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August 25, 2003

Hand-delivered

Ms. Luly E. Massaro, Commission Clerk
Public Utilities Commission
89 Jefferson Blvd.
Warwick, RI 02889

Re: Docket 3400 (Debt Forgiveness)

Dear Ms. Massaro:

Enclosed for filing please find original and nine copies of Pre-Hearing Memorandum of the George Wiley Center and the Advocacy Groups.

Very truly yours,

John B. Lawlor, Jr.

cc: Service List

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS
PUBLIC UTILITIES COMMISSION

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| *In re* IMPLEMENTATION OF | ) | |
| | ) | Docket # 3400 |
| DEBT FORGIVENESS PLAN | ) | |

**PRE-HEARING MEMORANDUM**
**OF THE GEORGE WILEY CENTER**
**AND THE ADVOCACY GROUPS**

This memorandum is submitted by the George Wiley Center and affiliated advocacy groups. The commission has asked the parties to brief the following questions: (1) whether the commission has the authority under either state or federal law to order a surcharge to fund the proposed program; (2) whether the commission could order a surcharge during a distribution rate freeze period; and (3) whether the proposed surcharge would violate any provision of state or federal law. These issues will be addressed in turn after a recitation of the facts pertinent to each argument.

**1. The commission has the power to implement final approval of a plan to which the utilities have lent their substantial initiative through participation in the planning process.**

This Docket 3400 is an investigation initiated by the commission. By decision and order in a previous case (Docket 1725), the commission had ordered, among other things, that "a new docket is hereby established to examine the feasibility of implementing a debt forgiveness policy for arrearages on gas and electric utility bills." *In Re Regulations Governing Termination of Residential Electric, Gas and Water Utility Service*, (R.I.P.U.C. Docket No. 1725; order of Jan. 28, 2002), at

11. The commission had specifically found in Docket 1725 that it lacked information on how to fund a debt forgiveness program. *See id*. at 9.

By statute, the commission has authority to hold investigations and hearings involving the rates and charges of gas and electric utilities. R.I. GEN. LAWS § 39-1-3.[1] By statute, the commission also has "all additional, implied, and incidental power which may be proper or necessary to effectuate [its] purposes." R.I. GEN. LAWS § 39-1-38.[2] The commission also has all "the powers of a court of record in the determination and adjudication of all matters over which it is given jurisdiction." R.I. GEN. LAWS § 39-1-7.[3] The General Assembly has declared that these provisions shall be "interpreted and construed liberally." R.I. GEN. LAWS § 39-1-38 (quoted in n.2 above). The Rhode Island Supreme Court has held that the "statutory sentiment to which we have just alluded represents a clear legislative intent to grant the commission broad powers as it seeks to establish a system of rates which will be just and equitable to all concerned including the utility and its customers." *Rhode Island Chamber of Commerce Federation v. Burke*, 443 A.2d 1236, 1237 (R.I.

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[1]R.I. GEN. LAWS § 39-1-3 provides in pertinent part as follows:
" * * * The commission shall serve as a quasi-judicial tribunal with jurisdiction, powers, and duties * * * to hold investigations and hearings involving the rates, tariffs, tolls, and charges, and the sufficiency and reasonableness of facilities and accommodations of * * * gas [and] electric distribution * * *."

[2]R.I. GEN. LAWS § 39-1-38 provides in pertinent part as follows:
"The provisions of this title shall be interpreted and construed liberally in aid of its declared purpose. The commission * * * shall have, in addition to powers specified in this chapter, all additional, implied, and incidental power which may be proper or necessary to effectuate [its] purposes. * * *"

[3]R.I. GEN. LAWS § 39-1-7 provides in pertinent part as follows:
"The commission shall have the powers of a court of record in the determination and adjudication of all matters over which it is given jurisdiction. It may make orders and render judgments and enforce the same by any suitable process issuable by the superior court. * * *"

1982).

