

KEEGAN WERLIN LLP

ATTORNEYS AT LAW
99 HIGH STREET, SUITE 2900
BOSTON, MASSACHUSETTS 02110

(617) 951-1400

TELECOPIER:
(617) 951-1354

January 19, 2024

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

Re: In re: Investigation of Misconduct by The Narragansett Electric Company Relating to
Past Payments of Energy Efficiency Program Shareholder Incentives
Docket No. 22-05-EE

Dear Ms. Massaro:

On behalf of National Grid USA (“National Grid”), enclosed is National Grid’s brief in response to the questions issued by the Public Utilities Commission on December 6, 2023, regarding burden of proof.

Please do not hesitate to contact me if you have any questions. Thank you for your attention to this matter.

Very truly yours,



Robert J. Humm

Enclosures

cc: Docket No. 22-05-EE Service List

**STATE OF RHODE ISLAND
PUBLIC UTILITIES COMMISSION**

In re: Investigation of Misconduct by)
The Narragansett Electric Company Relating)
to Past Payments of Energy Efficiency)
Program Shareholder Incentives)
_____)

Docket No. 22-05-EE

**BRIEF OF NATIONAL GRID USA IN RESPONSE TO
BRIEFING QUESTIONS ISSUED BY PUBLIC UTILITIES
COMMISSION ON DECEMBER 5, 2023 REGARDING BURDEN OF PROOF**

Submitted by:

Cheryl Kimball, Esq.
Robert J. Humm, Esq.
Keegan Werlin LLP
99 High Street, Suite 2900
Boston, Massachusetts 02110
(617) 951-1400
ckimball@keeganwerlin.com
rhumh@keeganwerlin.com

Laura C. Bickel, Esq.
National Grid
170 Data Drive
Waltham, Massachusetts 02451
(781) 907-2126
laura.bickel@nationalgrid.com

Dated: January 19, 2024

Table of Contents

I. INTRODUCTION AND BACKGROUND..... 1

II. BRIEFING ISSUES 2

A. Authority of the Commission..... 2

B. Burden of Proof and Shifting Burden..... 3

C. Evidentiary Support for Calculation of Over-Collection..... 7

III. CONCLUSION..... 8

**STATE OF RHODE ISLAND
PUBLIC UTILITIES COMMISSION**

_____))
In re: Investigation of Misconduct by))
The Narragansett Electric Company Relating))
to Past Payments of Energy Efficiency))
Program Shareholder Incentives))
_____))

Docket No. 22-05-EE

**BRIEF OF NATIONAL GRID USA IN RESPONSE TO
BRIEFING QUESTIONS ISSUED BY PUBLIC UTILITIES
COMMISSION ON DECEMBER 6, 2023 REGARDING BURDEN OF PROOF**

National Grid USA (“National Grid”) submits this brief in response to the questions issued by the Public Utilities Commission (“PUC” or the “Commission”) on December 6, 2023 (“Briefing Memorandum”), regarding the burden of proof.

I. INTRODUCTION AND BACKGROUND

Following an extensive discovery period in the above-captioned proceeding, and completion of National Grid’s comprehensive investigation and transaction analysis regarding the scope and impact of out-of-period invoicing, National Grid submitted the Report on Investigation of Out-of-Period Invoicing Within the Rhode Island Energy Efficiency Program (2012-2021) dated March 10, 2023 (“March 10, 2023 Report”). On November 27, 2023, the Division of Public Utilities and Carriers (the “Division”) filed the Joint Testimony of Michael R. Ballaban and Jacob Van Reen (“Division Testimony”) in response to the March 10, 2023 Report.

On December 6, 2023, the Commission requested briefing on issues related to burden of proof and applicability of statutes regarding penalties for violations in this proceeding (see PUC Briefing Memorandum at 2). This brief addresses the questions in the PUC Briefing Memorandum regarding the burden of proof. As discussed in more detail below, the Commission’s authority is

derived from statute. The Narragansett Electric Company¹ bears the burden of proof with respect to the calculation of the alleged over-collection of performance incentives because Narragansett, as a public utility, has the burden to calculate its energy efficiency reconciling rate to recover energy efficiency program costs. To the extent another party to the proceeding seeks relief for alleged violations of other statutes, such as a civil penalty or other sanction, the party asserting such relief bears the burden of proof.

