STATE OF RHODE ISLAND

DIVISION OF PUBLIC UTILITIES & CARRIERS
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February 16, 2024

Ms. Luly Massaro
Public Utilities Commission
89 Jefferson Boulevard
Warwick, R.I. 02888

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

Dear Ms. Massaro:

Attached please find the "Burden of Proof" Memorandum of the Division of Public Utilities and Carriers, for filing in the above-entitled docket. Hard copies will be provided to the Commission as well.

Very truly yours,

/s/ Margaret L. Hogan

Margaret L. Hogan, Esq.

cc: Linda D. George, Esq., Administrator, DPUC
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

"BURDEN OF PROOF" MEMORANDUM OF THE DIVISION OF PUBLIC UTILITIES AND CARRIERS

I) INTRODUCTION

In its Briefing Memorandum dated December 7, 2023, the Public Utilities Commission ("Commission") directed the parties to address a series of threshold questions in an organized procedural timeframe. The first round of briefing was completed on January 19, 2024. In that round, the Division of Public Utilities and Carriers ("Division") and The Rhode Island Attorney General's Office addressed the issue of penalties while the Narragansett Electric Company ("Narragansett" or "Company") d/b/a Rhode Island Energy ("RIE") and formerly d/b/a National Grid addressed the issue of "burden of proof."

Accompanying the Division's "penalty" memo was a series of motions requesting the Commission to set aside its orders in prior energy efficiency dockets, back to 2012. Attached to each of those motions was a copy of the Company's March 10, 2023 report in which the Company (when d/b/a National Grid) admitted that the practice of invoice manipulation went back to at least 2012.[1]

[1] 2012 was the earliest year of complete data in National Grid USA's current invoice management system, "In-Demand." See Division Data Request 1-1 (a). https://ripuc.ri.gov/sites/g/files/xkgbur841/files/2022-08/2205-RIE-DR-DIVSet1-Public%208-12-22%20bates1.pdf. There is no evidence to suggest that the practice of invoice manipulation ***began*** in 2012.

The Commission's December 7, 2023 memo asserts that §39-3-12 of Rhode Island General Laws cannot be relied upon for ascertaining which party in this proceeding has the "burden of proof" because any hearing in this matter does not involve a proposed increase in any rate, toll, or charge, citing *ACP Land, LLC v. Public Utilities Commission*, 228 A.3d 328 (R.I. 2020). The Commission seeks opinions on the following questions:

(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) DISCUSSION

We begin our discussion with a stark reminder that Narragansett Electric has *admitted* to a long-standing practice of invoice manipulation in its operation and management of the energy efficiency programs and that three of the four underlying motives for such manipulation were for Narragansett's benefit: (1) to manage its budgets; (2) to maximize the Company's performance

incentive; and (3) to better position the programs' performance for the following year.[2] As such, the basis for the calculation of the system benefit charge ("SBC"), which includes the performance incentive awarded to Narragansett for its management and implementation of the energy efficiency programs, was manipulated and untruthful for at least the years 2012-2021.

In that light, we observe that Rhode Island Energy admits: "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 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 efficiency plans."[3] And, National Grid submits: "Accordingly, the burden of proof on the issue of the appropriate refund to customers through the energy efficiency reconciling mechanism rests with Narragansett 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."[4]

The Division submits that these acknowledgements, that Narragansett Electric has the burden of demonstrating that it received the appropriate amount of performance incentives in each energy efficiency program year, is precisely one of the very reasons to re-open all the prior energy

[2] National Grid Report on Out of Period Invoicing, March 10, 2023 at 14; https://ripuc.ri.gov/sites/g/files/xkgbur841/files/2023-03/2205-NGrid-Report-on-Investigation_310-2023.pdf.
[3] Rhode Island Energy's memorandum, January 19, 2024 at 7; https://ripuc.ri.gov/sites/g/files/xkgbur841/files/2024-01/2205-RIE-Brief-BOP_1-19-24.pdf.
[4] National Grid's memorandum, January 19, 2024 at 5; https://ripuc.ri.gov/sites/g/files/xkgbur841/files/2024-01/2205-NGrid-Brief-BOP_1-19-24.pdf.

efficiency dockets, as set forth in the Division's motions requesting the Commission to set aside its prior orders in each of those dockets. In Narragansett Electric's objections to the motions, it suggests that the Commission setting aside prior orders is unnecessary and essentially overkill and that it would undo settled matters. The issue in dispute is the Company's compensation. That matter can be resolved in each and every docket without disturbing any other settled matters. The records in these dockets should accurately and fully reflect *all* the proceedings involving those program years during which the Company admitted that it engaged in fraudulent activity.

