

The Narragansett Electric Company
d/b/a Rhode Island Energy
280 Melrose Street
Providence, RI 02907



March 24, 2023

VIA ELECTRONIC MAIL AND HAND DELIVERY

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

RE: Docket No. 22-53-EL - Proposed FY 2024 Electric Infrastructure, Safety, and Reliability Plan

Docket No. 22-54-NG – Proposed FY 2024 Gas Infrastructure, Safety, and Reliability Plan

The Narragansett Electric Company’s Joint Brief in Response to PUC Memorandum dated March 10, 2023

Dear Ms. Massaro:

On behalf of The Narragansett Electric Company d/b/a Rhode Island Energy (the “Company”), enclosed is the Company’s joint brief in response to the Public Utilities Commission (“PUC”) Memorandum dated March 10, 2023. The joint brief addresses certain legal issues relating to the interpretation of the statutory provisions in Rhode Island General Laws which established the regulatory process for the Infrastructure, Safety and Reliability (“ISR”) program for both Rhode Island Energy’s electric and gas distribution businesses.

Thank you for your attention to this transmittal. If you have any questions or concerns, please do not hesitate to contact Andrew Marcaccio at 401-784-4263 or Jennifer Brooks Hutchinson at 401-784-7288.

Sincerely,

A handwritten signature in blue ink, appearing to read "Andrew S. Marcaccio".

Andrew S. Marcaccio

A handwritten signature in blue ink, appearing to read "Jennifer Brooks Hutchinson".

Jennifer Brooks Hutchinson

Enclosures

cc: Docket No. 22-53-EL Service List
Docket No. 22-54-NG Service List

STATE OF RHODE ISLAND

RHODE ISLAND PUBLIC UTILITIES COMMISSION

In re: The Narragansett Electric Company)
d/b/a Rhode Island Energy’s Proposed FY) Docket No. 22-53-EL
2024 Electric Infrastructure Safety and)
Reliability Plan)

In re: The Narragansett Electric Company)
d/b/a Rhode Island Energy’s Proposed FY) Docket No. 22-54-NG
2024 Gas Infrastructure Safety and)
Reliability Plan)

**THE NARRAGANSETT ELECTRIC COMPANY D/B/A RHODE ISLAND
ENERGY’S BRIEF REGARDING CERTAIN LEGAL QUESTIONS POSED
BY THE PUBLIC UTILITIES COMMISSION**

The Narragansett Electric Company d/b/a Rhode Island Energy (“Rhode Island Energy” or the “Company”) submits this brief in response to certain legal questions posed by the Rhode Island Public Utilities Commission (the “Commission”) in a Memorandum dated March 10, 2023 (the “Memorandum”). The Memorandum instructed the parties in the dockets for both the Company’s proposed fiscal year (“FY”) 2024 Electric Infrastructure, Safety and Reliability (“ISR”) Plan, Docket No. 22-53-EL (the “Electric ISR Plan”), and proposed FY 2024 Gas Infrastructure, Safety and Reliability Plan, Docket No. 22-54-NG (the “Gas ISR Plan”), to address a series of legal questions. These questions relate to cost recovery for investments that meet the legal standard as reasonably needed to maintain safe and reliable distribution service in the short and long term, but that were not specifically included among the anticipated capital investments presented as part of the ISR spending plan approved by the Commission. For the reasons below, recovery through rates of the expenses incurred in the interest of safety and

reliability under the circumstances described in the Memorandum is permissible, reasonably needed for the maintenance of safety and reliability in the short and long term, and consistent with historic ISR practice. This conclusion is consistent with general ratemaking principles and their specific application in the ISR plan context.

First, R.I. Gen. Laws § 39-1-27.7.1 (the “Revenue Decoupling Statute”), which created the ISR plan process, requires a utility to demonstrate that its proposed investments and spending are “reasonably needed to maintain safe and reliable distribution service over the short and long term.” *Id.* The utility must make this showing annually with respect to each ISR plan. If the utility meets this standard, the Commission “shall” approve “the plan.” *Id.* Per the statute, the Commission approves the plan, not the individual investments. When the utility files its annual rate-reconciliation mechanism, it must include a reconcilable allowance for “anticipated” capital investments pursuant to the “pre-approved budget” – not pre-approved specific investments. So long as the actual investments are consistent with the approved ISR plan, the utility may recover the costs of those investments through the ISR reconciliation mechanism.

Of course, meaningful review of a proposed ISR budget requires some specificity with respect to major programs or investments. Without this, the Commission and the Rhode Island Division of Public Utilities and Carriers (the “Division”) would be asked to evaluate gross dollar amounts in a vacuum. Ultimately, however, ISR plans are forecasts. The very existence of an ISR reconciliation mechanism contemplates variances from the specific investments that might be included in any year’s ISR plan.

Second, as the Commission has articulated in prior orders addressing ISR plans, it retains authority to review the Company’s actual investments for reasonableness and prudence at the time of the rate reconciliation filing. Although ISR plan approval may indicate “directionally”

that a particular investment is appropriate and prudent, *see infra* Section III.A.2, the Commission may revisit reasonableness and prudence when the investment is actually placed in service and all the facts regarding the investment are known. Accordingly, the utility bears the risk that it will not be able to recover costs for investments that it makes should the Commission decide that the Company's investments were not reasonable and prudent.

Third, under well-established Rhode Island law, the utility has responsibility for the management and operation of its business. Although the Commission must regulate utilities to ensure fair and reasonable rates, neither the Commission nor the Division has the authority to manage the utility or to exercise the prerogatives of ownership. *See infra* Section III.A.3. Interpreting the ISR plan process to require Commission preapproval of each individual investment without regard for the utility's management obligations throughout the subsequent year, or to interfere with the utility's ability to sequence investments or adjust to real-world conditions, would interfere with the utility's management prerogatives and contravene this well-established legal principle.

