STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS
PUBLIC UTILITIES COMMISSION

IN RE: AMENDMENT OF THE RULES AND REGULATIONS GOVERNING TERMINATION OF RESIDENTIAL ELECTRIC, GAS AND WATER UTILITY SERVICE	:	Docket No. 3876

COMMENTS REGARDING AMENDMENTS TO THE COMMISSION'S RULES AND REGULATIONS GOVERNING TERMINATION OF RESIDENTIAL ELECTRIC, GAS AND WATER UTILITY SERVICE

I. Travel

On September 28, 2007, the Public Utilities Commission ("Commission") issued proposed amendments to its Rules and Regulations Governing Termination of Residential Electric, Gas and Water Utility Service ("Termination Rules"), which were last revised in 2007. In accordance with R.I. Gen. Laws § 42-35-3, the Commission published a Notice of Proposed Rulemaking in the Providence Journal which included a Notice of Public Hearing scheduled for October 11, 2007. The Commission initially requested written comments be submitted on or before October 29, 2007, but in response to a request from the George Wiley Center and the Attorney General, the Commission extended the deadline to November 5, 2007. On September 27, 2007, the proposed Termination Rules were electronically delivered to all parties to Docket No. 1725, a generic docket in which information related to the Termination Rules is gathered.[1]

The purpose of the amended regulations was to make the following technical changes to the Termination Rules: delete reference to a Department of Labor and

[1] While a copy of the Termination Rules was served electronically on the George Wiley Center's attorney, a hard copy was mailed to the Director of the George Wiley Center via first class mail. In accordance with R.I. Gen. Laws § 42-35-3.3, a copy was also forwarded to the Governor's office and the Economic Development Corporation to which the Commission received no comment.

Training ("DLT") ID card to prove temporary unemployment upon information that DLT no longer issues such cards, update Appendix A to include the current Rhode Island Median Income levels for determining financial status, revise language of the Termination Notice on Form III to reflect requested changes from the Wiley Center as accepted by the electric and gas utility companies in 2005, remove the illustrative examples that appear in Appendix D of the Termination Rules, and add a severability clause.[2]

The proposed amendments also made the following substantive changes: (1) the addition of a payment plan option for very low income customers that allows for arrearage forgiveness over three years in accordance with Rhode Island Gen. Laws § 39-2-1(d)(1)-(2); (2) the addition of an additional protection for financial hardship customers who have a child under twelve (12) months of age domiciled in the household in accordance with Public Law Ch. 07-419; (3) the removal of a provision which allows non-lawyers to represent customers at formal hearings before the Division of Public Utilities and Carriers and the addition of language that allows only lawyers permitted to practice law in the State of Rhode Island to do so (nothing took away the right of a customer to appear *pro se*); (4) the removal of a provision in Part V, Section (4)(A) which allows utility companies to offer more lenient payment plans than those allowed by the Termination Rules; (5) the removal of Part VII, Section 1(A) of the Termination Rules allowing the Commission to order immediate restoration of service while amending Part VII, Section 1(B) to allow the Administrator of the Division of Public Utilities and Carriers to order immediate restoration without determining that the Commission is available and removal of Part VII, Section 1(C) which requires a written

[2] No comments were received regarding any of the proposed technical changes.

order to be issued.

The adoption of the new provisions related to arrearage forgiveness and infant protection were mandated by statute and therefore, no alternative approach would be allowed.[3] The proposal regarding the representation of customers at Division formal hearings was changed as a result of concerns that the regulation was inconsistent with State law. The removal of the allowance of more lenient payment plans was made as the result of responses to Commission data requests that customers were being allowed to continue with service for as long as 30 months without ever making a payment on his or her account. The change allowing the Division of Public Utilities and Carriers ("Division") the authority to order emergency restorations rather than the Commission was the result of the Commission's determination that the Division had more expertise in the area.

II. Comments in Response to September 29, 2007 Notice

On October 11, 2007, a hearing was conducted for the purposes of taking public comment. Eighteen members of the public provided oral comments.[4] The Commission also received seven written comments from interested organizations on or before November 5, 2007.[5] Comments that were emailed by November 5, 2007 were considered

[3] On August 17, 2007, NGrid filed a letter explaining their proposed implementation of R.I. Gen. Laws § 1.1-2.1 (Infant Protection). This was docketed as Commission Docket No. 3866. As a result of the Commission's actions in this Rulemaking docket, Docket No. 3866 is closed with no action.

