

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS
DEPARTMENT OF ENVIRONMENTAL MANAGEMENT
ADMINISTRATIVE ADJUDICATION DIVISION

RE: BARCO L.P. (PETITION FOR DECLARATORY RULING)
69 GLENWOOD AVENUE
PAWTUCKET, RHODE ISLAND 02860

DECISION AND ORDER DENYING PETITIONER'S REQUEST
FOR DECLARATORY RULING

This matter is before the hearing officer on the Petition for Declaratory Ruling filed with the Director on behalf of BARCO, L.P.. The Petition was referred to the Administrative Adjudication Division for Environmental Matters ("AAD") by the Director for a Recommended Decision and Order. The Division of Site Remediation ("Division") filed an objection to the Petition and filed a memorandum of law in support of its objection. The petitioner, BARCO, L.P. filed a supplemental document in response to the Division's memorandum.

A hearing on the Petition was scheduled sua sponte by the hearing officer and was held on February 10, 1995. As the Order Scheduling Oral Argument states, the hearing officer scheduled argument to afford the petitioner additional opportunity to reference the specific statutes and regulations sought to be interpreted by the petitioner as well as any case law and/or citations supporting BARCO's request for a declaratory ruling. The Division of Site Remediation was represented by Brian A. Wagner, Esq., and BARCO, L.P. was represented by its general partner, James Bartley, Esq.

The Administrative Procedures Act ("APA"), R.I.G.L. §42-35-8 mandates that each agency provide by rule for the filing

and disposition of petitions for declaratory ruling as to the applicability of statutory provisions or any rule of the agency. The Administrative Rules of Practice and Procedure for the Department of Environmental Management are the regulations which implement that APA requirement and govern requests for declaratory rulings by the Department. In particular, Rule 18.00 addresses requests for declaratory rulings. It provides in pertinent part:

18.00 Petition for Declaratory Rulings

(a) Any person affected by any statutory provision administered by the Department or affected by any rule or order of the Department may, in accordance with R.I.G.L. §42-35-8 and these regulations, petition the director for a declaratory ruling as to the applicability of such statute, rule or order. Such petition shall be filed with the Department in the manner required by Section 4.00 and 5.00 of these regulations and the petition shall clearly and concisely identify:

- (1) The precise statute, rule or order, including paragraph(s) or subparagraph(s) on which a declaratory ruling is sought;
- (2) How the petitioner is affected by the statute, rule or order;
- (3) Why the ruling is sought;
- (4) The petitioner's position on how the applicable statute, rule or order should be interpreted, including citations to any applicable documents or law that support petitioner's position.
- (5) Other persons who may be affected if the Department adopts that petitioner's position including any small businesses that may experience a significant adverse economic impact; small business shall be defined in accordance with R.I.G.L. §42-35-1.

(6) Whether the petitioner has, or is aware of, any other matters pending before the Department or the courts that may be affected by the declaratory ruling sought; this shall include, but not be limited to: permit applications, enforcement actions, petitions, contracts and leases or rental agreements.

(b) Upon submission of such a petition the director shall promptly:

(1) Issue a declaratory ruling which will have the same status as a departmental decision or order in a contested case; or

(2) If necessary, seek additional clarification of issues raised by the petitioner and upon receipt of the clarifications, promptly issue a declaratory ruling; or

(3) Find that the petitioner is not in fact an interested person affected by a statute, rule or order of the Department and decline to issue a declaratory ruling; or

...

I have carefully reviewed petitioner's request in light of the requirements of Rule 18.00. Petitioner has provided no case law or testimony concerning its petition and has relied on the written Petition and Supplement filed with the Director and oral arguments made before the hearing officer.

In the present matter, there are no enforcement proceedings pending against the Petitioner and the Division's counsel has represented on the record at oral argument that the Division does not contemplate taking any enforcement action against Petitioner based on the facts presented by

Petitioner in its Petition. No controversy presently exists between the Petitioner and the Division and there is no threatened application of a statute, rule or regulation under the Department's jurisdiction. It is clear from the Petitioner's request that it is seeking a declaration of rights as between the Petitioner and possible third parties.

