



Mernicks for the use of gas from October 14, 2005 until August 2, 2016 for a total amount of \$4897.19. (Reply Br. Ex. B.)

On November 30, 2017 National Grid initiated steps to terminate the Mernicks' gas account for non-payment. (Reply Br. Ex. C.) Consequently, on December 5, 2017, Ken Mernick contacted the Consumer Section of the DPUC to request an Informal Review regarding the gas account. (Reply Br. Ex. F.) The Informal Review was scheduled for December 18, 2017. (Reply Br. Ex. E.)

National Grid sent the Notice of Informal Review (Notice) to the Mernicks' home address, with a copy to Christian Lincoln, a representative for National Grid. (Reply Br. Ex. E.) The Notice provided for the date and time, in bold letters, along with the specified location for the Informal Review. *Id.* The Notice also stated the Informal Review was scheduled based on the December 5, 2017 request and concerned the residential National Grid gas utility service. *Id.* It also listed the specified procedures for requesting a postponement. *Id.* Additionally, the Notice explained the consequences for a party's failure to attend a scheduled Informal Review. *Id.*

On December 18, 2017, the DPUC commenced the Informal Review. National Grid representative Christian Lincoln, who was also copied on the Notice, appeared before the Informal Review panel. (Reply Br. Ex. F.) However, the Mernicks failed to appear. *Id.* Based on the entirety of the record, there is no showing that the Mernicks requested a postponement of the Informal Review. On December 20, 2017, the Decision was entered. *Id.* at 2. The Decision made the following findings: (1) Ken Mernick requested an Informal Review regarding his/her gas account on December 5, 2017; (2) the Informal Review was scheduled for December 18, 2017; (3) Ken Mernick failed to either appear at the Informal Review or to call to reschedule; (4) the current account balance is \$4968.99; (5) the utility service is on; and (6) the date for termination

is not confirmed. *Id.* at 2. The Informal Review was dismissed due to Ken Mernick’s failure to appear. *Id.*

The Decision was mailed to the Mernicks at the same home address as the prior Notice. *Id.* at 1. The Decision describes the appeals process for parties who failed to appear at the Informal Review hearing. *Id.* at 3-4. Notably, the appeals process requires the party to file an appeal with the Rhode Island Superior Court within thirty days from the mailing date of the Decision. *Id.* at 3.

On January 19, 2018, the Mernicks filed this appeal in the Providence County Superior Court. Presently, the Mernicks contest the legality of the notice provided and whether the Decision complies with § 42-35-12. The DPUC has timely objected to the appeal.

## II

### Standard of Review

This Court’s review of an appeal from an administrative action is governed by § 42-35-15. Pursuant to § 42-35-15(a), “[a]ny preliminary, procedural, or intermediate agency act or ruling is immediately reviewable in any case in which review of the final agency order would not provide an adequate remedy.” Sec. 42-35-15(g) provides:

“The court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. The court may affirm the decision of the agency or remand the case for further proceedings, or it may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:

“(1) In violation of constitutional or statutory provisions;

“(2) In excess of the statutory authority of the agency;

“(3) Made upon unlawful procedure;

“(4) Affected by other error of law;

“(5) Clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or

“(6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.”  
Sec. 42-35-15(g).

When reviewing an agency’s decision, this Court looks only to the certified record that was before the agency at the time the decision was rendered. *Johnston Ambulatory Surgical Assocs., Ltd. v. Nolan*, 755 A.2d 799, 804-05 (R.I. 2000). Based on the record, this Court must determine “whether there is any legally competent evidence to justify the [agency’s] conclusions.” *Power Test Realty Co. Ltd. P’ship v. Coit*, 134 A.3d 1213, 1218 (R.I. 2016) (quoting *Envtl. Sci. Corp. v. Durfee*, 621 A.2d 200, 208 (R.I. 1993)). As to questions of fact, this Court will not substitute its judgment for that of the agency with regard to the credibility of witnesses or the weight of the evidence. *State Dep’t of Env’tl. Mgmt. v. Admin. Adjudication Div.*, 60 A.3d 921, 924 (R.I. 2012).

Additionally, questions of law are reviewed *de novo*. *City of Pawtucket v. Laprade*, 94 A.3d 503, 513 (R.I. 2014). However, this Court must provide deference to an agency’s interpretation of an ambiguous “regulatory statute that the General Assembly empowered the agency to enforce . . . ‘as long as that construction is not clearly erroneous or unauthorized.’” *Labor Ready Ne., Inc. v. McConaghy*, 849 A.2d 340, 344 (R.I. 2004) (citing *In re Lallo*, 768 A.2d 921, 926 (R.I. 2001)). Such deference is required “even when the agency’s interpretation is not the only permissible interpretation that could be applied.” *Pawtucket Power Assocs. Ltd. P’ship v. City of Pawtucket*, 622 A.2d 452, 456-57 (R.I. 1993). Accordingly, this Court should not substitute its own interpretation of an agency’s regulation where the agency’s interpretation was objectively reasonable. *State v. Cluley*, 808 A.2d 1098, 1103-04 (R.I. 2002).

