The City of East Providence V. National Grid

Docket No. D-19-04

CITY OF EAST PROVIDENCE

MEMORANDUM OF LAW IN SUPPORT OF PETITION FOR RELIEF

Now comes the Petitioner, the City of East Providence (hereinafter referred to as the "City"), and does hereby submit this Memorandum of Law in support of its Petition (hereinafter "Petition")[1] for the above captioned matter, pursuant to Rhode Island General Laws §§39-30-3(e) and §42-35-8, as well as Public Utilities Commission Rules of Practice and Procedure §§ 1.4 (C) (3); and 1.26.

Jurisdiction

The Rhode Island Division of Public Utilities and Carriers (hereinafter the "Division") has jurisdiction over this matter pursuant to R.I. Gen. Laws §39-30-3(e) and R.I. Gen. Laws §42-35-8, "Declaratory Order", which states in pertinent part:

> (a) A person may petition an agency for a declaratory order that interprets or applies a statute administered by the agency or states whether, or in what manner, a rule, guidance document, or order issued by the agency applies to the petitioner.

R.I. Gen. Laws §42-35-8. The Division of Public Utilities and Carriers is an agency pursuant to R.I. Gen. Laws §42-35-1(1). The Division applies the Municipal Streetlight Investment Act

[1] Appendix Exhibit 1 – City of East Providence Petition

pursuant to R.I. Gen. Laws §39-30-3(e). The City has petitioned the Division pursuant to R.I. Gen. Laws §42-35-8(a), therefore the City is entitled to a Declaratory Order pursuant to R.I. Gen. Laws §§ §39-30-3(e); and 42-35-8.

Concise Statement of the Case

This dispute arises pursuant to R.I. Gen. Laws §39-30-1 *et seq.* the Municipal Streetlights Investment Act ("MSIA" or the "Act")[2]. Fundamentally, the MSIA is a municipal investment opportunity, designed by the Rhode Island General Assembly, for the express purpose to "reduce municipal street lighting costs and improve service to citizens by . . . reducing maintenance costs … [and] eliminating the current "facilities charge." R.I. Gen. Laws § 39-30-1 (b). Ownership of the Lighting Equipment allows municipalities to save costs by hiring third parties to maintain the lights, rather than incurring National Grid's embedded facilities charge inherent to the S-14 Tariff.

Despite the undisputed fact that the City gave National Grid notice, pursuant to R.I.G.L. § 39-30-3(a), that it was acquiring Lighting Equipment on July 29, 2016[3] ("MSIA Notice Letter"), National Grid has steadfastly refused to allow the City to realize the benefits intended by the R.I. General Assembly in the Act. The City has therefore petitioned the Division in accordance with R.I. Gen Laws §39-30-3(e) in an effort to force National Grid to comply with the Act, such that the City may realize the Rhode Island General Assembly's MSIA intended benefits

Generally, municipalities realize the benefit of savings under the MSIA primarily through changes in their ownership interest of Lighting Equipment, which is a statutorily defined term that means:

> "Lighting equipment" means all equipment used to light streets in the municipality, the operation and maintenance of which is currently **charged to the municipality**,

[2] Appendix Exhibit 2 – Municipal Streetlight Investment Act
[3] Appendix Exhibit 3 – Agreed-Upon Statement of Facts, *see* ¶6

> including lighting ballasts, fixtures, and other equipment necessary for the conversion of electric energy into street lighting service, but excluding the utility poles upon which the lighting equipment is fixed. Lighting equipment shall include, but not be limited to, decorative street and area lighting equipment and solid-state (LED) lighting technologies.

R.I. Gen. Laws § 39-30-2 (3). (**emphasis added**). The municipal purchase of Lighting Equipment reduces maintenance costs and eliminates the "facilities charge" from National Grid, thus reducing National Grid's income from Lighting Equipment. Under the Act, National Grid's own estimate of its lost revenue due to the municipal purchase of Lighting Equipment in the State of Rhode Island is approximately $8,155,205.00 and specific to the City of East Providence, National Grid estimates that it will lose $384,498.00 in revenue.[4] [5] The MSIA has effectively locked the City and National Grid into a classic zero-sum game.

In the MSIA zero-sum game, every time the City realizes savings, National Grid loses revenue. National Grid has sought to mitigate those losses in revenue by creating barriers to entry, through manipulation of the cost to purchase the Lighting Equipment, manipulation of the new S-05 Tariff, and unlawful provisions throughout its "Agreement of Sale" and "Attachment Agreement," which seek to control the purchase and subsequent use of municipally acquired Lighting Equipment. Each of National Grid's efforts to mitigate its losses comes at the direct expense of the City's savings as provided by the MSIA, and therefore is a violation of the express purpose of the Act.

Specifically, National Grid's calculation of its compensation owed under the Act for the purchase of Lighting Equipment violates the MSIA in at least five (5) ways:

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[4] Appendix Exhibit 4 - National Grid Exhibit 3 – National Grid's Response to Public Utilities Commission Data Request 1-7 in Docket No. 4442; *see* Attachment Commission 1-7(c).
[5] Of note, the lost revenue estimated in Attachment Commission 1-7(c) does not indicate a time period. Those losses could be monthly or quarterly losses.

1) National Grid has used varying procedures to determine its compensation for any purchase of Lighting Equipment.
2) Each of the said procedures used by National Grid violate the process set forth in the MSIA.
3) National Grid's calculation of compensation for the purchase of the Lighting Equipment uses the value of lights not included within the definition of Lighting Equipment (including but not limited to State Street Lights).
4) National Grid is attempting to force the City to purchase lights that fall outside the definition of Lighting Equipment (including but not limited to State Street Lights).
5) National Grid's failure to provide the City with an accurate estimation of its compensation due under the MSIA has violated the deadlines of the MSIA.

In addition, National Grid's proposed Agreement of Sale[6] and Attachment Agreement[7] violate the MSIA in at least three (3) ways:

1) National Grid is attempting to force the City to purchase lights that fall outside the definition of Lighting Equipment (including but not limited to State Street Lights).
2) National Grid is attempting to retain the right to remove municipally purchased Lighting Equipment from its poles without cause.
3) National Grid is attempting to control the manner in with the City uses the Lighting Equipment.

And finally, the S-05 Tariff violates the MSIA in at least two (2) ways:

1) The new tariff fails to use existing rates for purchased lighting.
2) The new tariff imposes a rate hike prior to the conversion of lighting.

All told, National Grid is violating the MSIA in at least ten (10) different ways. Each of the ten violations benefits National Grid in an attempt to mitigate its financial losses by limiting municipal savings. National Grid's loss mitigation strategy violates the express purpose of the Municipal Streetlights Investment Act, namely, "...to reduce municipal streetlighting costs and improve service to citizens..." *R.I. Gen. Laws §39-30-1(b).*

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[6] Appendix Exhibit 5 – Agreed-Upon Statement of Facts, Joint Exhibit 4, P. 6-15
[7] Appendix Exhibit 5 – Agreed-Upon Statement of Facts, Joint Exhibit 4, P. 16-58

Statutory Interpretation

In interpreting this Municipal Streetlights Investment Act, the well accepted cannons of statutory construction must be applied. "'When the language of a statute is clear and unambiguous, [this Court] must enforce the statute as written by giving the words of the statute their plain and ordinary meaning.'" *Gem Plumbing & Heating Co. v. Rossi*, 867 A.2d 796, 811 (R.I. 2005) (quoting *Harvard Pilgrim Health Care of New England, Inc. v. Gelati*, 865 A.2d 1028, 1037 (R.I. 2004)). In addition, the MSIA specifies a heightened standard of review. Specifically:

> R.I. Gen Laws § 39-30-4 - "The provisions of this chapter shall be liberally construed to give effect to the purposes thereof."
>
> R.I. Gen Laws § 39-30-1(b) - "Now, therefore, **the purpose of this chapter** is to **reduce municipal street lighting costs** and improve service to citizens by:
>
> (1) Improving public safety with street lights that provide better illumination;
> (2) **Reducing maintenance costs** by allowing municipalities to own the street and area lighting within their borders and to enter into regional maintenance service contracts;
> (3) **Reducing whole-system cost** through municipal ownership and regional management and by **eliminating the current "facilities charge;"**
> (4) Providing innovative and proven technologies for more efficient lighting; and
> (5) Providing more responsive service for lighting repairs.

