STATE OF RHODE ISLAND
OFFICE OF THE ATTORNEY GENERAL

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Peter F. Neronha
Attorney General

Re: ATTORNEY GENERAL'S COMMENTS ON THE NARRAGANSETT ELECTRIC COMPANY d/b/a RHODE ISLAND ENERGY'S ELECTRIC INFRASTRUCTURE, SAFETY, AND RELIABILITY PLAN FY 2023 PROPOSAL - RECONCILIATION

Docket No. 5209

Dear Public Utilities Commission:

The Attorney General of the State of Rhode Island ("Attorney General") wishes to provide the following comment with respect to the above-referenced docket.

It has become apparent in this docket that the Public Utilities Commission ("Commission") may review certain expenditures that were not approved in the applicable FY 2023 Infrastructure, Safety and Reliability ("ISR") Plan. Specifically, the Division of Public Utilities and Carriers ("Division") has, in its recent Position Statement in this docket, identified certain expenditures on reclosers that were included within a considerable overspend in Rhode Island Energy's "System Capacity & Performance Blanket" category. As pointed out by the Division, there was some $1,669,833 of spending on reclosers. Meanwhile, review of the prior five-years revealed a typical expenditure of only $95,000 to $312,000 on reclosers in that category.

The Division has correctly noted that this nearly $1.7 million spend on reclosers was "part of a new program that had not been presented or appropriately justified prior to the FY 2023 ISR Plan year commencing." *See* Division Position Statement at 2 of 3 (quoting Testimony of Engineering Consultant Mr. Gregory Booth). Accordingly, the Attorney General agrees with the Division that recovery for those expenses should be disallowed in the present reconciliation filing.[1] This is consistent with the legal position previously taken by the Attorney General in Commission Docket Nos. 22-53-EL and 22-54-NG in his legal brief attached hereto as **Exhibit 1**. As noted in that brief, the Revenue Decoupling Statute creates an ISR planning, budgeting, and reconciliation process designed to foster transparent utility investment in safety and reliability projects. That statutory process must be followed to protect ratepayers from the impacts of unapproved spending.

[1] It should also be noted that although the Division has indicated that recovery could be considered in a future base rate case or ISR Plan, that issue need not be addressed in the current docket. The Commission should only consider the appropriateness of recovery in a separate filing if Rhode Island Energy were to seek such recovery in a future filing.

Sincerely,

PETER F. NERONHA
Rhode Island Attorney General

/s/ Nicholas M. Vaz

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Exhibit 1

STATE OF RHODE ISLAND
PUBLIC UTILITIES COMMISSION

IN RE:	**THE NARRAGANSETT ELECTRIC COMPANY**	**:**
	d/b/a RHODE ISLAND ENERGY	**: Docket No. 22-53-EL**
	INFRASTRUCTURE, SAFETY AND	**: Docket No. 22-54-NG**
	RELIABILITY PLAN FY 2024 PROPOSALS	**:**

THE ATTORNEY GENERAL OF THE STATE OF RHODE ISLAND'S
LEGAL MEMORANDUM IN RESPONSE TO COMMISSION REQUEST

NOW COMES Peter F. Neronha, Attorney General of the State of Rhode Island ("Attorney General"), and hereby provides the following memorandum in response to the questions posed by the Public Utilities Commission ("Commission") during hearings in its Docket No. 22-53-EL on March 9, 2023 as articulated in the Commission's March 10, 2023 memorandum (the "Briefing Prompt").

I. INTRODUCTION

As explained in the Commission's Briefing Prompt, The Narragansett Electric Company d/b/a Rhode Island Energy (the "Company" or "RIE") has "identified certain projects or investments that were not expressly approved in the ISR filing for the relevant fiscal year and indicated an expectation that the Company would be able to utilize the Infrastructure, Safety, and Reliability ("ISR") reconciliation to recover the revenue requirement retroactively for projects going into service during the fiscal year." *Briefing Prompt* at 3. The questions that follow are general legal questions specifically tailored to determining the appropriate use of the statutory ISR Plan and reconciliation process provided for in R.I. Gen. Laws § 39-1-27.7.1 (the "Revenue Decoupling Statute"), separate and apart from the specific projects identified by the Company. See generally, *id.* To that end, the parties have been asked to make certain assumptions to aid in analysis of the legal issues presented. Those simplifying assumptions are as follows:

(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.

