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Peter F. Neronha
Attorney General

March 24, 2023

Via Electronic Mail

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

RE: *PUC Dockets: 22-53-EL Proposed FY 2024 Electric Infrastructure Safety and Reliability Plan and 22-54-NG Proposed FY 2024 Gas Infrastructure Safety and Reliability Plan*

Dear Ms. Massaro:

On behalf of the Division of Public Utilities and Carriers, please accept for filing the attached Brief in Response to Memorandum dated March 10, 2023, regarding the above reference docket.

Thank you for your attention to this submission.

Very truly yours,

/s/ Gregory S. Schultz

Gregory S. Schultz
Special Assistant Attorney General
On behalf of the Division of Public Utilities and Carriers

Enclosure

cc: 22-53-EL & 22-54-NG Service Lists
Linda George, Esq., Division Administrator
John Spirito, Esq., Division Deputy Administrator
Christy Hetherington, Esq., Division Chief Legal Counsel
Paul Roberti, Esq., Division Chief Economic and Policy Analyst

**RHODE ISLAND
PUBLIC UTILITIES COMMISSON**

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

**DIVISION’S BRIEF IN RESPONSE TO MEMORANDUM
FROM COMMISSION DATED MARCH 10, 2023**

I. INTRODUCTION

The Division of Public Utilities and Carriers (“Division”) submits this brief in response to the March 10, 2023 Memorandum from the Rhode Island Public Utilities Commission (“Commission”) directing the parties in Docket Nos. 22-54-NG and 22-53-EL to submit briefs addressing the following legal question:

[I]f there are capital projects and associated expenses occurring in a given ISR fiscal year that were not approved by the Commission in the ISR filing pertaining to the that ISR fiscal year affect, to what extent does the absence of pre-approval affect the right and/or timing of recovery of the associated revenue requirement in the ISR-related rates?

The Commission requested that the following facts be assumed:

- (a) The capital investment was not included in the initial ISR filing for the applicable year and, therefore, was never pre-approved;
- (b) The capital investment decision was made after the ISR plan was approved;
- (c) The capital investment was made during the fiscal year to which the initial ISR filing applied;
- (d) The capital project relating to the investment was placed in service during that fiscal year;
- (e) The capital investment was prudent and addressed safety and reliability (and no party disputes the reasonableness of the investment); and

- (f) The capital investment would have been approved by the Commission if it had been timely included in the initial ISR filing for the applicable fiscal year.

The relevant provision of the Rhode Island General Laws pertaining to the instant Infrastructure, Safety, and Reliability (“ISR”) question appears in R.I. Gen. Laws § 39-1-27.7.1(c), which, in pertinent part, provides:

- (c) The [ISR] proposals shall contain the following features and components:

(1) A revenue decoupling reconciliation mechanism [not relevant to the ISR] . . . ; and

(2) An annual infrastructure, safety, and reliability spending plan 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 the annual pre-approved budget** as developed in accordance with subsection (d) of this section. (Emphasis added).

In addition to the requirements of § 39-1-27.7.1(c), subsection (b) states in part that the proposed ISR plan shall be “consistent with the intent and objectives contained in subsection (a) of this section. Actions taken by the Commission in the exercise of its ratemaking authority for electric and gas rate cases shall be within the norm of industry standards and recognize the need to maintain the financial health of the distribution company as a stand-alone entity in Rhode Island.”

Notwithstanding the statutory requirements of § 39-1-27.7.1(c)(2), the Rhode Island Supreme Court has recognized certain exceptions to the long-standing principle that prohibits retroactive ratemaking that results in future payments for past expenses.”¹ Using these exceptions, the Commission has approved many tariff provisions that have allowed for retroactive ratemaking.² The Rhode Island Supreme Court has further recognized that “[t]he statutory sentiments [of R.I. Gen. Laws §§ 39-1-1 and 39-1-38] represent a clear legislative intent to grant

¹ *In Re Providence Water Supply Board’s Application to Change Rate Schedules*, 989 A.2d 110, 115 (R.I. 2010).

