RHODE ISLAND
PUBLIC UTILITIES COMMISSON

The Narragansett Electric Company d/b/a Rhode Island Energy Proposed FY 2024 Gas Infrastructure, Safety and Reliability Plan 21-Month Filing April 2023 – December 2024 and Proposed FY 2024 Electric Infrastructure Safety and Reliability Plan 21-Month Filing April 2023 – December 2024	))))))))	**Docket Nos. 22-54-NG and 22-53-EL**

DIVISION'S BRIEF IN RESPONSE TO MEMORANDUM FROM COMMISSION DATED JANUARY 3, 2023

I. Introduction

On January 3, 2023, the Rhode Island Public Utilities Commission ("Commission") directed the Rhode Island Division of Public Utilities and Carriers ("Division") and Rhode Island Energy ("Company" or "RIE") to brief the following issue:

> *How are the Proposed 21-month plans that span two fiscal years (FY 2023 and FY 2024) filed as the FY 2024 Proposed Electric Infrastructure Safety and Reliability Plan and the Proposed FY 2024 Gas Infrastructure Safety and Reliability Plan made by Rhode Island Energy on December 22, 2022 consistent with the statutory requirement to file a spending plan for the following fiscal year?*

At the outset, it is important to observe that the Commission, itself, has recognized that a submitted Infrastructure Safety and Reliability ("ISR") Plan is "for each fiscal year and an annual rate reconciliation mechanism that includes a reconcilable allowance for the anticipated capital investments and other spending pursuant to an annual pre-approved budget."[1] To carry out its

[1] *See e.g., In Re: The Narragansett Electric Company d/b/a National Grid Gas Infrastructure, Safety & Reliability Plan FY 2023*, Docket No. 5210 (Notice of Public Hearing).

statutory function to this end, the Commission sets ISR factors that seek to recover "the incremental revenue requirement" for the "proposed spending" reflected in the annual budgets.[2] The incremental revenue requirement then is reconciled on a 12-month basis.[3] At no time since the initiation of ISR process, that the Division can recollect, has the Division ever consulted with the Company in an ISR docket about plans or budgets other than for the prospective fiscal year. Nor can the Division recollect an ISR docket in which the Commission has ever examined and/or approved plans or budgets beyond those for the prospective fiscal year or set gas or electric ISR factors for a period greater than 12 months in duration.

With this history as a backdrop, the pending filing, as the Commission inquires, raises the issue of whether the Company's filing runs afoul of R.I. Gen. Laws § 39-1-27.7.1(d). Having raised a similar concern with the Company early on in the gas and electric ISR consultation process, the Division understood from the Company that it interpreted the filings as compliant with the ISR statute. The Company further opined that the pending filings were a "one off" event intended to transition the ISR review process to a calendar year basis.[4] As the Division was and is statutorily obligated to cooperate in good faith with the Company, rather than object to the filing at the outset, the Division took the position that it would attempt to work with the Company to negotiate a resolution to as much of the filings as the Division believed was possible. Unfortunately, except for an agreement in principle regarding accumulated deferred income taxes, a comprehensive settlement of the gas and electric ISR dockets, unlike in past years, proved futile.

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[2] *Id.*

[3] *Id.*

[4] Specifically, RIE seeks to transition the ISR process to a fiscal year basis: "January 1 – December 31." *See* 21-Month Filing, n. 2.

Despite disagreement between the Company and the Division, subject to certain conditions and limitations to preserve the integrity of the gas and electric ISR consultation, review and approval process, the Division believes that a path forward still exists for the Commission to adjudicate the pending filings. This Brief first will attempt to address the Commission's inquiry. It will then provide a recommended framework for the Commission to adjudicate the Company's pending 21-month gas and electric ISR plans.

II. Analysis

It is well settled that when the language of a statute is "clear and unambiguous," the Rhode Island Supreme Court "interpret[s] the statute literally and must give the words of the statute their plain and ordinary meanings."[5] Having done that, the Supreme Court has held its "work of judicial interpretation is at an end."[6]

Subsection (d) of R.I. Gen. Laws § 39-1-27.7.1(d), in pertinent part, provides:

> (d) Prior to the beginning of *each fiscal year* gas and electric distribution companies shall consult with the division of public utilities and carriers regarding their infrastructure, safety and reliability spending plan for the *following fiscal year* addressing the following categories:
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> (1) Capital spending on infrastructure;
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> (2) For electric distribution companies, operation and maintenance expenses on vegetation management;
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> (3) For electric distribution companies, operation and maintenance expenses on system inspection, including expenses from expected resulting repairs; and

[5] *See e.g., Sindelar v. Leguia*, 750 A.2d 967, 971 (R.I. 2000) (per curiam); *Providence & Worcester Railroad Co. v. Pine*, 729 A.2d 202, 208 (R.I.1999).