II. STATUTORY REQUIREMENTS OF ISR PLAN AND RECONCILIATION

The Commission has stated that "[t]he ISR provisions in the law were intended to limit or eliminate regulatory lag for certain capital projects that relate to safety and reliability, as expressed in statute." *Briefing Prompt* at 2. A stated purpose of the Revenue Decoupling Statute is "[f]acilitating and encouraging investment in utility infrastructure, safety, and reliability[.]" R.I. Gen. Laws § 39-1-27.7.1(a)(7). But other purposes include "[i]ncreasing efficiency" and various demand reduction goals of the legislature. *Id.* § 39-1-27.7.1(a). Moreover, as the Commission interprets this statute, it must also bear in mind the Act on Climate, R.I. Gen. Laws §§ 42-6.2-8,9. Achieving the emissions reduction mandates on the short timescale available requires the State to incentivize forward-planning and to carefully scrutinize investments to ensure that the available time and resources are deployed in a manner most likely to achieve the mandates.

Although the legislature sought to encourage investment in infrastructure, safety and reliability, the ISR and its reconciliation mechanism do not authorize boundless, unreviewed spending authority with guaranteed revenue requirement recovery for regulated utilities. Instead, the statute provides for a regulatory review process by which the Company can propose a course of action and a capital expenditure budget for certain reliability and safety projects and receive approval for recovery for all or some of its proposed investments. This process is clearly defined in R.I. Gen. Laws § 39-1-27.7.1, and consists of:

> 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).

R.I. Gen. Laws § 39-1-27.7.1(c)(2) (*emphasis added*). Subsection (d) contains the requirements for the Company's ISR spending plan submission, which must consider spending for the "following fiscal year." R.I. Gen. Laws § 39-1-27.7.1(d). The Plan must address 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.

Id. Following a statutory period of at least sixty days "[p]rior to the beginning of each fiscal year" when the Company and the Division of Public Utilities and Carriers ("Division") must "cooperate in good faith to reach an agreement on a **proposed plan** for these categories of costs **for the**

prospective fiscal year," a plan must be submitted to the Commission for review and approval. *Id.* (*emphasis added*).

When interpreting statutory provisions, "'the plain statutory language' itself serves as 'the best indicator.'" *McCain v. Town of N. Providence ex rel. Lombardi*, 41 A.3d 239, 243 (R.I. 2012) (citing *DeMarco v. Travelers Insurance Co.*, 26 A.3d 585, 616 (R.I.2011) (quoting *State v. Santos*, 870 A.2d 1029, 1032 (R.I.2005))). Moreover, "[w]hen that statutory language is 'clear and unambiguous, [the court must] interpret the statute literally and must give the words of the statute their plain and ordinary meanings.'" *Id.* (quoting *State v. Gordon*, 30 A.3d 636, 638 (R.I.2011) (quoting *Tanner v. Town Council of East Greenwich*, 880 A.2d 784, 796 (R.I.2005))). When examining an unambiguous statute, "'there is no room for statutory construction'" and the statute must be applied "'as written.'" *Id.* (quoting *Planned Environments Management Corp. v. Robert*, 966 A.2d 117, 122 (R.I.2009) (quoting *State v. Oliveira*, 882 A.2d 1097, 1110 (R.I.2005))).

Accordingly, the unambiguous plain language of the Revenue Decoupling Statute should be interpreted literally, and the recovery mechanisms created therein may not be liberally construed or altered. The statute by its plain language calls for an annual budgeting process to determine a budget that must be approved in advance, with a mechanism to reconcile variances from that preapproved budget. It would be nonsensical to construe the legislature's language as creating a second base rate case for expenditures related to safety and reliability. Instead, the Revenue Decoupling Statute provided for a new method of recovery for certain "anticipated" safety and reliability expenditures that were properly presented in a "pre-approved" annual ISR budget. R.I. Gen. Laws § 39-1-27.7.1(c)(2). Unanticipated or unapproved expenses cannot be recovered through the ISR or the reconciliation mechanism by the plain language of the statute.

Any necessary but unanticipated or unapproved expenses must await the next rate case or recovery through other applicable authorized avenues.

This plain-language interpretation is consistent with the Commission's prior positions on the ISR reconciliation and its relationship to the prior fiscal year's approved ISR Plan and budget. As outlined by the Commission in 2011, "[e]ach year, the Company will reconcile the revenue requirement to the revenue billed from the rate adjustments implemented at the beginning of each fiscal year." *In Re: Nat'l Grid Proposed Fy 2012 Elec. Infrastructure, Safety & Reliability Plan Pursuant to R.I.G.L. S39-1-27.7.1*, No. 4218, 2011 WL 6960168, at *3 (Dec. 12, 2011) (*internal citations and quotations omitted*). The process specifically considers reconciliation of discretionary and non-discretionary expenses under the prior year's ISR Plan as follows:

> During the reconciliation process, the Electric ISR Plan budget will be compared to actual expenses, but the Company will not be able to adjust rates to collect for expenses in excess of the budgeted amount unless the Company can prove the expenses were the result of factors outside of the control of the Company. [N]on-discretionary capital investments will be reconciled to the lesser of the actual 'nondiscretionary'-related capital investments placed into service and actual 'non-discretionary' spending levels on a cumulative fiscal year-to-date basis whereas discretionary capital investments will be reconciled to the lesser of the actual 'discretionary'-related capital investments placed into service and the level of approved 'discretionary' spending … on a cumulative fiscal year-to-date basis.

