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**

MEMORANDUM OF EXCEPTION TO THE PUBLIC UTILITIES COMMISSION'S CONCLUSIONS REGARDING THE DIVISION OF PUBLIC UTILITIES & CARRIERS' JURISDICTION

I. INTRODUCTION

In response to the Division of Public Utilities & Carriers' ("Division") Motion to Dismiss, the Public Utilities Commission ("Commission") conducted oral argument on March 28, 2023. Thereafter, on April 20, 2023, the Commission issued Order No. 24648 ("Order No. 24648"). In that order, the Commission made several pronouncements about "practical considerations" that compelled the Commission's continued investigations and urges the cessation of the Division's independent investigation. These were identified as: (1) the Commission's investigation was transparent and the Division's was "secret"; (2) the Commission's process is flexible and there are investigatory tools available to the Division in the Commission investigation, such as an audit, should the Division so request; (3) The Division's traditional role of Ratepayer Advocate is retained; (4) since the sale of Narragansett Electric, National Grid is a party to the Commission's proceedings through a written commitment to the Commission, which does not include the Division; (5) complex factual issues exist which are relevant to the Commission's final decision which would address to what extent the utility may owe a refund to ratepayers, but also may implicate potential modifications to the management of the energy efficiency program that only the Commission could order to be implemented; (6) it makes no practical sense to have duplicative proceedings (which the Commission implies may give rise to unspecified due process concerns);

and (7) should the evidence support it, the Commission has the authority to impose penalties against the utility.

The Commission further opined that its complex legal analysis and discussion of the Rhode Island Supreme Court decisions, starting with *Narragansett Electric Company v. Harsch*, 368 A.2d 1194 (R.I. 1977), *see* Order No. 24648 at 28, leads to an inescapable conclusion that the Division's role is to serve the Commission and that the Division's role is subordinate to the Commission when jurisdiction is assigned to the Commission.[1] In this case, the Commission notes that the Division is not assigned any responsibility for supervising or overseeing the energy efficiency program or the applicable account related to the program.[2] As such, the Commission argues that only it has the authority to conduct the investigation into the Company's admittedly wrongful activities.

The Commission's order declared, over-broadly, that the Division's reliance on R.I. Gen. Laws §39-4-13 (enacted over one hundred years ago) would wrongfully authorize the Division to undertake an investigation at any time, for any reason, effectively overriding every other provision of Title 39 that assigns jurisdiction and authority to the Commission.[3] This skewed analysis led the Commission to declare:

> The implications of the Division's interpretation of its authority arising out of the Summary Investigative Provision would mean that any time the Division wishes to halt a Commission proceeding on any subject relating to public utilities, the Division may simply do so by 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 litigated subject 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. 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

[1] Order No. 24648 at 31 (April 20, 2023).
[2] *Id*. at 33.
[3] *Id*. at 36.

to investigate rate matters and other issues under its jurisdiction, with the Division serving as a party in those proceedings.

Additionally, on April 21, 2023, the Chairman of the Commission issued Order No. 24649 ("Order No. 24649"), styled as a procedural order, in which the Chairman described the Division's actions as a duplicative summary investigation, opened in secret, without notice to the Commission.[4] This order directly interceded into a Division investigation and ordered Rhode Island Energy ("RIE" or "Company") and National Grid ("NGrid"), to file copies of the Division's investigatory inquiries issued to RIE and its responses thereto, into the Commission's Docket No. 22-05-EE, and to provide the same to the Rhode Island Attorney General's office. The order was styled as "on-going," requiring compliance not only as to discovery issued to date, but to all future discovery the Division might issue in its investigation.

By these two orders, the Commission makes bold and broad assertions about the Commission and the Division's respective authority to justify its denial of the Division's Motion to Dismiss and to legitimize the subsequent discovery overreach. *See* Orders No. 24648 & No. 24649. Resultingly, the Division is compelled to file this memorandum to advise the Commission of the Division's position, not only as it relates to its conclusions in this docket, but as to the Division's position concerning its jurisdiction generally and the Division's intent to continue to exercise its full authority.

II. STATE OF THE LAW RELATING TO THE JURISDICTION AND AUTHORITY OF THE COMMISSION AND THE DIVISION: DIVISION ANALYSIS OF THE CONTROLING STATUTES AND CASELAW

The Commission made the following observation in its order denying the Division's Motion to Dismiss: "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

[4] Order No. 24649 at 4 (April 21, 2023).

Division, as well as the differences between the two agencies. This involves a complex legal analysis." Order No. 24648 at 27. Indeed, the Division agrees that a complex legal analysis is warranted. However, the Division takes exception to the analysis undertaken by the Commission; by interpreting statutory or precedential law in a myopic and misperceived manner, the analysis is incongruous with the state of the law. As such, the Division submits that the Commission's analysis fails to provide a sound legal basis for the procedural rulings made in Orders No. 24648 & No. 24649. The Division's legal analysis of statutory and caselaw precedent are addressed seriatim, below.

A. Scope and Interpretation of Statutory Authority:

i. WHAT IS THE SCOPE OF THE PUBLIC UTILITIES COMMISSION'S STATUTORY AUTHORITY REGARDING CONDUCTING INVESTIGATIONS AND WHAT, IF ANY, AUTHORITY DOES THE PUBLIC UTILITIES COMMISSION HAVE OVER THE DIVISION OF PUBLIC UTILITIES AND CARRIERS?

The General Assembly, in setting out the State's overall policy with respect to public utilities and their regulation, stated that it is the policy of the State:

> … ***to provide fair regulation of public utilities and carriers in the interest of the public***, to promote availability of adequate, efficient, and economical energy, communication, and transportation services and water supplies to the inhabitants of the state, to provide just and reasonable rates and charges for such services and supplies, without unjust discrimination, undue preferences or advantages, or unfair or destructive competitive practices, and ***to cooperate with other … government in promoting and coordinating efforts to achieve realization of this policy***.

RIGL §39-1-1(b) (***emphasis*** supplied).

To effectuate that State policy, the General Assembly then designated its agents for doing so as follows:

> … there is hereby vested in the ***public utilities commission and the division of public utilities and carriers*** *the* ***exclusive power and authority to supervise, regulate, and make orders*** governing the conduct of companies offering to the public in intrastate commerce energy, communication, and transportation services and water supplies for the purpose of increasing and maintaining the efficiency of

> the companies, according desirable safeguards and convenience to their employees and to the public, and protecting them and the public against improper and unreasonable rates, tolls, and charges by providing full, fair, and adequate administrative procedures and remedies, and by securing a judicial review to any party aggrieved by such an administrative proceeding or ruling.

RIGL §39-1-1(c) (***all emphasis*** supplied).

Interestingly, then, ***the General Assembly does not distinguish between the Commission and the Division when vesting regulatory authority in the two agencies*** to empower them, jointly and severally, to carry out the State's public utility regulatory policy – it vests "the ***exclusive power and authority to supervise, regulate, and make orders governing the conduct of" public utilities jointly and severally in both the Commission and the Division***.

Recognizing that such an overlap in authority between the Commission and Division would be a recipe for massive regulatory confusion for both the agencies and those whom they regulate, the General Assembly next established the general operating parameters within which each agency would operate as follows:

> **RIGL § 39-1-3. Commission and division established – Functions of commission – Administrator.**
> (a) …The ***commission shall serve as a quasi-judicial tribunal with jurisdiction, powers, and duties*** to implement and enforce the standards of conduct under §39-1-27.6 [standards of conduct applicable to electric distribution companies] 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 location of railroad depots and stations, and the control of grade crossings; the revocation, suspension, or alteration of certificates issued pursuant to § 39-19-4 [CATV certificates of operating authority; the Division, however, issues the certificates in the first instance]; appeals under § 39-1-30 [zoning review – approval of ordinances and regulations]; petitions under § 39-1-31 [eminent domain]; and proceedings under § 39-1-32 [emergency powers of Commission].
>
> (b) The administrator [of the Division] … ***shall exercise the jurisdiction, powers, and duties not specifically assigned to the commission, including the execution of all laws relating to public utilities*** and carriers ***and all regulations and orders of the commission governing the conduct and charges of public***

> ***utilities and*** who shall perform ***other duties and have powers as are hereinafter set forth***. … The public utilities administrator also shall have powers and duties as provided in § 46-15.3-20 [enforcement of Water Resources Board determinations of noncompliance].

