

**STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS  
DIVISION OF PUBLIC UTILITIES AND CARRIERS  
89 JEFFERSON BOULEVARD  
WARWICK, RHODE ISLAND 02888**

IN RE: Complaint by The City of East Providence :  
Against National Grid – Electric : Docket No. D-19-04

**REPORT AND ORDER**

On or about February 1, 2019 the Rhode Island Division of Public Utilities and Carriers (“Division”) received a complaint/petition (“complaint”) from the City of East Providence, Rhode Island (“East Providence” or “the City”) against National Grid – Electric (“National Grid” or “the Company”).<sup>1</sup> The City filed its complaint pursuant to Rhode Island General Laws, Chapter 39-30, entitled: *Municipal Streetlight Investment Act* (the “Act”); specifically, Rhode Island General Laws, Section 39-30-3 (“RIGL §39-30-3”).

RIGL §39-30-3, entitled: *Streetlight investment*, provides in pertinent part:

(a) Any city or town receiving street lighting service from an electric distribution company pursuant to an electric rate tariff providing for the use by such municipality of lighting equipment owned by the electric distribution company, at its option, upon sixty (60) days notice to the electric company and to the department, and subject to the provisions of subsections (b) through (e), may:

(1) Convert its street lighting service from the subject tariff rate to an alternative tariff rate providing for delivery service by the electric distribution company of electric energy, whether or not supplied by the electric distribution company, over distribution facilities and wires owned by the electric distribution company to lighting equipment owned or leased by the municipality, and further providing for the use by such municipality 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. The alternative tariff rate shall provide for

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<sup>1</sup> City of East Providence Exhibit 1.

monthly bills for street and area lighting that shall include a schedule of energy charges based on a determination annual kilowatt-hour usage per lumen rating or nominal wattage of all types of lighting equipment, but shall not include facility, support, maintenance, or accessory charges. The new 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. The new tariff shall be structured so as to allow options for various street lighting controls, including both conventional dusk/dawn operation using photocell or scheduling controls, as well as schedule-based dimming or on/off controls that dim or turn off street lights during periods of low activity. The electric distribution company, in consultation with the office, shall file the new tariff with the public utilities commission within sixty (60) days of the effective date of this chapter and the commission shall then issue a decision within sixty (60) days after the filing to effectuate the purposes and provisions of this chapter.

(2) Purchase electric energy for use in such municipal lighting equipment from the electric distribution company or any other person allowed by law to provide electric energy; and

(3) After due diligence, including an analysis of the cost impact to the municipality, 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. Any contract a municipality enters for such services must require appropriate levels of training and certification of personnel providing pole service for public and worker safety, evidence of twenty-four (24) hour call capacity and a committed timely response schedule for both emergency and routine outages. The municipality may also request that the electric company remove any part of such

lighting equipment that it does not acquire from the electric distribution company in which case the municipality shall reimburse the electric distribution company the cost of removal by the electric distribution company, along with the original cost, less depreciation, of the removed part, net of any salvage value.

(c) When a municipality exercises its option pursuant to this subsection, the municipality will notify the electric distribution company of any alterations to street and area lighting inventory within sixty (60) days of the alteration. The electric distribution company will then adjust its monthly billing determinations to reflect the alteration within sixty (60) days.

(d) When a municipality exercises its option pursuant to subsection (a), anyone other than the electric distribution company controlling the right to use space on any pole, lamp post, or other mounting surface previously used by the electric distribution company in such municipality shall allow the municipality to assume the rights and obligations of the electric distribution company with respect to such space for the unexpired term of any lease, easement, or other agreement under which the electric distribution company used such space; provided, however, that:

(i) The municipality is subject to the same terms and conditions that pole owners make to others that attach to the poles; and

(ii) In the assumption of the rights and obligations of the electric distribution company by such a municipality, such municipality shall in no way or form restrict, impede, or prohibit universal access for the provision of electric and other services.

(e) Any dispute regarding the terms of the alternative tariff, the compensation to be paid the electric distribution company, or any other matter arising in connection with the exercise of the option provided in subsection (a), including, but not limited to, the terms on which space is to be provided to the municipality in accordance with subsection (c), shall be resolved by the division of public utilities and carriers within ninety (90) days of any request for such resolution by the municipality or any person involved in such dispute.

(f) Notwithstanding any general or special law, rule, or regulation to the contrary, any affiliate of any electric distribution company whose street lighting service is converted by any municipality in accordance with the provisions of this section may solicit and compete for the business of any such municipality for the provision of

lighting equipment or any other service such as equipment maintenance in connection therewith.

The City states in its complaint that it is exercising its right under RIGL §39-30-3(e), *supra*, to request that the Division resolve a dispute that has developed between the City and National Grid concerning the terms of the City's purchase of streetlight assets. The City identified four (4) individual areas of dispute, which are summarized below:

1. Timeliness Violations – The City asserts that National Grid failed to provide the City with a proper cost estimate of the purchase within 60 days of said request in accordance with RIGL §39-30-3(b).
2. Tariff S-05 Violation – The City asserts that National Grid has imposed an illegal rate hike.
3. Agreement of Sale and Attachment Agreement Violations – The City asserts that National Grid is compelling the City to execute agreements which violate the Act.
4. Requirement to Purchase Violation – The City asserts that National Grid is requiring the City to purchase all streetlighting equipment within the boundaries of the municipality in violation of the Act.

In response to the City's filing, the Division established the instant docket and conducted a pre-hearing conference on March 12, 2019. The following counsel entered appearances in this case:

For the City:

Dylan Conley, Esq.

For National Grid:

Andrew S. Tugan, Esq., and  
Adam M. Ramos, Esq.

For the Division's  
Advocacy Section:

Christy Heatherington, Esq.  
Spec. Asst. Attorney General

During the pre-hearing conference, the parties agreed to the following schedule:

- March 12, 2019 – Discovery begins;
- March 19, 2019 - Parties to file Stipulation to Waive Statutory 90-day deadline for Division to resolve dispute – extend deadline to June 11, 2019;
- March 19, 2019 – National Grid deadline to file Answer/Response to Complaint
- April 2, 2019 - Deadline to file Agreed-upon Statement of Facts; and to identify all issues that remain in dispute. Parties to also identify witnesses and provide a summary of expected testimony.
- April 9, 2019 - Hearing
- May 7, 2019 - Deadline for filing Briefs;
  - Subsequently, extended to May 21, 2019 at the joint request of the parties on May 1, 2019.
  - Subsequently, extended again to May 28, 2019 at the joint request of the parties on May 21, 2019.
- May 14, 2019 - Deadline for filing Reply Briefs;
  - Subsequently, extended to May 28, 2019 at the joint request of the parties on May 1, 2019.
  - Subsequently, extended again to May 31, 2019 at the joint request of the parties on May 21, 2019.
- June 11, 2019 – Target date for Decision
  - Subsequently, extended to June 25, 2019 at the joint request of the parties on May 1, 2019.
  - Subsequently, extended again to June 28, 2019 at the joint request of the parties on May 21, 2019.

National Grid filed an Answer to the City's complaint on March 19, 2019.<sup>2</sup> In its Answer, National Grid generally denies the City's assertions that National Grid has committed violations of the Act. National Grid argues that the draft agreement of sale and draft attachment agreement it offered the City "contains substantially similar terms" to the draft sale and attachment agreements "it has provided every other municipality that has expressed interest in purchasing all of the public street and area lighting equipment...." National Grid further argues that the City may not, through its petition, "challenge a tariff that has already been approved by the PUC." Additionally, National Grid argues that it has not included privately owned lighting equipment or lighting equipment owned by the State or federal government in its inventory of lighting equipment assigned to the City.

The Division conducted a duly noticed public hearing on April 9, 2019. The hearing was conducted in the Division's hearing room, located at 89 Jefferson Boulevard in Warwick. The following counsel entered appearances at the hearing:

For the City:	Dylan Conley, Esq.
For National Grid:	Andrew S. Tugan, Esq.
For the Division's Advocacy Section:	Christy Hetherington, Esq. Special Assistant Attorney General

Only National Grid proffered witnesses during the hearing. The witnesses were identified as Mr. Jacques Afonso, a National Grid Community and Customer Manager; and Ms. Paula Roseen, Lead Analyst in National Grid's Outdoor Lighting and Attachment Group.

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<sup>2</sup> National Grid Exhibit 1.

