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Peter F. Neronha
Attorney General

January 19, 2024

Luly Massaro, Clerk
Division of Public Utilities and Carriers
89 Jefferson Blvd.
Warwick, RI 02888
Luly.massaro@puc.ri.gov

RE: IN RE: INVESTIGATION OF UTILITY MISCONDUCT OR FRAUD BY THE NARRAGANSETT ELECTRIC COMPANY RELATING TO PAST PAYMENT OF SHAREHOLDER INCENTIVE
DOCKET NO. 22-05-EE

Dear Ms. Massaro:

Enclosed please find for filing an original and nine (9) copies of the Attorney General's Brief Concerning Statutory Penalties, 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
nvaz@riag.ri.gov

Enclosures

Copy to: Service List

STATE OF RHODE ISLAND
PUBLIC UTILITIES COMMISSION

IN RE: INVESTIGATION OF UTILITY MISCONDUCT OR FRAUD BY THE NARRAGANSETT ELECTRIC COMPANY RELATING TO PAST PAYMENT OF SHAREHOLDER INCENTIVE	**:**	**DOCKET NO. 22-05-EE**

THE ATTORNEY GENERAL'S BRIEF CONCERNING STATUTORY PENALTIES IN COMMISSION DOCKET

NOW COMES Peter F. Neronha, Attorney General of the State of Rhode Island ("Attorney General"), and hereby provides the following in response to Section II of the Commission's pre-hearing briefing prompt in the above-captioned docket, concerning the applicability of statutes regarding penalties for violations. It should be noted that this question is being posited prior to a full evidentiary process, and therefore the Attorney General reserves his right to amend or supplement the positions offered herein as the docket progresses.

I. Introduction

The General Assembly has outlined the importance of providing "fair regulation of public utilities and carriers in the interest of the public, to promote availability of adequate, efficient, and economical energy, [ ] to the inhabitants of the state, [and] to provide just and reasonable rates and charges for such services and supplies[.]" R.I. Gen. Laws § 39-1-1 (b). In furtherance of that goal, the Public Utilities Commission ("Commission") has been afforded the power and authority to regulate utility companies to, among other things, "protect the public against improper and unreasonable rates, tolls, and charges by providing full, fair, and adequate administrative procedures and remedies[.]" *Id.* at 1(c). Additionally, "[t]he commission shall have the powers of a court of record in the determination and adjudication of all matters over which it is given jurisdiction[.]" R.I. Gen. Laws § 39-5-1.

The Commission has indicated that it will be considering *whether* it should assess financial penalties in response to The Narragansett Electric Company's ("Company") out-of-period invoicing practices. However, given the egregious nature of the Company actions of intentionally filing false reports to maximize its own financial gain, the question before the Commission is more appropriately *what* financial penalties should be implemented. It should be noted that the threshold questions before the parties address only financial penalties, which is separate and apart from the incontestable need for full restitution to the ratepayers, with interest. *See e.g.* R.I. Gen. Laws § 39-3-13.1. Penalties against wrongful actors serve an important function within the State's regulatory process. Not only must the people of Rhode Island be made whole, but there must be an appropriate response to compensate for damage to the regulatory process and the public trust, and to ensure that similar violations in the future are sufficiently deterred. Of course, any such financial penalties must be issued in a manner that makes certain that only the violator shoulders the consequences of its actions, and that the Commission disallows any impact on ratepayers via any and all potential recovery mechanisms.

As the Commission has outlined in its briefing prompt, there are at least two statutory provisions that address penalties for violations committed by regulated utilities, R.I. Gen. Laws §§ 39-2-8 and 39-1-22. As discussed in greater detail below, both of these provisions are applicable in the instant matter, and the Commission should apply both of these statutory schemes when determining appropriate financial penalties in light of the Company's actions. Moreover, should it become clear through the course of these proceedings that additional statutes or regulations apply, the Commission should analyze the evidence and testimony before it in light of all potential grounds for penalty.

The Division of Public Utilities and Carriers ("Division") has recently opined in expert testimony that the cost to Rhode Islanders could be far greater than the $320,000 suggested by the Company in its March 10, 2023 report, or even the $2.4 million estimated by the Company prior to that report. After conducting a lengthy review of the information made available by the Company, the Division and its experts have suggested that ratepayers could be owed some $12.35 million (inclusive of interest) as a result of the Company's out-of-period invoicing practices related to energy efficiency programs in Rhode Island. *See* Ballaban and Van Reen Test., (November 27, 2023) at 37:8 - 39:2. This suggests that the Company may still not have fully compensated ratepayers for the harm it caused through its out-of-period invoicing practices, before any penalty has been assessed. While deceiving the Commission and the people of Rhode Island to gain even a single dollar is unacceptable, the Division's analysis highlights the gravity of the issues before the Commission in this Docket. In light of what is known so far, and what the Company has admitted to since the Commission first began investigating this issue in Docket 5189, it is clear that this cannot be allowed to happen again and strong deterrence is needed to ensure the integrity of energy efficiency programs which continue to be an important component of Rhode Island's efforts to reduce greenhouse gas emissions as mandated by the 2021 Act on Climate.

