STATE OF RHODE ISLAND

PROVIDENCE, SC. **SUPERIOR COURT**

[Filed: April 1, 2022]

PETER NERONHA ATTORNEY GENERAL OF THE STATE OF RHODE ISLAND	:	
Petitioner,	:	
v.	:	**C.A. No. PC-2022-01095**
RHODE ISLAND DIVISION OF PUBLIC UTILITIES AND CARRIERS, LINDA GEORGE, ADMINISTRATOR IN HER OFFICIAL CAPACITY ONLY; NATIONAL GRID USA; NARRAGANSETT ELECTRIC; PPL CORPORATION; AND PPL RHODE ISLAND HOLDINGS, LLC,	:	
***Respondents*.**	:	

DECISION

STERN, J. Before the Court is Petitioner Peter F. Neronha Attorney General of the State of Rhode Island's (Petitioner) Emergency Motion to Stay the Division of Public Utilities and Carriers' (the Division) Order 24322 (the Order) during the pendency of an appeal for review of the Order pursuant to the Administrative Procedures Act (APA). Respondents National Grid USA, The Narragansett Electric Company, PPL Corporation, and PPL Rhode Island Holdings, LLC filed timely objections. Jurisdiction is pursuant to G.L. 1956 § 42-35-15(c).

I

Facts and Travel

By way of background, on May 4, 2021, PPL Corporation (PPL Corp.), PPL Rhode Island Holdings, LLC (PPL RI), National Grid USA (National Grid), and The

Narragansett Electric Company (Narragansett) (collectively, Respondents) filed a joint petition (the Petition) with the Division pursuant to R.I. Gen. Laws §§ 39-3-24 and 39-3-25 and 815-RICR-00-00-1.13, seeking approval to transfer 100 percent of the outstanding shares of common stock in Narragansett from National Grid to PPL RI, a subsidiary of PPL Corp. created for purposes of this transaction. (Pet'r's Mem. of Law in Supp. of Emergency Mot. to Stay (Pet'r's Mem.) Ex. A, at 4.) Respondents initially requested that the Division issue a ruling on the Petition by no later than November 1, 2021. *Id*.

On June 11, 2021, the Division issued a Notice of Filing and Deadline to Intervene, which required interested parties to file motions to intervene by June 25, 2021. *Id*. at 4-5; *see also* Pet'r's Ex. D. After receiving timely motions to intervene from a number of interested parties, and following a hearing on said motions on July 15, 2021, the Division issued a Decision on August 19, 2021, in which the current parties of record "were authorized to participate in this docket." (Pet'r's Mem. Ex. A, at 5.) Among the parties permitted to intervene in this matter were the Rhode Island Department of Attorney General, the Rhode Island Office of Energy Resources, the Acadia Center, Green Energy Consumers Alliance, Inc., and the Conservation Law Foundation. *Id*. An appearance was also entered by the Division's Advocacy Section as an indispensable party. *Id*.

Following resolution of the intervening issues presented in this matter, the Division met with the parties at a pre-hearing conference on September 9, 2021, for the "purpose of establishing a procedural schedule." *Id*. An initial procedural schedule was adopted by agreement of the parties, and the adopted schedule set February 25, 2022 as the date for a final decision in this matter, rather than the initial November 1, 2021 deadline previously proposed by Respondents. *Id*. Subsequently, the Division conducted four duly noticed public hearings on the Petition, on December 13, 2021 through December 16, 2021. (Pet'r's Mem. 8; PPL

Corp. and PPL RI's Mem. of Law Supp. of Obj. to Mot. to Stay (PPL's Obj.) 7.) The parties filed post-hearing briefs, and the Division issued the Order on February 23, 2022 approving the Petition. *See* Pet'r's Mem. Ex. A, at 337.

Following issuance of the Order approving the Petition to transfer 100 percent of the outstanding shares of common stock in Narragansett from National Grid to PPL RI, on February 24, 2022, Petitioner filed an appeal of the Order contemporaneously with the present Motion to Stay the Division's Order. *See* Pet'r's Compl.; Pet'r's Emergency Mot. to Stay Division Order During Pendency of Appeal. In support of its Motion to Stay, Petitioner argues that, among other things, the Division's approval of the Petition was "issued under a newly articulated standard, divergent from the Division's own prior decisions and inconsistent with statute[,]" and was made "without adequate financial information to evidence or assure that there will be continued quality and efficiency of services[.]" (Pet'r's Mem. 2.) Respondents filed objections, arguing that Petitioner failed to make a "strong showing" that: (1) it will prevail on the merits of its appeal; (2) that it will suffer irreparable harm if the stay is not granted; (3) that no substantial harm will come to other interested parties; and (4) that a stay will not harm the public interest. *See* National Grid and Narragansett Obj. to Pet'r's Emergency Mot. to Stay (National Grid and Narragansett Obj.) 2, 9-22; PPL's Obj. 8, 12-32. The Court heard argument on the present Motion to Stay on March 2, 2022. *See* Docket (PC-2022-01095).

