STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS PUBLIC UTILITIES COMMISSION

IN RE: NATIONAL GRID'S PROPOSED **ENERGY EFFICIENCY PROGRAM PLAN FOR 2011** SETTLEMENT OF THE PARTIES AND PROPOSED **ENERGY EFFICIENCY PROGRAM TARIFF** PROVISIONS FOR GAS AND ELECTRIC

DOCKET NO. 4209

REPORT AND ORDER

1. Background

On November 1, 2010 Narragansett Electric Company d/b/a National Grid ("National Grid" or "Company") filed with the Public Utilities Commission ("Commission") its proposed Energy Efficiency Program Plan For 2011 Settlement of the Parties ("2011 EEP Plan") and Proposed Energy Efficiency Program Tariff Provisions for Gas and Electric ("2011 EEP Tariffs") pursuant to the recently amended System Reliability and Least Cost Procurement Act ("LCP Statute") (R.I.G.L. § 39-1-27.7), R.I.G.L. § 39-2-1.2 and the Standards for Energy Efficiency and Conservation Procurement ("Standards") approved by the Commission on July 18, 2008 in Docket 3931.1 The LCP Statute was amended in the 2010 legislative session to include natural gas in the energy efficiency plan requirements and to 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". ² National Grid's 2011 EEP Plan is a settlement agreement between and among a collaboration of interested parties who have performed extensive research on how to implement the cost effective energy efficiency programs mandated by the LCP Statute and the

¹ Commission Order No. 19344 (Docket 3931). ² R.I.G.L. § 39-1-27.7(c)(5)

Standards for Energy Efficiency and Conservation Procurement which were approved by the Commission in Docket 3931. The parties to this settlement agreement are the Energy Efficiency Resource Management Council ("EERMC"), the Office of Energy Resources ("OER"), the Division of Public Utilities and Carriers ("the Division"), Environment Northeast ("ENE") and the Energy Council of Rhode Island ("TEC-RI"). The statutory authority for the Company's 2011 EEP Plan is also derived in part from R.I.G.L. § 39-2-1.2 which mandates the inclusion of certain charges in electric and gas rates for the specific purpose of funding energy efficiency programs.³

II. National Grid's Energy Efficiency Program Plan For 2011 Settlement of the Parties

National Grid's 2011 EEP Plan is a comprehensive plan for a number of energy efficiency initiatives in the gas and electric sectors. It is the culmination of extensive research on energy efficiency programs performed by a collaborative of stakeholders over the past several years. The Plan is a settlement agreement executed by the following parties: National Grid, the Division of Public Utilities and Carriers, the Energy Council of Rhode Island, Environment Northeast and the Rhode Island Energy Efficiency and Resources Management Council. The primary goal of the 2011 EEP Plan is to generate cost savings for customers and provides detailed estimates on the amount of savings projected for gas and electric customers in 2011. The projected savings, which stem from new and existing energy efficiency programs, are higher than the savings proposed in the Company's 2010 plan and cover a broader range of customers. The increase in savings goals and targeted customers are due in part to the recent amendments to the LCP Statute which extends energy efficiency to gas customers.

³ R.I.G.L. 39-2-1.2(b) and (f).

⁴ Senate Bill 2841 Sub A- An Act Relating To Public Utilities And Carriers—Revenue Decoupling

The Company filed Tariff Provisions contemporaneously with the 2011 EEP Plan which propose to establish separate energy efficiency charges for gas and electric efficiency programs. These charges would appear on the customer's bill as a separate item entitled "Energy Efficiency Program ("EEP"). For electric customers, the Company proposed an EEP charge of \$ 0.0526/kWh, and for gas customers, an EEP charge of \$ 0.411/dkthm. These charges would be subject to reconciliation when the Company files its annual EEP plan on November 1 of each year.

III. EERMC Review and Approval of the 2011 Annual Energy Efficiency Plan's Cost-Effectiveness

On November 8, 2010, EERMC filed with the Commission a document affirming its approval of the cost-effectiveness of the 2011 EEP Plan in accordance with R.I.G.L. § 39-1-27.7 (c)(5). Rhode Island law requires the Commission to approve energy efficiency programs which are "cost-effective and lower cost than acquisition of additional supply". ⁵ While this may appear to be a two part test comprised of two separate standards, EERMC urged that the former test subsumes the latter. ⁶ Specifically, EERMC stated in its November 8 letter that the test for determining whether the Company's energy efficiency programs are cost-effective is the Total Resource Cost ("TRC") Test, based on a prior order of the Commission and industry standards in general. ⁷ EERMC further explains that because the TRC test measures program benefits to program costs, with a benefits to costs ratio of 1 considered cost-effective, a program passing the TRC test would necessarily pass the cheaper than supply test since it already measures costs and

⁵ R.I.G.L. 39-1-27.7(c)(5)

⁶ This particular discussion of the standard for determining cost-effectiveness was put forth by the Vermont Energy Investment Corporation ("VEIC"), an EERMC Consulting Team.