Mr. Alfonso testified that his responsibilities include being an account manager and liaison for certain municipalities in their customer dealings with National Grid. Specifically, he related that his duties include answering any questions and concerns coming from East Providence, Barrington, Warren, Bristol, Portsmouth, Middletown, Newport, Jamestown, Tiverton and Little Compton. Mr. Alfonso testified that in this capacity he has worked with municipalities who have decided to purchase streetlights from National Grid, including the City of East Providence.<sup>3</sup>

Mr. Alfonso next identified a number of documents related to the City's decision to purchase streetlights from National Grid. These documents are summarized below:

- A July 29, 2016 letter from the City (from the City Manager) to National Grid wherein the City states that it has decided to proceed with the purchase of its streetlight system as provided by R.I.G.L. §39-30-1. In this letter, the City also requests "a final purchase price and the required closing documentation."<sup>4</sup>
- An August 11, 2016 email, with attachments, which Mr. Alfonso sent to the City in response to the City's July 29, 2016 request for information. This package of information included the relevant "closing documents," which consisted of "the purchase price, inventory, sales agreement, attachment agreement and miscellaneous information."<sup>5</sup>

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<sup>3</sup> Tr. 9-11.

<sup>4</sup> Joint Exhibit 1, Tab 3; Tr. 11-12.

<sup>5</sup> Joint Exhibit 1, Tab 4; Tr. 12-13.

- A 2017 email (specific date is unknown), with attachments, from Mr. Alfonso to the City containing revised closing documents. This update was provided in response to the City's request for an updated purchase price.<sup>6</sup>
- A May 30, 2018 email from Lori Spangler at National Grid to the City again containing revised closing documents and an updated purchase price.<sup>7</sup>
- A November 8, 2018 email, with attachments, from Mr. Alfonso to the City's DPW Director again containing revised closing documents and an updated purchase price.<sup>8</sup>

During questioning from the Division's Advocacy Section, Mr. Alfonso stated that he does not calculate the pricing in these streetlight-purchasing cases. He related that another department within the Company makes those calculations. Mr. Alfonso also opined that the several updates to the closing documents and pricing in this matter relate to the depreciation of assets over time and also the possibility that assets have been replaced or added. Mr. Alfonso emphasized that the updated purchase prices were not based on negotiations between the parties.<sup>9</sup>

In further response to questions from the Advocacy Section, Mr. Alfonso testified that he was involved in similar streetlight-purchasing cases involving Barrington, Bristol, Warren, Tiverton and Little Compton and that none of those

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<sup>6</sup> Joint Exhibit 1, Tab 5; Tr. 15-16.

<sup>7</sup> Joint Exhibit 1, Tab 6; Tr. 17.

<sup>8</sup> Joint Exhibit 1, Tab 9; Tr. 17-18.

<sup>9</sup> Tr. 20-22.



cases resulted in any disagreements with National Grid. He recalled that in those cases, “[t]he process was actually very smooth.”<sup>10</sup>

Ms. Roseen testified that her department manages and coordinates National Grid’s streetlighting business. She stressed that her department follows tariff procedure. She also related that she and her group have been involved with the municipal streetlight purchasing program since its enactment in 2013 and that she participated in the docket before the Public Utilities Commission (“Commission” or “PUC”) that led to the adoption of the tariff that applies to this program.<sup>11</sup>

Ms. Roseen testified that since the start of the program, 18 municipalities and 5 five districts have made streetlighting purchases from National Grid. She explained that all of these purchases have followed a “uniform process.” She described the process as follows:

We receive the customer’s formal request to – giving notice that they will be purchasing the streetlight equipment. We extract the billing inventory for that municipality. We provide that to our pricing group which does the actual pricing calculation. We get back and we draft the closing documents that we provide to the customer as well, put all of that into an e-mail and relay that to the community manager for delivery to the customer.<sup>12</sup>

Ms. Roseen testified that the closing documents include the pricing sheets, which provide the final purchase price, the agreement of sale, the attachment agreement and the billing inventory. She explained that the attachment agreements are substantially similar in all streetlighting-purchasing cases, but that the inventory

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<sup>10</sup> Tr. 22-24.

<sup>11</sup> Tr. 26-28.

<sup>12</sup> Tr. 28-29.

and pricing vary based on the actual streetlighting equipment located in each municipality or fire district.<sup>13</sup>

With respect to the way National Grid calculates the final price, Ms. Roseen related that her group does not produce the calculation. She did, however, offer her understanding of the calculation process:

All of the company's streetlight assets are stored in a utility accounting system which we refer to as the power plant. And those assets are entered in with a value. When we calculate a purchase price for a streetlight asset sale, those values are extracted, what we refer to as the net book value. And because the nature of this utility accounting system was not meant to sell assets, we had to allocate those net book values across the quantifies [sic] of the entire municipality streetlight equipment base.

So in other words, we have City of East Providence as a customer, but we also... have other customers within the municipality boundaries that we also have streetlight assets with us. So the net book value is extracted, and then its allocated across the entire streetlight base to create a value per luminaire, per pole.

Those values are then allocated across the assets being sold to the customer and that is the final purchase price that's calculated.<sup>14</sup>

Ms. Roseen next sponsored an exhibit that provides insights into the pricing methodology that National Grid uses to calculate a streetlighting purchase price for municipalities looking to purchase streetlights from the Company. The document was identified as a data response that was proffered by National Grid in Commission Docket 4442, the docket from which the Commission adopted a tariff (Rate S-05) for National Grid's use in pricing streetlighting equipment under

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<sup>13</sup> Tr. 30-32.

<sup>14</sup> Tr. 33-34.

the Act.<sup>15</sup> Ms. Roseen testified that National Grid has used this same pricing methodology for all its streetlighting purchase transactions with municipalities.<sup>16</sup>

### **Issues Presented**

The parties have presented the following issues for consideration in this docket, which the Division has consolidated into four main issues, *infra*:

#### City of East Providence:<sup>17</sup>

1. How is the cost to purchase the lights calculated under the Act?
2. Did National Grid comply with the Act when it provided cost calculations to the City?
3. What is the remedy for failure to comply with the timeliness provisions of R.I. Gen. Laws §39-30-3(a)?
4. Does the Rate S-05 Tariff comply with R.I. Gen. Laws §39-30-3(a)(1)?
5. Does the Attachment Agreement and Agreement of Sale comply with the Act?
6. Can the Agreement of Sale and Attachment Agreement require the City to purchase non-municipal lighting equipment?
7. If National Grid has been found to violate the Act, and has been enriched at the expense of the City as a result of that failure to comply with the Act, what is the remedy?

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<sup>15</sup> National Grid Exhibit 3; Tr. 34-36.

<sup>16</sup> Tr. 36.

<sup>17</sup> East Providence Exhibit 2.

National Grid:<sup>18</sup>

1. Whether the City's July 29, 2016 communication to National Grid regarding the public street and area lighting in the City required National Grid to take any actions within any specified time period pursuant to the Act?
2. Whether National Grid fulfilled its obligations under the Act, though its numerous communications with the City providing information about the steps the City needed to take to complete the purchase of public street and area lighting in the City?
3. Whether the Division has jurisdiction to determine that the Rate S-05 Tariff approved by the Commission violates the Act?
4. Whether the Rate S-05 Tariff approved by the Commission violates the Act.
5. Whether the City is required to enter into substantially the same Agreement of Sale that National Grid has executed with all other Rhode Island municipalities making public street and area lighting purchases under the Act?
6. Whether the Agreement of Sale that National Grid provided the City violates the Act?
7. Whether the City is required to enter into substantially the same Attachment Agreement that National Grid has executed with all other Rhode Island municipalities making public street and area lighting purchases under the Act?

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<sup>18</sup> National Grid Exhibit 2.

8. Whether the Division has jurisdiction to determine whether the Attachment Agreement that National Grid provided the City violates the Act?
9. Whether the Attachment Agreement that National Grid provided the City violates the Act?
10. Whether the Act, upon the City deciding to purchase public street and area lighting under the Act, requires the City to purchase all public street light and area lighting in the City regardless of whether that public street and area lighting is located on, or adjacent to, roads owned or maintained by the State of Rhode Island?
11. Whether the City had a right to cease payment of the full amount of the charges it incurred, including the facilities charge, for the provision of general street and area lighting in the City even though it did not complete its purchase of the public street and area lighting in the City?
12. Whether the balance forward amount on each of the City's monthly street lighting bills constitutes an amount owed in arrears?
13. Whether the City had an obligation to seek resolution from the Division pursuant to R.I. Gen. Laws §39-30-3(e) before taking unilateral action to cease paying the full amount of its bills for general street and area lighting?
14. Whether the City has a legal obligation to pay all past due amounts for its public street and area lighting bills before it can complete a purchase of the street and area lighting in the City under the Act?

