

## **Issues to Be Briefed by the Parties Prior to Commencement of Evidentiary Hearings**

December 6, 2023

### **I. Burden of Proof**

The Company's own investigation, conducted by National Grid, revealed that out-of-period invoicing occurred from 2012 to 2021, across the three energy efficiency program sectors.

Given the admission by the utility relating to the improper accounting of the performance incentive, one of the key questions before the Commission relates to the extent to which the out-of-period invoicing practice affected the pay out of the annual performance incentives in each year.

National Grid appears to have used a combination of invoice review and extrapolation to conclude that there was only an impact of \$320,000. They also identified what they referred to as a more conservative calculation, arriving at the amount of \$2.4 million.

In contrast, the Division uses extrapolation techniques to argue for a partial disallowance of the performance incentives earned across the relevant period, calculating an amount of \$10.5 million, plus interest of \$1.7 million.

This is a substantial difference in potential outcomes and raises the question of who has the burden of proof relating to proving the extent of the impact on the earnings incentive.

It is important to note that § 39-3-12 of Rhode Island General Laws designates that “in any hearing involving any proposed increase in any rate, toll, or charge, the burden of proof to show that the increase is necessary in order to obtain reasonable compensation for service rendered shall be upon the public utility.”

However, this case does not involve a proposed increase in any rate, toll, or charge. In that regard, the Rhode Island Supreme Court, in the case of *ACP Land, LLC v. Public Utilities Commission*, 228 A.3d 328 (R.I. 2020), has opined on the inapplicability of § 39-3-12 when a rate increase is not involved, stating the following in a footnote:

“§ 39-3-12 applies specifically to proposed increases in the rate, toll, or charge, stating that ‘the burden of proof to show that the increase is necessary in order to obtain a reasonable compensation for the service rendered shall be upon the public utility . . . .’ Notably, however, this case does not involve an increase in the rate at issue; therefore, § 39-3-12 is not applicable to this situation.”

This footnote does not necessarily mean that the burden should not reside upon the utility for other reasons, but it does appear to indicate that there is no statutory requirement imposing the burden unless a case involves a proposed rate increase.

Before the evidentiary hearings take place, it will be important for the Commission to determine which party carries the burden of proof to determine the financial harm to ratepayers, if any. Thus, the issue needs to be briefed by the parties.

Here are some questions implicated by this case relating to the burden of proof. The listing is not intended to be the only questions that might be implicated, but provide guidance for the parties to address the issue:

- (1) In the absence of the applicability of a statutory requirement that stipulates the burden of proof, does the Commission have the discretion to establish the standard of review as it relates to burden of proof, or is the issue governed by common law or other precedent regarding civil rules of evidence or administrative law?
- (2) Please provide a view on how the burden of proof should be treated: (i) should it be treated as if this case related to a proposed rate increase, or (ii) should it be treated like a matter of civil litigation, where the party asserting that financial harm has occurred carries the burden of proof to establish the extent of the financial harm, or (iii) are there other relevant rules of evidence or precedent that would prevail?
- (3) Even if the utility carries the burden of proof, is there a shift in burden from the utility to the parties challenging the Company's estimate if the Commission were to determine that the Company put forth a prima facie case supporting an estimate of the financial impact?
- (4) If proving the financial impact with a reasonable and reliable estimate is not possible because too many of the pertinent records are not in existence, or the administrative burden of doing the calculation is so high that it makes such an endeavor impractical or even impossible for any party to prove, what is the effect on the burden of proof and/or applicable remedies, if any, given the admission that out-of-period invoicing occurred over the specified period?

## **II. Applicability of Statutes Regarding Penalties for Violations**

Another issue which the Commission intends to examine in this case is the extent to which the utility should or should not be assessed financial penalties as a result of the Company's out-of-period invoicing practices. There are at least two statutory provisions that may be implicated:

### **(a) Section 39-2-8 – Penalty for Violations**

Section 39-2-8 of Rhode Island General laws states:

Any public utility which shall violate any provision of chapters 1 — 5 of this title, or shall do any act herein prohibited, or shall fail or refuse to perform any duty enjoined upon it for which a penalty has not been provided, shall be subject to a penalty of not less than two hundred dollars (\$200) nor more than one thousand dollars (\$1,000), and in the case of a continuing violation of any of the provisions of the chapters, every day's continuance thereof shall be deemed to be a separate and distinct offense.

The parties are asked to file briefs addressing the question whether Section 39-2-8 applies to the admitted conduct of out-of-period invoicing, including the filing of reports and financial schedules supporting the award of performance incentives that may have reflected inaccurate or false reporting of cost incurrence in applicable program years.

In particular, the Company filed Annual Reports from 2013 through 2022 which may have reflected inaccurate calculations and accounting of program costs in each year.

The Commission requests the parties to brief the following questions:

- (1) To what extent does Section 39-2-8 apply to the filing of the Annual Reports or other accounting or rate schedules if such reports or rate schedules reflected inaccurate or false information caused by the out-of-period invoicing? In this regard, see for example, a recent California case, in which the California Public Utilities Commission counted each day following the filing of a false energy efficiency report to be a continuance of the violation until it was cured. See: <https://docs.cpuc.ca.gov/PublishedDocs/Published/G000/M498/K964/498964399.PDF> )
- (2) If Section 39-2-8 was applicable and the Commission were to determine that a penalty should be assessed, what factors should the Commission be considering to determine the amount of the penalty? (See, for example, how the California PUC addressed this question in the case cited above.)

**(b) Section 39-1-22 -- False Returns**

Section 39-1-22 of Rhode Island General Laws states:

A company subject to the supervision of the commission or division that furnishes it with a sworn or affirmed report, return, or statement, that the company knows or should know contains false figures or information regarding any material matter lawfully required of it, and any company that fails within a reasonable time to obey a final order of the commission or division, shall be fined not more than twenty thousand dollars (\$20,000).

The Company sponsored witnesses who supported under oath rate schedules and/or other statements that were based on the calculations and accounting of program costs. The schedules/statements may have contained false figures or information as a result of the admitted out-of-period invoicing.

The parties are requested to address the following question:

To what extent is Section 39-1-22 implicated if the Commission finds that witnesses in prior evidentiary proceedings supported figures or other information under oath that was based on inaccurate or false information caused by the out-of-period invoicing?

If the Division or Attorney General believes there is another statutory or other basis for the assessment of penalties, that should be addressed as well, with an explanation.

### **III. Briefing Schedule**

The briefing schedule shall be as follows:

#### **Section I. Burden of Proof**

1. National Grid and Rhode Island Energy shall submit briefs by January 19, 2024.
2. The Attorney General and the Division shall file response briefs by February 16, 2024.
3. Reply TBD

#### **Section II. Applicability of Statutes Regarding Penalties for Violations**

1. The Attorney General and the Division shall file response briefs by January 19, 2024.
2. National Grid and Rhode Island Energy shall file response briefs by February 16, 2024.
3. Reply TBD