⁷ Commission Order No. 19344, Docket 3931.

benefits of efficiency programs.⁸ Referring to the TRC test, EERMC states, "[t]he benefits are calculated using the avoided costs of electric energy and demand, and fossil fuels, thus it [the TRC test] inherently compares the costs of efficiency to the total cost of energy supply. When an efficiency measure...passes the TRC cost-effectiveness, it is lower cost than supply..." After reviewing National Grid's projections and TRC calculations regarding cost-effectiveness for all of the energy efficiency programs proposed for 2011, EERMC found them to be appropriate and consistent with the General Laws and industry standards.

IV. Technical Session

Following public notice, a technical session was held on December 13, 2010 at the Commission's offices located at 89 Jefferson Boulevard, Warwick, Rhode Island at which time National Grid explained the various energy components of the 2011 EEP Plan including the various energy efficiency programs that comprise the Plan. Representatives from National Grid gave a power point presentation on the details of the 2011 EEP Plan and fielded questions from the Commission. The following appearances were entered:

FOR NATIONAL GRID:

Thomas Teehan, Esq.

Katie O'Rourke Rachel Henschel Shawn Nestor Janet Besser Brian Kearney Jeremy Newberger Jeanne Lloyd

FOR THE DIVISION:

John Hagopian, Esq.

David Stearns

FOR TEC-RI:

Chris Powell

FOR EERMC:

S. Paul Ryan, Esq. Abigail Anthony

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⁸ An Assessment and Report by The VEIC/Optimal consultant Team Working on Behalf of EERMC, p.16.

Scudder Parker Daniel Prentiss, Esq. Marion Gold

FOR THE OFFICE OF ENERGY RESOURCES: Kenneth Payne

FOR ENVIRONMENT NORTHEST:

Sam Krasnow, Esq.

FOR THE COMMISSION:

Amy K. D'Alessandro, Esq.

Jeremy Newberger identified four major goals of the Plan: to create cost savings, allow for uniform widespread customer participation in the Plan's energy efficiency programs, meet previously assigned savings targets for electrical energy efficiency, to achieve gas savings pursuant to recent legislation and to improve infrastructure for the purpose of achieving greater savings. As explained by Mr. Newberger, the 2011 EEP Plan represents the third year in a three year plan (2009-2011) and incorporates more aggressive savings goals than originally projected in the three year plan. Specifically, the Plan incorporates a 39 % increase in gas savings and 46 % in electric savings. 10 In order to achieve these increases savings, the Company plans to significantly expand customer participation in its energy efficiency programs. ¹¹ The Company claims that broadening customer participation will ultimately translate to approximately \$ 213,000,000 in monetary benefits to customers and a return of \$ 2.75 in lifetime benefits for every customer dollar spent on energy efficiency. 12 The Company believes these monetary savings from energy efficiency programs may lead to broader economic benefits such as job growth to the extent these programs free up income not spent on electric bills and lead to investments in other purchases. ¹³

¹⁰ Transcript, p.9.

¹³ ld., p.13.

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Brian Kearney explained certain aspects of National Grid's energy efficiency programs for residential customers. Since expanding customer participation is a central theme of the 2011 EEP Plan, the Company intends to implement various marketing strategies designed to achieve this goal. To this end, the Company will strive both to retain existing customer participation and reach out to customers who have not previously participated in National Grid's energy programs. A key feature in this objective is a new centralized telephone number available to both residential and commercial customers providing access to helpful information about the Company's programs. 14 The Company also plans on reaching out to the community and encouraging participation in energy efficiency programs through various incentives. One of these programs would give schools an opportunity to participate in energy efficiency by giving CFLs to students who raise money for their school to reinvest in energy efficient lighting. 15 Another program would give certain qualified customers access to "zero percent interest loans" for replacing their heating systems. ¹⁶ The Company will also reach out to building contractors in effort to incorporate energy efficiency programs into new construction projects. 17 Another program would give certain customers an opportunity to receive an audit and/or other information concerning the Company's programs upon being notified of the Company's presence in their neighborhood. 18 The Company will also begin a behavioral pilot program which will enable customers to manage their own energy consumption through the use of advanced technologies which provide remote access to appliances and light switches. ¹⁹

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¹⁴ Id., pgs.13-14.

