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April 4, 2023

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Public Utilities Commission
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**In Re: IN RE: The Narragansett Electric Co. d/b/a Rhode Island Energy Issuance of
Advisory Opinion to Energy Facility Siting Board Regarding The Narragansett
Electric Co. Application to Construct LNG Vaporization Facility**

Docket No. 22-42-NG

Dear Ms. Massaro:

Enclosed please find for filing an original and five (5) copies of the Attorney General's Memorandum of Law in the above-referenced docket.

Thank you for your attention to this matter. Should you have any questions, please do not hesitate to contact me.

Sincerely,

/s/ Nicholas Vaz

Special Assistant Attorney General
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Enclosures

Copy to: Service List

**STATE OF RHODE ISLAND
PUBLIC UTILITIES COMMISSION**

**In Re: The Narragansett Electric
Company Application for a License
to Mobilize and Operate a Liquefied
Natural Gas Vaporization Facility at
Old Mill Lane (Portsmouth, RI)**

Docket No. 22-42-NG

**ATTORNEY GENERAL OF THE STATE OF RHODE ISLAND'S
MEMORANDUM OF LAW**

NOW HERE COMES the Rhode Island Attorney General, Peter F. Neronha (hereinafter “Attorney General”), and hereby provides the following Memorandum of Law in the above-captioned docket currently pending before the Public Utilities Commission (“Commission”) in response to the Commission’s legal briefing question provided to the parties in this docket.

I. INTRODUCTION

The Narragansett Electric Company – now doing business as Rhode Island Energy (“RI Energy” or “Company”) - has been operating a portable liquefied natural gas (“LNG”) vaporization facility on Old Mill Lane in Portsmouth, RI (the “Facility”) each winter since 2019 to provide emergency backup gas supply. Pursuant to its pending application submitted in Energy Facility Siting Board (“EFSB”) Docket Number SB-2021-04 (the “Application”), the Company is now seeking to make the temporary Facility permanent, mobilizing each winter for the stated purpose of “provid[ing] standby peak-shaving and backup supply to the Aquidneck Island natural gas distribution system” (the “Project”). *See* EFSB Order 156.

As part of the EFSB’s review of the Application, the Commission is now charged, pursuant to R.I. Gen. Laws § 42-98-9(d), to: “conduct an investigation [] and render an advisory opinion

as to the need for the proposed facility.” As a result, the Commission has set forth a series of legal questions that it would like the parties in this docket to brief in aid of its investigation. While the briefing questions are related to the Company’s proposal, the Commission’s questions are not fact specific. Instead, the Commission’s inquiry centers around the legal question of “need” in the context of the Energy Facility Siting Act (“EFSA”). Under the EFSA, “evaluation of proposals must recognize and consider the need for [major energy] facilities *in relation to the overall impact of the facilities upon public health and safety, the environment and the economy of the state[.]*” 42 R.I. Gen. Laws § 42-98-1(a) (emphasis added). To that end, “statewide and regional planning for energy resources and the assessment of our state's need for energy should be on-going activities within Rhode Island.” 42 R.I. Gen. Laws § 42-98-1(c).

The EFSB’s direction to the Commission highlighted a variety of factors to be considered when assessing need. *See* EFSB Order No. 156 at 17. Specifically, the Commission must consider “the potential duration of [any] license, whether the license should contain a contingent expiration date, identifying the conditions that would need to be met for granting an extension, and proposing such a date if a contingent expiration is deemed appropriate.” *Id.* The Commission “should also advise on the extent to which a moratorium on new gas connections on Aquidneck Island could materially contribute to shortening the period over which the proposed Facility would be needed.” *Id.*

Given the situation of the requirement within the entire statutory scheme, the “need for . . . facilities” has a few guiding principles. First, the “need” for the facility must be the “need” considering broad impacts on the environment and economy. Second, the “need” may have a temporal as well as geographic component—the statute refers to “on-going activities” and “statewide and regional planning.” *See* 42 R.I. Gen. Laws § 42-98-1(c). These considerations,

present in the statute and in the EFSB’s interpretation of its operating statute, which under principles of administrative agency law should be given deference,¹ illustrate that the term “need,” as used in the statute, is not stagnant. Even though a facility may be needed in the short-term, permanent approval is not required and should not be granted if it would leave Rhode Islanders shouldering excessive costs for projects that outlive their useful lives.