For these reasons and as outlined below, the Company answers the briefing questions as follows:

- 1) A utility is entitled to recover the first fiscal year revenue requirement through reconciliation for a capital investment placed into service during a given fiscal year but not approved by the Commission in the relevant ISR plan filing where that investment is consistent with the approved budget for the relevant ISR plan filing.
- 2) The Company has two responses to this question. If the question intends to refer to investments that were included in the prior fiscal year's reconciliation (as contemplated by Question No. 1), then a utility is entitled to obtain recovery in the subsequent fiscal year ISR plan filing for the prospective revenue requirement for a project implemented in the prior fiscal year, and the utility need not wait to seek recovery until the next base distribution rate case (this is referred to below as Scenario 1). If the question intends to refer to the unusual circumstance in which the utility

placed into service a project necessary for safety and reliability that was not foreseen at the time of the prior ISR plan approval, and that is not consistent with that approved ISR plan, then the utility is not entitled to recovery, but the Commission has discretion to allow recovery (this is referred to below as Scenario 2).

- 3) The Revenue Decoupling Statute sets forth a mandatory process upon the utility showing that investments and spending are “reasonably needed to maintain safe and reliable distribution service over the short and long term,” and the Commission usually does not have discretion to allow or disallow recovery of the revenue requirement for an investment through reconciliation once the utility has satisfied this standard. The Commission has the discretion to determine whether the capital investment is consistent with the approved spending plan, and therefore appropriate for rate recovery through the ISR process, and even if the investment is inconsistent, the Commission has the discretion to allow or disallow recovery pursuant to general ratemaking principles.
- 4) The Commission usually does not have discretion to allow or disallow recovery of the revenue requirement through the approval of an ISR spending plan once the utility has satisfied the “reasonably needed” standard. Under Scenario 1, the Commission would not have discretion to allow or disallow recovery. In the unusual circumstance of Scenario 2, the Commission would have discretion to allow recovery pursuant to general ratemaking principles.

I. BACKGROUND

A. The Company’s Proposed Cost Recovery for Reclosers

On December 22, 2022, the Company filed its Electric ISR Plan with the Commission.

As required by the Revenue Decoupling Statute, the Electric ISR Plan addressed the Company’s proposal for 1) capital spending on electric infrastructure; 2) operation and maintenance (“O&M”) expenses for vegetation management; 3) O&M expenses for system inspection; and 4) other costs related to maintaining the safety and reliability of the electric distribution system.¹

¹ The Company originally proposed a 21-month Electric ISR Plan to gain alignment with Rhode Island Energy’s new fiscal year. The 21-month Electric ISR Plan proposed \$327.8 million in capital spending, \$24.0 million for the Company’s Vegetation Management Program, and \$5.6 million for the Company’s Inspection and Maintenance Plan and other O&M expenses. On January 20, 2023, the Commission directed the Company submit a supplemental budget for April 1, 2023, through March 31, 2024, and supplemental revenue requirements and bill impacts for April 1, 2023, through March 31, 2024. The Company submitted its Supplemental Budget on January 27, 2023, and its Supplemental Revenue Requirement on February 3, 2023.

During FY 2023, after the Commission approved the Company's FY 2023 Electric ISR Plan, the Company installed 22 new reclosers on the electric distribution system. Although the Company did not specifically identify those reclosers in the FY 2023 Electric ISR Plan, the Company determined that they were reasonably needed to maintain safe and reliable distribution service over the short and long term. The Company therefore invested in and installed the reclosers under the "*Blanket Projects*" category of the approved System Capacity and Performance portion of the spending plan. *See* FY 2023 Electric ISR Plan at Bates pages 73-74, *approved by* Order No. 24607. Each of the 22 reclosers was advanced to resolve system and equipment loading and reliability issues, and the work requests for each recloser had a value of less than \$100,000. Accordingly, these recloser investments were consistent with the approved FY 2023 Electric ISR Plan. The Commission has identified the Company's intent to seek recovery for the first fiscal year revenue requirement for these reclosers through the FY 2023 ISR rate-reconciliation mechanism as a driver of the briefing questions presented in the Memorandum.

B. The Company's Proposed Cost Recovery for Certain Equipment Costs Identified in the FY 2024 Gas ISR Plan, but moved to the FY 2023 Gas ISR Reconciliation Filing

On December 22, 2022, the Company also filed its Gas ISR Plan with the Commission. In it, the Company described its plan to maintain and upgrade the Company's gas delivery system by proactively replacing leak-prone pipe; upgrading the gas delivery system's custody transfer stations, pressure regulating facilities, and peak shaving plants; responding to emergency leak situations; and addressing infrastructure conflicts that arise out of state, municipal, and third-party construction projects.²

² As with the Electric ISR Plan, the Company proposed a 21-month plan with a total of \$388.53 million in capital investment. On January 20, 2023, the Commission directed the Company submit a supplemental budget for April 1,

The Company's FY 2024 Gas ISR Plan included spending related to certain pieces of equipment³ required for maintaining safety and reliability. The Company intended to purchase the equipment and place it into service in FY 2024. Because of ongoing global supply chain delays, the Company ordered the tool in advance of submitting the FY 2024 Gas ISR Plan. The tool arrived sooner than anticipated, and the Company placed it into service during FY 2023. As a result, the Company removed it from the proposed budget in the FY 2024 Gas ISR Plan and indicated that it intends to request cost recovery for this equipment in the FY 2023 Gas ISR rate reconciliation filing. The Commission has identified this plan to seek cost recovery through the FY 2023 Gas ISR rate reconciliation filing as a driver of the briefing questions presented in the Memorandum.

C. The Company's Standard Procedure for Developing the ISR Plan Revenue Requirement and Reconciliation Factor

The Company follows a standard and consistent procedure with respect to proposing the ISR plan revenue requirement and subsequently reconciling it through the reconciliation filing. The Company provides a brief overview of that process as context for its responses below.