Shortly after this Court heard argument on the present Motion to Stay, however, the Massachusetts Supreme Judicial Court issued a temporary order on March 3, 2022, staying the Massachusetts Department of Public Utilities Order until further order of that Court. *See* Docket (SJ-2021-0305). In light of this, this Court held a status conference, where the parties agreed to hold the instant Emergency Motion to Stay in abeyance during the pendency of the Massachusetts

Supreme Judicial Court's temporary stay, and to proceed on an expedited basis in connection with Petitioner's administrative appeal of the Order.[1] *See* Docket (PC-2022-01095). Subsequently, on March 29, 2022, however, the Massachusetts Supreme Judicial Court issued an Order lifting the order of stay after the parties agreed to a voluntary dismissal and motion to lift the order of stay. *See* Docket (SJ-2021-0305). The parties now seek a decision by this Court on Petitioner's Emergency Motion to Stay, which was previously held in abeyance. The Court's decision follows.

II

Standard of Review

In *Narragansett Electric Co. v. Harsch*, 367 A.2d 195 (R.I. 1976), our Supreme Court specified that the appropriate test for considering a stay of an administrative order is the federal appellate standard. *Id*. at 197. Specifically, the Court stated that "[a] stay will not be issued . . . unless the party seeking the stay makes a 'strong showing' that (1) it will prevail on the merits of its appeal; (2) it will suffer irreparable harm if the stay is not granted; (3) no substantial harm will come to other interested parties; and (4) a stay will not harm the public interest." *Id*.; *see also Morgan v. Kerrigan*, 523 F.2d 917 (1st Cir. 1975).

The Court later contemplated the range of the test enumerated in *Harsch* in *State, Department of Corrections v. Rhode Island State Labor Relations Board*, 658 A.2d 509 (R.I. 1995), and explained that the Court does "not construe the *Harsch* case as being applicable in respect to the stay of every agency order" that may be subject to review pursuant to

[1] The Stipulated Scheduling Order entered by this Court on March 11, 2022 specifies that: (1) the Division's Certified Record shall be submitted to this Court no later than March 18, 2022; (2) Petitioner shall submit its brief by March 23, 2022; (3) Respondents shall submit their respective briefs by April 4, 2022, by noon; (4) Petitioner shall submit its reply brief by April 8, 2022; and (5) oral argument will be held on April 11 and 12, 2022. *See* Stipulated Scheduling Order (PC-2022-01905) (Stern, J.).

G.L. 1956 § 42-35-15(c). *State, Department of Corrections*, 658 A.2d at 510. This is because § 42-35-15(c) specifically provides that the agency may grant, "or the reviewing court may order, a stay upon the appropriate terms." *Id*. (quoting § 42-35-15(c)). The Court in *State, Department of Corrections* interpretated the language of § 42-35-15(c) as "grant[ing] to the reviewing court the power to grant a stay of an agency order under circumstances which in the trial justice's sound discretion should require that matters be held in status quo pending review of the agency decision on its merits." *Id.* The Court also noted that while the *Harsch* criteria "may be persuasive in a given context, we do not consider that they are rigid requirements that the reviewing court must meet in each instance." *Id*.

III

Analysis

Based on our Supreme Court's decision in *Harsh*, there is no doubt that the four-part test established therein applies when considering a stay of an administrative order. *See Harsch*, 367 A.2d at 197. However, relying on our Supreme Court's subsequent decision in *State, Department of Corrections* and the language of § 42-35-15(c), as mentioned above, "the reviewing court [has] the power to grant a stay of an agency order under circumstances which in the trial justice's sound discretion should require that matters be held in status quo pending review of the agency decision on the merits." *State, Department of Corrections*, 658 A.2d at 510; *see also* § 42-35-15(c). Our Supreme Court in *State, Department of Corrections* also expressly stated that while the *Harsch* criteria "may be persuasive in a given context, we do not consider that they are rigid requirements that the reviewing court must meet in each instance." *State, Department of Corrections*, 658 A.2d at 510. Because of this, the Court herein will focus on the portions of the *Harsch* criteria that are of particular importance in determining whether the Court should issue a

stay pending review of the Order on the merits. *See Harsch*, 367 A.2d at 197; *see also Allstate Insurance Co. v. Rhode Island Department of Business Regulation*, No. PC-2017-3908, 2018 WL 468262, at *2 (R.I. Super. Jan. 10, 2018) (court loosely applying *Harsch* factors and acknowledging that the issuance of a stay is within the trial justice's sound discretion based on our Supreme Court's decision in *State, Department of Corrections*).

