

**STATE OF RHODE ISLAND
PUBLIC UTILITIES COMMISSION**

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

**PROCEDURAL ORDER
OVERRULING OBJECTION, DENYING MOTION TO QUASH,
AND GRANTING CONFIDENTIAL TREATMENT OF DOCUMENTS**

This is a Procedural Order issued by the Chairman of the Public Utilities Commission, as presiding officer in these proceedings,¹ regarding an Objection to Discovery and a Motion to Quash filed by the Division of Public Utilities and Carriers (Division) in the above-referenced proceeding.²

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 Commission asked for copies of documents from the regulated utility, Rhode Island Energy, over whom the Commission has regulatory and supervisory authority. The documents requested are those that the utility is providing to the

¹ The Chairman is the presiding officer in this case, as provided in Commission rules that states: “The hearing shall be conducted by a presiding officer who shall be the Chair or a Commissioner.” Rule 1.21(C). That rule also provides: “The presiding officer shall make all decisions regarding the admission or exclusion of evidence or any other procedural matters which may arise in the course of the hearing, unless such authority is delegated to Commission counsel.” Similarly, Commission Rule 1.19(E) provides that “the presiding officer may make an order when justice requires” in ruling on a motion for protective order.

² The parties to this proceeding are the Division in its statutory role as ratepayer advocate, the Attorney General, Narragansett Electric d/b/a Rhode Island Energy (Rhode Island Energy), and National Grid USA (National Grid), the former owner of Narragansett Electric that sold its ownership interest in the Company to PPL Rhode Island Holdings LLC (a subsidiary of PPL Corporation, a Pennsylvania company) on May 25, 2023, but owned the Company during time when the admitted and alleged utility employee misconduct being investigated in this Docket occurred. National Grid voluntarily filed a motion to intervene which was granted.

Division in a parallel or duplicative investigation being conducted by the Division on the same subject matter as the Commission's case in this Docket. The Division objected to the request and filed a Motion to Quash the Commission's discovery request.

For the reasons given in this Order,

- (1) the Objection is overruled;
- (2) the Motion to Quash is denied, however, the Chairman is treating the Objection and Motion to Quash as a Motion for Protective Order and makes the following orders:
 - a. Rhode Island Energy and National Grid are directed to file copies of the applicable documents with the Commission;
 - b. All applicable documents provided to the Commission are granted preliminary **confidential treatment** as specified in the body of this Order;
 - c. The Commission shall not release any of the applicable documents to the public without notifying the parties in this case and providing them an opportunity to be heard; and
 - d. Rhode Island Energy and National Grid are directed to file copies of the applicable documents with the Attorney General, as specified in the body of this Order; and
- (3) Compliance with this Order shall commence on May 5, 2023.

I. Travel of the Case and Incorporation by Reference of the Commission's April 20, 2023 Order

The Commission recently issued an order in this case on April 20, 2023 (the April 20, 2023 Order),³ reflecting a unanimous decision to deny a Motion to Dismiss the Commission's investigation, which motion was filed by the Division in this same case. That order, which is more than 40 pages in length, provides a comprehensive history of the travel of the case and extensive

³ Order Denying Motion to Dismiss, *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 and 5189, Order No. 24648 (April 20, 2023) (hereinafter referred to as the "April 20, 2023 Order"). The order can be found at: <https://ripuc.ri.gov/sites/g/files/xkgbur841/files/2023-04/2205-5189-PUC-Ord24648%204-20-23.pdf>

legal analysis. The long travel and analysis will not be restated here. This Order incorporates by reference the April 20, 2023 Order in its entirety, including the history, findings, and conclusions of law drawn by the Commission, all of which are relevant to the Chairman’s considerations in the procedural rulings reflected in this Order.

In summary, as described at length in the April 20, 2023 Order, the Commission began its inquiry 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,⁴ the Commission issued an order formally opening the investigation within a separate Docket No. 22-03-EE, incorporating all relevant evidence already submitted in Docket No. 5189 related to the issues.⁵ The Division was a party in Docket No. 5189 and continued as a party in Docket 22-03-EE.

The Division participated in the Commission’s investigation in its statutory role as ratepayer advocate for most of calendar year 2022 and issued discovery in the form of numerous sets of data requests.⁶ Then, six months after the Commission’s order opening this separate investigation and over a year after the Commission learned of the misconduct by utility employees in Docket No. 5189 and began its inquiry, the Division filed a Motion to Dismiss the Commission’s investigation on January 19, 2023.

⁴ 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>

⁵ *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

⁶ Responses to the Division’s nine sets of discovery requests can be found at the link to this Docket on the Commission’s website at: <https://ripuc.ri.gov/Docket-22-05-EE>

Subsequently, and before the Commission heard the Motion to Dismiss, the Commission learned from Rhode Island Energy⁷ that the Division – even though it was an active party in the Commission’s near year-old inquiry – had opened a parallel or duplicative summary investigation in secret without notifying the Commission.⁸ On March 17, 2023, the Commission then sent a set of three data requests to Rhode Island Energy relating to the disclosure, entitled Commission Data Request Set 2. At the same time, the Commission established March 28, 2023, as the date for oral argument on the Motion to Dismiss, indicating that the responses to the data requests would be due the day before the oral argument. The three data requests in Set 2 were as follows:

- 2-1. In its Motion to Dismiss the Division of Public Utilities and Carriers (Division) stated that sufficient evidence exists in this docket to warrant an “independent summary investigation.” Has the Division opened an independent summary investigation, separate and apart from the investigation in Docket 22-05-EE, related to the issues involved in Docket 22-05-EE? If so, please provide a copy of any written notice provided to Narragansett Electric.
- 2-2. If the answer to PUC 2-1 above is yes, has the Division made any requests, formally or informally, for documents or information from Narragansett Electric in that investigation? If so, please provide a copy of all such requests.
- 2-3. If the answer to PUC 2-2 above is yes, please provide a copy of all documents and information produced in response to all such requests.