¹⁵ ld., p.15.

¹⁶ ld., pgs.18-19.

¹⁷ Id

¹⁸ ld., pgs.21-22.

¹⁹ ld., pgs.22-23.

Katie O'Rourke presented the major highlights of the programs National Grid will offer to commercial customers. She likened the program goals for commercial customers to that of residential customers and identified saving energy and money as the top priority for both residential and commercial customers. As with the residential class, the Company hopes to expand customer participation, improve program delivery and increase energy savings for commercial customers. During her presentation, Ms. O'Rourke conveyed the results of one particular company's energy efficiency measures. 20 Ms. O'Rourke explained how the installation of combustion controls and a variable flow device to steam boilers allowed the company to track and manage oxygen and gas levels in order to produce only the most efficient levels. According to Ms. O'Rourke, the installation of these two devices resulted in a savings to the company of \$ 70,000 per year over a 13 year period. ²¹ Companies like this one can take advantage of monetary incentives provided by National Grid to make similar type upgrades to their gas and electric systems. Incentives would depend on the type of customer and energy efficiency measures taken. For instance, large commercial new construction customers would be entitled to receive up to 75 % of the cost of electric energy efficiency measures and up to 90 % of the cost of energy efficiency measures implemented on both the gas and electric side. ²²

The benefits derived from these programs, according to Jeremy Newberger, have an estimated value of \$ 213 million in "direct benefits" from the installation of various energy efficiency measures and also in "avoided energy costs" from reduced fossil fuels and reduced electric prices, as well as water and sewer savings from devices such as energy efficient washing machines. ²³ The amount of savings that an individual customer derives from the Company's

²⁰ Darlington Fabrics of Westerly, RI. Transcript, p. 28.

²¹ ld. According to National Grid, the average life of an energy efficiency measure is 13 years. Id., pg. 30 and 41.

²² Id., pgs.33-36.

²³ Id., pgs.40-41.

2011 EEP Plan ultimately depends on the particular program(s) the customer participates in and the degree of participation. ²⁴

Sam Krasnow of Environmental Northeast testified in support of the Plan stating that it would "save hundreds of thousands of tons of carbon dioxide pollution from ever reaching the atmosphere and other pollutants as well, and at the same time save customers-- residential, C&I, low-income- money, and have more money circulating in the local economy." ²⁵ Marion Gold, URI's Director of the Outreach Center and Co-Director of the Energy Center, also testified in support of National Grid's 2011 EEP Plan, characterizing it as a "win/win opportunity" and maintaining that it would lower electric bills, keeping more money in the state. ²⁶ Scudder Parker testified on behalf of Vermont Energy Investment Corporation. ²⁷ He characterized the programs included in the 2011 EEP Plan as "robustly cost effective" and said that it "represent[s] a very good investment for the State of Rhode Island, for its consumers, for the economy in general." ²⁸ The Division echoed the widespread support of the Plan saying that it is "in the best interest of the ratepayers". ²⁹

Upon questioning from Commission staff, during the discovery process and during the technical session, the Company conceded there has been some lag in receiving RGGI funds. ³⁰ The Commission expressed concern at the technical session over the Company's uncertainty in the amount and timing of receiving RGGI funds, particularly with regard to how this uncertainty would affect rates. When asked if anticipated revenue from RGGI were not received from the Company, whether the uncollected revenue would be recovered from ratepayers, Mr. Newberger

²⁴ Id., pg.39.

²⁵ Id., p.80.

²⁶ ld., pgs.85-86.

²⁷ Vermont Energy Investment Corporation is a consultant group working on behalf of EERMC.

²⁸ Id., pgs.89-90

²⁹ Id., p.91.

