



STATE OF RHODE ISLAND

DIVISION OF PUBLIC UTILITIES & CARRIERS

Legal Section

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March 24, 2023

Ms. Luly Massaro
Public Utilities Commission
89 Jefferson Boulevard
Warwick, R.I. 02888

Re: Docket 5189 & Docket 22-05-EE

Dear Ms. Massaro:

Attached please find the following documents from the Division of Public Utilities & Carriers to be filed in the above referenced dockets.

1. Objection to Discovery
2. Motion to Quash
3. Memorandum in Support of Objection and Motion

Very Truly Yours,

A handwritten signature in black ink, appearing to read "Margaret L. Hogan".

Margaret L. Hogan, Esq.

cc: Linda D. George, Esq., Administrator, DPUC

STATE OF RHODE ISLAND
PUBLIC UTILITIES COMMISSION

In re: Investigation of Misconduct by The Narragansett
Electric Company Relating to Past Payments of Energy
Efficiency Program Shareholder Incentives

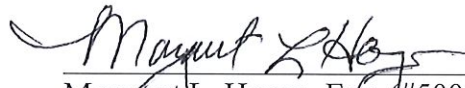
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: DOCKET NO. 22-05-EE
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**DIVISION OF PUBLIC UTILITIES AND CARRIERS'
OBJECTION TO THE COMMISSION'S SECOND SET OF DATA REQUESTS ISSUED
TO THE NARRAGANSETT ELECTRIC COMPANY ON MARCH 17, 2023**

Now comes the Division of Public Utilities and Carriers ("Division") and objects to the Public Utilities Commission's ("PUC" or "Commission") Second Set of Data Requests issued to The Narragansett Electric Company on March 17, 2023. In support hereof, the Commission is directed to a memorandum filed contemporaneously herewith.

March 24, 2023


Respectfully Submitted:
Linda D. George, Esq., Administrator
By her Attorney:



Margaret L. Hogan, Esq. (#5006)
Division of Public Utilities & Carriers
89 Jefferson Boulevard
Warwick, R.I. 02888
Tel 401-780-0120
Margaret.l.hogan@dpuc.ri.gov

CERTIFICATION

I do hereby certify that on the 24th day of March, 2023, I sent a copy of the within Objection to the service list of PUC docket 22-05-EE via email.



Margaret L. Hogan, Esq.

STATE OF RHODE ISLAND
PUBLIC UTILITIES COMMISSION

In re: Investigation of Misconduct by The Narragansett
Electric Company Relating to Past Payments of Energy
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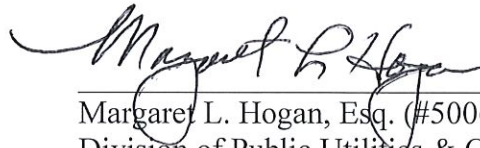
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: DOCKET NO. 22-05-EE
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**DIVISION OF PUBLIC UTILITIES AND CARRIERS MOTION TO RECONSIDER/QUASH
COMMISSION'S SECOND SET OF DATA REQUESTS ISSUED ON MARCH 17, 2023 TO
THE NARRAGANSETT ELECTRIC COMPANY**

Now comes the Division of Public Utilities and Carriers (“Division”) and moves the Public Utilities Commission’s (“PUC” or “Commission”) to reconsider or, in the alternative, an order quashing the Commission’s Second Set of Data Requests issued to The Narragansett Electric Company on March 17, 2023. In support hereof, the Commission is directed to a memorandum filed contemporaneously herewith.

Respectfully Submitted:
Linda D. George, Esq., Administrator
By her Attorney:

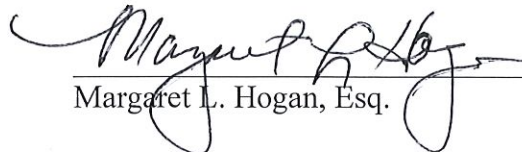
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CERTIFICATION

I do hereby certify that on the 24th day of March, 2023, I sent a copy of the within Motion to Reconsider/Quash to the service list of PUC docket 22-05-EE via email.