The method of funding is, of course, the very matter that is being investigated in this case, and the case law has been clear for almost twenty years that the obvious method for funding such a plan is through a surcharge on rates. *See Montgomery County Bd. of Comm'rs v. Public Utilities Commission*, 503 N.E.2d 167, 179 (Ohio 1986)(Wright, J., concurring)(no viable course appears to be available besides a rate surcharge; "it makes no sense at all to find that an emergency exists and not sanction a reaction to that emergency by way of altering rates."). *See also Arkansas Gas Consumers, Inc. v. Arkansas Public Service Comm'n*, 91 S.W.3d 75 (Ark. App. 2002)(upholding rate surcharge funding low-income gas reconnection policy); *Consumers Power Co. v. ABATE*, 518 N.W.2d 514 (Mich. App. 1994)(upholding surcharge to fund energy assistance program for the poor). The Rhode Island P.U.C. has repeatedly approved company-filed tariffs that include such a low-income surcharge. *See, e.g.,* Narragansett Electric's A-60 Low-Income Rate (R.I.P.U.C. No. 1128) (http://www.narragansett.com/filelib/pdf/nec-rate.pdf#page=13). No reason appears why the Commission may not request companies to file proposals for payment assistance plans to be submitted for commission approval.

In conducting its investigation, the commission has a statutory duty to be "impartial." R.I. GEN. LAWS § 39-1-11.[4] Unfortunate dicta in another previous case causes the advocacy groups to stress the commission's duty to avoid prejudging the merits. Referring in Docket 3423 to the investigation pending in Docket 3400, the commission unfortunately misspoke as follows: "The

[4]R.I. GEN. LAWS § 39-1-11 provides in pertinent part as follows:
" * * * The commission shall sit as an impartial, independent body, and is charged with the duty of rendering independent decisions affecting the public interest and private rights based upon the law and upon the evidence presented before it by the division and by the parties in interest."

Commission expects that any proposal for a debt forgiveness program will have an independent funding source that will not include socializing the costs of a debt forgiveness program among other utility ratepayers." *In Re: Request to Amend the Rules and Regulations Governing Terminations of Residential Electric, Gas and Water Utility Service*,(R.I.P.U.C. Docket No. 3423; order of April 16, 2002), at 5. This apparent prejudgment of the very issue under investigation in Docket 3400 violated the mandate of impartiality and for that reason did not become the law of the case.

When the commission opened the present docket, the utilities --- including Narragansett Electric Co. and New England Gas Co. --- created a working group that included the utilities' managers and lawyers. The utilities were not compelled to participate: the initiative was theirs to participate voluntarily or not as they so chose, and they chose for eighteen months to undertake substantial participation toward implementing a debt-forgiveness solution. The working group met periodically at the P.U.C. offices, and it filed working papers with the commission at sixty-day intervals approximately. The utilities provided data and their practical insight into a plan for forgiving arrearages in accordance with the terms of a percentage of income payment plan administered by the governor's office of energy assistance for low-income households who are eligible to receive funds under the federal Low Income Home Energy Assistance Program (hereinafter "LIHEAP"). In this regard, the working group's work closely tracked an enabling statute enacted by the General Assembly. *See* R.I. GEN. LAWS § 39-2-5(10).[5]

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[5]R.I. GEN. LAWS § 39-2-5 ("Exceptions to anti-discrimination provisions") provides in pertinent part as follows:

* * *

"(10) Nothing in this section nor any other provision of the general laws shall be construed to prohibit any public utility with the approval of the commission, from forgiving arrearages of any person in accordance with the terms of a percentage of income payment plan administered by the governor's office of energy assistance for low-income households who

Recently the view of the advocacy groups has been that the working group became lethargic as it stalemated over how funding should be achieved. The facilitator of the working group therefore prepared a document that he felt could be a consensus document, reflecting agreement as to first principles and program design. That document, which is signed by New England Gas and the advocacy groups, is entitled "Long-Term Arrearage Management Solutions for Rhode Island," (hereinafter the "Plan"), which the State Energy Office filed with the commission. In addenda to the consensus document filed with the commission, the utilities have taken the position that stalemated the working group. The utilities take the position that the investigation has failed to identify a funding mechanism other than a rate surcharge. For their part, the advocacy groups, in addenda filed with the commission, point to a surcharge on rates as the obvious funding mechanism.