On March 24, 2023 – the Friday before the oral argument that was scheduled for March 28 – the Division filed an Objection to Discovery, Motion to Quash, and a Memorandum in Support of Objection and Motion.⁹ Upon receiving the filing, Commission counsel notified Rhode Island Energy that the due date of March 27 for the responses was suspended. Oral argument went forward on March 28 solely on the Motion to Dismiss. On March 31, counsel for the Commission

⁷ The Narragansett Electric Company was acquired from National Grid on May 25, 2022 and is now doing business as Rhode Island Energy.

⁸ For a description of the sequence, *see* April 20, 2023 Order at 14-15.

⁹ The filing can be found at: https://ripuc.ri.gov/sites/g/files/xkgbur841/files/2023-03/2205-5189-DIV-Ojbection-Motion-Memo_3-24-23.pdf

notified the parties that any responses to the Division's Objection and Motion was extended to April 12, 2023. No other party responded to the Division's Objection and Motion.

II. Summary of the Division's Position

The primary grounds for the Division's Objection and Motion to Quash, as stated in the Memorandum, is the assertion 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."¹⁰ The Division further asserts that the Division's authority is to "conduct utility investigations, including audits," while the Commission's authority is to "conduct investigations and hearings that involve utility rate, tariffs, tolls, and charges."¹¹ According to the Division, the Division would conduct its own investigation. "Then, if appropriate, the Division would request the Commission to undertake its investigation as to the financial impact in rates, tariffs, tolls, and charges, if any."¹²

The Division points to an investigation that had been conducted by the Division in 2019 which pertained to a natural gas outage on Aquidneck Island in which the Chairman (mentioned by name in the Division's Memorandum) was involved as a consultant to the Division.¹³ The Division maintains that its separate investigation relating to the energy efficiency program is the same as the investigation into the gas outage and the Division would be following the same process.¹⁴

¹⁰ Division of Public Utilities and Carriers' Memorandum in Support of Objection and Motion to Quash, at 1 (Memorandum).

¹¹ *Id.*

¹² *Id.* at 1-2

¹³ *Id.* at 3.

¹⁴ *Id.*

The Division, in its Memorandum, essentially supports its position with four categories of arguments. The first category relies on the provisions of the Access to Public Records Act, as set forth in chapter 2 of Title 38 (APRA) and an exemption from public records that pertain to documents that are the subject of an investigation.¹⁵ The second category is an argument which relies on R.I. Gen. Laws §§ 39-1-15, 39-4-13, and 39-4-14, relating to provisions which provide the Division authority to conduct summary investigations of public utilities.¹⁶ This is accompanied by the Division's assertion of a very narrow and circumscribed view of the scope of the Commission's authority that the Division argues is a limitation on the authority of the Commission to investigate. The third category is an argument asserting that the Commission's data request is impermissible because the documents are not public and, therefore, production is not permitted by law.¹⁷ Finally, the fourth category is an argument which essentially questions the ability of the Commission to remain impartial if the Commission receives copies of the documents and later must decide whether investigation costs should be assessed against the utility.¹⁸

Each of the arguments and others made by the Division will be addressed below, taken in a different logical sequence than presented in the Division's filing.

III. Addressing the Division's Arguments

A. The Argument that the Division Has Exclusive Investigatory Authority

The Division makes two assertions based on its interpretations of certain provisions of Title 39. First, the Division claims exclusive authority to conduct investigations on any subject relating to public utilities that does not relate to a narrow set of matters given to the Commission. Second,

¹⁵ Memorandum at 4.

¹⁶ *Id.* at 7.

¹⁷ *Id.* at 9. The Division also included an argument that objected to the due date of March 27 for the responses. However, that objection asserted in the Memorandum was rendered moot when the Commission suspended the due date and extended the time for other parties to respond to April 12.

¹⁸ *Id.* at 10.

the Division asserts an extremely narrow view of the scope of the Commission's authority regarding investigations, claiming that the Commission may only:

- (1) investigate "repairs to utility plant or equipment,"
- (2) investigate matters that determine whether the Commission should "order a utility to pay expenses incurred by the division in an investigation and hearing,"
- (3) investigate "to review railroad grade crossings ordinances," and
- (4) "once the Division has completed an investigation and concluded that there may be an impact to utility rates, tariffs, tolls, and charges," "investigate the impacts, if any, to utility rates, tariffs, tolls, and charges."¹⁹

The limited view that the Division gives to the Commission's scope of authority is unprecedented. Nowhere does the Division provide any citations to any administrative or judicial precedents. Nowhere does the Division cite any Supreme Court cases that discuss the comparative jurisdiction of the Commission and the Division. Nowhere does the Division address the authority that was given to the Commission to oversee the energy efficiency program which is at issue in this case. Moreover, the Division does not even fully address the foundational definitions of authority contained in § 39-1-3 of Title 39 which defines the two agencies and the jurisdiction, powers, and authority of each.