The ISR plan contains a cumulative revenue requirement and consists of essentially three components. First, it includes a revenue requirement for each fiscal year dating back to the Company's last base distribution rate case and through the most recent fiscal year that has been through the ISR reconciliation process. This reflects the actual value of plant-in-service. For example, the Company's FY 2024 ISR Plan revenue requirement includes actual amounts in-service for FY 2018 (approval of the last base rate case) through FY 2022 (the last year for

2023, through March 31, 2024, and supplemental revenue requirements and bill impacts for April 1, 2023, through March 31, 2024. The Company submitted its Supplemental Budget on January 27, 2023, and its Supplemental Revenue Requirement on February 3, 2023.

³ The pieces of equipment are the T.D. Williamson ProStopp and a specialty saw.

which the Company has filed, and the Commission has approved, an ISR reconciliation mechanism). Second, the revenue requirement includes the approved revenue requirement from the most recent ISR plan. For example, the Company's FY 2024 ISR Plan revenue requirement includes the revenue requirement approved by the Commission in the FY 2023 ISR Plan. Third, the revenue requirement includes the proposed revenue requirement for the upcoming fiscal year. For example, the Company's FY 2024 ISR Plan revenue requirement includes the revenue requirement proposed for FY 2024. The FY 2024 ISR Plan's total revenue requirement therefore constitutes the sum of these three components.

The ISR Reconciliation involves comparing that proposed total revenue requirement to the revenue requirement for what actually went into service in the fiscal year. For example, the Company's FY 2023 reconciliation will look at what investments were actually placed in service in FY 2023 to determine the actual revenue requirement for FY 2023.⁴ The Company will also look at actual energy sales compared to what was forecasted. The Company then proposes an adjustment to rates based on the combination of those two factors. In submitting its ISR reconciliation mechanism to the Commission, the Company will identify any differences from the approved ISR plan that exceed certain thresholds established by the existing reconciliation mechanism. These variances, and the reasons for them, are generally reported throughout a fiscal year through the Company's quarterly ISR plan reports.

Once the Commission approves the reconciliation filing, which reflects what investments were actually placed in service during the prior FY, that value becomes fixed in future year's ISR plans and reconciliations. In this example, the capital placed in-service during FY 2023 used

⁴ As a standard convention, the Company assumes that all investments are placed into service halfway through the year. Without this simplifying assumption, calculating the revenue requirement would be prohibitively time consuming.

to calculate the revenue requirement will be fixed, and the line item for FY 2023 investments that carries forward into the next proposed ISR plan (FY 2025) and beyond until the next base distribution rate case will reflect changes in the revenue requirement resulting from depreciation and taxes but not changes to capital investment amounts.

II. LEGAL STANDARD

The Revenue Decoupling Statute requires gas and electric distribution companies to consult with the Division and submit to the Commission a budget for the company's upcoming fiscal year that addresses spending for infrastructure, safety, and reliability:

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:

- 1) Capital spending on utility infrastructure;
- 2) For electric-distribution companies, operation and maintenance expenses on vegetation management;
- 3) For electric-distribution companies, operation and maintenance expenses on system inspection, including expenses from expected resulting repairs; and
- 4) Any other costs relating to maintaining safety and reliability that are mutually agreed upon by the division and the company.

R.I. Gen. Laws § 39-1-27.7.1(d). The utilities first must submit the ISR plan to the Division to attempt to reach agreement on a plan. *Id.* In the absence of an agreement, the utility “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.” *Id.*

In addition to the ISR plan, gas and electric distribution companies also must submit to the Commission “an annual rate-reconciliation mechanism” in connection with the ISR plan. R.I. Gen. Laws § 39-1-27.7.1(c)(2). This mechanism must include “a reconcilable allowance for the

anticipated capital investments and other spending pursuant to the annual pre-approved budget as developed in accordance with” the process outlined above. *Id.*

III. LEGAL ANALYSIS

A. Overall Assessment

The Company’s responses to the specific briefing questions reflect an overarching assessment of the legal framework applicable to the ISR process, the overall regulatory backdrop in which it is situated, and a historical perspective on the past practices of the Commission, the Division, and the Company in ISR plan and reconciliation proceedings. The Company’s responses below incorporate the following three legal conclusions: 1) the utility has the burden to demonstrate that the investments and spending contained in its ISR plan are “reasonably needed to maintain safe and reliable distribution service over the short and long term”; 2) the utility’s ISR plan investments are subject to review by the Commission for reasonableness and prudence at the time of the reconciliation filing; and 3) the utility has responsibility for day-to-day operation of the company.

1. ISR Investments Must Be “Reasonably Needed to Maintain Safe and Reliable Distribution Service Over the Short and Long Term”

In any ISR plan proceeding, the utility has the burden to demonstrate to the Commission that the proposed investments and spending are “reasonably needed to maintain safe and reliable distribution service over the short and long term.” R.I. Gen. Laws § 39-1-27.7.1(d). If the utility successfully makes this showing, then the Commission “shall” “approve the plan.” *Id.* This statutory mandate has two important ramifications.

First, every time the utility submits an ISR plan, the utility must meet this standard, whether it presents a plan agreed-upon with the Division or not. This means that “[p]rior to the beginning of each fiscal year,” the Commission has an opportunity to review the utility’s

proposed investments and spending to ensure that they are “reasonably needed to maintain safe and reliable distribution over the short and long term.” *Id.* (emphasis added).