II. R.I. Gen. Laws § 39-2-8 applies to the filing of Annual Reports or other accounting rate schedules reflecting inaccurate information, and such violations should be viewed as continuous.

As noted by the Commission, 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.

(emphasis added). Thus, every time any public utility fails to perform a duty enjoined upon it by, for instance, intentionally providing inaccurate accounting of program costs to the Commission, it should be assessed a penalty between $200 and $1000. Here, the public utility failed in its duty under R.I. Gen. Laws § 39-1-27.7(c) and the Least Cost Procurement Standards as approved and adopted by the Commission to accurately file its Annual Reports and other filings. This duty is freestanding and went unfulfilled because of the magnitude of the misrepresentations in the report. R.I. Gen. Laws § 39-1-27.7(c) is located in chapter 1, and failure to comply with the program's requirements as approved is a failure susceptible to the penalties provided for in § 39-2-8. More than just the accuracy of the report itself, the failure of duty here includes improper use and allocation of the funds received.

Moreover, each time the utility fails to correct a known inaccurate filing or use of funds, it is a violation that continues each day and the utility should accrue additional penalties until the failure of duty is corrected. For instance, if a filing containing false information is filed by a public utility to derive unjust financial gain, a violation has occurred. Each day thereafter, until the false information and resulting unjust gain is appropriately rectified, there remains an ongoing violation that accrues between $200 and $1000 in penalties per day. If that violation existed uncorrected for a full year, the appropriate penalty would be between $73,000 and $365,000. If it was left uncorrected for ten years, an appropriate penalty would be between $730,000 and $3,650,000. A second instance of providing that information becomes a new violation, and similarly continues until corrected.

As noted by the Commission, California has come to a similar conclusion by treating false filings as ongoing violations. In support of this logical conclusion, the California Public Utilities Commission ("CPUC") has pointed out that the misleading information and filings could be

corrected at any time. *See e.g.* CPUC, Decision 22-11-031 at 38 (explaining that fines for misleading and inaccurate filings were treated as continuing violations until corrected); *see also id.* at 27 (noting that continuous fines were appropriate when misleading information was not the result of excusable error and should not have been provided in the first place).

Here, the Company has admitted to misreporting information about its implementation of the state's energy efficiency programs in order to maximize its performance incentives. This is precisely the type of intolerable violation that should have been corrected immediately, and simply was not. Accordingly, it is appropriate to view each instance of misleading the Commission as a separate and ongoing violation.

III. Given that R.I. Gen. Laws § 39-2-8 applies, several factors should be considered by the Commission in determining the amount of the penalty.

As noted above, the Commission has broad authority in matters falling under its jurisdiction. To be sure, the Commission sits as "an impartial, independent body, and is charged with the duty of rendering independent decisions affecting the public interest and private rights based upon the law and upon the evidence presented before it [.]" R.I. Gen. Laws § 39-1-11. Accordingly, the Commission has widespread authority to assess financial penalties against regulated utilities, so long as its decision is consistent with the law and is not arbitrary or capricious. *See e.g.* R.I. Gen. Laws § 39-5-1. Thus, given the apparent absence of set standards for the Public Utilities Commission's consideration of financial penalties, apart from the statutory penalty range provided at § 39-2-8, the Commission should carefully weigh and assess the evidence provided throughout the evidentiary process in this docket to come to a just decision.

The Commission also cited CPUC Decision 22-11-031 discussed above for having outlined that commission's well-established five-factor framework for considering penalty amounts. *See* CPUC, Decision 22-11-031 at 21-28. Although the Commission should not feel bound to replicate

the process set forth in California, it is certainly helpful to review that jurisdiction's rationale, and these factors provide a strong framework for considering penalties in the case at hand. Firstly, in considering the severity of the offense, CPUC considers not only the nature of the actions taken by the utility, but also the harm to the regulatory process. *Id.* at 22-23. Second, it reviews the conduct of the utility before, during, and after the offense. This includes whether the utility took action to prevent the violation, any actions taken to detect the violation, and any efforts to disclose or rectify a violation. *See id.* at 23-24. Third, CPUC considers the financial resources of the utility and its ability to pay a fine. *See id.* at 24. Fourth, the commission looks at the totality of the circumstances presented. To do this, they review both "the degree of the wrongdoing and the harm from the prospective of the public interest." *Id.* at 25. For instance, CPUC considers whether the actions of the utility resulted in a cost to ratepayers and whether it harmed the regulatory process. *See id.* Lastly, the commission looks to precedent to determine whether the imposed fine is reasonable relative to past fines it has imposed. *See id.*

In Rhode Island, agencies responsible for issuing financial penalties consider similar factors. By way of example, the Rhode Island Department of Environmental Management ("RIDEM") issues financial penalties for failure to comply with permitting and reporting requirements, as well as for tangible environmental harms. In the case of RIDEM, there is a statutory framework identifying several factors to consider when assessing penalties. These factors have significant overlap with the framework adopted by the California Public Utilities Commission. Specifically, pursuant to R.I. Gen. Laws § 42-17.6-6, the Director of RIDEM should consider the following when assessing penalties:

> (1) The actual and potential impact on public health, safety and welfare and the environment of the failure to comply;

(2) The actual and potential damages suffered, and actual or potential costs incurred, by the director, or by any other person;

(3) Whether the person being assessed the administrative penalty took steps to prevent noncompliance, to promptly come into compliance and to remedy and mitigate whatever harm might have been done as a result of such noncompliance;

(4) Whether the person being assessed the administrative penalty has previously failed to comply with any rule, regulation, order, permit, license, or approval issued or adopted by the director, or any law which the director has the authority or responsibility to enforce;

(5) Making compliance less costly than noncompliance;

(6) Deterring future noncompliance;

(7) The financial condition of the person being assessed the administrative penalty;

(8) The amount necessary to eliminate the economic advantage of noncompliance including, but not limited to, the financial advantage acquired over competitors from the noncompliance;

(9) Whether the failure to comply was intentional, willful, or knowing and not the result of error;

(10) Any amount specified by state and/or federal statute for a similar violation or failure to comply;

(11) Any other factor(s) that may be relevant in determining the amount of a penalty, provided that the other factors shall be set forth in the written notice of assessment of the penalty; and

(12) The public interest.

Although RIDEM's test has more factors than the CPUC test, the subject matter is similar. Specifically, both tests adopt factual analysis of the practical consequences of the violation, and recognize the need to protect the public's interest in transparent and fair regulatory processes and decisions. Both tests also focus on: (1) the direct harm to the people of the State; (2) the intentions and actions of the violator at the time of the violation; (3) any independent actions taken by the

violator to prevent or correct the violation; (4) a desire to discourage future violations; and (5) protection of the public interest and the integrity of the regulatory process.[1] Accordingly, regardless of how the Commission may choose to articulate its reasoning in assessing its own financial penalties, these considerations should remain at the forefront. Additionally, although Rhode Island has significantly less precedent than California, consistency with past financial penalties is an important due process concern. Here, as a matter of first impression for misrepresentation so pervasive, the penalties assessed may *set* a precedent—and in doing so, the deterrent effect on future utility conduct should also hold weight.

IV. R.I. Gen. Laws § 39-1-22 applies to witness statements supporting false figures and information, and penalties are appropriate.

As identified by the Commission, the Company submitted sworn or affirmed reports or statements. Each such statement containing false representations violates R.I. Gen. Laws § 39-1-22. Pursuant to that statute:

> 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).

Thus, the plain language of the statute prescribes that each time a witness affirmed a report or provided a sworn statement to the Commission advancing false information materially related to a Commission decision, it is appropriate for the Commission to assess a single-instance financial penalty of up to $20,000. In this case, there is no question that the Company knew or should have known that it was advancing false information. This violation is separate from the failure to carry

[1] It should also be pointed out that, as is the case with R.I. Gen. Laws § 39-2-8, penalties assessed by RIDEM accrue on a daily basis until the violation is rectified. *See* R.I. Gen. Laws § 42-17.6-7.

out the required energy demand program identified in section II, and these penalties may therefore each apply to different aspects of the malfeasance in this case.

V. Conclusion

At this stage of these proceedings, it has been established and admitted to that the Company engaged in out-of-period invoicing practices that inflated performance incentives received through Rhode Island's energy efficiency programs. Although the full evidentiary process will likely add clarity, it is clear that this practice resulted in numerous violations for which the Company should be assessed financial penalties. These likely included, but were not necessarily limited to, the filing of false reports and figures and the submission of false testimony. Some of those violations may have occurred more than a decade ago, and many likely constituted ongoing violations that should be assessed financial penalties of $200 to $1,000 each day pursuant to R.I. Gen. Laws § 39-2-8. Additionally, penalties of up to $20,000 are appropriate for each violation under R.I. Gen. Laws § 39-1-22.

As noted above, the gravity of this situation cannot be overstated, and there has been a significant affront to the public interest and the regulatory process that was established to protect it. The Commission must consider what will no doubt be substantial financial penalties. In so doing, it should consider multiple factors designed to appropriately weigh the nature of the violations, the harm caused thereby, and the need to protect the regulatory process and discourage future violations. It is also possible that throughout this docket, a need for consideration of additional factors or statutory provisions may become appropriate, and the Attorney General explicitly reserves the right to amend and further express his position as the evidentiary process continues.

Respectfully submitted,

PETER F. NERONHA
ATTORNEY GENERAL OF THE
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By his Attorney,

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Dated: January 19, 2024

CERTIFICATE OF SERVICE

I hereby certify that on the 19th day of January 2023, the original and nine hard copies of this document were sent via hand-delivery to Luly Massaro, Clerk of the Division of Public Utilities and Carriers, 89 Jefferson Boulevard, Warwick, RI 02888. In addition, electronic copies of the within was served via electronic mail on the service list for this Docket January 19, 2024.

/s/ Nicholas M. Vaz