II. THE ACT ON CLIMATE AND THE STATE’S ENERGY POLICY FAVOR NON-FOSSIL FUEL SOLUTIONS

In April 2021, the Act on Climate was passed, mandating that state agencies take into account the State’s energy goals and the future of our reliance on fossil fuels (including natural gas) in every decision that they make. The Act on Climate requires that the State aggressively reduce greenhouse gas emissions in the short term while pursuing the mandated net zero emissions by 2050. R.I. Gen. Laws § 42-6.2-9. Moreover, it is within the “*powers, duties, and obligations of all state departments, agencies, commissions, councils, and instrumentalities*” to address the Act on Climate and to consider “climate change mitigation, adaptation, and resilience in so far as climate change affects its mission, duties, responsibilities, projects, or programs.” R.I. Gen. Laws § 42-6.2-8 (emphasis added). These changes in responsibility must be expressly recognized at every opportunity as the new mandate begins to impact state decisions. As laid out by the EFSB in its Order 153 issued in Docket No. SB-2021-03: “If there are proposed actions before the Board that would materially impact the ability of the state to meet the mandatory targets in a timely manner, the Board cannot wait [] to address the issue[.]” EFSB Order 153 at 34.

The Project, by its very nature, seeks to increase the burning of fossil fuels during the winter months for heat in residential and commercial settings. Under those circumstances, the

¹ See e.g., *Arnold v. Rhode Island Dep’t of Lab. & Training Bd. of Rev.*, 822 A.2d 164, 169 (R.I. 2003) (noting deference to agency where the interpretation is not clearly erroneous or unauthorized)

Commission must carefully consider the effects of the Project on the State’s climate and energy goals, as well as the impact that its determination could have on the State’s ability to pursue other alternatives, such as electrification and demand reduction programs. The Commission has also recently opened its *Investigation into the Future of the Regulated Gas Distribution Business in Rhode Island in Light of the Act on Climate* to consider the future of natural gas infrastructure in our State. See Commission Docket 22-01-NG (the “Future of Gas Docket”). That docket will consider many essential questions that could change the way Rhode Island views its gas distribution system, including, but not limited to: “What statutory, regulatory, or stakeholder requirements and/or preferences exist that represent constraints on possible pathways for reducing gas system emissions consistent with the Act[?]”; “What are the economic risks associated with investment in the gas system and who bears those risks?”; “What values are not considered in the current regulation of RIE’s gas business that should be considered in light of the Act?”; and, “What infrastructure and non-infrastructure options exist for reducing emissions from the gas system?” See Docket 22- 01-NG, Proceeding Scope, 3-5. Ultimately, the proceeding will consider whether the natural gas distribution system in its entirety may remain viable consistent with the Act on Climate. See *id.*

The Energy Facility Siting Act also requires the EFSB to pursue:

... the objective of ensuring that the construction, operation, and decommissioning of the facility [which] shall produce the fewest possible adverse effects on the quality of the state's environment; most particularly, its land and its wildlife and resources, the health and safety of its citizens, the purity of its air and water, its aquatic and marine life, and its esthetic and recreational value to the public.

R.I. Gen. Laws § 42-98-2(3). Moreover, pursuant to the EFSA, the Project must be “consistent with the state's established energy plans, goals, and policy.” R.I. Gen. Laws § 42-98-2(6). This, of course, includes consistency with the Act on Climate, but also extends to other laws and policies (such as those that will result from the analysis taking place in the Future of Gas Docket).

Accordingly, the Commission must consider alternatives and conditions related to the Project that could provide an opportunity to reduce fossil fuel and greenhouse gas emissions and create greater consistency with the State’s energy goals before concluding that the Project is “needed” in the context of the EFSA.

III. THE COMMISSION’S QUESTIONS CONCERNING THE NEEDS OF THE STATE HIGHLIGHT THE TRANSIENT NATURE OF NEED AND THE CRITICAL IMPORTANCE OF CONSIDERING THE STATE’S ENVIRONMENTAL AND ENERGY POLICIES

The Commission has posed a series of questions arising from its central inquiry: “Whether a project designed to serve only a portion of the state, Aquidneck Island, which is served by a single natural gas pipeline, falls within the definition of ‘necessary to meet the needs of the state and/or region.’” This briefing prompt highlights key language in the EFSA, which states that a potential project must be “*necessary* to meet the *needs* of the state and/or region for energy of the type to be produced by the proposed facility.” R.I. Gen. Laws § 42-98-11(b)(1). In general, a need is “a lack of something important; a requirement.” NEED, Black's Law Dictionary (11th ed. 2019). Similarly, something is necessary when it “is needed for some purpose or reason” or “must exist or happen and cannot be avoided.” NECESSARY, Black's Law Dictionary (11th ed. 2019). Thus, the EFSA requires more than simply showing that the proposed project is *a* solution, or even *a preferred* solution, to satisfy the State’s energy needs.