The Commission’s simplifying assumptions in the Memorandum⁵ instruct the parties to assume that the “capital investment was prudent and addressed safety and reliability (and no party disputes the reasonableness of the investment).” Memorandum at 3. The simplifying assumptions, therefore, presume that the proposed investments satisfy the legal standard in the Revenue Decoupling Statute. By the plain language of the statute, once the Commission concludes that the utility has met this standard, then the Commission has no discretion to approve or disapprove the ISR plan; the Commission “shall” approve it. The Commission, however, retains authority year after year to ensure that each ISR plan submitted by the utility meets the statutory standard. Accordingly, although the Company assumes necessity for purposes of the Memorandum, the requirement for the utility to make this showing every year for each proposed ISR plan should not be overlooked or discounted. The Commission holds the utility accountable to the purpose and scope of the Revenue Decoupling Statute through this annual review.

Second, although the Commission must evaluate whether the “investments and spending” are “reasonably needed,” the statute calls for the Commission to “approve the plan.” In other words, the statute expressly envisions Commission approval at the plan level, not each individual

⁵ The Memorandum instructs the parties to make the following simplifying assumptions:

- 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.

investment. As discussed below, the utility may need to make adjustments to individual investments during the course of the ISR plan year. The ISR process accounts for this needed flexibility in managing the day-to-day operations of the distribution systems while also maintaining the necessary regulatory oversight of the utility's spending and associated rate recovery. The utility can adjust the specific investments it makes consistent with the approved plan, and then can demonstrate the reasonableness and prudence of those adjustments, consistent with the approved ISR plan, at the time makes its rate reconciliation filing. If the utility does this successfully, it is entitled to recover the revenue requirement for these adjusted investments through the reconciling mechanism. This is consistent with the historic understanding and practice of the Commission, the Division, and the Company, as demonstrated by the Commission's prior orders and the Company's approved reconciliation filings.

2. Specific ISR Plan Investments Are Subject to Review for Reasonableness and Prudence during Reconciliation

The Commission has been clear and consistent that ISR Plan approval does not constitute the last word with respect to any given investment. The Commission can review any investment for prudence once the utility places the investment in service and seeks recovery through the ISR reconciliation mechanism. This process is consistent with the statutory language. The Commission has stated clearly that utilities have responsibility at all times for the prudence of their investments.

The Commission addressed this issue directly in Docket No. 5099 regarding the Company's proposed FY 2022 Gas ISR Plan:

It should be well understood that when the Commission approves a budget item even for projects that will be placed in service during the fiscal year, it does not represent a guarantee of prudence in all respects. The Commission action, of course, does directionally indicate that the proposed project is justified based on the reasons given by the Company in the filing. However, the Company always

has the duty and responsibility to pursue, procure, construct, and implement the project in a prudent manner. The fact that the Commission has approved a specific spending budget does not insulate the Company from a prudence review should events or facts known to the Company at the time of project implementation affect the reasonableness of if, how, or when the Company implements its plan. The Commission always retains its regulatory authority to assure the Company acted practically given all the facts reasonably known at the time.

Report & Order, Docket No. 5099, *In re The Narragansett Elec. Co. d/b/a Nat'l Grid, Gas Infrastructure, Safety, & Reliability Plan FY 2022 Proposal*, at 20-21 (Apr. 1, 2021) [*hereinafter* “2021 Gas ISR Plan Order”]. The Commission further stated that, “An approved budget may provide some degree of assurance that the Company is proceeding in a directionally prudent manner, but . . . a budget approval should never be seen as a guarantee that there will never be scrutiny over the final outcome of a project.” *Id.* at 21. The Commission’s language sets a clear expectation that it can review investments for prudence and reasonableness at the time they go into service. If the actual investment is identical to what the utility proposed in the ISR plan, then the Commission’s approval of the ISR plan “does directionally indicate that the proposed project is justified based on the reasons given by the Company in the filing.” *Id.* at 20. If the actual investment deviates from what the utility proposed in the ISR plan, then the Commission may apply greater scrutiny to that element of the utility’s reconciliation filing. *See id.* at 21 (“[T]he Company always retains the responsibility to carry out its duty to assure that its capital spending appropriately addresses the safety and reliability of the system for all its customers. . . . There may be times when this could place the Company in an uncomfortable position of regulatory risk, but the Company should not view the ISR as an insurance policy for the utility that relieves the utility of financial or decision-making risk.”).

The 2021 Gas ISR Plan Order stated pellucidly that the ISR plan process “should never be interpreted as a pre-stamped approval of prudence”:

The ISR spending plan is very helpful for the Company, the Division, and the Commission, to give visibility to the planning and budgeting process. It is the transparency and up-front review of the planning processes that benefits all parties involved. In that way, it limits the regulatory risks to the Company to the extent the Division and the Commission have an opportunity to review the Company's capital spending plans before they are implemented. Nevertheless, this helpful process *should never be interpreted as a pre-stamped approval of prudence*. Prudence reviews always come after-the-fact, when all the facts at the time of implementation are known. The ISR does not change this dynamic.

Id. at 21-22 (emphasis added). This interpretation of the Revenue Decoupling Statute provides the Commission with an opportunity to review the prudence of – and potentially deny recovery through rates for – investments included in the utility's reconciliation filing.

The Company's ISR Provision tariffs, which the Commission also reviews and must approve, have reflected this statutory interpretation. For example, R.I.P.U.C. No. 2255 specifies circumstances under which the Company must demonstrate reasonableness and prudence during the reconciliation filing:

In implementing its Electric ISR Plan, the circumstances encountered during the year may require reasonable deviations from the original plans approved by the Commission. In such cases, in the annual report, the Company would include an explanation of any deviations in excess of ten (10) percent above Forecasted Capital Investment, Forecasted I&M Expense, and Forecasted VM Expense. For cost recovery purposes, the Company has the burden to show that any such deviations were due to circumstances out of its reasonable control or, if within its control, were reasonable and prudent.

The Narragansett Elec. Co. ISR Provision, RIPUC No. 2255, 4 (issued July 25, 2022).

