State of Rhode Island and Providence Plantations

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VIA ELECTRONIC FILING AND HAND DELIVERY

Ms. Luly Massaro, Clerk
Rhode Island Public Utilities Commission
89 Jefferson Blvd.
Warwick, RI 02888

Re: **Docket 3876 – Rules and Regulations Governing the Termination of Residential Electric, Gas and Water Utility Service**

Dear Ms. Massaro:

The Department of Attorney General submits the following comments concerning the Commission's proposal to amend the existing Rules and Regulations Governing the Termination of Residential Electric, Gas and Water Utility Services. The Attorney General's comments focus on three of the proposed modifications to the existing rules: (1) Proposed elimination of a customer's right to petition the Public Utilities Commission pursuant to Part VII, Section 1; (2) Proposed elimination of a utility's right to make decisions regarding restoration or preservation of utility services under Part V, Section 4(A); and (3) Proposed elimination of a provision that allows customers to be represented by persons of their choice in the context of Division hearings under Part VI, Section 5(A)(1).[1] The proposed revisions are discussed in order below.

Right of Appeal to the Public Utilities Commission

The Commission proposes to eliminate Part VII, Section 1(A) in its entirety, which afforded any aggrieved customer the right to petition the Commission "when restoration of such service is necessary to protect the health, welfare and safety of the residents of the dwelling to which utility service has been disconnected." While this authority also resides concurrently with the Division under Section 1(B), the proposed

[1] On October 16, 2007 Commission Counsel Cynthia Wilson-Frias, wrote to Attorney General Patrick Lynch requesting a legal opinion concerning the legality of the existing regulation. Given that the Attorney General is appearing in the docket, the Attorney General separately wrote back to Commission Counsel explaining that the position of the Attorney General on that very question would be addressed in the body of these comments. The Attorney General's letter to Counsel Wilson-Frias has been filed with the Commission in the instant Docket.

rule change intends to vest the Division with exclusive authority to order restoration of utility service in times of emergencies.

The Attorney General submits that the proposed rule change should not be adopted for a variety of reasons. First, the volatility in oil and gas markets over the last few years has resulted overall in substantially higher electricity and natural gas rates. The ability of customers to make timely and complete payments for utility services is worsening with the rising trend in energy prices. Now is not the time to trim procedural avenues of redress for consumers that may face dire financial circumstances. Indeed, the plenary authority of the Commission under Title 39 includes the right to consider the petition of any consumer seeking emergency restoration of utility services when warranted by the evidence – subject to the right of the parties to be heard in due time. *Providence Gas Co. v. Public Utilities Commission, 354 A.2d 413 (R.I. 1976).* In the Attorney General's opinion, the Commission regulations should remain transparent about the authority of the Commission to entertain, and conversely the right of aggrieved consumers to file, petitions seeking emergency restoration of utility services.

Utility's Right to Permit Less Stringent Payment Requirements

The Attorney General has considered the Commission's proposal to eliminate the flexibility of a utility to deviate from the payment plan specifications provided under the rules. This change would for the first time eliminate a utility's discretion over one of the most fundamental, traditional roles that the utility possesses: the obligation to consider specific customer requests for maintenance or restoration of utility service along with the obligation to exercise discretion to continue offering utility services to a customer based on the particular circumstances facing that customer. Inherent in that discretion is the ability to set up payment plans that may be less stringent than what is prescribed by the regulations.

The Attorney General believes that all utilities should continue to have the right to make such determinations. The utility is most knowledgeable about the economic and social implications of departing from the strictures of the regulations in certain cases rather than pursuing termination of service in each and every case. The Commission's approach unnecessarily eliminates the flexibility, discretion and responsibility of the utility to safeguard the interests of their respective ratepayers when warranted by unique circumstances. The reasonableness of a utility's exercise of that discretion, and any concomitant ratepayer impacts, must ultimately be measured in the context of the rate setting process prescribed by R.I.G.L § 39-3-11 and § 39-3-12.

***Right of** Consumers to Rely on Non-Lawyers for Assistance During Hearings*

The Commission has proposed to eliminate language in Part VI, Section 5, of the existing regulations that states that during evidentiary hearings, consumers have the "right to appear in person and to retain, and be represented by, *counsel or another person of their choice*." (Emphasized language proposed to be stricken). In place thereof, the Commission proposes language that would make licensed lawyers mandatory, rather than permissive. The Commission is obviously concerned about allowing activities that could be deemed to constitute the unauthorized practice of law in violation of R.I.G.L. § 11-27-5.

In Creditors' Service Corporation et al. v. Cummings, 190 A. 2 (R.I. 1937), the Rhode Island Supreme Court observed: "What constitutes the practice of law is extremely difficult, if not unwise, to even attempt to define, and so the determination of any issue that presents this question must be left to the facts in each particular case." Subsequently, in *Unauthorized Practice of Law Committee v. State of Rhode Island Department of Workers' Compensation, 543 A.2d 662 (R.I. 1988)*, the Supreme Court rendered a decision concerning the use of employee assistants by the Workers' Compensation Commission to assist claimants in preparing for and participating at informal conferences. Again, the Court reiterated, "the practice of law at a given time cannot be easily defined. Nor should it be subject to such rigid and traditional definition as to ignore the public interest." *Id. at 665. See also Unauthorized Practice of Law Committee v. Employers Unity, Inc., 716 P.2d 460 (Colo. 1986)* (holding that there may be certain limited circumstances where it may be appropriate for a layperson to engage in activities that fall under the definition of the "practice of law"); *Henize v. Giles, 490 N.E.2d 585 (Ohio 1986)* (holding that a non-lawyer may appear at certain types of unemployment-compensation hearings).

Since the determination of what constitutes the "practice of law" is determined on a "case-by-case" basis, one is hard-pressed to justify the imposition of a *per se* rule that bars a non-lawyer from rendering any type of assistance in all formal termination hearings that transpire before the Division of Public Utilities and Carriers. This would be particularly true when the claimant is indigent and cannot afford or obtain legal representation or has difficulty communicating with the Hearing Officer due to language or other barriers, *etc.* Of course, only the Rhode Island Supreme Court may decide what constitutes the "practice of law" in the State of Rhode Island. *In re: Steven E. Ferrey, 774 A.2d 62, 64 (R.I. 2001); R.I. Dept. of Workers' Compensation, 543 A.2d at 664.* Thus, only the Supreme Court can determine whether or not the Commission's existing regulation, and the particular circumstances under which non-lawyers assist utility

customers, would qualify as the "practice of law." Consequently, the Commission's proposal to promulgate a *per se* rule that requires licensed Rhode Island attorneys to represent claimants at formal termination hearings may unnecessarily restrict the ability of consumers to draw assistance from non-lawyers under such circumstances as the Supreme Court might not deem to constitute the "practice of law."

The Rhode Island Supreme Court has established the Unauthorized Practice of Law Committee for the purpose of investigating and prosecuting alleged instances of the unauthorized practice of law. The Committee is composed of seven well-respected members of the Rhode Island Bar Association. Should the Commission be so inclined, it could contact the Committee to determine the feasibility of promulgating a Commission rule that strikes the proper balance between the needs of indigent claimants and the legal profession's need to prohibit the unauthorized practice of law in the State of Rhode Island.

Thank you for your consideration of these comments.

Very truly yours,

Paul Roberti
Assistant Attorney General
Chief, Regulatory Unit

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