(**emphasis added**). It is clear that the MSIA is to be liberally construed to the financial benefit of the City and the reduction in municipal cost is largely realized through savings in maintenance and the elimination of the facilities charge.

When considering an enactment such as the MSIA, the express purpose of the Act holds great weight.

> When construing a statute "our ultimate goal is to give effect to the purpose of the act as intended by the Legislature." *Webster v. Perrotta*, 774 A.2d 68, 75 (R.I.2001). (citing *Matter of Falstaff Brewing Corp. Re: Narragansett Brewery Fire*, 637 A.2d 1047, 1050 (R.I.1994)) ... Moreover, in interpreting a legislative

> enactment, it is incumbent upon us to "determine and effectuate the Legislature's intent and to attribute to the enactment the meaning most consistent with its policies or obvious purposes." *Brennan v. Kirby*, 529 A.2d 633, 637 (R.I.1987)

Oliveira v. Lombardi, 794 A.2d 453, 457 (R.I. 2002). Therefore, the standard of review particular to this case requires the Court to enforce the expressed purpose of municipal savings by applying the plain and ordinary meaning of the language of the MSIA.

Claim 1:

Timeliness Violations of the Municipal Streetlight Investment Act

National Grid uses several delay tactics in an effort to mitigate its losses at the expense of the City in the MSIA's zero sum game. Since the City does not start to save money until it has acquired the Lighting Equipment, National Grid has created a prerequisite procedural process antithetical to the MSIA. These artificial barriers to the City's acquisition of the Lighting Equipment primarily include manipulation of the calculation and timing of National Grid's compensation under the Act.

I. Timeliness of the Municipal Right to Acquire Lighting Equipment and National Grid's Right to Compensation Under the Municipal Streetlight Investment Act

R.I. Gen. Laws § 39-30-3(a)(3) guarantees the City the right to acquire Lighting Equipment upon sixty (60) days' notice to National Grid. The MSIA also establishes a specific process for the calculation of the compensation owed to National Grid. *R.I. Gen. Laws §39-30-3(b)*. These two provisions work in concert with each other. Said provisions state as follows:

> (a) Any city [...] at its option, upon sixty (60) days **notice** [...] and subject to the provisions of subsections (b) through (e), may:
>
> [...]
>
> (3) ... acquire all of the public street and area **lighting equipment** of the electric distribution company in the municipality, compensating the electric distribution company as necessary, in accordance with subsection (b).
>
> (b) Any municipality exercising the option to convert its lighting equipment pursuant to subsection (a) must compensate the electric distribution company for the original cost, less depreciation and less amortization, of any active or inactive existing public lighting equipment owned by the electric distribution company and

> installed in the municipality as of the date the municipality exercises its right of acquisition pursuant to subsection (a), net of any salvage value. Upon such payment, the municipality shall have the right to use, alter, remove, or replace such acquired **lighting equipment** in any way the municipality deems appropriate. [...]

R.I. Gen. Laws § 39-30-3 (edited for pertinence, **emphasis added**). The clear and unambiguous language of the MSIA describe two distinct rights: (1) the City's right to acquire Lighting Equipment and (2) National Grid's right to compensation.

The interplay of these two rights set the deadlines inherent to the Act. These deadlines are critical because it has a direct impact on municipal savings, which again, is the express purpose of the Act. It is the obligation of this Court to give effect to the purpose of the Act and to attribute to the Act the meaning most consistent with municipal savings. *Oliveira v. Lombardi*, 794 A.2d 453, 457 (R.I. 2002). In the MSIA zero-sum game, National Grid retains revenue at the expense of the City every day of delay.

A. The City's Right to Acquire Lighting Equipment

The City "may ... acquire all of the public street and area lighting equipment of the electric distribution company in the municipality. . . upon sixty (60) days' notice to the electric company." *R.I. Gen. Laws §39-30-3(a).* The burden on the City to acquire the Lighting Equipment is a notice burden, not a purchase "burden." In other words, National Grid's required compensation is not a prerequisite to acquiring the lighting equipment. In effect, through the City's July 29, 2016, MSIA Notice Letter, the City has been statutorily empowered to acquire the Lighting Equipment since September 27, 2016. However, National Grid has refused to relinquish its interests in the Lighting Equipment by unlawfully demanding compensation up front. In other words, National Grid's unlawful demand for an up-front payment prior to the City acquiring the Lighting Equipment has

delayed the City's ability to realize the intended purpose of the MSIA. Specifically, National Grid has retained revenue at the direct expense of the City since September 27, 2016.

While there is no dispute that the City must compensate National Grid in accordance with R.I. Gen. Laws §39-30-3(b), there are serious questions regarding when the City must compensate National Grid and how that compensation is calculated. To answer those questions, as noted above regarding the precepts of statutory interpretation, this Court must apply the plain and ordinary meaning of the language of the statute to give effect to the purpose of the MSIA. R.I. Gen. Laws §39-30-3(a) states:

> ...**upon sixty (60) days notice to [National Grid]** and to the department, and subject to the provisions of subsections (b) through (e), [the City] **may**:
>
> [. . .]
>
> (3) ... **acquire** all of the public street and area lighting equipment of the electric distribution company in the municipality ...

R.I. Gen. Laws §39-30-3(b) further states:

> ...Upon [R.I. Gen. Laws §39-30-3(b)] payment, the municipality shall have the right to use, alter, remove, or replace such **acquired** lighting equipment in any way the municipality deems appropriate...

R.I. Gen. Laws §39-30-3. (edited for pertinence, **emphasis added**). Given the plain and ordinary meaning of the words and the purpose of the Act, the statute is clear and unambiguous. The City has the power to acquire the Lighting Equipment sixty (60) days after providing National Grid with notice. That said, but the City cannot use, alter, remove, or replace said acquired Lighting Equipment until it has compensated National Grid for said "acquir**ed**" Lighting Equipment. The use of acquired in the past tense within R.I. Gen. Laws §39-30-3(b) expressly acknowledges that said Lighting Equipment is already owned by the municipality prior to National Grid's subsequent entitlement to compensation. This distinction is critical because of the "facilities charge" and the

heightened statutory interpretation standard of review requiring that the provisions of the MSIA be liberally construed to realize the benefit of municipalities avoiding said charge. *see R.I. Gen Laws § 39-30-1(b); R.I. Gen Laws § 39-30-4.*

The City would have realized savings through the elimination of the facilities charge as of September 27, 2016 because that is when the City was empowered to acquire the Lighting Equipment regardless of the status of National Grid's compensation. This savings could have generated the municipality's investment funds for National Grid's compensation and/or the conversion of the Lighting Equipment to better technology. However, National Grid has unilaterally imposed its own interpretation of the MSIA on the City and impermissibly required that their compensation is prerequisite[8] to acquiring the Lighting Equipment. As predicted by the Energy Efficiency & Resources Management Council and the Office of Energy Resources, this prerequisite is a perfect example of National Grid's unduly burdensome process and how such barriers effectively dissuade municipalities from realizing the Act's savings. (Rhode Island Public Utilities Commission ("PUC") Order No. 21704 in Docket No. 4442 ("Docket 4442"), P. 9-11.

Assuming arguendo, that this Court infers that the City must compensate National Grid prior to acquiring the Lighting Equipment, National Grid has still violated the R.I. Gen. Laws §39-30-3(a) 60-day notice provision. In that case, said provision morphs from a municipal notice provision into a *defacto* deadline, because, if National Grid's compensation is interpreted as a prerequisite to acquiring the Lighting Equipment, then the City's R.I. Gen. Laws §39-30-3(A)(3)

[8] Appendix Exhibit 5 - Agreed-Upon Statement of Facts, Joint Exhibit 1, S-05 Tariff, *see* Sheet 1, which states: "Service under this rate **is contingent upon the execution of a written purchase and sale agreement** for the Company's designated street and area lighting facilities, and dedicated poles, standards or accessories, the completed transfer of title to the facilities from the Company to the Customer, and the execution of **and compliance with associated attachment agreements** between the Customer and the Company." (**emphasis added**)

right to acquire the Lighting Equipment within sixty (60) days inherently forces National Grid to give the City an accurate compensation figure prior to that deadline. Otherwise, without a timely calculation of National Grid's compensation, the City will not realize the MSIA's guaranteed benefit of acquiring the Lighting Equipment within sixty (60) days.