First, the Commission has asked parties to consider “[w]hether the possibility of a supply constraint or contingency event to one portion of the state where there are other areas of the state with no access to gas supply at all is a ‘need of the state’ standard in the Energy Facility Siting Act.” Currently, a significant number of Rhode Islanders do not receive natural gas supply to their homes—many because there is no economically feasible way to connect to the distribution system. In fact, only 54% of the State’s residential homes are served by natural gas. *See* Heating Sector

Transformation in Rhode Island: Pathways to Decarbonization by 2050; <https://energy.ri.gov/sites/g/files/xkgbur741/files/documents/HST/RI-HST-Final-Pathways-Report-5-27-20.pdf> (last visited March 26, 2023). The remaining 46% use other fuels which are alternatives to natural gas. These alternates include fuel oil, propane, wood, and electricity. *See id.* at 6; Figure 4. Some of those alternatives have a more negative impact on emissions and some have a more positive impact on emissions—or have the potential to zero out emissions in the future. *See id.* at 17 (discussing ways to convert fuel sources to carbon neutrality). Moreover, each alternate fuel has its own cost profile and costs more or less to switch from a greenhouse-gas intense fuel to a zero-emissions fuel in the future. Thus, the question becomes whether the State’s needs for energy require the long-term provision of backup supply for natural gas in a specific location to combat a potential supply constraint or contingency event in a targeted area, such as Aquidneck Island. This is a challenging question where current reliance on natural gas is potentially at odds with rapidly changing State energy policy that could alleviate some of the short-term supply concerns in the near future.

In conjunction with its obligation to apply the Act on Climate and to consider the impacts of the Project on the State’s ability to achieve its climate and energy mandates, the Commission, and ultimately the EFSB, must also consider, and ultimately confirm, the need for the specific Project as proposed. As noted in EFSB Order 156, while “[i]n most other cases, the need for a facility is indefinite,” here “there is a question regarding the duration of the need, given the policy underlying the Act on Climate to reduce greenhouse gas emissions.” EFSB Order 156, 16. Rhode Island policy is rapidly adapting as the State looks to lead the charge against the dire impacts of climate change. As noted above, the Future of Gas Docket stands to aid the State in its essential efforts to systematically reimagine natural gas infrastructure and policy. Depending on the

outcome of that docket, other administrative proceedings, and potential legislative changes, the need for *and even potential legality of* this Project could shift, even in time as short as a few years from now.

Additionally, investments and initiatives to decrease demand and to shift natural gas customers to cleaner energy sources voluntarily that are currently underway may obviate the need for the Facility. The Company has noted that its own analysis shows that under some circumstances the Project might no longer be needed to address capacity constraints as early as 2029. *See e.g.* Company Response to Data Request CLF 1-3(a) (noting that, under certain rates of electrification, non-infrastructure alternatives could make capacity constraint concerns irrelevant by the winter of 2029/30). Moreover, the Company has indicated that the project consists of “portable non-permanent equipment so that, if the Project is no longer needed [] it can be discontinued.” Company Response to Data Request CLF 1-3(c). The Commission must, at minimum, assess need in such a way as to take the Company up on its offer to discontinue any approved project as soon as it becomes unnecessary. If the Commission concludes that the Facility is necessary to protect against inability to heat homes and businesses currently relying on natural gas, such a conclusion should be regularly re-examined in short intervals to ensure that the data continues to support such a need.

The amount of investment that ratepayers can afford to subsidize is limited. Any expenditure takes away from other needed investments that may be identified in the Future of Gas Docket, like the costs of switching away from natural gas to other fuel sources. Infrastructure investment has a long regulatory payoff period, and approval of infrastructure investment that will endure past its useful life will burden future ratepayers. These future burdens could be felt inequitably, as those businesses and people with means to invest in capital equipment to enable

fuel switching voluntarily leave natural gas service, leaving only those without savings, likely including many living in environmental justice communities, to shoulder the entire burden. Any approval should contain requirements to phase out spending on and continued use of the Project responsibly and cost-effectively.

