

STEVEN J. BOYAJIAN

One Financial Plaza, 14th Floor  
Providence, RI 02903-2485  
Main (401) 709-3300  
Fax (401) 709-3399  
sboyajian@rc.com  
Direct (401) 709-3359

Also admitted in Massachusetts

January 19, 2024

**VIA HAND DELIVERY & ELECTRONIC MAIL**

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

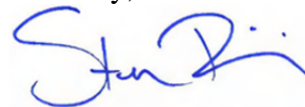
**Re: Docket No. 22-05-EE Investigation of Misconduct by The Narragansett Electric Company Relating to Past Payments of Energy Efficiency Program Shareholder Incentives – Brief of The Narragansett Electric Company d/b/a Rhode Island Energy**

Dear Ms. Massaro:

On behalf of The Narragansett Electric Company d/b/a Rhode Island Energy (the “Company”), I have enclosed the Company’s brief addressing the questions concerning the burden of proof posed by the Rhode Island Public Utilities Commission in its memorandum dated December 6, 2023 in the above-referenced docket.

Thank you for your attention to this matter. If you have any questions, please contact me at 401-709-3359.

Sincerely,



Steven J. Boyajian

Enclosure

cc: Docket 22-05-EE Service List

Certificate of Service

I hereby certify that a copy of the cover letter and any materials accompanying this certificate were electronically transmitted to the individuals listed below.

The paper copies of this filing are being hand delivered to the Rhode Island Public Utilities Commission and to the Rhode Island Division of Public Utilities and Carriers.



Heidi J. Seddon

January 19, 2024

Date

**Docket No. 22-05-EE – PUC Investigation of Utility Misconduct or Fraud by The Narragansett Electric Co. Service list updated 11/27/2023**

<b>Name /Address</b>	<b>E-mail Distribution List</b>	<b>Phone</b>
<b>The Narragansett Electric Company d/b/a Rhode Island Energy</b> Andrew Marcaccio, Esq. 280 Melrose St. Providence, RI 02907  Steven J. Boyajian, Esq. Leticia C. Pimentel, Esq. <b>Robinson &amp; Cole LLP</b> One Financial Plaza, 14th Floor Providence, RI 02903	<a href="mailto:amarcaccio@pplweb.com">amarcaccio@pplweb.com</a> ;	401-784-4263
	<a href="mailto:cobrien@pplweb.com">cobrien@pplweb.com</a> ;	
	<a href="mailto:jhutchinson@pplweb.com">jhutchinson@pplweb.com</a> ;	
	<a href="mailto:jscanlon@pplweb.com">jscanlon@pplweb.com</a> ;	
	<a href="mailto:mocrayne@ng.rienergy.com">mocrayne@ng.rienergy.com</a> ;	
	<a href="mailto:dmoreira@rienergy.com">dmoreira@rienergy.com</a> ;	
	<a href="mailto:bsfeldman@rienergy.com">bsfeldman@rienergy.com</a> ;	
	<a href="mailto:djtukey@rienergy.com">djtukey@rienergy.com</a> ;	
	<a href="mailto:fcharlot@rienergy.com">fcharlot@rienergy.com</a> ;	
	<a href="mailto:bjpelletier@rienergy.com">bjpelletier@rienergy.com</a> ;	
<a href="mailto:SBoyajian@rc.com">SBoyajian@rc.com</a> ;		
<a href="mailto:LPimentel@rc.com">LPimentel@rc.com</a> ;		
<a href="mailto:HSeddon@rc.com">HSeddon@rc.com</a> ;		
<b>National Grid USA</b> Chery Kimball, Esq. Robert Humm Keegan Werlin LLP 99 High St., Suite 2900 Boston, MA 02110	<a href="mailto:ckimball@keeganwerlin.com">ckimball@keeganwerlin.com</a> ;	617-951-1400
	<a href="mailto:rhumh@keeganwerlin.com">rhumh@keeganwerlin.com</a> ;	
	<a href="mailto:jdunne@keeganwerlin.com">jdunne@keeganwerlin.com</a> ;	