Regardless of whether or not National Grid's compensation is a pre-requisite of acquiring Lighting Equipment, National Grid's inappropriate methods[9] of calculating its compensation, and the corresponding delay in the City's ability to acquire the Lighting Equipment violates the R.I. Gen. Laws §39-30-3(a) 60-day deadline.

In sum, regarding the right to acquire Lighting Equipment, National Grid has been unjustly enriched through the facilities charge since September 27, 2016 by unlawfully delaying the City's R.I. Gen. Laws §39-30-3(1) right to acquire the Lighting Equipment upon sixty (60) days notice.

B. National Grid's Right to Compensation

National Grid's own calculations of its own compensation owed under the Act are not in conformance with the Act. It is undisputed that the City gave notice that it was acquiring the Lighting Equipment on July 29, 2016.[10] In response to that request, it is also undisputed that National Grid provided East Providence with emails and attachments on August 11, 2016, November 20, 2017, and May 30, 2018, which contained National Grid's compensation and terms of acquisition demands.[11] Subsequently, the City requested an updated calculation of National Grid's compensation under the Act on August 15, 2018.[12] National Grid then provided the City

[9] See National Grid's Right to Compensation section below
[10] Appendix Exhibit 5 – Agreed-Upon Statement of Facts; *See* ¶6.
[11] Appendix Exhibit 5 – Agreed-Upon Statement of Facts; *See* ¶7-9.
[12] Appendix Exhibit 5 – Agreed-Upon Statement of Facts; *See* ¶10.

with emails and attachments on November 8, 2018.[13][14] In total, National Grid has generated four (4) calculations of its compensation under the Act ("Compensation Calculations"). None of those Compensation Calculations meet the requirements of the MSIA. R.I. Gen. Laws §39-30-3(b) states:

> Any municipality exercising the option to convert its lighting equipment pursuant to subsection (a) must compensate the electric distribution company **for the original cost**, **less depreciation** and **less amortization**, of any active or inactive existing public **lighting equipment** owned by the electric distribution company and installed in the municipality as of the date the municipality exercises its right of acquisition pursuant to subsection (a), **net of any salvage value**.

R.I. Gen. Laws §39-30-3(b). There are five (5) elements necessary to determine National Grid's compensation under the act:

1. **Lighting Equipment** – National Grid must identify the lights that qualify as "Lighting Equipment" under the Act
2. **Original Cost** – National Grid must identify the Original Cost of the Lighting Equipment
3. **Depreciation** – National Grid must determine the depreciation of the Lighting Equipment
4. **Amortization** – National Grid must determine the amortization of the Lighting Equipment
5. **Salvage Value** – National Grid must determine the Salvage Value of the Lighting Equipment

Not one of those five elements are addressed in any of the Compensation Calculations provided to the City. Instead of identifying which lights are Lighting Equipment under the Act,

[13] Appendix Exhibit 5 - Agreed-Upon Statement of Facts, ¶12.
[14] Appendix Exhibit 6 - April 9 2019 Transcript re: City of East Providence Streetlight Petition ("Transcript"); - *See generally* Testimony of Jacques Alfonso, P. 11 Line 23 – Page 17, Line 24.

National Grid simply relies on its billing inventory,[15] which is apparently unreliable because the total number of luminaires changes from Computation Calculation to Computation Calculation.[16]

Inventory Date	Luminaire Overhead	Luminaire Total
10/3/18	4854	4999
5/23/18	4855	5000
9/28/17	4854	4999
8/4/16	4826	4971

In addition to the inconsistent total number of luminaires, there is no indication of original cost, depreciation, amortization or salvage value. In its place, National Grid provides some "Net Book" values with no description as to how it arrived at that value. The lack of description is troubling, because a close examination of National Grid's pricing tables reveals that National Grid uses different inventory, price, cost, luminaire charge, luminaire revenue, net book values etc. each time they do a Compensation Calculation.[17] Just by way of example, National Grid is not even consistent when it comes to the number of different types of luminaires:

	6/14/16 Inventory	10/17 Inventory	4/30/18 Inventory	10/31/18 Inventory
LUM MV FLD 1000W	-	11	11	11
LUM MV FLD 400W	-	17	17	17
LUM HPS RWY 50W	3,641	3,643	3,643	3,644
LUM HPS RWY 100W	896	893	893	891
LUM HPS RWY 150W	-	1	1	1
LUM HPS FLD 250W	14	18	18	18
LUM HPS RWY 250W	336	336	336	337
LUM HPS FLD 400W	9	12	12	12
Subtotal	4,964	4,999	4,999	4,999

[15] For a detailed review of why the billing inventory contains lights that fall outside the MSIA definition of "Lighting Equipment," please see Claim 4 starting on page 23 hereunder. In sum, the inventory impermissibly includes State Road Streetlights.

[16] Appendix Exhibit 5 - Table compiled using the summaries within Joint Statement of Agreed-Upon Facts Attachments 4-3, 5-1, 6-4, 9-9.

[17] Appendix Exhibit 5 - Joint Statement of Agreed-Upon Facts, Attachments 4-1; 5-9; 6-1; 9-8.

If National Grid does not know how many lights are in the City or what type of lights they are, how can the City possibly rely on National Grid's demanded purchase price?

In her testimony, the Lead Analyst in the Outdoor Lighting and Attachment Group openly admitted that National Grid's accounting system was not meant to sell assets, and that National Grid's calculation of the City's 'net book' value used the price of all lights in the City regardless of whether or not the City would be acquiring them. *Transcript P. 32 Lines 23 – P.34 Line 3; P. 41 Line 1 – P. 42 Line 6; P. 48 Line 9-17.* In sum, National Grid claims that the MSIA requires the City to pay them hundreds of thousands of dollars based on a calculation that:

1. Uses inconsistent numbers of lights,
2. Uses inconsistent numbers of types of lights,
3. Uses inconsistent price, cost, luminaire charge, luminaire revenue, net book values etc.,
4. Doesn't include a single one of the five elements required under the MSIA, and
5. Bases its Net Book value on lights that the City isn't going to acquire.

Even worse, the fact that National Grid is wholly incapable of complying with the compensation calculation requirements of the MSIA works to National Grid's financial gain at the direct expense of the City. Since the City has refused to acquire the Lighting Equipment under National Grid's calculations but demanded conditions and pricing, National Grid has illegally retained its revenue every day since September 27, 2016.

National Grid's refusal to allow the City to timely acquire the Lighting Equipment under the pretext that the City has not paid National Grid, despite the fact that National Grid has not provided the City with an accurate compensation calculation under the MSIA, is a violation of the MSIA. Said violation has materially harmed the financial interests of the City. Each day that the lighting equipment is not converted is a day that the City is not realizing R.I. Gen. Laws §39-30-1(b)'s reduction in municipal streetlight costs through reduced maintenance costs and elimination of the "facilities charge." Each day that National Grid stalls the conversion of the lighting

equipment is a day that National Grid is unjustly enriched by continuing to profit through the facilities charge and S-14 Tariff. In terms of timeliness, each day unjustly enriches National Grid at the expense of the City of East Providence Taxpayer and Ratepayer.

Claim 2:

Tariff S-05 Violates the Municipal Streetlight Investment Act

The S-05 Tariff, drafted by National Grid and submitted to the PUC, controls streetlight billing after a municipality converts its Lighting Equipment pursuant to the MSIA. R.I. Gen Laws § 39-30-3(a)(1) states in pertinent part:

> [...] The [S-05] tariff shall use existing usage calculation methods and existing rates for any currently existing **lighting equipment**, only setting reasonable **new rates for newly adopted lighting equipment**. [...]

R.I. Gen Laws § 39-30-3(a)(1). (**emphasis added**). The S-05 Tariff currently imposed by National Grid violates two key provisions of the MSIA. First, it violates the timing trigger for the removal of the facilities charge, and second, it violates the timing trigger for the retail delivery rate hike.

National Grid's efforts to obfuscate the language of the Municipal Streetlight Investment Act as a means to mitigate its losses thereunder are so thorough that the S-05 Tariff, purportedly drafted by National Grid to effectuate the General Assembly's purpose of creating municipal savings, completely abandons the defined terms and language of the MSIA. In order to unpack the S-05 Tariff's violations of the MSIA, we must first identify the purposely misleading language therein. The S-05 Tariff states in pertinent part:

> Customers who have received service under the Company's General Street and Area Lighting Rate S-14 or Decorative Street and Area Lighting Service Rate S-06 and (1) have **purchased** street and area lighting facilities, including dedicated poles, standards, or accessories pursuant to R.I.G.L § 39-30-1 *et seq.*; or (2) have otherwise **purchased** street and area lighting facilities consistent with the requirements described in R.I.G.L § 39-30-1 *et seq.*, shall be served under this rate [...]