These considerations are not dependent on the localized nature of the Project. Instead, a holistic view of the energy needs of the State and the impact of the Project on those needs is necessary. In some cases, a need of the State could be served through a more localized project designed to ensure that Rhode Island homes and businesses have access to safe and reliable service. However, if that project entails any greenhouse gas emissions at all, there is an additional requirement to evaluate whether the need is perpetual in light of current technology and future State energy plans. In terms of the present day, the needs of the State dictate a responsibility to immediately begin to economically and efficiently reduce demand for fossil fuels to ensure that the State can comply with the mandates set forth in the Act on Climate. The EFSB's decision with respect to a limited-application infrastructure project that relies on fossil fuels should aim to avoid making permanent a temporary solution, and should seek to reduce fossil fuel use and infrastructure in the long-term in a manner consistent with state energy policy.

Next, the Commission has asked the parties to consider: "Whether the utility has a legal/regulatory duty to serve future incremental growth in customers and/or usage and if so, how that duty correlates to a 'need of the state' standard in the Energy Facility Siting Act." Pursuant to R.I. Gen Laws § 39-1-1(b), it is the policy of the state to:

...provide fair regulation of public utilities and carriers in the interest of the public, to promote availability of adequate, efficient, and economical energy, communication, and transportation services and water supplies to the inhabitants of the state, to provide just and reasonable rates and charges for such services and supplies, without

unjust discrimination, undue preferences or advantages, or unfair or destructive competitive practices...

However, the availability of adequate, efficient, and economical energy does not require continued expansion of natural gas, especially where there is an admitted supply constraint issue, and future growth stands to hinder the State's ability to comply with other state laws such as the Act on Climate. The Company has not pointed to any statutory or regulatory requirement that specifically requires it to provide new natural gas hookups regardless of circumstance. Rather, the Company's own policies, which are adopted in its filed and ultimately approved tariff, indicate that the utility will provide gas service to any new customer who requests the service and pays the appropriate fee. *E.g.*, The Narragansett Electric Company d/b/a National Grid, Rhode Island Public Utilities Commission Tariff, Section 8. At the same time, the Company has acknowledged that new customers need not be provided service when certain circumstances are present, stating in its Aquidneck Island Long-Term Gas Capacity Study:

For both residential and non-residential applicants, National Grid is required to connect and service all customers that request gas service in Rhode Island, unless precluded by certain conditions, such as the incomplete construction of necessary facilities, insufficient supply, or considerations for public safety.

National Grid, *Aquidneck Island Long-Term Gas Capacity Study*;

<https://www.nationalgridus.com/media/pdfs/other/aquidneckislandlong-termgascapacitystudy.pdf>

(September 2020). The tariff also provides certain exceptions, noting that “[t]he Company reserves the right to [] refuse to connect its service if, to its knowledge and in its judgment, the Customer’s installation has become or is unsafe, defective, or in violation of the Company’s policies or any ordinances, laws, codes, or regulations.” Tariff, Section 8. Clearly, this leaves room for denying service in the face of insufficient supply, or in light of any laws, codes, or regulations aimed at reducing

emissions and/or limiting use of fossil fuels.²

By statute, the gas utility has an obligation to provide “safe, reasonable, and adequate services” and to its customers and to ensure that the utility is not unjustly discriminatory or unfair. R.I. Gen Laws § 39-2-1; *see also* R.I. Gen Laws § 39-1-1(b). Adequate service refers to the provision of good service to customers throughout the year, meeting certain service standards. *See e.g.* In Re New England Gas Co., 230 P.U.R.4th 332 (Nov. 21, 2003). But there does not seem to be any support for a requirement to make services available to new customers, so long as failure to do so is not based on discrimination or unfair practices. *Id.* Even if there were some prior interpretation of “safe, reasonable, and adequate services” that supported a requirement to offer service to anyone who requests it, the lack of natural gas service in several areas throughout the State illustrates that as a practical matter, any such requirement is illusory. In any event, it is not compelled by the statutory text, which only requires “adequate” services to existing customers — not services to all who may desire it, regardless of economic or environmental cost. This is borne out by the rest of the statute, only one section of which concerns new occupants, which requires that utility services may not be withheld because of a former occupant’s nonpayment. *See* R.I. Gen Laws § 39-2-2. But there is no express statutory mandate to provide or extend gas service to areas where it does not exist. Absent a universal statutory mandate to serve, and with the Act on Climate’s mandates in mind, the Commission should reject any past administrative interpretations that could be read to require the expansion of natural gas services.³ Similarly, absent growth, any claims that usage will grow substantially should be met with great skepticism as appliances

² In the future, this may include, for example, building codes requiring certain heat sources, a ban on certain gas appliances, regulations otherwise limiting fossil fuel heating systems, or a moratorium on gas hookups.

