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Attorney General

February 19, 2024

Luly Massaro, Clerk
Division of Public Utilities and Carriers
89 Jefferson Blvd.
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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 Burden of Proof, as corrected to address a transcription error in the version filed on February 16, 2024 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 RESPONSE BRIEF CONCERNING BURDEN OF PROOF

NOW COMES Peter F. Neronha, Attorney General of the State of Rhode Island ("Attorney General"), and hereby provides the following brief in response to Section I of the Commission's pre-hearing briefing prompt in the above-captioned docket, concerning the burden of proof, not as to liability but as to financial harm, and the briefs filed by Narragansett Electric d/b/a Rhode Island Energy (the "Company") and National Grid USA ("National Grid").

I. INTRODUCTION

The current docket arises out of the Company's own investigation which revealed that it is responsible for significant and recurrent false reporting to the Public Utilities Commission ("Commission") that enabled it to unfairly profit at the expense of ratepayers. By the Company's own admission, its internal procedures resulted in the intentional filing of false reports containing out-of-period invoices in order to maximize its own financial gain. The result was, unequivocally, damages suffered by ratepayers. As noted by the Company, "[t]he Company and the Division agree that financial harm, in the form of overcollection of Company incentives, has occurred as a result of out-of-period invoicing" and "the burden of establishing the occurrence of harm is not relevant." *Company Brief Concerning Burden of Proof*, Commission Docket No. 22-05-EE, January 16, 2024 at 7.

The only remaining issues are to properly quantify these improper profits and to implement a plan that returns value to the ratepayers. To that end, the Commission has charged the parties in this docket with opining as to "which party carries the burden of proof to determine the financial harm to ratepayers[.]" *See* Briefing Prompt at 1. The Attorney General construes this question to pertain to the quantification of ratepayer harm, not the existence of the harm, which has already been conceded by the Company. Although there are several considerations resulting from the Commission's briefing questions, as explained below, the simple answer is that the Company has the burden to show that any performance incentive received for energy efficiency programs since at least 2012 can be supported by true and accurate evidence.

II. THIS DOCKET IS AN INVESTIGATION OF A FAILURE TO SUPPORT INCENTIVES RECEIVED IN THE PAST.

Per the Commission Rules, "[t]o the extent permitted by law, the Commission may conduct any inquiry, investigation, hearing or other process necessary to its duties and functions." Commission Rule 1.3(F) (810-RICR-00-00-1.3(F)). Commission Docket No. 22-05-EE is such an investigatory docket and was opened by the Commission pursuant to Commission Rule 1.13 (810-RICR-00-00-1.13). *See* Commission Order 24441. Thus, although there are several parties participating in this docket, the Commission is the ultimate finder of fact, as well as the driving force behind the investigation.

Performance-based incentives are set by a statutory process requiring a contested proceeding. *See* R.I. Gen. Laws § 39-1-27.7(f); *see also* R.I. Gen. Laws § 39-1-27.7(d)(6)(iii) (requiring incentive levels to be included in the energy-efficiency annual plan). This docket is meant to determine whether the Company was entitled to performance-based incentive funds received in several dockets dating back to at least 2012. In those dockets, the Company purported to have achieved certain performance levels entitling it to incentives. As admitted by the

Company, it did not actually achieve those performance standards. Instead, the Company relied on out-of-period invoicing to achieve those incentives, which were funded by ratepayers. The Commission, may, at any time, "entertain an independent action to relieve a party from an order or to set aside an order for fraud upon the Commission", *see* Commission Rule 1.29(D) (810-RICR-00-00-1.29(D)), which is consistent with the Division's recent filings in Dockets 4295, 4366, 4451, 4527, 4580, 4654, 4755, 4888, and 4979. While the Commission has discretion in determining whether to reopen those dockets or to potentially entertain relief in this docket, the requests from the Division are helpful in highlighting the true nature of the controversy at hand – namely that the Company potentially received undeserved incentives in each and every one of those dockets and now must be held to account.

Accordingly, throughout its participation in this investigation, the Company has the burden to support its entitlement to any and all of the performance incentives it received in the relevant years. This is a direct result of that burden admittedly not having been met in all of the prior proceedings as a direct result of the false and misleading Company statements. The Company should be required to adequately support the incentive amounts it received by verifiable and accurate evidence. Review of available records, and ultimately righting of the wrong, is precisely the aim of this investigation.

III. RESPONSE TO QUESTIONS POSED BY THE COMMISSION

A. <u>*Commission Question (1)*</u> *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 noted in the briefing prompt, no statute specifically addresses this situation. Rather, the Commission has discretion, bounded by its delegation of authority as set forth in its organic statute

to construct the applicable rules. *See* R.I. Gen. Laws § 39-1-3(a). Here, it is important to remember that the Commission initiated an investigation under Commission Rule 1.13 and not an adjudicatory docket, as contemplated by Rhode Island General Law § 39-1-3(a) ("[t]he commission shall serve as a quasi-judicial tribunal with jurisdiction, powers, and duties to . . . to hold investigations . . ."),. "[I]t is clear that investigations conducted by administrative agencies, even when they may lead to criminal prosecutions, do not trigger due process rights." *Aponte v. Calderon*, 284 F.3d 184, 193 (1st Cir. 2002).