This commission has the duty to investigate the funding issue impartially, and it has all additional, implied and incidental power to effectuate the purpose it had in opening the investigation, namely to implement a debt-forgiveness program for poor people. In this case, the utilities have contributed the initiative for the Plan that the law requires. *See Rhode Island Consumers Council v. Smith*, 111 R.I. 271, 302, 302 A.2d 757, 775 (1973). Having once consented to the commission's process in this docket, it is not possible for the utilities now to evade the commission's power of approval. *Cf., e.g., Pitchell v. Hartford,* 722 A.2d 797 (Conn. 1998)(having consented to jurisdiction, party may not thereafter withdraw); *McDonough v. McDonough,* 227 Cal. Rptr. 872 (Cal. App. 1986)(same). Having the powers of a court of record, and also implied and incidental powers as necessary to effectuate its purpose, the commission has the administrative discretion to fashion a remedy in this docket. The commission has the power to finish what the utilities' working

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are eligible to receive funds under the federal low income home energy assistance program."

group undertook and started. The utilities' substantial undertaking in hammering out the Plan and signing it satisfies the enabling statute's requirement of utility initiative and puts the case in a posture where the commission may now give its approval to a rate surcharge to fund the Plan.

A recent decision, addressing commission power to fund a surcharge for relief of the poor, upheld commission power, which the court found to be implied in the code's various, general statutory sections read together as the legislature intended. *See Arkansas Gas Consumers, Inc. v. Arkansas Public Service Comm'n,* 91 S.W.3d 75 (Ark. App. 2002)(upholding rate surcharge funding low-income gas reconnection policy). In the *Arkansas Gas* case, the commission opened a docket on its own initiative to consider an assistance program designed to help low-income families in Arkansas obtain reconnection of their natural gas service before the onset of cold winter weather. Finding no alternative to a rate surcharge, the commission issued an order that found as follows:

> "Many of these disconnected homes are occupied by low income families that are simply unable financially to raise the necessary dollars to have their disconnected gas service restored. Recognizing that another winter season is about to begin and also in anticipation of another winter of high natural gas costs, the commission proposed the implementation of the [arrearage policy]. Without assistance, many of these low-income families will be facing winter without heat for their homes. Without heat, the health, lives and safety of these families will be threatened. Accordingly, the commission determined that the public interest required the expeditious consideration and implementation of an appropriate low-income family gas reconnection policy."

*Id.* at 80. On appeal, the reviewing court wrote a thorough opinion that upheld the commission's rate surcharge against a variety of challenges. The court specifically held that the commission had the discretion to order relief in the form of a surcharge if it so chose. *Id.* at 87. The similarity of the Arkansas case to the present docket is striking and persuasive, and Rhode Island should follow that state's enlightened lead.

The commission has asked for the parties' thoughts on federal considerations, and it appears

that federal policy likewise favors protecting low-income citizens from the catastrophic effects of impossible energy burdens and from unreasonable service terminations owing to inability to pay. *See generally* 15 U.S.C. §§ 3203, 3204 (2003)(standards governing termination of gas service for low-income, elderly, and handicapped persons unable to pay in accordance with utility's billing); 16 U.S.C. § 2624 (2003)(lifeline rates of electric utilities). These federal statutes, taken together, have been held to constitute persuasive authority for upholding rate relief for low-income residential gas customers who experienced hardship in paying their winter heating bills. *See Great Lakes Steel Div. of Nat. Steel Corp. v. Michigan Pub. Serv. Comm'n*, 344 N.W.2d 321, 327 (Mich. App. 1983). Moreover, it goes without saying that the federal LIHEAP program states a national policy in favor of providing low-income home-energy assistance. *See* 42 U.S.C. § 8621, *et seq.* (2003).

In this docket, the commission has the power to implement final approval of a plan to which the utilities have lent their substantial initiative through participation in the planning process. The commission should so hold and order the rate surcharge advocated by the George Wiley Center and the advocacy groups.

**2. The commission may order a surcharge notwithstanding the rate freezes.**

Narragansett Electric's electric rates, and New England Gas's gas rates, are presently subject to the terms of rate freezes, and the commission has asked the parties whether the commission may order a surcharge during a distribution rate freeze period. The answer is that neither rate freeze was intended to freeze out the subject of low-income debt forgiveness or a surcharge to fund it.

The Narragansett Electric rate freeze took effect in March, 2000, in Docket No. 2930. For present purposes it suffices to say that the settlement in that case froze electric rates through

December 31, 2004, subject to certain conditions not applicable here. *See In Re: Consolidation and Adjustment of Rates for Narragansett Elec. Co., et al.*, (R.I.P.U.C. Docket No. 2930; report and order of March 24, 2000), at 8. Debt-forgiveness for low-income customers was not an issue in the case. The George Wiley Center and the advocacy groups were not parties to that case. In its order, the commission expressly reserved the right to review and where required to modify electric rates in accordance with its ongoing, nondelegable, statutory duty. *Id.* at 12.