RIPUC No. 2190, S-05 Tariff, Sheet 1. (**emphasis added**). Pointedly absent from the S-05 Tariff's language, which determines when and how said Tariff applies, is the MSIA defined term,

"Lighting Equipment." In its place is a new concept identified as "purchased street and area lighting facilities." The MSIA does not set forth a means for municipalities to purchase street and area lighting facilities. As noted in detail above, the MSIA empowers municipalities to acquire Lighting Equipment to avoid the facilities charge and then requires municipalities to compensate National Grid prior to converting the already acquired Lighting Equipment. By putting forth Tariff language that does not conform to the language and definitions under the MSIA, National Grid has confused when municipalities participating in the Act should fall under the new Tariff contemplated by the Act.

I. Timing of the Removal of the Facilities Charge

Specifically, National Grid's purposeful language confusion by abandoning the defined terms of the MSIA in the S-05 Tariff transformed the MSIA right to acquire Lighting Equipment into a prerequisite "purchase of street and area lighting facilities." This change impacts when a municipality is excused from the facilities charge. As explained in detail above, the City has a right to escape the facilities charge upon sixty (60) days notice to National Grid.[18] This fulfills the purpose of the MSIA because it allows the municipality to hire some other company to manage the Lighting Equipment, effectively eliminating the facilities charge. However, under National Grid's S-05 Tariff, the City is required to "purchase" "street and area lighting facilities" and comply with a "purchase and sales agreement"[19] and associated "attachment agreement"[20] (sometimes jointly referred to as the "Closing Documents")[21] before it qualifies for the MSIA's

[18] See Claim 1 starting on P.4 Above
[19] Appendix Exhibit 5 – Joint Exhibit 4 P.6
[20] Appendix Exhibit 5 – Joint Exhibit 4 P.16
[21] Appendix Exhibit 5 - Joint Exhibit 2 P.39

intended benefits which only arise under the S-05 Tariff. In other words, the S-05 Tariff silently implies that the City must remain on the S-14 Tariff without realizing the intended benefits of the MSIA, until the City agrees to National Grid's compensation and terms of acquisition and use demands. The PUC found that the S-05 Tariff's requirements regarding the Closing Documents were a barrier to municipalities realizing savings under the Act when the PUC determined that the Closing Documents, which are mandatory under said S-05 Tariff and non-negotiable according to National Grid, are the mechanism that allows municipalities to become eligible for the MSIA savings. *Docket 4442, P. 39.* In other words, the PUC expressly found that the City will not realize any of the benefits of the MSIA unless and until it acquiesces to National Grid's closing documents.

In sum, while the MSIA makes it abundantly clear that the City has a right to acquire the Lighting Equipment with sixty (60) days notice to National Grid and thereafter immediately begin saving money through the elimination of the facilities charge, the S-05 Tariff forces municipalities to continue either continue to pay the facilities charge well after that sixty (60) day notice or acquiesce to National Grid's purchase and sales agreement and attachment agreement. In this scenario, the City has no leverage. Despite the MSIA's expressed purpose of municipal savings, National Grid has used the S-05 Tariff to corner the City into an ultimatum: either accept National Grid's terms for acquiring the Lighting Equipment or forego the MSIA savings and keep paying National Grid the full S-14 Tariff rate and facilities charge. This ultimatum is a barrier to entry that favors National Grid's revenues over the City's savings in the MSIA zero-sum game. Every delay and complication equates to sustained revenue for National Grid at the expense of municipal savings, which is a violation of the expressed purpose of the Act.

II. Timing of the Increased Retail Delivery Rate

Since the S-05 Tariff automatically applies once National Grid allows the City to acquire the Lighting Equipment, the S-05's increased retail delivery rate applies at the time the City acquires the Lighting Equipment, which may be well before the City eventually installs new Lighting Equipment.

> Customers who have received service under the Company's General Street and Area Lighting Rate S-14 or Decorative Street and Area Lighting Service Rate S-06 and (1) have purchased street and area lighting facilities, including dedicated poles, standards, or accessories pursuant to R.I.G.L § 39-30-1 et seq.; or (2) have otherwise purchased street and area lighting facilities consistent with the requirements described in R.I.G.L § 39-30-1 et seq., **shall** be served under this rate.

RIPUC No. 2190, S-05 Tariff, Sheet 1(**emphasis added**). In effect, the S-05 Tariff precludes the City's ability to acquire the Lighting Equipment and enjoy the savings avoidance of the facilities charge without paying the increased retail delivery rate. Those savings, generated by acquiring but not converting the lights, would generate the investment funds for the City to compensate National Grid and install new LED Lighting Equipment. Unlike the Act, which states that new rates shall only apply to newly adopted Lighting Equipment, the S-05 Tariff's increased retail delivery rate occurs upon purchase *not* the subsequent conversion. In other words, under the MSIA, there was a window where the City could acquire the Lighting Equipment and would not be subjected to a new electricity rate until the City adopted new technology. *see R.I. Gen Laws § 39-30-3(a)(1)*. But, since National Grid rolled both the avoidance of the facilities charge and the increased retail delivery rate into the same Tariff provisions, the window for municipal savings has been closed in favor of mitigating National Grid's lost revenues under the Act.

Claim 3:

The Agreement of Sale and Attachment Agreement Violate the Municipal Streetlights Investment Act

The Agreement of Sale and Attachment Agreement and the Closing Documents National Grid created to control the terms of acquiring and using the Lighting Equipment. Provisions within these imposed terms violate the Municipal Streetlight Investment Act by limiting the City's use of the Lighting Equipment and by maintaining that the City's right to attach to National Grid infrastructure may be revoked without cause. The PUC and Division share discrete jurisdiction specific to the Attachment Agreements to the extent that it is akin to conditions of distribution service for customer-owned street lighting. *Docket 4442, P. 40-41.* Said discrete jurisdiction sets the PUC as the authority that reviews and approves the Attachment Agreement at the outset and then the Division's subsequent jurisdiction resolves any disputes that may arise. *Id.* The Commission concluded that the MSIA is unique because there is no other state mandate obligating the PUC to approve a tariff that requires National Grid to have an Attachment Agreement in place allowing for the use of space on poles to other customers. *Id., P. 42.* In sum, the PUC and Division have some jurisdiction over the Attachment Agreement, but the Agreement of Sale is a negotiable instrument not subject to approval by the PUC. *Id. P. 40, 48.*

The Attachment Agreement in particular limits how the City's Lighting Equipment may be used, but the MSIA states in pertinent part:

> "[…] Upon such payment, the municipality **shall** have the right to use, alter, remove, or replace such acquired lighting equipment **in any way the municipality deems appropriate**. […]"

R.I. Gen. Laws §39-30-3(b). The MSIA is clear: the City enjoys a mandatory entitlement to use acquired Lighting Equipment in any way it deems fit. Therefore, any portion of the Attachment Agreement or Agreement of Sale that in any way abridges the City's right to use, alter, remove, or replace acquired Lighting Equipment is void.

While the Sales Agreement has not been reviewed or approved by the PUC, National Grid claims it is a wholly non-negotiable instrument. This flies directly in the face of the Commission's finding that, "a sales agreement will be subject to negotiation between the parties." *Docket 4442 P. 40.* Despite the fact that the PUC has held that it does not have jurisdiction over the sales agreement because it is a negotiable instrument, National Grid is refusing to negotiate the sales agreement terms and delaying the City's ability to realize the intended savings benefits of the MSIA.

In particular, National Grid is adamant that the Attachment Agreement contains so-called "Removal Rights" which are in effect a revocation clause allowing National Grid to remove the City's acquired Lighting Equipment from National Grid's poles at will without cause.[22] The complete lack of qualifying elements for revocation is a threat to public safety. By agreeing to that clause, the City would have no guarantee that National Grid could not arbitrarily decide to take down any or all Lighting Equipment in the municipality.

The MSIA seems to have contemplated the critical nature of the right to attach to National Grid poles after acquiring Lighting Equipment, because it expressly states:

> [The City may] Convert its street lighting service from the subject tariff rate to an alternative tariff rate [...] and **further providing for the use by [the City] of the space on any pole, lamp post, or other mounting surface previously used by the electric distribution company for the mounting of the lighting equipment**. [...]