A

Likelihood of Success on the Merits

As mentioned above, in order for Petitioner to prevail on its Emergency Motion to Stay the Division's Order, Petitioner must demonstrate a sufficient likelihood of success on the merits of its appeal. *See Harsch*, 367 A.2d at 197. To this point, Petitioner argues that it is likely to succeed on the merits of its underlying claim based on the Division's alleged misapplication of the applicable legal standard, which is inconsistent with the statutory language contained in § 39-3-25. (Pet'r's Mem. 2.) Specifically, Petitioner argues that the Hearing Officer not only misinterpreted the applicable statute, but erroneously applied the statute to the facts, which, according to Petitioner, is an error of law under the APA. (Pet'r's Reply 5.)

Respondents, however, argue that the Hearing Officer "properly applied the correct legal standard." (PPL's Obj. 23.) More specifically, Respondents contend that the Hearing Officer "interpreted and applied the statutory standard that has been in place for decades in the same way it did in the 2006 *Southern Union* case." *Id.* This fact is important because, as Respondents note, the Hearing Officer in the instant proceeding is the same hearing officer who authored the *Southern Union* Order. *Id.* Petitioner, however, maintains that the Hearing Officer's analysis, and specifically his interpretation of § 39-3-25, constitutes a radical departure from both the plain

language of the statute and the Division's previous interpretation of § 39-3-25 in *Southern Union*. (Pet'r's Reply 6.)

Section 39-3-25 sets forth the statutory standard that must be applied when approving or rejecting a transaction between public utility providers in the State of Rhode Island. Section 39-3-25. Importantly, § 39-3-25 provides, in relevant part, that:

> "If, after the hearing, or, in case no hearing is required, the division is satisfied that the prayer of the petition should be granted; that the facilities for furnishing service to the public will not thereby be diminished; and that the purchase, sale, *or lease and the terms thereof are consistent with the public interest*, it shall make such order in the premises as it may deem proper and the circumstances may require." *Id*. (emphasis added).

Evidently, § 39-3-25 makes clear that the Division must make an affirmative finding based upon an evidentiary record that: (1) the facilities for furnishing service to the public will not thereby be diminished; and (2) the purchase, sale or lease and the terms thereof are consistent with the public interest. The issues before the Court concern the Hearing Officer's reinterpretation of the second statutory requirement, specifically, the meaning of "consistent with the public interest," as well as the Hearing Officer's consideration (or lack thereof) of ratepayers.

1

The Division's Interpretation of § 39-3-25 in *Southern Union*

As noted above, the Division previously interpreted the meaning of § 39-3-25 in *Southern Union*. *See Joint Petition for Purchase and Sale of Assets by the Narragansett Electric Company and the Southern Union Company*, Docket No. D-06-13. In *Southern Union*, the Division interpreted § 39-3-25's second criterion, explaining that "'consistent with the public interest' requires a finding that the proposed transaction will not unfavorably impact the general public (*including ratepayers*)." *Id*. (emphasis added). The Division went on to further note that:

> "While the law in Rhode Island has yet to be developed regarding this question, the Division finds that the plain meaning of the words must be controlling. Toward that end the word 'consistent' is defined as 'being in agreement: compatible', and the term 'public interest' is defined as 'the wellbeing of the general public.' These definitions would suggest that the Division could only approve the proposed transaction upon a finding that the sale of New England Gas Company's business assets would not unfavorably impact the general public." *Id.*

After interpreting § 39-3-25's second criteria in *Southern Union* and defining the phrase "consistent with the public interest," the Hearing Officer went on to analyze the issues that were presented to the Division. *Id.* In doing this, the Hearing Officer considered not only the transaction's impact on low-income ratepayers but also the transaction's impact on "environmental remediation costs."[2] *Id.*[3]

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[2] Interestingly, in the instant Order, the Hearing Officer explained that "[t]he Division does not agree that the Southern Union Case established a precedent for denying a utility sale based on the potential for literally any type or amount of increased cost in the future . . . ." (Pet'r's Mem. Ex. A, at 283.) The Hearing Officer further explained that § 39-3-25 "must be based on an evaluation of the proposed buyer's ability to provide the utility services authorized under the incumbent's operating charter or certificate. Comparing the utilities' respective operating costs for providing such utility services is not a valid legal prerequisite under this approval standard." *Id.* at 288-89. This would seem to suggest that considering the potential for increased costs in the future and/or the costs associated with providing utility services is immaterial to determining whether the transaction in question is consistent with the public interest. However, as explained above, the Hearing Officer in *Southern Union* considered, in detail, the economic impacts the proposed transaction would have on low-income ratepayers as well as the impact on environmental remediation costs. The Court herein merely seeks to highlight this potential inconsistency.