Laura Bickel, Esq. National Grid	<a href="mailto:laura.bickel@nationalgrid.com">laura.bickel@nationalgrid.com</a> ;	
	<a href="mailto:Brooke.Skulley@nationalgrid.com">Brooke.Skulley@nationalgrid.com</a> ;	
	<a href="mailto:melissa.little@nationalgrid.com">melissa.little@nationalgrid.com</a> ;	
	<a href="mailto:Scott.McCabe@nationalgrid.com">Scott.McCabe@nationalgrid.com</a> ;	
<b>Division of Public Utilities and Carriers</b> Margaret L. Hogan, Esq.	<a href="mailto:Margaret.L.Hogan@dpuc.ri.gov">Margaret.L.Hogan@dpuc.ri.gov</a> ;	401-780-2120
	<a href="mailto:john.bell@dpuc.ri.gov">john.bell@dpuc.ri.gov</a> ;	
	<a href="mailto:Joel.munoz@dpuc.ri.gov">Joel.munoz@dpuc.ri.gov</a> ;	
	<a href="mailto:Ellen.golde@dpuc.ri.gov">Ellen.golde@dpuc.ri.gov</a> ;	
	<a href="mailto:Machaela.Seaton@dpuc.ri.gov">Machaela.Seaton@dpuc.ri.gov</a> ;	
	<a href="mailto:Paul.roberti@dpuc.ri.gov">Paul.roberti@dpuc.ri.gov</a> ;	
	<a href="mailto:Linda.george@dpuc.ri.gov">Linda.george@dpuc.ri.gov</a> ;	
Tim Woolf Jennifer Kallay Synapse Energy Economics 22 Pearl Street Cambridge, MA 02139	<a href="mailto:twoolf@synapse-energy.com">twoolf@synapse-energy.com</a> ;	
	<a href="mailto:jkallay@synapse-energy.com">jkallay@synapse-energy.com</a> ;	
<b>Rhode Island Attorney General's Office</b> Nicholas Vaz, Esq. Alison Hoffman, Esq.	<a href="mailto:nvaz@riag.ri.gov">nvaz@riag.ri.gov</a> ;	
	<a href="mailto:ahoffman@riag.ri.gov">ahoffman@riag.ri.gov</a> ;	
	<a href="mailto:mbedell@riag.ri.gov">mbedell@riag.ri.gov</a> ;	
<b>RI EERMC</b> Marisa Desautel, Esq. Desautel Browning Law 38 Bellevue Ave, Unit H Newport, RI 02840  Sam Ross, Optimal Energy	<a href="mailto:marisa@desautelbrowning.com">marisa@desautelbrowning.com</a> ;	401-477-0023
	<a href="mailto:ross@optenergy.com">ross@optenergy.com</a> ;	
<b>Office of Energy Resources (OER)</b> Albert Vitali, Esq. Dept. of Administration Division of Legal Services One Capitol Hill, 4 <sup>th</sup> Floor Providence, RI 02908	<a href="mailto:Albert.Vitali@doa.ri.gov">Albert.Vitali@doa.ri.gov</a> ;	401-222-8880
	<a href="mailto:Nancy.Russolino@doa.ri.gov">Nancy.Russolino@doa.ri.gov</a> ;	
	<a href="mailto:Christopher.Kearns@energy.ri.gov">Christopher.Kearns@energy.ri.gov</a> ;	
	<a href="mailto:Steven.Chybowski@energy.ri.gov">Steven.Chybowski@energy.ri.gov</a> ;	
	<a href="mailto:William.Owen@energy.ri.gov">William.Owen@energy.ri.gov</a> ;	
	<a href="mailto:Nathan.Cleveland@energy.ri.gov">Nathan.Cleveland@energy.ri.gov</a> ;	
<b>Original &amp; 9 copies file w/:</b> Luly E. Massaro, Commission Clerk	<a href="mailto:Luly.massaro@puc.ri.gov">Luly.massaro@puc.ri.gov</a> ;	401-780-2107
	<a href="mailto:John.Harrington@puc.ri.gov">John.Harrington@puc.ri.gov</a> ;	