[4] The comments were primarily focused on the changes to the emergency restoration, representation at formal Division hearings, whether the utilities should have discretion in setting payment plan terms, and a suggestion by Senator Montalbano to reduce the downpayments required to enter into payment plans. NGrid agreed outside of the Commission process to reduce the downpayments required for restoration prior to the start of the moratorium and as such, the Commission does not need to address this proposal through a rulemaking.

[5] Written comments were received by the Rhode Island Community Action Association (attorney provision and lenient payment plans); George Wiley Center (attorney provision, lenient payment plans, emergency restoration and a new proposal regarding payment plan downpayments); Attorney General (emergency restoration, lenient payment plans, attorney provision); Pascoag Utility District (lenient payment plans, attorney provision); ACLU (attorney provision, lenient payment plans, emergency restoration); AARP

by the Commission, even if a hard copy was not received until after that date.

At an open meeting held on November 29, 2007, the Commission discussed the comments and voted to adopt additional changes in response to comments that were provided or filed. The Commission's rationale is set forth below regarding why it adopted further changes and why it did not make a change in response to one comment from the AARP regarding the infant protection. The Commission reissued the proposed Termination Rules with the additional changes through a Supplemental Notice of Proposed Rulemaking published in the Providence Journal on December 5, 2007.[6] The proposed further revisions to the Termination Rules were sent via electronic mail to all parties to Docket No. 1725 and all persons or organizations that had provided comments in response to the previous Notice in this docket and made available at the Commission's offices and on the Commission's website. The Commission requested written comments be submitted on or before January 4, 2008.

Many commenters argued that the Commission should allow non-attorneys to represent customers at Division hearings based on equity and cost. The Commission believes that the law is clear that the appearance of non-attorneys at such evidentiary hearings before the Division as representatives of customers would fall within the broad definition of R.I. Gen. Laws § 11-27-2, but also recognizes that there is caselaw in Rhode Island that may suggest otherwise. Therefore, rather than provide an interpretation of the criminal code and its application in Division hearings, the Commission responded to these comments by changing its proposed language to state that customers have "the right

(attorney provision, lenient payment plans, emergency restorations, infant protection, support for Senator Montalbano's suggestion that payment plan downpayments be lowered); and NGrid (technical changes, lenient payment plans, "loophole" allowing customers to remain connected indefinitely without making payments).

to appear in person and to retain, and be represented by legal counsel or another person in accordance with Rhode Island state law."[7] The Commission issued this proposed language for an additional 30 days' comment through the December 5, 2007 public notice.

Many commenters also argued that the Commission should not remove itself from the Emergency Restoration Process. However, a reading of those comments suggests that the rationale is on the basis that the Commission should be acting not as an independent arbiter of emergency requests, but as an appellate body to the Division, something which would be in conflict with the provision in the Termination Rules for appeal of Division findings in accordance with the Rhode Island Administrative Procedures Act. Additionally, Commission experience with requests for emergency restorations had shown a trend toward customers attempting to use the Commission as a means to end-run the customer responsibility requirements of the Termination Rules. However, the Commission does agree that it has the responsibility to keep itself available in the event the Division is unable to hear a customer request for emergency termination. Therefore, the Commission responded to these comments by changing its proposed language to the following:

(A) The Administrator of the Division of Public Utilities and Carriers or his designee shall have the emergency authority to order immediate restoration of utility service when restoration of such service is necessary to protect the health, welfare and

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[6] The Supplemental Notice of Proposed Rulemaking also discussed additional technical changes to which no comments were received.

[7] The Commission did seek input from the Attorney General of Rhode Island and was advised that because he was commenting in the rulemaking proceeding he did not believe it would be appropriate to offer a separate independent opinion. His comments in the rulemaking were that it appeared there may be an exception for the type of hearing conducted by the Division based on caselaw and public policy. Letter to

safety of the residents of the dwelling to which utility service has been terminated. The Administrator's designee under this Section shall not have been involved in prior review of the customer's account.