RIGL §39-1-3 (***all emphasis*** supplied).

The Commission had occasion to address the interplay of this often-overlapping jurisdiction in Order No. 24648.[5] After a brief discussion of RIGL §39-1-3 similar to that set out above, the Order opens its substantive analysis of the jurisdictional responsibilities of the Commission and Division by noting that 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***."[6] (***Emphasis*** supplied). To the extent that this statement can be read to suggest that the position of "Administrator" was newly created, it is both misleading and inaccurate. To fully understand the Division's and Commission's roles and authority, a historical statutory and caselaw review is necessary.

Pre-1969

Prior to 1969 the "Administrator" was the agency head for the Division which was, at that point in time, the sole regulatory agency with jurisdiction over public utilities and was located within the Department of Business Regulation. There was no Commission and there were no utility commissioners. Indeed, RIGL Title 39 was entitled simply "Division of Public Utilities." Regulatory authority over public utilities was vested solely in the Division, which was administratively located within the Department of Business Regulation.[7]

[5] Order No. 24648 at pp. 27-32.
[6] *Id.* at 28.
[7] *Id*., n.71 at p. 28.

The 1969 Amendment

In 1969, however, the General Assembly amended Title 39 to create the Commission. With respect to the new Commission's powers, RIGL §39-1-3 was amended as follows:

> 39-1-3. Composition of division—Commission.—Within the department of business regulation there shall be a division of public utilities and carriers. To implement the legislative policy set forth in section 39-1-1 and serve as the agency of the state in effectuating the legislative purpose, there is hereby established within the department of business regulation a public utilities commission which shall function as a unit independent of the director of the department of business regulation and not subject to his jurisdiction. By virtue of his office, the chairman of the public utilities commission shall be the public utilities administrator who shall supervise and direct the execution of all laws relating to public utilities and carriers and all regulations and orders of the commission governing the conduct and charges of public utilities and carriers, and who shall perform such other duties and have such other powers as are hereinafter set forth.

P.L. 1969, ch. 240, § 1.

Clearly, the responsibilities of the Commission were rather vague, focusing solely on implementing and effectuating the legislative policy and purposes set out in RIGL §39-1-1. The chairman of the Commission was also made the administrator of the Division and, as Administrator, charged with supervising and directing "the ***execution of all laws relating to public utilities*** and carriers ***and all regulations and orders of the commission governing the conduct and charges of public utilities*** and carriers" in addition to other specific powers granted to the Division and its administrator elsewhere in the title.

The 1973 Amendment

Within a very few years it became clear that the duties and responsibilities – and the respective jurisdictions – of the Commission and Division needed further clarification and delineation. Thus, in 1973 RIGL §39-1-3 was again amended, this time to make it clear that both agencies were responsible for regulating utilities, with the Commission serving as a quasi-judicial tribunal "***with jurisdiction, powers, and duties to hold investigations and hearings involving the***

rates, tariffs, tolls and charges and the sufficiency and reasonableness of facilities and accommodations of … public utilities…" as well as other specifically identified responsibilities, while the Division (in the person of its Administrator) "***shall exercise the jurisdiction, supervision, powers and duties not specifically assigned to the commission … and who shall perform such other duties and have such other powers as are hereinafter set forth***"; the Public Law provides (in pertinent part):

> 39-1-3. COMPOSITION OF DIVISION—COMMISSION.— ~~Within the department of business regulation there shall be a division of public utilities and carriers.~~ To implement the legislative policy set forth in section 39-1-1 and to serve as the ~~agency~~ **agencies** of the state in effectuating the legislative purpose, there ~~is~~ **are** hereby established within the department of business regulation a public utilities commission **and** a **division of public utilities and carriers** which shall function as ~~a unit~~ **units** independent of the director of the department of business regulation and not subject to his jurisdiction. **The commission shall serve as a quasi-judicial tribunal with jurisdiction, powers, and duties to hold investigations and hearings involving the rates, tariffs, tolls and charges and the sufficiency and reasonableness of facilities and accommodations of … public utilities, … appeals under section 39-1-30, petitions under section 39-1-31, and proceedings under section 39-1-32. The administrator shall exercise the jurisdiction, supervision, powers and duties not specifically assigned to the commission.** By virtue of his office, the chairman of the public utilities commission shall be the public utilities administrator who shall supervise and direct the execution of all laws relating to public utilities and carriers and all regulations and orders of the commission governing the conduct and charges of public utilities ~~and carriers~~, and who shall perform such other duties and have such other powers as are hereinafter set forth.

P.L. 1973, ch. 199, § 1 (**all** ~~emphasis~~ in the original).

While the 1973 amendment represents an improvement with respect to delineating the jurisdiction and responsibilities of the Commission and Division, it still left much uncertainty. Indeed, as the Commission noted in Order No. 24648:

> 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).

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 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).

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. (***Emphasis*** supplied; emphasis in original).[8]

There are four salient points in these lengthy quotes from the *Harsch* decision. First of all, the Court made it quite clear that its discussion – and conclusions – were based on its reading of

[8] *Id.* at 28-29, discussing *Narragansett Electric Company v. Harsch*, 368 A.2D 1194 (R.I. 1977), footnotes omitted.

the present (as of 1977) statute; if the statute were to be amended (and it has been, at least three times) the Court would have to reevaluate whether its interpretation in *Harsch* was still valid. Second, the Court looked at the use of the conjunctive between the clauses "by the division" ***and*** "by the parties in interest" and concluded that the Legislature intended for Division to be acting, in essence, as a party in interest (though representing the interests of the general body of ratepayers rather than those of a discrete entity). Third, the Court made it clear that the Division's role as a "party in interest" was in effect only "***in matters brought for hearing before the commission***" where "***the division would assume a role not unlike that of a party in interest***." Finally, the Court concluded that the role of the Division, "in pursuit of the public interest set forth in section 39-1-1" is, "in addition to its broad regulatory powers," to appear "***on behalf of the public to present evidence and to make arguments before the commission***."

In effect, the *Harsch* court is saying that the relationship between the Commission and the Division, in those matters where the Division is appearing before the Commission, is analogous to that between the courts and the Department of the Attorney General. While the Attorney General represents the people as a whole before the courts, the Division represents the general body of ratepayers before the Commission.

The 1980 Amendment

In 1980 the Legislature again altered the law with respect to the relationship between the Commission and the Division, this time by taking both agencies completely out from under the Department of Business Regulation and placing them in the Commission as a new and separate State department. *See P.L.* 1980, ch. 335, § 1 (amending RIGL § 42-6-1). Section 3 of that Public Law enacted a new chapter in RIGL Title 42 (ch. 14.2, since renumbered as ch. 14.3) entitled "Public Utilities Commission." The first section of the new chapter provided:

> 42-14.2-1. DEPARTMENT ESTABLISHED – POWERS – There shall be a public utilities commission. The head of the commission shall be the chairman of the public utilities commission, who shall carry out, except as otherwise provided by this title, the provisions of chapters 1 to 20, inclusive, of title 39, and of all other general laws and public laws heretofore carried out by the former administrator of public utilities and carriers and division of public utilities and carriers.

See P.L. 1980, ch. 335, § 3 (adding RIGL § 42-14.2-1, since renumbered as RIGL § 42-14.3-1).

While the plain reading of RIGL § 42-14.2-1 would certainly lead one to conclude that the Division had been disestablished, that conclusion is directly contradicted by the amendment to RIGL § 39-1-3 set out in section 6 of the Public Law:

> 39-1-3. COMPOSITION OF DIVISION – COMMISSION. – To implement the legislative policy set forth in 39-1-1 and to serve as the agencies of the state in effectuating the legislative purpose, ***there are hereby established*** ~~within the department of business regulation~~ a public utilities commission and ***a division of public utilities and carriers.*** ~~which shall function as units independent of the director of the department of business regulation and not subject to his jurisdiction.~~ ***The commission shall serve as a quasi-judicial tribunal with jurisdiction, powers, and duties 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, water, telephone, telegraph and pipeline ***utilities***, the location of railroad depots and stations and the control of grade crossings, the revocation, suspension or alteration of certificates issued pursuant to 39-19-4, appeals under 39-1-30, petitions under 39-1-31, and proceedings under 39-1-32. ***The administrator shall exercise the jurisdiction, supervision, powers and duties not specifically assigned to the commission.*** By virtue of his office, the chairman of the public utilities commission shall also be ***the public utilities administrator*** who ***shall supervise and direct the execution of all laws relating to public utilities and carriers and all regulations and orders of the commission governing the conduct and charges of public utilities***, and who shall perform such other duties and have such powers as are hereinafter set forth.