John Harrington, Commission Counsel Public Utilities Commission 89 Jefferson Blvd. Warwick, RI 02888	<a href="mailto:Alan.nault@puc.ri.gov">Alan.nault@puc.ri.gov</a> ;	
	<a href="mailto:Todd.bianco@puc.ri.gov">Todd.bianco@puc.ri.gov</a> ;	
	<a href="mailto:Emma.Rodvien@puc.ri.gov">Emma.Rodvien@puc.ri.gov</a> ;	
<b>Interested Party/Individual</b>		
<b>RI Infrastructure Bank</b> Chris Vitale, Esq.,	<a href="mailto:cvitale@hvlawltd.com">cvitale@hvlawltd.com</a> ;	
	<a href="mailto:SUatine@riib.org">SUatine@riib.org</a> ;	
	<a href="mailto:Larry@massenergy.org">Larry@massenergy.org</a> ;	
<b>Acadia Center</b> Emily Koo, Director	<a href="mailto:EKoo@acadiacenter.org">EKoo@acadiacenter.org</a> ;	
<b>Green Energy Consumers Alliance</b> Larry Chretien, Executive Director	<a href="mailto:Larry@massenergy.org">Larry@massenergy.org</a> ;	

STATE OF RHODE ISLAND  
PUBLIC UTILITIES COMMISSION

---

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

---

**BRIEF OF THE NARRAGANSETT ELECTRIC COMPANY**  
**D/B/A RHODE ISLAND ENERGY CONCERNING BURDEN OF PROOF**

The Narragansett Electric Company d/b/a Rhode Island Energy (the “Company” or “Rhode Island Energy”) hereby responds to the briefing questions posed by the Rhode Island Public Utilities Commission (“Commission”) in its memorandum dated December 6, 2023 (the “December 6, 2023 Memorandum”). In the December 6, 2023 Memorandum, the Commission requested briefs from the Company, National Grid USA (“National Grid”), the Rhode Island Division of Public Utilities and Carriers (the “Division”) and Attorney General on several questions concerning the burden of proof in this proceeding. The Company summarizes the relevant factual and legal framework below in order to answer the Commission’s questions in context.

**I. BACKGROUND**

The Commission’s investigation into out-of-period invoices in the Energy Efficiency Program began in December 2021 in Docket No. 5189 in which the Company’s 2022 Annual Energy Efficiency Plan was under review. In 2022, the Company conducted an internal investigation and review of out-of-period invoices within the Rhode Island residential upstream lighting energy efficiency program (“Residential Upstream Lighting”) and, based on the results

of that initial investigation, expanded its review to determine the extent to which similar out-of-period invoicing, if any, occurred within other energy efficiency programs. The Company found 48 instances of similar practices (inclusive of the Residential Upstream Lighting instances), resulting in a proposed net downward adjustment of the Company’s performance incentives for program years 2012 through 2020 of \$1,400,423.00.<sup>1</sup> After the Company filed a report with these findings, the Commission opened Docket No. 22-05-EE on July 11, 2022 to further investigate. In this docket, while both the Company and National Grid – which owned The Narragansett Electric Company at the time of the out-of-period invoices – responded to over 160 data requests, National Grid also conducted its own internal investigation into the out-of-period invoices to: (1) identify the scope of the out-of-period invoicing; and (2) more precisely assess the impact of the conduct on customers.