(B) If there is no Division of Public Utilities and Carriers employee available to act as the Administrator's designee, the Public Utilities Commission or, in the absence of two or more Commissioners, one Commissioner may order any utility service immediately restored, pending hearing and decision by the Division of Public Utilities and Carriers, when restoration of such service is necessary to protect the health, welfare and safety of the residents of the dwelling to which utility service has been terminated. In considering the request, the Commission will determine whether the requestor has attempted to avoid termination through the procedures set forth in these Rules and will not act as an appellate body to the Division of Public Utilities and Carriers. Further, in addition to obtaining information from the requestor, the Commission will seek input from the utility company and Division of Public Utilities and Carriers prior to making any decision and if quorum exists, will comply with the Open Meetings Laws of the State of Rhode Island. The Commission issued this proposed language for an additional 30 days' comment through the December 5, 2007 public notice.

Many commenters also argued against the elimination of payment plans that are more lenient than those set forth in the Termination Rules. The main argument was that the utility companies should be able to exercise management prerogative to enter into more individualized payment plans. In its comments, National Grid ("NGrid") made the same argument and made the Commission aware of what it perceived as a "loophole" in

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Cynthia G. Wilson-Frias from Paul Roberti, Assistant Attorney General dated November 5, 2007; Comments of the Attorney General.

the Termination Rules, the relevant portion of which has been in effect since 2002, that would allow customers to avoid termination indefinitely simply by calling the utility company after receiving a termination notice, but prior to physical termination of service. Because the Commission agrees that the utility companies should be able to exercise management prerogative subject to Commission prudence reviews and agrees with NGrid that the language of the Termination Rules could allow continuation of service indefinitely without payment in certain circumstances, the Commission restored the language which would allow the utility to enter into more lenient payment plans and accepted changes by NGrid, as noted below, which would close the "loophole" and meet the Commission's goal of eliminating the ability of customers to maintain service indefinitely without making any payments.

National Grid proposed clarifying language to several sections of the Termination Rules that address Residential Payment Plans. This language would clarify that customers will have one opportunity to enter into a payment plan without making a downpayment. Following disenrollment from a payment plan which did not require a downpayment, regardless of whether there is a physical termination of service, the customer would be required to enter into a payment plan that required a downpayment, either 25% for protected customers or 60% for standard customers. However, a customer would not be moved to the next payment plan unless service was physically terminated. Therefore, this would eliminate the possibility of a customer having the opportunity to continually re-enroll in zero downpayment plans despite having never made a payment

on the account.[8] The Commission accepted and issued this proposed language for an additional 30 days' comment through the December 5, 2007 public notice.[9]

The AARP proposed changing the rule regarding infant protection to allow parents ten business days rather than seven days to provide proof of a birth because parents might have to wait for other parties to provide the required information. However, before a parent can leave the hospital with a newborn, the newborn must be discharged by a pediatrician. This discharge information would be readily available to the parent and would meet the requirement of evidence of a birth. While the Commission recognizes there is a delay in receiving birth certificates, these are not the only documents which would satisfy the burden of proving the age of a child.[10] Therefore, the Commission declines to adopt the proposed change. The Commission also does not accept the suggestion that the Notice of Termination should state specifically that the infant protection is not available to restore service, because a customer whose service is already terminated will not receive the Notice of Termination.

III. Comments in Response to the December 5, 2007 Notice

Two interested parties submitted comments in response to the December 5, 2007 Notice. At an open meeting, held on January 31, 2008, the Commission discussed the comments and voted not to adopt additional changes in response to comments that were

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[8] NGrid's Comments, pp. 5-10. The definition of disenrolled remained unchanged from the definition contained in the existing Termination Rules as promulgated in 2002.

[9] On November 8, 2007, the Division filed an Objection to NGrid's comments arguing that the Commission should not consider any comments related to the "loophole" on the basis that it was outside of the scope of the Commission's Notice of Proposed Rulemaking dated September 29, 2007. At its open meeting held on November 29, 2007, the Commission determined that because it was issuing the proposal made by NGrid along with other additional language changes for an additional 30 day comment period, the Division's objection was overruled.