[22] Appendix Exhibit 5 – Joint Exhibit 4 P.16, Attachment Agreement §17

R.I. Gen. Laws §39-30-3(a)(1). (edited for pertinence and clarity, **emphasis added**). The language of the statute is clear. Under the Act, the City enjoys the right to be attached to any National Grid infrastructure previously used for mounting Lighting Equipment. National Grid's at-will right to revoke the City's license to attach to poles is in direct contravention of the MSIA. And yet again, National Grid has found a way to profit at the expense of the City's savings by blatantly violating state law as a means to delay the City's acquisition of the Lighting Equipment.

Moreover, the PUC, based on the opinion of its expert Richard Hahn, found that National Grid failed to identify circumstances that would warrant at will termination of any attachment license. *Docket 4442 p.37.* Accordingly, the PUC's findings regarding the Attachment Agreement declared that National Grid's April 4, 2014 proposed Attachment Agreement must be revised to conform to Mr. Hahn's filed comments. *Docket 4442 P. 43.* Despite this directive, National Grid seems to have ignored the authority of the PUC and kept the at will revocation clause within the attachment agreement. Regardless of any subsequent final approval, the oversight error and National Grid's purposeful avoidance of a PUC directive must be corrected.

Claim 4:

The Agreement of Sale and Attachment Agreement Require the City to Purchase Lighting Equipment for which the City has no Legal Property Interest

Streetlights are subject to R.I. Gen. Laws and Tariffs. The S-05 and S-14 Tariffs, as well as the MSIA, must be read in conjunction to understand the rights and interests of parties pursuant to streetlights. When they are read in conjunction, it is clear that it is impossible for streetlights along state roads ("State Road Streetlights") to meet the definition of Lighting Equipment under the MSIA. The Municipal Streetlight Investment Act defines "Lighting Equipment" as follows:

> "Lighting equipment" means all equipment used to light streets in the municipality, the operation and maintenance of which is currently charged to the municipality, including lighting ballasts, fixtures, and other equipment necessary for the conversion of electric energy into street lighting service, but excluding the utility poles upon which the lighting equipment is fixed. Lighting equipment shall include, but not be limited to, decorative street and area lighting equipment and solid-state (LED) lighting technologies.

R.I. Gen. Laws §39-30-2, "Definitions." A streetlight is only "Lighting Equipment" if its associated costs are charged to the municipality. Under the S-14 Tariff, the City cannot be charged for State Road Streetlights.

Moreover, National Grid itself has stated that lighting in the City that is owned by state entities is not considered "public street and area lighting equipment" pursuant to the Act. *see National Grid's Answer to Petition of the City of East Providence, ¶34.*[23]

[23] Appendix Exhibit 9 - National Grid's Answer to Petition of the City of East Providence

I. The City Cannot be the S-14 Tariff Customer for State Road Streetlights

A tariff, as a determination by the Rhode Island Public Utilities Commission, is the result of a complex hearing process established in R.I. Gen. Laws Title 39. The plain and ordinary meaning of the S-14 Tariff shows that National Grid has violated said Tariff by charging the City for the costs associated with State Road Streetlights instead of the State because the City cannot be the "Customer" for State Road Streetlights.[24]

In other words, National Grid can only charge the State as the S-14 "Customer" for State Road Streetlights. Since the City cannot be charged for State Road Streetlights, such lights do not fit the MSIA's Lighting Equipment definition because, by law, State Road Streetlights cannot meet the definitional element that the Lighting Equipment consists of streetlights that are "charged to the municipality." *R.I. Gen. Laws §39-30-2.* This inherently means that the use of State Road Streetlights in the calculation of National Grid's compensation under the Act is impermissible, and it also means that the City cannot acquire the State Road Streetlights because they are not Lighting Equipment. The pertinent sections of the S-14 Tariff state as follows:

> General Street and Area Lighting Service is available under this rate to any city, town, **governmental entity, or other public authority**[25] hereinafter referred to as the **Customer**, in accordance with the specifications hereinafter set forth:
>
> 1. For **municipal-owned or accepted roadways**, including those classified as **"private areas" for which a municipal Customer has agreed to supply street and area lighting service**. [26]

[24] Appendix Exhibit 7 - S-14 Tariff, p. 64, 65, 70; In particular the pertinent sections presented within the following paragraph.

[25] Any governmental entity or public authority, not just municipalities, may be a "Customer" under the Tariff.

[26] It is indisputable that state roads are not "municipal-owned" nor are they "private areas," therefore the question is whether state roads are municipal "accepted roadways". The City's

[. . .]

4. Service under this rate is available to a private contractor, developer, or association of customers, **wherein the municipality has agreed in writing to accept responsibility for future payments of such lights *upon acceptance of applicable streets and areas.*[27]**

[. . .]

9. The management of vegetation and/or other adjacent physical conditions which obstruct the normal distribution of light from the specified street and area lighting facilities **is the responsibility of the Customer**.[28]

[. . .]

LOCATION OF STREET AND AREA LIGHTS

[. . .] **The Customer, by requesting and accepting service under this rate, hereby *shall*[29] *provide, grant and confer to the Company, all necessary easement, rights-of-way and/or consent rights and privileges* as is necessary to provide such service in a manner satisfactory to the Company**. . .[30]

S-14 Tariff, p. 64, 65, 70. (***emphasis added***, footnotes are City commentary). In sum, any governmental entity may be a Customer under the S-14 Tariff, but the Customer is responsible for controlling the vegetation and, "*shall* provide, grant and confer to [National Grid], all necessary easement, rights-of-way and/or consent rights and privileges as is necessary." *S-14 Tariff, p. 70.* (*emphasis added*). This "shall" provision is critical.

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position is that state roads are not and cannot be "accepted roadways" under state law and the Tariff.

[27] The City has not and cannot "accept" state roads. There is no evidence that the City has agreed in writing to accept the responsibility for future payments upon acceptance of state roads.

[28] It is undisputed that RIDOT, no the City, maintains the physical conditions which may obstruct the normal distribution of light from National Grid's state road streetlights.

[29] The Rhode Island Supreme Court has said that the use of the word "shall" makes mandatory that which is set forth in the statute. See *Shine v. Moreau*, 119 A.3d 1, 13 (R.I. 2015)

[30] The City does not have the legal authority to grant or confer easements, rights-of-way and/or consent rights and privileges over state roads.

The Rhode Island Supreme Court has said that the use of the word "shall" makes mandatory that which is set forth in the statute. *Shine v. Moreau*, 119 A.3d 1, 13 (R.I. 2015). Accordingly, it is mandatory that the relevant governmental entity, in this case either the City or the State, grant sufficient land interests to National Grid in order to be the S-14 Tariff "Customer." If the governmental entity cannot grant sufficient land interests, it cannot be the S-14 Tariff "Customer." As a matter of law, the City has no rights over the land interests of state property. Therefore, as a matter of law, the City is not the S-14 Tariff Customer for State Road Streetlights and accordingly cannot be charged for State Road Streetlights which implies that State Road Streetlights are not MSIA Lighting Equipment.

Rhode Island Law makes it abundantly clear that the State, and no other governmental entity, has exclusive authority to grant National Grid the interests in land necessary to be a "Customer" under the S-14 Tariff. Specifically:

- Rhode Island General Laws §24-7-8 - which states that nothing in this chapter shall be held to oust the state of jurisdiction regarding sidewalks or curbing along state roads.
- R.I. Gen. Laws §24-8-1.3(c) - which defines municipal roads as "any public road not designated as a state road either under the statue or under the functional classification guidelines"
- R.I. Gen. Laws §24-8-1.3(g) - which defines state roads as "all public roads classified as arterials and major collectors . . ."
- R.I. Gen. Laws §24-8-34(a) - whereby the director of the department of transportation is authorized to regulate construction in state highway rights-of-way.
- R.I. Gen. Laws §24-8.1-1 - whereby the state finds that utilities are necessary for the general welfare and the cost of relocation of utilities are for a public purpose.
- R.I. Gen. Laws §24-8.1-2 - whereby the state agrees to compensate utility companies whenever changes to state roads require the relocation of utilities.
- R.I. Gen. Laws §24-8.1-2.1 - whereby the state agrees to compensate utility companies whenever sewer line changes to require the relocation of utilities.
- R.I. Gen. Laws §24-8.1-3.1 - whereby the state requires utility companies to provide "as-built" plans regarding the installation or relocation for all utilities affecting state roads.