See P.L. 1980, ch. 335, § 6 (***all emphasis*** supplied).

Thus, the 1980 amendment did nothing more that move the public utilities regulation agencies out from under the Department of Business Regulation, and specifically subsume the Division – for the first time – within the organizational body of the Commission as a division of the Commission. Substantively speaking, under the amended RIGL § 39-1-3, the Division

continued to function as before, performing every aspect of public utilities regulation, enforcement and oversight ***not specifically assigned to the Commission itself***.

In Order No. 24648, the Commission cites the Supreme Court's 1980 decision in *Providence Gas Co. v. Burke*, 419 A.2d 263, 270 (R.I. 1980) wherein the court states that, in its "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."[9] The Commission then argues that the Supreme Court "has been unequivocal regarding the statutory role of the Division when the Commission is holding hearings and investigations, citing *obiter dictum* in a 1998 decision by the Supreme Court concerning the Providence Water Supply Board that quotes the *Providence Gas* decision.[10] This reliance on *Providence Gas* is not well-founded.

The relevant issue in *Providence Gas* concerned the role of the Division when the Attorney General (who had represented the Division before the Commission) challenges an order of the Commission. The Court first noted that the chairman of the Commission, by virtue of his office, also served as the administrator and chief executive officer of the Division. Second, pursuant to RIGL § 39-1-19, upon request of the administrator, the Attorney General would represent the Division in a public-utility proceeding. This could give rise to the "somewhat incongruous situation … wherein the administrator despite his capacity as chairman of the commission may, pursuant to 39-5-1, seek review of a unanimous decision of the commission in his capacity as administrator of the division." The Court determined that once the Commission has made its decision:

> … [I]t is inappropriate for the division and its administrator to challenge that decision, even when the administrator (chairman) has dissented. In such a situation,

[9] *Id.* at 29 citing *Providence Gas Co. v. Burke*, 419 A.2d 263, 270 (R.I. 1980).
[10] *Id.* at 29 citing *Providence Water Supply Board v. Public Utilities Commission*, 708 A.2d 537, 539 (R.I. 1998).

> the people and rate payers of the State of Rhode Island may most properly be represented by the Attorney General in seeking review of the commission's decision. The Attorney General need not be precluded from seeking such review merely because he has previously represented the division as counsel.

Thus, *Providence Gas*, ***in the context where the Chairman of the Commission is also the Administrator of the Division***, stands for the proposition that the Chairman/Administrator cannot appeal his/her own decisions. The Division appears before the Commission as a litigant only.[11]

Amendment

By 1998, when the Supreme Court issued the *Providence Water* decision, the Legislature had once again amended RIGL § 39-1-3, this time to separate the roles of Commission Chairman and Division Administrator and eliminate the conflict of interest inherent in having one person fill both roles – presiding officer of a quasi-judicial tribunal and litigant before that quasi-judicial tribunal:

> **RIGL § 39-1-3. Commission and division established – Functions of commission – Administrator. –**
>
> (a) To implement the legislative policy set forth in section 39-1-1 and to serve as the agencies of the state in effectuating the legislative purpose, there are hereby established a public utilities commission and a division of public utilities and carriers. The commission shall serve as a quasi-judicial tribunal with jurisdiction, powers, and duties **to implement and enforce the standards of conduct under §39-1-27.6 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 location of railroad depots and stations, and the control of grade crossings; the revocation, suspension, or alteration of certificates issued pursuant to § 39-19-4 [CATV certificates of operating authority; the Division, however, issues the certificates in the first instance]; appeals under § 39-1-30 [zoning review – approval of ordinances and regulations]; petitions under § 39-1-31 [eminent domain]; and proceedings under § 39-1-32 [emergency powers of Commission].
>
> (b) The administrator shall **be a person who is not a commissioner and who shall** exercise the jurisdiction, powers, and duties not specifically assigned to the commission**, including the execution of all laws relating to public**

[11] *Providence Gas* at 270.

> **utilities and carriers and all regulations and orders of the commission governing the conduct and charges of public utilities and who shall perform other duties and have powers as are hereinafter set forth. The administrator shall be a person who is appointed by the Governor for an initial term of six (6) years. The administrator shall be appointed with the advice and consent of the senate. The director of administration, with the approval of the governor, shall allocate the administrator to one of the grades established by the pay plan for unclassified employees.** ~~By virtue of his or her office, the chairperson of the public utilities commission shall be the public utilities administrator who shall supervise and direct the execution of all laws relating to public utilities and carriers and all regulations and orders of the commission governing the conduct and charges of public utilities, and who shall perform such other duties and have such powers as are hereinafter set forth.~~ The public utilities administrator also shall have powers and duties as provided in § 46-15.3-20 [enforcement of Water Resources Board determinations of noncompliance].

P.L. 1996, ch. 316, § 1 (~~all~~ **emphasis** in original).

Importantly, the *Providence Water* case involved an appeal by the utility and did not involve a question of the competing regulatory jurisdictions of the Commission and Division at all. Instead, the Supreme Court was faced with a question of the limits of the Commission's regulatory authority *vis-à-vis* regulated utilities and concluded (unequivocally) "that the broad regulatory powers of the PUC ordinarily do not include the authority to dictate managerial policy." *See Providence Water* at 543. The Court's reference to the relationship between the Commission and the Division (*see Providence Water* at 539), quoting the 18-year-old *Providence Gas* decision that was issued under a since-amended (and, thus, no longer on point) version of RIGL 39-1-3, was unnecessary to the decision in *Providence Water* and was nothing more than *obiter dictum*.

To the extent that the Commission's reference in its recent Order quoting *Providence Gas* that 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"[12] is read as no more than meaning that the Division is to act as the ratepayer advocate in Commission proceedings, bringing to the Commission in that capacity "all relevant evidence, facts, and arguments that will lead the commission in its quasi-judicial capacity to reach a just result", the Division concurs – because it is the Division's duty to act as the ratepayer advocate where the ratepayer is a necessary and crucial party in Commission proceedings who would not otherwise be represented.[13] To the extent that the Commission's Order might be trying to say that the Division is subordinate to the Commission, the Division disagrees.

Notably, the Commission identifies three principles derived from its review of Supreme Court decisions concerning the jurisdiction of the Commission ***and the role of the Division when appearing before the Commission as a party***:

> There are three salient principles that arise out of this history or the Rhode Island Supreme Court decisions interpreting Title 39, relating to the Commission's jurisdiction ***and the role of the Division***. First, the Commission's [sic] 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…." (emphasis added) [*citing* RIGL § 39-1-3(b)] – a principle that was quoted by the Supreme Court in … [in *Kent County Water Authority* at 125-26]. In other words, the Division's jurisdiction picks up where the Commission's jurisdiction leaves off.[14]

(Emphasis in original; ***emphasis*** added).

Commission Order No. 24648 does not, accurately reflect the jurisdiction of either the Commission or the Division. First, the Legislature clearly "vested in the public utilities commission ***and the division of public utilities and carriers*** the exclusive power and authority to supervise, regulate, and make orders governing the conduct of …" all public utilities engaged in

[12] *See* Order No. 24648 at 29 (quoting *Providence Gas* at 270).
[13] *Id* at 30, citing *In Re Island Hi-Speed Ferry, LLC*, 746 A.2d 1240, 1244 (R.I. 2000).
[14] *Id* at 31-32, citing *Kent County Water Authority Change Rate Schedules*, 996 A.2d 123, 125-126 (R.I. 2010).

intrastate operations. RIGL § 39-1-1(c). Thus, both agencies have very broad regulatory authority in this single discrete area of the law.