## **Legal Arguments on the Issues**

### **1. 60-Day Timeliness Violation**

East Providence argues that National Grid failed to provide the City with a proper cost estimate of the purchase price within 60 days of the City's request, as required under R.I. Gen. Laws §39-30-3(a) and (b). The City calculates that based on its original July 29, 2016 request, National Grid had until September 27, 2016 to provide the cost estimate. The City asserts that due to this failure, National Grid has been unjustly enriched by the sum total of what the City would have paid if the City had been allowed to purchase its lights by September 27, 2016.<sup>19</sup>

The City contends that National Grid has improperly created a prerequisite procedural process that is "antithetical" to the Act. The City argues that "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."<sup>20</sup> The City asserts that the burden on the City to acquire the Lighting Equipment is a "notice" burden, not a "purchase" burden; it is unlawful for National Grid to "demand... an upfront payment prior to the City acquiring the Lighting Equipment...."<sup>21</sup> The City maintains that National Grid was required to turn over the Lighting Equipment within 60 days; the City asserts it cannot be responsible for "facilities charges" after 60 days following its notice to National Grid.<sup>22</sup> Alternatively, the City argues that even if it must compensate National Grid prior to acquiring the Lighting Equipment, National Grid was

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<sup>19</sup> East Providence Exhibit 1, p. 4.

<sup>20</sup> East Providence Brief, p. 7.

<sup>21</sup> Id., pp. 8-9.

<sup>22</sup> Id., pp. 9-10.

required to provide the City with an accurate compensation figure within the 60-day deadline.<sup>23</sup>

The City argues that National Grid's calculations of its compensation are not in conformance with the Act. The City observes that the Act requires that compensation be based on five components, specifically, (1) identified Lighting Equipment, (2) Original Cost of the Lighting Equipment, (3) Depreciation, (4) Amortization, and (5) Salvage Value. The City argues that none of these five elements are addressed in any of the compensation calculations which National Grid provided the City.<sup>24</sup>

In response to the City's assertions, National Grid emphasizes that it responded to the City's July 29, 2016 notice letter with a reply on August 11, 2016, thirteen days later. National Grid points out that its response to the City included an Excel pricing sheet that described the purchase price for the streetlight assets, an agreement of sale, an attachment agreement, an Excel sheet identifying the City's streetlight inventory, and other informational documents.<sup>25</sup> National Grid argues that its communication to the City provided it with all the information necessary to complete the purchase of the streetlight assets and "satisfied any obligation that the Act imposed on it."<sup>26</sup>

National Grid contends that "East Providence decided not to close and indeed there is no evidence that East Providence even had legal authority to close

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<sup>23</sup> Id., pp. 10-11.

<sup>24</sup> Id., pp. 12-15.

<sup>25</sup> National Grid Brief, pp. 5-6.

<sup>26</sup> Id., p. 6.

until the City Council granted *conditional* approval on September 18, 2018 – more than two years after National Grid provided the closing documents.”<sup>27</sup>

National Grid also disputes the City’s assertion that National Grid’s pricing methodology violates the Act. National Grid called this assertion baseless and argues that it “used the pricing methodology it presented to the PUC in Docket No. 4442 when it sought and received approval of the Rate S-05 Tariff.”<sup>28</sup> National Grid contends that if the City had concerns with this pricing methodology it should have disputed the methodology in 2013 during PUC Docket No. 4442.<sup>29</sup>

National Grid notes that the Act requires the City to compensate National Grid for the original cost of the Streetlight Assets, less depreciation and amortization, net of any salvage value. National Grid argues that it “determined this price each time the City requested it by obtaining the ‘net plant value’ of streetlight assets within the physical borders of East Providence, and then allocating the net plant value among assets within the City’s inventory and assets in other customers’ inventories, such as residential and commercial customers, the federal government and the State of Rhode Island.” National Grid asserts that net book value is another way of describing the compensation calculation in the Act and that this is how National Grid determines the ‘net book value’ of assets to be purchased.<sup>30</sup> National Grid further argues that East Providence has not

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<sup>27</sup> Id., p. 6; relying on Joint Exhibit 1, Tab 8.

<sup>28</sup> Id., p. 6.

<sup>29</sup> Id., pp. 6-7; relying on National Grid Exhibit 3.

<sup>30</sup> Id., p. 7.



offered any evidence that any other calculation would have yielded a different purchase price.<sup>31</sup>

The Advocacy Section maintains that the “timing obligations of the parties may not be as simple or clear as the City suggests.” The Advocacy Section argues that despite the “sixty (60) days notice” provision in the Act, the practical reality is that the complete acquisition process, to include compliance with the conditions articulated in RIGL §39-30-3(b)-(e), may well require more than sixty (60) days from the date of the initial notice of intent to purchase.<sup>32</sup> The Advocacy Section further argues that delays may also result because “the city or town may also choose to negotiate the purchase of electric energy from a competitive supplier and/or negotiate and secure a contract for maintenance of the equipment.

The Advocacy Section argues that although the protracted timeline in the instant matter falls well beyond 60 days, or September 27, 2016, from the City’s July 29, 2016 letter initiating the purchase process, the Advocacy Section “does not interpret the law or evidence as supportive of a finding that Grid ‘knowingly, willfully, purposely refused to respond’ to the City’s requests to purchase its streetlights.”<sup>33</sup> The Advocacy Section also argues that the evidence does not support any bad faith or purposeful delay by either the City or National Grid. The Advocacy Section observes that National Grid “duly responded within two weeks to the City’s July 29, 2016 letter of intention with a purchase price tailored to the City’s inventory and with what appeared to be the closing documents standard to

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<sup>31</sup> Id., p. 8.

<sup>32</sup> Advocacy Section Brief, p. 2.

<sup>33</sup> Id., p. 3.

these types of transactions.”<sup>34</sup> The Advocacy Section maintains that the record reflects that “at no time did the correspondence between the parties take a contentious or urgent tone, even after a period of years-long delay.” Instead, the Advocacy Section likened the delay to “reasonable negotiation” and points to the minutes from a City Council meeting wherein the term “negotiating” is used to describe the status of the City’s desire to purchase its streetlights from National Grid.<sup>35</sup>

The Advocacy Section also disputes the City’s assertion that National Grid failed to provide a ‘proper cost estimate’ within the 60-day timeframe. The Advocacy Section argues that National Grid’s witness, Ms. Roseen, made it clear that of the 23 municipalities and fire districts in Rhode Island and 54 in Massachusetts that had purchased streetlights, “the acquisition documents and procedures were uniform” and “that although the purchase price estimate is calculated based on inventory that is unique to each customer..., Grid did not stray from the standard process when providing the City purchase price estimates.”<sup>36</sup>

## 2. Whether Rate S-05 Tariff Violates the Act

East Providence argues that R.I. Gen. Laws §39-30-3(a)(1) requires that the Rate S-05 Tariff use existing rates for current lighting equipment. The City relies on the following language:

The new tariff **shall** use existing usage calculation methods and existing rates for any currently existing lighting

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<sup>34</sup> Id.

<sup>35</sup> Id., pp. 3-4.

<sup>36</sup> Id., p. 4.

equipment, only setting reasonable new rates for newly adopted lighting equipment.... (emphasis in original).

The City observes that Rate S-05 Tariff uses a new rate of approximately 4.842 cents per kwh instead of the existing 2.188 cents per kwh “for all lighting equipment purchased by the municipality instead of only new equipment as required by law.” East Providence asserts that the Tariff “imposes an illegal rate hike on municipalities that purchase the street lights but do not immediately or eventually convert to new lighting equipment.”<sup>37</sup>

The City argues that the Rate S-05 Tariff violates two key provisions of the Act: the “timing trigger for the removal of the facilities charge, and... the timing trigger for the retail delivery rate hike.” According to the City, it is a violation of the Act to require municipalities to ‘purchase’ ‘street and area lighting facilities’ and comply with a ‘purchase and sale agreement’ and associated ‘attachment agreement,’ before the municipality qualifies for the Act’s intended benefits.<sup>38</sup> The City argues that this Tariff requirement “forces municipalities to continue either 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.”<sup>39</sup>

Regarding its retail delivery rate concern, the City argues that since the Rate S-05 Tariff automatically applies once National Grid allows the City to acquire the Lighting Equipment, the Rate S-05 Tariff’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.” The City argues

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<sup>37</sup> East Providence Exhibit 1, p. 5.