Administrative declaratory ruling proceedings under Section 42-35-8 have been held to be the administrative counterpart of the Declaratory Judgments Act, R.I.G.L.

§9-30-1. Liquori v. Aetna Casualty and Surety Co., 119 R.I. 875, 384 A.2d 308 (1978). As such, cases decided by the courts of our state under the Uniform Declaratory Judgments Act provide guidance in the matter before AAD.

The Uniform Declaratory Judgments Act, and by analogy its administrative counterpart §42-35-8, and DEM's Rule 18.00 adopted pursuant thereto, all require that a justiciable controversy exist between the parties. Specifically, the Rhode Island Supreme Court decisively stated in Lamb v. Perry, 101 R.I. 538, 225 A.2d 521, (1967)

However, apart from a relatively few instances when compelling public interest makes for an exception to the rule, the authorities all agree that a justiciable controversy between the parties is basic to the court's jurisdiction. Furthermore the controversy must be actual and present a case for the consideration of the court wherein the plaintiff is asserting some legal or property right adverse to the defendant. (citations omitted)

Id., 101 R.I. 538 at 542.

Although the absence of a justiciable controversy is dispositive of this Petition, I feel compelled to note that the grant of declaratory relief under the Uniform Declaratory Judgments Act and under §42-35-7 is discretionary. Lombardi v. Goodyear Loan Co., 549 A.2d 1025 (R.I. 1988) . By analogy, the grant of declaratory relief at the agency level is also discretionary. In determining whether or not to exercise that discretion, the court has held that some of the issues a trial justice must consider are the existence of another remedy, the availability of other relief, and the fact that a question may readily be presented in an actual trial. Berberian v. Travisono, 114 R.I. 269, 332 A.2d 121, (1975). In deliberating upon those issues, it is plain from the facts as presented by BARCO in its Petition that another remedy exists through a civil suit between Petitioner and third parties in a civil court. The issues Petitioner seeks to have addressed in a declaratory ruling are the precise issues that would be addressed by a court of competent jurisdiction. By way of example, Petitioner's request that property ownership be determined by way of declaratory ruling is one issue which could readily be presented and determined by a court of competent jurisdiction at trial. Consideration of the factors articulated by the court in Berberian likewise warrants denial of the Petition.

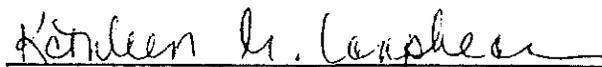
Moreover, the purpose of declaratory judgment actions is to facilitate the termination of controversies. Fireman's Fund Insurance Co. v. E.W. Burman, Inc., 120 R.I. 841, 391 A.2d 99 (1978). Petitioner conceded at oral argument that even if a declaratory ruling were issued as requested, such a ruling would not end the controversy and further litigation in some forum would be required.

Based on the foregoing discussion and after review and consideration of the written documentation and oral arguments of counsel, it is hereby

ORDERED

that the Director declines to issue a declaratory ruling and accordingly the Petition is DENIED.

The foregoing recommended Decision and Order Denying Petitioner's Request for a Declaratory Ruling is entered this 10th day of March, 1995.



Kathleen M. Lanphear
Chief Hearing Officer
Department of Environmental Management
Administrative Adjudication Division
One Capitol Hill, Third Floor
Providence, Rhode Island 02908

Entered as a Final Agency Order this 13th day of March,
1995.



Timothy R. E. Keeney
Director
Department of Environmental Management
9 Hayes Street
Providence, Rhode Island 02908

CERTIFICATION

I hereby certify that I caused a true copy of the within order to be forwarded, via regular mail, postage prepaid to James F. Bartley, Esq., 69 Glenwood Avenue, Pawtucket, RI 02860 and via interoffice mail to Brian A. Wagner, Esq., Office of Legal Services, 9 Hayes Street, Providence, RI 02908 on this 17th day of March, 1995.