[10] Because the law states that the customer must provide verifiable certification, the Commission believes a utility company would be hard pressed to deny protection if a customer presented a health record from the child's pediatrician in lieu of hospital documentation.

filed. The Commission's rationale regarding why it declined to adopt further changes is set forth below. The Commission voted unanimously to promulgate the proposed Termination Rules as issued for Comment on December 5, 2007.

The George Wiley Center argued that it was not enough for the Commission to reinsert the language allowing customers to seek emergency restorations from the Commission if the Division was unavailable, but that in order to avoid violating the Americans with Disabilities Act ("ADA"), it must allow customers to seek such restoration from the Commission in the first instance. The George Wiley Center argued that anyone with a disability should be allowed to petition the Commission without first being denied consideration of an emergency petition by the Division, stating, "the ADA requires the PUC to make an exception for particular disabled persons to its termination regulations."[11]

The purpose of the ADA is to avoid discrimination of people with disabilities through reasonable accommodation. The George Wiley Center argued that "a state agency that promulgated a program of uniform regulations will, on occasion, have to make an individualized exception as an accommodation in a particular case."[12] In fact, by allowing a customer to seek exceptions from the Division, including an emergency restoration, the Termination Rules comply with the statement made by the George Wiley Center.[13] Furthermore, if the Division is not available to hear a petition, the Commission has still made itself available. Finally, the Commission notes that R.I. Gen. Laws § 39-1.1-1 states that "No public utility…shall terminate service to any household…where any resident is disabled…for failure to pay an outstanding indebtedness for service, without

[11] Comments of the George Wiley Center, January 4, 2008, p. 1.
[12] *Id.*

first complying with all rules and regulations for such terminations issued by the commission." The Termination Rules contain protections for this class of customers as required by the law and together with the provisions for the grant of flexibility within the Termination Rules, the Commission does not agree that its proposal would violate the ADA.

The AARP was dissatisfied that the Commission did not simply retain the original language in the Termination Rules which allowed anyone to represent customers at formal Division hearings. However, the Commission believes that the language it chose is legal under State law and allows the Division to interpret the statute in the context of its hearings.

The AARP argues that the Division should not be in the position of considering petitions for emergency restorations in the first instance because, "it is unfair for the customer to have to appear before the same adjudicator who may have ordered disconnection in the first place."[14] However, the proposed Rule specifically prohibits a Division employee from hearing the request for emergency restoration if that employee was involved in prior review of the customer's account. Therefore, the customer would not be working with the same adjudicator. One cannot reasonably expect the entire agency to be precluded from considering a customer's request because one employee reviewed that customer's account.

The AARP also argues that the following language is objectionable and unfair: "In considering the request, the Commission will determine whether the requestor has attempted to avoid termination through the procedures set forth in these Rules and will

[13] *See* Part VI, Section 7 of the Termination Rules.
[14] AARP's Comments, p. 4.

not act as an appellate body to the Division of Public Utilities and Carriers. Further, in addition to obtaining information from the requestor, the Commission will seek input from the utility company and Division of Public Utilities and Carriers prior to making any decision and if quorum exists, will comply with the Open Meetings Laws of the State of Rhode Island."[15] This language is meant to provide every customer with the same level of due process and to memorialize what the Commission has informally attempted to do in prior requests for emergency restoration. The AARP argues that "in the context of such a case the consumer is in fact trying to avoid termination" the language does not make sense because it might "delay the proceeding and put the consumer at greater risk of disconnection."[16] The AARP's concern appears misplaced because if a customer has not yet had service terminated, there would be no need to seek *restoration*, emergency or otherwise. A customer can avoid termination of service simply by calling the Division and requesting a hearing. This stops the entire termination process. Again, if a customer has gone through the informal and formal hearing process, the Termination Rules state that the appropriate means of appeal are to the Superior Court under the Rhode Island Administrative Procedures Act.