<sup>38</sup> East Providence Brief, pp. 17-18.

<sup>39</sup> Id., pp. 18-19.

that, in effect, the Rate 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.” The City contends that “[t]hose 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.

National Grid responded to the City’s assertions by arguing that the Division does not have the authority to invalidate the Rate S-05 Tariff. National Grid contends that only the Commission is authorized to approve tariffs and that if East Providence was aggrieved by the Rate S-05 Tariff it could have appealed the Commission’s decision approving the Tariff.<sup>40</sup>

The Advocacy Section disagrees with the City and opines that the Rate S-05 Tariff neither violates the Act, the Commission decision in Docket No. 4442 nor “ratemaking principles and methods generally.”<sup>41</sup> The Advocacy Section also argues that it “interprets and understands the language of the Act differently from the City; it does not read the Act as assigning a new tariff only to newly converted lighting equipment such as energy efficient LED lighting, but rather, provides for variations in the fixture charge categorizations within the tariff as new lighting technologies and conversions come about.”

The Advocacy Section also supports National Grid’s argument that the City’s allegations that the Rate S-05 Tariff violates the Act “are not properly before

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<sup>40</sup> National Grid Brief, p. 12.

<sup>41</sup> Advocacy Section Brief, p. 5.

the Division for consideration.”<sup>42</sup> The Advocacy Section argues that the Commission “carefully vetted this tariff via Docket 4442, providing an in-depth decision in support therein.” The Advocacy Section further notes that the Rhode Island League of Cities and Towns “actively participated in Docket 4442 as [an] intervenor and advocate for Rhode Island municipalities, to include East Providence.” The Advocacy Section asserts that any challenge to the Rate S-05 Tariff would need to have been pursued by way of an appeal of the Commission’s decision, and that no appeal was taken.<sup>43</sup>

3. Whether the Agreement of Sale and Attachment Agreement violate the Act

The City argues that National Grid’s Agreement of Sale and Attachment Agreement improperly limit the use and type of lighting equipment the City may install. The City relies on the following provision in R.I. Gen. Laws §39-30-3(b)(1):

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. (emphasis in original).

The City argues that the Act grants a municipality the right to use any technology the municipality deems appropriate subsequent to the purchase of the lighting equipment.

East Providence also argues that R.I. Gen. Laws §39-30-3(a)(1) requires National Grid to provide municipalities the space to mount the lighting equipment on the poles, which is evidenced as follows:

...and further providing for the use by such municipality of the space on any pole, lamp post, or other mounting surface

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<sup>42</sup> Id.

<sup>43</sup> Id.

previously used by the electric distribution company for the mounting of the lighting equipment...

The City contends that such language should nullify National Grid's efforts, through the Agreement of Sale and Attachment Agreement, to only provide municipalities with a "revocable" mounting license that National Grid may revoke without cause and at any time.<sup>44</sup>

Also, on the issue National Grid's revocation clause, the City notes that in Docket No. 4442, the Commission found that National Grid failed to identify any circumstances that would warrant an "at will termination of any attachment license." Based on this finding, the City asserts that the Commission ordered National Grid to revise its Attachment Agreement to remove this "at will termination" provision, which the City argues has been ignored by National Grid; the City asserts this oversight error must be corrected.<sup>45</sup>

The City also takes exception to National Grid's claim that the Sales Agreement "is a wholly non-negotiable instrument," notwithstanding the fact that the Sales Agreement has never been reviewed by the Commission. The City also references a Commission finding in Docket No. 4442 wherein the Commission accepted that *'a sales agreement will be subject to negotiation between the parties.'*<sup>46</sup>

Initially, National Grid criticizes East Providence for looking for "preferential treatment" and "a better deal." National Grid argues that the Division should require East Providence to conform to the same practices as every other

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<sup>44</sup> East Providence Exhibit 1, pp. 6-7.

<sup>45</sup> East Providence Brief, p. 22.

<sup>46</sup> East Providence Brief, p. 21.

municipality in Rhode Island if East Providence decides to purchase the streetlight assets in the City. National Grid asserts that Rhode Island law prohibits it from “discriminating – negatively or positively – among similarly situated customers” (National Grid notes that the City is requesting a different pricing methodology, a different attachment agreement, different purchase and sale documents and a different inventory calculation).<sup>47</sup>

With respect to the attachment agreement, National Grid argues that the attachment agreement being offered to East Providence was approved by the Commission in Docket No. 4442. National Grid emphasizes that in its final decision in Docket No. 4442, the Commission stated, “[t]he revised attachment agreement, filed on July 31, 2014, is hereby approved.”<sup>48</sup> National Grid contends that if the City had concerns about the attachment agreement, it was required to raise those concerns before the Commission in Docket No. 4442, not with the Division. National Grid also argues that its attachment agreement does not violate the Act because it contains the same terms and conditions that National Grid applies to all third-party attachment owners.

With respect to the agreement of sale, National Grid stresses that it has presented substantially the same agreement of sale to every municipality that has sought to purchase streetlight assets under the Act. National Grid also argues that the City has not identified a single provision of the agreement of sale that creates a violation of the Act or any explanation of how National Grid’s agreement of sale violates the Act. National Grid also argues that even though the

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<sup>47</sup> National Grid Brief, p.4; relying on R.I. Gen Laws §39-2-2 and related caselaw.

<sup>48</sup> Id., p. 9.

Commission did not recognize jurisdiction over National Grid's agreement of sale in Docket No. 4442, neither the Commission nor any interested parties in that docket questioned whether the agreement of sale violates the Act.<sup>49</sup>

The Advocacy Section observes that when the Commission vetted and approved the Rate S-05 Tariff in Docket No 4442, it queried whether its scope of review included these two agreements and whether either should be incorporated into the Tariff. Ultimately, the Commission determined that approval of the sales agreement fell beyond its jurisdiction; but the attachment agreement was vetted and approved, though not incorporated through the tariff proceeding. Based on this approval, the Advocacy Section maintains that it must defer to the Commission on appropriateness and reasonableness of the attachment agreement. The Advocacy Section again notes that "municipalities had a seat at the Docket 4442 table and their collective position on the attachment agreement was considered [by the Commission]."<sup>50</sup>

4. Whether National Grid Can Compel the City to Purchase Lighting Equipment for which the City has no Legal Property Interest

The City argues that National Grid's Agreement of Sale and Attachment Agreement improperly require municipalities to purchase all streetlighting equipment within the boundaries of the municipality. The City contends that it should not have to purchase "federal, state and/or private lighting equipment within the municipality."<sup>51</sup> The City argues that a streetlight is only 'Lighting Equipment' under the definition contained in the Act "if its associated costs are

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<sup>49</sup> Id., p. 10.

<sup>50</sup> Id., p. 6.

<sup>51</sup> East Providence Exhibit 1, p. 8; and East Providence Brief, p. 23.



charged to the municipality.”<sup>52</sup> According to the City, “[t]his 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.”<sup>53</sup> In support of this argument, the City relies on provisions contained in National Grid’s Rate S-14 Tariff (standard streetlighting tariff) that the City contends reflect that “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.” The City argues that this “shall” provision is critical because if “the governmental entity cannot grant sufficient land interests, it cannot be the S-14 Tariff ‘Customer.” The City asserts that “[a]s a matter of law, it 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... Lighting Equipment [under the Act].”<sup>54</sup>

East Providence additionally argues that charges to the City for State road streetlights are “*Void ab Initio*” because such charges are violations of State Law and the Rate S-14 Tariff. The City argues that as “legal impossibilities,” those charges are *void ab initio* and cannot be said to exist.<sup>55</sup>

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<sup>52</sup> East Providence Brief, p. 23.

<sup>53</sup> Id., p. 24.

<sup>54</sup> Id., pp. 24-28.

<sup>55</sup> Id., pp. 28-29.

As an additional argument, the City contends that its past payments of State road streetlight charges “do not make said charges legal.” East Providence predicts that since there “is no evidence that it 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.”<sup>56</sup> However, the City calls this argument “flawed” and rejects the argument on several grounds. Specifically, the City offers the following bases for its position: (1) past billing practices are irrelevant extrinsic evidence; (2) past practices do not bind municipalities; and (3) estoppel is an insufficient argument against a municipality.<sup>57</sup>

The City next argued that the Agreement of Sale “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.”<sup>58</sup> “[A]s a negotiable instrument,” the City asserts that it “should be empowered to determine what lights are included within the Sales Agreement.”<sup>59</sup> The City contends that National Grid’s record keeping “does not identify the legal Customer for its lights,” and therefore, questions the validity of the inventory assigned to the City.<sup>60</sup> The City argues that it is “troublesome” for National Grid to prevent the City from removing those

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<sup>56</sup> Id., p. 29.

