

followed with respect to motions to intervene and wrongfully seeks to expand the now closed record on NERI's motion to intervene. For that reason, the Hearing Officer should strike the motion or at least the reargument in the motion.¹

FACTUAL AND PROCEDURAL BACKGROUND

This proceeding began on May 4, 2021 when PPL, PPL RI, National Grid USA, and The Narragansett Electric Company ("Narragansett") (collectively, the "Applicants") filed a petition for approval of PPL RI's purchase of the common stock of Narragansett and related approvals. The Applicants filed this petition pursuant to R.I. Gen. Laws §§ 39-3-24 and 39-3-25. Those statutes provide that the Rhode Island Division of Public Utilities and Carriers shall approve the petition if it is satisfied "that the facilities for furnishing service to the public will not . . . be diminished" and that the transaction is "consistent with the public interest" – which the Division has interpreted to require a showing that the transaction will not result in harm to the public.

In furtherance of this statutory obligation, on June 11, 2021, the Division issued a Notice of Filing and Deadline to Intervene (the "Intervention Notice") that required interested parties to file motions to intervene by June 25, 2021 and responses by July 9, 2021 with a hearing on July 15, 2021.

Ten parties moved to intervene, including NERI.² The Hearing Officer then held the scheduled July 15, 2021 hearing.³ The Hearing Officer took the motions to intervene under

¹ Additionally, NERI's motion is untimely. NERI did not file this motion until after the hearing on its motion to intervene. If NERI had sincere concerns about the Hearing Officer, a motion for recusal should have been filed before the Hearing Officer conducted the hearing on NERI's motion to intervene.

² One party later voluntarily withdrew, leaving nine parties moving for intervention.

³ Although there was no indication on the public docket regarding the identity of the Hearing Officer prior to hearing on the motions to intervene, it was not a secret that Mr. Spirito had been assigned as the Hearing Officer, and it is PPL and PPL RI's understanding that the identity of the assigned Hearing Officer in this matter was available to anyone who requested it.

advisement, informing the parties and the potential interveners that he would issue a written order “in the weeks to come.”⁴ On July 19, 2021, four days after the hearing on the motions concluded, NERI filed the motion for recusal.

STANDARD OF REVIEW

“The party seeking recusal bears the burden of establishing that the judicial officer possesses a personal bias or prejudice by reason of a preconceived or settled opinion of a character calculated to impair his or her impartiality seriously and sway his or her judgement.” *State v. Howard*, 23 A.3d 1133, 1136 (R.I. 2011). The burden to prove the existence of bias is “substantial.” *In re: Jermaine*, 9 A.3d 1227, 1230 (R.I. 2010). “Recusal is not in order by a mere accusation that is totally unsupported by substantial fact.” *State v. Clark*, 423 A.2d 1151, 1158 (R.I. 1980). In fact, an adjudicatory decision-maker such as the Hearing Officer here “has as great an obligation not to disqualify himself or herself when there is no sound reason to do so as he or she has to disqualify himself or herself when a proper occasion to do so does arise.” *Kelly v. RIPTA*, 740 A.2d 1243, 1246 (R.I. 1999) (citing *State v. Clark*, 423 A.2d at 1158).

ARGUMENT

A. NERI’s Bias Allegations Are Unsupported and Meritless

NERI’s motion launches unsupported claims of bias against the Hearing Officer that fall far short of meeting its substantial burden. NERI presents no evidence of bias. Rather, the motion simply reflects NERI’s disagreement with positions and conclusions that Hearing Officer reached in other contexts – when he was not acting as a hearing or adjudicatory

⁴ *In re: Petition of PPL Corporation, PPL Rhode Island, LLC, National Grid USA, and The Narragansett Electric Company for Authority to Transfer Ownership of The Narragansett Electric Company to PPL Rhode Island Holdings, LLC and Related Approvals*, Docket No. D-2021-09, Transcript of July 15, 2021 Hearing on Motions to Intervene at 122.

officer. NERI contends the Hearing Officer is biased because he did not accept NERI's past positions in those prior interactions. This falls far short of supporting, let alone requiring, recusal by the Hearing Officer.

More specifically, NERI's motion describes actions taken by the Division as the ratepayer advocate in a Rhode Island Public Utilities Commission matter – *In Re: Petition of the Episcopal Diocese of Rhode Island for Declaratory Judgment on Transmission System Costs and Related "Affected System Operator" Studies*, Docket No. 4981 (the "Episcopal Diocese Docket"). There, Mr. Spirito acted not as a hearing officer, but as an attorney representing the Division in responding to an Access to Public Records Act request for communications the Division engaged in as the ratepayer advocate and a party in that proceeding. There, the Division and Narragansett did not agree that the ratepayers, rather than the renewable generation developer, should pay costs necessary to ensure that interconnection of a proposed solar generation project would not adversely impact the electric transmission system. NERI's counsel sought communications between counsel for the Division and counsel for Narragansett on this topic, and Mr. Spirito, as an attorney representing the Division – not as a decision-maker, asserted the common interest privilege. The Attorney General determined that the law did not support the Division's assertion of common interest privilege in that particular context, and the Division produced the communications.