Second, the Legislature saw fit to use far more restrictive language in delineating the authority of the Commission than it did when defining the authority of the Division. The Commission is ***specifically*** singled out to "serve as a quasi-judicial tribunal with jurisdiction, powers, and duties … to hold investigations and hearings involving the rates, tariffs, tolls, and charges, and the sufficiency and reasonableness of facilities and accommodations …" of public utilities[15]. RIGL § 39-1-3(a). With respect to the Division, however, the Legislature specified that the Division (through the Administrator) "exercises the jurisdiction, supervision, powers, and duties ***not specifically*** assigned to the commission, ***including the execution of all laws relating to public utilities and carriers and all regulations and orders of the commission governing the conduct and charges of public utilities and who shall perform such other duties and have such powers as are hereinafter set forth….***[16]" RIGL § 39-1-3(b).

Thus, both the Commission and Division are granted some specific duties and powers by the Legislature, with ***anything not specifically identified but necessary to the regulation of public utilities assigned to the Division, including very specifically, "execution of … all regulations and orders of the commission governing the conduct and charges of public utilities…."*** The passages quoted above were specifically added to RIGL § 39-1-3(b) by P.L. 1996, ch. 316, § 1, making it very clear that while the Commission was primarily a quasi-judicial tribunal, ***the***

[15] RIGL § 39-1-3 was amended into its current form by P.L. 1996, ch. 316, § 1. That amendment divided the statute into two subsections, with subsection (a) concerned primarily with the duties of the Commission. It also added the phrase "to implement and enforce the standards of conduct under section 39-1-27.6 and to" to the statute, as well as adding the word "distribution" filing the word electric to make sure that it was clear that the Commision's authority applied specifically to electric distribution utilities, not electric transmission utilities.

[16] RIGL § 39-1-3 was amended into its current form by P.L. 1996, ch. 316, § 1. That amendment divided the statute into two subsections, with subsection (b) concerned primarily with the duties of the Division. It also made it very clear that the person running the Division was not to also be a PUC Commissioner – thus finally severing the Division from any direct oversight or control by the Commission.

Division is the entity responsible for executing not only all laws pertaining to public utilities, but ***all regulations and orders of the Commission*** "***governing the conduct and charges of public utilities.***"

There is nothing in the statutes – or the case law cited in the Commission's Order – to suggest that the Division is subservient to the Commission in carrying out the Division's legislatively-assigned responsibilities. The Division is only subject to the authority of the Commission to the same degree as any other party appearing before the Commission when that agency is acting as a quasi-judicial tribunal – and, like every other party, must be free to develop its own case, and represent its own interests, free from the interference of the tribunal before which it appears.

ii. WHAT IS THE JURISDICTION AND AUTHORITY OF THE PUBLIC UTILITIES COMMISSION WITH RESPECT TO THE ENERGY EFFICIENCY PROGRAM AND THE INCENTIVE MECHANISM FOR THAT PROGRAM UNDER RIGL §§ 39-1-27.7 AND 39-2-1.2(B) AND HOW DOES THAT RELATE TO THE RESPONSIBILITIES OF THE DIVISION OF PUBLIC UTILITIES AND CARRIERS?

In Order No. 24648, the Commission states that it has "exclusive authority to ensure that the rates charged by the utility for the energy efficiency program are just and reasonable."[17] The Division agrees with that claim as the Commission is specifically granted the "jurisdiction, powers, and duties to … hold investigations and hearings involving the rates, tariffs, tolls, and charges, … of gas, electric distribution, … public utilities …" under RIGL 39-1-3(a), and the rates charged by a utility for its energy efficiency program clearly fall within that specific grant.

The Order then goes on to state that the Commission has been assigned "explicit authority and responsibility … for the oversight of the energy efficiency program itself and, most important, responsibility for the incentive mechanism which the Company [the Narragansett Electric

[17] Order No. 24648 at pp. 32-33.

Company, then doing business as National Grid—Electric and National Grid—Gas] admittedly manipulated through the mismanagement of out-of-period invoices to enhance the payout of incentives."[18] The Division agrees generally that RIGL §§ 39-1-27.7 and 39-2-1.2 assign oversight of the energy efficiency program – and the related incentive mechanism – to the Commission, specifically with regard to the design of the program and its success in furthering energy efficiency within the state while still allowing a reasonable recovery to the affected public utilities; this program clearly falls within the specific grant of authority to the Commission over "rates, tariffs, tolls, and charges."

Finally, the Commission's Order states that:

> 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, 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.[19]

(***Emphasis*** added).

The Commission Order does not accurately describe the authority granted to the Division. Nor does it accurately describe the relationship between the Commission and the Division as it has existed since 1996. The Division does not "serve the Commission." The Division serves the general body of ratepayers as ***their*** advocate when appearing on ***their behalf*** before the Commission ***as a party***.

[18] *Id.* at p. 33 citing RIGL §§ 39-1-27.7 and 39-2-1.2.
[19] *Id.* at p. 34.

The Legislature has explicitly directed the Administrator of the Division to exercise "the jurisdiction, supervision, powers, and duties not specifically assigned to the commission, ***including the execution of all laws relating to public utilities and carriers and all regulations and orders of the commission*** governing the conduct and charges of public utilities" among other duties. RIGL § 39-1-3(b) [***all emphasis*** added]. Clearly, then, "the execution of all laws relating to public utilities and carriers and all regulations and orders of the commission" governing the conduct and charges of public utilities are among the powers that ***have not*** been "specifically assigned" to the Commission.

What "jurisdiction, supervision, powers, and duties" have been explicitly assigned to the Commission under RIGL § 39-1-27.7?

- The Commission ***shall establish standards*** for system reliability and energy efficiency and conservation procurement that shall include standards and guidelines for system reliability procurement and least-cost procurement. RIGL § 39-1-27.7(b).
- The Commission ***will review the standards*** established by RIGL § 39-1-27.7(b) at least every three years and amend them as appropriate. RIGL § 39-1-27.7(c).
- The Commission ***shall issue standards*** with regard to plans for system reliability and energy efficiency and conservation procurement and amend/revise those standards as appropriate. RIGL § 39-1-27.7(d)(2).
- The Commission ***shall issue an order approving all energy-efficiency measures*** that are cost-effective and lower cost than acquisition of additional supply, and any related annual plans submitted by the utility and reviewed/approved by Energy Efficiency and Resources Management Council ***and approve a fully reconciling funding mechanism*** to fund investments in efficiency measures. RIGL § 39-1-27.7(d)(5).

- The Commission ***shall evaluate*** the submitted combined heat and power program as part of the annual energy-efficiency plan and issue an order approving the energy efficiency plan within 60 days. RIGL § 39-1-27.7(d)(6)(iv).
- The Commission ***shall determine*** that the implementation of system reliability and energy efficiency and conservation procurement has caused, or is likely to cause, ***under or over-recovery of overhead and fixed costs of the utility and may then establish a mandatory rate-adjustment clause*** for the utility to provide for full recovery of reasonable and prudent overhead and fixed costs. RIGL § 39-1-27.7(e).
- The Commission ***shall*** 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. RIGL § 39-1-27.7(f).
- The Office of Energy Resources may retain experts to carry out an energy efficiency verification study. The costs related to this study "shall be recoverable through the system benefit charge ***subject to" Commission approval***. RIGL § 39-1-27.7(g)(3).

The Commission, however, is not the only entity granted authority under this statute. The Office of Energy Resources, the Energy Efficiency and Resources Management Council, the gas and electric distribution utilities, and even the Division, are all assigned roles under this statute, some of which requires their approval even before the Commission can act.

What "jurisdiction, supervision, powers, and duties" have been explicitly assigned to the Commission under RIGL § 39-2-1.2?