³⁰ ld., pgs.55-61.

answered in the affirmative. ³¹ Mr. Prentiss weighed in on this issue, maintaining that the issue of funding the programs through ratepayers is moot to the extent that it has already been resolved by the legislature. He said, "...it [the legislature] made the policy decision that if there's to be shortfall in RGGI funds or any other expected funding, the legislature has made the policy decision that that is to be accounted for through a fully reconciling funding mechanism which means yes, that the legislature has said that ratepayers are going to pay this..." ³²

V. Post-Hearing Brief

On December 16, 2010 the Commission requested briefs from the parties on the following two questions: 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) and 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. ³³ In response to the briefing questions, National Grid filed a single brief on behalf of all of the 2011 EEP Plan signatories. In its brief, National Grid's counsel characterized R.I.G.L. § 39-2-1.2(f), the statutory cap of \$ 0.15/dkthm for demand side management programs, and R.I.G.L. § 39-1-27.7(c)(5), the newly enacted fully reconciling funding mechanism, as "complementary statutory provisions". ³⁴ He argued that the two statutory provisions correspond to two separate sources of funding for the Company's proposed gas efficiency programs. According to Mr. Teehan, part of the funding would come from the demand side management charge authorized by R.I.G.L. § 39-2-1.2 for up to \$ 0.15/dkthm. ³⁵ This funding source is projected to raise approximately \$ 3.6 million for the

³¹ Id., pgs. 63-64.

³² ld., pgs, 66-67.

³³ Memo from Commission counsel to Docket 4209 Service List

³⁴ Post-Hearing Brief, p.2.

³⁵ Id.

Company's gas efficiency programs. ³⁶ The second funding source, the fully funding reconciling mechanism authorized by the recently enacted R.I.G.L. § 39-1-27.7(c)(5), which equates to \$ 0.261/dkthm, is projected to raise approximately \$ 7.9 million for the gas efficiency programs. ³⁷ These two charges, according to Mr. Teehan, combine to form one "Energy Efficiency Programs" charge of \$ 0.411/dkthm (\$ 0.15/dkthm + \$ 0.261/dkthm) on the customers' bill. ³⁸

Mr. Teehan argues that R.I.G.L. § 39-2-1.2(f) and R.I.G.L. § 39-1-27.7(c)(5) do not conflict and "should be read consistently to accomplish the clear legislative mandate and intent to fully fund all cost effective gas energy efficiency programs." ³⁹ He goes on to argue, however, that if one were to construe them as irreconcilably repugnant, then Such v. State ⁴⁰ would dictate an implied repeal of R.I.G.L. § 39-2-1.2 in favor of the recently enacted R.I.G.L. § 39-1-27.7(c)(5). ⁴¹ Finally, Mr. Teehan argues that the statutory limit of \$ 0.15/dkthm for demand side management does not apply to all gas efficiency funding, and to so construe this statute would contradict the recent legislative mandate to fund all cost effective gas efficiency codified at R.I.G.L. § 39-1-27.7(c)(5), thereby yielding an absurd result. ⁴²

The next question posed to the Company was whether it could assure that it would rely on distribution rates, after RGGI proceeds in funding energy efficiency programs. The question was provoked by concerns of the Commission that uncertainty and unpredictability in receiving RGGI proceeds may lead to a pattern of upward reconciliations. In Mr. Teehan's response, he did not assure that the Company would rely on distribution rates after RGGI proceeds in funding

³⁶ Id., p.3; National Grid's Energy Efficiency Program Plan for 2011, Settlement of the Parties, p.3.

³¹ ld.

³⁸ Id., p. 4; National Grid's Energy Efficiency Program Plan for 2011, Settlement of the Parties, p.11.

³⁹ Id., p. 4, citing <u>Brennan V. Kirby</u>, 529 A.2d 633, 637 (R.I. 1987).

⁴⁰ 950 A.2d 1150, 1156 (R.I. 2008).

⁴¹ ld., p. 5.

⁴² Id., p.6, citing <u>Berman v. Sitrin</u>, 991 A.2d 1038, 1049 (R.I. 2010).

energy efficiency, but rather confirmed that the Plan would indeed necessitate an upward reconciliation in the event of any budget shortfalls including those resulting from the non-materialization of RGGI proceeds. ⁴³

VI. Commission Findings

At open meeting on December 22, 2010, the Commission voted unanimously to approve National Grid's 2011 EEP Plan and 2011 EEP Tariff Provisions relating to electric energy efficiency, including without limitation the proposed electric EEP charge of \$ 0.00526/kWh. There was no evidence in the record to suggest that the programs offered by the Company in the 2011 EEP Plan were not cost-effective. All of the parties to the Settlement submitted written and oral comments in support of the 2011 EEP Plan, and the Division's counsel spoke in support of the Plan, all of whom averred the Plan's compliance with key provisions of the Least Cost Procurement Act. Notably, all of the Settlement parties and Division counsel asserted that the 2011 EEP Plan met the statutory requirements for cost-effectiveness set forth in R.I.G.L. § 39-1-27.7(c)(5).

