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Senior Counsel - Rhode Island

December 20, 2010

VIA HAND DELIVERY & ELECTRONIC MAIL

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

RE: Docket 4209 Energy Efficiency Program Plan for 2011

Dear Ms. Massaro:

On behalf of National Grid, the Energy Efficiency Resource Management Council ("EERMC"), the Division of Public Utilities and Carriers ("Division"), Environment Northeast ("ENE"), and The Energy Council of Rhode Island ("TEC-RI") (together "the Settling Parties"), I am submitting the enclosed joint response to two questions posed by the Rhode Island Public Utilities Commission ("Commission") about the Energy Efficiency Program Plan for 2011 (the "Plan") following the technical session held on December 13, 2010.

Thank you for your attention to this matter.

Respectfully submitted,

On behalf of
The Narragansett Electric Company d/b/a
National Grid and
the Settling Parties

Thomas R. Teehan

cc: Docket 4209 Service List

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STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS
RHODE ISLAND PUBLIC UTILITIES COMMISSION

Energy Efficiency Program Plan
for 2011 Settlement of the Parties Docket No. 4209

POST-HEARING MEMORANDUM OF THE NARRAGANSETT ELECTRIC COMPANY, D/B/A NATIONAL GRID AND THE SETTLING PARTIES

INTRODUCTION

In this docket, the Company and the Settling Parties have submitted the proposed Energy Efficiency Program Plan for 2011 containing the proposed gas and electric energy efficiency programs, their budgets, goals, and funding. This joint memorandum submitted by National Grid[1], the Energy Efficiency Resource Management Council ("EERMC"), the Division of Public Utilities and Carriers ("Division"), Environment Northeast ("ENE"), and The Energy Council of Rhode Island ("TEC-RI") responds to two questions posed by the Rhode Island Public Utilities Commission ("Commission") about the Energy Efficiency Program Plan for 2011 (the "Plan") following the technical session held on December 13, 2010.

1. ***Please state whether the fully reconciling funding mechanism for gas energy efficiency proposed in the Plan complies with R.I.G.L. § 39-2-1.2(f). Please include detailed reasons in support of your response.***

<u>The Demand Side Management Provisions of R.I.G.L. § 39-2-1.2 and Fully Reconciling Funding Mechanism Requirement of §39-1-27.7(c)(5) Are Complementary and the Plan Complies with Both Provisions</u>

[1] The Narragansett Electric Company d/b/a National Grid ("National Grid" or the "Company").

Yes. The fully reconciling funding mechanism directly complies with both the Demand Side Management provisions of R.I.G.L. §39-2-1.2 and the all cost-effective funding mandate in the recently revised R.I.G.L. §39-1-27.7(c)(5) by incorporating the provisions of those separate but complementary statutory provisions. The Plan's proposed funding for cost-effective natural gas efficiency programs relies on the existing gas demand side management charge of $0.15/dkthm in concert with an additional $0.261/dkthm charge through the fully reconciling funding mechanism required by R.I.G.L. §39-1-27.7(c)(5) to fund all cost-effective gas energy efficiency. By so doing, the Plan incorporates and directly complies with separate but complementary statutory provisions. Put simply, the fully reconciling funding mechanism required by recent revisions to R.I.G.L. §39-1-27.7(c)(5) operates in concert with the funding provisions found in the Demand Side Management Statute (R.I.G.L. §39-2-1.2). Those statutory provisions are not in conflict, but rather, they work in harmony to provide full funding for gas energy efficiency programs that the EERMC recently found to be cost-effective. As is described in more detail below, the Plan's proposed funding mechanism is in complete compliance with both statutory provisions.

The provisions of R.I.G.L. § 39-2-1.2(f) provide funding of up to $0.15/dkthm through the existing demand side management charge, and do <u>not</u> limit the newly established fully reconciling funding mechanism required by § 39-1-27.7(c)(5). Rather, the fully reconciling funding mechanism required by § 39-1-27.7(c)(5) establishes a separate and complementary source of funding to deliver expanded cost-effective gas energy efficiency programs to Rhode Island customers.