[3] Below is a photograph of the Table of Contents to the *Southern Union* Order:

2

The Division's Interpretation of § 39-3-25 in the Order

Interestingly, despite the Division's previous interpretation of § 39-3-25's second criterion and specific consideration of low-income ratepayers as well as the impact on environmental remediation costs in *Southern Union*, the Division in the instant matter noted that consideration of ratepayers specifically is "no longer . . . necessary [because t]he statute's use of the word 'public' would naturally include ratepayers thereby rendering the sub-group of 'ratepayers' unnecessary." (Pet'r's Mem. Ex. A, at 289.) More specifically, the Division explained that:

> "With respect to the second criterion for approval, that the proposed transaction be '*consistent with the public interest*' the Division reaffirms that the test '*requires a finding that the proposed transaction will not unfavorably impact the general public.*' But to avoid confusion, *the Division no longer believes it is necessary to emphasize that 'ratepayers' are included in this group*. The statute's use of the word 'public' would naturally include ratepayers thereby rendering the sub-group of 'ratepayers' unnecessary." *Id*. (emphasis added).

After reinterpreting § 39-3-25's second criterion and expressly excluding consideration of ratepayers as no longer being necessary as a separate group, the Division went on to also redefine the term "consistent," explaining that:

> "The Division additionally finds that clarification is needed to make clear that the word 'consistent' in the phrase 'consistent with the public interest' denotes a requirement for a 'generalized harmonious' relationship with the public as a whole rather than a particular benefit to an individual or a group of individuals."[4] *Id*. at 289.

Joint Petition for Purchase and Sale of Assets by the Narragansett Electric Company and the Southern Union Company, Docket No. D-06-13.

[4] The Court would like to note the stark difference in the Hearing Officer's definitions of "consistent with the public interest." As mentioned above, in *Southern Union*, the Hearing Officer defined the phrase "consistent with the public interest" to expressly

Finally, unsatisfied with its previous interpretation of § 39-3-25 in *Southern Union*, the Division lastly went on to, once again, redefine the term "public interest," while simultaneously establishing a new test with which to evaluate § 39-3-25 approval proceedings. *Id*. at 289-90. Specifically, the Division explained that:

> "The Division also believes further clarification is needed to discourage attempts by future parties to define 'public interest' so narrowly and subjectively as to render all Section 39-3-25 reviews unduly time consuming and expensive to adjudicate, and unduly burdensome to the [Energy Companies]; all of which the Division finds, paradoxically, to be *'inconsistent with the public interest.'* Specifically, the Division believes that confirmation of a generalized harmonious relationship to the public interest principally requires the Division to address Section 39-3-25 reviews in a fashion similar to the way the Division adjudicates the myriad other applications for authorizing approval of new operating authority and transfers of existing operating authority that come before the Division – *by thoroughly evaluating the petitioner's fitness, willingness, and ability properly to perform the services proposed and to conform to the provisions of Title 39 and the requirements, orders, rules, and regulations of the Division and Commission as well as the general laws of Rhode Island as a whole*."[5] *Id*. (emphasis added).[6]

include ratepayers as a group. *See* Docket No. D-06-13. In the instant Order, however, the Hearing Officer reinterpreted "consistent with the public interest" as no longer requiring a separate and express consideration of ratepayers, but instead requiring a finding of a "generalized harmonious" relationship with the public as a whole rather than any "individual or group of individuals." (Pet'r's Mem. Ex. A, at 289.) Evidently, these two definitions of "consistent with the public interest" are drastically different as the former implicates consideration of a particular sub-group of interested individuals while the latter contemplates the interests of the public holistically without reference to any individual or group of individuals. This is not the same standard nor a clarification but an entirely new standard.

[5] Evidently, the Hearing Officer desires that the approval process be streamlined because he believes it is unduly time-consuming and expensive to adjudicate and places an undue burden on the energy companies. However, the Transaction is one of the largest transactions in this State's history (at approximately $5.3 billion), impacting a large portion of businesses and residents within the State. Thus, although this Court agrees that efficiency is an important consideration, efficiency cannot be prioritized over the level of diligence required for a transaction of this magnitude.

[6] Notably, the Hearing Officer herein makes broad sweeping statements without any citation to statute, case law, or applicable regulations to support these propositions.

As will be further discussed below, this Court takes issue with the Division's reinterpretation of § 39-3-25 and subsequent conclusions of law to the extent that the Division improperly reinterpreted § 39-3-25 in a manner consistent with Rhode Island law.