The New England Gas rate freeze was approved on May, 23, 2002, and the order followed on February 28, 2003, in Docket No. 3401. For present purposes it suffices to say that the settlement in that case froze distribution rates through June 30, 2005. *See In Re: New England Gas Co. Rate Consolidation Filing*, (R.I.P.U.C. Docket No. 3401; report and order of February 23, 2003), at 63. The George Wiley Center was an intervenor in that case. The topic of a low-income debt-forgiveness program was in the air during hearings before the settlement, but the chairman admonished a witness for the low-income intervenors from testifying in any detail in Docket 3401 about the need for a debt-forgiveness program. The chairman reasoned that the commission had opened Docket 3400 for that express purpose and that testimony in the rate case about debt forgiveness was out of order. *See* Hearing Transcript of May 6, 2002, at 18.[6] When the case settled,

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[6]The hearing transcript for that day contains colloquy between witness Margaret Rogers and Chairman Germani as follows.:

WITNESS: * * * And I really – I think that a forgiveness plan needs to be that third leg; and I think it can be included in this docket. * * *

THE CHAIRMAN: Ms. Rogers.

THE WITNESS: I know what you're going to say I bet. I bet you're going to say you don't want the ratepayers included in that.

the low-income intervenors did not agree to the settlement, and they were not signatories to the settlement agreement. Since debt-forgiveness was not a part of the gas litigation, it follows that neither was it a part of the settlement, nor foreclosed by the settlement. The commission left debt-forgiveness for another day, and that day is now.

The California P.U.C. (CPUC) has considered whether a commission may order a surcharge while otherwise maintaining a rate freeze; the commission ordered the surcharge. The proceedings are described in *Pacific Gas & Elec. Co. v. Lynch*, 216 F. Supp. 2d 1016, 1023 (N.D. Cal. 2002), which is a related case. The California legislature had enacted a retail rate freeze as part of electric-restucturing legislation, but PG&E lost billions when prices went up in the wholesale-supply market. PG&E petitioned for a general, retail rate increase but was denied because of the freeze. PG&E filed for bankruptcy and petitioned the CPUC for a surcharge. The CPUC first granted a $.01/kWh emergency surcharge,[7] then later approved a further $.03/kWh surcharge, while noting that the rate freeze would otherwise remain in effect.[8]

The advocacy groups are at pains to point out that to call Rhode Island's present situation a rate freeze is an oversimplification. The P.U.C. orders approving the "rate freezes" are rife with large exceptions written into them, and in fact both Narragansett Electric and New England Gas have raised rates with the commission's approval during the so-called "rate freezes." Thus, cases in Rhode Island and California make clear that the utilities, when it suits their purposes, seek and obtain

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THE CHAIRMAN: Don't anticipate what I'm going to say, you might be wrong. I was going to point out to you that a forgiveness program is another docket we established.

[7]CPUC D01-01-018 (January 4, 2001).

[8]CPUC D01-03-082 (March 27, 2001).

rate increases during a rate freeze. This commission should hold that a debt-forgiveness program is a matter not covered by the Rhode Island rate freeze. Notwithstanding the rate freeze, this commission has the authority to order a surcharge to fund a debt-forgiveness program for low-income LIHEAP recipients.

The commission should so rule.

**3. The proposed Plan otherwise comports with applicable law.**

At the prehearing conference, counsel for Narragansett Electric posed as an issue the concern that the Plan might be said to unlawfully discriminate in favor of those low-income ratepayers who would benefit from the plan. Rhode Island law prohibits the commission from setting rates that give an "unreasonable" or an "undue" preference or advantage. *Energy Council v. Public Utilities Comm'n,* 773 A.2d 853, 862 & n.9 (R.I. 2001)(broadly characterizing statutes discussed in the case).[9]

Courts have divided on the general permissibility of rates favoring the poor. *See generally* Annot., *Public Utilities: Validity of Preferential Rates for Elderly or Low-Income Persons,* 29 A.L.R. 4th 615 (2003). In this case, the Plan proposes a volumetric surcharge. It would raise rates approximately 1%. The volumetric surcharge would apply equally to all classes of ratepayer, including the low-income people benefitted by the Plan, who likewise would be subject to the surcharge. The Rhode Island Supreme Court has held that where the increase is spread "across the board among several customer classes, a presumption arises that the new rates are reasonable and nondiscriminatory." *Blackstone Valley Chamber of Commerce v. Public Utilities Comm'n,* 121 R.I. 122, 396 A.2d 102, 104 (1979). This surcharge is entitled to that presumption.