These issues were researched by the Commission and are addressed at great length in the April 20, 2023 Order.²⁰ The latter reference to R.I. Gen. Laws § 39-1-3 is most significant. In that section, the Commission is given authority to investigate matters relating to rates, tolls, and

¹⁹ *Id.* at 9.

²⁰ *See* April 20, 2023 Order at 27-41.

charges. The same section also defines the Division 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.²¹ (emphasis added)

What is most notable about the comparison of authority is that the Division's jurisdiction picks up where the Commission's jurisdiction leaves off. Thus, to the extent that the Commission is assigned jurisdiction over a matter in Title 39, the Commission's authority controls.

The Division, however, takes a very narrow view of what it means to conduct investigations regarding rates. The Division appears to be excluding inquiries into the accounting practices of the utility which is a core issue in this case. Yet, the reason why there would be any overcharges in rates in this case would relate to whether the utility properly accounted for the expense activities and associated energy savings through its recording of program invoices and its reporting of program expenses and savings to the Commission. In order to make a determination regarding rate impacts, it is imperative that the Commission have the authority to dive deeply into questions relating to the conduct of how the utility was accounting for its cost incurrence from one year to the next. This is consistent with the authority of public utility commissions across the country. It is settled law that matters of utility accounting are within the purview of commissions.²² To suggest that the Commission cannot evaluate and probe how a utility accounted for its costs and the extent to which it may have been manipulating the accounting is nothing short of absurd. It would render the role of the Commission to simply adding up costs and calculating rates – a

²¹ R.I. Gen. Laws § 39-1-13(b).

²² 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.”).

perspective that is without precedent and completely inconsistent with the statutory authority and breadth of judicial precedent.

Moreover, as the Commission’s April 20, 2023 Order explains, the Commission was specifically assigned authority to oversee the energy efficiency program and the associated performance incentive at issue in this matter. R.I. General Laws § 39-1-27.7.²³ In fact, during oral argument before the Commission on March 28 relating to the Division’s Motion to Dismiss, counsel for the Division conceded the Commission’s authority on those matters.²⁴ Thus, the Commission has indisputable jurisdiction and authority to take whatever actions it deems appropriate to properly oversee, supervise, and regulate that program, including review of the accounts associated with the program.

Further, as the Commission’s April 20, 2023 Order analyzes extensively,²⁵ there are numerous Supreme Court cases which clearly contemplate the broad authority of the Commission to supervise and regulate utilities and hold investigations through hearings to do the same. And when the Commission holds such investigations through hearings on subject matters over which it has jurisdiction, it is the statutory role of the Division “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. . . .’”²⁶ Further, as the Supreme Court stated in another case (also cited in the April 20, 2023 Order):

In [citations omitted] 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

²³ April 20, 2023 Order at 32-34.

²⁴ Docket 22-05-EE, Hr’g Tr. at 52 (March 28, 2023).

²⁵ See Section V of the Commission’s April 20, 2023 Order for an extensive analysis of the numerous Supreme Court cases comparing the role of the Commission to the role of the Division.

²⁶ *Providence Water Supply Board v. Public Utilities Commission*, 708 A.2d 537, 539 (R.I. 1998).

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.”²⁷

The Division also ignores the Commission’s statutory authority to subpoena any documents in all cases before it of every nature:

“[T]he commission, in all cases of every nature pending before it, is hereby authorized and empowered to summon and examine witnesses and to compel the production of papers, books, accounts, documents, records, certificates, and other legal evidence that may be necessary or proper for the determination and decision of any question before or the discharge of any duty required by law of the commission. . . .” R.I. Gen. Laws § 39-1-13

The subject matter in this case before the Commission is one over which it has indisputable authority – oversight over the energy efficiency program, authority over the shareholder performance incentive, and authority over the rates which flow from the accounting of invoices.

Given the Commission’s paramount authority to oversee the energy efficiency program, and the fact that the accounting manipulation relates directly to the question of whether the rates have been just and reasonable, the Commission has clear authority to obtain any documents that have been prepared or are in the possession of the utility that relates to the issue at hand. In this case, the core issue is the extent to which the manipulation of invoices resulted in rates being overcharged to ratepayers through the energy efficiency program. If the utility created or is providing documents to the Division on this subject – regardless of how the Division self-defines its role – the Commission has the authority to compel the production of those documents from the regulated utility.

B. The Argument that APRA Prevents the Commission from Compelling Production of Documents Relevant to the Commission’s Investigation

²⁷ *Town of East Greenwich v. O’Neil*, 617 A.2d 104, 109-10 (R.I. 1992)(citations omitted)(emphasis in original).