3

Rhode Island Statutory Interpretation

The Rhode Island Supreme Court has provided lower courts and administrative agencies with clear guidance regarding statutory interpretation. Issues of statutory interpretation are generally questions of law. *See Iselin v. Retirement Board of Employees' Retirement System of Rhode Island*, 943 A.2d 1045, 1049 (R.I. 2008). When interpreting a statute, courts must first determine whether the statute is ambiguous. *Bucci v. Lehman Brothers Bank, FSB*, 68 A.3d 1069, 1078 (R.I. 2013). "[W]hen the language of a statute is clear and unambiguous, [the court] must interpret the statute literally and must give the words of the statute their plain and ordinary meanings." *Accent Store Design, Inc. v. Marathon House, Inc.*, 674 A.2d 1223, 1226 (R.I. 1996) (alteration omitted); *see also Dart Industries, Inc. v. Clark*, 696 A.2d 306, 310 (R.I. 1997) (citation omitted). In certain circumstances, however, courts will not interpret the statute literally, namely "when to do so would produce a result at odds with its legislative intent . . . Rather, [the court] will give the enactment 'what appears to be the meaning that is most consistent with its policy or obvious purpose.'" *Kirby v. Planning Board of Review of Town of Middletown*, 634 A.2d 285, 290 (R.I. 1993) (quoting *Zannelli v. Di Sandro*, 84 R.I. 76, 81, 121 A.2d 652, 655 (1956)).

Should the Court find that a statute is ambiguous, the analysis shifts because "'when a statute is susceptible of more than one meaning, [the Court] employ[s] [its] well-established maxims of statutory construction in an effort to glean the intent of the Legislature.'" *Town of Burrillville v. Pascoag Apartment Associates, LLC*, 950 A.2d 435, 445 (R.I. 2008)

(quoting *Unistrut Corp. v. State Department of Labor and Training*, 922 A.2d 93, 98-99 (R.I. 2007)). Even with an ambiguous statute, the court begins with the "plain language of the statute to determine the legislative intent." *Matter of Falstaff Brewing Corp. re: Narragansett Brewery Fire*, 637 A.2d 1047, 1050 (R.I. 1994). When "interpreting a legislative enactment [it is incumbent upon the court] to determine and effectuate the Legislature's intent and to attribute to the enactment the meaning most consistent with its policies or obvious purposes." *Brennan v. Kirby*, 529 A.2d 633, 637 (R.I. 1987). It is only then that a court may determine how the legislative act serves its purpose, taking into consideration the practical results should the court adopt an alternative interpretation. *Matter of Falstaff Brewing Corp.*, 637 A.2d at 1050.

Here, the Hearing Officer's reinterpretation of § 39-3-25 is likely erroneous. Initially, this is because in attempting to redefine the statutory analysis required to approve the Transaction pursuant to § 39-3-25, the Hearing Officer failed to interpret the statute consistent with the Division's previous interpretation in *Southern Union*, where the Hearing Officer expressly stated that the "plain meaning of the words must be controlling." *See Joint Petition for Purchase and Sale of Assets by the Narragansett Electric Company and the Southern Union Company*, Docket No. D-06-13. To this point, in attempting to "clarify" the statutory language contained in § 39-3-25 in the instant matter, including the meaning of the phrase "public interest," the Hearing Officer failed to affirmatively find that the statutory language at issue is ambiguous or that his previous interpretation was erroneous, likely leaving the Hearing Officer without a sufficient justification for reinterpreting the applicable statute. *See Matter of Falstaff Brewing Corp.*, 637 A.2d at 1050. If, for example, the Hearing Officer had made a finding that the statute was actually ambiguous and thereafter provided a new analytical framework, then this would have been, at the very least, consistent with Rhode Island statutory interpretation law. However, the Hearing Officer failed to

make any such finding, and consequently, likely erred in reinterpreting § 39-3-25. Thus, the Hearing Officer's failure to follow Rhode Island's approach to statutory interpretation demonstrates a likely error of law, supporting a finding that Petitioner has a reasonable likelihood to succeed on the merits of Petitioner's appeal.[7]

4

Hearing Officer's Consideration of Ratepayers (or Lack Thereof)

Additionally, not only did the Hearing Officer erroneously reinterpret § 39-3-25 at odds with the Division's own previous interpretation without making an affirmative finding that the statute is ambiguous or that his previous interpretation of the statute in *Southern Union* was incorrect, the Hearing Officer also failed to make any determination that ratepayers would not be unfavorably impacted by the Transaction. *See generally* Pet'r's Mem. Ex. A, at 289-305. In the Order, the Hearing Officer focused primarily on the interests of the general public as a whole and sparingly mentioned ratepayers in limited contexts in an effort to demonstrate a hypothetical outcome where the ratepayers could benefit from this Transaction. *Id*. at 300 ("The hybrid model also *looks to have the potential to* actually reduce costs for Narragansett's ratepayers") (emphasis added). Interestingly, to the extent the Hearing Officer did consider ratepayers, the Hearing Officer characterized issues related to ratepayer risks as inappropriately