A majority of the Commission voted to approve the 2011 EEP Plan relating natural gas efficiency up to \$ 0.15/dkthm in accordance with R.I.G.L. § 39-2-1.2(f). The 2011 EEP Tariff Provisions for natural gas efficiency were also approved by majority vote up to \$ 0.15/dkthm.

The majority found that the charge proposed by the Company to fund gas efficiency programs was \$ 0.411/dkthm.

44 This charge exceeded the statutory limit of \$ 0.15/dkthm authorized by R.I.G.L. § 39-2-1.2(f) for the implementation of demand side management programs, including... programs for cost-effective energy efficiency (emphasis added)." Counsel for National Grid attempted to argue that the \$ 0.411/dkthm charge for gas efficiency programs did

⁴³ ld., pgs. 7-10.

⁴⁴ National Grid Exhibit 4, p.1.

not violate § 39-2-1.2 (f) because it represented a total of two separate charges—a "demand side management charge" of \$ 0.15/dkthm and a "fully reconciling funding mechanism" of \$ 0.261/dkthm. ⁴⁵ Mr. Teehan argued that R.I.G.L. § 39-2-1.2(f) "only limits the gas demand side management charge" to \$ 0.15/dkthm and not the overall gas EEP charge. ⁴⁶ Since the demand side management portion of the overall gas EEP charge was \$ 0.15/dkthm, he argued that the overall gas EEP charge was in compliance with the statute. Mr. Teehan argued that applying the statutory cap to all gas efficiency would violate the recent legislative mandate "to fund investments in all efficiency measures that are cost effective..." ⁴⁷ The Commission majority was unpersuaded by this argument.

The legislature delegated to the Commission a primary duty to approve rates that are reasonable and just. ⁴⁸ The Commission is reluctant to assume that the legislature, in amending the Least Cost Procurement Act, meant to repeal the Commission's primary responsibility to approve rates that are reasonable and just, or for that matter, repeal any statute by implication. The Commission is a creature of statute, tasked with carrying out only those powers delegated to it by the legislature. As such, the Commission will refrain from extrapolating about legislative intent in order to exceed boundaries that are clearly and unambiguously delineated by statute. That said, the legislature has capped the amount a gas distribution company may charge for energy efficiency programs at \$ 0.15/dkthm. ⁴⁹ At \$ 0.411/dkthm, the EEP charge proposed by National Grid for gas efficiency programs exceeds this cap. Although the Company's projections for cost-effectiveness of the energy efficiency programs (for both gas and electric) appear to be consistent with the Total Resource Test, the Commission is nonetheless constrained

⁴⁵ Post-Hearing Brief, pgs.2-4.

⁴⁶ ld., p.6.

⁴⁷ ld.

⁴⁸ R.I.G.L. § 39-2-1.

⁴⁹ R.I.G.L. § 39-2-1.2(f).

to reject the portions of the 2011 EEP Plan relating to gas efficiency that would authorize the Company to assess a gas efficiency charge in excess of the statutory cap. The Commission, while mindful of the legislative mandate to fund investments in all cost effective efficiency measures, will refrain from interpreting this as a directive to abrogate its rate-making responsibility or ignore the law. The Commission disagrees with counsel's characterization that the \$ 0.411/dkthm gas EEP charge falls outside the purview of the \$ 0.15/dkthm cap because one component of the charge does in fact comply with the cap, or that the cap only applies to demand side management charges and not to the EEP charge. This characterization seems to somewhat of a semantical leap. R.I.G.L. § 39-2-1.2(f) authorizes "a charge of up to fifteen cents (\$0.15) per deca therm delivered to demand side management programs, *including, but not limited to, programs for cost-effective energy efficiency...* (emphasis added)". The \$ 0.411/dkthm EEP gas charge at issue here is undeniably an energy efficiency charge, despite counsel's attempt to characterize it otherwise, and as such, is subject to the cap imposed by R.I.G.L. § 39-2-1.2(f).

The Commission remains concerned about the issues expressed at the technical session surrounding the receipt of RGGI funds and the potential ramifications of these issues on ratepayers. Of particular concern is the acknowledgement at the technical session and in the joint brief filed by National Grid on behalf of the parties that any potential shortfalls in the receipt of these funds will ultimately be paid by the ratepayer. ⁵⁰ The legislature, however, mandated this result when it amended the Least Cost Procurement Act to require the Commission to "approve a fully reconciling funding mechanism to fund investments in all efficiency measures that are cost effective...". Although the legislature did not define the phrase "fully reconciling funding mechanism", the broad-sweeping, mandatory language of the statute renders any inquiry into the appropriateness of RGGI funds virtually moot, since the statute, as

⁵⁰ Post-hearing brief, p.10; Transcript, pgs.59-67.

