STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS
PUBLIC UTILITIES COMMISSION

IN RE: Block Island Power Company : Docket No. 3655
General Rate Filing

BLOCK ISLAND POWER COMPANY'S
OBJECTION TO MOTION TO INTERVENE OF THE BLOCK ISLAND SUSTAINABILITY COALITION AND OBJECTION TO THE REQUEST OF THE BLOCK ISLAND SUSTAINABILITY COALITION FOR DETERMINATION OF SCOPE OF PROCEEDING

Block Island Power Company (BIPCo) hereby objects to (1) the Block Island Sustainability Coalition's Motion to Intervene, and (2) the Block Island Sustainability Coalition's Request for Determination of the Scope of Proceeding for the following reasons:

1. The Motions were filed by Christopher Warfel. It appears that Mr. Warfel is not an attorney. Rule 1.4(a)(1) of the Commission's Rules specifically requires that "each party to and participant in a proceeding, other than individuals who appear *pro se*, shall be represented by an attorney . . . ." Because Mr. Warfel is attempting to act in a representative capacity on behalf of the Block Island Sustainability Coalition (BISC), which is an apparent unincorporated association of undetermined and unspecified individuals, Mr. Warfel is prohibited by Rule 1.4 (not to mention the statutes against the unauthorized practice of law) from acting in such a representative capacity. Accordingly, the Motions filed by Mr. Warfel are a nullity and should be summarily dismissed by this Commission.

2. A check of the records at the Rhode Island Secretary of State's office indicates that there is no entity known as the BISC. Accordingly, BISC is assumed to be an unincorporated association. Mr. Warfel's Motions do not identify whether there are any members of BISC other than Mr. Warfel himself. But in any event, Rhode Island law is

clear that an unincorporated association is not a proper party in the courts of Rhode Island and accordingly would not be a proper party before this Commission, because any appeal from this Commission would go to the Supreme Court. This is a rule of long standing. For example, the Rhode Island Supreme Court in the case of Walsh v. Israel Couture Post, 542 A.2d 1096 (RI 1988), stated: "An unincorporated association is not a proper party in the lawsuit under the law of Rhode Island. *Guild v. Allen*, 28 R.I. 430, 434, 67 A. 855, 857 (1907)." (at 1098, fn. 1). See also Corrente v. State of Rhode Island, Department of Corrections, 757 F. Supp. 73, 80 (D.R.I. 1991).

2. This principle was extensively discussed in the case of Lischio .v Town of North Kingstown, a decision of Justice Dimitri of the Superior Court of the State of Rhode Island in a decision rendered on April 25, 2003 in Civil Action No. WC 00-0372. Judge Dimitri was dealing with a petition in a zoning matter submitted by Mountain Laurel Estates Homeowners Association, an unincorporated association that was seeking a zone change. Judge Dimitri set forth the law as follows:

> "With respect to unincorporated associations, it is well-recognized that "at common law, an unincorporated association is not an entity, and has no status distinct from the persons composing it, but rather is a body of individuals acting together for the prosecution of a common enterprise without a corporate charter but upon methods and forms used by corporations." 6 Am.Jur.2d, Associations and Clubs §1 at 393 (1992). The members of such associations become agents, each to the other, and are bound to each other on a joint enterprise theory of liability. Walsh v. Israel Couture Post, No. 2274 V.F.W. 542 A.2d 1094, 1096 (RI 1988). Thus, "in the absence of an enabling or permissive statute or rule of practice, an unincorporated association . . . cannot sue or be sued in the organization's own name." 6 Am.Jur.2d, Associations and Clubs §51 at 438; see City of Greenbelt v. Jaeger, 206 A.2d 694, 698 (M.D. 1965) (holding that "an association or corporate body representing only the viewpoint of its members is not itself aggrieved merely because its members are"); Citizens for Los Alamos, Inc. v. Incorporated County of Los Alamos, 725 P.2d 250 (N.M. 1986) (unincorporated association was not a "person aggrieved" for purposes of standing to challenge zoning board decision"); see also Northampton Residents Assn v. Northampton Township Bd. of Supervisors, 322 A.2d 787

(Pa. Commw. 1974); but see Piney Mountain Neightborhood Assn. Inc. v. Town of Chapel Hill, 304 S.E.2d 251, 253 (N.C. App 1983) (granting standing to an incorporated homeowners' association challenging a town council's approval of a special use permit. Although the association "[had] no property interest . . . [standing was, nevertheless, warranted because the association] represent[ed] individuals who live[d] in the affected area and who potentially [would] suffer injury by the issuance of the special use permit.") States having such permissive legislation have patterned it on the Uniform Unincorporated Nonprofit Association Act, authorizing "nonprofit associations to institute, defend, intervene, or participate in judicial and other proceedings." 6 A.Jur.2d, Associations and Clubs § 52 at 439.

Rhode Island, however, has not adopted this act. Where there is no statutory authorization of suits by or against an incorporated association in the association name, the remedy, when a cause of action for or against the association exists, is by an action in the names of the several persons constituting the association . . . ." Id. §57 at 444. Thus, it has often been said that associations which assert standing on behalf of their members must demonstrate to courts that those "members have requested that [the association] bring suit or otherwise asserted some control over the decision." Charles Allen Wright, et al., Federal Practice and Procedure § 3531.8 at 624 (1984) (citing, inter alia, Natural Resources Defense Council, Inc., v. U.S. EPA, 507 F.2d 905, 908-911 (C.A. 9th 1974) (denying standing in the absence of any showing that the members had requested or consented to representation by the associations))."