[7] Additionally, to the extent that the Division failed to adequately consider the environmental impacts of the Transaction in accordance with the 2021 Act on Climate, codified in §§ 42-6.2-1 *et seq.* (the Act), this provides Petitioner with an additional ground upon which to challenge the Division's Order on the merits. Section 42-6.2-9 of the Act sets out specific decarbonization goals for the State, including a forty-five percent reduction in greenhouse gas emissions from 1990 levels by 2030. Importantly, § 42-6.2-8 requires all state agencies, including quasi-public agencies, to conduct their regular business with achievement of these goals in mind. Thus, in accordance with the Act, the Division is required to consider the climate impacts of the Transaction, and to the extent the Division failed to do so provides Petitioner with yet another basis to challenge the Order on the merits.

before the Division, and consequently, refused to consider such risks. *Id*. at 304. Instead, the Hearing Officer noted that matters related to rate increases as a result of the Transaction properly belong before the Rhode Island Public Utilities Commission.[8] *Id*.

With respect to this determination, however, the Hearing Officer is incorrect. While the Division is not authorized to set specific utility rates, the Division is charged with considering ratepayers in the approval of not only this Transaction but other similar transactions. While the phrase "public interest" necessarily requires consideration of the public's interest as a whole, Petitioner has a reasonable likelihood of success in establishing that the phrase "public interest" also requires consideration of any specific class or sub-set of individuals whose interests are directly implicated or otherwise significantly affected by the underlying transaction. That is, if a particular sub-group's interests (for example, ratepayers) are directly implicated or otherwise affected by a proposed transaction, the interest of that sub-group cannot be ignored or otherwise disregarded simply because that class or sub-group happens to also be a part of a larger sub-group

[8] The Rhode Island Public Utilities Commission (Commission) and the Division are two separate regulatory bodies. The Commission is a quasi-judicial tribunal charged with enforcing the standards of conduct and hearing matters related to rates, tariffs, and tolls among other things. *See* State of Rhode Island Public Utilities Commission and Division of Public Utilities and Carriers, *About the Commission*, RIPUC - About the Commission (last visited Mar. 30, 2022). The Division is tasked with "exercising 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." State of Rhode Island Public Utilities Commission and Division of Public Utilities and Carriers, *About the Division*, RIPUC - About the Division (last visited Mar. 30, 2022). Based on the delegation of authority between the two regulatory bodies, the Hearing Officer's view of the Division's role in approving transactions appears to be misplaced. As noted above, while the Commission has the authority to set utility rates, the Division has the authority to assess the impact of those potential rates on ratepayers in Rhode Island when considering whether the transaction is consistent with the public interest. Thus, there is clearly a difference between actually setting the utility rates and considering the effect potential utility rate increases and costs may have on ratepayers. In this regard, the Hearing Officer conflated his role in evaluating the Transaction on the part of the Division and the role of the Commission in setting the utility rates.

(for example, the public as a whole). While the larger sub-group may have certain interests in common with the smaller sub-group, the latter is undoubtfully interested in ways the former is not.[9] Thus, Petitioner has a reasonable likelihood of success in demonstrating that the Hearing Officer improperly approved the Transaction by considering only the interest of the public at large without addressing the interests of ratepayers directly implicated by the Transaction.

In conclusion, the Petitioner has demonstrated a reasonable likelihood of success on the merits as it relates to the Hearing Officer's reinterpretation of the statute and the failure to meaningfully consider the Transaction's direct impact on ratepayers. The Division's decision to read out its previous requirement to expressly consider ratepayers under § 39-3-25, and to redefine the terms "public interest" and "consistent" without adhering to Rhode Island law regarding statutory interpretation, provides Petitioner with sufficient grounds upon which to challenge the merits of the Order.[10] While Rhode Island law requires the Superior Court to review an administrative agency's factual findings under a deferential standard of review, Petitioner asserts that the Division acted "in violation of constitutional or statutory provisions"; "in excess of the statutory authority of the agency"; and that the Division's Order was "affected by other error of

[9] To be clear, this is not to suggest that the interests of each and every sub-group must be considered. However, sub-groups who have a direct and substantial interest in the underlying activity or transaction should be considered, particularly if that sub-group's interests were previously considered in a similar transaction.