The Division maintains that APRA prevents the Commission from obtaining the documents from the regulated utility because such documents fall under one of the public exemptions to the definition of public records. Specifically, the Division refers to one APRA exemption which excludes certain documents from the definition of “public record.” The exemption is defined as:

All investigatory records of public bodies, with the exception of law enforcement agencies, pertaining to possible violations of statute, rule, 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.

The Division argues that this definition in APRA prevents the Commission from obtaining the documents relating to the Division’s non-public “investigation” from the utility over which the Commission has indisputable regulatory authority. There are several flaws in the Division’s reliance on APRA.

First, the Commission is not seeking to obtain documents from a public body that is subject to APRA. The Commission is compelling the production of documents from an investor-owned public utility over which the Commission has indisputable supervisory authority. Thus, the APRA rules do not even apply to this situation. APRA sets forth rules that must be followed by public bodies already in possession of documents when a member of the public is seeking to obtain copies. APRA regulates the public body holding the documents. It does not regulate the treatment of documents held by private entities.²⁸

Further, the Supreme Court has made it quite clear that APRA does not create a right of action to compel non-disclosure. The Court has stated: “Our statute, like the Federal FOIA statute, is directed solely toward requiring disclosure by public agencies and does not provide a reverse remedy to prevent disclosure.”²⁹ The Division’s position ignores this rule and then adds an

²⁸ See R.I. Gen. Laws §38-2-3 (referencing only public bodies).

²⁹ *Rhode Island Federation of Teachers v. Sundlun*, 595 A.2d 799, 802 (R.I. 1991).

unprecedented additional twist, relying upon APRA not only to compel non-disclosure, but also to compel non-disclosure by a private entity to a public body. As the Supreme Court reiterated in another case: “APRA provides a remedy only to those people who are denied access to public records; it does not provide a remedy to prevent public agencies from disclosing records.”³⁰

The Division also seems to be implying that if a document falls under an exemption to public records, a public body is prohibited from releasing the documents to the public. But again, this misconstrues APRA. As the Supreme Court stated in another case: “[T]he APRA exemptions, similar to those under the FOIA, allow public agencies to withhold documents, but do not require withholding.”³¹ In the same case (involving a Commission decision to release documents), the Court stated that a party “has no ability under the rules to challenge the commission’s decision to release the documents pursuant to a public request under the APRA.”³²

The Division also attempts to use the APRA investigatory exemption to bootstrap another argument, stating: “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 around the statute.”³³ Aside from the fact that APRA does not apply to these circumstances, the Division never explains how the Commission obtaining copies of these documents thwarts anything about the Division’s parallel investigation. It is no different than the Commission receiving copies of data requests in any case before the Commission. Yet, instead of participating in this case in its traditional and statutory role as a ratepayer advocate, the Division appears to be treating this as competition between agencies. This position – designed to block the Commission from obtaining relevant documents – is astonishing and inexplicable.

³⁰ *In re: New England Gas Company*, 841 A.2d 545, 547 (R.I. 2004).

³¹ *In re New England Gas Company*, 842 A.2d at 551 (emphasis added).

³² *Id.* at 552-53.

³³ Memorandum at 6.

The Division also purports to sound an alarm for the Attorney General's office:

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?

The Division seems to be suggesting that if the Commission obtains the documents in this case from the utility, there would be nothing to stop the Commission from deliberately issuing discovery to obtain documents from a utility that were obtained by the Attorney General's office in a criminal investigation. If that was the intention of the Division's comment, that assertion is inappropriate. The notion that the Commission would – over the Attorney General's objection – deliberately subpoena documents from a utility which were obtained by the Attorney General during an on-going criminal investigation is nothing but disrespectful hyperbole. It also ignores the fact that this case relates to matters falling under a subject matter governed by Title 39, in which the Commission is exercising its authority within the boundaries of that Title. The Commission is not venturing outside of its statutory arena of responsibility.

Finally, the Chairman questions whether the Division has subject matter jurisdiction to pursue a summary investigation in a duplicative proceeding when the Commission is exercising its paramount authority over the same subject under Title 39.³⁴ Nevertheless, even if there is concurrent authority, APRA still does not provide an avenue for blocking the production of documents from the utility to the Commission within the boundaries of Title 39. The argument that relies upon APRA is misplaced and offers no legal or practical support for the Commission sustaining the objection or granting the Division's motion.

C. The Argument that the Commission Cannot Compel Production of the Documents Because the Documents are Non-Public

³⁴ See April 20, 2023 Order, at 39.

The Division also argues that the Commission has no legal authority to request the documents because the documents are confidential, stating: “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 by law.”³⁵ This argument, much like the others, is made with no support from the law or any judicial precedents. It is merely a conclusory statement with nothing to justify the assertion.

In addition, the Division’s position appears to equate the production of documents to the release of documents to the public. The two are not the same. The Commission often receives motions for confidentiality and regularly grants confidential treatment when the standards for confidentiality are met. And in circumstances where confidentiality is not clear, the Commission grants preliminary confidential treatment preventing the release of the documents to the public until the matter can be evaluated more fully, as contemplated under the Commission’s rules.³⁶ This Order will address this confidentiality issue further in sections VI and VII of this Order below, but if the Division’s concern was keeping documents non-public, the proper action would have been to file a motion for confidentiality or a protective order – not a motion to quash.