[6] *See e.g., DeAngelis v. Rhode Island Ethics Commission, 656 A.2d 967, 969 (R.I. 1995).*

> (4) Any other costs relating to maintaining safety and reliability that are mutually agreed upon by the division and the company. (Emphasis added). [7]

R.I. Gen. Laws § 39-1-27.7.1(d) sets out a year-by-year development, review, and approval process for the Company's gas and electric ISR plans. The word "each" preceding the words "fiscal year" clearly and unambiguously reflects that the Division-Company consultation process is to take place each and every year. The consultation process, moreover, is limited to review of "the spending plan for the following fiscal year" and proposed plan costs for the "prospective fiscal year." In accordance with long-standing agency practice, the Commission sets gas and electric ISR factors prospectively on a 12-month basis to allow the Company to recover its incremental revenue requirements for that period, and then reconciles the recovered amounts retrospectively for the same 12-month period by adjusting the previously set ISR factors.[8]

Consistent with this practice, the meaning of the words "following fiscal year" or "prospective fiscal year" in R.I. Gen. Laws § 39-1-27.7.1(d) best aligns with the period of April through December of CY 2023. This 9-month period represents the "prospective" or "following fiscal year" (FY 2024) for the "21-month Filing" RIE made in December, 2022 and also would have been the first 9-months of National Grid's "following" or "prospective fiscal year" (FY 2024) had Narragansett not been sold to PPL in May of 2022. This period also dovetails nicely with the directives of R.I. Gen. Laws § 39-1-27.7.1(c) which emphasize the "annual" nature of the ISR plan

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[7] The remainder of Subsection (d) provides: "The distribution company shall submit a plan to the division and the division shall cooperate in good faith to reach an agreement on a proposed plan for these categories of costs for the *prospective fiscal year* within sixty (60) days. To the extent the that the company and the division mutually agree on a plan, such plan shall be filed with the commission for review and approval within ninety (90) days. If the company and the division cannot agree on a plan, the company shall file a proposed plan with the commission and the commission shall review and, if the investments and spending are found to be reasonably needed to maintain safe and reliable distribution service over the short and long term, approve the plan within ninety (90) days." (Emphasis added).

[8] *See e.g., The Narragansett Electric Company, d/b/a National Grid Gas Infrastructure, Safety, and Reliability Plan FY 2023 Proposal*, Docket No. 5210, Order No. 24452 at 21 (2022).

"for each fiscal year," along with the "annual" nature of the "rate reconciliation pre-approved budget" as developed in accordance with subsection (d).[9]

Nowhere is the Division authorized by the statute's language to skip the annual consultation process. Nor is the Division anywhere authorized to attempt to reach an agreement regarding multiple fiscal year gas or electric ISR budgets for Company investments made in multiple fiscal years. Similarly, nowhere is the Commission authorized to review and approve a gas or electric ISR plan for the year beyond the "following fiscal year" or set gas or electric ISR factors beyond the 12-month period of the "prospective fiscal year."

RIPUC NG-GAS No. 101, § 3.2.1 provides further color as to how the Company, the Division, and the Commission all believed R.I. Gen. Laws § 39-1-27.7.1(d) should be construed. That tariff sections provides as follows:

> **3.2.1 <u>Infrastructure, Safety and Reliability Plan:</u>**
>
> In compliance with R.I.G.L. Section 39-1-27.7.1, no later than January 1 of <u>*each year*</u>, the Company shall submit to the PUC a Gas Infrastructure, Safety, and Reliability Plan (Gas ISR Plan) <u>*for the upcoming fiscal year (April to March*</u> for review and approval within 90 days). The Gas ISR Plan shall <u>include the *upcoming fiscal year's* forecasted capital investment</u> on its gas distribution system infrastructure and may include any other costs relating to maintaining safety and reliability that have been mutually agreed upon by the Division and Company." (Emphasis added).

[9] It should be noted as well that the Commission has applied ratemaking principles that are applicable in general rate proceedings to the gas and electric ISR dockets. For example, the Commission has applied the Used and Useful Principle to prohibit a utility from including leak prone pipe in rate base before it is used and useful. *E.g., The Narragansett Electric Company, d/b/a National Grid Gas Infrastructure, Safety, and Reliability Plan FY 2022 Proposal*, Docket No. 5210, Order No. 24541 at 19-20 (2022). *See also The Narragansett Electric Company, d/b/a National Grid Gas Infrastructure, Safety, and Reliability Plan FY 2022 Proposal*, Docket No. 5099, Order No. 24042 at 18 (2021) (directing the Company to commence using the plant-in-service methodology for the Gas ISR that is currently employed for the Electric ISR based on the Used and Useful Principle). Rule 5.6 of the Commission's *Additional Requirements for Filings of General Rate Schedule Changes* provides "[t]he rate year is the *twelve-month* period for which new rates are designed to recover the proposed cost of service." (Emphasis added). By proposing 21-month factors to recover costs for two budgets (CY 2023 and CY 2024) over the period April 1, 2023, through December 31, 2024, the Company is proposing a 21-month rate year, well beyond the maximum 12-month period the Commission has consistently used for setting ISR factors. The Company's 21-month ISR plans do not comply with Rule 5.6.