III) BURDEN OF PROOF- CIVIL LITIGATION- BRIEF OVERVIEW

"The term 'burden of proof' embraces two different concepts"- the burden of persuasion and the burden of production. *Murphy v O'Neill*, 454 A.2d 248, 250 (R.I. 1983). The burden of persuasion refers to a litigant's burden of establishing the truth of a given proposition in a case by such quantum of evidence as the law may require, and this burden never shifts between parties. *Cranston Police Retirees Action Committee v City of Cranston*, 208 A.3d 557, 573 (R.I. 2019) "The burden of production, also referred to as the 'burden of going forward with the evidence' *DeBlois v Clark*, 764 A.2d 727,732 n.3 (R.I. 2001) "shifts from party to party as the case progresses." *Murphy*, 454 A.2d at 250." *Cranston Police Retirees* at 573.

IV) BURDEN OF PROOF- COMMISSION'S INQUIRIES

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?

As a threshold matter, the Division does not necessarily agree that the provisions of R.I. Gen Law §39-3-12 is not applicable at all. It provides:

> "At 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 a reasonable compensation for the service rendered shall be upon the public utility; provided, that the commission may, in its discretion and for good cause shown, allow changes within less time than required by the notice specified in § 39-3-11, and without holding the hearing and investigation therein provided for, or modify the requirements of § 39-3-11 with respect to filing and publishing tariffs, either in the particular instance or by general order applicable to special or particular circumstances or conditions, or may enter an interim order prescribing a temporary schedule of rates, tolls, and charges pending the completion of its investigation."(Emphasis added)

In the case of the annual energy efficiency plans, only the initial base year of these plans would have been a year in which the system benefit ***charge*** would not necessarily have been an increase. Thereafter, in each succeeding year, the system benefit charge for that year would either be less than, the same, or an increase, in the prior year's charge. To the extent that an increase in the system benefit charge was sought, the burden of proof is on the utility to establish that the system benefit charge represented not only the necessary investments in efficiency measures that are cost-effective and lower cost than acquisition of additional supply, but also to reasonably fund the Company's performance-based incentive plan.

Additionally, the Division avers that R.I. Gen Laws § 39-1-27.7(f) provides the basis for the burden of proof as it pertains to the Company's performance incentive. It states: "The commission shall conduct a *contested case proceeding* to establish a performance-based incentive plan that allows for additional compensation for each electric distribution company and each company providing gas to end-users and/or retail customers based on the level of its success in mitigating the cost and variability of electric and gas services through procurement portfolios." (Italics added) The use of the words "contested case proceeding" means that administrative agency law is applicable and the utility, as the petitioner, always carries the burden of proof that it earned the performance incentive collected, regardless of when such proceeding occurs, or ends. And,

while conducting the contested case proceeding, the Commission, as an administrative agency, is not strictly bound to the rules of civil procedures. Commission Rule 810 RICR-00-00-1.23 A:

"While the rules of evidence as applied in civil cases in the Superior Courts of this state shall be followed to the extent practicable, the Commission shall not be bound by technical evidentiary rules, and, when necessary to ascertain facts not reasonably susceptible of proof under the rules, evidence not otherwise admissible may be submitted, unless precluded by statute, if it is of a type commonly relied upon by reasonably prudent persons in the conduct of their affairs."

