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February 16, 2024

VIA HAND DELIVERY & ELECTRONIC MAIL

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

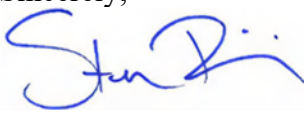
Re: Docket No. 22-05-EE Investigation of Misconduct by The Narragansett Electric Company Relating to Past Payments of Energy Efficiency Program Shareholder Incentives – Reply Brief of The Narragansett Electric Company d/b/a Rhode Island Energy

Dear Ms. Massaro:

On behalf of The Narragansett Electric Company d/b/a Rhode Island Energy (the "Company"), I have enclosed the Company's reply brief addressing the questions concerning the applicability of penalty statutes 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.

Leticia Pimentel

Leticia C. Pimentel

February 16, 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

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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

REPLY BRIEF OF THE NARRAGANSETT ELECTRIC COMPANY D/B/A RHODE ISLAND ENERGY CONCERNING PENALTIES

The Narragansett Electric Company d/b/a Rhode Island Energy (the "Company" or "Rhode Island Energy") submits this brief in response to 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 Rhode Island Attorney General ("Attorney General" or "RIAG") on several questions concerning the applicability of penalty statutes to this proceeding.

I. BACKGROUND

As noted in the Company's January 19, 2024 brief, 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 investigation initially identified forty-eight 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.[1] 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 comprehensive 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."[2] This joint effort identified an over-collection of performance incentives by the Company of $322,660 over the relevant period. The Investigation Report details the methodology 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 percentage of invoices that were

[1] 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.

[2] Investigation Report, at 1.

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 Reen (the "Division Testimony"). Messrs. Ballaban and Van Reen agree that the use of the Residential Upstream Lighting Program as a proxy is a reasonable methodology to determine the customer impact of out-of-period invoices.[3] 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[4] at the time of the filing.[5]

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. On January 19, 2024, the Company and National Grid filed briefs responding to the Commission's questions concerning burden of proof. That same day the Division and Attorney General filed briefs responding to questions concerning the applicability of certain provisions of the Rhode Island General Laws providing for the imposition of penalties on public utilities. The Company now addresses the questions concerning the applicability of certain penalty statutes as

[3] 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.")

[4] The Division recommended that the final figure to be credited to customers 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.

[5] 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.

set forth in the Commission's December 6, 2023 Memorandum and responds to the Division and Attorney General's arguments regarding same.

II. DISCUSSION OF QUESTIONS POSED BY THE COMMISSION

A. To what extent does Section 39-2-8 apply to the filing of the Annual Reports or other accounting or rate schedules if such reports or rate schedules reflected inaccurate or false information caused by the out-of-period invoicing?

R.I. Gen. Laws § 39-2-8 does not apply to the filing of false reports, accountings, or rate schedules with the Commission because that conduct is specifically proscribed by R.I. Gen. Laws § 39-1-22, which provides for a penalty for violations not to exceed $20,000. R.I. Gen. Laws § 39-2-8 provides that

> 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.

Penalties under R.I. Gen. Laws § 39-2-8 apply when there is no specific applicable penalty provided elsewhere and: (1) when there is a violation of Chapters 1 through 5 of Title 39; (2) when the public utility engages in conduct that is prohibited "herein"; and (3) when the public utility fails to perform any duty enjoined upon it. The question posed by the Commission asks whether R.I. Gen. Laws § 39-2-8 would apply to the submission of false reports or rate schedules, and, because that conduct is specifically proscribed by a statute providing for a specific maximum penalty, the provisions of R.I. Gen. Laws § 39-2-8 do not apply.

In its January 19, 2024 brief ("Division January Brief"), the Division incorrectly states that there is no statute that "specifically prohibits invoice manipulation or the filing of false documents or the making of false statements," and goes on to note that the penalties provided for in R.I. Gen. Laws § 39-2-8 apply to conduct, "'**for which a penalty has not been provided.**'"[6] Contrary to the Division's suggestion, R.I. Gen. Laws § 39-1-22 specifically prohibits the furnishing of "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." Therefore, the conduct that the Division is concerned may have occurred, "submitting deliberately misleading or untruthful pre-filed testimony and schedules, answering data requests untruthfully, testifying untruthfully or in a deliberately deceiving manner under oath, and submitting untruthful post-hearing compliance filings,"[7] is specifically proscribed and may result in a fine of "not more than $20,000." *See* R.I. Gen. Laws § 39-1-22. Because R.I. Gen. Laws § 39-1-22 already provides for a maximum penalty for the conduct that is described in the Commission's question, the separate daily penalties provided in R.I. Gen. Laws § 39-2-8 would not apply.

This conclusion is consistent with the codified rules of statutory interpretation contained in R.I. Gen. Laws § 43-3-26, which provides

> Wherever a general provision shall be in conflict with a special provision relating to the same or to a similar subject, the two (2) provisions shall be construed, if possible, so that effect may be given to both; and in those cases, if effect cannot be given to both, the special provision shall prevail and shall be construed as an exception to the general provision.

[6] Division January Brief at 4-5, quoting R.I. Gen. Laws § 39-2-8 (emphasis in Division January Brief).

