August 25, 2003

Luly Massaro, Clerk
Public Utilities Commission
89 Jefferson Blvd.
Warwick, RI 02888

Re: Docket No. 3400

Dear Ms. Massaro

The Public Utilities Commission ("Commission") has requested the Division of Public Utilities and Carriers ("Division") to brief the following issues:

1. Whether the Commission has the authority under either state or federal law to order a surcharge to fund the proposed program; [1] and

2. Whether the Commission can order a surcharge during a distribution freeze period.[2]

Memorandum Dated July 11, 2003.

Under the Rhode Island General Laws, public utilities are prohibited from giving any undue or unreasonable preference or advantage to any person, G.L. § 39-2-3. Public utilities are also prohibited from discriminating against any person, firm or corporation by charging them a greater or lesser amount for a like and contemporaneous service

[1] The answer to the third question contained in the memorandum-whether a PIP-type program violates state or federal is reflected by the response to the first question.

[2]Nothing in Docket Nos. 2930 and 3401 bars the Commission from raising rates in a separate docket so long as procedural due process requirements are satisfied. See Orders 16200, 16208 (Docket No. 2930) and Order 17381 (Docket No. 3401).

under substantially similar circumstances and conditions. The limited exceptions to these prohibitions are set forth in G.L. § 39-2-5. By its terms, neither G.L. § 39-2-5 nor § 39-2-5(10) authorizes the Commission to impose a "surcharge" upon different classes of ratepayers for the purpose of subsidizing the forgiveness of arrearages of one particular class of ratepayers.

The Rhode Island Supreme Court has held that the Commission "erred in relying upon the ability of consumers to pay for services in setting a cost of equity." Narragansett Electric Co. v. Harsch, 368 A.2d 1194, 1201 (R.I. 1977). The Court extended this principle in Blackstone Valley Chamber of Commerce v. Public Utilities Comm'n, 396 A.2d 102 (R.I. 1986) stating that "public service companies are not eleemonsynary institutions." "Through taxation only," the Court reasoned, "in common with all taxpayers, can they be compelled to contribute to the relief of the distressed." Blackstone Valley, 396 A.2d at 126 (quoting State ex rel. Sound Power & Light Co. v. Department of Public Works, 38 P.2d 350 (Wash. 1934)). Thus, "in the absence of specific statutory authority for the commission to mandate such a result," "commercial, industrial and non-residential enterprise" customers cannot be "compelled to devote their property in the form of utility payment for the benefit of those deemed worthy by the commission to be subsidized." Id. at 127.

For this reason and those set forth in its Addendum, the Division does not believe that the Commission can or should adopt a PIP-type program in the absence of an independent non-ratepayer funding source and the appropriate legislative authority established by the General Assembly.

Respectfully submitted,

Division of Public Utilities and Carriers

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Special Assistant Attorney General