<sup>57</sup> Id., pp. 30-33.

<sup>58</sup> Id., p. 33; relying on the final order in Docket No. 4442, pp. 39-40.

<sup>59</sup> Id., p. 33.

<sup>60</sup> Id., pp. 33-34.

streetlights from the inventory that the City believes are rightfully the responsibility of the State.<sup>61</sup>

National Grid responds by arguing that the Act defines what assets East Providence must purchase. Specifically, National Grid relies on R.I. Gen Laws §39-30-3(a)(3), which provides that the municipality has a right to “*acquire all of the public street and area lighting equipment of the electric distribution company in the municipality.*” National Grid also notes that R.I. Gen Laws §39-30-2 of the Act defines “*lighting equipment*” as:

...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.<sup>62</sup>

National Grid also points out that R.I. Gen Laws §39-30-3(b) of the Act requires East Providence to compensate National Grid for ‘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).’ Also, in anticipation of East Providence’s arguments, National Grid emphasizes that “nothing in the Act discusses whether a lighting equipment currently is located on ‘state roads’ or even what ‘state roads’ would mean.”<sup>63</sup>

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<sup>61</sup> Id., pp. 34-37.

<sup>62</sup> National Grid Brief, p. 11.

<sup>63</sup> Id.

On this issue, the Advocacy Section, again, argues that it “does not read the language and effect of the agreements in the same way as the City.” The Advocacy Section asserts that although it is unclear what portion of the agreements allegedly requires ownership of non-municipal lighting equipment, the Advocacy Section “finds that the agreements adequately capture the purpose of the Act, namely, to effectuate cost savings for those municipalities ‘purchasing their streetlight systems from electric distribution companies and contracting for maintenance independently.’”<sup>64</sup> The Advocacy Section also argues that the plain language of the agreements “appears to align with the definition of ‘lighting equipment’ provided at RIGL §39-30-2(3), which includes ‘all equipment used to light streets in the municipality... including ballasts, fixtures... but excluding the utility poles upon which the lighting equipment is fixed.’”<sup>65</sup> The Advocacy Section also takes comfort in the fact that the attachment agreement and agreement of sale provided to the City in this matter “are the same ones executed by other Rhode Island municipalities... and the same ones vetted by the PUC in Docket 4442.”<sup>66</sup>

### **Rebuttal Arguments**

#### **East Providence**

As an initial comment, East Providence asserts that despite National Grid’s allegation, the City has never sought “preferential treatment.” The City contends that it seeks only “legal treatment” and if National Grid is treating all

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<sup>64</sup> Id., pp. 6-7.

<sup>65</sup> Id., p. 7.

<sup>66</sup> Id.

municipalities in the same manner “then National Grid is illegally harming all municipalities.”<sup>67</sup>

East Providence also argues that the Advocacy Section is not an indispensable party in this docket and should not be permitted to participate as a party to the City’s complaint and request for relief. The City further argues that the Advocacy Section has a conflict of interest under the R.I. Code of Ethics.<sup>68</sup>

The City argues that based on caselaw, the Division is a proper party in cases before the Commission and that the Attorney General may properly represent the Division in such cases.<sup>69</sup> However, in cases before the Division, the City argues that the Attorney General may not represent the Division, as “no quasi-judicial body can sit in judgment of itself.”<sup>70</sup> The City asserts that this arrangement constitutes a conflict of interest and, therefore, the Hearing Officer must strike the Advocacy Section’s position on the City’s petition from the record.<sup>71</sup>

The City next argues that as a non-party, the Advocacy Section’s “Letter” (post-hearing legal memorandum) reads akin to an *Amicus Curiae* brief, which “[a]s a general principle of law, courts are not obligated to consider....” The City asserts that the Hearing Officer should reject the Advocacy Section’s Letter for the following reasons: “(1) the Advocacy Section is not a party to this action; (2) the Advocacy Section Letter is drafted by the Division and is submitted to the

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<sup>67</sup> East Providence Reply Brief, p. 1.

<sup>68</sup> Id., pp. 2-3.

<sup>69</sup> Id., pp. 3-5, citing Narragansett Electric Co. v. Harsch, 368 A.2d 1194 (R.I. 1977).

<sup>70</sup> Id., p. 5. The City distinguishes the Division’s participation in Commission cases, which the City characterizes as acting in an “administrative capacity” from the Division appearing in cases before a Division hearing officer, which the City characterizes as a “judicial” capacity.

<sup>71</sup> Id.

Division. This self-authorship presents an inherent bias that precludes the City of a full and fair opportunity to be heard; (3) assuming *arguendo*, that this Court finds that the Advocacy Section is either a party to the City's Petition, or that the Advocacy Section Letter is an admissible amicus brief, the Advocacy [Section] Letter should still not be considered because it fails its self-identified duty to, 'ensure that ratepayer interests are adequately represented and protected.'"<sup>72</sup>

The City also wants the Advocacy Section removed from the docket due to the Advocacy Section's failure to advocate on behalf of the City, whom the City observes is the only "ratepayer" in this case.<sup>73</sup> The City argues that every delay imposed by National Grid on the City maintains National Grid's revenues at the expense of the ratepayer.<sup>74</sup>

East Providence next asserts that National Grid's and the Advocacy Section's reliance on the fact that other municipalities have been treated the same way constitutes an irrelevant argument. The City insists that the issue in this matter is not whether National Grid is treating all municipalities in the same fashion; but rather the correct issue is whether National Grid's actions are legal under the mandates contained in the Act.<sup>75</sup>

The City also takes exception to the Advocacy Section's claim that the City has not paid outstanding "facilities and maintenance" fees and National Grid's claim that the City stopped paying the full amount of its bills without any justification. The City asserts that it is properly paying all facilities and

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<sup>72</sup> Id., p. 6.

<sup>73</sup> Id., pp. 6-7.

<sup>74</sup> Id., pp. 7-8.

<sup>75</sup> Id., pp. 9-10.

maintenance fees and is paying National Grid “what National Grid is legally entitled....” East Providence explains that it only stopped paying for streetlights located on state roads.<sup>76</sup>

The City next makes a “statutory construction” argument that the Division must “enforce the General Assembly’s express purpose of municipal savings by applying the plain and ordinary meaning of the language of the... Act.” Specifically, the City rejects the Advocacy Section’s argument that ‘it is important first to understand the obligations of the parties pursuant to the act’ in order to interpret the Act. The City contends that understanding the obligations of the parties is irrelevant when applying the proper rules of statutory construction. The City likewise argues that reading the Act in conjunction with the routine regulatory constraints is also improper because such constraints are subservient to State law.<sup>77</sup>

The City next structured its remaining arguments to coincide with its principal four dispute claims in this docket, namely, (1) 60-day timeliness violations, (2) Rate S-05 Tariff violations, (3) Agreement of Sale and Attachment Agreement violations, and (4) requiring the purchase of lighting equipment located on State roads.

On the issue of timeliness violations, the City again argues that National Grid has used delay tactics to mitigate its losses under the Act at the expense of the City. The City argues that regardless of whether or not National Grid has a right to be compensated before or after the City acquires the Lighting Equipment,

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<sup>76</sup> Id., p. 11

<sup>77</sup> Id., pp. 12-13.

any violation of the 60-day deadline reduces the City's savings and, consequently, is a violation of the express purpose of the Act.<sup>78</sup>

The City asserts that the express purpose of the Act is to 'reduce municipal street lighting costs... by reducing maintenance costs... [and] eliminating the 'facilities charge.' The City argues that this savings can be effectuated quickly by National Grid, by having a "clerk" plug in a "different bill rate"... change the rate in the invoicing software – nothing more."<sup>79</sup> The City argues that there are "no 'transactions, obligations and considerations necessitated by the Act' that render a 'facilities charge' billing change impossible."<sup>80</sup>

The City reiterates that National Grid has never provided the City with an accurate compensation calculation. The City argues that the record suggests that National Grid's compensation calculation includes costs for lighting equipment that belong "to other entities/owners." The City also faults National Grid for its reliance on using "net book value" in its compensation calculation. The City argues that although the use of "net book value" was appropriate in the *AT&T Info. Sys., Inc. v FCC* case, which National Grid cites, such reliance is inappropriate here because the Commission never declared that using net book value is the only feasible approach to calculating the aggregate economic value of the equipment. The City also contends that if the General Assembly wanted National Grid to calculate its compensation using a net book value analysis it would have indicated so in the Act.<sup>81</sup>

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<sup>78</sup> Id., p. 14.