On March 10, 2023, National Grid filed a comprehensive report of its “Investigation into Out-of-Period Invoicing within the Rhode Island Energy Efficiency Program (2012-2021)” (the “Investigation Report”). As noted in the Executive Summary of the Investigation Report, “[w]ith the assistance of an independent forensic consultant, National Grid performed extensive transaction analysis and developed a method for quantifying the estimated customer impact of the out-of-period invoicing practice.”<sup>2</sup> This joint effort identified an over-collection of performance incentives by the Company of \$322,660 over the relevant time period. The Investigation Report provides greater detail of the means employed to calculate the \$322,660 customer impact. In short, the Residential Upstream Lighting Program was used as a proxy to estimate customer impacts across the energy efficiency program portfolio by identifying a

---

<sup>1</sup> The Company credited energy efficiency fund the upper end of the initial estimated impact range: \$2,194,339.64 plus interest, for a total of \$2,422,235.

<sup>2</sup> Investigation Report, at 1.

percentage of invoices that were out of period in each program year, and then reallocating those invoices, and the associated savings to the appropriate program year.

On November 27, 2023, the Division filed a response to the Investigation Report in the form of pre-filed testimony of Michael R. Ballaban and Jacob Van Ren (the “Division Testimony”). Messrs. Ballaban and Van Ren agree that the use of the Residential Upstream Lighting Program was a reasonable methodology to determine the customer impact of out-of-period invoices.<sup>3</sup> Notwithstanding that agreement, the Division has recommended that the Commission disallow a portion of the performance incentives awarded between the period of 2012 through 2021 – specifically, \$10,592,634, plus \$1,767,174 in interest for a total of \$12,359,808<sup>4</sup> at the time of the filing.<sup>5</sup>

On December 6, 2023, following a procedural conference, the Commission requested that the parties respond to the briefing questions contained in the December 6, 2023 Memorandum.

## **II. DISCUSSION**

### **A. Overview of Burden of Proof**

The Commission’s questions are directed to the allocation of the burden of proof, but “[t]he term ‘burden of proof’ embraces two different concepts—the burden of production and the burden of persuasion.” Cranston Police Retirees Action Comm. v. City of Cranston, 208 A.3d 557, 573 (R.I. 2019) (quoting Murphy v. O’Neill, 454 A.2d 248, 250 (R.I. 1983) (internal

---

<sup>3</sup> Division Testimony, at 30-31 (stating, “we agree with the Company’s conclusion that [the Residential Upstream Lighting] program invoice testing results are a ‘reasonable proxy for the out-of-period invoicing activity’ for other Rhode Island EEPs.”)

<sup>4</sup> The Division recommended that the final figure to be credited to ratepayers should include interest accumulated to the date of the crediting. The \$2.4 million that the Company has already credited to the energy efficiency fund included interest.

<sup>5</sup> Division Testimony, at 8. The Division does not appear to have accounted for the \$2.4 million credit that the Company has already made to the energy efficiency fund.

quotation omitted). The “burden of persuasion” refers to a party’s ultimate “burden of establishing the truth of a given proposition in a case by such quantum of evidence as the law may require.” Id. (quoting Murphy, 454 A.2d at 250). The burden of persuasion does not shift between litigants. Id. (quoting Murphy, 454 A.2d at 250). On the other hand, the “burden of production” (sometimes referred to as the “burden of going forward with the evidence”) “shifts from party to party as the case progresses.” Id. (quoting Murphy, 454 A.2d at 250).

The Company acknowledges that it has the burden of persuasion to demonstrate the customer impact, in the form of over-collected incentives, of out-of-period invoicing. However, the burden of establishing the applicability and amount of any penalty or fine sits exclusively with the party seeking the imposition of a penalty or fine.<sup>6</sup>

The Company has satisfied its burden of production with respect to the customer impact of out-of-period invoicing by producing a reasonable probable estimate of the customer impact in the Investigation Report. See Johnston Equities Assocs., LP v. Town of Johnston, 277 A.3d 716, 743 (R.I. 2022) (“Damages do not have to be calculated with mathematical exactitude; all that is required is that they are based on reasonable and probable estimates.”) Because the Company has satisfied its burden of production, the burden shifts to the Division<sup>7</sup> to produce: (1) evidence refuting the Company’s estimate; or (2) evidence of its own reasonable and probable estimate. If the Division fails to refute or rebut the Company’s evidence, then the Company has satisfied its burden of proof (both the burden of production and persuasion). See Paramount Office Supply Company, Inc. v. D.A. McIsaac, Inc., 524 A.2d 1099, 1102 (R.I.1987) (In order to

---

<sup>6</sup> The Company is not conceding the applicability of any statute or rule authorizing the imposition or levy of fines or penalties. The Company expressly reserves its right to fully brief the legal issues concerning fines and penalties as outlined in the December 6, 2023 Memorandum.