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?**

As noted *supra*, Narragansett Electric, through both its current owner, Rhode Island Energy, and its prior owner, National Grid, concedes that Narragansett Electric has the burden to determine the level of financial harm that occurred to customers as a result of the out-of-period invoicing in the residential upstream lighting program. They submit that Narragansett's internal investigation was sufficient for establishing the level of financial harm to its customers and that mere accounting adjustments are sufficient to remedy the financial misconduct. National Grid claims: "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."[5] Rhode Island Energy avers that the Investigation Report (March 2023)

[5] National Grid's memorandum January 19, 2024 at 5.

"includes a detailed analysis of the financial harm resulting from the out-of-period invoicing with a reasonable and probable estimate of the incentive amount that should be credited to customers."[6]

The Division submits that Narragansett Electric always retains the burden of establishing that it earned its performance incentive. Its own report acknowledges that from 2012 through 2021, there was substantial out-of-period invoicing occurring in its energy efficiency programs and that the practice was not simply confined to the residential upstream lighting program. At various times over the course of the investigative period, Narragansett calculated and reported a dizzying range of the purported financial impacts of this practice:

1. In January 2022, the electric customer impact was represented as $124,135, with interested added in the amount of $3,185.
2. In May 2022, Narragansett calculated a gas credit and additional electric credit totaling $2,070,204.
3. In June 2022, Narragansett calculated another $292,173 as interest on the May credit- but in October 2022, reversed $67,462 of the June 2022 credit as a spreadsheet error.[7]
4. By March of 2023, Narragansett asserted that the revised net impact of the out-of-program invoicing activity associated with all customer-facing energy efficiency programs from 2012- to 2021 is a customer impact of $322,660.[8]

In this case, Narragansett admits it caused financial harm through its unearned, retained performance incentive. The Company now seeks to downplay the misconduct by claiming that the awarded incentives simply were not *calculated* correctly based on the out-of-period invoicing.

[6] Rhode Island Energy's memorandum; January 19, 2024 at 7.
[7] See Table 5 March 10, 2023 report; https://ripuc.ri.gov/sites/g/files/xkgbur841/files/2023-03/2205-NGrid-Report-on-Investigation_310-2023.pdf.
[8] March 10, 2023 report at 28.

Narragansett submits the performance incentive has now been calculated correctly or to the best possible figure given the Company's lack of records, the passage of time, the complexity of its programs, the unavailability of its former employees, etc. The Division submits that the mere *calculation* approach of moving program dollars between program years unfairly and inappropriately ignores the Company's underlying dishonesty and doesn't factor in whether the Company actually *earned* a performance incentive. Accepting Narragansett's position on its level of earned performance incentive for each of the years 2012-2021 requires the Commission to also accept an underlying premise that the utility does not have any obligation for truthfulness in its dealings, either to the customers who are paying the system benefit charge or to the Commission as it reviews and approves a performance incentive mechanism.

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?

No. We are dealing with a regulated monopoly that has a duty of good faith and fair dealing with the ratepayers, as well as the regulators. The utility has the obligation to prove that it has *earned* the compensation that it has *collected.* The Company's approach to date is that earning and collecting are two entirely separate constructs and it has failed to identify, at all, how it has *earned* a performance incentive, let alone the one that it has *collected*. The Company's approach is similar to a clerk at a store improperly "borrowing" funds out of the till and then, when caught, putting them back and thinking that he or she ought to still be employed. After all, the funds were put back, so no harm, no foul. In the real world, that employee would be fired for dishonesty and probably wouldn't be paid for that shift as well. And, the employee could be prosecuted and suffer additional penalties- even after the employer was made whole.

In this case, the ratepayers can't fire the utility because it is legislatively chartered to provide a monopoly service to the citizens of the state. In exchange for the grant of that monopoly, the utility owes a duty of honesty and fair dealing as fundamental basis for incentive compensation. The Company knows this and promotes these concepts in its newly developed training modules. The Division's testimony at 34-35 highlights the Company's acknowledgement that it carries an ongoing obligation for savings accuracy and financial accuracy. While the employee trainings may be new in recent years, these obligations have always existed. It is apparent that the Company failed to adequately train employees in these fundamentals. Why the Company failed is a question to which the answer remains elusive.