- The Commission ***shall promulgate such rules and regulations*** as are necessary to require public disclosure of all advertising expenses of any kind, direct or indirect, and to otherwise effectuate the provisions of this section (with respect to utility base rates). RIGL § 39-2-1.2(a).
- Electric distribution companies are required to maintain a separate account for ***demand-side management programs subject to the regulatory reviewing authority of the Commission***, and a separate account for renewable energy programs to be administered by the Rhode Island Commerce Corporation. RIGL § 39-2-1.2(b).
- The Commission ***may***, in its discretion, after notice and public hearing, ***increase the sums for demand-side management and renewable resources*** and ***shall***, after notice and public hearing, ***determine the appropriate charge for these programs***. RIGL § 39-2-1.2(b).
- Gas distribution companies shall include, with ***the approval of the Commission***, a charge per deca therm to fund demand-side management programs. RIGL § 39-2-1.2(e).
- Each gas distribution company will have a separate account for demand-side management programs funded by the gas demand-side charge subject to the regulatory reviewing authority of the Commission. ***The Commission may establish administrative mechanisms and procedures*** similar to those for electric distribution company programs. RIGL § 39-2-1.2(f).
- The Commission ***may except*** from the demand-side management charge gas used for distribution generation and gas used for manufacturing processes (in some circumstances). RIGL § 39-2-1.2(g).

- The Commission ***may*** ***provide for the coordinated and/or integrated administration*** of electric and gas demand-side management programs to enhance the effectiveness of the programs. RIGL § 39-2-1.2(h).
- The Commission ***shall*** ***allocate***, from demand-side management gas and electric funds, an amount not to exceed 3% of such funds on an annual basis for the retention of expert consultants, and reasonable administration costs of the Energy Efficiency and Resources Management Council associated with managing energy efficiency programs, renewable energy programs, least-cost procurement, etc. RIGL § 39-2-1.2(i).
- The Commission ***shall*** ***annually allocate from the administrative funding*** amount allocated in RIGL § 39-2-1.2(i) from the demand-side management program sums for administrative purposes associated with that program. RIGL § 39-2-1.2(j).
- The Commission ***shall*** ***allocate, from demand-side management gas and electric funds*** authorized pursuant to RIGL § 39-2-1.2, $5,000,000 of such funds on an annual basis to the Rhode Island Infrastructure Bank; the Infrastructure Bank shall report to the Commission annually how collections transferred under this section were utilized. RIGL § 39-2-1.2(n).

The Commission, however, is again not the only entity granted authority under this statute. The Rhode Island Commerce Corporation, the Office of Energy Resources, the Energy Efficiency and Resources Management Council, the Rhode Island Infrastructure Bank, and the gas and electric distribution utilities, are all assigned roles under this statute, some of which requires their approval even before the Commission can act.

All the "jurisdiction, supervision, powers, and duties" assigned to the Commission by RIGL §§ 39-1-27.7 and 39-2-1.2 fall squarely within its specific responsibilities assigned to it by

RIGL § 39-1-3(a) to "serve as a quasi-judicial tribunal with jurisdiction, powers, and duties … to hold investigations and hearings involving the rates, tariffs, tolls, and charges, and the sufficiency and reasonableness of facilities and accommodations …" of public utilities. They all deal with establishing standards within which utilities must operate, allocating funds amongst various programs and recipients, and ascertaining that various rates are just and reasonable. None of the assigned "jurisdiction, supervision, powers, and duties" concern "***the execution of all laws relating to public utilities and carriers and all regulations and orders of the commission*** governing the conduct and charges of public utilities" that are assigned specifically to the Division by RIGL § 39-1-3(b).

Put another way, the Commission establishes, revises, and amends standards and allocations of funds. The Division ensures that the regulated utilities are in compliance with those standards and allocations established by the Commission and takes appropriate corrective actions against the regulated entities if they are not.

How may the Division ensure that a public utility complies with the various standards and allocations that have been established by the Commission? Upon receipt of a proper written complaint (and the Division would consider a complaint received from the Commission against a public utility to be actionable in the same manner as a complaint received from – for example – a corporation), ***the Legislature has directed the Division to "proceed, with or without notice, to make such investigations as it may deem necessary or convenient***. But no order affecting the rates, tolls, charges, regulations, measurements, practice, act, or service complained of shall be entered by the division without a formal public hearing." RIGL § 39-4-3.

Once the Division has completed its investigation and determined that formal action regarding a public utility's "rates, tolls, charges, regulations, … practice, act or service" is called for:

> The division shall, prior to a formal hearing, notify the public utility complained of that a complaint has been made, and ten (10) days after notice has been given, the division may proceed to set a time and place for a hearing and an investigation as hereinafter provided.

RIGL § 39-4-4.

Alternatively, the Division can initiate actions *sua sponte*, even without receipt of a formal complaint, if it receives, or develops, credible information suggesting that a public utility is in violation of RIGL, Title 39:

> ***Whenever the division shall believe*** that any of the rates, tolls, charges, … demanded, exacted, or collected by any public utility are in any respect unreasonable or unjustly discriminatory or otherwise in violation of [Title 39] 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, …or power, 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*** [Fixing Standards For Service] and ***39-3-11*** [Notice Of Change In Rates – Suspension Of Change – Hearings].

RIGL § 39-4-13 (***all emphasis*** supplied; bracketed material added).

Upon completion of the summary investigation:

> 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.

RIGL § 39-4-14 (***all emphasis*** supplied).

Whether the initial investigation is done in response to a formal complaint or *sua sponte* by the Division by way of a summary investigation, the requirement for a formal hearing is the same:

> ***Notice*** of the time and place for a hearing and investigation shall be given to the public utility ***and to such other interested persons as the division shall deem necessary***, as provided in § 39-4-5, and thereafter the proceedings shall be had and conducted in reference to the matter investigated in like manner as though a complaint had been filed with the division relative to the matter investigated, and the same order or orders may be made in reference thereto as if the hearing and investigation had been made on a complaint.

RIGL § 39-4-15 (***all emphasis*** supplied).

Following the formal hearing and investigation:

> The division ***shall*** cause a certified copy of all its orders to be ***served upon an officer or agent of the public utility affected*** thereby, ***and upon the complainant*** if any there be, and all orders shall of their own force take effect and become operative ten (10) days after service thereof unless a different time be fixed by the order.

RIGL § 39-4-16.

The Division has been granted significant authority with respect to taking actions to correct misconduct or malfeasance on the part of a regulated public utility. For example, Title 39, Ch. 3 (Regulatory Powers of Administration) authorizes the Division to order refunds:

> ***The division shall have the power***, when deemed by it necessary, … ***to order the public utility to make restitution*** to any party or parties, individually or as a class, injured by the prohibited or unlawful acts, ***by way of a*** cash refund, billing credit, or ***rate adjustment, or any other form of relief that the division may devise to do equity to the parties***. Any award made in restitution shall carry interest from the date of the injury, at the rate of seven percent (7%) from the date of the order of the division.

RIGL § 39-3-13.1 (***all emphasis*** supplied).

In order to improve accountability and oversight of public utilities:

> The division may, from time to time, establish and prescribe a system of forms of accounts to be used by all public utilities…. The division may also, in its discretion, prescribe the forms of records and memoranda to be kept by the public utilities….

RIGL § 39-3-14.

Depending on the circumstances of a particular matter, the Division has authority to penalize public utilities for failing to comply with chapters 1 through 5 of Title 39, as well as for failing to obey the orders issued by the Division:

> Every public utility …, and all officers and agents thereof, ***shall obey, observe, and comply with every order <u>of the division</u> made under the authority of chapters 1 — 5 of this title*** as long as the order shall be and remain in force. Every public utility … that shall violate any of the provisions of the chapters or ***that fails***, omits, or neglects to obey, observe, or ***comply with any order <u>of the division</u>***, shall be subject to a penalty of not less than two hundred dollars ($200) nor more than one thousand dollars ($1,000) for each and every offense. Every violation of the order shall be a separate and distinct offense and, in case of a continuing violation, every day's continuance thereof shall be, and be deemed to be, a separate and distinct offense. ***Every officer***, agent, or employee of a public utility … who shall violate any of the provisions of the chapters, or who procures, aids, or abets any violation by any public utility …, or ***who shall fail to obey, observe, or comply with any order <u>of the division</u>, or any provision of an order <u>of the division</u>***, or who procures, aids, or abets any public utility or water supplier in its failure to obey, observe, or comply with any order or provision, shall be guilty of a misdemeanor and shall be fined not less than one hundred dollars ($100) nor more than five hundred dollars ($500). In construing and enforcing the provisions of this section, the act, omission, or failure of any officer, agent, or other person acting for or employed by any public utility …, acting within the scope of his or her employment, shall in every case be deemed to be also the act, omission, or failure of the public utility ….