In direct compliance with R.I.G.L. § 39-2-1.2(f), the first funding source the Plan relied on for gas efficiency is the existing demand side management charge of up to $0.15/dkthm. This compliance is illustrated in Row 11 of Table G-1 of the Plan, which depicts the reliance on the demand side management charge of $0.15/dkthm as the first funding source for gas energy efficiency. In addition, page 3 of the Plan articulates compliance with § 39-2-1.2(f) by stating "$3.6 million [of the cost-effective gas efficiency budget] can be funded by the existing demand side management charge of $0.15 cents per dekatherm." Pursuant to § 39-2-1.2(f), the existing demand side management charge of $0.15/dkthm or $3.6 million is the maximum amount of gas budget that can be funded by this first funding source, and that is reflected in the Plan.

The second funding source for gas energy efficiency proposed in the Plan – a fully reconciling funding mechanism of $0.261/dkthm – is in direct compliance with the recent May 2010 additions to § 39-1-27.7(c)(5).[2] This compliance with the recent additions to the least cost procurement provisions is illustrated by Row 12 of Table G-1, which depicts the use of a fully reconciling funding mechanism for an additional $0.261/dkthm to fully fund cost-effective gas energy efficiency as required by § 39-1-27.7(c)(5). In addition, page 3 of the Plan articulates compliance with § 39-1-27.7(c)(5) by stating, "a fully reconciling funding mechanism of $0.261 per dekatherm, projected to raise $7.9 million is needed to fund the cost-effective natural gas energy efficiency programs for 2011."

[2] The Commission's December 16 memorandum to the Parties correctly notes that two recently enacted legislative mandates codified at R.I.G.L. 39-1-27.2 require the Commission to approve "all energy efficiency measures that are cost effective and lower cost than acquisition of additional supply" and to "approve a fully reconciling funding mechanism to fund investments in all efficiency measures that are cost effective and lower cost than acquisition of additional supply."

The Settlement on page 11 proposes that the $0.15/dkthm in demand side management funding provided in § 39-2-1.2(f) and the $0.261/dkthm in fully reconciling funding as required by § 39-1-27.7(c)(5) be consolidated on one single line on customers' bills of $0.411/dkthm labeled "Energy Efficiency Programs." The Parties believe that displaying the two statutory funding sources on one line on customers' bills labeled "Energy Efficiency Programs" while not required is permitted by Rhode Island law and provides the substantial benefit of raising awareness among all gas customers of the opportunity to participate in cost-saving gas efficiency programs.[3]

The Plan Follows the Well-Settled Principle that Statutes on the Same Subject Matter Should Be Considered Together and Read in a Way that Harmonizes Them

The two statutory provisions § 39-2-1.2(f) and § 39-1-27.7(c)(5) can and should be read consistently to accomplish the clear legislative mandate and intent to fully fund all cost-effective gas energy efficiency programs. Under the Rhode Island Supreme Court's well established rules of statutory construction, statutes relating to the same subject matter should be considered together so that they will harmonize with each other and be consistent with the overall legislative objective and purpose. Brennan v. Kirby, 529 A.2d 633,637 (RI 1987); State v. Goff, 110 R.I. 202, 205, 291 A.2d 416, 417 (1972). The Plan's proposed use of the existing demand side management charge of $0.15/dkthm, pursuant to § 39-2-1.2(f), used in concert with a fully reconciling funding mechanism of $0.261/dkthm as required by recent amendments to §39-1-27.7(c)(5), construes two different sections of Rhode Island law in such

[3] As stated in footnote 12 on page 11 of the Plan, the EERMC, TEC-RI, and ENE maintain that another option is to leave the existing $0.15/dkthm demand side management charge on customers' bills as is and add the $0.261/dkthm in fully reconciling funding required by § 39-1-27.7(c)(5) to the existing volumetric distribution rate. For purposes of the Settlement the Division and National Grid do not support showing program cost recovery in the volumetric distribution rate.

a way as to harmonize them, giving effect to all manifestation of legislation intent and in so doing follows well established rules of statutory construction as articulated in *Brennan* and *State*. In addition, the Plan gives effect to three additional May 2010 statutory revisions beyond the revision to §39-1-27.7(c)(5), which also establish least cost procurement of all cost-effective natural gas efficiency – the introduction of §39-1-27.7, §39-1-27.7(c)(4), and §39-1-27.7(c)(6).