In its calculation of what it believes is an appropriate performance mechanism, the Company itself did not have access to all its underlying records pertaining to the energy efficiency program administration. And, whose fault is that? Certainly not the Division's or the ratepayers, or the Commission's. It's quite the audacious approach for National Grid to assert that once it produced its March 10 report (which it deems as evidence)[9] the burden shifted to other parties to produce evidence (which it admits it does not possess and therefore could not be obtained by the Division or others) related to the reasonableness of National Grid's investigation.

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?**

[9] The March Report has not been authenticated by its author(s) and is not evidence yet.

Rhode Island Energy's and National Grid's approaches treat the recalculation of the *correct* performance incentive as if recoupment of overpayment is a *penalty*, thus triggering burden shifting. National Grid argues that "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 RI Gen Laws §39-1-27.7" Further, National Grid asserts that "it is illogical that Narragansett would bear the burden of proving a negative- to sufficiently prove that it should not be assessed a penalty."[10] This approach fails to understand the actual nature of this proceeding, to date. Narragansett's compensation is not a "done deal" once the formula for a performance incentive is established in an annual docket. Narragansett must still earn the incentive, honestly, and be able to prove that any payment was justified, particularly after admitting the fraudulent behavior.[11] The penalty aspect of this proceeding has not yet begun. As the Division indicated in its last memorandum, there is adequate evidence in this docket thus far to authorize an in-depth review of all filings in the preceding docket years, during the penalty phase of this proceeding.

The Division maintains that the burden of proving that the company collected what it *earned* lies solely with the Company and that burden does not shift to the Division because the burden of recalculating incentives is extremely untenable for the Division or Commission to carry in light of the Company's failure to maintain internal records. While the Division acknowledged in its testimony that the revised procedures in the revised and extended investigation period (after

[10] National Grid memorandum January 19, 2024 at 7.

[11] This case has highlighted an inherent weakness in the process currently used in the payment of the performance incentive. Other dockets with reconciling mechanisms undergo an annual review of that mechanism, to insure that it has been calculated correctly. Presently, Narragansett files quarterly progress reports which highlights energy efficiency savings targets and achievements, as well as the cost to achieve the same. Approximately six months after the end of a program year, Narragansett files its annual report and thereafter takes its incentive payment. There is no formal review process of the accuracy of the annual report or final approved of the *earned* incentive. The Division has previously suggested that the Company's shareholders should be required to fund an annual audit of the program. Additionally, the Commission might want to consider opening an annual performance incentive review docket where these issues could be more fully explored and the incentive could be examined for accuracy.

June 2022) were a reasonable approach to conducting the investigation, and that the residential upstream lighting program's invoice testing result was a reasonable proxy for the out of period invoicing activity for other programs, the Division does not agree that this mathematical adjustment exercise is the proper methodology to use to quantify the financial harm to the ratepayers.

The Division accepted the Company's calculations for the percentage of out-of-period invoicing for each year from 2012 -2021. Since these percentages represented a quantification of work performed improperly, it was only logical that this would form the basis for calculating the amount of incentives that were improperly awarded and retained. This calculation was determined using the figures from the Company's own investigative report which acknowledged the wrongdoing.

The underlying issue in this case was not a software glitch, or an error in a table that was discovered in the normal course of business. In such a case, a reduction in retained earnings may or may not be appropriate, depending upon the circumstances. However, the issue is that the utility was dishonest in its operations and in its subsequent filings, and testimony before this Commission. The dishonesty was an intrinsic component of the corporate culture, despite the existence of written accounting policies. See Attachment Div.5-6-1 at 1:

> "This accounting policy establishes the guidelines for activities related to the recording and reporting of accrued liabilities in order to ensure that the Energy Efficiency Group accounts for unrecorded liabilities at the end of each monthly accounting period. This accrual is in compliance with National Grid's US Accounting Policy 305.01.1 "Accrued Liabilities" ("AP 305.01.1"), and generally accepted accounting principles ("GAAP"). The purpose of the monthly accrual is to ensure that all liabilities are recorded for the accounting period and thus reported for that period in the Company's financial statements. EE Accounting and EE Reporting, in conjunction with Program Managers, Marketing, Program Execution, and any others identified as relevant, have the joint responsibility for ensuring that all unrecorded liabilities for EE Program charges for work completed or services

> provided during the month are accrued at the end of the month. Procedures have been implemented to ensure the accuracy of the accrual amount recorded (Refer to Energy Efficiency Monthly Invoice Accrual Procedures in Appendix). This policy provides guidance on the relevant policies and procedures for accruing unrecorded Energy Efficiency liabilities."