D. The Argument that Questions the Ability of the Commission to Remain Impartial

The Division makes an argument that is based on the premise that the Commission’s receipt of the documents from the utility will somehow bias the Commission if and when the Division seeks an order from the Commission to address the recovery of the Division’s investigatory costs from the utility. In making this argument, the Division maintains that the Commission’s receipt

³⁵ Memorandum at 9.

³⁶ See Rule 1.3(H)(2).

of the documents equates to the Commission “injecting itself into the Division’s investigations.”³⁷ In turn, the Division argues: “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 investigatory expenses.”³⁸

There are a number of flaws in the Division’s assumptions and assertions here, each of which will be addressed below.

First, the Division’s claim that the Commission is “interjecting itself” into the Division’s investigation is a flat-out exaggeration. The Commission is only asking for copies of documents from the regulated utility which relate to the precise issues over which the Commission has undisputed jurisdiction in the energy efficiency program and an open, on-going investigation. To equate the production of relevant documents by the utility as the Commission disrupting the Division’s separate and duplicative investigation is foundationless. If the Division decides to continue with its process, the fact that the Commission obtains copies of documents from the utility that the Division also has obtained from the utility in its review has no effect on the Division.

Second, the Division is asserting that the Commission’s receipt of discovery causes an inherent bias which will prevent the Commission from acting impartially. This assertion ignores decades of Commission practice in hearings and proceedings before the Commission in which discovery takes place. One need only peruse the dockets published on the Commission’s website to observe that in every single instance, without exception, all discovery is filed with the Commission, as provided in the Commission’s rules.³⁹ When a utility is being investigated relating

³⁷ Memorandum at 11.

³⁸ *Id.*

³⁹ See <https://ripuc.ri.gov/events-and-actions/commission-docket>; Commission Rules of Practice and Procedure 1.19(C)(5) states in pertinent part: “Copies of the responses shall be provided to the Division, and to other parties

to any matter, whether it is the review of proposed energy efficiency programs,⁴⁰ the review of capital spending plans,⁴¹ the review of the utility's operational costs in a full rate case,⁴² the resolution of interconnection disputes between utility and distributed generators,⁴³ or any other matter in which there are discovery requests, all discovery is filed with the Commission.

The Commission is well aware that it must make fact-finding decisions based on the evidence that is entered into the record as full exhibits. All parties have an opportunity to object to the admission of any discovery documents that may have been produced during the discovery stage of proceedings. Like a court, the Commission reviews the matter and makes its decisions during the evidentiary hearings to allow admission or not. It is a gross exaggeration to suggest that impartiality is irreparably compromised merely because the Commission receives or views documents prior to them being admitted into evidence. The Division's argument flies in the face of decades of Commission practice.

Third, the Division's argument may give the impression – to anyone not familiar with how the Division recovers its costs in utility proceedings – that the Division is at risk of not being able to recover its expenses from the utility, leaving ratepayers to foot the bill. But that is not at all true. In that regard, it is important to summarize how the Division funds its costs of participating in utility hearings and hiring experts.

The Division and the Commission are funded in two ways, pursuant to R.I. Gen. Laws § 39-1-26(a) & (b). First, the Division and the Commission have a shared operating budget which is funded by all utilities over which the Commission has regulatory authority through an annual

upon request. In addition, three copies of both requests and responses shall be filed with the Clerk, unless otherwise directed by the Clerk.”

⁴⁰ See <https://ripuc.ri.gov/Docket-22-33-EE>

⁴¹ See <https://ripuc.ri.gov/Docket-22-53-EL>

⁴² See <https://ripuc.ri.gov/eventsactions/docket/4770-Discovery.html>

⁴³ See <https://ripuc.ri.gov/eventsactions/docket/5060page.html>

assessment on all utilities. This annual assessment is established in paragraph (a) of § 39-1-26. Most of the administrative costs of both the Commission and the Division are covered by the assessment.

However, when the Division (or Commission) incurs expenses in a case involving Narragansett Electric, there is another important means of recovering those expenses which appears in paragraph (b) of § 39-1-26. That paragraph provides that the Division and the Commission may assess any costs incurred relating to specific proceedings of the utility directly on the utility, regardless of the outcome. If there is any matter involving the utility in which either the Division or the Commission has incurred expenses, the Division and Commission may assess their costs on the utility and the utility pays the costs, up to annual caps. For Rhode Island Energy, the cap on annual expenses that can be charged to the utility is \$750,000 for the electric distribution business and \$750,000 for the gas distribution business.⁴⁴ If the annual caps are reached during an applicable year, any expenses of the Commission or the Division must be drawn out of the operating budget that is funded by all utilities annually under paragraph (a) of § 39-1-26.

In the case of energy efficiency program matters – such as this case – the Division and the Commission may allocate the costs of the proceedings between electric and gas, applied against the expense caps. Presumably, the Division has already incurred expenses in 2022 when it participated in this Docket and asked nine sets of discovery requests. If so, the Division would have had the opportunity to charge those expenses directly to Rhode Island Energy.⁴⁵

It also is important to point out that Rhode Island Energy is not currently able to pass along any investigation costs to ratepayers, even if it pays the Commission and Division expenses.

⁴⁴ The statute indicates \$750,000. However, there are two separate regulated business units of the utility, each of which has a separate \$750,000 cap and both business units are implicated in the Commission's investigation.