<sup>7</sup> The Company refers to the Division’s burden since no other party has offered testimony to refute the Company’s calculation of customer impact.



establish a prima facie case, the moving party must present some “amount of evidence that, if unrebutted, is sufficient to satisfy the burden of proof on a particular issue.”) Alternatively, if the Division presented a reasonable and probable estimate that differed from the Company’s – which it has not, because of its inherently flawed methodology – then both parties would have met their burden of production, and the Commission could decide if the Company has met its burden of persuasion by producing a reasonable and probable estimate of customer impact that is likely more accurate than the Division’s.<sup>8</sup>

## **B. Questions Posed by the Commission**

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?

The Company has not found any statute granting the Commission discretion to establish an allocation of evidentiary burdens in matters before it. Absent this clear authority, the Commission should not invent standards, but rather should rely on well-established and sound principles of procedure and evidence in civil litigation. See Iselin v. Ret. Bd. of Employees’ Ret. Sys. of Rhode Island, 943 A.2d 1045, 1050 (R.I. 2008); (“An administrative agency is a product of the legislation that creates it, and it follows that ‘[a]gency action is only valid, therefore, when the agency acts within the parameters of the statutes that define [its] powers.’”) This would be consistent with the Commission’s own rules which provide, with respect to evidentiary issues,

---

<sup>8</sup> The Division has not refuted the Company’s evidence with a sound methodology of its own. Instead, the Division calculates the impact to customers in a counter-factual manner that simply ignores the existence of any costs or savings attributable to energy efficiency measures that were the subject of an out-of-period invoice. To determine the actual customer impact of out-of-period invoicing, energy efficiency spending and savings must be accounted for in the correct year.

that, with some exceptions to facilitate the Commission’s fact finding, “the rules of evidence as applied in civil cases in the Superior Courts of this state shall be followed to the extent practicable.” See 810-RICR-00-00-1.23(A).

As a general matter, in the absence of any specific allocation of burdens by rule or statute, the burden of persuasion in civil litigation is allocated to the party seeking affirmative relief. Schaffer ex rel. Schaffer v. Weast, 546 U.S. 49, 56, 126 S. Ct. 528, 534, 163 L. Ed. 2d 387 (2005); Douglas Furniture Corp. v. Ehrlich, 160 A.2d 362, 365 (R.I. 1960). The justification for this principle is that it is “the plaintiff who generally seeks to change the present state of affairs and who therefore naturally should be expected to bear the risk of failure of proof or persuasion.” 2 McCormick on Evid. § 337 (8th ed.). This allocation of burdens is explicitly provided for in the federal Administrative Procedures Act. See 5 U.S.C. § 556(d) (stating, “Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof.”).<sup>9</sup> This allocation of burdens is also applied by other agencies in Rhode Island. See, e.g., Woods v. Rhode Island Dep’t of Hum. Servs., No. PC 2002-1599, 2002 WL 31867876, at \*3 (R.I. Super. Dec. 5, 2002) (explaining that the burden of production and persuasion lies with the Department of Human Services when it seeks to recover overpayments from beneficiaries of assistance programs in an administrative proceeding); In the Matter of: Rising Financial Corporation and Franchesco Franco, 2016 WL 1623040, at \*2 (R.I.D.B.R. Mar. 24, 2016) (stating, “It is well settled that in formal or informal adjudications modeled on the federal Administrative Procedures Act, the initial burdens of production and persuasion rest with the moving party.”); Re: Weaver's Cove Energy, LLC, 2009 WL 6870104, at \*2 (R.I.D.E.M. 2009).