II. BRIEFING ISSUES

A. Authority of the Commission

The Commission is a creature of statute and, as such, it possesses only those powers, duties, responsibilities, and jurisdiction conferred upon it by the General Assembly. Bristol County Water Co. v. Pub. Utilities Comm'n, 117 R.I. 89, 97, 363 A. 2d 444, 449 (1976). The Commission does not have the authority to exercise jurisdiction or develop remedies, including those provided through common law, that are not derived from statutory delegation by the General Assembly. As a quasi-judicial tribunal, the Commission may adopt reasonable rules and regulations governing the procedure to be followed in any matter that may come before it for a hearing. R.I. Gen. Laws § 39-1-1; In re Kent County Water Auth. Change Rate Schedules, 996 A.2d 123, 125-126 (2010). Although the Commission may examine evidence beyond the types of evidence permitted under the rules of civil procedure and develop procedural rules for the conduct of its hearings, the PUC's substantive jurisdiction and analysis must be derived from an express statutory grant of authority by the General Assembly.

In this proceeding, the Commission's authority over the underlying subject matter at issue – Narragansett's energy efficiency programs in Rhode Island – arises under the energy efficiency

¹ The Narragansett Electric Company d/b/a Rhode Island Energy ("Narragansett" or "Rhode Island Energy").

statute, R.I. Gen. Laws § 39-1-27.7. Specifically at issue is the impact of the out-of-period invoicing on the collection of performance incentives by Narragansett. Narragansett recovers its energy efficiency program costs through a reconciling mechanism authorized pursuant to R.I. Gen. Laws § 39-1-27.7(d)(5).

B. Burden of Proof and Shifting Burden

1. Summary Legal Precedent

Burden of proof generally includes two different concepts – the burden of production and the burden of persuasion. Burden of production refers to the “burden of going forward” with the evidence, which shifts from party to party as the case progresses. Murphy v. O’Neill, 454 A.2d 248, 250 (1983); Giblin v. Dudley Hardware Co., 44 R.I. 371, 375, 117 A. 418, 419 (1922); see Providence Gas Co. v. Malachowski, 600 A.2d 711, 715-16. The burden of persuasion generally refers to the “burden of establishing the truth of a given proposition in a case by such quantum of evidence as the law may require.” Murphy, 454 A.2d at 250 (citing Giblin, 44 R.I. at 375, 117 A. at 419). The burden of persuasion does not shift during a proceeding and generally rests with the party asserting the claim. Douglas Furniture Corp. v. Ehrlich, 160 A.2d 362, 365 (1960).

In many cases, the law defines which party bears the burden of proof in a proceeding before the Commission. In rate proceedings pursuant to R.I. Gen. Laws § 39-3-12, the burden of proof to show any proposed *increase* in any rate, toll, or charge rests with the public utility. Providence Gas Company v. Pub. Utilities Comm’n, 352 A.2d. 630, 633 (1976). However, R.I. Gen. Laws § 39-3-12 does not apply to situations that do not involve an increase in rates. See ACP Land, LLC v. Pub. Utilities Comm’n, 228 A.3d 328, 337 n.10 (2020). The General Assembly did not specifically assign a burden with respect to the fully reconciling funding mechanism under R.I. Gen. Laws § 39-1-27.7.

Where the burden of proof is not specifically defined by statute, the party that bears the burden should be determined based on the claims giving rise to the dispute. As a general principle, the party asserting a claim (the moving party, plaintiff, appellant, prosecution, etc.) bears the burden of proof. See Providence Gas Co. v. Malachowski, 600 A.2d at 715-716 (citing U.S. v. Pub. Utilities Comm’n, 393 A.2d 1092, 1094 (1978)); Douglas Furniture Corp., 160 A.2d at 365; Berman v. Sitrin, 101 A.3d 1251, 1264 (2014) (citing Jones v. Wilbur, 604 A.2d 779, 780 (1992) (party asserting evidence should be excluded from record bears burden of proof)); General Acc. Ins. Co. of America v. American Nat. Fireproofing, Inc., 716 A.2d 751, 757 (1998) (“the burden of proof rests upon the party who asserts the affirmative of an issue and this burden never shifts”).²

2. Burden of Proof in this Proceeding Regarding Refund of Over-Collection of Performance Incentives

Fundamentally, this proceeding involves the question of the appropriate amount of performance incentives Narragansett should have collected through its energy efficiency fully reconciling funding mechanism for the period 2012 through 2021. Unlike traditional ratemaking, fully reconciling funding mechanisms are intended to be adjusted periodically to provide dollar-for-dollar recovery of specified costs, including the retroactive reconciliation of previously incurred costs. See National Grid’s Gas Cost Recovery Charge, Docket No. 4199, at 2010 WL 5543979 (2010); In re The Narragansett Electric Company d/b/a National Grid Gas Infrastructure, Safety, and Reliability Plan FY 2022, Docket No. 5099, at 12, 2021 WL 2190208 (2021). To