<sup>79</sup> Id., p. 15.

<sup>80</sup> Id.

<sup>81</sup> Id., pp. 16-18.



The City next attacked the Advocacy Section's and National Grid's defense of the Rate S-05 Tariff. Starting with the arguments that a proper challenge to the Rate S-05 Tariff required an appeal of the Commission's decision approving the Tariff, the City counters by arguing that the Act provides the Division with abundant jurisdiction to resolve any disputes involving the "alternative tariff." Based on this provision in the Act the City contends that the Division has the authority to overrule the Commission and order a rate calculation that complies with the Act.<sup>82</sup>

The City continues to argue that National Grid's Agreement of Sale and the Attachment Agreement violate the Act. With respect to National Grid's arguments in support of these agreements, the City rejects the notion that the Division must defer to the Commission's decision in Docket No. 4442. The City again argues that the Act provides the Division with the authority to resolve any disputes and determining the legality of these agreements falls under that authority. The City declares that the Commission "cannot give National Grid permission to break the law."<sup>83</sup>

The City also rejects the argument that it must sign the Attachment Agreement before the Division can "review" it. East Providence calls this "pretzel logic" and maintains that the Division has complete authority to examine the legality of the document. Further, by signing the Attachment Agreement first, the

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<sup>82</sup> Id., pp. 19-21.

<sup>83</sup> Id., pp. 22-23.

City contends that it would be providing National Grid with the defense that the City cannot seek review on an agreement that it already signed.<sup>84</sup>

The City also rejects National Grid's argument that anything other than the attachment agreement would be harsher than the standards National Grid generally imposes on third party attachment owners. The City argues that it cannot accept an attachment agreement that gives National Grid "the at-will, without-cause, right to revoke the City's license to attach its Lighting Equipment to National Grid's poles after spending hundreds of thousands of dollars acquiring the lights."<sup>85</sup>

The City also rejects the Advocacy Section's and National Grid's defense of the Agreement of Sale document. The City argues that it makes no sense to first acknowledge that the Commission determined that it had no jurisdiction and then use "the lack of findings inherent to any lack of jurisdiction as evidence of absence of a violation of state law." The City further argues that National Grid and the Advocacy Section cannot insist that the Commission vetted this agreement; "[a]s the sales agreement was outside the jurisdiction of the PUC, the PUC cannot be said to have vetted the agreement."<sup>86</sup>

The City also rebuffs the Advocacy Section's suggestion that the City has the ability to negotiate with National Grid. The City argues that it cannot negotiate when National Grid asserts "that it cannot and will not negotiate the

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<sup>84</sup> Id., p. 23.

<sup>85</sup> Id., pp. 23-24.

<sup>86</sup> Id., p. 24.

Compensation Calculation, Inventory, Attachment Agreement, Agreement of Sale, or really anything at all.”<sup>87</sup>

Finally, on the issue of legal property interest, the City contends that neither National Grid nor the Advocacy Section dealt with the fact that State road streetlights fall outside the Act’s definition of ‘Lighting Equipment.’ The City continues to assert that state property cannot be included in the City’s inventory of “municipal Lighting Equipment.”<sup>88</sup>

#### National Grid

In its reply brief, National Grid contends that “none of the disparate arguments that East Providence raises in its post-hearing briefing justify the relief that the City seeks.”<sup>89</sup> National Grid asserts that the Division should reject these arguments and permit National Grid to treat the City the same as every other municipality in Rhode Island seeking to purchase street lights.

National Grid takes exception, to what it calls, the City’s mischaracterization of the dispute as an attempt by National Grid to intentionally delay East Providence’s purchase “so that it can profit from the alleged delay.” National Grid argues that to accept this “false framing of the dispute” the Division “would have to disregard a critical fact: twenty-three cities, towns, and fire districts in Rhode Island have purchased their streetlight assets using the exact same process that National Grid has followed with East Providence.”<sup>90</sup>

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<sup>87</sup> Id., p. 25.

<sup>88</sup> Id., p. 26.

<sup>89</sup> National Grid Reply Brief, p. 1.

<sup>90</sup> Id.

National Grid also asserts that the City's argument that National Grid used varying methods to determine East Providence's inventory and purchase price is also wrong. National Grid explains that East Providence's inventory changed over time, as did the net book value of its inventory; that is why East Providence received different purchase prices at different points in time.<sup>91</sup> National Grid reiterates that it has applied the same methodology with East Providence that it used with every other municipal entity in Rhode Island to calculate the streetlight asset purchase price. National Grid emphasizes that it explained that methodology to the Commission in Docket No. 4442 and used that methodology each time East Providence requested the purchase price for its streetlight assets. National Grid notes that it bases this calculation on the relevant municipality's inventory, and the calculation includes depreciation of the relevant assets.<sup>92</sup> National Grid also argues that the City has provided no evidence that the different purchase prices that it received over time were the result of anything other than changes in inventory and changes in asset value.<sup>93</sup>

National Grid next addressed the City's dispute over the agreement of sale. As an initial observation, National Grid questions why the City "repeatedly conflates the Attachment Agreement and the Agreement of Sale. National Grid argues that the documents have distinctly different purposes and should not be confused. National Grid argues that because the attachment agreement was approved by the Commission, "the Division's jurisdiction is limited to resolving disputes that arise under the attachment agreement." However, as East

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<sup>91</sup> Id., pp. 1-2.

<sup>92</sup> Id., p. 2.

<sup>93</sup> Id., p. 3.

Providence has refused to sign the attachment agreement, National Grid contends that “there is no dispute for the Division to resolve.”<sup>94</sup> In contrast, the agreement of sale was considered but not incorporated into the Rate S-05 Tariff. National Grid argues that East Providence “neither offers any justification for why it should receive different terms of sale than other municipal entities that have purchased under the Act nor does East Providence identify a specific provision of the Agreement of Sale that is in dispute.”<sup>95</sup>

National Grid next argues that the Act determines exactly which streetlight assets the City can purchase. And because the Act does not differentiate streetlighting assets near a ‘state road,’ National Grid argues that this distinction is irrelevant to the issue. Instead, National Grid argues that the Act clearly requires East Providence to “purchase all lighting equipment which is currently charged to the municipality.”<sup>96</sup>

Finally, National Grid argues that East Providence must pay for the streetlight assets when it purchases them. National Grid argues against the City’s assertion that the Act allows the City to ‘acquire’ the streetlight assets before it pays for them. National Grid rejects the City’s legal argument that “the Act contemplates a transfer of property without any exchange of consideration or the signature on any contract documents.”<sup>97</sup> National Grid also describes the City’s argument as “impractical,” as it would require National Grid to “immediately turn off all lighting equipment in East Providence’s inventory 60

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<sup>94</sup> Id.

<sup>95</sup> Id., pp. 3-4.

<sup>96</sup> Id., pp. 4-5.

<sup>97</sup> Id., pp. 5-6.

days after East Providence sent its notice of intent to purchase in 2016.” National Grid argues that “[t]his does not make sense and it is unclear how turning off East Providence’s Streetlight Assets until East Providence paid for those assets would benefit the city or its residents.”<sup>98</sup>

In the end, National Grid argues that the Commission recognized in the Rate S-05 Tariff proceedings that the “acquisition of streetlight assets is a process that necessarily involves an attachment agreement, an agreement of sale, and an exchange of consideration.” National Grid points out that the Advocacy Section agrees and has concluded that “the practical reality is that the complete acquisition process, to include compliance with the conditions articulated in RIGL §39-30-3(b)-(e), may well require more than sixty (60) days from the date of initial notice of intent to purchase.”<sup>99</sup> National Grid agrees with the Advocacy Section on this point.<sup>100</sup>

### **Findings**

The Division has carefully reviewed the record in this docket and has considered the arguments presented by the parties. Predicated on this review and consideration, the Division has reached findings on the matters in dispute.

Starting with East Providence’s objection to the Advocacy Section’s party-status in Division dockets, it appears that the City has proffered a legal position and an ethics code violation allegation with little regard to the copious caselaw that exists which legitimizes the bifurcation of an administrative agency into investigatory, inquisitional (party-status) and adjudicative functions. Such

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<sup>98</sup> Id., p. 6.