⁴⁵ The Commission is not aware of whether any charges were assessed in 2022.

Rhode Island Energy has agreed to a distribution rate freeze that will endure well into 2026 and the costs of assessments and regulatory expenses can only be recovered through a rate case prospectively.⁴⁶ Nevertheless, this still raises a question relating to the applicability of the statutory provision of R.I. Gen. Laws § 39-4-12, cited by the Division, which states:

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 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.

The applicability of this provision, however, is not limited to investigations by the Division. By its own terms, the law provides that “upon a hearing or investigation” the provisions relating to reimbursement apply. Thus, under the plain language of the law, it can apply to any Commission proceedings in which the Division has incurred expenses “in the investigation and hearing” – not just Division investigations and hearings.

In that regard, the Division’s position is puzzling.⁴⁷ The utility has already admitted that employees intentionally engaged in the wrongdoing of holding back invoices,⁴⁸ and this provision places a responsibility upon the utility to pay those incremental expenses if the requisite factual finding of intentional wrongdoing is made by the Commission. Nevertheless, if evidence were to emerge that exonerates the utility from intentionality, the Division’s position that the Commission

⁴⁶ See <https://riag.ri.gov/press-releases/attorney-general-neronha-announces-agreement-securing-over-200-million-value-ri>.

⁴⁷ It also is difficult to understand why a ratepayer advocate would argue that the Commission could not rule impartially against the regulated utility if the Commission simply receives documents requested by the ratepayer advocate in a discovery process.

⁴⁸ See, e.g., “Review of Invoices within the Energy Efficiency Program,” Report filed by Rhode Island Energy on June 7, 2022, at 7.

could not act impartially in evaluating whether there was intentional wrongdoing by the utility is unsupported by any legal analysis. It also is contradicted by decades of Commission proceedings within which the Commission has received all discovery documents in the cases before it, and still made countless impartial fact-finding decisions. In short, the Division's argument is meritless.

E. The Argument that the Division Has the Authority to Audit, But Not the Commission

The Division appears to imply the Division is the only appropriate party to conduct an audit, not the Commission.⁴⁹ But the Division fails to cite any statutory authority for such proposition. Most important, the Division ignores the Commission's express statutory authority to order audits, as well as Supreme Court precedent.

First, R.I. Gen. Laws 39-1-7(b) expressly authorizes the Commission to conduct audits, stating: "The Commission shall have the power to do a complete audit of the books of all public utilities doing business in the state." For that reason alone, any suggestion by the Division that it is not appropriate for the Commission to order an audit is without any support under the law.

Second, the Supreme Court has affirmed the Commission's authority to hire an independent auditor. In the case of *In re Narragansett Bay Commission General Rate*, 808 A.2d 631 (R.I. 2002), there was a dispute in the proceedings before the Commission relating to whether the Commission could hire an independent auditor in connection with a Narragansett Bay Commission (NBC) project. The Attorney General made a request for the Commission to hire an independent auditor. The Division and NBC opposed the request. The Commission ordered the hiring of the independent auditor over the Division's objection. NBC then appealed to the Supreme

⁴⁹ The Division's Memorandum states: "Pursuant to R.I. Gen. Laws § 39-1-5, § 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 an investigation which may include an audit." Memorandum at 1.

Court. In its decision, the Supreme Court made it clear that the Commission had such authority, stating: “The NBC has failed to demonstrate that the commission exceeded its authority or acted illegally, arbitrarily, or unreasonably when it ordered the retention and funding of an independent auditor.”⁵⁰

Again, the Division’s apparent argument that the Division is the only appropriate party to conduct an audit is belied by statutory authority and judicial precedent.

F. The Argument that this Case Mirrors the Aquidneck Island Investigation

The Division also maintains that the summary investigation it commenced on this matter is the same as the investigation that took place when the Division investigated the gas system outage on Aquidneck Island in 2019.⁵¹ This assertion is completely at odds with what occurred in 2019. The Commission’s April 20, 2023 Order rejected this identical assertion:

[T]he Aquidneck Island investigation was fundamentally different. 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. 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. 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.⁵²

The Division’s assertion that the Aquidneck Island matter was the same as the circumstances in this case completely mischaracterizes that case. Moreover, when the Division conducted its investigation, numerous discovery responses received by the Division were shared with the

⁵⁰ *In re Narragansett Bay Commission General Rate*, 808 A.2d 631, 637 (R.I. 2002)

⁵¹ 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)(Aquidneck Island Report).

⁵² April 20, 2023 Order at 37-38.

Pipeline and Hazardous Materials Safety Administration (PHMSA) prior to the completion of the Division's investigation.⁵³

G. The Argument that the Commission's Document Request is an "Unwarranted Intrusion into a Sister Agency's Authority and Control"

Finally, the Division's Memorandum characterizes the Commission's document request as "an unwarranted intrusion into a sister agency's authority and control."⁵⁴ The Division never gives any explanation of how and why the mere receipt of the documents by the Commission constitutes an intrusion or interferes in any way with what the Division is apparently setting out to do. It is a bare assertion without reasons. But there is significant irony in the Division's assertion that the Commission is interfering with an investigation of a sister agency.