² In its Briefing Memorandum, the Commission posed a question whether it could establish a standard of review for the burden of proof given the absence of express statutory language regarding the assignment of the burden. Standard of review, however, is a separate but related legal concept to the burden of proof. The standard of review establishes the scope of review and the bounds of authority of the administrative body or court. See Rodriguez v. Dept. of Veterans Affairs, 8 F.4th 1290, 1298 (2021) (citing Louis L. Jaffe, *Administrative Law: Burden of Proof and Scope of Review*, 79 Harv. L. Rev. 914, 915 (1966)). A standard or scope of review does not dictate the appropriate burden of proof in a proceeding. See Collins Secs Corp. v. SEC, 562 F.2d 820, 823 (D.C. Cir. 1977). Accordingly, while the PUC may develop a reasonable standard of review consistent with the applicable laws, that standard of review does not establish the party with the burden of proof.

correct past calculations of a fully reconciling funding mechanism, the Commission may approve an adjustment to the rate to reconcile any improper over- or under-collection of actual costs. Accordingly, the burden of proof on the issue of the appropriate refund to customers through the energy efficiency reconciling mechanism rests with Narragansett. This is because the central issue is the calculation of Narragansett's reconciling mechanism and Narragansett's burden to demonstrate that it is receiving no more and no less than recovery of reasonable and prudently incurred energy efficiency costs.

In this proceeding, Narragansett, working together with National Grid, has responded to substantial discovery and, upon the conclusion of a full investigation and expanded transaction analysis, National Grid submitted an extensive report detailing the customer impact analysis by recomputing the annual results to isolate the impact of out-of-period invoicing on customers. The calculation to move the actual dollars into the correct program years demonstrated an over-collection of performance incentives of \$322,660; thereby, satisfying Narragansett's burden of proof.³

After the submission of the March 10, 2023 Report, the burden of production shifted to other parties to produce evidence related to the reasonableness of the National Grid's investigation and calculation of Narragansett's customer impact due to the potential over-collection of performance incentives. See e.g., Providence Gas Co. v. Malachowski, 600 A.2d at 715-16 (Division produced an expert witness to counter a proposal to capitalize expenses). For example, the Division Testimony submitted on November 27, 2023 asserted that the March 10, 2023 Report reflected an "effective" and "reasonable" investigation, and the analysis of residential upstream

³ Following its initial investigation, Narragansett adjusted its energy efficiency fully reconciling funding mechanism to refund the upper end of its initial *estimated* impact range of \$2,194,339, plus interest, for a total of \$2,422,235.

lighting (“RUL”) invoices and use of the RUL testing results as a proxy for other non-RUL energy efficiency programs is “reasonable” (Division Testimony at 22-31). The Division’s testimony on these issues is consistent with the shifting of the burden of production, and does not impact Narragansett’s ultimate burden of persuasion regarding the issue of the appropriate level of refund through the energy efficiency reconciling mechanism to resolve any over-collection of performance incentives, which Narragansett has met through the extensive transaction analysis presented in the March 10, 2023 Report.⁴

3. Burden of Proof Regarding Other Claims

The Division’s testimony suggests that the investigation in this proceeding should result in a monetary penalty assessed on Narragansett. For example, the Division’s testimony asserts that the calculation of impact to customers should go beyond the calculation of over-collected performance incentives due to out-of-period invoices and that the Commission should also deny performance incentives based on an alleged failure of Narragansett to uphold a “critical obligation” (Division Testimony at 34-36). In its Briefing Memorandum, the Commission has requested separate briefing on the applicability of statutes related to financial penalties. National Grid and Rhode Island Energy will address this issue in a subsequent brief on February 16, 2024, consistent with the timelines established by the Commission. However, National Grid notes that the burden of proof for any claim under a separate statute should rest with the party asserting the claim. Providence Gas Co. v. Malachowski, 600 A.2d at 715-16 (citing U.S. v. Pub. Utilities Comm’n, 393 A.2d at 1094); Douglas Furniture Corp., 160 A.2d at 365; General Acc. Ins. Co. of America, 716 A.2d at 757 (1998).

⁴ To the extent the Division argues that Narragansett bears a heightened evidentiary duty other than what is discussed in this brief (see Division Testimony at 36), National Grid disagrees with the Division’s assertion. Nevertheless, the purpose of this pre-hearing brief is to outline the appropriate assignment of the burden of proof and, therefore, National Grid will fully address the Division’s substantive arguments at the appropriate time.