### **III**

#### **Analysis**

##### **A**

#### **Notice**

On appeal, the Mernicks contend that the DPUC failed to provide notice and an opportunity to be heard in accordance with § 42-35-9. Specifically, the Mernicks contend that the Notice was not provided to them or to their counsel. The Mernicks argue that lack of notice is demonstrated by the fact that the Notice is not dated and does not reference any mailing date. Conversely, the DPUC avers that notice was timely given to the Mernicks. The DPUC contends that notice to the Mernicks' counsel was not required under its Rules of Practice and Procedure because counsel failed to enter a written appearance with the DPUC. See DPUC's Rules of Practice and Procedure, 815-RICR-00-00-1 § 1.12(E)(1)(c). Additionally, the DPUC argues that there is no statutory requirement mandating the Notice contain a date or date of mailing under § 42-35-9.

“In any contested case, all parties shall be afforded an opportunity for a hearing after reasonable notice.” Sec. 42-35-9(a). The notice shall include:

“(1) [a] statement of the time, place, and nature of the hearing;

(2) [a] statement of the legal authority and jurisdiction under which the hearing is to be held;

(3) [a] reference to the particular sections of the statutes and rules involved;

(4) [a] short and plain statement of the matters inserted. If the agency or other party is unable to state the matters in detail at the time the notice is served, the initial notice may be limited to a statement of the issues involved and detailed statement shall be furnished.” Sec. 42-35-9(b)(1)-(4); *see also* DPUC's Rules of Practice and Procedure, 815-RICR-00-00-1 § 1.12(C)(1)(a)-(e).

In addition to the preceding requirements, “[t]he division shall give the public utility and the complainant, if any, ten (10) days notice of the time and place where and when the hearing and investigation will be held.” G.L. 1956 § 39-4-5; *see also* DPUC’s Rules of Practice and Procedure, 815-RICR-00-00-1 § 1.12(D)(1). Notice to a party’s counsel is required “[i]f an attorney has entered an appearance on behalf of the addressee.” DPUC’s Rules of Practice and Procedure, 815-RICR-00-00-1 § 1.12(E)(1)(c).

Here, notice of the Informal Review was mailed to the Mernicks at their home address. (Reply Br. Ex. E.) Additionally, the Mernicks failed to produce any form of evidence or affidavit indicating that they did not receive the Notice. Furthermore, the Notice was mailed to the same address as the Decision, which the Mernicks received in light of the fact that they filed a timely appeal. The Notice was also received by National Grid representative Christian Lincoln, who appeared at the Informal Review. Furthermore, the record does not indicate that the Mernicks’ counsel entered a written appearance with the DPUC, which would require notice to also be mailed to their counsel. Thus, based on the entirety of the administrative record, there is no manifestation that the Mernicks did not, in fact, receive notice and that the Mernicks’ counsel was required to receive notice.

Additionally, under Rhode Island law, notice is reasonable provided that it complies with § 42-35-9(b)(1)-(4). With regard to time, the DPUC has mandated that notice is given ten days prior to the hearing—a time that is reasonable in accordance with § 39-4-5. In the case at hand, Ken Mernick contacted the DPUC to request an Informal Review on December 5, 2017. The Informal Review was subsequently scheduled for December 18, 2017, which is more than ten calendar days prior to the Informal Review. Although the Mernicks contest timely notice and point to the lack of date or mailing date on the Notice, it is not required under § 42-35-9(b)(1)-

(4) or the DPUC's Rules of Practice and Procedure, 815-RICR-00-00-1 § 1.12(C)(1)(a)-(e) and § 1.12(D)(1). *See* § 42-35-9.

The Mernicks also contend that the Notice failed to provide a short and plain statement because it purportedly did not indicate the nature, allegations and amount due. On the contrary, the DPUC argues that the Notice was sufficient to apprise the Mernicks that an Informal Review was scheduled to take place on December 18, 2017 concerning their residential gas account.

Under Rhode Island Law, a party involved in a contested matter is entitled to reasonable notice containing “[a] short and plain statement of the matters inserted.” Sec. 42-35-9(b)(4). In order for notice to meet the standards of due process, notice must be reasonably calculated, “under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.” *E. Greenwich Fire Dist. v. Penn Cent. Co.*, 111 R.I. 303, 315, 302 A.2d 304, 311 (1973) (finding the public utilities commission provided reasonable notice). The question of whether notice is reasonable is decided on a case-by-case basis. *Id.* at 315-16, 302 A.2d at 311. However, it should be noted that “[n]otice of a hearing is not required to contain an accurate forecast of the precise action which will be taken upon the subject matter referred to in the notice.” *Id.* at 319, 302 A.2d at 313.