The Commission began its inquiry into the allegations of misconduct over a year ago. The Division actively participated in the Commission's investigation throughout 2022, asking nine sets of discovery requests and raising no concerns about the Commission's inquiry. In turn, no issues were raised by the Division when the Commission opened a separate docket in June of 2022, nor did the Division complain throughout the summer and fall when the Division issued its discovery. Then, without any legal memoranda supporting its claim, the Division filed a Motion to Dismiss the Commission's ongoing proceeding in January of 2023. And at some unspecified date that the Division has not disclosed, the Division opened its own investigation in secret without providing a courtesy notice to the Commission.

The lengthy participation by the Division in the Commission's ongoing investigation and the sequence of events speak for themselves.

IV. Precedent for Investigations within the Energy Efficiency Program

⁵³ Aquidneck Island Report at 10.

⁵⁴ Memorandum at 1.

As addressed above, the Division argued that the Aquidneck Island investigation was an example of how this case should proceed. The Division's reference to the Aquidneck Island circumstances was not only misplaced, but the Division overlooked an example of how the Division has engaged in an investigation within Commission proceedings without opening a separate docket outside of the Commission's energy efficiency proceedings. Specifically, in 2018 and 2019, the Division engaged in an in-depth investigation of the activities of National Grid in the context of a Combined Heat and Power project through which National Grid was proposing to pay an incentive of over \$7 million for a generation project in Newport under the Company's energy efficiency program in Docket No. 4755.⁵⁵ In reviewing the proposal, the Division uncovered activities of the Company's employees which raised issues of potential impropriety.

The discovery process required the review of a large volume of emails.⁵⁶ Over many months, the Division issued ten sets of complex data requests and engaged in discussions with the utility as the Division performed the investigation under the umbrella of the Commission's energy efficiency docket.⁵⁷ All the discovery responses were filed with the Commission, without exception. Finally, months later, the Division filed a settlement under which National Grid agreed to credit customers for certain costs it had collected through the energy efficiency fund, with recommendations to the Commission for certain program modifications.⁵⁸ The Division found no need to act separate and apart from the Commission. Instead, the Division – fulfilling its statutory obligation as the ratepayer advocate in Commission proceedings – respected the oversight authority of the Commission regarding the entire energy efficiency program and conducted the

⁵⁵ Docket No. 4755, found at: <https://ripuc.ri.gov/eventsactions/docket/4755page.html>

⁵⁶ See <https://ripuc.ri.gov/sites/g/files/xkgbur841/files/eventsactions/docket/4755-NGrid-DR-DIV4-1-%26-Motion-%2810-11-18%29.pdf>

⁵⁷ The data requests and relevant information are available on the Commission's website, found at: <https://ripuc.ri.gov/eventsactions/docket/4755page.html>

⁵⁸ The settlement can be found at: <https://ripuc.ri.gov/sites/g/files/xkgbur841/files/eventsactions/docket/4755-NGrid-Settlement-%286-23-2020%29.pdf>

entire investigation within the Commission's energy efficiency docket. There is absolutely no reason why the same process cannot and should not be followed in this case.

V. Request for the Division to Reconsider its Separate Process

Given all that is described in this Order and the Commission's April 20, 2023 Order, the Chairman urges the Division to reconsider its decision to engage in a separate duplicative investigation. There are many reasons for the Division to change course:

- (1) The legal analyses reflected herein and in the Commission's April 20, 2023 Order,
- (2) The practical considerations described in the April 20, 2023 Order of why it is more efficient for the Division to perform its investigative tasks within the Commission's transparent docket,⁵⁹
- (3) Avoiding the needless expenditure of Division resources on its own independent investigation while simultaneously carrying out its statutory duty to participate in the Commission's proceedings in its role of ratepayer advocate, as required by Supreme Court precedent,
- (4) The precedent from Docket No. 4775 described above that illustrates the practicality of the Division performing any investigative function as the ratepayer advocate under the umbrella of the Commission's energy efficiency proceedings,
- (5) The fact that the Division can point to no incremental benefit of engaging in a duplicative investigation,
- (6) The expectations of members of the public that the two agencies charged with regulating the utility should be working in procedural harmony,

⁵⁹ See April 20, 2023 Order at 22-27.

- (7) The fact that the two agencies should be focusing their time and attention on the issues of misconduct at hand rather than a needless jurisdictional disagreement,
- (8) The risk that there could be conflicting findings-of-fact between a hearing officer at the Division and the Commission in two separate evidentiary hearings,
- (9) The potential due process complications that arise from requiring the utility being investigated to litigate the same issues twice, and
- (10) Plain common sense and mutual respect that should be exercised in the relationship among state agencies charged with protecting the public.

For all of these reasons, the Chairman respectfully urges the Division to reconsider its decision.

VI. Procedural Technicality: Treatment of the Division's Objection and Motion to Quash as a Motion for Protective Order

The Division filed two motions, the first entitled "Objection to the Commission's Second Set of Data Requests." The second motion is entitled "Motion to Reconsider/Quash" and requests that the Commission "reconsider" or, in the alternative, "quash" the Commission's Second Set of Data Requests. The Division's accompanying memorandum is styled as in support of its Objection and Motion to Quash. The Division did not cite to any provision of the Commission's Rules of Practice and Procedure or the Rhode Island Superior Court Rules of Civil Procedure in support of its Motion.