State statute, in particular R.I. Gen. Laws §24-7-8, is proof that the City has no jurisdiction over State Road Streetlights. Without jurisdiction over State Road Streetlights, it is legally impossible for the City to grant the interests in land necessary to qualify as the "Customer" under the S-14 Tariff.

Moreover, state roads are not and cannot be municipally "accepted roadways" under the S-14 Tariff. The S-14 Tariff defines municipally accepted roadways as follows:

> 1. For municipal-owned or accepted roadways, including those classified as "private areas" for which a municipal Customer has agreed to supply street and area lighting service.
>
> [...]
>
> 4. Service under this rate is available to a private contractor, developer, or association of customers, wherein the municipality has agreed **in writing** to accept responsibility for future payment of such lights upon acceptance of applicable streets and areas.

In addition, R.I. Gen. Laws §24-2-1 *et seq* sets for the statutory procedure whereby a roadway may be 'accepted' by a municipality. Particularly relevant is R.I. Gen. Laws §24-2-8 which requires that roadways be deeded to the City.[31] There is no evidence that the City has "accepted" state roadways such that it has agreed to pay for lighting service. Moreover, the City lacks the legal capacity to "accept" any rights or interests over State property.

Under state law, the City has not and cannot "accept" state roads. The State is the only party that maintains the state roads. The State is the only party with the authority to confer property rights regarding state roads and their corresponding sidewalks or curbing. *see R.I. Gen. Laws §24-7-8.* Accordingly, the State is the only party that can possibly meet the definition of "Customer" under the S-14 Tariff. If the State and not the City is the customer for State Road Streetlights, then

[31] There is no evidence that any of the State Roads are deeded to the City. Moreover, East Providence City Charter requires that the City Council approve contracts. *See* EP Charter §§ 3-5 (8); 4-9.

National Grid is violating the terms of the S-14 Tariff by levying charges against the City as the Customer for State Road Streetlights. Since it is legally impermissible for National Grid to "charge the municipality" for lights for which it is not a "Customer" under the S-14 Tariff, those charges are void.

II. Charges to the City for State Road Streetlights are *Void ab Initio*

Every charge National Grid levied against the City for State Road Streetlights are legal impossibilities because such charges are violations of State Law and the S-14 Tariff. As legal impossibilities, those charges are *void ab initio* and cannot be said to exist.

> *Void ab initio* is a legal principal concerning which is invoked when an act is entirely nullified from inception. Such nullification arises in circumstances of statutory interpretation because an act is legally impossible, contains an imperfection or defect that cannot be cured by an act or confirmation, or is rendered directly nugatory and ineffectual by statute.

See Black's Law Dictionary (9th ed. 2009). The principal of *void ab initio* creates a legal fiction assuming a state of facts as if the *void ab initio* action never occurred. In other words, the act is not merely of no legal effect, the act never existed. For example, when an individual who is already married goes on to marry a second person, the new, bigamous marriage is rendered *void ab initio*, and is treated as though it legally never happened. (see *Sanchez v. Sanchez*, 79 A.D.2d 651; *Zeitlan v. Zeitlan*, 31 A.D.2d 955, 956). Likewise, if a customer fraudulently provides false information to procure insurance coverage, the resulting policy is rendered utterly nugatory, and held *void ab initio. Peerless Ins. Co. v. Keane,* C.A. NO. 90-1387, 1994 WL 930909 (R.I. Super. 1994). Such facts are similar to this case. National Grid's illegal practice of charging the City when the State

is the only legally possible Customer under the S-14 Tariff cannot be cured such that State Road Streetlights could possibly be interpreted as meeting the MSIA definition of Lighting Equipment. An act cannot occur as a matter of law if that act seriously offends law or public policy. *Black's Law Dictionary (9th ed. 2009).* In this case, the MSIA policy of facilitating municipal savings would be seriously offended if National Grid was allowed to charge the City for State Road Streetlights. Therefore, all charges to the City regarding State Road Streetlights are *void ab initio.* Since those charges are v*oid ab initio*, it cannot be said that the City is "charged" for those streetlights and therefore State Road Streetlights fall outside the definition of "Lighting Equipment." *see R.I. Gen. Laws §39-30-2.*

III. The City's Past Payments of State Road Streetlight Charges do not make said Charges Legal

Since there is no evidence that the City ever accepted, requested, or agreed to pay for the monthly charges of State Road Streetlights, and there is statutory proof that those charges are in fact *void ab initio,* National Grid's last argument will undoubtedly be that the City has always paid for State Road Streetlights in the past, therefore the City must continue to be liable for them in the future. In other words, National Grid will argue that if someone pays for their neighbor's electric bill, the fact they paid for it makes the erroneous billing legal and allows National Grid to keep demanding payment for a neighbor's bill. This logic and argument are flawed on several fronts.

A. Past Billing Practices are Irrelevant Extrinsic Evidence

First, past billing practices and payments are extrinsic evidence. Pursuant to the canons of both contract interpretation and statutory interpretation, extrinsic evidence is only admissible when there is an ambiguity within the contract or statute. *Angell v. Union Fire District of South Kingstown*, 935 A.2d 943, 946 (R.I. 2007), (quoting *State v. Menard*, 888 A.2d 57, 60 (R.I. 2005); *Paradis v. Greater Providence Deposit Corp.*, 651 A.2d 738, 741 (R.I. 1994). There is no ambiguous language within the S-14 Tariff or the Municipal Streetlight Investment Act, therefore historic billing practices are not relevant to the interpretation of the meaning of the S-14 Tariff or the Act.

B. Past Practices Do Not Bind Municipalities

Second, National Gird cannot rely on a past practice against a municipality. The Rhode Island Supreme Court has repeatedly held that:

> the authority of a public agent to bind a municipality must be actual ***. Consequently, any representations made by such an agent lacking actual authority are not binding on the municipality.

Casa DiMario, Inc. v. Richardson, 763 A.2d 607, at 610 (R.I. 2000) (interior citations omitted). In *Casa DiMario, Inc.*, a case where Plaintiff alleged the Town of Johnston was estopped from enforcing an ordinance because of the actions of an agent of the Town, the Court found that past practices could not bind municipalities:

> [...] the town [of Johnston's] alleged past practice of allowing the solicitor to settle certain cases involving the town without a formal prior vote of the council were misplaced and unjustified. Communications, representations, and alleged acts of this kind are insufficient as a matter of law to bind a municipality to future acts or inaction. *See, e.g., School Committee of Providence*, 429 A.2d at 1302 (holding that school principal's alleged representations to a per-diem substitute teacher that he would be employed until the absent teacher returned to work were ultra vires; therefore, the substitute teacher was not entitled to rely thereon). **Rather, a city or town can bind itself on such matters only by the official acts of its town council or by the authorized actions of its representatives**. See *El Marocco Club, Inc.*, 746 A.2d at 1234. According to Johnston's charter, the council may act in its official

> capacity only in the form of a rule, an ordinance, or a resolution. See *Town of Johnston Town Home Rule Charter, § 3–9*. There is no record in the council's minutes [. . .] evidencing any resolutions or other action taken by the council requesting, authorizing, or permitting the solicitor to settle [plaintiff's] claims on the terms set forth in the consent order, nor is there any charter provision that would authorize the solicitor's settlement. Without a properly convened meeting at which council members vote on the record in their official capacity, the council cannot be deemed to have exercised or delegated to the solicitor its powers to compromise [plaintiff's] lawsuit against the town. *Id.* Thus, **any putative reliance by [plaintiff]** on communications from the solicitor, individual council members, or from other town officials concerning [plaintiff's] [. . .] status [. . .] **would not have been justified**. See *El Marocco Club, Inc.*, 746 A.2d at 1233–34 (holding that party asserting equitable estoppel must justifiably rely upon misrepresentation made by authorized municipal agents).

Id. at 611. (lightly edited for pertinence, **emphasis added**). Specific to the City's Petition, this precedent means that National Grid is not justified in relying on any past practice or representations of the City (if any may be argued to exist) without some official action by the City accepting responsibility for State Road Streetlights. Since, as held in *Casa DiMario*, National Grid cannot argue that it justifiably relied on any of the City's past practices, it is clear that the City is not responsible for State Road Streetlights and cannot be charged for State Road Streetlights.