This policy acknowledges the Company's legal accountability:

> E. Accountability: The Energy Efficiency Accounting Group is responsible for ensuring that all accrued liabilities are properly calculated and recorded for each accounting period. In keeping with this policy, all liabilities incurred during the current month for which an invoice has not been posted in SAP must be accrued. Any accruals from previous months that meet the accrual criteria in the current period must be reaccrued as well.[12]

The utility utterly failed in its supervisory duties of its employees and failed to have and/or utilize the appropriate audit checks and balances to ensure that such practices were not occurring. (See responses and attachments to Confidential DIV 7-2-1, Div. 7-2-3, and Div. 7-2-4.) Therefore, the Company should not retain a performance incentive that simply was not earned.

CONCLUSION

Rhode Island public policy pertaining to utilities provides:

> "It is hereby declared to be the policy of the state to provide fair regulation of public utilities and carriers in the interest of the public, to promote availability of adequate, efficient, and economical energy, communication, and transportation services and water supplies to the inhabitants of the state, ***to provide just and reasonable rates and charges for such services*** and supplies, without unjust discrimination, undue preferences or advantages, or unfair or destructive competitive practices, and to cooperate with other states and agencies of the federal government in promoting and coordinating efforts to achieve realization of this policy." § 39-1-1 (b)

The General Assembly has further declared in pertinent part:

> The provisions of this title shall be interpreted and construed liberally in aid of its declared purpose. The commission and the division shall have, in addition to powers specified in this chapter, all additional, implied, and incidental power that

[12] See Attachment Div.5-6-1 at 2.

> may be proper or necessary to effectuate their purposes. No rule, order, act, or regulation of the commission and of the division shall be declared inoperative, illegal, or void for any omission of a technical nature. If any provision of this title, or of any rule or regulation made thereunder, or the application thereof to any company or circumstance, is held invalid by a court of competent jurisdiction, the remainder of the title, rule, or regulation, and the application of the provision to other companies or circumstances shall not be affected thereby. The invalidity of any section or sections or parts of any section or sections of this title shall not affect the validity of the remainder of the title.

It is well established and admitted that the utility engaged in wrong-doing and that it did not fully earn the performance incentive that was awarded and retained for each energy efficiency program year from 2012 through 2021. An incentive not fully earned is not a just or reasonable rate, and the Commission must adjust the incentives for each of these years accordingly. The Commission should set aside its previous orders in each of the referenced dockets and issue an order recalculating the Company's performance incentive for each program year. In doing so, the Commission should utilize the methodology proffered by the Division as the most reasonable remedial measure since it has a quantifiable nexus to earnings that were [presumably] not tainted by the improper out-of-period invoicing scheme. The recalculation of the performance incentive to align with honest performance is not a penalty[13]; it is an adjustment to correct the incentive to a fair and reasonable rate, given the underlying circumstances. Therefore, the Division recommends that the Commission find that the total unearned performance incentive accrued is $12,359,808 as of the date of submission of the Division's testimony, with interest continuing to accrue to the date of a decision.[14]

[13] As previously indicated, the penalty phase of this proceeding is not yet before the Commission.
[14] When recouping those funds, the Company will obviously be credited with any sums paid to date.

Respectfully Submitted:
DIVISION OF PUBLIC UTILITIES
AND CARRIERS
By its attorney:

/s/ Margaret L. Hogan, Esq.
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CERTIFICATION OF NOTICE

A true copy of the within pleading is sent this 16th day of February 2024 to the current service lists for Docket No. 5189 and Docket No. 22-05-EE.

/s/ Ellen Golde