Likewise, the Company's Distribution Adjustment Clause ("DAC") for gas distribution recognizes that the reconciliation process involves approving specific investments once they have gone into service. In discussing the ISR factor reconciliation mechanism, the DAC states the following: "The Company shall include an annual reconciliation mechanism associated with the ISR Factor designed to reconcile the actual Cumulative Revenue Requirements and any associated costs *approved for recovery through this mechanism* to the actual billed revenue for

the prior fiscal year.” Distribution Adjustment Clause, RIPUC RIE-GAS No. 101, The Narragansett Elec. Co, Schedule A, Sheet 5 (14th rev. issued July 25, 2022) (emphasis added).

Combined, the Revenue Decoupling Statute, the Commission’s prior orders, and the Company’s tariffs all point in a single direction: In connection with filing an ISR plan, the utility bears the burden to demonstrate that the proposed investments and spending are reasonably needed to maintain safe and reliable distribution service over the short and long term. If the Commission concludes that the utility has satisfied this burden, then the Commission must approve the plan. This approval allows the utility to move forward with the overall plan with a directional indication from the Commission that the investments and categories of spending included in the plan are justified based on the information known to the utility at the time of the filing. The utility will have to demonstrate at the time the investments made based on the approved plan go into service and become subject to the reconciliation mechanism that those investments were consistent with the plan, reasonable and prudent. At that time, the Commission can assess any deviations from the approved ISR plan or any additional facts not known at the time of ISR plan approval. Thus, even after Commission approval of the ISR plan, the Company still faces regulatory risk and decision-making risk that the Commission may determine that the investments it made and placed into service were not reasonable and prudent.

3. The Utility Has Responsibility for Managing its Operations

The Commission must interpret the Revenue Decoupling Statute in light of existing Rhode Island Supreme Court precedent holding that the Commission cannot impede upon a utility’s managerial prerogative. “The Legislature is presumed to know the state of existing relevant law when it enacts a statute.” *State v. Briggs*, 934 A.2d 811,814 (R.I. 2007). In this case, long-standing relevant law states that “the broad regulatory powers of the PUC ordinarily do not

include the authority to dictate managerial policy.” *Providence Water Supply Bd. v. Pub. Utils. Comm’n*, 708 A.2d 537, 543 (R.I. 1998) (citing, among others, *Blackstone Valley Elec. Co. v. Pub. Utils. Comm’n*, 543 A.2d 253, 255 (R.I. 1988) (“It is the function of the PUC to regulate a utility in order to determine that its rates are fair and reasonable. It is not the function of the PUC to manage the utility or to exercise the prerogatives of ownership”)).

For example, in *Providence Water Supply Board v. Public Utilities Commission*, 708 A.2d 537 (R.I. 1998), a water utility sought Commission approval to purchase and install “an advanced water-meter-reading system.” *Id.* at 538. The Division objected to the proposal and advocated for repair and upgrade using existing technology. *Id.* at 540. The Commission denied the water utility’s request on the ground that the new meters were too expensive. *Id.* at 540. When the water utility subsequently revised its estimated cost downward and sought reconsideration of the proposal – now with the Division’s support – the Commission affirmed its prior decision on the ground that the existing “meter reading system remains the more cost effective option.” *Id.* at 541.

The Rhode Island Supreme Court reversed this decision. *Id.* at 543. The court concluded that “the selection of meter-reading technology ‘is an incident of management’” and that the Commission “exceeded its authority by interfering with this management function absent evidence of ‘an unjust and unreasonable burden on the ratepayers.’” *Id.* at 543-44 (quoting *Narragansett Elec. Co. v. Kennelly*, 143 A.2d 709, 726 (R.I. 1958)); *see also In re Kent Cnty. Water Auth. Change Rate Schedules*, 996 A.2d 123, 131 (R.I. 2010) (suggesting that the Commission should not “dictate or prioritize the projects [the utility] might elect to complete”). Although the Commission is charged with “supervision and reasonable regulation” of utilities,

R.I. Gen. Laws § 39-1-1(a)(2), “[t]he Commission’s role is not analogous to the role of utility management.” 2021 Gas ISR Plan Order at 21.

The Commission has stated that “[t]he ISR process does not shift management responsibility from the Company to the Commission.” *Id.* Thus, although the Commission conducts a searching review of a utility’s ISR plan and proposed budget to ensure that the investments and spending are “reasonably needed to maintain safe and reliable distribution service over the short and long term,” the Commission does not approve individual investments. Nor does it dictate the utility’s priorities or strategy, so long as the utility’s proposal “would not have an adverse effect on any rights of ratepayers to be charged no more than just and reasonable rates.” *Providence Water Supply Bd.*, 708 A.2d at 544 (quoting *Narragansett Elec. Co.*, 143 A.2d at 726). To do so would impermissibly “shift management responsibility from the Company to the Commission.” 2021 Gas ISR Plan Order at 21. Accordingly, to the extent the Memorandum suggests that the Commission’s review of an ISR plan includes line-item approval of individual projects or investments, Memorandum at 3, such an interpretation of the Revenue Decoupling Statute would be inconsistent with well-established Rhode Island law.

B. Specific Responses

In line with these overarching principles, the Company provides the following specific responses to the Memorandum’s briefing questions.

1. The Utility Is Entitled to Recovery for Capital Investments Not Specifically Reviewed and Approved in the Prior ISR⁶

Under the circumstances outlined in the Memorandum, the utility is entitled to recovery for a capital investment not specifically reviewed and approved by the Commission in the relevant ISR filing pursuant to the reconciliation mechanism, including the first year's revenue requirement recovery.⁷ The utility need not experience regulatory lag for that investment. So long as the capital investment is consistent with the approved ISR plan capital spending budget for that same fiscal year, the utility is entitled to recovery.