RIGL § 39-3-22 (***<u>all</u> emphasis*** supplied).

In addition, Title 39, ch. 2 (Duties of Utilities and Carriers), provides as follows:

> 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.

RIGL § 39-2-8.

While this section does not specifically assign the Division authority to implement it, neither does it specifically assign authority to the Commission – ***and if authority is not specifically assigned to the Commission it falls automatically, by operation of law under RIGL § 39-1-3(b), to the Division***. (More to the point, this chapter applies to all utilities and carriers, and the Commission does not regulate motor carriers; regulation of motor carriers – including rates and tariffs, where applicable – falls solely to the Division.)

Finally, the Division may impose a penalty on a regulated utility for filing a false return:

> 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).

RIGL § 39-1-22 (***all emphasis*** supplied).

While this last provision does reference the Commission, it does not specifically grant the Commission the authority to execute the law in accordance with RIGL § 39-1-3(b); as we know, if the power is not specifically granted to the Commission and involves the "execution of all laws relating to public utilities and carriers and all regulations and orders of the commission, that power belongs to the Division. This conclusion is further supported by RIGL § 39-4-24, which provides that:

> ***An action to recover a penalty or forfeiture*** under this chapter shall be brought in any court of competent jurisdiction in this state in the name of the state, and ***shall be commenced and prosecuted to final judgment by the administrator***. All money recovered in any action, together with the costs thereof, shall be paid into the state

> treasury. Any action may be discontinued or compromised on application of the administrator upon such terms as the court shall approve and order.

Simply put, the Commission and Division have complementary jurisdiction even in the matter at hand. If the Narragansett Electric Company is to be held accountable for having violated the standards established by the Commission for the renewable energy incentive plan, it must be done by the Division under its enforcement authority.[20] That requires that the Division conduct its own investigation into the matter.

iii. DOES THE DIVISION OF PUBLIC UTILITIES AND CARRIERS HAVE AUTHORITY TO CONDUCT AN INDEPENDENT INVESTIGATION OF ISSUES EVEN IF IT IS APPEARING AS A PARTY BEFORE THE PUBLIC UTILITIES COMMISSION ON A RELATED MATTER?

The Chairman issued Commission Order No. 24649.[21] The Division would like to address one specific issue raised by the Chairman in which it believes he errs.

The Chairman notes in Order No. 24649, in discussing the travel of the Division's Motion To Dismiss (without prejudice) the Commission's investigation that:

> Subsequently, and before the Commission had heard the Motion to Dismiss, the Commission learned from Rhode Island Energy 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 <u>in secret</u> without notifying the Commission***. …[22]

(***<u>All</u> emphasis*** supplied).

The Chairman later goes on to argue that:

> ***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

[20] See footnote 39.
[21] *See In Re Investigation Of Utility Misconduct Or Fraud By The Narragansett Electric Company Relating To Past Payment Of Shareholder Incentive*, Procedural Order Overruling Objection, Denying Motion To Quash, And Granting Confidential Treatment Of Documents, Order No. 24649 dated April 21, 2023, in Commission Dockets Nos. 22-05-EE and 5189.
[22] *Id.* at 4.

> 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.[23]

(***All emphasis*** supplied).

Together, these quotes reveal an apparent fundamental misunderstanding by the Chairman on ***how the Legislature – not the Division – defines the role of the Division in enforcing both the law and the regulations and orders of the Commission***.

As discussed, *infra*, the Legislature spells out the role of the Division in RIGL § 39-1-3(a) as follows: the Division (through the Administrator) "exercises the jurisdiction, supervision, powers, and duties ***not specifically*** assigned to the commission, ***including the execution of all laws relating to public utilities and carriers and all regulations and orders of the commission governing the conduct and charges of public utilities and who shall perform such other duties and have such powers as are hereinafter set forth….***"

With respect to system reliability and least-cost procurement, the Legislature has specifically assigned to the Commission the authority for establishing "standards for system reliability and energy efficiency and conservation procurement that shall include standards and guidelines for: (1) system reliability procurement, …" and "(2) least-cost procurement…" RIGL § 39-1-27.7(b). The Legislature has also directed the Commission to subject the standards it established under RIGL § 39-1-27.7(b) "to periodic review and as appropriate amendment by the commission" at least every three years. RIGL §§ 39-1-27.7(c) and 39-1-27.7(d)(2). The Legislature requires the Commission to review the system reliability and energy efficiency and

[23] *Id.* at 10.

conservation procurement plans of gas and electric distribution companies triennially. RIGL § 39-1-27.7(d)(4). The Legislature requires that the Commission ***shall*** issue an order approving all energy-efficiency measures that are cost-effective and lower cost than acquisition of additional supply ***that have been reviewed and approved by the Energy Efficiency and Resources Management Council*** and approve a fully reconciling funding mechanism. RIGL § 39-1-27.7(d)(5). The Legislature requires the Commission to "evaluate the submitted combined heat and power program as part of the annual energy-efficiency plan" and then approve "the energy-efficiency plan and programs within sixty (60) days of the filing." RIGL § 39-1-27.7(d)(6)(iv). The Legislature requires the Commission to "determine that the implementation of system reliability and energy efficiency and conservation procurement has caused, or is likely to cause, under or over-recovery of overhead and fixed costs" for the implanting utility, then allows the Commission to establish a mandatory rate-adjustment clause for that utility to provide for full recovery or reasonable and prudent overhead and fixed costs. RIGL § 39-1-27.7(e). The Legislature requires the Commission to conduct a contested case proceeding to establish a performance-based incentive plan. RIGL § 39-1-27.7(f). Finally, the Legislature assigns significant authority and responsibility to the Office of Energy Resources and the Energy Efficiency and Resources Management Council, in some cases conditioning the Commission's actions on those agencies' prior concurrence.

There is one thing that the Legislature does ***not*** do in RIGL § 39-1-27.7. ***It does not assign the Commission any specific enforcement authority*** with respect to utility compliance with the standards established by the Commission under that section of the law. Which means, in accordance with RIGL § 39-1-3(b), ***performance standard enforcement actions fall within the sole jurisdiction of the Division***.

In the absence of a written complaint submitted pursuant to RIGL § 39-4-3, the Division may proceed with a summary investigation pursuant to RIGL § 39-4-13. That statute provides, in pertinent part, as follows:

> ***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 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***.

RIGL § 39-3-7 concerns Commission investigations and hearings into establishing standards of service (the following section, RIGL § 39-3-8, similarly sets out the Division's duty to "ascertain and fix adequate and serviceable standards for the measurement of the quality, pressure, initial voltage, or other condition pertaining to the supply … of the service rendered by any public utility" as well as to establish other utility standards regarding testing and measuring of services among other things), and RIGL § 39-3-11 concerns Commission investigations and hearings relating to "rates, tolls and charges", an area that otherwise falls within the specific purview of the Commission. Put another way, ***the Legislature specifically contemplates that the Division may conduct a summary investigation in parallel with Commission investigations and hearings on a closely related matter with or without notice to a party.***

In the instant case, of course, the Commission's stated goal appears to be to address The Narragansett Electric Company's violation of the system reliability and least-cost procurement standards established by the Commission under RIGL § 39-1-27.7. To the extent that the Commission is attempting to ***enforce*** the ***existing*** standards established under that statute (and investigating alleged or even admitted fraud is very clearly an enforcement action), it is acting outside its statutory authority. ***Enforcement*** actions with respect to Commission standards, rules,

and orders, falls within the exclusive jurisdiction of the Division as we have already discussed above. In the instant action before the Commission, the Commission only has the authority to review and, if necessary, amend the existing standards. Therefore, the Division's investigation, which is for enforcement purposes, is not overlapping or infringing on the Commission's authority or existing proceedings.

