

**KEEGAN WERLIN LLP**

ATTORNEYS AT LAW  
99 HIGH STREET, SUITE 2900  
BOSTON, MASSACHUSETTS 02110  
\_\_\_\_\_  
(617) 951-1400

TELECOPIER:  
(617) 951-1354

February 16, 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 the applicability of statutes regarding penalties for violations.

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



**Table of Contents**

**I. INTRODUCTION AND BACKGROUND..... 1**

**II. BRIEFING ISSUES ..... 3**

    A. Authority of the Commission Must Arise from a Statute ..... 3

    B. Section 39-2-8 Does Not Apply to this Proceeding..... 4

    C. Section 39-1-22 Application to this Proceeding ..... 6

    D. Considerations for Whether to Assess a Penalty ..... 7

**III. CONCLUSION..... 9**

**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	)	
	)	

---

**REPLY BRIEF OF NATIONAL GRID USA IN RESPONSE TO  
BRIEFING QUESTIONS ISSUED BY  
THE RHODE ISLAND PUBLIC UTILITIES COMMISSION**

National Grid USA (“National Grid”) submits this reply brief consistent with the memorandum issued by the Rhode Island Public Utilities Commission (“PUC” or the “Commission”) on December 6, 2023 (“Briefing Memorandum”), regarding the applicability of statutes regarding penalties for violations.

**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 Rhode Island 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: (1) the applicable burden of proof; and (2) applicability of statutes regarding penalties for violations in this proceeding (PUC Briefing Memorandum at 2). On January 19, 2024, National Grid and The

Narragansett Electric Company d/b/a Rhode Island Energy (“Narragansett” or “Rhode Island Energy”) each submitted a brief addressing the questions in the PUC Briefing Memorandum regarding the burden of proof. In the briefs, Rhode Island Energy and National Grid both explained that Narragansett 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.

Also on January 19, 2024, the Division and the Attorney General of the State of Rhode Island (“RIAG” or “Attorney General”) each submitted a brief addressing the questions in the PUC Briefing Memorandum regarding the applicability of statutes regarding penalties.<sup>1</sup> This reply brief is submitted by National Grid to respond to the briefs submitted by the Division and Attorney General on January 19, 2024, and further addresses the questions in the PUC’s Briefing Memorandum regarding the applicability of statutes regarding penalties.

Notably, the statute on which the Division and the Attorney General rely, R.I. Gen. Laws § 39-2-8, requires violation of a *predicate statute* in order to impose penalties. However, no statute under Title 39 of the Rhode Island General Laws applies to out-of-period invoicing and, therefore, R.I. Gen. Laws § 39-2-8 does not apply. Further, the only other statutory basis asserted by the Division and Attorney General is R.I. Gen. Laws § 39-1-22, which could apply only if the Division and Attorney General bring forth evidence to demonstrate that Narragansett filed a sworn or

---

<sup>1</sup> In their respective briefs, the Division and the Attorney General make some factual assertions and arguments urging the Commission take certain actions at the conclusion of this proceeding. National Grid disagrees with many of their assertions and arguments. Nevertheless, the purpose of this brief is to outline the potentially applicable statutes, and not to argue the substantive facts. Therefore, National Grid will fully address the Attorney General and the Division’s substantive arguments at the appropriate time.

affirmed return, report, or statement that it knows or should have known contains false figures or information regarding a material matter. This has not occurred.

## **II. BRIEFING ISSUES**

### **A. Authority of the Commission Must Arise from a Statute**

As discussed in National Grid's brief regarding the burden of proof, 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 or penalties, that are not derived directly from a statutory delegation by the General Assembly. The Division and the Attorney General assert that both R.I. Gen. Laws §§ 39-2-8 ("Section 39-2-8") and 39-1-22 ("Section 39-1-22") authorize the Commission to penalize Narragansett for alleged intentional wrongful activities, if the statutory requirements are met. As discussed below, based on the Division and Attorney General's own rationale, Section 39-2-8 does not apply to this investigation. To the extent Section 39-1-22 is applicable, the Commission must determine (1) whether Narragansett knew or should have known about the actions of certain employees, and thereby knew or should have known that reports contained false information; and, if so, (2) whether and how much of a penalty to assess. As discussed in the briefs submitted by National Grid and Rhode Island Energy on the burden of proof, the party alleging imposition of a penalty bears the burden of proof on these matters.