As the Rhode Island Supreme Court said in Doyle v. Burke, 29 R.I. 123, 125 "an unincorporated association as a body . . . has no legal existence as such, but any action must be against the individuals."

Accordingly, Mr. Warfel's attempt to intervene on behalf of this unincorporated association in unavailing because he cannot act in a representative capacity, he cannot act as an attorney, and BISC is not an entity legally capable of intervening in this matter.

3. Even if BISC were an entity capable of intervening in this matter, and even if Mr. Warfel were capable of acting in a representative capacity with regard to BISC, or even if the individuals making up BISC were to withdraw Mr. Warfel's motion and re-file as individuals, then even in that situation, the Motion should be denied. Intervention before the Public Utilities Commission is controlled by Rule 1.13. Under 1.13(b), it must be

demonstrated that an attempted intervention "is necessary or appropriate," and that the interests of the potential intervenor are "not adequately represented by existing parties." BISC appears to be a group of BIPCo ratepayers. In this case, the interests of BIPCo's ratepayers are already doubly represented. The Division of Public Utilities and Carriers, represented by the Attorney General's Office, is statutorily required to represent the interests of the ratepayers on Block Island. As the Supreme Court said in In Re: Island Hi-Speed Ferry, LLC., 746 A.2d 1240, 1244 fn.6:

> "The Division, which is represented by the Department of the Attorney General in all administrative and legal proceedings, is statutorily charged with representing the interests of the public, as its advocate, in rate proceedings before the Commission. See G.L. 1956 §§ 39-1-1(b); Providence Gas Co. v. Burke, 419 A.2d 263 (RI 1980); Narragansett Electric Co. v. Harsch, 117 RI 395, 368 A.2d 1194 (1977)."

This means that the interests of BIPCo's ratepayers on Block Island will be fully and adequately represented by the Division of Public Utilities and Carriers, which is in turn represented by the Attorney General's Office. The Division does this for a living and has already retained a cost of service expert as well as a rate design expert to assist the Division and the Commission in examining BIPCo's rate filing in this matter. The Division is intimately familiar with BIPCo and is fully capable of exploring any and all issues related to BIPCo in this matter.

However, representation of the interests of the Town's ratepayers does not end with the Division and the Attorney General. The Town of New Shoreham has independently intervened in this matter. The Town is represented by two lawyers--its Solicitor and a utility legal counsel from Boston, Massachusetts. We have been informed that the Town will be retaining at least one expert witness in this matter. To date, over 100 data requests have been propounded to BIPCo.

In light of the vigorous and sophisticated representation the Town's ratepayers are receiving in this matter, it is clearly unnecessary for Mr. Warfel and/or the BISC and/or its members to additionally become full party intervenors in this matter. Their interests will be more than adequately represented. If each ratepayer of a public utility could become a full party intervenor and seek, as the BISC seeks, authority to "conduct discovery, cross examine witnesses sponsored by other parties, offer exhibits, and present direct testimony," then the orderly conduct of rate cases would come to an end.

This does not mean, of course, that Mr. Warfel and/or the other members of the BISC cannot participate in this rate proceeding as members of the public. The Commission always seeks and obtains public input. In fact, the Commission has already scheduled a hearing on Block Island, at which the Commission will be seeking input from all the ratepayers of the Town of Block Island. Public input can be offered at the public comment hearing on Block Island and/or at any of the public hearings scheduled for the Commission's offices. Receipt of such public comment is routine, desirable, and helpful.

However, to allow full party intervention by individual ratepayers in the form of conducting discovery, cross examination of witnesses, offering exhibits, and presenting direct testimony would unduly complicate and extend rate case proceedings and would significantly increase rate case costs to the Commission, the Division, and the utility, all of which are passed through to BIPCo's ratepayers. We respectfully submit that the Commission would be setting a dangerous precedent if it allowed full party intervention by individual ratepayers. We request that the Motion of BISC for intervention be denied.[1]

[1] It should also be noted that under Rule 1.13(d), intervention other than a matter of right (and clearly BISC has no right conferred by statute) may be granted "with such limitations and/or upon such conditions as the Commission shall determine." Although we oppose any intervention by BISC, should the Commission consider intervention at all, such intervention should be subject to appropriate and strict limitations and conditions that would allow the hearing to proceed in an orderly fashion. However, we believe that the

4. BISC has also made a request to the Commission to determine the scope of the proceeding. The Town has filed a similar motion and BIPCo has objected in writing to the Town's Motion. BIPCo objects to BISC's Request for Determination of the Scope of Proceeding for the reasons set forth above, and in addition, for the same reasons set forth in BIPCo's Objection to the Town's similar motion. BIPCo's Objection to the Town's Motion for Determination of the Scope of Proceeding is incorporated by reference herein.

provision for public comment should allow BISC to set forth its positions and provide input to the Commission.

CONCLUSION

For the forgoing reasons, BIPCo respectfully requests that the Motions of BISC for intervention and for determination of the scope of proceeding be denied.

Respectfully submitted,
Block Island Power Company
By its attorney

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CERTIFICATE OF SERVICE

I hereby certify that on the ____ day of January 2005, I mailed a true copy of the foregoing by first class mail to the following:

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