Here, the notice contained a short and plain statement that is reasonably calculated to apprise the interested parties of the pendency of the action and afford them with an opportunity to present their objections. *Id.* at 315, 302 A.2d at 311. The Notice informed the Mernicks that the *requested* Informal Review with respect to their National Grid gas utility service was scheduled for, in bold letters, December 18, 2017. (Emphasis added.) The Notice proceeded to inform them that it concerned their account at their residential address. Additionally, the Notice informed the Mernicks that the Informal Review was requested on December 5, 2017. The

Notice identifies the location and the exact time of the Informal Review, and provides that presence is mandatory. In light of all circumstances, the Notice was reasonably calculated to apprise the Mernicks of the pendency of the Informal Review. *Id.* at 315, 302 A.2d at 311.

## **B**

### **Informal Review Decision**

The Mernicks also aver that the Decision is not in compliance with § 42-35-12 because it makes no findings of fact. Specifically, the Mernicks contend that the Decision does not address whether notice was sent, the amount due on the utility account, or cite to any statutory authority for its reasoning. The DPUC objects arguing that the Decision met the requirements for this Court to uphold its decision.

An administrative agency's final order is governed by § 42-35-12, which provides in pertinent part:

“Any final order adverse to a party in a contested case shall be in writing or stated in the record. Any final order shall include findings of fact and conclusions of law, separately stated. Findings of fact, if set forth in statutory language, shall be accompanied by a concise and explicit statement of the underlying facts supporting the findings.” Sec. 42-35-12.

In order to satisfy this statutory requirement, “[t]he rationality of an agency’s decision must encompass its fact findings, its interpretation of the pertinent law, and its application of the law to the facts as found.” *Sakonnet Rogers, Inc. v. Coastal Res. Mgmt. Council*, 536 A.2d 893, 896 (R.I. 1988) (quoting *Arrow Transp. Co., Inc. v. United States*, 300 F. Supp. 813, 817 (D.R.I. 1969)). However, if competent evidence exists in the administrative record, the Superior Court is mandated to uphold the agency’s conclusion. *Auto Body Ass’n of R.I. v. State Dep’t of Bus. Regulation*, 996 A.2d 91, 95 (R.I. 2010); *see also R.I. Pub. Telecomms. Auth. v. R.I. State Labor Relations Bd.*, 650 A.2d 479, 485 (R.I. 1994). In conducting a review of the agency’s final order,



the court is limited to questions of law, which are reviewed *de novo*. *Id.* With regard to an Informal Review by the DPUC, “[a]n informal review shall consist of a factual investigation into the dispute by a reviewing officer.” R.I. Admin. Code 53-1-15:VI(2)(A). After the Informal Review, a written notice of the decision and order shall be sent to the parties and their counsel. R.I. Admin. Code 53-1-15:VI(3)(A). The notice of decision must contain, if appropriate, “[a] statement of the decision and order and a statement of the material facts underlying that decision and order.” R.I. Admin. Code 53-1-15:VI(3)(B)(1). Additionally, the notice of decision shall contain the date of proposed terminations, if known and applicable. R.I. Admin. Code 53-1-15:VI(3)(B)(2).

Here, the Decision states that the Complainants, the Mernicks, did not appear. The Decision also sets forth the date of request made by Ken Mernick, the scheduled date of the Informal Review hearing, the current status of the gas utility service, the account balance and that the date of termination has yet to be established. The Mernicks’ failure to attend the scheduled Informal Review constituted cause for summary disposition, including dismissal of the customer’s complaint. *See* R.I. Admin. Code 53-1-15:VI(2)(A); Reply Br. Ex. E. Thus, the reviewing officer dismissed the Mernicks’ request for an Informal Review. The Decision contained the material facts underlying the reviewing officer’s decision to dismiss the Mernicks’ request for an Informal Review; specifically, the material fact that the Mernicks failed to appear. *See* R.I. Admin. Code 53-1-15:VI(3)(B)(1); Reply Br. Ex. F. Based on the fact that the Mernicks failed to appear, it would have been difficult for the DPUC to make additional findings of fact. Furthermore, the Mernicks’ failure to appear constituted a waiver of right to a formal evidentiary hearing. *See* R.I. Admin. Code 53-1-15:VI(4); Reply Br. Ex. E. Accordingly, this Court finds that the DPUC’s Decision is in compliance with § 42-35-12.

## **IV**

### **Conclusion**

This Court finds the Decision of the DPUC dismissing the request for an Informal Review was not made upon unlawful procedure or arbitrary or capricious. This Court affirms said dismissal without prejudice to the Mernicks' right to refile a request for an Informal Review pursuant to R.I. Admin. Code 53-1-15:VI. Counsel shall submit the appropriate judgment for entry.



**RHODE ISLAND SUPERIOR COURT**  
*Decision Addendum Sheet*

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**TITLE OF CASE:** Linda Mernick and Ken Mernick v. State of Rhode Island  
Division of Public Utilities and Carriers

**CASE NO:** PC-2018-0375

**COURT:** Providence Superior Court

**DATE DECISION FILED:** May 22, 2019

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

**ATTORNEYS:**

For Plaintiff: Edward R. McCormick, III, Esq.

For Defendant: Casey Lee, Esq.