary investigation that was launched without notice in this case is the same as the Aquidneck Island investigation.[97] But the Aquidneck Island investigation was

[95] *See* R.I. Gen. Laws § 39-1-15.
[96] *See* cases cited, *supra*, Section V of this Order.
[97] Tr. March 28, 2023, at 40-41.

fundamentally different.[98] First, the investigatory report did not make binding findings of fact that could affect rates, nor did the Division hold any hearings relating to any facts relating to the outage or rate matters after the report was issued.[99] Second, the objective of the investigation was to identify the operational causes of the outage and determine whether any regulations under the Division's purview were violated by the utility. In fact, the report found a single violation of the Division's regulations.[100] Further, the Division notified the Commission of the investigation and issued a press release disclosing the investigation to the public when it was commenced. Nearly every aspect of that investigation was different than what is before the Commission in this case.

In this case, the Division has appeared to set in motion the displacement of the Commission's authority and place it in the hands of a single hearing officer by launching its version of the investigation without notifying the Commission. But the law as interpreted by the Supreme Court and the statutory amendment that clarified jurisdiction in 1973 reflects long-standing principles that reveal the Division's approach to be jurisdictionally flawed. As a matter of law, if the Division's jurisdiction only begins where the Commission's jurisdiction leaves off, any decisions or findings made by the Division through the Summary Investigation Provision cannot, as a matter of law, bind the Commission. Once the Commission commenced its own investigation related to a subject matter over which it had jurisdiction, the Commission's investigation and any findings it makes on the matter must prevail, regardless of any outcomes in the Division hearing

[98] The final report of the investigation can be found at: https://ripuc.ri.gov/sites/g/files/xkgbur841/files/eventsactions/AI_Report.pdf (Aquidneck Island Report, October 30, 2019).
[99] One short section of the report concluded that the Company should not be allowed cost recovery, but recognized that it was an issue for the Commission, stating: "[T]he Division believes that from a ratemaking perspective, Narragansett Electric ratepayers should not bear restoration costs and other post-event incremental costs incurred from the outage. . . . In any event, the decision of whether ratepayers should reimburse Narragansett Electric for any of the costs not recovered from other service providers would be made by the Public Utilities Commission." Aquidneck Island Report at 73.
[100] *Id*. at 60.

and regardless of who finishes first.[101] Under ordinary principles of due process, statutory interpretation, and plain common sense, the Division's position cannot stand.

During oral argument, however, counsel for the Division suggested that the Commission should defer to the Division. But deferring to the Division's summary investigation process would be an abdication of the Commission's own jurisdictional duties. If the Commission granted the Division's request, the role of the quasi-judicial Commission to make findings of fact upon which its subsequent rate and program-related decision is based could be evaded under principles of *res judicata* or *collateral estoppel.* These legal doctrines of civil procedure are intended to prevent the same issues from being litigated twice. Under these doctrines, once there is a finding of fact and final decision from one tribunal, the findings could become binding on all parties who have participated in the first tribunal, thus preventing the issues from being relitigated in a second tribunal. If applied to this case, such a result would collide with the jurisdictional framework of Title 39, as confirmed by the Supreme Court, because the Commission would be deprived of independently evaluating and probing all of the relevant evidence upon which its rate and program-related decision would be based.

Another problem with the Division's position is the lack of clarity regarding the Division's intentions. Specifically, there were inconsistent assertions made by the Division in its short Motion to Dismiss, compared to the assertions of counsel for the Division during oral argument. Within the Motion to Dismiss, the Division stated:

> [T]he Division submits that sufficient evidence exists in this docket to date to warrant an independent summary investigation by the Division, to include an audit of the Company, pursuant to R.I. Gen. Laws § 39-4-13.

[101] The case in this Docket does not involve a situation in which the Commission has jurisdiction and chooses not to exercise it. Nor is it a situation where the Commission has requested the Division to investigate separately. The Commission draws no conclusions in this case relating to those hypothetical situations. In this case, the Commission did exercise its authority and commenced an investigation.