Where Statutes Cannot Be Harmonized the Later-Enacted Must Prevail If Necessary To Resolve the Conflict

In the case where two statutes are "irreconcilably repugnant," which the Parties have explained above is not the case here, the Rhode Island Supreme Court's rules of statutory construction dictate an implied repeal of the earlier statute and the last enacted statute prevails. Such v. State, 950 A.2d 1150, 1156 (R.I. 2008). Consequently, even if one were to try to argue that there is an irreconcilable conflict between § 39-2-1.2(f) and § 39-1-27.7(c)(5), the recent legislative revisions to § 39-1-27.7(c)(5) (as well as to the introduction of §39-1-27.7, §39-1-27.7(c)(4), and §39-1-27.7(c)(6)) that occurred in May of 2010 would prevail over § 39-2-1.2(f) which was enacted in 2006. In our case, both statutory provisions can be read to work together. As explained above the Plan harmonizes both statutory provisions to give effect to the legislative purpose expressed in the new revisions to §39-1-27.7(c)(5) – a requirement to fully fund all cost-effective natural gas energy efficiency – while incorporating the legacy provisions of § 39-2-1.2(f).

Statutes Should Not Be Construed So As To Yield an Absurd Result

As explained in detail above, § 39-2-1.2(f) only limits the gas demand side management charge pursuant to that section to $0.15/dkthm and does not limit the additional funding required §39-1-27.7(c)(5) to fully fund all cost-effective gas efficiency through a new fully reconciling funding mechanism. Trying to make a tortured reading of § 39-2-1.2(f) as limiting all gas efficiency funding to $0.15/dkthm is not only inaccurate and in direct contradiction to the more recently passed § 39-1-27.7(c)(5) requiring full funding for all cost effective gas efficiency, but it would also construe statutes in a way that yields an absurd result and is at odds with legislation intent, in violation of established Rhode Island legal principles. Berman v. Sitrin, 991 A.2d 1038, 1049 (R.I. 2010), articulates that it is a well settled principle of the Rhode Island Supreme Court not to interpret statutes in a way that would lead to an absurd result or a result that is at odds with legislative intent, such as § 39-1-27.7(c)(5)'s requirement for full funding for all cost effective gas efficiency.

Conclusion

In summary, as established above, the demand side management provisions of R.I.G.L. § 39-2-1.2 and the fully reconciling funding mechanism requirement of §39-1-27.7(c)(5) are complementary. The 2011 Plan, as proposed by the Parties and successfully reviewed for cost-effectiveness by the EERMC, complies with both § 39-2-1.2(f) by relying on the demand side management funding of $0.15/dkthm and the requirements of § 39-1-27.7(c)(5) by funding the rest of the cost-effective annual plan with a fully reconciling funding mechanism of $0.261/dkthm.

2. (To National Grid.) In light of your responses to data requests concerning the difficulty in receiving RGGI funds, please explain whether National Grid can assure that in carrying out the Plan, it will rely on distribution rates after RGGI proceeds to fund the energy efficiency programs proposed in the Plan, consistent with the Standards approved in Docket 3931.

National Grid's answer to the Commission's second question, which is supported by the Parties, is as follows:

No. The Company is relying on a fully reconciling funding mechanism to recover funding shortfalls as is set out in the proposed tariff and as required by recent revisions to §39-1-27.7(c)(5) which mandate full funding for all cost effective electric energy efficiency. In compliance with the mandate of the newly revised Least Cost Procurement law, the Company has submitted for approval a fully reconciling funding mechanism to fund all cost-effective electric energy efficiency as proposed by the Parties in the 2011 Plan. In the event that all the Regional Greenhouse Gas Initiative ("RGGI") proceeds relied on in the Plan do not materialize as expected, the Company would utilize the fully reconciling funding mechanism as required by § 39-1-27.7(c)(5) to ensure full funding for the cost-effective efficiency programs identified in the 2011 Plan. The fully reconciling funding mechanism is designed to prevent disruption in achieving the cost-effective efficiency opportunities required to be funded by § 39-1-27.7(c)(5). It accomplishes this by being adjusted from year to year to either recover any funding shortfalls or, in the event that additional funding sources become available, such as more RGGI revenue than expected, to credit any funding surpluses.

Under the Company's proposed Energy Efficiency Tariff, the Company would file for Commission review and approval on November 1 any necessary changes to charges under the fully reconciling mechanism in order to reconcile costs and revenues for the current year. That reconciliation would be considered by the Commission at the same time as the following year's plan – in this instance by November 1, 2011 and would go into effect on January 1,

2012. Within reasonable limits, the Company would continue to run the affected Plan programs, even though the shortfall amounts would not be recovered until a revised fully reconciling mechanism was established at that time.[4] It is important to note and a critical feature of the Company's proposal that there would be an annual process by which the Commission would review any such required changes to the fully reconciling funding mechanism, and the resulting Energy Efficiency Program Charge.