<sup>99</sup> Id.

<sup>100</sup> Id.

separation of functions is “a common and recommended feature of administrative enforcement activity” and “not foreign to Rhode Island administrative procedures”<sup>101</sup> Indeed, the Courts have specifically recognized the Division’s Advocacy Section as a valid party in cases before a Division hearing officer.<sup>102</sup> The United States Supreme Court has ruled that in order to challenge an administrative process successfully on the grounds of a combination of incompatible functions, a respondent must show that the procedures “pos[e] such a risk of actual bias or prejudgment that the practice must be forbidden if the guarantee of due process is to be adequately implemented.”<sup>103</sup> A respondent who raises this sort of irregularity must overcome a “presumption of honesty and integrity in those serving as adjudicators... which presumption is a validating feature of our entire system of administrative law as presently constituted.”<sup>104</sup>

As for the Advocacy Section’s role as “ratepayer advocate,” East Providence is incorrect in its assertion that such role compels the Advocacy Section to blindly support the City’s complaint case against National Grid. The Advocacy Section is compelled to represent the interests of all of National Grid’s ratepayers, of which the City is only one.

#### 60-Day Timeliness Violation

The City argues that starting on September 27, 2016, National Grid was in violation of the sixty (60) day notice provision contained in the Act. As a result of

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<sup>101</sup> See La Petite Auberge, Inc. v. Rhode Island Commission for Human Rights, 419 A.2d 274 (R.I. 1980).

<sup>102</sup> See Desrosiers, et al v. Rhode Island Public Utilities Commission, Division of Motor Carriers, et al, 2001 WL 1685595.

<sup>103</sup> See Withrow v. Larkin, 421 U.S. 35 (1975).

<sup>104</sup> Id. and also La Petite Auberge, Inc. v. Rhode Island Commission for Human Rights, 419 A.2d 274 (R.I. 1980).

this alleged violation, the City contends that it has been economically harmed by having to continue paying under the standard streetlighting tariff (Rate S-14 Tariff), which includes facilities charges. East Providence maintains that National Grid has intentionally delayed the prescribed purchase process by refusing to provide the City with a proper cost estimate for the City's streetlighting assets. The City contends that National Grid has been unjustly enriched by these delays.

National Grid maintains that it satisfied the 60-day time limit by offering the City a complete closing package of documents on August 11, 2016, thirteen days after the City provided notice of its intent to purchase its streetlights. National Grid also argues that the Act requires East Providence to compensate National Grid as a condition-precedent to the transfer of streetlighting assets.

The Advocacy Section states that based on the record it cannot conclude that National Grid acted in bad faith. The Advocacy Section also opined that the delays that occurred in this matter beyond the 60-day time frame can be likened to negotiations between the parties.

After an examination of the record, the Division cannot agree with the City that National Grid violated the time constraints contained in the Act. The most troubling inconsistency in the City's argument is why it took the City until February 1, 2019 to file a complaint against National Grid if it believed that National Grid was required to transfer ownership of the City's streetlights by September 27, 2016. The City never explained why it took over 28 months to file its complaint. This fact alone suggests that East Providence was either not ready to consummate the purchase with National Grid or that it believed the purchase price was being negotiated during this timeframe.



The record simply does not support a finding that National Grid purposely delayed the streetlight purchase process, for its own profit, as the City alleges, or for any other reason. Instead, the record reflects that the East Providence City Council only approved the streetlight purchase from National Grid on September 18, 2018, nearly two years after the September 27, 2016 date the City argues triggered the violation. Moreover, the minutes of the Council's meeting reflect that Councilman Faria attributed the two-year delay to the "negotiating" that was going on with National Grid over the purchase price.<sup>105</sup> Though there was a brief discussion about the applicable attachment agreement, no one at the Council meeting expressed frustration with National Grid or accused National Grid of unreasonable delays or nefarious intent.

The Division also cannot agree with the City's assertion that its savings should have begun prior to the execution of an agreement of sale and the compensation due National Grid. The Act provides that "any municipality exercising the option to convert its lighting equipment... must compensate the electric distribution company...." The Act also provides that: "[u]pon 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." The above provision makes it clear that the transfer of ownership does not ensue until compensation takes place. Therefore, the City's argument that National Grid should have transferred the City over to a lower tariff rate sixty

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<sup>105</sup> Joint Exhibit 1, Tab 8. Councilman Faria stated that his negotiations resulted in a reduction of the purchase price to \$218,000, from an original amount of \$300,000.

(60) days after its notice of intent to purchase its streetlights appears rather incongruous with the clear wording contained in the Act.

The City also contends that if it was required to compensate National Grid before a transfer of the lighting equipment could take place, National Grid was required to provide the City with an accurate compensation calculation and figure within the 60-day deadline. The problem with this argument is the fact that East Providence waited 28 months to file its complaint with the Division. If the City genuinely believed that National Grid's August 11, 2016 compensation calculation and figure was in violation of the Act, it should have taken its dispute to the Division immediately. Instead, it alternatively decided on a self-help remedy and unilaterally withheld payments commensurate with what it believed to be a proper compensation calculation and tariff rate, presumably as a negotiating tactic. The Division finds this self-help remedy grossly inconsistent with the requirements of the Act. The Division also finds that the City's decision to not accept National Grid's August 11, 2016 closing documents and compensation calculation does not manifest a violation by National Grid of the Act's 60-day deadline.

#### Whether Rate S-05 Tariff Violates the Act

The City has attacked the validity of the S-05 Tariff on multiple grounds. Claiming first that the Tariff violates the Act because it adopts a new rate for currently existing lighting equipment. The City has characterized this as an "illegal rate hike."

The City also asserts that the Tariff violates the Act by requiring municipalities to purchase "street and area lighting facilities" and sign a purchase

and sale agreement and an attachment agreement before municipalities can benefit from the savings contemplated in the Act. The City argues that this requirement compels municipalities to continue to have to pay the facilities charge beyond the 60-day deadline.

National Grid and the Advocacy Section both argue that the Division lacks the authority to invalidate the Rate S-05 Tariff due to Commission's exclusive jurisdiction over National Grid's rates. Both maintain that a grievance against the Commission's decision in Docket No. 4442 and/or the validity of the Rate S-05 Tariff should have been pursued through an appeal to the Court.

East Providence is essentially arguing that the Commission's approval of the Rate S-05 Tariff was illegal. The City contends that the provisions of the Rate S-05 Tariff are violative of the mandates under the Act and incompatible with the legislative intent behind the enactment of this statutory law. In seeking a remedy to this alleged illegal tariff, the City has asked the Division to abrogate the Commission's decision and nullify or compel amendments to the Rate S-05 Tariff. The City insists that the Act confers all of the jurisdictional authority the Division requires to approve the City's request.

Unquestionably, such an extraordinary demand for relief requires an analysis of the Division's *de facto* jurisdiction to overturn a final decision of the Commission. Beginning with the Act itself, which the City asserts provides sufficient jurisdiction for the Division to nullify the Commission-approved Rate S-05 Tariff, the Division's authority is described as follows:

Any dispute regarding the terms of the alternative tariff, the compensation to be paid the electric distribution company, or any other matter arising in connection with the exercise of

the option provided in subsection (a), including, but not limited to the terms on which space is to be provided to the municipality in accordance with subsection (c), shall be resolved by the division of public utilities and carriers....”

In order to best interpret the limits of the above provision, the Division is obligated to weigh this grant of authority against existing statutory law and caselaw precedent.

The Commission is statutorily empowered to “serve as a quasi-judicial tribunal with jurisdiction, powers and duties to... hold hearings involving the rates, tariffs, tolls, and charges... of... electric distribution... public utilities.”<sup>106</sup> In contrast, the Division “shall exercise the jurisdiction, supervision, powers, and duties not specifically assigned to the commission...”<sup>107</sup> Accordingly, on the issue of rates, the General Assembly has made it clear that the Commission has exclusive jurisdiction over National Grid’s rates.

The Rhode Island Supreme Court has held that the rate that the Commission approves for a utility carries a presumption of reasonableness that remains until the contrary is proven.<sup>108</sup> The same Court also held that it is the function of the Division to serve the Commission in bringing to it all relevant evidence, facts and arguments which will lead the Commission in its quasi-judicial capacity to reach a just result.<sup>109</sup> The Division performed this function in Docket No. 4222; and the Commission’s decision in that case carries a presumption of reasonableness. The Rhode Island Supreme Court has also held that once the Commission has made its decision, it is inappropriate for the

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<sup>106</sup> R.I.G.L. §39-1-3.