C. Estoppel is an Insufficient Argument Against a Municipality

Third, National Grid cannot rely on estoppel against a municipality. Any attempt to rely on past conduct sounds in the nature of an equitable estoppel argument. The Supreme Court has reviewed the concept of estoppel against a municipality as a principle, finding:

> As a general rule, courts are reluctant to invoke estoppel against the government on the basis of an action of one of its officers. Indeed, any party dealing with a municipality is bound at his own peril to know the extent of its capacity.

Id. at 613. (interior citations and quotations omitted). National Grid will likely argue that the City's previous payments for electricity used by State Road Streetlights amounts to some proof of the City's financial liability. This argument, if proffered, cannot stand because National Grid is bound at its own peril to know the extent of the capacity of whoever paid those charges. Absent an official

action of the City, no prior payments made by City personnel could legally bind the City to future payments for State Road Streetlights.

In *Michael Dubis et al v. East Greenwich*, the Court held that:

> [...] notions of promissory estoppel that are routinely applied in private contractual contexts are ill-suited to public-contract-rights analysis. *D.Corso Excavating, Inc., v. Poulin,* 747 A.2d 994, 1001 (R.I. 2000). Indeed, "'courts have consistently refused to give effect to government-fostered expectations that, had they arisen in the private sector, might well have formed the basis of contract or estoppel.'" *Retired Adjunct Professors,* 690 A.2d at 1346 (R.I. 1997).

Dubis v. East Greenwich, KC-2014-0688 (R.I. Super. February 11, 2016) at 22. Contrary to the requirements of *Dubis,* neither the MSIA nor the S-14 Tariff were established in a private contractual context, and the City is a public sector government entity. Past practices that may be relevant in a private sector dispute under theories of contract or estoppel are not relevant in this regulatory dispute with a municipality.

Here, the only evidence in support of any past practice or estoppel argument is that the City has historically paid for the electricity consumed by State Road Streetlights. Significantly, no evidence exists that the City, or any of its agents for that matter, were aware that the City was being charged for electricity consumed by State Road Streetlights at the time the City was paying said charges. In other words, not only did the agents that made payments on behalf of the City not have the authority to pay for electricity consumed by State Road Streetlights, there is no evidence that those agents were even aware they were doing so.

Given Rhode Island precedent and these facts, the past practice of the City is irrelevant because National Grid cannot successfully make any such argument against a municipality or in the absence of a contract. In order for the doctrine of equitable estoppel to apply, the following elements must be established:

> First, an affirmative representation or equivalent conduct on the part of the person against whom the estoppel is claimed which is directed to another for the purpose of inducing the other to act or fail to act in reliance thereon; and secondly, that such representation or conduct in fact did induce the other to act or fail to act to his injury.

El Marocco Club, Inc. v. Richardson, 746 A.2d 1228, 1233 (R.I. 2000). National Grid cannot produce any evidence to demonstrate any actions by the City directed at National Grid for the purpose of inducing National Grid to act or fail to act regarding State Road Streetlights based upon detrimental reliance. Nor is there evidence of City conduct that did in fact induce National Grid to act or fail to act to its injury. The only evidence relevant to a question of whether the City entered into a contract for electric service charges for State Road Streetlights would be a literal written contract between the City and National Grid approved by the East Providence City Council via an official action. No such contract or action exists. Therefore, this case is merely a question of law to be determined based on the statutory interpretation of the MSIA. Under the S-14 Tariff, the City cannot be legally charged for State Road Streetlights which inherently implies that State Road Streetlights are not MSIA Lighting Equipment.

IV. The Inclusion of State Road Streetlights in the Sales Agreement

The Sales Agreement was supposed to be subject to negotiation between the parties as approval of a sales agreement is outside the scope of the PUC's jurisdiction. *Docket 4442, P. 39-40.* The PUC expressly ordered that the Sales Agreement is not subject to the approval of the PUC. *Docket 4442, P. 48.* As a negotiable instrument, the City should be empowered to determine what lights are included within the Sales Agreement.

The ability for the City to determine which lights it will purchase is critical, because National Grid's record keeping does not identify the legal Customer for its lights. It is it is clear

that National Grid's list of Lighting Equipment offered to the City is based on its "inventory,"[32] it is much less clear how each streetlight is placed into an "inventory". As detailed through Hearing Officer Spirito's ("Mr. Spirito") examination of National Grid Lead Analyst in the Outdoor Lighting and Attachment Group, Ms. Roseen, the question of how "state lights" are identified is critical to the creation of the inventory.

> [Mr. Spirito]: So I'm interested in the state lights. How do you make a determination as to which lights are state lights?
> [Ms. Roseen]: So these are also in the billing inventory as are the City of East Providence's, and we use that information to determine which locations are unmetered street lighting billed to the state.
> [Mr. Spirito]: These are the streetlights that the state is paying for?
> [Ms. Roseen]: Correct.
> [Mr. Spirito]: Streetlights presumably that the state requested National Grid install on behalf of the state?
> [Ms. Roseen]: Yes.
> [Mr. Spirito]: You're aware that some – there's been municipalities that have argued that just because – that if the light is on a state road, the municipality may not necessarily be responsible for paying for it even though the state has never requested that that light be installed based on the records National Grid possesses.
> [Ms. Roseen]: I am aware of the issue.
> [Mr. Spirito]: That's not factored into this. **This is only lights** --
> [Ms. Roseen]: Correct.
> [Mr. Spirito]: -- **that the state has specifically asked for**.
> [Ms. Roseen]: Yes.
> [Mr. Spirito]: **And you have a record to show**?
> [Ms. Roseen]: **Yes**.

Transcript P. 46, Line 13 – P.47, Line 20. In sum, a streetlight will only be placed in the State's inventory if National Grid is in possession of a record indicating that the State specifically asked for it. Ms. Roseen further elucidated the process for placing lights into inventory under examination by the City.

> [City]: So I believe we just heard that the billing inventory determines who is going -- whether or not the municipality needs to purchase the

[32] Appendix Exhibit 6 - Transcript, P. 13, Lines 14-17; Page 16, Lines 5-15; P. 28, Line 19 – P. 29 Line 24; P. 31 Line 9 – 24; P. 37 Line 5 -10; P. 38 Line 23 – P. 39 Line 15; P. 48 Line 13 – P. 49, Line 8.

light. Do you know how each individual light makes it into a different party's billing inventory?

[Ms. Roseen]: Yes. And that can be a couple of different ways, depending on which way the request comes to the company. So it may come through the community manager, it may come through our customer service our customer service center, it may come through another internal group that deal with streetlight requests. So there's a number of different ways that a request could come in, **but [the request] comes from the customer**.

[City]: So each light has a corresponding request from a party that determines which inventory it's placed in?

[Ms. Roseen]: It may be an aggregate request, but **yes.**

[City]: So there couldn't be a [situation] where a municipality has never requested a light but is being required to purchase it?

[Ms. Roseen]: **I can't answer that definitively.**

Transcript P. 49, Line 13 – P.50, Line 12. This is troublesome. Where National Grid is certain that the State is only billed for lights for which it has a record indicating that the State requested the light,[33] the Lead Analyst in Outdoor Lighting cannot definitively say whether or not municipalities are being forced to purchase lights they did not request.[34] As noted in detail above, National Grid does not even know how many lights there are, what type of light they are, how much they cost, or really seemingly anything about its streetlights.[35] If there is no record of a request to install a light, how does National Grid know which inventory to place it in? Has National Grid installed lights in the City of East Providence without being expressly requested to do so? A couple of things are clear. First, National Grid does not know whether or not the City of East Providence requested each of the lights National Grid has placed in the City's inventory. Second, National Grid's calculation of its own compensation due under the Act is bereft of any proof that the City is legally responsible for the lights it is being forced to acquire.

[33] Appendix Exhibit 6 - Transcript P. 46, Line 13 – P.47, Line 20
[34] Appendix Exhibit 6 - Transcript P. 49, Line 13 – P.50, Line 12
[35] *See above* National Grid's Right to Compensation, P.11

National Grid readily admits that its "utility accounting system was not meant to sell assets."[36] The problem is understandable, but National Grid's solution is illegal. National Grid's problem is that it does not have records or an accounting system that tracked which party requested the installation of every single individual streetlight. National Grid has openly admitted as much:

> [National Grid] employs the mass plant convention of accounting for certain assets on a vintage year basis such as its investment in street light equipment ... which are too numerous to practically track on an individual basis given the small relative value of each individual asset.