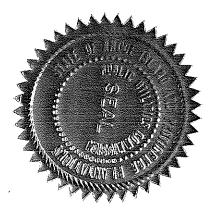
currently drafted, would feasibly allow the Company to propose, and require the Commission to approve, *any* fund to support energy efficiency, regardless of how dubious. In short, the legislature has directed the Commission to approve any funding proposed by the Company for cost effective energy efficiency which allows the Company to recover budget overages and shortfalls through annual rate reconciliations. In this context, the Commission is without discretion to rule on the appropriateness of funding from RGGI proceeds or other proposed funding sources which otherwise comply with the General Laws.

Accordingly, it is hereby (20308) ORDERED:

- 1. The 2011 EEP Plan as it relates to electric energy efficiency, including the proposed electric EEP charge of \$0.00526/kWh, is hereby approved.
- 2. The 2011 EEP Plan as it relates to natural gas efficiency is approved up to \$ 0.15/dkthm in accordance with R.I.G.L. § 39-2-1.2(f).
- 3. The 2011 EEP Tariffs filed by National Grid are approved for electric efficiency programs at \$ 0.00526/kWh and for natural gas efficiency programs up to \$ 0.15/dkthm.
- 4. All Energy Efficiency Tariff Provisions filed by National Grid, including any revisions thereof, shall comply with the provisions of this Order, including without limitation the Commission's approval of the 2011 EEP Plan as it relates to electric efficiency programs at \$ 0.00526/kWh and for gas efficiency programs up to \$ 0.15/dkthm.

5. Within 30 days, National Grid shall file a revised budget for gas efficiency programs in compliance with the provisions of this Order⁵¹.

EFFECTIVE AT WARWICK, RHODE ISLAND ON JANUARY 1, 2011
PURSUANT TO AN OPEN MEETING DECISION ON DECEMBER 22, 2010. WRITTEN
ORDER ISSUED MARCH 14, 2011.



PUBLIC UTILITIES COMMISSION

Elia Germani, Chairman

Mary E. Bray, Commissioner

*Paul J. Roberti, Commissioner

*Commissioner Roberti dissented from the majority with regard to natural gas efficiency, finding that R.I.G.L. § 39-2-1.2(f) does not limit the amount the Company can charge for gas efficiency programs to \$ 0.15/dkthm. He, therefore, voted to approve the 2011 EEP Plan, as it relates to natural gas efficiency, as originally proposed without a \$ 0.15/dkthm limit. Commissioner Roberti's dissenting opinion follows.

⁵¹ As of the date of this Order, National Grid is in compliance with Paragraphs 4 and 5 herein, having filed a revised budget for gas efficiency programs on January 21, 2011. The Commission approved this budget at an open meeting held on February 8, 2011. Revised tariffs were also filed on January 7, 2011 in compliance with this Order and approved by the Commission on February 8, 2011.

Commissioner Roberti, dissenting.

I concur with all of the Majority's findings with one exception pertaining to the interpretation of recent legislative enactments, which cause me to respectfully disagree with the Majority's conclusion that National Grid's proposed budget increase in the natural gas efficiency programs is inconsistent with, and barred by, Rhode Island law. The Majority reached this conclusion by comparing language contained in the 2010 legislative amendments to the "System Reliability and Least Cost Procurement Act," R.I.G.L. § 39-1-27.7 ("LCP Statute"), with legacy statutory provisions contained in R.I.G.L. § 39-2-1.2(f). The latter statutory provision reflects an earlier legislative pronouncement that the base charges for gas demand-side management and related programs not exceed a "charge of up to fifteen cents (\$0.15) per deca therm delivered" R.I.G.L. § 39-2-1.2(f). The relevant language of the two statutes, when read together, raise an obvious conflict with respect to the question of what the legislature intended concerning energy conservation goals and policies in Rhode Island on a going forward basis. For the reasons that follow, I conclude that the only reasonable interpretation of these conflicting provisions is to find that the 2010 LCP statutory amendments repeal by implication any funding constraints that might be deemed to exist in R.I.G.L. § 39-2-1.2(f).