Specifically, the utility will have satisfied each of the statutory requirements for that fiscal year. First, the utility submitted an ISR plan pursuant to R.I. Gen. Laws § 39-1-27.7.1. Per the Memorandum's simplifying assumptions, whether by agreement with the Division or Commission review, the Commission has approved that *plan* as "reasonably needed to maintain safe and reliable distribution service over the short and long term." *Id.*

Second, the utility will have submitted an ISR reconciliation mechanism with a "reconcilable allowance for the *anticipated* capital investments and other spending pursuant to the annual pre-approved budget." R.I. Gen. Laws § 39-1-27.7.1 (emphasis added). The statute recognizes that the capital investments are "anticipated": "expected or looked-forward to." *Merriam Webster Dictionary*, www.merriam-webster.com/dictionary/anticipated (last visited Mar. 18, 2023). Further, the term "pre-approved" modifies "budget." A "budget" is a "plan for

⁶ Question No. 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?

⁷ Within the ISR plan, the utility forecasts what capital investments will be placed in service over the applicable fiscal year and creates a revenue requirement based on that estimate. The utility does not assume a full year of cost recovery for the estimated plant in service; rather, all investments are assumed to go into service halfway through the year as a simplifying convention. The reconciliation mechanism subsequently adjusts the revenue requirement based on the actual capital placed in service during the fiscal year.

the coordination of resources and expenditures” or “the amount of money that is available for, required for, or assigned to a particular purpose.” *Merriam Webster Dictionary*, www.merriam-webster.com/dictionary/budget (last visited Mar. 18, 2023); *see also* “Budget,” *Black’s Law Dictionary* (11th ed. 2019) (“a sum of money allocated to a particular purpose or project). Used in the context of the statute and against the backdrop of established law that the utility maintains managerial discretion, the “pre-approved budget” referred to is the “plan” for which the Commission granted approval, not the individual line-item investments contained within the plan.

Thus, as long as the capital investment made relates to the purposes or projects set forth in the applicable approved ISR plan, then the utility is entitled to recover the first fiscal year revenue requirement for that investment through reconciliation. As described above, *supra* § III.A.2, the utility also must demonstrate during the reconciliation filing that the investment was reasonable and prudent. In light of the simplifying assumptions set forth in the Memorandum, however, reasonableness and prudence have been established. Accordingly, the utility is entitled to recovery.

This interpretation aligns with the history of the ISR plan process. In multiple reconciliation proceedings, the Company has presented testimony to explain variances from the approved ISR plan budget, and the Commission has approved the proposed reconciliation factor as reasonable and prudent. *See* Order No. 24562, Dkt. Nos. 22-13-NG and 22-20-NG, *In re The Narragansett Elec. Co. d/b/a R.I. Energy Distribution Adjustment Charge & Gas Cost Recovery* at 9, 16 (R.I.P.U.C. Jan. 10, 2023) (after hearing testimony regarding variances in spending, stating, “When the utility makes a filing of this type, the Commission (and the Division, acting as the ratepayer advocate) review the reasonableness of the costs and, unless there is an

evidentiary basis for a finding that the costs were not necessary or the Company acted imprudently, the costs are allowed to flow through rates.”); Order No. 24275, Dkt. Nos. 5165 & 5180, *In re The Narragansett Elec. Co. d/b/a Nat'l Grid* at 9, 20 (R.I.P.U.C. Dec. 16, 2021) (same); Order No. 54560, Dkt. No. 5098, *In re The Narragansett Elec. Co. d/b/a/ R.I. Energy's Fiscal Year 2022 ISR Annual Report & Reconciliation* at 4 (R.I.P.U.C. Dec. 23, 2022) (“The Division also provided a memorandum from its consultant Gregory L. Booth, P.E., which reviewed the variances between the budgeted amount and actual spend for FY 2022. Mr. Booth concluded that the variances did not raise any issue of prudence.”). The Commission, the Division, and the Company all have demonstrated the understanding that there may be variances from the approved ISR plan, and so long as these variances are reasonable and prudent, the Commission must nevertheless approve them through the reconciliation filing.

The utility carries significant risk throughout this process. As evidenced by the Company's area studies and other long-range planning initiatives, utilities must plan their capital investment strategy years in advance. They also must arrange purchase orders and often make purchases before the Commission approves a given ISR plan to be able to execute the plan within the following fiscal year. This upfront planning and purchasing is done at-risk to the utility. Further, the utility cannot begin to recover its costs until the investment is actually in-service. Thus, although the annual ISR plan process lessens the risk on the utility, it does not eliminate it. Nor does it shift all the risk to customers. The utility still must proceed initially at-risk and must demonstrate to the Commission that the proposed investments are reasonably needed to maintain safe and reliable distribution service over the short and long term and that the investments are reasonable and prudent at the time the utility seeks recovery through reconciliation.

For all of these reasons, the utility is entitled to recover the first fiscal year revenue requirement for a capital investment not included specifically in the applicable ISR plan but that is (i) consistent with its proposed purposes and projects, and (ii) reasonable and prudent.

2. The Utility Generally Is Entitled to Recovery of the Prospective Revenue Requirement through the Subsequent FY ISR Filing⁸

The Company has identified two potential interpretations of Question No. 2. Under the first interpretation, referred to as Scenario 1, the utility seeks to obtain recovery of the prospective revenue requirement after seeking recovery of the first fiscal year revenue requirement through the reconciliation mechanism. In other words, the capital investment was consistent with the prior FY's approved ISR plan, the utility sought recovery through the reconciliation mechanism, and the utility then disclosed the capital investment in the subsequent FY ISR plan and sought prospective recovery through that plan. Under Scenario 1, which the Company considers more likely to occur, the utility is entitled to recovery.