Finally, we note that the Commission appears to take exception with the Division initiating "a parallel or duplicative summary investigation in secret without notifying the Commission."[24] In fact, the Legislature very specifically authorized the Division to conduct a summary investigation "with or without notice as it shall deem proper." Thus, there is no statutory requirement that the Division inform the Commission of its summary investigation into the incentive program in furtherance of its enforcement responsibilities; indeed, the statute ***specifically*** states that a summary investigation ***may be commenced without prior notice to anyone***. The fact that such a summary investigation could also assist the Division in formulating its positions before the Commission on behalf of the general ratepaying public as a side benefit to the enforcement/execution action does not change this at all. The fact that the Narragansett Electric

[24] *Id.* at 4. Order No. 24648, too, makes repeated reference to the Division's investigation as being conducted "in secret." *Id.* at 16 and 23. The Division takes umbrage with this specious choice of words. The phrase "in secret" is defined as "in a private place or manner" while the noun "secret" is defined as "something kept hidden or unexplained." *See* https://www.merriam-webster.com/dictionary/secret. Quite plainly, the word "secret" carries with it a negative connotation of nefarious intentions. The Commission deliberately mentions the term when discussing "the matter of transparency," characterizing the Commission's proceeding as "transparent" in stark contrast to the Division's "proposal [ ] to investigate in secret." *Id.* at 23. It concludes, "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." *Id.* By this, the Commission uses the word "secret" not merely as a means to describe others' lack of awareness, but rather as a judgment-laden statement aimed at undermining the legitimacy of one agency's process in favor of the other's that is deemed justified. As explained, *supra*, the Division's investigation is statutorily authorized and it was initiated properly. It is universally recognized that regulatory and law enforcement agencies alike conduct preliminary investigations - by their very nature - outside the public purview in order to preserve the integrity of the investigation. To that end, the instant Division investigation is being conducted with intention and with discretion; it does not proceed "in secret."

Company, ***as the only party to the Division investigation***, knew of the summary investigation was more notice than the law requires.

The Commission should be aware that the Division conducts literally hundreds of summary investigations every year, most of them as a result of consumer complaints. Many of them may involve high bill complaints or challenges to the application of specific tariff provisions and be considered by the Division even while a related rate case is pending before the Commission, and some of those summary investigations then lead to formal investigations and hearings before the Division. The Division does not, and never has, notified the Commission of any of these matters because they are all enforcement actions within the sole purview of the Division – ***as is this matter insofar as it involves allegations of a violation of an existing Commission-approved standard***.

B. The Division's Exceptions to the Commission's Interpretation and Application of Supreme Court Precedent

The Commission's use of Supreme Court caselaw in Order No. 24648, and the subsequent incorporated reference to, and use of, the same caselaw and principals by the Chairman in Order No. 24649, is misplaced. The Division submits that these cases do not provide the same singular and definitive answers to the question of Division and Commission authority/role that the Commission suggests.

The Commission cites *Narragansett Electric Co. v. Harsch*, 368 A.22d 1194 (R.I. 1977) for the proposition that "the Division's function is 'to serve the commission' *in Commission proceedings*, in its role as ratepayer advocate."[25] Citing *In Re: Island Hi-Speed Ferry*, 746 A.2d 1240 (R.I. 2000), the Commission reiterates this principle on page 30 of Order 24648: "The Division . . . is statutorily charged with representing the interest of the public, as its advocate, *in*

[25] Order No. 24648 at 29 (emphasis added).

rate proceedings before the Commission."[26] From these two holdings the Commission reaches the overly-broad and thus erroneous conclusion that "…the jurisdiction of the Division is subordinate to the jurisdiction of the Commission when jurisdiction is assigned to the Commission . . . In other words, the Division's jurisdiction picks up where the Commission's jurisdiction leaves off."[27] In citing the *Harsch* and *Hi-Speed Ferry* cases the Commission makes two fundamental mistakes: (i) the Commission fails to limit its assertions about the Division's role before the Commission to *"proceedings before the Commission,"* and (ii) based on this principle, the Commission erroneously assumes that when the Commission exercises jurisdiction, the Division either: (a) has no independent jurisdiction of its own or (b) is barred from exercising its own independent jurisdiction.

With respect to the first error, the Rhode Island Supreme Court has been explicit that the Division serves as the ratepayer advocate before the Commission in Commission proceedings.[28] That the Division functions in its role of serving as a ratepayer advocate, *i.e.,* like a party-in-interest in "Commission proceedings," has been discussed and affirmed by the Supreme Court on numerous occasions in other cases.[29] This principle holds true even after the 1996 amendment to Title 39, Chapter 1, Section 3(b).[30]

---

[26] *Id.* at 31 (emphasis added).
[27] *Id*. at 32.
[28] *See e.g., Narragansett Elec. Co. v. Harsch,* 368 A.2d 395 (R.I. 1977) ("…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).
[29] *See e.g., Providence Gas v. Burman*, 376 A.2d 687, 701 (R.I. 1977) ("…the division, in addition to its regulatory powers, appears on behalf of the public to present evidence and to make arguments before the commission"); *O'Neil v. Interstate Nav. Co.,* 565 A.2d 530, 532 (R.I. 1989) ("division assumes a role similar to that of a party in interest in hearings before the commission").
[30] *In Re: Island Hi-Speed Ferry, LLC*, 746 A.2d 1240, 1244 n. 6 (R.I. 2000) ("…Division . . . is statutorily charged with representing the interests of the public, as its advocate, *in rate proceedings before the Commission*") (emphasis added).

With respect to the second of the two errors, as is discussed at length, *supra*, no question exists that the Division has jurisdiction of its own. This principle, too, has been affirmed by the Supreme Court on numerous occasions.[31] That leaves the last erroneous assumption in Order No. 24648, namely, that the Commission's exercise of its jurisdiction mandatorily bars the Division from exercising its own jurisdiction regarding the same subject matter.

In federal court matters, generally where "two cases between the same parties on the same cause of action are commenced in two different federal courts, the one which is commenced first is to be allowed to proceed to its conclusion first."[32] However, when two similar cases are filed concurrently in two different fora, equitable considerations such as whether common fact and legal issues predominate both cases and whether resolution of one case will resolve the other, must be considered in order to assess whether to stay one proceeding or the other.[33]

State court precedent does not appear to differ greatly. The general principle is that "administrative agencies are entitled to and, indeed . . . may in fact be required to exercise their statutory powers over controversies properly before them regardless of whether other administrative or judicial avenues for relief are also open to the complainants."[34] However, in deciding whether or not to exercise jurisdiction, the concern should be whether or not resolution of the common issues would serve to moot the remaining questions in dispute, whether important interests other than those of the immediate parties are implicated, and whether the broad powers of the first agency are inadequate to provide redress.[35]

---

[31] *See e.g., O'Neil,* 565 A.2d at 532 ("Section 39-1-3 establishes two separate agencies, the commission and the division . . .The division's powers include the 'effective administration, supervision and regulation of public utilities, communications, carriers and common or contract carriers'").
[32] *Utah American Energy*, 685 F.3d at 1124 (quoting *WMATA v. Ragonese*, 617 F.2d 828, 830 (D.C. Cir. 1980).
[33] *United HealthCare Insurance Company v. Price*, 255 F.Supp.3d 208, 211 (D.D.C. 2017).
[34] *City of Hackensack v. Winner*, 410 A.2d 1146, 1162 (N.J. 1980). *See also Town of Dedham v. Labor Relations Com'n*., 312 N.E.2d 548, 559 (Mass. 1974) (considerable precedent exists for giving employee "more than one string to his bow;" thus cases may arise when a single episode may twice be examined at the administrative level").
[35] *Id.*

In the pending matter, no serious debate can exist under Rhode Island law that the Division possesses independent jurisdiction that includes the supervision and regulation of public utilities, such as Rhode Island Energy (RIE).[36] In Docket No. 22-05-EE, the Commission opened a new docket (Docket No. 22-05-EE) in which the Commission stated it would "investigate the Company's actions and the actions of its National Grid employees during the time it was a National Grid affiliate being provided services by National Grid USA Service Company, relating to the manipulation of the reporting of invoices affecting the calculation of past energy efficiency shareholder incentives and the resulting impact on ratepayers."[37] In its "Notice of Summary Investigation," the Division discussed the Company's June 7, 2022, report filed with the Commission in which the Company concluded that there were at least forty-eight (48) instances of delayed invoice payments for the years 2012 through 2020 that resulted in a credit back to the energy efficiency fund of sums in the amount of $1,276,288 and $124,135 in unearned performance incentive awards.[38] The Division determined to exercise its broad authority to