It is also important to note that in no event would the energy efficiency Plan funding come out of current distribution rates that are designed to recover an approved revenue requirement in order to fund the provision of distribution service. Redirecting revenues derived from existing distribution rates in order to fund energy efficiency programs would run directly counter to the framework established by the legislature in May of 2010 – a new fully reconciling funding mechanism to fund all cost-effective energy efficiency – and is not part of the settlement agreement submitted for Commission review and approval.

Nowhere in the statutory provisions for Least Cost Procurement is there support for using existing distribution rates to support energy efficiency plans. Indeed, to do so, would amount to an impermissible taking. Bluefield Water Works v. Public Service Comm'n, 262 U.S 679 (1923).[5] Thus, to the extent that the Commission's second question may suggest that the Standards somehow support such an appropriation of existing distribution rates approved to fund the provision of distribution service, such an interpretation of the Standards contradicts the applicable statutory provisions requiring the Commission to approve "a fully

[4] The Company's proposed fully reconciling funding mechanism does provide that the Company may file to change the fully reconciling funding mechanism and the resulting EEP Charge at any time should significant over- or under- recoveries occur.

[5] The Company's electric distribution rates were recently set in the electric rate case in Docket 4065. A constitutional problem would be created by taking revenues derived from those rates to fund energy efficiency programs.

reconciling funding mechanism to fund investments in all efficiency measures that are cost effective and lower cost than acquisition of additional supply." R.I.G.L. § 39-1-27.7(c)(5).

In addition, it is National Grid's individual position that the Company's base distribution rates were set in the last gas and electric rate case dockets. These rates were based on a cost of service that included the costs of operating the distribution system and expressly excluded energy efficiency programs from the case. They were excluded because the statutory scheme requires them to be excluded and addressed outside of a base distribution rate proceeding. Requiring energy efficiency programs to be funded through pre-existing distribution rates would, in effect, cause a reduction in distribution revenue that was found to be necessary for the operation of the distribution system and necessary for the utility to earn a reasonable return on its investments. Requiring existing distribution rates with no corresponding rate case and rate increase to cover the costs of the energy efficiency programs would be an order requiring the utility's shareholders to bear the cost of the energy efficiency program. Thus, to the extent that the Commission's second question may suggest that the Standards somehow support such an appropriation of existing distribution rates approved to fund the provision of distribution service, such an interpretation of the Standards is inconsistent with general principles of ratemaking and contradicts the applicable statutory provisions requiring the Commission to approve "a fully reconciling funding mechanism to fund investments in all efficiency measures that are cost effective and lower cost than acquisition of additional supply." R.I.G.L. § 39-1-27.7(c)(5).

The Company has always understood Section 1.2 A (4)(v) of the Commission's Standards to refer to a factor or rates in addition to existing established distribution rates. This would reflect a scenario where the Company continues to run a program through the end of a program cycle and then recovers unfunded amounts from its distribution customers through a reconciling mechanism as is the case with the proposed EEP Provision.[6] The Company has never understood Section 1.2 A (4)(v) to suggest that existing distribution rates could or should be appropriated for the purpose of funding energy efficiency programs. That section of the Standards, however, never was intended nor could it be reasonably interpreted to take revenues from existing distribution rates – that were approved explicitly to fund distribution service – to fund energy efficiency programs.

In summary, the Company would not rely on existing distribution rates if the planned for RGGI proceeds do not materialize to fund the energy efficiency programs proposed in the Plan. Rather, consistent with the newly established legislative mandate, shortfalls (or surpluses) would be funded (or credited) through changes to the fully reconciling funding mechanism, which would be filed with the Commission by November 1, 2011 in concert with the next year's proposed cost-effective energy efficiency program plan.

[6] As indicated above, the EERMC, TEC-RI, and ENE maintain that another interpretation of Section 1.2 A (4)(v) of the Standards would be to add the fully reconciling funding mechanism amount needed to fund the cost-effective electric efficiency for 2011 to the established distribution rate starting January 1, 2011.

Respectfully submitted,

On behalf of
The Narragansett Electric Company
d/b/a National Grid and the
Settling Parties

By its attorney,

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Dated: December 20, 2010