Margaret L. Hogan, Esq.

STATE OF RHODE ISLAND
PUBLIC UTILITIES COMMISSION

In re: Investigation of Misconduct by The Narragansett Electric Company Relating to Past Payments of Energy Efficiency Program Shareholder Incentives	:	:	DOCKET NO. 22-05-EE
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**DIVISION OF PUBLIC UTILITIES AND CARRIERS’
MEMORANDUM IN SUPPORT OF OBJECTION AND MOTION TO QUASH**

Now comes the Division of Public Utilities and Carriers (“Division”) and objects to the data requests issued to The Narragansett Electric Company (“Narragansett” or “Company”) and moves this Public Utilities Commission (“PUC” or “Commission”) for an order quashing its data requests directed to Narragansett on Friday, March 17, 2023.

As grounds therefore, the Division submits that the Commission’s data requests seek to secure non-public information that is within the exclusive jurisdiction of the Division, as an investigative agency, pursuant to R.I. Gen. Laws §39-4-13, and is an unwarranted intrusion into a sister state agency’s authority and control. Moreover, since the Division has previously indicated that upon the conclusion of its investigative and audit processes, the Division will provide the PUC with a report outlining the Division’s findings and final decisions, the PUC’s attempt to insert itself into the Division’s investigative processes is wholly unnecessary.

Pursuant to R.I. Gen Laws §39-1-15, §39-4-13, and §39-4-14, the Division has the authority to conduct utility investigations, including audits. The PUC, pursuant to §39-1-3(a) has the authority to conduct investigations and hearings that involve utility rates, tariffs, tolls, and charges. As such, the Division asserts that the appropriate process permits the Division to first conduct and complete an investigation which may include an audit. Then if appropriate, the

Division would request the PUC to undertake its investigation as to the financial impact in rates tariffs, tolls and charges, if any.

The timing of the utility's March 27, 2023 deadline to answer the PUC's data requests coincides with the deadline for the Division to file its objection to the discovery. As such, the Division will be deprived of an opportunity to be heard concerning its objection to the data requests, a wholly unnecessary violation of due process.

Finally, the Division is concerned that the PUC's intrusion in the Division's investigation could provide a legal impediment to the Commission's impartiality should the Division decide to seek expenses from the electric distribution utility for the costs of its investigation, pursuant to R.I. Gen. Law §39-4-12. The Division implores the Commission to examine this particular issue with a careful lens.

INTRODUCTION

At the outset, the Division reassures the Commission that, as anticipated and indicated in the Division's prior motion to dismiss, the Division has opened an undocketed investigation, which may include an audit, into Narragansett's conduct within its energy efficiency programs. Although the Division, pursuant to R.I. Gen Law §39-4-13, is not required to provide notice to Narragansett concerning the commencement of an investigative proceeding, the Division did, in fact, provide such notice. At present, the undocketed investigatory process is underway and no conclusions or recommendations for further proceedings under R.I. Gen Laws §39-4-14 have been reached by the Division. The Division reserves all its rights and duties under law to pursue that investigatory process, without outside interference and further reserves its right to seek assistance, collaboration,

and cooperation from the Rhode Island Attorney General's office, as necessary, and to the extent permitted by law.

This approach, an undocketed investigation, is not only permitted by law, but has been utilized by the Division as recently as 2019, when now PUC Chairman Gerwatowski, (then working as a Consulting Senior Regulatory Advisor to the Division), led the Division's undocketed investigation into the Aquidneck Island gas outage. In that case, the Division hired expert consultants, conducted discovery through multiple rounds of data requests, and conducted interviews of utility personnel. Additionally, the Division reached out to and collaborated with the federal Pipeline and Hazardous Materials Safety Administration ("PHMSA") and the Rhode Island Attorney General's Office. While the Commission, as well as the rest of the state, was certainly anxious to hear the results of the gas outage investigation, that process unfolded without outside interference. As evidenced by the report issued by the Division's investigative team a little over nine months later on October 30, 2019, investigations often take a fair amount of time.¹ It was not until the conclusion of that complete investigation that the PUC was notified of the final results of that investigation. A copy of the Division's report was timely filed with the Commission.