**B. Section 39-2-8 Does Not Apply to this Proceeding**

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.

In order to impose a penalty under Section 39-2-8, the Commission must find: (1) a public utility either (a) violated a provision of statute, (b) performed a statutorily prohibited act, or (c) failed or refused to perform a duty required by statute; and (2) the alleged violation is not subject to any other penalty. Neither the Division nor the Attorney General assert any claim that satisfies the requirements of Section 39-2-8.

As an initial matter, the Division acknowledges that there is no alleged violation of a specific statutory duty (Division Brief at 5). Instead, the Division asserts that Narragansett is subject to an inherent duty to submit truthful reports and statements to the Commission (*id.*).<sup>2</sup> Further, the Division also admits that Section 39-1-22 is the more likely applicable statute, and that Section 39-2-8 should apply only to the extent that Section 39-1-22 does not (*id.* at 6). As discussed below, Section 39-1-22 sets forth the standard and potential penalties for the submission of false reports and statements to the Commission.

Therefore, Section 39-2-8 does not apply because (1) there is no alleged violation of any predicate statute; and (2) there is another statute that provides a penalty for the alleged wrongdoing.

---

<sup>2</sup> The Division's assertions about the just and reasonableness of rates is a red herring. Narragansett, through its own investigation, identified potential inappropriate actions of certain employees, proactively raised the issue with the Commission, and preemptively refunded customers for a potential over-collection of performance incentives. The primary issue in this proceeding is not about just and reasonable rates; rather, it is to establish the appropriate refund to customers due to the over-collection of performance incentives.

The Attorney General asserts that Section 39-2-8 applies because Narragansett did not fulfill its obligations under R.I. Gen. Laws § 39-1-27.7(c) by failing to submit accurate reports and due to an alleged misuse of funds.<sup>3</sup> Subsection (c), however, does not create any duty on a public utility.<sup>4</sup> The subsection allows the Commission to establish and periodically amend standards and guidelines governing Least Cost Procurement. Further, to the extent that subsection (c) creates a duty on the public utility by reference, the Least Cost Procurement Standards, last amended in 2021, do not address accounting or invoicing requirements at issue in this proceeding. Accordingly, the Attorney General's reliance on R.I. Gen. Laws § 39-1-27.7(c) as the predicate statute to impose penalties under R.I. Gen. Laws § 39-2-8 is not accurate.

Even if R.I. Gen. Laws § 39-1-27.7(c) created the alleged duties asserted by the Attorney General, this proceeding examines the over-collection of performance incentives, not the misuse of funds as alleged by the Attorney General. To the extent that the Attorney General alleges Narragansett knowingly submitted false annual reports submitted pursuant to Section 6.3(E) of the current Least Cost Procurement Standards, the penalty for submission of false reports is provided

---

<sup>3</sup> The Attorney General also asserts in a passing comment that Narragansett failed "to carry out the required energy demand program" (RIAG Brief at 8-9). The Attorney General provides no explanation for this accusation. Narragansett has continuously implemented its energy efficiency program under R.I. Gen. Laws § 39-1-27.7, and there is no evidence in the record to suggest otherwise. To the extent the Attorney General is raising an issue with the delivery of energy efficiency services, this issue is beyond the scope of this proceeding.