NERI's accusation that this assertion of privilege by the Division demonstrates general bias against renewable generators is entirely unsupported. The Division merely disagreed with the position argued by NERI's counsel. These are run of the mill disputes in contested matters that occur all the time – and they do not demonstrate bias of any sort. In

fact, the Division frequently takes positions adverse to Narragansett. Does that entitle Narragansett to recuse the Division? Of course not.

More properly understood, NERI's contention lies against the Division, the party that made the decision, not Mr. Spirito individually as the lawyer who implemented that decision. NERI cannot recuse the Division from presiding over this proceeding - the statute requires it to do so.

Finally, NERI's counsel already has litigated his concerns about the Division's actions in the Episcopal Diocese Docket before the Commission – raising identical claims of bias from the assertion of “common interest.” The Commission rejected those claims out of hand, and explained that NERI's position “collides with a common sense reading of the clear and unambiguous law” and “is inconsistent with the Commission's rules. The Division's communication with Narragansett did not create a legal defect and there was nothing illegal or improper about it.”⁵ The communications for which Mr. Spirito asserted the Division had a common interest with Narragansett were “a lawful exchange of views between two parties who simply agreed on the same legal conclusions.”⁶

Underscoring the baselessness of NERI's position in this motion for recusal, the Chairman of the Commission was “compelled to write [a] separate concurrence” due to concern that NERI's counsel had “maligned” the integrity of the regulatory and adjudicatory process.⁷ In addition to forcefully rejecting and criticizing NERI's counsel's actions in that proceeding, the Chairman's concurrence expressly rejected the suggestion that the Division's actions in the Episcopal Diocese docket reflect a bias against renewable energy developers:

Cost allocation in ratemaking can give rise to weighty policy

⁵ Docket 4981 Remand Order at 45-46.

⁶ *Id.* at 55.

⁷ *Id.* at 57.

issues. In the context of renewable generation development, it presents a question of finding the fairest and most effective way to carry out the important initiatives that are intended to move our energy systems away from reliance on fossil fuels and toward reliance on renewable resources, at reasonable cost to ratepayers. During that challenging trek, someone has to pick up the cost. The Commission is aware that there are hundreds of megawatts of renewable energy projects in the interconnection queue that are proposed to be located in Rhode Island. The incremental costs of these initiatives are being funded by ratepayers, even without unexpected system modification costs added. It should, therefore, come as no surprise that the Division - in its role of ratepayer advocate for the wide body of ratepayers - would take a position which supports an allocation of those additional costs to the investors of the distributed generation projects instead of adding costs to the ratepayers. That is not opposition to clean energy that shirks a duty, it is defending ratepayers consistent with the role of a ratepayer advocate.⁸

In sum, there is no substantive support for NERI's motion. Mr. Spirito's previous assertion that the Division had a common interest with Narragansett in advocating for renewable generators to remain responsible for the costs of interconnection provides no support for NERI's baseless motion.

B. NERI Improperly Reargues Its Motion to Intervene

NERI spends more time in its papers rearguing the motion to intervene than arguing the motion to recuse. This transparent attempt to reargue violates the procedural rules and schedule in this case. The Hearing Officer should strike the motion, or at least that portion that addresses the intervention motion.

The Hearing Officer established a clear schedule for briefing and argument on motions to intervene in this proceeding. The parties, including NERI, complied with that schedule, and the record on the motions to intervene closed after the hearing on July 15, 2021. Now, as part of this putative motion for recusal, NERI flouts that schedule and improperly reargues the substance

⁸ *Id.* at 61-62.

of its motion to intervene. Much of NERI's motion consists of block quotes from NERI's motion to intervene and from NERI's arguments at the hearing. NERI flagrantly violates the schedule and the procedural rules that every other party followed. The Hearing Officer should not permit NERI to circumvent the procedure and schedule and should strike NERI's motion to recuse for that reason.

CONCLUSION

NERI's motion for recusal is baseless on its face. There is no evidence of bias on the part of the Hearing Officer anywhere in the motion. Rather, it is merely an untimely and improper attempt to interpose delay and further argue NERI's motion to intervene. Accordingly, the Hearing Officer should reject the motion and strike it from the record.

Date: July 29, 2021

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CERTIFICATE OF SERVICE

I hereby certify that on July 29, 2021, I sent a copy of the foregoing to the service list by electronic mail.

/s/ Adam M. Ramos