Under the second interpretation, referred to as Scenario 2, the utility seeks to obtain recovery through the current FY's ISR plan of the prospective revenue requirement of a capital investment that is inconsistent with the prior FY's approved ISR plan – but still reasonably needed to maintain safe and reliable distribution service over the short and long term – and went into service in the prior FY. Under Scenario 2, which the Company considers less likely to occur, the utility is not entitled to recovery and must wait until the next distribution rate case before seeking recovery of any prospective revenue requirement. The Commission, however, retains the

⁸ Question No. 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?

discretion to allow recovery on a prospective basis, as further described in the Company's response to Question No. 4, below.

a) Under Scenario 1, the utility is entitled to recovery.

The utility is entitled to obtain recovery in the subsequent fiscal year ISR plan filing for the prospective revenue requirement for a project implemented in the prior fiscal year. As discussed above, *supra* § III.B.2, the Revenue Decoupling Statute calls for preapproval of the "budget," not individual investments. Here, the utility discloses and includes the investment in the next possible ISR plan, and the utility seeks prospective revenue recovery. Assuming the Commission approves that ISR plan, when the utility submits its rate-reconciliation mechanism, that mechanism will include "a reconcilable allowance for the anticipated capital investments and other spending pursuant to the annual pre-approved budget," and the pre-approved budget will include the revenue requirement for the project. R.I. Gen. Laws § 39-1-27.7.1(c)(2). The statutory requirements are satisfied, and the utility is entitled to recovery.

The Commission has a second opportunity to review investments during the ISR reconciliation filing. As the Commission stated in the 2021 Gas ISR Plan Order, "the specific dollar amounts of a project item should not be interpreted by the utility as providing a guarantee to the Company that it can spend the approved amount without risk." 2021 Gas ISR Plan Order at 21. Rather, "[p]rudence reviews always come after-the-fact, when all the facts at the time of implementation are known." *Id.* The Commission therefore has two opportunities to review the proposed spending categories and investments – during the ISR plan review and during review of the reconciling mechanism.

Interpreting the Revenue Decoupling Statute to require the utility to wait until its next base distribution rate case before seeking recovery on the ground that the specific investment

was not “pre-approved” would undermine the statute’s purposes. The statute’s purposes include, among others, 1) “increasing efficiency in the operations and management of the electric- and gas-distribution system”; 2) “reducing risks for both customers and the distribution company, including, but not limited to, societal risks, weather risks, and economic risks”; and 3) “facilitating and encouraging investment in utility infrastructure, safety, and reliability.” R.I. Gen. Laws § 39-1-27.7.1(a). The delay would disincent orderly investment in infrastructure, safety, and reliability. There are any number of reasons why an ISR plan project could become necessary between ISR plan filings to maintain safe and reliable distribution service. A weather event could create an urgent need. A global pandemic could interrupt the utility’s anticipated ISR plan and require it to nimbly change directions to remain on pace to complete work included in long-term programs. Supply chain delays could disrupt the utility’s proposed investment timetable and require it to change priorities. The ISR plan process provides the mechanism for the utility to commence the review process for these necessary investments quickly and orderly. Delaying them to the utility’s next distribution rate case would increase uncertainty and risk, contrary to the purposes of the statute. *See* R.I. Gen. Laws § 39-1-27.7.1(a).

Requiring the utility to wait until its next base distribution rate case to recover the cost of ISR plan investments placed into service would also increase risk to customers, thereby frustrating a central purpose of the statute. The ISR factor allows for incremental rate changes, which provides the benefit of rate stability to customers. Delaying recovery for investments that should otherwise flow through the ISR plan process increases the utility’s revenue requirement for the rate case, making customers susceptible to rate volatility at unpredictable intervals. This runs contrary to the statute’s stated purpose to reduce risks to customers.

Further, the utility's entitlement to recover the prospective revenue requirement for the project does not run afoul of the principle against retroactive ratemaking. The utility must meet the statutory requirements, and the Commission must approve the ISR plan before the utility can seek to recover for the project through the reconciliation mechanism. This situation is distinguishable from *In re Providence Water Supply Board's Application to Change Rate Schedules*, 989 A.2d 110 (R.I. 2010). There, the utility waited years (close to a decade) before seeking to recover a particular expense through rates. *Id.* at 112. Here, the utility would disclose and seek recovery for the investment at the very next opportunity in a specifically defined annual reporting and reconciliation process. This procedure is consistent with ratemaking principles.

For all of these reasons, the utility is entitled to obtain recovery in the subsequent fiscal year ISR for the project implemented in the prior fiscal year.

b) Under Scenario 2, the utility is not entitled to recovery.

For Scenario 2, described above, to occur, the utility must make a capital investment during the course of the FY that is reasonably needed to maintain safe and reliable distribution service over the short and long term but is inconsistent with the prior FY's approved ISR plan. Additionally, the capital investment must be placed into service during that prior FY (the trigger for revenue recovery). It is difficult to envision a situation in which Scenario 2 could occur. It would require a circumstance to arise that the utility could not foresee at the time it submitted its prior ISR plan for approval and that was so unexpected it was not consistent with the prior plan. Further, having failed to foresee the need for the capital investment, the utility would have to develop any necessary plans for the capital investment, fulfill purchasing requirements related to it, and place the capital investment in service within that same year.

Putting aside the likelihood of such an event, the utility would not be entitled to recovery through the ISR plan process under Scenario 2. The Revenue Decoupling Statute sets forth a planning process to facilitate ISR plan investments. Under Scenario 2, the capital investment would be complete before the utility had an opportunity to propose it and seek review from the Commission, placing the investment outside the ISR plan process.