The Commission's Role in Construing Statutes

The Rhode Island Supreme Court has noted that the Commission is "entrusted with the interpretation and implementation of title 39, which deals with all activities relating to public utilities" <u>Pawtucket Power Assoc. L.P. v. Pawtucket</u>, 622 A.2d 452, 457 (R.I. 1993). The Court's statement is consistent with a longstanding policy that administrative agencies maintain the threshold duty of interpreting statutes "whose

administration and enforcement have been entrusted to the agency." *Id. at 456-57*. In exercising that duty, the Court has long been mindful that the discharge of these legislative functions often involve "complex statutory schemes or fact finding [that] frequently necessitates administrative expertise." *Town of East Greenwich v. O'Neil*, 617 *A.2d 104, 113 (R.I. 1992)*. Furthermore, integral to an administrative agency's statutory construction effort is the inherent "flexibility to effectuate the purposes of the legislation." Id.

The Implication of the 2010 LCP Statutory Amendments

When the General Assembly enacted amendments to the LCP statute during the last legislative session, it truly represented a paradigm shift in the state's pursuit of energy conservation as a vital component of the State's "least-cost procurement" strategy. The amended law states that "least-cost procurement shall comprise system reliability and energy efficiency and conservation procurement . . . and supply procurement . . . as complementary but distinct activities" that have a "common purpose" in meeting the "electrical and natural gas energy needs of Rhode Island, in a manner that is optimally cost-effective, reliable, prudent and environmentally responsible." *R.I.G.L. §* 39-1-27.7. The critical aspect of the amendment was to expand the scope of least-cost procurement to include "all energy efficiency measures that are cost-effective and lower than the acquisition of additional supply" for both electric and gas operations. *R.I.G.L. §* 39-1-27.7(c)(5) (emphasis supplied). To the extent that the record demonstrates that National Grid's proposed efficiency programs satisfied the above criteria, the

¹ As further evidence of the paradigm shift, it is important to note that the LCP statutory amendments were enacted simultaneously with another legislative enactment that instituted a comprehensive "revenue decoupling" scheme that is intended to protect National Grid's electric and natural gas operations from the revenue erosion effects associated with the much more aggressive conservation targets permitted under the amended LCP statute. See R.I.G.L. § 39-1-27.7.1.

Commission "shall issue an order approving" the energy efficiency measures. Further, the amended LCP statute mandates that the Commission "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, not greater than sixty (60) days after it is filed with the commission." *Id (emphasis supplied)*.

It is reasonable to conclude that the legislature, in amending the LCP statute, was embarking on a new course to dramatically ramp up energy efficiency activities that are "optimally cost-effective, reliable, prudent and environmentally responsible." *R.I.G.L. §* 39-1-27.7. As a result, National Grid, with the endorsement of the Energy Efficiency and Resource Management Council, Environment Northeast, the State Office of Energy Resources, the Division of Public Utilities and Carriers, and The Energy Council of Rhode Island (collectively, the "Settling Parties"), proposed increasing the budget for electric conservation programs to \$54 million, which represented an approximate 44 percent increase from the prior year's budget. For gas efficiency programs, National Grid, again with the support of all stakeholders identified above, proposed increasing the budget from \$0.15 per deca therm to \$0.411 per deca therm, representing a 220 percent increase over the prior year's budget.

A number of important points can be gleaned from this information in terms of construing the amended LCP statute and effectuating the purposes of the legislation. First, the existing gas efficiency programs had traditionally been funded up to the maximum amount permitted under the legacy statutory provisions contained in R.I.G.L. § 39-2-1.2(f) (i.e., \$0.15 per deca therm). Secondly, the perceived funding limitation under R.I.G.L. § 39-2-1.2(f) severely constrained the scope of efficiency efforts to prevent the programs from reaching many cost-effective energy efficiency measures that were lower

in cost than the acquisition of additional supply. The legislature presumably recognized that the existing statutory framework, along with the regulatory practices of the Commission in budgeting for energy efficiency programs, were not achieving the least-cost procurement vision that precipitated the passage of the amended LCP statute. The Majority's adherence to the perceived funding limitation under R.I.G.L. § 39-2-1.2(f) vitiates the legislature's most recent policy declaration and essentially renders the amended LCP statute a nullity in terms of its effect on gas efficiency programs.