[7] Division January Brief at 6.

Two potentially conflicting statutes are implicated by the Commission's question. The first, R.I. Gen. Laws § 39-1-22, is a specific statute that governs the penalties for filing of false materials as described in the question, and it permits a maximum fine of $20,000. The second, R.I. Gen. Laws § 39-2-8, permits the imposition of daily fines that could exceed $20,000 for conduct where no other penalty is specifically provided. The two provisions can be construed to give effect to both if: (1) R.I. Gen. Laws § 39-2-8 is construed as applying only when no specific penalty is provided by another statute, or (2) the $20,000 limitation on fine for the conduct described in R.I. Gen. Laws § 39-1-22 is interpreted to act as a limit upon the potentially higher daily fines provided in R.I. Gen. Laws § 39-2-8. Any other construction of the two statutes would put them in conflict such that the more specific statute, R.I. Gen. Laws § 39-1-22, must prevail over R.I. Gen. Laws § 39-2-8.

The Division argues that an inherent duty of truthfulness, accuracy, and candor in all administrative proceedings before the Commission and the Division supports its argument that R.I. Gen. Laws § 39-2-8 is applicable.[8] The Division lists types of misrepresentations that would "[c]ertainly" result in the applicability of R.I. Gen. Laws § 39-2-8 – including, for example, the giving of false testimony.[9] The Division, however, does not cite any legal support for its position and does not explain how R.I. Gen. Laws § 39-2-8's potentially unlimited daily fines can be reconciled with R.I. Gen Laws § 39-1-22's fine limitation. Nor have any factual findings been made in this proceeding regarding the Company's conduct that would permit a determination at this stage of the proceedings that the penalties provided in R.I. Gen. Laws § 39-

[8] Division January Brief at 5.

[9] Id.

2-8 could apply.[10] In short, while the Division argues that R.I. Gen. Laws § 39-2-8 would apply, it has not explained how it can be applied consistent with R.I. Gen. Laws § 39-1-22, nor has the Division identified the necessary predicate acts to support the statute's application.

The Attorney General argues that R.I. Gen. Laws § 39-2-8 is applicable because the Company "failed in its duty under R.I. Gen. Laws § 39-1-27.7(c) and the Least Cost Procurement Standards as approved and adopted by the Commission to accurately file its Annual Reports or other filings."[11] Section 39-1-27.7(c) provides that "The [energy efficiency] standards and guidelines provided for by subsection (b) shall be subject to periodic review and as appropriate amendment by the commission, which review will be conducted not less frequently than every three (3) years after the adoption of the standards and guidelines." The Attorney General does not explain what duty is imposed by this statute that the Company has failed to fulfill or how the statute's requirements have been violated. Rather, the Attorney General points to the alleged falsity of filings made as justification for the imposition of penalties under R.I. Gen. Laws § 39-2-8 ignoring the more specific provisions of R.I. Gen. Laws § 39-1-22 that govern the submission of false statements to the Commission and impose a limitation upon the penalty that can be levied.[12] Like the Division, the Attorney General has not identified a predicate act that would trigger fines under R.I. Gen. Laws § 39-2-8 nor has he explained how the daily fines available under that statute can be applied to the conduct that the question describes, which are separately and specifically proscribed by R.I. Gen. Laws § 39-1-22.

[10] Division January Brief at 6.

[11] RIAG January Brief at 4.

[12] Id.

The Commission's authority to levy fines is provided, and limited, by the legislature. The Attorney General asserts that "the Commission has widespread authority to assess financial penalties against regulated utilities, so long as its decision is consistent with the law and is not arbitrary or capricious."[13] To the extent that this is intended to suggest that the authority to impose fines is some inherent power of the Commission, the Attorney General is incorrect. Such broad authority would be inconsistent with well-established principle that "[a]n administrative agency is a product of the legislation that creates it, and it follows that agency action is only valid, therefore, when the agency acts within the parameters of the statutes that define its powers." Iselin v. Ret. Bd. of Employees' Ret. Sys. of Rhode Island, 943 A.2d 1045, 1050 (R.I. 2008) (internal quotations and citation omitted). With respect to the submission of false information as described in the Commission's question, R.I. Gen. Laws § 39-1-22, and not R.I. Gen. Laws § 39-2-8, defines the extent of the Commission's powers.

B. If Section 39-2-8 was applicable and the Commission were to determine that a penalty should be assessed, what factors should the Commission be considering to determine the amount of the penalty? (See, for example, how the California PUC addressed this question in the case cited above.)

If the Commission concludes that R.I. Gen. Laws § 39-2-8 is applicable, finds facts sufficient to support its application, and determines that a financial penalty should be assessed, the Company agrees with the Division and the Attorney General that the factors considered by the California Public Utilities Commission in assessing financial penalties are appropriate to consider.[14] These factors include: (1) severity of the offense (including harm to the regulatory process); (2) conduct of utility before, during and after the offense; (3) financial resources of the

[13] RIAG January Brief at 5.