In the present matter, the Division expects to follow a similar path in its investigation and anticipates that it may utilize the assistance of other state regulatory or potentially other law enforcement agencies, such as the Rhode Island Attorney General's Office, as necessary and if appropriate. Like the Aquidneck Island proceeding, and as referenced in the Division's prior

¹ See pages 9-11, Summary Investigation into the Aquidneck Island Gas Service Interruption of January 21, 2019, (October 30, 2019); https://ripuc.ri.gov/sites/g/files/xkgbur841/files/eventsactions/AI_Report.pdf.

motion to dismiss, the Division anticipates filing a report with the Commission upon the completion of its investigation.

ARGUMENTS

1.) THE DOCUMENTS SOUGHT FROM THE UTILITY ARE NOT “PUBLIC RECORDS”, AS DEFINED BY R.I. GEN. LAWS 3-2-2 (4)(P) AND REQUESTING THE SAME FROM THE ENTITY UNDER INVESTIGATION EFFECTUATES AN END-RUN AROUND SPECIFIC EXEMPTIONS OF THE ACCESS TO PUBLIC RECORDS LAWS.

The Division is a “public body”, as defined by R.I. Gen Law §38-2-2 and its records, *unless otherwise exempted from disclosure* are available upon request to the public. The records sought in this case are indisputably investigatory records of a public body and are exempt from access, pursuant to R.I. Gen. Law §38-2-2(4)(P) which states:

“All investigatory records of public bodies, with the exception of law enforcement agencies, pertaining to possible violations of statute, rule, or regulation other than records of final actions taken, provided that all records prior to formal notification of violations or noncompliance shall not be deemed to be public.”

In this case, had the Commission requested the documents sought under its data requests directly from the Division, the request would have been rightfully denied, as protected investigatory records which have been deemed by the legislature as not public records (“shall not be deemed to be public”). The public policy behind such an exemption to disclosure is to permit the investigatory body the ability to undertake its investigation as it sees fit, without interference from members of the public or other bodies that have no jurisdiction to review said records. In some cases, investigatory records may reveal an agency’s investigative techniques, investigator identities, confidential sources, confidential and sensitive personal information, trade-secrets, and other information which simply does not belong in the public domain. In an investigation, an

agency may cast a wide net and secure records that ultimately are not utilized to reach the investigation's final determination. As such, non-disclosure of those investigatory records make sense because it balances the public's right to access to agency records (which the legislature has deemed *may* be public) and a right to privacy, in accordance with the state's public policy set forth at R.I. Gen. Law §38-2-1. Upon conclusion of an investigation, some of the underlying discovery documents may become public, as was the case in the Division's gas outage investigation. In fact, the appendix to that report stated: "Most of the documents contain labels indicating they are 'confidential.' During the pendency of the investigation, they were exempt from public disclosure as "investigatory records" in a pending investigation."² Division Rule 1.6(A)(1) also specifically provides for confidentiality of investigatory documents:

"No particular form of informal inquiry or complaint is required. Informal inquires or complaints may be made by letter, telephone, or in person. Pursuant to R.I. Gen. Laws § 38-2-2(D)(16) any final action taken will be deemed a public document, however, such final action does not thereby make the investigatory file leading up thereto public documents and such investigatory file is exempt from disclosure to non-parties."

In the present case, rather than request the confidential investigatory documents from the Division, the Commission has sought them, in an open docket, from the utility under investigation.³ The utility is not a public entity as defined under the Access to Public Records Act, ("APRA") and has no statutory shield available to deny discovery, as does the Division. The utility is at the mercy, so-to-speak, to the Commission's highly irregular discovery approach. Without the Commission's reconsideration of its discovery demands, or relief granted to the Division by the Rhode Island Supreme Court, the utility will be required to release to the Commission and the

² https://ripuc.ri.gov/sites/g/files/xkgbur841/files/eventsactions/AI_RPT_Appndx.pdf.