Id. at *4 (internal citations and quotations omitted). Similarly, "[t]he 2016 Electric ISR Plan included a spending plan and proposed an annual reconciliation mechanism to allow for recovery **related to capital investments and other spending undertaken pursuant to the approved budget.**" *In Re: The Narragansett Elec. Co. d/b/a Nat'l Grid Fiscal Year 2016 Elec. Infrastructure, Safety, & Reliability Plan Ann. Rep. & Reconciliation*, No. 4539, 2016 WL 7474015, at *1 (Dec. 21, 2016) (approving reconciliation for prior fiscal year after analysis to

ensure that "[d]iscretionary capital investment [was] reconciled to the lesser of the actual capital investment placed-in-service and the level of approved spending on a cumulative basis [and n]on-discretionary capital investment [was] reconciled to the actual capital investment placed in service."). Accordingly, "[e]ach year [t]he Company proposes Capital Expenditure reconciling factors [ ] for the following twelve-month period. The reconciliation compares the actual cumulative revenue requirement to actual billed revenue generated from the Capital Expenditure Factors included **in the prior year's** overall ISR Factor." *In Re: The Narragansett Elec. Co. d/b/a Nat'l Grids Elec. Infrastructure, Safety, & Reliability Plan FYy 2020 Proposal*, No. 4915, 2020 WL 6203839, at *4 (Sept. 29, 2020) (*emphasis added*).

Thus, the ISR reconciliation process created by statute is limited in applicability to necessary adjustments to the revenue requirement considering only expenditures arising from the prior year's approved ISR Plan and its approved budget. This is consistent with the legislature's clearly expressed intent to tie reconciliation to the carefully-devised ISR planning process. Ensuring that this limitation is properly respected protects the integrity of the Commission's review. Under a process whereby reconciliation could be used to recover unapproved costs, there would be a category of investments which never underwent regulatory review at all—either during the ISR budget and planning process or through a traditional rate case. Such a significant departure from ratemaking principles would not have been approved by the legislature without express statutory language. Additionally, investments made absent preapproval could potentially avoid consideration of the Act on Climate, which is required during the Commission's review of the ISR Plan. See R.I. Gen. Laws § 42-6.2-8. Certainly, an expression of interest in sustaining investment in infrastructure would not be enough to countermand the statutory mandate that only approved, budgeted expenses be recovered through the ISR reconciliation mechanism.

III. CONSIDERATION OF THE COMMISSION'S HYPOTHETICAL QUESTIONS

In its Briefing Prompt, the Commission has articulated four questions that the parties should consider in light of the provided simplifying assumptions. The responses to each of these questions requires careful consideration of the legal analysis outlined above.

a. 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?

The utility must experience regulatory lag under the plain language of the statute. First, there are several policy concerns related to whether the proposed investment would be recoverable through the reconciliation. As noted by the Commission in its Briefing Prompt, "'The central principle is that ratemaking must be prospective and, although subject to narrow exceptions, the PUC may not engage in retroactive ratemaking that results in future payments for past expenses.'" *Briefing Prompt* at 2 (quoting *In Re Providence Water Supply Board's Application to Change Rate Schedules*, 989 A.2d 110, 115 (R.I. 2010)). The noted exceptions are limited and outside of the ISR reconciliation process. See *Briefing Prompt* at fn 4 (noting that exceptions are typically related to extraordinary expenses outside of the Company's control, such as when there has been a significant storm or supplemental tax increase during the rate year). Allowance of retroactive recovery for investments absent preapproval flies in the face of this basic principle and erodes the importance of the ISR Plan review process designed to ensure a reasonable budget for needed improvements to the safety and reliability of regulated distribution systems. Moreover, if the

incurred costs were discretionary in nature, there is an additional harm to ratepayers in that the reconciliation process would be unable to consider any pre-approved budget when reconciling the revenue requirement. In this scenario, the Commission would only have access to actual costs incurred by the Company for a project that was placed into service without ever having been proposed to the Commission. In other words, rate payers would be deprived of the formula mandated in the statute for discretionary expenditures such that the Company would recover more up front and rate payers would pay more because the Company submitted payment after approval of the ISR plan. Obviously, this could operate as an incentive *not to include* expenses, creating a classic 'moral hazard.'