[10] Notwithstanding the Division's failure to follow Rhode Island's approach to statutory interpretation in the Order, the *only* reference to the concept of statutory interpretation made in the Order is to the "absurd result" exception. *See* Pet'r's Mem. Ex. A, at 284. The Division invokes this principle of statutory interpretation in an effort to disagree with Petitioner's proffered interpretation. *See id*. After referencing the "absurd result" exception, the Division cites to *Public Citizen v. United States Department of Justice*, 491 U.S. 440, 470 (1989). However, in *Public Citizen*, the United States Supreme Court noted that "[t]his exception remains a legitimate tool of the Judiciary, however, only as long as the Court acts with *self-discipline* by limiting the exception to situations where the result of applying the plain language would be, in a genuine sense, absurd." *Id*. Consequently, this Court finds the Division's reliance on the "absurd result" exception unpersuasive.

law." *See* Pet'r's Reply 5; *see also State, Department of Environmental Management v. State, Labor Relations Board*, 799 A.2d 274, 277 (R.I. 2002). Consequently, these questions of law are subject to *de novo* review. *State, Labor Relations Board*, 799 A.2d at 277.[11]

B

Irreparable Harm

Turning to whether Petitioner will suffer irreparable harm if its Motion to Stay is not granted, Petitioner argues that if the Order is not stayed and PPL and National Grid proceed to close the transaction, "virtually all of Rhode Island's electric and natural gas distribution would change hands, beginning the unravelling from its current cost-efficient regional system and integration into a new corporate structure with undefined synergies." (Pet'r's Mem. 16.) More specifically, Petitioner argues that "[s]uch a transaction could not be unwound without unacceptable costs to ratepayers and the public at large. Thus, any judicial review of the Order would be rendered moot[.]" *Id*. In short, Petitioner contends that "without a stay of the transaction closing, [Petitioner] and the public will be permanently deprived of judicial review of the Division's Order and a transaction will be approved that has never met the statutory standard for approval." (Pet'r's Reply 15.)

PPL and PPL RI, however, argue that Petitioner's "assertion of irreparable harm is baseless and rests on the false premise that because [Petitioner] cannot unwind the transaction, the State faces irreparable harm." (PPL's Obj. 27.) PPL and PPL RI contend that the "inability to unwind the transaction does not demonstrate irreparable harm, or any harm at all[,]" and that Petitioner must demonstrate that the State will suffer irreparable harm if PPL

[11] Based on the foregoing, the Court herein need not address the other potential issues with the Order raised by Petitioner.

assumes operation of Narragansett, which, according to PPL and PPL RI, Petitioner has failed to do. *Id*. Moreover, PPL and PPL RI argue that "[Petitioner's] concerns about potential operational and rate impacts were fully and thoroughly vetted in the Approval Order, and the Division fully explained that these concerns were highly speculative and that the existing regulatory oversight from the Division and the [Public Utilities Commission] would protect against them." *Id*. at 28. Thus, PPL and PPL RI aver that Petitioner's "unsupported and generalized assertions of irreparable harm fade into obscurity when measured against the detailed findings by the Division employing its agency expertise[,]" and therefore, Petitioner has made "no showing that irreparable harm will occur in the absence of a stay." *Id*.

National Grid and Narragansett assert similar counterarguments to that of PPL and PPL RI, arguing that Petitioner's "claims of irreparable harm are speculative and rely solely on unsupported assumptions." (National Grid and Narragansett Obj. 19.) More specifically, National Grid and Narragansett argue that the alleged harms identified by Petitioner in its supporting memorandum "are not actual harms supported by the administrative record; they are all speculative." *Id*. Further, National Grid and Narragansett claim that "if the Transaction closes, [Petitioner] will maintain its role as a consumer advocate for the State of Rhode Island and will have an opportunity to participate in all regulatory proceedings in which PPL is involved to protect its rights and the rights of others in Rhode Island." *Id*. at 19-20. Thus, according to National Grid and Narragansett, "there is no irreparable harm to [Petitioner] if the stay is not granted." *Id*. at 20.

Despite being in the context of a preliminary injunction, our Supreme Court has explained that the moving party must demonstrate that it "stands to suffer some irreparable harm that is presently threatened or imminent and for which no adequate legal remedy exists to restore that plaintiff to its rightful position." *Fund for Community Progress v. United Way of Southeastern*

New England, 695 A.2d 517, 521 (R.I. 1997). As more fully explained above, the thrust of Petitioner's irreparable harm argument is that without a stay of the Division's Order approving the Transaction to review the merits of the Order, Petitioner and the public will be permanently deprived of judicial review of the Division's Order because there will be no future opportunity for the Court, or any court for that matter, to review the merits of the Order. *See* Pet'r's Mem. 16; Pet'r's Reply 15-16. This point appears to have been largely missed by Respondents outside of National Grid and Narragansett's contention that Petitioner will maintain its role as a consumer advocate for the State of Rhode Island and will have an opportunity to participate in all regulatory proceedings in which PPL is involved. (National Grid and Narragansett Obj. 19-20.) However, the purported ability to maintain its role as a consumer advocate for the State of Rhode Island and opportunity to participate in regulatory proceedings in which PPL is involved does not sufficiently cure the harm identified by Petitioners.