³ Although there is no statutory mandate to provide service in the ordinary course, there *is* statutory delegation of discretion to the Commission sufficient to require provision of service in enumerated emergent circumstances. R.I. Gen Laws § 39-1-32(a).

improve efficiency and homes voluntarily switch away from natural gas.

A desire to furnish new service and expand fossil fuel dependence is not synonymous with furnishing the needs of the state. The State’s energy policies require a decreasing reliance on fossil fuels as the State works towards the mandated greenhouse gas emission reductions set forth in the Act on Climate. In fact, for this very reason, allowing a project for the stated purpose of increasing fossil fuel use is contrary to the needs of the State. How the needs of the State can be addressed by the current natural gas distribution system is exactly the area of inquiry the Commission is currently considering in the pending Future of Gas Docket.

Lastly, the Commission has asked: “Whether or how the utility’s legal/regulatory duty to provide reliable service to existing customers under the type of contingency event described in the filing correlates to a ‘need of the state’ standard in the Energy Facility Siting Act.” This question requires similar considerations to the ones addressed above. Again, the immediate needs of homes and businesses reliant on fossil fuels for heat must be addressed, but there is a difference between an immediate need and preparation for a low-probability “contingency event” where the Company has identified a “capacity vulnerability.” In its filings, the Company has claimed that Aquidneck Island is particularly vulnerable to a supply disruption because of its location at the end of the pipeline. *See* Application at Siting Report 2.3.2. However, the Company notes at the same time that “[w]hile this is by no means unique in terms of [the Company’s] gas network, a long-term solution that would mitigate this single-point-of-failure risk would provide an ancillary benefit in addition to addressing the vulnerability to upstream capacity disruptions.”⁴

⁴ Application, Siting Report (as previously filed May 2021 in EFSB Docket No. SB-2021-04) at 2.3.2. It should be noted that this statement was removed from the subsequent version of the Application filed in April 2022. However, the claim is consistent with the Division’s expert testimony, which states: “[M]ost gas distribution systems are vulnerable to supply disruptions on upstream pipelines. Few have the ability to ensure continuous gas supply reliability for **all customers** under **all conditions** if gas flows on upstream pipeline systems encounter significant disruptions

Here, the Company has not shown a need, but has instead highlighted a benefit to its proposed plan. While this benefit has clear value in the event of a supply disruption in the right location, it does not support a finding of need for perpetual winter mobilization at the Facility to prepare for a rare contingency. More so than the above scenarios, this plan appears to put forth a hyper-local assessment of need that does not support the permanent operation of the Facility. Any increased use of fossil fuels or expansion or extension of the life of the natural gas system may run contrary to the State's energy goals, as the Future of Gas Docket will elaborate. In the event of a true contingency event, the Company might need to mobilize an emergency response at that time. But to the extent that new technology becomes available or the population potentially affected by the contingency could use the opportunity to leverage existing or future subsidies to transition fuel sources, the readiness of a back-up fossil-fuel reliant system could hinder the State's energy needs.

IV. CONCLUSION

The Commission may ultimately conclude that the Project is required on an interim basis to address *immediate* needs of the State, but that determination must be made by considering whether cleaner energy sources and demand-reducing programs could substitute for the Facility in the immediate-term, short-term, or long-term. In assessing need, the Commission must consider our State's energy policies and the Act on Climate while ensuring safe, reliable, and affordable heat for customers. Any approval of a current plan should also consider the rapidly changing energy landscape in our State. In the very near term, the Commission will be considering the Future of Gas Docket and the State and federal governments will be implementing aggressive incentive programs to aid people seeking to update their homes and transition away from fossil

during high demand periods. The Company's Aquidneck Island system has operated for decades without planning adequate backup capacity to ensure that all customers would have access to needed gas supplies at all times." *Testimony of Mssrs. Oliver and Roberti* at 26: 17-20; 27: 1-2 (emphasis in original).

fuels. As such, the Commission and the EFSB should factor into any approval the periodic review of the need for seasonal operation at the Facility on a short timeframe to allow careful assessment of the changing needs of the State.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 4th day of April 2023, the original and five hard copies of this document were sent, via electronic mail and first-class mail, to Luly Massaro, Clerk of the Division of Public Utilities and Carriers, 89 Jefferson Boulevard, Warwick, RI 02888. In addition, electronic copies of the document were served via electronic mail on the service list for the above captioned Docket on this date.

/s/ Maria Bedell