---

<sup>9</sup> Despite the similarities between Rhode Island’s Administrative Procedures Act, R.I. Gen. Laws §§ 42-35-1, *et seq.*, and its federal counterpart, Rhode Island’s Administrative Procedures Act does not provide for any specific allocation of burdens of production and persuasion.

In the absence of any specific statutory directive, the Company submits that the general rule regarding allocation of burdens should apply. Each party seeking affirmative relief should have the burden of establishing entitlement to that relief.

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?

This proceeding should be treated like a matter of civil litigation in which the party asserting that financial harm has occurred carries the burden to establish the extent of the financial harm. The Company and the Division agree that financial harm, in the form of over-collection of Company incentives, has occurred as a result of out-of-period invoicing. It was the Company's own disclosures and investigations that confirmed this, so the burden of establishing the occurrence of harm is not relevant. The material issue is the quantification of that harm, and the Company bears the burden of production and persuasion with respect to this issue since the financial harm that has occurred is the over-collection of incentives that the Company has the burden of establishing each year during the Commission's consideration of annual energy efficiency plans.

It is because the Company carries this burden that the Investigation Report includes a detailed analysis of the financial harm resulting from out-of-period invoicing with a reasonable and probable estimate of the incentive amount that should be credited to customers. See Johnston Equities Assocs., LP, 277 A.3d at 743 (damages should be based on reasonable and probable estimates); Narragansett Elec. Co. v. Carbone, 898 A.2d 87, 100 (R.I. 2006) (stating, "a fair preponderance of the evidence may be supported by circumstantial evidence"). The

Investigation Report provides a rational standard for the calculation of customer impact, employing a method that the Division agrees is reasonable — the use of out-of-period invoicing percentages from the Residential Upstream Lighting program to assess the impact of out-of-period invoicing across the energy efficiency program portfolio.<sup>10</sup> The application of this methodology has yielded a conclusion that is consistent with the data and rules governing the calculation of Company energy efficiency program incentives. This satisfies the Company’s burden of production on the issue of customer impact. See Smith Dev. Corp. v. Bilow Enterprises, Inc., 308 A.2d 477, 483 (R.I. 1973) (stating, “[W]here the existence of a loss is established, absolute certainty in proving its quantum is not required.” 1 Sedgwick, *Damages* § 170A (9th ed. 1912). All that is required is that the court or jury be guided by some rational standard. McCormick, *The Recovery of Damages for Loss of Expected Profits*, 7 N.C.L.Rev. 235, 239 (1929).”)

With respect to the imposition of any fines or penalties, the burden of production and persuasion lay firmly with the party seeking such imposition. This is not only consistent with the general rules regarding the allocations of the burdens of production and persuasion explained in response to the Commission’s first question above, it is also consistent with the regulations of the few Rhode Island agencies whose rules specify a burden of proof. See, e.g., 250-RICR-130-00-1.12 (stating, “In an enforcement hearing the Director [of the Department of Environmental Management] must prove the alleged violation by a preponderance of the evidence.”); 250-RICR-80-00-9.5 (stating, “In matters in which a violation is alleged the burden of proof shall be on the [State Pilotage] Commission.”)

---

<sup>10</sup> Division Testimony, at 30-31.

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?