<sup>107</sup> Id.

<sup>108</sup> In Re: Island Hi-Speed Ferry, LLC, 852 A2.d 524 (R.I. 2004).

<sup>109</sup> Providence Gas Company v. Burke, 419 A.2d 263 (R.I. 1980).

Division and its Administrator to challenge that decision.<sup>110</sup> In the instant matter, East Providence is urging the Division to do just that, to challenge the Commission's decision in Docket No. 4442 by now declaring the Rate S-05 Tariff invalid.

The City has argued that there are many legal deficiencies in the Rate S-05 Tariff and that the Division has the authority to correct those deficiencies. However, in view of the totality of pertinent statutory law and caselaw precedent, the Division must find that it lacks sufficient authority to overturn a Commission decision that establishes rates and charges for National Grid. The language in the Act that purports to provide the Division with broad powers to resolve any dispute, must, in the interest of employing proper statutory construction, be read in harmony with these other legal tenets.<sup>111</sup> In this regard, the Division must interpret the authority conferred through the Act as limited authority to resolve disagreements over the proper application of, or the accuracy of calculations provided under, National Grid's Rate S-05 Tariff, not to entertain arguments to nullify the tariff and replace it with another rate calculation methodology.

#### Dispute over Agreement of Sale and Attachment Agreement

The City argues that National Grid's agreement of sale and attachment agreement violate the Act because these agreements improperly restrict the City's use and type of lighting equipment options and because these agreements only provide a "revocable" mounting license. The City further objects to the non-negotiable posture that National Grid has displayed over these agreements.

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<sup>110</sup> Id.

<sup>111</sup> See Bailey v. American Stores, Inc./Star Market, 610 A.2d 117 (R.I. 1992).

In its defense, National Grid points to the other 23 Rhode Island municipalities and fire districts that have executed similar agreements and the fact that the Commission approved the Company's Attachment Agreement when it approved the Rate S-05 Tariff. National Grid also rejects the City's effort to reach "a better deal." With respect to the agreement of sale, National Grid emphasizes that while the Commission found that it lacked jurisdiction to approve National Grid's agreement of sale in Docket No. 4222, neither the Commission nor any intervenor raised concerns with any violations of the Act.

The Advocacy Section defers to the Commission on its approval of National Grid's attachment agreement. The Advocacy Section also contends that any concerns about violations of the Act ought to have been pursued before the Court, not before the Division under the dispute resolution provision in the Act.

The Division has reviewed the Commission's decision in Docket No. 4222 with respect to the question of the "revocable" nature of National Grid's attachment agreement. Although the Division's witness in that case (Richard Hahn) also expressed concerns over the attachment agreement's revocation clause, this same witness fully accepted an amended attachment agreement that National Grid later proffered in that docket. It was this amended attachment agreement that was approved by the Commission, the same attachment agreement that National Grid has presented to East Providence in the instant matter.

Again, the Division is not in a position to vacate or abrogate a Commission decision. The Commission approved National Grid's attachment agreement in the context of its Rate S-05 Tariff approval in Docket No. 4222. Although the

Commission likened the attachment agreement to “terms and conditions” in that docket, the Division must still recognize the Commission’s authority over the “terms and conditions” of public utilities, which are routinely vetted and approved by the Commission during rate cases.

In the City’s complaint, the City is not seeking a resolution to a dispute over the meaning of a term used in National Grid’s attachment agreement. The City is requesting that the Division categorically reject a provision that was previously vetted and approved by the Commission. For the reasons cited above in connection with the propriety of the Rate S-05 Tariff, the Division is unable to grant the City the relief it seeks.

The agreement of sale, on the other hand, was not approved by the Commission. In fact, the Commission concluded that this closing document was not subject to its regulatory purview. Therefore, the Division may address disputes over the content of National Grid’s Agreement of Sale.

However, after examining the City’s complaint and arguments on the issue, the record fails to present a discernable dispute particular to the agreement of sale used by National Grid. East Providence makes a convincing argument that the Division has the necessary authority to consider the City’s difficulties with the agreement of sale; but fails to articulate what, specifically, is the origin of the dispute over the document.

#### Lighting Equipment located on State Roads

East Providence has couched the issue as whether it is required to purchase lighting equipment for which the City has no legal property interest. Boiled down, however, the issue is really whether National Grid can compel the

City to purchase lighting equipment located on so-called “State roads.” The issue appears limited to lighting equipment on State roads as there is no evidence in the record to suggest that privately-owned or federally-owned lighting equipment is involved in the dispute.

Ironically, both the City and National Grid rely on the same language in the Act in support of their respective positions. The City argues that a streetlight is only Lighting Equipment” under the definition in the Act “if its associated costs are charged to the municipality.” The City asserts that this inherently means that the inclusion of State road streetlights in the calculation is impermissible because such State road streetlights are not properly chargeable to East Providence. The City also relies on language contained in National Grid’s standard streetlighting tariff (Rate S-14 Tariff) to argue that because the City is not responsible for controlling vegetation and granting easements on State roads, it cannot be considered to have an ownership interest in the streetlighting equipment located on State roads. The City contends that charges to the City for streetlights on State roads is *void ab initio* and must be rejected by the Division. The City also maintains that its past payments for these streetlights “do not make said charges legal.”

National Grid counter-argues that the Act defines what assets the City must purchase and that streetlighting on State roads is not exempted from the City’s obligations under the Act’s right to purchase provisions. National Grid asserts that under Section 39-30-3(a)(3) of the Act, the City has a right to “acquire all of the public street and area lighting equipment of the electric distribution company in the municipality” and that under Section 39-30-2 of the



Act, that lighting equipment is defined as “all equipment used to light streets in the municipality, the operation and maintenance of which is currently charged to the municipality...”

The record in this case reflects that East Providence has historically been charged for all of the streetlights located on State roads in the City. The record also reflects that East Providence has historically paid those charges, only refusing to pay since September 27, 2016. The Division finds that under these factual circumstances, it would be difficult to accept the City’s argument that these streetlights should now be considered the responsibility of the State.

It is apparent to the Division that the City, through this argument, is endeavoring to shift or transfer a significant portion of its streetlighting costs to the State - without the State’s knowledge or approval. For such a transfer of costs to be appropriate, the Rhode Island Department of Transportation (“RIDOT”) would have to accept this change. Or the City would have to successfully challenge the State in Court over this streetlighting cost responsibility question. Without such approval by RIDOT or successful Court challenge, to accept the City’s argument would mean that the City would tacitly be approving of shutting down all streetlighting on State roads in the City of East Providence. Though the Division must question the wisdom of this approach to cutting costs, it is clear from the plain meaning of the wording in the Act that these streetlights are properly included in the City’s inventory of lighting equipment assets and not the responsibility of the State.

### Conclusion

Predicated on the findings discussed above, the Division finds insufficient evidence and legal justification to grant the City's request for relief. The record reflects that National Grid is properly adhering to a Commission-approved tariff and attachment agreement and that it did not fail to comply with the time limitations contained in the Act. The Division further finds that East Providence's argument against National Grid's agreement of sale is, in effect, really an argument against having streetlights that are located on State roads from being included in East Providence's inventory of streetlighting assets; a legal argument that the Division finds is unsupported under the relevant provisions contained in the Act.

Accordingly, it is

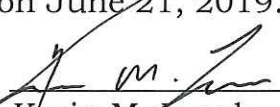
(23619) ORDERED:

1. That the City of East Providence's February 1, 2019 complaint filing and request for relief against National Grid – Electric, made pursuant to the *Municipal Streetlight Investment Act*, is hereby denied and dismissed.
2. That the City of East Providence shall pay National Grid the outstanding arrearage that has accrued since the City began withholding payment

Dated and Effective at Warwick, Rhode Island on June 21, 2019.

  
John Spirito, Jr., Esq.  
Hearing Officer

APPROVED: \_\_\_\_\_

  
Kevin M. Lynch  
Deputy Administrator<sup>112</sup>

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<sup>112</sup> Normally, the Administrator of the Rhode Island Division of Public Utilities and Carriers ("the Administrator") would approve and sign Orders such as this. In his absence, and pursuant to the authority granted by R.I.G.L. §§ 42-20-3 and 42-20-5, Deputy Administrator Lynch has been designated and authorized by the Administrator to sign Final Orders of the Division.