> Thereafter, should the Division find sufficient grounds, the Division may proceed to a formal hearing as to the matters under investigation, pursuant to R.I. Gen. Laws § 39-4-14 and § 39-4-15. Upon conclusion of its investigative process, the Division will provide the PUC with a report outlining the Division's findings and final decisions.

The final sentence of the pleading asserts that the Division contemplates the possibility of a hearing with findings of fact and "final decisions," without any limitation as to the subject matter of the inquiry. Yet, during oral argument, counsel for the Commission described the Division's intentions quite differently, cautiously denying any intention to address the amount of the refund that would be owed and how it would be determined.[102] She represented that the Division only intends to explore whether there was additional wrongdoing by the utility that was not already admitted by the utility, and then inform the Commission who could then take it into account when addressing any refund. But she equivocated in her response.[103]

Given the reference to an "audit" in the Motion to Dismiss, it is hard to understand how the audit would limit itself to additional wrongdoing. In either case, however, any additional wrongdoing would be directly relevant to the outcome of the rate and program issues. Segregating those issues for a separate hearing outside of the Commission proceeding causes a collision between the Commission's authority and the Division's separate investigatory initiative.

Prior to the 1996 amendments to Title 39 which separated the positions of chair and administrator, the chair of the Commission had the authority to determine which agency should engage in investigations in any given case. Therefore, there could never be an impasse between the agencies regarding investigations. When the law was amended to create separate positions for the chair and the administrator, it had the perceived collateral effect of removing this impasse-avoidance. However, as numerous Supreme Court decisions have held, the statutory distinctions

[102] Docket 22-05-EE, Hr'g Tr. at 23-24 (March 28, 2023).
[103] *Id.* at 24 ("I wouldn't anticipate that the Division would be undertaking the calculations. I can't say for certain, but I don't believe that that would be the case.").

remained, with the Commission having paramount authority on matters over which it has been granted jurisdiction. Thus, no impasse should occur when it involves a matter specifically assigned to the Commission and the Commission exercises its jurisdiction over the matter. The Commission's jurisdiction and authority prevails.

As the Supreme Court stated in the 1977 *Narragansett Electric v. Harsch* decision, "we must attempt herein to ascertain the legislative intention from a consideration of the legislation in its entirety, viewing the language used therein in light, nature, and purpose of the enactment thereof." Applying that same standard today, the only sensible result that aligns with the entire legislative framework is to respect the authority of the Commission to investigate matters over which it has unambiguous jurisdiction and, in turn, have the Division fill its role of serving the Commission as a ratepayer advocate in those proceedings, as opposed to shutting down the Commission's case and handing it over to a single hearing officer at the Division.

In sum, the Division has failed to make any persuasive arguments to support its position on any grounds. The Division did not provide any legal memoranda supporting its motion. The Division did not assert during oral argument that the Commission's jurisdiction and authority to continue the investigation was preempted in any fashion by the Division. Nor did the Division provide any reasons based on administrative efficiency, fairness to the utility being investigated, due process considerations, or any other reason except to assert that the legislature bifurcated the responsibilities of the Commission and the Division. Merely stating a conclusion without any legal arguments to support the assertion does not make it true. Finally, the wealth of Supreme Court precedent defining the roles of the Commission and the Division contradicts the Division's inexplicable position.

VIII. Conclusion

For all of these reasons, both legal and practical, the Division's motion must be denied and the Commission must continue its investigation.

Accordingly, it is hereby

(24648) ORDERED:

The Division of Public Utilities and Carriers Motion to Dismiss is denied.

EFFECTIVE AT WARWICK, RHODE ISLAND ON APRIL 14, 2023, PURSUANT TO AN OPEN MEETING DECISION ON APRIL 14, 2023. WRITTEN ORDER ISSUED APRIL 20, 2023.

PUBLIC UTILITIES COMMISSION

Ronald T. Gerwatowski, Chairman

Abigail Anthony, Commissioner

John C. Revens, Jr., Commissioner

NOTICE OF RIGHT OF APPEAL: Pursuant to R.I. Gen. Laws §39-5-1, any person aggrieved by a decision or order of the PUC may, within seven (7) days from the date of the order, petition the Supreme Court for a Writ of Certiorari to review the legality and reasonableness of the decision or order.