The Chairman notes that the Commission's Rules do not reference a motion to quash and that the Superior Court Rules of Civil Procedure set forth the standards for a motion to quash in reference to subpoenas – not discovery requests. In this matter, the Commission issued data requests directed to a party – Rhode Island Energy – as specifically provided under Commission Rule 1.19(C)(1). Rhode Island Energy did not object. Similarly, Commission Rule 1.19(E) allows

a “party from whom discovery is sought” to file a motion for a protective order. Rhode Island Energy, the party from whom discovery is sought, did not move for a protective order.

Notwithstanding that the Division’s filing did not conform to the Commission’s rules, the Chairman nevertheless is treating the Division’s filing as similar to a motion for protective order filed consistent with Rule 26(c) of the Superior Court Rules of Civil Procedure which provides that a “party” or “the person from who discovery is sought” may move for a protective order. Pursuant to that Rule 26(c), the Commission may make an order which justice may require regarding the production of documents.

In that regard, the Chairman notes that one of the core concerns expressed by the Division was that the documents requested by the Commission should remain non-public. Given this concern, the Chairman is granting (as specified below) preliminary confidential treatment to all of the documents that are provided to the Commission by Rhode Island Energy and National Grid which are responsive to Commission Data Request Set 2, as provided by Commission Rule 1.3(H).

VII. Procedural Decision, Directives, and Preliminary Grant of Confidentiality

For the reasons described above, the Division’s Objection is overruled and the Motion to Quash is denied. In addition, the Chairman establishes the following procedural directives that shall apply to the production and handling of the documents sought under the Commission’s data requests identified in this Order.

A. Directives to Rhode Island Energy and National Grid for Production of Documents

Subject to the confidentiality treatment addressed below, all documents sought through Commission data request Set 2 shall be filed with the Commission by Rhode Island Energy. Any

documents may be provided by National Grid directly, if convenient for the utilities to arrange it in that manner.

B. Confidential Treatment of Documents

Pursuant to Commission Rule 1.3(H), the Chairman grants preliminary confidentiality to all documents filed in compliance with this Order. The filing should be accompanied by a Motion for Confidentiality referencing the directive in this Order. While the confidential treatment afforded hereto is designated preliminary per the Commission's rules, the Commission shall not release any of the applicable documents to the public without notifying the parties to this Docket and providing all parties an opportunity to be heard.

To the extent that Rhode Island Energy or National Grid believe that certain portions of the documents should be protected as confidential because they fall under other applicable exemptions in APRA (other than the investigatory exemption claimed by the Division in this case), they should identify the nature of those exemptions in the accompanying Motion for Confidentiality. However, it is not necessary for Rhode Island Energy or National Grid to file redacted versions of any of the documents, unless later directed by the Chairman as presiding officer or directed by the vote of the Commission.

C. Special Treatment for the Attorney General

The only remaining party in this investigatory docket (other than the Division, Rhode Island Energy, National Grid, and the Division) is the Attorney General. Given the participation of the Attorney General in this proceeding, Rhode Island Energy and National Grid are directed to provide copies of all documents filed with the Commission pursuant to this Order with the

Attorney General.⁶⁰ This Order places no conditions on the production of those documents to the Attorney General, who is fully capable of determining whether such documents should be kept confidential in his office as a distinct public body pursuant to any applicable APRA exemption or not. Rhode Island Energy, National Grid, and/or the Division may seek confidential treatment directly from the Attorney General in that regard without involvement of the Commission, subject only to courtesy notifications to the Commission regarding whether such request(s) have been made and notification of any outcomes therefrom.

D. The Ongoing Obligation of this Order

Should the Division continue its separate investigation and continue to request documents and information from the utilities, this Order creates an ongoing obligation, such that any documents and information provided to the Division or the Division's designees by Rhode Island Energy and/or National Grid are required to be filed by the utilities with the Commission and the Attorney General within a reasonable time after such documents are produced to the Division or the Division's designees.

VIII. Rulings

- (1) The Division's Objection is overruled;
- (2) The Motion to Quash is denied, however, the Chairman is treating the Objection and Motion to Quash as a Motion for Protective Order and makes the following orders:
 - a. Rhode Island Energy and National Grid are directed to file copies of the applicable documents with the Commission, as specified in section VII of this Order;
 - b. All applicable documents provided to the Commission are granted preliminary confidential treatment as specified in section VII of this Order;

⁶⁰ Rhode Island Energy and National Grid do not have to make duplicative filings. As long as all the documents are provided to the Commission and the Attorney General by one party or the other, the obligation is met.

c. The Commission shall not release any of the applicable documents to the public without notifying the parties in this case and providing them an opportunity to be heard;

d. Rhode Island Energy and National Grid are directed to file copies of the applicable documents with the Attorney General, as specified in section VII of this Order;

(3) Compliance with this Order shall commence on May 5, 2023.

(24649) So ordered.

DATED AND EFFECTIVE at Warwick, Rhode Island, on April 21, 2023.

PUBLIC UTILITIES COMMISSION



Ronald T. Gerwatowski, Chairman
Presiding Officer