This very point was demonstrated in *Town of Tiverton v. Ahern*, C.A. No. PB 06-4233, 2006 WL 3581558 (R.I. Super. Dec. 7, 2006) (Silverstein, J.).[12] In *Ahern*, the defendants filed motions for summary judgment seeking judgment that the plaintiff's appeal of a decision issued by the Division was moot because the sale had already closed. *Ahern*, 2006 WL 3581558, at *1-2. Significantly, the plaintiff filed a complaint and immediately sought a stay of the Division's Approval Decision, which was denied and no appeal of that stay denial was taken. *Id*. at *2. Because of this, defendants moved for summary judgment, arguing that the completion of the sale rendered the case moot. *Id*.

The court agreed with defendants, explaining that unless the Division maintained jurisdiction over the entity involved in the underlying transaction, the court could not order the

[12] Notably, this matter involved the *Southern Union* transaction.

Division to "retroactively place conditions on the approval, to deny approval, or to conduct additional discovery[.]" *Id*. at *3. Moreover, the court recognized that while the court enjoys "broad original jurisdiction to adjudicate equitable matters, it is not clear that the Court may exercise that jurisdiction while sitting in its appellate capacity under the APA." *Id*. at *5. Based on this, the court explained that "[w]ithout the equitable power to order the transaction rescinded, the Court is unable to fashion any relief for [the plaintiff] because the Division would have no jurisdiction over Southern if the Court simply remanded the Approval Decision." *Id*.

Importantly, the court also explained that even if the court possessed the authority to issue an injunction and rescind the asset sale, it was unlikely the court would make such an order. *Id*. at *6. This was because, among other reasons, the court was able to "identify at least two other remedies at law of which [the plaintiff] could have availed itself[,]" such as obtaining a stay of the Division's Approval. *Id*. As the court explained, this would have prevented the sale from closing and prevented the appeal from being moot.[13] *Id*. at *6. Based on those reasons, the court granted the defendants' motions for summary judgment and concluded that the plaintiff's appeal was moot. *Id*. at *7.

Here, not only does Petitioner provide a sufficient basis for the issuance of a stay unlike the plaintiff in *Ahern*, but Petitioner seeks the very type of relief identified by the court in *Ahern*: a stay of the Division's Order to prevent the sale from closing. Were this Court to deny Petitioner's request for a stay to review the merits of the Division's Order, the Petitioner as well as this Court, will not have another opportunity to do so and the transaction will close, just as it did in *Ahern*.

[13] The court noted that while the plaintiff sought a stay which was denied, the plaintiff failed to appeal that decision to the Supreme Court and request a stay, rendering the stay remedy unavailable. *Id*. at *6. The court noted that the unavailability of that potential remedy was "due in no small part to [the plaintiff's] own inaction." *Id*.

This is, without question, a type of irreparable harm that justifies a stay of the Division's Order in order to provide Petitioner an opportunity to appeal the merits of the Division's Order. To deny Petitioner's Motion to Stay would be to, effectively, close the door on the transaction between PPL and Narragansett, and eliminate any legitimate opportunity for Petitioner to seek review of the Order. To be clear, while Petitioner would, at least theoretically, still have the ability to appeal this Court's decision in the event the Court were to deny Petitioner's Motion to Stay, the Court does not consider this to be a legitimate remedy at law. Presently, the only remedy at law available to Petitioner which would prevent Petitioner from suffering irreparable harm is the issuance of a stay of the Division's Order approving the transaction between PPL and Narragansett.

IV

Conclusion

Based on the foregoing, Petitioner's Emergency Motion to Stay the Division of Public Utilities and Carriers' Order is granted. This Court recognizes the importance of the underlying transaction in this matter and the impact the transaction will have on Rhode Island as a whole. This Court also recognizes that an expeditious resolution of the administrative appeal currently before the Court is in the best interests of all parties. Consequently, the Court's previously issued Scheduling Order for the underlying APA appeal remains in full force and effect with oral argument to be heard on April 12, 2022 at 10:00 a.m. The Court will issue an order consistent with this Decision contemporaneously with the issuance of this Decision.

RHODE ISLAND SUPERIOR COURT

Decision Addendum Sheet

TITLE OF CASE: **Peter Neronha Attorney General of the State of Rhode Island v. Rhode Island Division of Public Utilities and Carriers, et al.**

CASE NO: **PC-2022-01095**

COURT: **Providence County Superior Court**

DATE DECISION FILED: **April 1, 2022**

JUSTICE/MAGISTRATE: **Stern, J.**

ATTORNEYS:

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For Respondents: **Margaret L. Hogan, Esq.; Robert J. Humm, Esq.; Gerald J. Petros, Esq.; Adam Ramos, Esq.**

Amicus Curiae: **Henry Webster, Esq.; Margaret E. Curran, Esq.; James T. Crowley, Esq.; James Rhodes, Esq.**