<sup>4</sup> R.I. Gen. Laws § 39-1-27.7 has been amended 12 times since its enactment, most recently in 2021. P.L. 2021, c. 224, § 1, effective July 8, 2021. The specific requirements included in subsection (c) have been amended over the years. The current subsection (c) requirement to allow the Commission to establish and periodically revise standards and guidelines for the energy efficiency plans, however, has been part of the law since enactment in 2006 (although its exact wording and assigned subsection has changed). Compare P.L. 2006, c. 236, § 6 and P.L. 2021, c. 224, § 1.



by Section 39-1-22. Therefore, Section 39-2-8 is inapplicable because a penalty for that alleged violation is provided by another section of law.<sup>5</sup>

**C. Application of Section 39-1-22 to this Proceeding**

Section 39-1-22 provides:

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

The Attorney General asserts that Section 39-1-22 applies to the reports and sworn statements provided by Narragansett. As noted above, the Division also asserts that Section 39-1-22 applies, and that Section 39-2-8 applies only to the extent Section 39-1-22 does not.<sup>6</sup> The primary basis the Division and the Attorney General assert for penalties throughout their respective briefs is that Narragansett allegedly knowingly submitted inaccurate reports. To the extent the

---

<sup>5</sup> Applying Section 39-2-8 to impose a penalty for the submission of an alleged false report when another statute (Section 39-1-22) already provides a penalty for such alleged conduct would be an attempt to shoehorn a higher penalty when it should not apply. Section 39-1-22 allows for penalties up to \$20,000 for knowingly submitting false reports or statements to the Commission. Section 39-2-8 allows for penalties between \$200 and \$1,000 for violation of certain statutory provisions or refusal to perform certain statutory duties, and such penalties may accrue daily until the violation is remedied.

<sup>6</sup> In the portion of its brief related to Section 39-1-22, the Division does not discuss the applicability of the section, but rather argues that the Commission should set aside prior orders in energy efficiency proceedings from 2012 through 2020. RIE fully addressed the Division's request in its Omnibus Objection of The Narragansett Electric Company d/b/a Rhode Island Energy to Division of Public Utilities and Carriers' January 19, 2024 Motions. The Division also incorrectly claims that Rhode Island Energy or National Grid made no effort to contact former employees during its investigation of out-of-period invoicing (Division Brief at 8). Contrary to the Division's bald accusation, National Grid's March 10, 2023 Report explains that National Grid did reach out to former employees during its investigation. Specifically, National Grid interviewed former employees, and reached out to others that either declined to be interviewed or failed to respond despite multiple efforts to contact the employees (March 10, 2023 Report at 20, 22-23). Notwithstanding this fact, the Division's argument is another red herring because National Grid and Rhode Island Energy determined that at least some of the out-of-period invoicing may have been done for the purpose of increasing performance incentives, rather than other reasonable basis for out-of-period invoicing, and therefore proposes to assume that all out-of-period invoicing was improper for the purpose of determining an appropriate refund of over-collected performance incentives.

out-of-period invoicing resulted in false statements or false reporting, Section 39-1-22 is the only statute that may be implicated.

To assess a penalty under Section 39-1-22, the Division and Attorney General must demonstrate that Narragansett furnished a sworn or affirmed report, return, or statement, that Narragansett *knew or should have known* contained false figures or information regarding a material matter it was required by law to provide. The Division and the Attorney General cannot possibly meet their burden to demonstrate Narragansett knew that certain returns, reports, or statements contained false information, or should have known that returns, reports, or statements contained false information, given that the March 10, 2023 Report explained that there are numerous valid reasons that invoices may be produced in a subsequent period (e.g., normal accounts payable payment terms, missing documentation, or a problem with a post-inspection, among other reasons) (March 10, 2023 Report at 17, 29). It is precisely this evidentiary challenge to establish certainty that required National Grid to employ conservative proxies and estimates in its the analysis presented in the March 10, 2023 Report.