Yes. As explained above, the Investigation Report contains a reasonable and probable estimate of the previously over-collected incentives (that have since been credited to customers), and this calculation is sufficient to carry the Company's burden of production to demonstrate the customer impact of out-of-period invoicing. See Johnston Equities Assocs., LP, 277 A.3d at 743. Having satisfied this burden of production through the Investigation Report, it is incumbent upon any parties that dispute the calculation of customer impact to show, through evidence, that it is incorrect. Absent such evidence, the calculation of customer impact contained in the Investigation Report would be uncontroverted and would be the only record evidence upon which the Commission could base its findings. See R.I. Gen. Laws § 42-35-9(g) (stating, "Findings of fact shall be based exclusively on the evidence and matters officially noticed."). If the Investigation Report is uncontroverted by admissible evidence, and no other basis to reject it is established, then the Company would have satisfied its burden of persuasion with respect to the customer impact of out-of-period invoicing. See Paramount Office Supply Co., 524 A.2d at 1102.<sup>11</sup>

---

<sup>11</sup> The Company maintains that the Division Testimony concerning the calculation of customer impact is inadmissible because its calculation methodology is so counter to the actual operation of the Company's energy efficiency programs and calculation of Company incentives, that the resulting figure (\$12 million) is mere speculation. See Sophie F. Bronowiski Mulligan Irrevocable Tr. v. Bridges, 44 A.3d 116, 120 (R.I. 2012) ("plaintiffs will not be denied recovery merely because the damages ... are difficult to ascertain, as long as they prove damages with reasonable certainty" however "the amount of damages sustained ... cannot rely upon speculation"). The Company reserves its arguments on this issue and only raises the issue of the sufficiency of the Division's Testimony to fully address the Commission's questions concerning the burden of proof.

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?

The Investigation Report provides a reasonable and reliable estimate of the financial impact of out-of-period invoicing sufficient to support a factual finding of customer impacts resulting from the issue. The reasonableness and reliability of the Investigation Report is confirmed by the Division's Pre-filed Testimony agreeing with the "Company's conclusion that [the Residential Upstream Lighting] program invoice testing results are a 'reasonable proxy for the out-of-period invoicing activity.'"<sup>12</sup> Using this proxy to determine the percentage of out-of-period invoicing across the energy efficiency portfolio allowed for a complete calculation of customer impacts in the Investigation Report that returned out-of-period spending and savings to the appropriate years and recalculated incentives. This methodology provides a sufficient evidentiary basis for the Commission to make a finding regarding the customer impact of out-of-period invoicing. See Johnston Equities Assocs., LP, 277 A.3d 716, 743 (R.I. 2022) ("Damages do not have to be calculated with mathematical exactitude; all that is required is that they are based on reasonable and probable estimates"). Hypothetically, if the Company were unable to provide a reasonable and reliable estimate of customer impacts from out-of-period invoicing, then the Company would need to present its best estimate and prove that the estimate was non-speculative. See Sophie F. Bronowiski Mulligan Irrevocable Tr. v. Bridges, 44 A.3d 116, 120 (R.I. 2012) ("plaintiffs will not be denied recovery merely because the damages ... are difficult

---

<sup>12</sup> Division Testimony, at 30-31.

to ascertain, as long as they prove damages with reasonable certainty” however “the amount of damages sustained ... cannot rely upon speculation”).

Respectfully submitted,


**THE NARRAGANSETT ELECTRIC  
COMPANY d/b/a RHODE ISLAND  
ENERGY**

By its attorneys,



---

Andrew S. Marcaccio (#8168)  
The Narragansett Electric Company  
280 Melrose Street  
Providence, RI 02907  
(401) 784-4263  
[amarcaccio@pplweb.com](mailto:amarcaccio@pplweb.com)



---

*Leticia Pimentel*

---

Steven J. Boyajian (#7263)  
Leticia Pimentel (#9332)  
Robinson & Cole LLP  
One Financial Plaza, 14th Floor  
Providence, RI 02903  
Tel. (401) 709-3300  
Fax. (401) 709-3399  
[sboyajian@rc.com](mailto:sboyajian@rc.com)  
[lpimentel@rc.com](mailto:lpimentel@rc.com)

Dated: January 19, 2024

**CERTIFICATE OF SERVICE**

I hereby certify that on January 19, 2024, I delivered a true copy of the foregoing memorandum via electronic mail to the parties on the Service List for Docket No. 22-05-EE.



---

Heidi J. Seddon