³ PUC Docket 22-05-EE: Investigation of Misconduct by The Narragansett Electric Company Relating to Past Payments of Energy Efficiency Program Shareholder Incentive.

public-at-large, records that would otherwise be shielded from disclosure at this point in the Division's investigation. The utility does not have standing to assert an APRA exception on the Division's behalf. This end-run around the construct of R.I. Gen Law §3-2-2 (4)(P) results in a litigatory squeeze-play.

Unless the Commission reconsiders or agrees to quash the discovery request issued by its staff, the statutory protections afforded to the Division's investigations will be thwarted through an end-run of the statute. Surely, upon reflection, neither the Commission nor the Attorney General's office, which is charged with upholding the Access to Public Records Act in its entirety, could possibly desire such an improper result. Indeed, if such a maneuver is countenanced, then what would prevent the Commission from issuing a similar demand upon the utility for investigatory demands that may have been issued, or might yet issue by the Rhode Island Attorney General's Office?

A search of Rhode Island caselaw did not yield any cases with a similar fact pattern as the present scenario: one state agency seeking the investigatory records of second state agency during the pendency of an investigation by the second agency, via the target of the second agency's investigation, rather than seeking such records directly from the investigating agency. In fact, only one Superior Court case even referenced R.I. Gen. Law §38-2-2(4) (P); *Atturio v Evora*, K.C. No. 08-0807 (R.I. Super. 2009). There, in response to a plaintiff's concerns that records sought by the R.I. Human Rights Commission would become public, the court said:

"The records sought for production are investigative records and thus are not public. See G.L. 1956 §38-2-2(4) (Investigatory records of public bodies, with the exception of law enforcement agencies, pertaining to possible violations of statute, rule, or regulations...shall not be deemed to be public." (*Id.* at 10.)

The Division notes that the exception from disclosure for investigatory records was one of the bedrock principles contained in the original Access to Public Records Act in 1979. This

exception has been modified only once, to provide the exception for law enforcement agencies. The Division is not a law-enforcement agency and its investigative records enjoy the full protections of the exemption from disclosure for its investigatory records set forth at R.I. Gen. Law §38-2-2(4)(P).

2. THE STATUTORY AUTHORITY TO CONDUCT UTILITY INVESTIGATIONS LIES WITH THE DIVISION, AS SET FORTH IN R.I. GEN LAWS §39-1-15, §39-4-13, AND § 39-4-14. R.I. GEN LAWS §39-1-3 (a) PROVIDES THE COMMISSION'S AUTHORITY TO HOLD INVESTIGATIONS AND HEARINGS THAT INVOLVE UTILITY RATES, TARIFFS, TOLLS, AND CHARGES.

R. I. Gen. Law § 39-1-15. Investigators and examiners provides:

For effective administration, supervision, and regulation of public utilities, communications carriers, and common or contract carriers, **the administrator**, at his or her discretion, may designate examiners, investigators, hearing officers, or one or more agents of the **division to make investigations and conduct hearings**. **In conducting investigations and hearings, the administrator and every person designated therefor by him or her shall be vested with all the powers conferred on the chairperson of the commission by § 39-1-13. Upon completion of his or her investigation and hearing, the person hearing or investigating shall file his or her recommended decision and findings in writing with the administrator;** and the decision and findings, when approved by the administrator, shall have the same force and effect as a decision and findings by the administrator. The administrator may, however, at his or her discretion, upon considering the evidence in the matter at issue and the written recommended decision as filed by the hearing officer, agent, examiner, or investigator, decide the matter in hearing or under investigation him or herself, and in such case, the decision of the administrator with his or her findings shall become effective when signed and filed by him or her. (Emphasis added)

R. I. Gen. Law §39-4-13- "Summary Investigation by Division" provides:

"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.” (Emphasis added)

R. I. Gen. Law § 39-4-14. Formal investigation — Notice to utility provides:

“If, after making a summary investigation, the **division** becomes satisfied that sufficient grounds exist to warrant a formal hearing being ordered as to the matters so investigated, it shall furnish to the public utility interested, a statement notifying the public utility of the matters under investigation. Ten (10) days after the notice has been given, the **division** may proceed to set a time and place for a hearing and investigation.”(Emphasis added)