Secondly, as noted above, pre-approval is a condition precedent to recovery of revenue requirement through reconciliation under the Revenue Decoupling Statute. The requirement set forth in R.I. Gen. Laws § 39-1-27.7.1(c)(2) demands that reconciliation be applied only to "anticipated capital investments and other spending pursuant to the annual pre-approved budget." In this scenario, the hypothetical capital investment was made by the Company and placed into service during a fiscal year in which it was not included in the pre-approved ISR Plan and budget. As such, recovery during the reconciliation process is inappropriate and expressly disallowed by statute. Allowing the contrary result would end up with ratepayers paying for investments that were never reviewed or approved by the Commission at all—a result nowhere contemplated in the statute.

The reconciliation mechanism, while reducing the number of expenditures subject to regulatory lag, does not completely eliminate that risk or other forms of economic risk for any and all capital expenses to which the utility can draw a nexus to safety and reliability – even if those investments were prudent and/or beneficial for customers. Likewise, it does not matter whether

the investment would have been approved in the prior year's ISR Plan if the Company had proposed it. According to the plain language of the statute, in the contemplated scenario, the Company would be prohibited from recovering the first fiscal year revenue requirement for such investment and must experience regulatory lag.

b. 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?

As explained in detail above, the Revenue Decoupling Statute expressly provides that reconciliation is available for investments that were anticipated as part of a pre-approved budget. The scenario articulated here contemplates an investment that has already been completed and placed into service in the prior fiscal year. The statutory reconciliation mechanism contained in R.I. Gen. Laws § 39-1-27.7.1(c)(2) does not provide a figurative "second bite at the apple" for the utility to propose capital investments for a prior ISR Plan. Thus, any recovery through reconciliation would be improper and the Company must experience regulatory lag until the next distribution rate case as a result of its failure or inability to conform to the statutory ISR Plan and budget pre-approval process.

c. 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?

For the reasons explained above, the Commission does not have discretion to expand the statutorily-created reconciliation process. This is true regardless of whether the proposed recovery is prospective or retroactive, and regardless of whether the Commission may find it reasonable to

allow recovery. This question is specific to the ISR reconciliation process provided for in the Revenue Decoupling Statute, which allows for reconciliation of pre-approved non-discretionary capital expenditures to the actual capital investment placed in service, and pre-approved discretionary expenditures to the lesser of the actual capital investment placed-in-service and the level of approved spending on a cumulative basis. See e.g. *In Re: The Narragansett Elec. Co. d/b/a Nat'l Grid Fiscal Year 2016 Elec. Infrastructure, Safety, & Reliability Plan Ann. Rep. & Reconciliation*, No. 4539, 2016 WL 7474015, at *1 (Dec. 21, 2016). The reconciliation mechanism is a departure from the normal ratemaking process, and it must conform to its statutory authorization. The contemplated project in this hypothetical is outside of this scope and therefore cannot be brought into the reconciliation.

d. 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?

As with the reconciliation process, the Commission cannot deviate from the statutorily prescribed process for devising and approving ISR spending plans. By statute, the ISR spending plan must consider spending for the "following fiscal year." R.I. Gen. Laws § 39-1-27.7.1(d). Moreover, the statute contemplates a collaborative process between the Company and the Division to attempt to coordinate a proposed plan **"**for the *prospective* fiscal year." *Id.* (*emphasis added*). The unambiguous statutory language requires pre-approval and does not provide for any consideration of prior projects within subsequent ISR plans.

This scenario contemplates an investment that has been placed into service in the prior fiscal year following a decision that was made after that fiscal year's ISR was approved by the Commission. The following year's ISR plan cannot include revenue requirement (prospective or retroactive) for a completed investment that was not included in a prior ISR Plan. While this may

ultimately mean that prudent, or even needed, investments made by the Company are not immediately able to recover revenue requirement, it preserves the protections afforded to ratepayers under the Revenue Decoupling Statute through the creation of a careful process of regulatory review prior to Company actions. Moreover, an adequate mechanism for compensating these investments exists in the normal rate review process. Accordingly, regardless of whether the Commission may consider it reasonable to allow recovery in the subsequent ISR budget, the Commission is without discretion to approve recovery in the ISR planning process that falls outside of the procedures outlined in the Revenue Decoupling Statute.

IV. CONCLUSION

It is clear that the Revenue Decoupling Statute creates an ISR planning, budgeting, and reconciliation process designed to foster transparent utility investment in safety and reliability projects. However, as explained above, the statute is not a guarantee to collect any and all revenue requirement associated with safety and reliability spending. Instead, it was crafted by the legislature to incentivize only those investments that are properly proposed and granted pre-approval by the Commission. Outside of that pre-approval process, the utility must seek recovery for capital investments through other means, even if that causes the utility to experience regulatory lag.

Respectfully submitted,

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By his Attorney,

/s/ Nicholas M. Vaz
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Dated: March 24, 2023

CERTIFICATE OF SERVICE

I hereby certify that on the 24th day of March 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 Motion were served via electronic mail on the service list for the above captioned Dockets on this date.

/s/ Nicholas M. Vaz