[36] R.I. Gen. Laws § 39-4-13. *See O'Neil,* 565 A.2d at 532 (the Division's separate authority from the Commission includes the effective administration, supervision and regulation of public utilities, communications, carriers and common or contract carriers).
[37] Docket No. 22-05-EE, Order No. 24441 (July 11, 2022).
[38] Notice of Summary Investigation (February 24, 2023).

conduct a summary investigation (including an audit)[39] of the matter, notwithstanding the existing investigation of the Commission.[40]

The Commission was simply wrong to suggest that "there is no jurisdictional basis for the Division to step out of its role of serving the Commission to assume a role similar to an impartial quasi-judicial authority in this case…"[41] under existing judicial precedent.[42]

The Commission also erred when it contended that the Division's exercise of its own independent jurisdiction necessarily would deny the Commission's exercise of its independent quasi-judicial function through the applications of *res judicata* or collateral estoppel.[43] Agencies are to be "guided in the situations where each was found to have parallel but discretionary jurisdiction over the same controversy . . . by 'principles of administrative comity.'"[44] In Rhode Island, as long as the administrative tribunal grants to the parties substantially the same rights that they would have if the matter were presented to a court, a prior decision of a board should be given preclusive effect upon any issue that was litigated or could have been litigated before that

---

[39] With respect to audits, it is important to note that the Chair states on p. 19 of Order No. 24649 that he believes the Division implies that the Division, not the Commission, is the only appropriate party to conduct an audit in this matter. To the extent that this is an enforcement matter – where the Division is statutorily charged with enforcement actions – that is correct. To the extent that the Commission believes that an audit is necessary to allow it to refine its existing standards, then the Commission's authority to conduct a complete audit under RIGL § 39-1-7(b) would come into play. The Division wishes to point out, however, that while RIGL § 39-1-7(b) gives the Commission the power to do a complete audit of The Narragansett Electric Company's books, that does not imply that it has the authority to direct the Division to do the audit for it, or in any way to control the focus of the Division in conducting its audit. An audit done for enforcement purposes, where imposition of civil and other penalties may result, may have a very limited focus and may not be the same as an audit done for some other regulatory purpose.

The Division notes that its legislatively granted investigatory powers are broad enough to allow it to conduct an audit for its own purposes. *See RIGL § 39-1-15* (grants the Division's investigators and examiners all of the powers conferred on the Commission Chair by RIGL § 39-1-13); *see also RIGL §§ 39-4-12 – 39-4-15* (payment of investigation expense by utility, summary investigation by division, formal investigation – notice to utility, and notice and proceedings on motion of division). Thus, the Division does not need to rely on the Commission for authority to conduct an audit for regulatory enforcement purposes (or any purpose).

[40] *Id.*

[41] Order No. 24648 at 34.

[42] *See e.g., Hackensack,* 410 A.2d at 1162 (stating the general principle that an administrative agency may be required to exercise its statutory power over a controversy regardless of whether another administrative avenue is also open to the complainant).

[43] Order No. 24648 at 39.

[44] *Hackensack,* 410 A.2d at 1152.

tribunal.[45] Thus, rather than providing a basis for denigrating the jurisdiction of an agency, principles of *res judicata* and collateral estoppel have a limited but "an important place in the administrative field."[46] Assuming the appropriate assertion of jurisdiction by the Division, the Commission was plainly wrong to contend that the application of *res judicata* or collateral estoppel would deprive the Commission of its right to independently evaluate and probe all the relevant evidence upon which its rate and program-related decision is based.[47]

As justification for the many erroneous assertions cited above, the Commission relies heavily on a host of Supreme Court cases. *See* Order No. 24648 at 27-32; *see also* Order No. 24649 at 9-10. Order No. 24648 concludes that, "…the wealth of Supreme Court precedent defining the roles of the Commission and the Division contradicts the Division's inexplicable position." Order No. 24648 at 41. However, the Commission employs inexact interpretations of these cases that wholly undermine the basis for its conclusions. For example, the Commission relies on *Town of East Greenwich v. O'Neil*, 617 A.2d 104 (R.I. 1992) to underscore "the broad [and exclusive] regulatory authority of the Commission over public utilities." Order No. 24648 at 29-30, n.77 (the Commission includes a block quote from *O'Neil*, citations omitted, with the Court's reference to *Burke* and *In re Woonsocket Water*). To be sure, the Commission accurately recites the Court's decision when it speaks about exclusivity of power and authority over the conduct of utilities. However, it is critically important to understand (something the Commission fails to acknowledge in its Order) that the *O'Neil* court was a case about whether the Commission had jurisdiction to review a town ordinance that sought to regulate high voltage electric power transmission. *Id*. In other words, the court was tasked with determining whether the Commission's authority pre-

[45] *Department of Corrections of R.I. v. Tucker*, 657 A.2d 546, 549 (R.I. 1995).
[46] *Hackensack,* 410 A.2d at 1161.
[47] Order No. 24648 at 39.

empted that of a municipality, not the Division. The Commission errs by making the confounding leap by inference that the holding in that case supports a finding of exclusivity of the Commission's authority over that of the Division.[48]

To further substantiate the conclusion about its preeminent authority, the Commission cites *Burke*, *Providence Water* and *Hi-Speed Ferry* to emphasize that the Division "serves" the Commission as ratepayer advocate. Although these cases do reference the role of the Division in Commission rate matters, the Commission's references lack context and scope. Nowhere in those cases is the Court called upon to compare the authority of the Commission versus that of the Division. By way of example, the *Hi-Speed Ferry* case pertained to whether the Commission lacked subject matter jurisdiction to investigate the utility's filing, an issue of first impression.

Taken in its totality, the Commission's analysis citing Supreme Court precedent is misguided and impliedly misleading. The Commission emphasizes its own exclusive authority while simultaneously downplaying and limiting reference to the Division's authority. Moreover, many of the Supreme Court cases relied upon pre-date the 1996 separation between the Commission and Division, and the Court's holdings are taken out of context, holding little to no precedential value.

III. CONCLUSION

The Division takes exception to the overreaching, misplaced legal analysis undertaken by the Commission and the Chairman in the April 20th and April 21st Orders, respectively, as relates to the jurisdictional authority of the Commission, the jurisdictional authority of the Division, and the interplay between the two. Although the Division does not seek to belabor the procedural and

[48] The Commission's reliance on *O'Neil* is further undermined by the fact that the case was decided in 1992, four (4) years before Title 39 was amended to separate the Commission and Division.

jurisdictional posturing,[49] it is compelled to file this memorandum in order to correct the record on these issues given the potentially enduring and damaging impact these assertions hold.

The Division is proceeding with its independent investigation and audit of the Energy Efficiency Program, and it will continue to do so until such time as its efforts and findings are complete; these findings will be shared with the Commission. To that end, for the sake of ratepayers and in the interest of administrative economy, the Division suggests that the Commission implement, *sua sponte*, a stay of Docket 22-05-EE until the Division's investigation concludes.

July 14, 2023

Respectfully Submitted:

Linda D. George, Esq., Administrator
Division of Public Utilities & Carriers
89 Jefferson Boulevard
Warwick, R.I. 02888
Tel 401-632-0668
linda.george@dpuc.ri.gov

CERTIFICATION

I do hereby certify that on the 14th day of July, 2023, I sent a copy of the within Memorandum to the service list of Commission Docket No. 22-05-EE via email.

[49] The Division agrees with the sentiment shared by Commissioner Anthony at the April 14, 2023, Open Meeting when she implored the Commission, the Division and all parties to "get back to the most important issue at hand, which is determining the extent to which National Grid compromised the public's trust in their administration of the Energy Efficiency program in pursuit of the performance incentive." She continued: "…we need to get to the bottom of what the core issue is and that's the amount that ratepayers are owed both [ ] financially and in the loss of trust." *https://video.ibm.com/recorded/132715042 at minute 05:30.*