[14] Id. at 5-6; Division January Brief at 7.

utility and ability to pay a fine; (4) the totality of the circumstances; and (5) precedent to determine whether the imposed fine is reasonable relative to past fines it has imposed.[15] The Company also agrees with the Attorney General that the factors considered by the Rhode Island Department of Environmental Management in assessing financial penalties, as set forth in R.I. Gen. Laws § 42-17.6-6, are reasonable and appropriate for consideration.[16]

The Company understands that the purpose of the Commission's briefing questions is to assist the Commission in setting the legal framework that will be applicable to proceedings in this docket, and the Company reserves its right to argue how these factors should be weighed and applied to the facts in this proceeding following evidentiary hearings. For that reason, the Company does not set forth here the many reasons that a financial penalty is not justified under the circumstances. The Company is, however, compelled to respond to the Division's arguments offered with respect to this question. Despite the procedural status of these proceedings, the Division's response to the Commission's legal questions is laced with aspersions that lack any evidentiary basis.[17] The Company disagrees with the Division's suggestion that the Commission should also consider the "apparent corporate culture that such conduct was acceptable" because: (1) aside from invective, the Division has not offered any evidence to support its assertion that there was a general corporate culture that was accepting of the conduct at issue; and (2) the current owner of Company was not the corporate parent company at the time of the out-of-period invoicing. The Company also disagrees with the Division's suggestion that the Company's accounting department should have discovered out-of-period invoicing based upon intuition and

[15] Ord. Instituting Rulemaking Concerning Energy Efficiency Rolling Portfolios, Pol'ys, Programs, Evaluation, & Related Issues., No. D. 22-11-031, 2022 WL 17225704, at *12–14 (Nov. 17, 2022)

[16] RIAG January Brief at 6.

[17] Division January Brief at 7-8.

the relative volume of invoices in the fourth quarter of one program year and the first quarter of the next.[18] There is simply no evidence in the record to support the Division's speculation in this regard and, as described in the Investigation Report, there are many legitimate reasons that costs incurred in one program year might not be invoiced until the next.

C. To what extent is Section 39-1-22 implicated if the Commission finds that witnesses in prior evidentiary proceedings supported figures or other information under oath that was based on inaccurate or false information caused by the out-of-period invoicing?

Rhode Island Gen. Laws § 39-1-22 provides that

> 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).

While the Division did not directly address this question in its legal brief,[19] the Attorney General argues that R.I. Gen. Laws § 39-1-22 is applicable to this proceeding based on the plain language of the statute. The Company concedes that R.I. Gen. Laws § 39-1-22 could be

[18] Id. at 8.

[19] Instead, after quoting the Commission's question and R.I. Gen. Laws § 39-1-22, the Division proceeded to argue that the Commission should reopen the nine separate energy efficiency plan dockets. The Division also took issue with the unavailability of certain former National Grid employees during National Grid's internal investigation and asked the Commission to make negative inferences from this unavailability ignoring the actual contents of the Investigation Report indicating that former employees were interviewed. Investigation Report at 20. Lastly, the Division argues that there is sufficient evidence on the record to conduct another investigation for which the Company should pay. Aside from being a procedurally improper attempt to seek affirmative relief by way a response to a clear and discrete legal question posed by the Commission, the Division's request for a Company funded investigation ignores the explicit requirement under R.I. Gen Laws § 39-4-12 that the assessment of investigation expenses upon a utility occur only *after* a hearing and findings.

applicable under the circumstances if the Commission makes requisite factual findings based upon sufficient and admissible evidence.[20]

III. CONCLUSION

Rhode Island Energy is committed to making customers whole for the financial impact of any out-of-period invoicing in the energy efficiency programs from 2012-2020. The questions posed by the Commission regarding the imposition of penalties raise entirely separate issues. As explained in the Company's January 19, 2023 brief, the burden of establishing facts to justify the imposition of fines rests firmly with the parties seeking their imposition. Despite their insistence that fines are appropriate here, the Division and Attorney General overlook the clear provisions of applicable statutes and the factual predicates that must be established, through competent evidence, before fines could be permissibly levied by the Commission. Even if the Division or Attorney General offer evidence that could support the imposition of fines, the Company will establish that it has been transparent, proactive and cooperative in an effort to bring this matter to a swift and satisfactory conclusion such that the imposition of fines would be unwarranted under the circumstances.

[SIGNATURES ON NEXT PAGE]

[20] See section II.A above. The Commission's question regarding R.I. Gen. Laws § 39-1-22 omits important statutory elements that must be satisfied in order or financial penalties to be assessed. Specifically, to impose a fine, the evidence must demonstrate that the Company knew or should have known that the material submitted to the Commission contained false figures or information. See R.I. Gen. Laws § 39-1-22.

Respectfully submitted,

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

By its attorneys,

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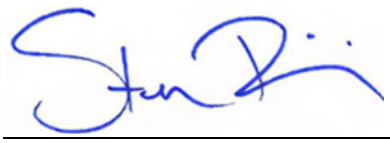

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Dated: February 16, 2024

CERTIFICATE OF SERVICE

I hereby certify that on February 16, 2024, I delivered a true copy of the foregoing brief via electronic mail to the parties on the Service List for Docket No. 22-05-EE.

Leticia Pimentel