National Grid Exhibit 3 – National Grid's Response to Public Utilities Commission Data Request 1-7 in Docket No. 4442, P.4. Streetlights have been installed since before electricity. It is understandable that National Grid does not know who requested the installation of State Road Streetlights. But National Grid's solution to their insufficient record keeping appears to be to just bill the municipality. That's illegal. You cannot bill a government entity without being granted actual authority. *Casa DiMario*, at 610. Therefore, those charges are *void ab initio.*

V. National Grid Cannot Force the City to Purchase State Road Streetlights

The MSIA compensates National Grid when municipalities convert acquired Lighting Equipment. Acquired Lighting Equipment can be properly understood as streetlights for which the municipality is being lawfully "charged" under the S-14 Tariff. State Law and the S-14 Tariff make it clear that the City is not responsible for State Road Streetlights because, as a result of State's unilateral statutory authority over state land, only the State can be the S-14 Tariff Customer. As violative of state law and the MSIA policy of facilitating municipal savings, all such charges for State Road Streetlights are *void ab initio.* The end result of this logical progression is that

[36] Appendix Exhibit 6 - Transcript P. 33 Lines 9-11

National Grid's use of State Road Streetlights in calculating its compensation under the MSIA is a violation of the law,[37] and any attempt to force the City to purchase State Road Streetlights is legally impossible.

All of this statutory citation and interpretation is a long-winded proof of a legal reality so blatantly obvious it is intuitively understood: The City does not own state property and therefore, the City is not responsible for electricity consumption on state property.

[37] *See above* National Grid's Right to Compensation, P.11

Proposed Findings of Fact

The City of East Providence submits that the questions at bar are all purely issues of law limited to statutory interpretation. To the extent that there are any relevant facts, they were agreed to in the joint "Agreed-Upon Statement of Facts"[38] submitted to this court by Petitioner, National Grid, and the Advocacy Section of the Division of Public Utilities and Carriers on April 2, 2019. There are no relevant facts in dispute.

[38] Appendix Exhibit 5

Proposed Conclusions of Law

The City of East Providence, based on the entirety of the record so far submitted, proposes that the Hearing Officer make the following conclusions of law:

1) National Grid's charges to the City of East Providence for State Road Streetlights are *void ab initio* for the following reasons:
    a. S-14 Tariff – whereby the City does not meet the definition of "Customer" because it does not have jurisdiction over state property.
    b. R.I. Gen. Laws §§ 24-7-8; §24-8-1.3(c); §24-8-1.3(g); §24-8-34(a); §24-8.1-1; §24-8.1-2; §24-8.1-2.1; §24-8.1-3.1 – whereby only the state has jurisdiction over state property.
    c. National Grid lacked the actual authority necessary to charge the City; *see*: *Casa DiMario, Inc. v. Richardson*, 763 A.2d 607, at 610 (R.I. 2000)
    d. Estoppel is an insufficient argument against a municipality; *see Casa DiMario, Inc. v. Richardson*, 763 A.2d 607, at 613 (R.I. 2000); *Dubis v. East Greenwich,* KC-2014-0688 (R.I. Super. February 11, 2016) at 22; *El Marocco Club, Inc. v. Richardson*, 746 A.2d 1228, 1233 (R.I. 2000).
2) State Road Streetlights do not meet the R.I. Gen. Laws §39-30-2 definition of "Lighting Equipment" because any charges to the City for said State Road Streetlights are *void ab initio*.
3) National Grid's Compensation Calculation under the Municipal Streetlights Investment Act is a violation of R.I. Gen. Laws §39-30-3(b) for the following reasons:
    a. It includes State Road Streetlights which do not fit the definition of Lighting Equipment under the Act.
    b. It does not include the original cost of Lighting Equipment.

c. It does not include the depreciation of Lighting Equipment.

d. It does not include the amortization of Lighting Equipment.

e. It does not include the salvage value of Lighting Equipment.

f. Its calculations use inconsistent and varying figures including but not limited to inventory numbers of lights, types of lights, prices of lights, luminaire charges, luminaire revenues, and 'Net Book' values.

g. National Grid does not know how its lights are placed in any inventory because it does not have any proof whether or not the City requested any light.

4) The City has been unlawfully forced by National Grid to pay National Grid excess fees under the S-14 Tariff since September 27, 2016

a. The MSIA requires that the City realize the benefits of acquiring the Lighting Equipment within sixty (60) days' notice to National Grid.

b. The City provided National Grid with notice on July 29, 2016

c. National Grid has unlawfully refused to transfer ownership of the Lights to the City by unlawfully demanded the following illegal pre-requisites:

i. Full compensation prior to the City converting the Lighting Equipment

ii. Improper Sales Agreement

iii. Improper Attachment Agreement

d. National Grid has unlawfully delayed the City's ability to acquire the Lighting Equipment either through its inability or willful refusal to provide the City with an accurate compensation calculation

5) It is unlawful for National Grid to refuse to negotiate the Sales Agreement pursuant to Docket 4442 P. 39-40, 48 which states that:

a. The Sales Agreement is a negotiable instrument that is not subject to the approval of the PUC.

6) It is unlawful for the Attachment Agreement to contain the at-will without cause revocation of the license to attach to National Grid's poles pursuant to R.I. Gen. Laws §39-30-(3)(a)(1):

a. [The City may] Convert its street lighting service from the subject tariff rate to an alternative tariff rate [...] and further providing for the use by [the City] of the space on any pole, lamp post, or other mounting surface previously used by the electric distribution company for the mounting of the lighting equipment. [...]

7) It is unlawful for the Attachment Agreement to contain restrictions on how the City may use its Lighting Equipment after acquisition pursuant to R.I. Gen. Laws §39-30-3(b):

a. [...] the municipality **shall** have the right to use, alter, remove, or replace such acquired lighting equipment **in any way** the municipality deems appropriate. [...]"

8) The S-05 Tariff impermissibly applies to Lighting Equipment at the time of acquisition instead of at the time of installation of new lighting equipment pursuant to R.I. Gen. Laws 39-30-3(a)(1):

a. [...] The [S-05] tariff shall use existing usage calculation methods and existing rates for any currently existing **lighting equipment**, only setting reasonable new rates for newly adopted lighting equipment. [...]

9) The S-05 Tariff impermissibly forces an increased Retail Delivery Rate at the time of acquisition of Lighting Equipment instead of at the time of the installation of new lighting equipment pursuant to R.I. Gen. Laws 39-30-3(a)(1):

   a. [...] The [S-05] tariff shall use existing usage calculation methods and existing rates for any currently existing lighting equipment, only setting reasonable **new rates** for **newly adopted** lighting equipment. [...]

Conclusion

For all the reasons stated herein, it is abundantly clear that National Grid is in violation of the Municipal Streetlights Investment Act. While the City reserves its right for a reply brief, the City hereby requests this Honorable Court, based on the proposed findings of fact and proposed conclusions of law set forth herein, declare:

NOW WHEREFORE:

1) National Grid's charges to the City of East Providence for State Road Streetlights are void ab initio;

2) State Road Streetlights do not meet the R.I. Gen. Laws §39-30-2 definition of "Lighting Equipment" because any charges to the City for said State Road Streetlights are *void ab initio*;

3) National Grid's Compensation Calculation under the Municipal Streetlights Investment Act is a violation of R.I. Gen. Laws §39-30-3(b);

4) The City has been unlawfully forced by National Grid to pay National Grid excess fees under the S-14 Tariff since September 27, 2016;

5) It is unlawful for National Grid to refuse to negotiate the Sales Agreement;

6) It is unlawful for the Attachment Agreement to contain the at-will without cause revocation of the license to attach to National Grid's poles;

7) It is unlawful for the Attachment Agreement to contain restrictions on how the City may use its Lighting Equipment after acquisition;

8) The S-05 Tariff impermissibly applies to Lighting Equipment at the time of acquisition instead of at the time of installation of new lighting equipment; and

9) The S-05 Tariff impermissibly forces an increased Retail Delivery Rate at the time of acquisition of Lighting Equipment instead of at the time of the installation of new lighting equipment.

Respectfully submitted,
The City of East Providence
By its Solicitor,

/s/
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Certificate of Service

I, Dylan Conley, hereby certify that the enclosed was filed electronically with the Docket No. D-19-04 service list on May 24, 2019.