Given the very strong language in the amended LCP statute that now mandates the procurement of all cost-effective energy efficiency measures for both "electrical and natural gas" distribution companies, *R.I.G.L. § 39-1-27.7(5) (emphasis supplied)*, one is hard-pressed to conclude that the dramatic shift in <u>statutory policy</u> for expanding, funding, and securing cost-effective energy efficiency would ultimately result in maintenance of the status quo for the State's gas efficiency programs. Such an outcome seems particularly untenable in light of the evidence suggesting that much of the promise for securing cost-effective energy efficiency resides in the natural gas side of the equation.

The Majority order references the looming potential associated with the growth and expansion of gas efficiency programs by noting that National Grid's 2011 Energy Efficiency Program ("EEP") incorporates a 39 percent increase in gas savings, and that the broadened customer participation under the overall plan will "translate to approximately \$213,000,000 in monetary benefits to customers and a return of \$2.75 in lifetime benefits for every customer dollar spent on energy efficiency." (Majority decision, at 5). Yet, much of the value assessed by the Majority, National Grid and the Settling Parties can never be realized under the Majority's interpretation of the statute. In

doing so, I believe that Majority's interpretation frustrates the intent of the legislature, rather than effectuating the stated purposes of the amended LCP statute.

The 2010 Amendments to the LCP Statute Impliedly Repeal Perceived Funding Limitations Contained in R.I.G.L. § 39-2-1.2(f)

While I recognize that National Grid and the Settling Parties have suggested that the legislature's directive in the amended LCP statute for the establishment of a "fully reconciling funding mechanism" for all gas and electric efficiency programs arguably could be read to complement the base charge limitations contained in R.I.G.L. § 39-2-1.2(f), I think the more appropriate approach to handling the statutory conflict is to recognize and conclude that it was likely an oversight of Legislature in failing to eliminate the contradictory language that already existed in another section of Title 39. In such situations, particularly where a new statute's clearly expressed objectives arguably conflict with one phrase in an existing statute, it is appropriate to conclude that the amended LCP statute impliedly repeals any funding limitation contained in R.I.G.L. § 39-2-1.2(f).

I am highly cognizant that "repeals by implication are not favored by the law."

Such v State, 950 A.2d 1150, 1156 (R.I. 2008) (quoting McKenna v. Williams, 874 A.2d 217, 241 (R.I. 2005)). But a related rule of statutory construction focuses on whether the conflicting acts were enacted by the same or different legislative sessions, and that enactments by the same legislative body "strengthens the presumption against implied

² Part of my difficulty with resorting to such an interpretation is that the existing gas and electric efficiency programs have systematically been subject to "fully reconciling adjustment" rate mechanisms. The inclusion of this phrase in the new law, in my view, references the legislature's intention that the costs incurred as a result of the expanded efficiency programs under the LCP statute also be subject to full reconciliation in order to ensure that National Grid ultimately recovers all prudently incurred costs in administering the programs, particularly when revenues collected for approved efficiency programs do not end up equaling prudently incurred costs incurred during the same program year. Of course, to the extent there is an over-recovery, the mechanism serves to refund excess amounts to ratepayers.

repeals." 950 A.2d at 1156. See also 1A Norman J. Singer, Sutherland Statutory

Construction § 23:18 at 523 (6th ed. 2002) (enactments from the same legislative session presumed to have been "actuated by the same policy and intended to have effect together"). However, in this proceeding, the two conflicting sections of law were enacted during different legislative sessions (in fact, the legislative sessions were four years apart), and thus fairly fall within the category of permissible repeals by implication as most recently described by the Supreme Court in <u>Such v. State</u>: "Only when the two statutory provisions are irreconcilably repugnant will a repeal be implied and <u>the last-enacted statute</u> be preferred." 950 A.2d at 1156 (emphasis supplied).

The Majority's decision highlights the "irreconcilable repugnancy" between these conflicting provisions of law, but unlike the Majority, I would appropriately give preeminent effect to latest legislative pronouncement contained in the amended LCP statute, rather than the legacy language contained in R.I.G.L. § 39-2-1.2(f). A repeal by implication not only effectuates the stated purposes of the 2010 amended LCP legislation, but also advances the proposed gas and electric efficiency programs that indisputably remain in the "best interests of ratepayers" as demonstrated by the evidence in the record. Accordingly, I respectfully dissent.

Paul J. Roberti, Commissioner

³ The Division of Public Utilities and Carriers, which is statutorily obligated to represent the interests of all ratepayers, "echoed widespread support of the Plan saying that it is 'in the best interest of ratepayers." (Majority Decision, at 8 (quoting December 13, 2010 Transcript of Technical Session, at page 91).