If the Division makes a determination that an elderly, handicapped, or disabled – designated account should be terminated, that means there has been an extensive notice process and opportunity for hearing. There is nothing in the law that states that these accounts can never be terminated for non-payment. In fact, the Termination Rules also require that each of these customers enter into a payment plan in order to retain service once the Division is called in by the utility to make a decision regarding termination of

[15] Part VII, Section 1(B), Commission's Proposed Termination Rules as issued on December 5, 2007.
[16] AARP's Comments, p. 4.

service on these accounts. Finally, a customer who believes he or she falls under the seriously ill category should contact the utility company and if that does not result in protection, should contact the Division. If a customer becomes seriously ill following a Division decision after a formal hearing, that customer can contact the Division under its Procedural Rules allowing for reconsideration in light of newly found evidence or under the emergency provision. However, a customer cannot simply ignore notices from the utility and/or the Division and expect the Commission to restore service.

Finally, the AARP argued against the proposed language to close the "loophole" which allowed people to continue service without making any payments at all on their accounts. The AARP argues, "the effect will be that certain customers who have been able to retain service through new payment plans will now be required to pay a down payment first. For many, the new down payment requirement may mean they are not able to maintain service at all."[17] The Commission never envisioned a scenario where a customer could avoid termination of service just by making telephone call after telephone call to the utility without ever making a payment. However, that is exactly what has been happening in many cases as shown by NGrid's responses to the Commission's data requests in this docket.

As noted by this Commission in 2002, "in order to provide an incentive for customers to make every effort to comply with the terms of the payment plans as written, if a customer fails to bring his or her account current within the period of time in which two payments are due on the customer's payment plan, the customer will be required (1) *to make the initial down payment required under the plan from which the customer was disenrolled,* and (2) to renegotiate a new residential payment plan in order to maintain

service. In other words, prior to service termination, the customer will be allowed to re-enroll in his or her payment plan, without moving to the next step of the "ladder," as long as only one payment has been missed. However, by imposing a termination penalty for successive non-payment, payment plan customers will be less likely to accrue increasingly large unpaid balances."[18] Unfortunately, where a customer has become "stuck" at the first step in the payment plan, he or she never has to make any payments to the utility company and the account balances grow into multiple-thousands of dollars. This is contrary to the Commission's intent. NGrid's proposal as adopted by the Commission is consistent with the Commission's goal in 2002 "to strike a balance between the Commission's concerns that a customer could be moved all the way up the payment plan ladder without ever having service terminated and the utilities' concerns that a customer not become stuck in a step by becoming disenrolled repeatedly but never being penalized because each time, he or she brought the account current just in time to avoid termination."[19] In this case, customers are not even bringing their accounts current just in time to avoid termination, but rather, are simply not paying, whether by choice or by circumstance.[20]

The AARP argues that "[i]f the Commission gives the utility the guarantee of having more customers who are required to provide down payments, it is fair to also reduce the level of down payments required."[21] However, it was never the Commission's intent to allow customers to maintain service indefinitely without ever having to make a

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[17] *Id.* at 5.
[18] Order No. 16966 (issued April 16, 2002), p. 14 (emphasis added).
[19] *Id.* at 14.
[20] This is not necessarily a low income issue. The Commission notes that non-protected or "Standard Customers" have found this loophole and in several instances, have been using it in order to avoid over two years of payments.
[21] AARP's Comments, pp. 5-6.

payment and had this "loophole" been brought to the Commission's attention by the utilities managing the payment plans earlier, the loophole most likely would have been closed long ago. Therefore, the Commission does not accept the AARP's suggestion to reduce down payments for all customers.

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EFFECTIVE AT WARWICK, RHODE ISLAND PURSUANT TO A OPEN MEETING DECISIONS ON SEPTEMBER 29, 2007, NOVEMBER 29, 2007 AND JANUARY 31, 2008. A COPY OF THE FINAL RULES WERE FILED WITH THE RHODE ISLAND SECRETARY OF STATE'S OFFICE ON FEBRUARY 7, 2008 WITH AN EFFECTIVE DATE OF MARCH 1, 2008. WRITTEN ORDER ISSUED ON MARCH 5, 2008.

PUBLIC UTILITIES COMMISSION

Elia Germani, Chairman

Robert B. Holbrook, Commissioner

Mary E. Bray, Commissioner