Chapter 4 of Title 39, Section 1-24 (sections 19 and 20 repealed) of the Rhode Island General Laws, entitled “Hearing and Investigations” sets forth the limited duties and responsibilities of the Commission pertaining to investigations. Notably, within that chapter, only Sections 2, 12, and 18 provide any role to the Commission: Section 2, to order repairs to utility plant or equipment; Section 12, to order a utility to pay the expenses incurred by the division in an investigation and hearing; and Section 18, to review railroad grade crossing ordinances. More importantly, nowhere in this Chapter or other chapters of the general laws is there any authority for the Commission to abrogate the Division’s investigatory authority or autonomy set forth under R.I. Gen Laws §39-1-15, §39-4-13, and §39-4-14.

However, once the Division has completed an investigation and has concluded that there may be an impact to utility rates, tariffs, tolls, and charges, the matter is appropriately turned over to the Commission to exercise its proper authority to conduct hearings and investigate the impacts, if any, to utility rates, tariffs, tolls, and charges, as provided for in R.I. Gen Laws §39-1-3 (a). Thus, utility investigation is a two-step process. The broad investigation phase is vested with the

Division and the authority and control of the remedy phase, pertaining to utility rates, tariffs, tolls, and charges, is vested with the Commission.

3. THE COMMISSION'S DATA REQUESTS ARE NOT PERMITTED BY STATUTE, AND THE UTILITY'S PRODUCTION DUE DATE OF MARCH 27, 2023 THWARTS THE DIVISION'S RIGHT TO DUE PROCESS TO SECURE A RULING ON ITS OBJECTION PRIOR TO THE UTILITY'S RESPONSE.

The Commission's Rules of Practice and Procedure, 810-RICR-00-00-1, §1.19.C (1) provides:

"Data Requests: In any proceeding pending before the Commission, the Commission staff and any party may request such data, studies, workpapers, reports, and information as are reasonably relevant to the proceeding and are permitted by these rules or by statute."

PUC Rule 1.19 (C) (3) provides:

"Objection to a data request in whole or in part on the ground that the request is unreasonable and/or the material is not relevant or not permitted or required by law shall be made by motion filed as soon as practicable and in no event later than ten (10) days after service of the request. An oral objection may be made at a hearing when the Commission has allowed an oral data request. Objections shall include the portions of the data request objected to and shall detail the basis for the objection. The presiding officer shall thereupon determine the validity of the request and shall establish a date for compliance. The relevancy of a request shall be determined under the standards established for such determinations under Rule 26 of the Superior Court Rules of Procedure."

Here, the requested documents are those of a confidential investigation being properly conducted by a Rhode Island State agency under its statutory authority. As such, they are not public and their production is not permitted or required by law. Accordingly, the data requests issued to the utility are improper and should be voluntarily recalled by the Commission forthwith.

As has already been noticed in the Division's prior motion to dismiss, the Division anticipates filing a report with the Commission once the Division's investigation and audit has

been concluded. In the interim, the disclosure of the non-public information sought from the utility in the Commission's Second Set of Data Requests is simply wrong and should not be pursued further by the Commission.⁴

Furthermore, the Commission advanced the normal response time afforded to responding to data requests of twenty-one days to ten days. The due date is March 27, 2023, one day prior to oral argument on the Division's motion to dismiss PUC Docket 22-05-EE, "Investigation of Misconduct by The Narragansett Electric Company Relating to Past Payments of Energy Efficiency Program Shareholder Incentives", opened on June 23, 2022. Thus, the Division's ten (10) day deadline to file an objection to the data requests coincides with the utility's due date to comply. As such, unless the Commission agrees to either: (1) stay its discovery request; (2) extend the date for performance; or (3) simply quash its own discovery request, the Division will be deprived of any meaningful due process and opportunity to be heard on its objection. The Commission has long been a body known for its scrupulous attention to affording all parties due process and should act accordingly to preserve that reputation and take one of the three enumerated actions set forth herein.