² *See e.g., Narragansett Electric Company v. Burke*, 415 A.2d 177, 179 (R.I. 1980) (exception for statutory changes affecting costs outside of the utility’s reasonable control).

the commission broad powers as it seeks to establish a system of rates which will be just and equitable to all concerned including the utility and its customers.³

Ultimately, the Commission should be guided by the Rhode Island Supreme Court's directive that "[t]he specter of retroactive ratemaking must not be viewed as a talismanic inhibition against the application of principles based upon equity and common sense."⁴

II. Division's Responses

The Division responds to the Commission's *Question's to Be Briefed* in the Commission's March 10, 2023 Memorandum as follows:

- (1) If a capital investment is made in a project during a given fiscal year which was not approved by the Commission in the relevant ISR filing pertaining to that same fiscal year, is the utility entitled to or prohibited from recovering the first fiscal year revenue requirement for such investment through the reconciliation, or must the utility experience regulatory lag for at least the first year's revenue requirement recovery?**

Division's Response:

The Commission's questions revolve around the statutory interpretation of R.I. Gen. Laws § 39-1-27.7.1(c)(2), especially the meaning of the phrase "anticipated capital investments and other spending"

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 However, the Court "give[s] deference to an agency's interpretation of an ambiguous statute that it has been charged with administering and enforcing, provided that the agency's construction is neither clearly erroneous nor unauthorized."⁶ "This level

³ *Rhode Island Chamber of Commerce Federation v. Burke*, 443 A.2d 1236, 1237 (R.I. 1982).

⁴ *Roberts v. Narragansett Electric Co.*, 470 A.2d 215, 217 (R.I.1984).

⁵ See e.g., *In re Narragansett Bay Commission General Rate Filing*, 808 A.2d 631, 636 (R.I. 2002) *Sindelar v. Leguia*, 750 A.2d 967, 971 (R.I. 2000) (per curium).

⁶ *In re Review of PROPOSED TOWN OF NEW SHOREHAM PROJECT*, 25 A.3d 482, 505 (R.I. 2002).

of deference is applied even when the agency's interpretation is not the only permissible interpretation that could be applied.”⁷

The Division’s response only contemplates discretionary projects since as the term states the utility has discretion in the timing, size and implementation of discretionary projects as opposed to non-discretionary project that demand immediate utility attention. Based on the plain language of the Statute, the utility is not “entitled” to recovery of the revenue requirement for non-approved discretionary capital investments through the reconciliation. Doing so would make the entire well established ISR process meaningless.

The Division emphasizes that a pre-approved ISR Plan establishes anticipated capital investment, comprised of projects and programs in discrete spending categories. Each project or program has a forecasted spend that generates the pre-approved budget. When implementing an ISR Plan it is anticipated that there may be a reasonable level of over or underspending on any individual program or project within the capital investment categories (“variance”) and that is why there is a reconciliation process allowed for under the law.

The Division provides the below responses to the last portion of question (1) which reads: **“or must the utility experience regulatory lag for at least the first year’s revenue requirement recovery”** and to questions (2) through (4) which read as follows:

(2) Is the utility entitled to obtain recovery in the subsequent fiscal year ISR filing for the prospective revenue requirement for such project which was implemented in the prior fiscal year if it is disclosed and included in the spending plan, or does the utility have to experience regulatory lag until the next distribution rate case before seeking recovery of any prospective revenue requirement because it was never pre-approved in an ISR plan filing?

(3) Does the Commission have the discretion (but not the obligation) to allow recovery of the revenue requirement prospectively or retroactively

⁷ *Id.* at 506.

through the reconciliation if the Commission finds it reasonable to allow it?

(4) Does the Commission have the discretion (but not the obligation) to allow recovery of the revenue requirement prospectively or retroactively through the approval of an ISR spending plan in the following fiscal year if the Commission finds it reasonable to allow it?

Division's Response:

Under the Commission's enabling legislation, especially R.I. Gen. Laws §§ 39-1-1 and 39-1-38, and associated case law, the Commission is granted broad regulatory authority, which allows for the discretion to implement any of the alternative ratemaking methods outlined in the above referenced questions.⁸

Respectfully submitted, as to Dockets
22-54-NG and 22-53-EL

DIVISION OF PUBLIC UTILITIES
AND CARRIERS
By Its Attorney,

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⁸ *Rhode Island Chamber of Commerce Federation v. Burke*, 443 A.2d at 1237. See also *Roberts v. Narragansett Electric Co.*, 470 A.2d at 217.

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 24th of March, 2023.

/s/ Ellen Golde

Ellen Golde