3. Although the Commission Generally Does Not Have the Discretion To Allow – Or Deny – Recovery of the Revenue Requirement Through Reconciliation, the Commission Has Discretion To Determine Whether the Capital Investment Is Consistent with the Approved ISR Plan and, even if the Investment Is Inconsistent, Allow Recovery Pursuant to General Ratemaking Principles⁹

The Commission generally does not have the discretion to allow – or deny – recovery of the revenue requirement through reconciliation. The Revenue Decoupling Statute establishes a mandatory process. As the Commission recently stated, “unless there is an evidentiary basis for a finding that the costs were not necessary or the Company acted imprudently, the costs are allowed to flow through rates. The Commission has no legal authority to deny recovery for most of the types of costs flowing through the [ISR reconciling mechanism] solely on the grounds that a rate increase is not desirable or might have a detrimental impact on the economy.” Order No. 24562, Dkt. Nos. 22-13-NG and 22-20-NG, *In re The Narragansett Elec. Co. d/b/a R.I. Energy Distribution Adjustment Charge & Gas Cost Recovery* at 16 (R.I.P.U.C. Jan. 10, 2023). The statute states that the Commission “shall review and [if the standard is met] approve the plan.” R.I. Gen. Laws § 39-1-27.7.1(d).

⁹ Question No. 3: Does the Commission have the discretion (but not the obligation) to allow recovery of the revenue requirement prospectively or retroactively through the reconciliation if the Commission finds it reasonable to allow it?

The Memorandum’s simplifying assumptions provide that the investment “was prudent and addressed safety and reliability (and no party disputes the reasonableness of the investment).” Memorandum at 3. This is the standard of review required by the decoupling statute. Once the utility has met its burden to make this required showing, the Commission must allow recovery. That said, the Commission has discretion to determine whether the investment is consistent with the approved ISR plan and therefore appropriate for rate recovery through the ISR plan process.

Although the Commission must allow recovery through reconciliation where it determines that the investment is consistent with the prior approved ISR plan, the Commission retains discretion to allow recovery if it found that the investment was inconsistent with the prior approved ISR plan, but circumstances warrant approval of cost recovery. The Commission has responsibility “to provide fair regulation of public utilities” and “to provide just and reasonable rates and charges.” R.I. Gen. Laws § 39-1-1(b). The Rhode Island Supreme Court has held that utilities may recover for “unusual and nonrecurring expenses related to [] extraordinary occurrences.” *Narragansett Elec. Co. v. Burke*, 415 A.2d 177, 179-80 (R.I. 1980). If a utility proposed recovery through reconciliation of an investment that was not consistent with the prior approved ISR plan, the Commission has authority to evaluate the circumstances surrounding the investment and allow recovery in the exercise of its general discretion.

Accordingly, the Commission does not have discretion to allow – or deny – recovery when an investment is consistent with the prior ISR plan. The Commission does have discretion to allow or deny recovery when an investment is not consistent with the prior ISR plan.

4. Although the Commission Generally Does Not Have the Discretion To Allow or Disallow Recovery through the Following FY's ISR Plan once the Utility Has Satisfied the "Reasonably Needed" Standard, Under Scenario 2 the Commission Has Discretion To Allow Recovery Pursuant to General Ratemaking Principles¹⁰

a) The Commission Has No Discretion under Scenario 1.

For the reasons stated in response to Question No. 3, *supra*, the Commission does not have discretion to allow – or deny – recovery under these circumstances.

b) The Commission Has Discretion To Allow Recovery under Scenario 2.

As discussed in response to Question No. 2, the Company views the confluence of factors leading to Scenario 2 as unlikely and unusual. This is the type of “unusual and nonrecurring” situation, however, in which the Rhode Island Supreme Court has held that a utility “may recover by whatever method the commission deems appropriate,” notwithstanding the general rule against retroactive ratemaking. *Narragansett Elec. Co.*, 415 A.2d at 179-80. In such a situation, circumstances may have arisen after approval of the prior FY’s ISR plan that the utility could not have foreseen, but that nevertheless require investment for maintaining safety and reliability. The safety and reliability concerns, along with the Commission’s responsibility “to provide fair regulation of public utilities” and “to provide just and reasonable rates and charges,” could outweigh the procedural shortcoming of not having sought prior approval. *See* R.I. Gen. Laws § 39-1-1(b). Accordingly, under Scenario 2, the Commission has authority to evaluate the circumstances surrounding the investment and allow recovery in the exercise of its general discretion.

¹⁰ Question No. 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?

IV. CONCLUSION

For the foregoing reasons, Rhode Island Energy respectfully contends that a utility is entitled to recovery of its revenue requirement under the circumstances described, and the Commission generally does not have discretion to allow or deny such recovery where investments are consistent with the prior ISR plan. The Commission and discretion to allow or deny recovery in situations where an investment is not consistent with the prior ISR plan.

Respectfully submitted,

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Dated: March 24, 2023

CERTIFICATE OF SERVICE

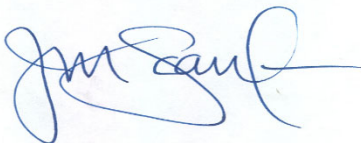
I hereby certify that on March 24, 2023, I sent a copy of the foregoing to the service list by electronic mail.

/s/ Adam M. Ramos

Certificate of Service

I hereby certify that a copy of the cover letter and any materials accompanying this certificate was electronically transmitted to the individuals listed below.

The paper copies of this filing are being hand delivered to the Rhode Island Public Utilities Commission and to the Rhode Island Division of Public Utilities and Carriers.



Joanne M. Scanlon

March 24, 2023

Date

**Docket No. 22-53-EL – RI Energy’s Electric ISR Plan FY 2024
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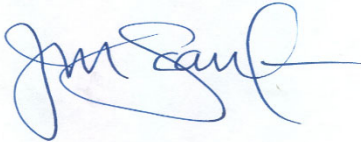
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I hereby certify that a copy of the cover letter and any materials accompanying this certificate was electronically transmitted to the individuals listed below.

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Joanne M. Scanlon

March 24, 2023
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Docket No. 22-54-NG- RI Energy's Gas Infrastructure, Safety and Reliability (ISR) Plan 2024 - Service List 2/6/2023

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