4) COMMISSION PARTICIPATION IN A DIVISION INVESTIGATION MAY JEOPARDIZE THE STATE'S ABILITY TO RECOVER INVESTIGATORY EXPENSES.

As referenced supra, upon the conclusion of an investigation by the Division, the Commission, pursuant to R.I. Gen. Law §39-4-12⁵, has the authority to determine whether a utility

⁴ There is nothing stopping the Commission and/or its staff from issuing other specific data requests to the utility in the PUC proceeding that relate to the Commission's desire for additional information on Narragansett's conduct of the energy efficiency programs; provided however, that the information sought must not be the Division's investigatory records.

⁵ §39-4-12. Payment of investigation expense by utility.

If, upon a hearing and investigation, it shall be found that any rate, toll, charge, or joint rate or rates is unjust, unreasonable, insufficient, or unjustly discriminatory or preferential or otherwise in violation of any of the provisions of this title, or that any regulation, measurement, practice, act, or service complained of is unjust, unreasonable, insufficient, preferential, or otherwise in violation of any of the provisions of this title, or if it is found that any service

has “knowingly and intentionally” undertaken the violations, as concluded by the Division’s investigation. The Commission is further authorized to order the utility to “pay the expenses incurred by the Division in the investigation and hearing.”

As a quasi-judicial⁶ agency deciding contested cases, the Commission has an obligation to remain neutral and to hear evidence before it in an unbiased manner. If the Commission has interjected itself into the Division’s investigatory processes, the question becomes whether the Commission could be impartial in any later proceedings to determine whether a utility has knowingly and intentionally undertaken a violation that could give rise to a request by the Division for its investigative expenses. An objection to the Commission’s impartiality and the right to due process would likely be raised by any utility faced with a Division claim for expenses. As such, in addition to for the reasons expressed, supra, the Commission should refrain from injecting itself into the Division’s investigations.

CONCLUSION

The Division is the regulatory agency charged under Rhode Island law to undertake certain investigations into the conduct of public utilities. R.I. Gen. Law §39-1-15, §39-4-13, and § 39-4-14. The APRA provides a disclosure exemption for investigative records of a public body, pursuant to R.I. Gen. Law §38-2-2(4)(P). The result of the Commission’s issuance of discovery which requires the utility, as the target of the Division’s investigation, to turn the Division’s investigatory documents over to the Commission in a public docket, effectuates an inappropriate end-run of the Public Access to Records Act. The Commission should re-consider its actions and

is inadequate or that any reasonable service cannot be obtained, the public utility found to be at fault shall, if the commission finds the utility to have knowingly and intentionally violated the provisions, pay the expenses incurred by the division in the investigation and hearing.

⁶ R.I. Gen Laws §39-1-3 (a).

should retract its recent discovery request for these documents. Moreover, the Commission's interference with the Division's investigation unnecessarily jeopardizes the potential for any possible future recovery of the Division's expenses. As such, the Commission should voluntarily withdraw its Second Set of Data Requests issued in PUC Docket 22-05-EE on Friday, March 17, 2023.

The Division seeks the following alternative and successive forms of relief:

1. Complete retraction of the Commission's Second Set of Data Request.
2. Absent retraction, an order to the utility to file any answers under seal, and to not distribute to the service list; or
3. Absent retraction, a stay of the utility's answer date until:
 - a.) An opportunity for oral argument and a decision by the Presiding Officer on a new date for compliance if the Division's objection is over-ruled and the motion to quash is not granted; and
 - b.) A written order issued is issued by the Commission and the period to appeal to the R.I. Supreme Court is exhausted; and
 - c.) A grant of stay of any adverse order until an appeal has been docketed and a request for a stay is heard by the Supreme Court.

March 24, 2023

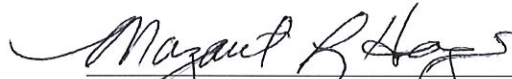
Respectfully Submitted:
Linda D. George, Esq., Administrator
By her Attorney:



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