The language of the Company's gas tariff reflects virtually identical requirements to the ISR statute. Again, this tariff language must be given its plain and ordinary meaning.[10] Under § 3.2.1, the Company must submit its gas ISR plan to the Commission no later than January of "each year." Thus, the Company is not permitted to skip submission of the ISR Plan in any year. Further, each ISR plan that is submitted must be for the "upcoming fiscal year." For similar reasons to those discussed with respect to the ISR statute, this period best aligns with April through December of CY 2023. Even more specifically, however, this period is defined in the gas ISR tariff as the 12-month "April to March" of the "upcoming fiscal year." The 9-month period (April to December of CY 2023) represents the closest analog to this defined fiscal year while maintaining consistency with past Commission and accepted ratemaking practice.

Based on the foregoing explanation, in the Division's opinion, "the proposed 21-month plan with 21-month factors, as filed, [are] not consistent with the statutory requirement[s] to file a spending plan for the following fiscal year."[11] The Company's filings do not comply with § 39-1-27.7.1(d) because it requires the Division to consult with the Company and the Commission to review and approve multiple gas and electric ISR budgets in CY 2023, without an appropriate review and approval process in CY 2023 for the CY 2024 plan and budget. The filings further do not comply with § 39-1-27.7.1(d) because it requires the Commission to set gas and electric ISR factors, the duration of which last longer than 12-months (*i.e.*, 21-months) to recover ISR investments made in multiple fiscal years (CY 2023 and CY 2024).

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[10] *See e.g., Sindelar* 750 A.2d at 971; *Union Village Development Associates v. Town of North Smithfield Zoning Board of Review,* 738 A.2d 1084, 1086 (R.I. 1999).

[11] PUC Memorandum dated January 3, 2023.

In addition to non-compliance with the clear and unambiguous language of the ISR statute, adopting 21-month gas and electric ISR factors derived from combined revenue requirements based on multiple fiscal year budgets improperly requires customers to pay for CY 2024 projects prematurely,[12] and may not promote the best rate design. While Division discovery on the last issue is outstanding, customers may be better able to mitigate the bill impacts in view of their seasonal consumption if the Commission adopts 9-month factors for CY 2023 in the ISR proceedings, and then in CY 2023, after examining the recommended filings, adopts 12-month factors to commence in CY 2024.

III. <u>Recommended Framework for Adjudication of the Pending Filing</u>

Despite non-compliance with the ISR statute, the Division believes sufficient information exists in the Company's pending filing for the Commission to adjudicate Docket Nos. 22-54-NG and 22-53-EL provided that the scope of the Commission's review is appropriately narrowed to accord with the aforementioned interpretations of the ISR statute and the other ratemaking considerations. Under this more narrowed scope of review, the Commission could adjudicate the Company's filings subject to ensuring the following requirements and conditions are satisfied:

Docket Nos. 22-54-NG:

(1) The Commission only reviews the proposed 9-month CY 2023 budget;

(2) The Commission only sets 9-month ISR factors for CY 2023 based on its review of the 9-month CY 2023 budget and revenue requirements derived from that budget;

(3) The Commission requires the Company to file an updated Calendar Year 2024 ISR Plan by September 1, 2023;

[12] *See The Narragansett Electric Company, d/b/a National Grid Gas Infrastructure, Safety, and Reliability Plan FY 2022 Proposal*, Docket No. 5099, Order No. 24042 at 18 (2021) (where the Commission held that "allowing the utility to commence recovery of costs for projects not yet in service conflicts with long-standing ratemaking precedent . . . that ratepayers should not be required to pay for plant that is not yet being used in the rendition of services").

(4) The Commission establishes a reasonable procedural schedule with expedited discovery for the Commission and Division to review and consider the Company's compliance filing; and

(5) The Commission establishes a budget and 12-month ISR factors for CY 2024 only after the Commission has had an opportunity to review the compliance filing and a Division recommendation for that filing.

Docket Nos. 22-53-EL:

(1) The Commission only reviews the proposed 9-month CY 2023 budget;

(2) The Commission only sets 9-month ISR factors for CY 2023 based on its review of the 9-month CY 2023 budget and revenue requirements derived from that budget;

(3) The Commission require the Company to file an updated Calendar Year 2024 ISR Plan in accordance with the statutory schedule as set forth in R.I. Gen. Laws § 39-1-27.7.1(d).

Respectfully submitted, as to Docket 22-54-NG

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CERTIFICATE OF SERVICE

I certify that a copy of the within Brief was forwarded by e-mail to the Service Lists in Docket Nos. 22-54-NG and 22-53-EL on the 17th of January, 2023.

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