Issuance of a penalty goes beyond the adjustment of a reconciling mechanism to correct Narragansett's original calculations and is outside the scope of a proceeding under R.I. Gen. Laws § 39-1-27.7. It is illogical that Narragansett would bear the burden of proving a negative – to sufficiently prove that it should not be assessed a penalty. Rather, the Commission must assign the burden on the party making the affirmative arguments for broader PUC action. General Acc. Ins. Co. of America, 716 A.2d at 757. For example, based on the accusations in its testimony, the Division bears the burden of proof on its claims related to denial of performance incentives for alleged failures to uphold a “critical obligation” (Division Testimony at 37). As discussed above, depending on the statutory provisions raised and the evidence presented, the burden of production on whether any penalties should apply and the amount thereof may shift to Narragansett if the other parties meet their burden, but the burden of persuasion will remain with the party asserting the claim against Narragansett.

C. Evidentiary Support for Calculation of Over-Collection

The Commission also raised a question about whether and how the PUC may fashion a remedy for over-collected performance incentives due to out-of-period invoices when certain invoices for the RUL program are no longer available and the ability to calculate a precise customer impact for non-RUL programs is impossible or impractical based on the circumstances described in the March 10, 2023 Report (PUC Briefing Memorandum at 2). The absence of perfect evidence does not prevent the Commission from weighing the available evidence and giving final approval of a refund in this proceeding based on a reasonable methodology for calculating what the costs should have been absent any improper out-of-period invoicing. In other cases, the PUC has used proxy values when direct evidence was not available. See, e.g., In re A&R Marine Corp., d/b/a Prudence & Bay Islands Transport Initial Rate Filing, Docket No. 4586 (2017) (PUC used proxy

information to establish components of rates due to lack of historical information); Narragansett Elec. Co. v. Rhode Island Pub. Utilities Comm'n, 35 A.3d 925, 933 (2012) (court stated it is an acceptable methodology to use a proxy group to set capital structure). Further, in cases involving faulty meters or meter tampering, reasonable methods have been used to calculate usage to bill or refund customers. See, e.g., In re Dinorah Reynoso v. National Grid, Docket No. D-19-34 (2020).

Where it is undisputed that the over-collection of performance incentives has occurred, the appropriate resolution is to develop a reasonable methodology to calculate the over-collection to refund customers and verify that Narragansett has taken steps to correct the misconduct of its employees. As discussed above, Narragansett has the burden to prove that it has appropriately calculated the over-collection to refund to customers under the circumstances. National Grid analyzed all available invoices and developed a reasonable proxy for the invoices from 2012 to 2015 that were in the possession of a former vendor, but that are no longer available. For non-RUL energy efficiency programs, in recognition of the impossible, or near impossible, burden on availability, time, costs, and resources, National Grid conducted a thorough investigation and transaction analysis to determine a reasonable approach to determining the customer impact. As noted above, the Division agrees that National Grid's approach is reasonable (Division Testimony at 25, 27, and 30-31). Therefore, National Grid's investigation and transaction analysis should serve as the basis for determining the refund to reconcile costs through Narragansett's energy efficiency reconciling mechanism.

III. CONCLUSION

Based on National Grid's review of the available statutes and case law, the Commission's authority is limited to that which is specifically granted by statute. Notwithstanding the lack of express statutory assignment of burden of proof, Narragansett bears the burden of proof with

respect to the calculation and reconciliation of the over-collection of performance incentives, given that Narragansett is responsible for calculating its energy efficiency reconciling rate to recover energy efficiency program costs. National Grid also acknowledges the complexity of calculating the precise customer impact and appreciates that the Division accepts the reasonableness of the methodology of National Grid's transaction analysis presented in the March 10, 2023 Report.

With respect to other claims and relief beyond the reconciliation of costs, the burden to demonstrate the legal authority and basis for relief, and the amount thereof, rests with the party asserting the harm and requested relief.

National Grid appreciates the opportunity to brief the legal issues that may be applicable to the resolution of this proceeding and looks forward to bringing this matter to a swift conclusion.

Respectfully submitted,

NATIONAL GRID USA,

By its attorneys,



Cheryl M. Kimball, Esq.
Robert J. Humm, Esq.
Keegan Werlin LLP
99 High Street, Suite 2900
Boston, Massachusetts 02110
(617) 951-1400
ckimball@keeganwerlin.com
rhumh@keeganwerlin.com



Laura C. Bickel, Esq.
National Grid
170 Data Drive
Waltham, Massachusetts 02451
(781) 907-2126
laura.bickel@nationalgrid.com

Dated: January 19, 2024