In a similar circumstance, the Public Utilities Commission of North Carolina opined that when "the Commission was performing its own investigation" there is "no burden of proof" in persuasion; in such a proceeding the utility is instead "compelled" to "provide information to the Commission." *In Re Duke Energy Corp*., No. E-7, 2003 WL 1869602 (Mar. 3, 2003). The Company therefore has a duty to produce evidence to the Commission's satisfaction.

B. <u>*Commission Question (2)*</u> *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 docket is an investigatory docket opened by the Commission to ascertain what monies have improperly been received by the Company. Accordingly, the Commission must treat this docket as an information-gathering docket for its own intended purpose of ensuring the accuracy of past energy efficiency docket orders in light of newly received information that the Company misreported its invoicing. Upon collecting that evidence via the various evidentiary tools at the Commission's disposal, the Commission may initiate a separate phase of this docket, under Commission Rule 1.29(D). *Id.* (permitting "an independent action to relieve a party from an order or to set aside an order for fraud upon the Commission" at initiative of the Commission).

Accordingly, characterizations of this docket itself as akin to litigation over the amount of "overcollection" are inapt. The Attorney General and the Division are not "plaintiffs" in this docket, but rather participating parties in an investigation meant to inform the Commission in any decision regarding the amount of performance incentives that should be returned to ratepayers as a result of the Company's failure to adequately support its having received the same in several energy efficiency dockets over a period of more than ten years (through affirmative misrepresentation of its performance). A subsequent phase will determine the remedy, including the manner in which a refund is provided, and the appropriateness of any penalties the Commission may (and should) impose.

C. <u>Commission Question (3)</u> *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. As explained above, there is no burden of proof in an investigatory docket. Instead, the Company is obligated to comply with the Commission's investigatory needs. *See e.g.* R.I. Gen. Laws § 9-17-3 (providing for the Commission's authority to issue subpoenas).

D. <u>Commission Question (4)</u> *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?*

As of now, the Company has provided varying estimates of the amounts it improperly took from ratepayers. It has returned some $2.4 million to ratepayers based on prior estimates, and later provided an inconsistent report on March 10, 2023 suggesting that it may have only received $320,000 as a result of its misreporting. At the same time, following a lengthy review of the evidence 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. ("Division Testimony"), (November 27, 2023) at 37:8 - 39:2. The evidence provided by both the Company and the Division required extrapolation because some records no longer exist, are missing, or cannot be reviewed. *See* Briefing Prompt at 1; *see also* Division Testimony at 36:11-14 (noting absence of an efficient means to review invoices from certain energy efficiency programs).

There are several investigatory tools that could be deployed to verify whether information is actually unavailable or unreliable. These include ordering forensic audit, subpoena, depositions, and other tools available to the Commission. Because the thrust of this docket is investigatory, the Commission may proceed with any and all procedures necessary to construct reliable evidence, including the use of experts.

If evidence is ultimately unavailable because of technical obsolescence or purposeful destruction, as uncovered by the investigatory process, the Commission may look to the Civil Rules of Evidence or common law principles in any adjudicatory phase. *See* Commission Rule 1.23 (810-RICR-00-00-1.29). For example, any spoliation should be evaluated under spoliation doctrine and the appropriate adverse inference should be applied. *E.g. Ord. Instituting Investigation on the Commissions Own Motion into the Operations & Pracs. of Pac. Gas & Elec. Companys Nat. Gas Transmission Pipeline Sys. in Locations with Higher Population Density.*, No. D. 15-04-022, 2015 WL 1687680, at *21 (Apr. 9, 2015) (where utility "failed to maintain records that it had a duty to maintain" it could not "benefit from that same failure" and "[t]he effect of the missing evidence on th[e] proceeding is fundamentally identical to the effect of spoliation of evidence on a court proceeding" and an adverse inference was appropriate); R.I. R. Evid. 804(a)(5). Rhode Island Courts have held that it is appropriate to consider spoliation where a party

"(1) failed to produce a document which the evidence tended to show was routinely generated by the [party] and (2) was unable to provide a satisfactory explanation as to why the document was not prepared with respect to the incident in the case before the court." *Mead v. Papa Razzi*, 899 A.2d 437, 442–43 (R.I. 2006).

IV. CONCLUSION

At this stage of these proceedings, it has been established and admitted that the Company engaged in out-of-period invoicing practices that inflated performance incentives received through Rhode Island's energy efficiency programs. Accordingly, the Company failed to show that it had earned the performance incentives it received dating back to at least 2012. The Company has a duty to satisfy any Commission inquiries into the evidence demonstrating that it can support its claims for performance incentive amounts. At this time approximately $12.35 million (inclusive of interest) is at issue. *See* Division Testimony at 37:9-38:2. The Commission should continue its inquiry of the Company until satisfied, and, if information is unavailable, inquiry into the circumstances of that unavailability should be made until a complete record is created so that the adjudicatory phase of the proceedings may commence. During the adjudicatory phase, applicable evidentiary common law and rules should be applied and adverse inferences should be made if appropriate under the circumstances.

Respectfully submitted,

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ATTORNEY GENERAL OF THE
STATE OF RHODE ISLAND

By his Attorney,

/s/ Nicholas M. Vaz
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Dated: February 16, 2024

CERTIFICATE OF SERVICE

I hereby certify that on the 19th day of February 2024, the original and nine hard copies of this corrected 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 February 19, 2024.

/s/ Nicholas M. Vaz