#### **D. Considerations for Whether to Assess a Penalty**

Although the Commission may seek to impose a reasonable penalty if the Commission determines a public utility's actions, based on evidence, warrant such penalty pursuant to statute, the Commission also has broad discretion to determine whether to even impose a penalty. Penalties are intended to financially punish a regulated entity for intentional actions that violate laws and deter prohibited actions. In exercising its discretion whether to even impose a penalty, assuming that a violation warranting a penalty exists, the Commission should consider a company's actions and whether the company needs additional encouragement to alter its behavior through the imposition of a financial penalty. Considerations should include, for example, whether

the company reported the conduct to the regulator upon discovering it; whether the company conducted an internal investigation to determine the scope and extent of the conduct; whether the company disciplined employees involved; whether the company trained employees to prevent future misconduct; and other measures. Companies that proactively take these remedial steps may be hesitant to do so in the future if self-reporting or subsequent training, for example, would lead to excessive penalties.

The Commission should also weigh the severity of the actions. This case is not about failure to implement a program for the benefit of customers, misuse of funds, or failure to deliver safe and reliable service; rather, the narrow issue is certain employees deferring a limited number of invoices for energy efficiency services in the year following the delivery of the services for customers, for various reasons.

In addition, the Commission must consider the potential ramifications of issuing a penalty under these facts and circumstances. Regulated companies will need to consider whether to change program practices, such as ending services early in a calendar year to ensure all services are invoiced and accounted for in the same program year to avoid any chance of out-of-period invoicing,<sup>7</sup> as well as ample time to ensure no errors occur.

The Commission should not be swayed by the unproductive and inflammatory rhetoric throughout the Division and the Attorney General's briefs. Penalizing regulated utilities should be carefully considered under the facts and circumstances, and penalties should not be used to extract a "pound of flesh" of a public utility due to errors or the inappropriate actions of a limited group of employees that Narragansett itself raised to its regulator and seeks to fairly remedy.

---

<sup>7</sup> As indicated in the March 10, 2023 Report, some energy efficiency programs may have valid reasons for out-of-period invoicing in the ordinary course of program administration (see March 10, 2023 Report at 29).

### **E. Other Issues**

The Division asserts that the Commission should penalize Narragansett for what the Division characterizes as unjust and unreasonable rates (Division Brief at 9-10, citing R.I. Gen. Laws § 39-3-10(c)). The Division, however, is confusing the appropriate remedy for providing restitution to customers and the use of, and the Commission's authority related to, penalties. It is not uncommon for a complex and comprehensive rate filing to contain certain figures and information that need to be adjusted. A refund or adjustment to rates is the appropriate remedy for any improperly calculated rate, not financial penalties. Although National Grid disagrees with the Division's characterizations, National Grid agrees that the purpose of the proceeding is to remedy any over-collection of performance incentives through a refund to ensure customers do not overcompensate Narragansett for energy efficiency services.

Lastly, the Division argues that the Commission should order Narragansett to pay the Division's investigatory expenses pursuant to R.I. Gen. Laws § 39-4-12 (Division Brief at 9). The Commission should consider the applicability of this provision given the circumstances of this proceeding. This proceeding was initiated based on Narragansett identifying a potential over-collection of costs and proposal to refund customers, rather than an investigation into whether a rate is just and reasonable. Further, the Commission should evaluate whether Narragansett's investigation costs were reasonable under the circumstances prior to an assessment against Narragansett.

### **III. CONCLUSION**

Based on National Grid's review of the available statutes and case law, the Commission's authority to levy a penalty is limited to that which is specifically granted by statute. Contrary to the Division and the Attorney General's assertions, Section 39-8-2 is not applicable to this

proceeding. To the extent Section 39-1-22 may be applicable, the burden to demonstrate the applicability of the statute and basis for any penalty rests with the party asserting the violation and requested relief. In order to levy a penalty under Section 39-1-22, the Commission must determine (1) whether Narragansett knew or should have known that annual reports contained false information; and, if so, (2) whether and how much of a penalty to assess. In determining whether to even assess a penalty, the Commission should carefully consider the reason for issuing such penalty, whether a penalty is needed to alter the behavior of the company, and the impact that assessing the penalty may have on future actions by regulated utilities.

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](mailto:ckimball@keeganwerlin.com)  
[rhumh@keeganwerlin.com](mailto:rhumh@keeganwerlin.com)



---

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

Dated: February 16, 2024