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[9] *See* R.I. GEN. LAWS §§ 39-2-2 through 39-2-4.

Rate differentials that are justified on a cost basis do not "unreasonably" discriminate. *See Rhode Island Chamber of Commerce Federation v. Burke,* 443 A.2d 1236, 1239 (R.I. 1982). In that case the Rhode Island Supreme Court wrote :"But if the commission properly found the differential in price was justified by a differential in the utility's cost of providing service, then the new rates are a valid expression of the commission's authority to allocate the cost of service." *Id.* Cost factors could be said to justify the surcharge in this case. A leading author has written, "The cost of service to low-income customers includes the cost of collections, terminations, and reconnections necessitated by the difficulties these ratepayers have in paying a rate which may be unaffordable to them. A commission or court might reasonably conclude that a lower rate to low-income households is justified by the utilities' savings realized from the fewer terminations and lower arrearages which will result from a more affordable rate." MARGOT SAUNDERS, ACCESS TO UTILITY SERVICE § 9.6.3.4 & n.229, at 243 (2d ed. 2003).

A cost differential supporting the proposed surcharge is sufficient to uphold the rate, but in Rhode Island it is not necessary. *Energy Council v. Public Utilities Comm'n,* 773 A.2d 853, 862 & n.9 (R.I. 2001)(rejecting argument equating discrimination with lack of cost differential). A Rhode Island statute prevents utilities from collecting "a greater or less compensation * * * than it charges * * * for a like and contemporaneous service under substantially similar circumstances and conditions * * *;" R.I. GEN. LAWS § 39-2-2(a); but even this statute is satisfied. LIHEAP customers for whom basic service is still not affordable face desperate economic circumstances and endure tenuous conditions of survival that other ratepayers do not endure; and thus the statute permits the commission to treat the desperately needy differently than other ratepayers. The fact that the "affordable energy bargain" under consideration in this case benefits only the neediest of the needy

is an equity that justifies the Plan and satisfies the antidiscrimination statutes. *See American Hoechest Corp. v. Department of Public Utilities,* 399 N.E.2d 1 (Mass. 1980)(justifying preferential rate for "the neediest of the needy").[10]

The final point to be made about discrimination is that the enabling statute that directed the working group's product contains a statutory exception to the discrimination provisions of the general laws: Thus, the discrimination objection is fully cured by the enabling statute. The enabling statute is framed as a list of legislative exceptions to the nondiscrimination principle, and the Plan clearly falls within the safe harbor of subsection 10 of that statute. *See* R.I. GEN. LAWS § 39-2-5(10)(titled "Exceptions to anti-discrimination provisions;" statute quoted in full at note 5 above). The affordable energy bargain outlined by the Plan seeks to limit a qualifying household's energy burden calculated as a percentage of income, as the statute requires. To the end of assisting eligible families against oppressive shutoffs, the Plan provides for a one-time arrearage forgiveness, which is also authorized by the statute. The Plan would be administered through the State Energy Office, as the statute envisions. The Plan would benefit only those households found eligible for LIHEAP assistance, as the statute requires. Having met the elements of the statute, the Plan falls within the statutory exception to the antidiscrimination provisions of the General Laws. Narragansett Electric's concern about discrimination is cured by the statute and is otherwise without merit.

Narragansett Electric's pretense concerning discrimination also appears to be disingenuous, because the General Assembly gave electric utilities carte blanche in the Utility Restructuring Act

[10]The *American Hoechest* case, in addition to addressing the discrimination issue, upholds the authority of the commission to approve a reduced rate for certain customers and to order that all classes of customers share equally in the cost of making reduced rates available to the elderly poor. *Id.*

of 1996 to inaugurate special rates for the poor. Rhode Island General Laws § 39-2-1.2(b) provides in part that "Nothing in this section shall be construed as prohibiting an electric distribution company from offering any special rates or programs for low income customers which are not in effect as of the effective date of this act, subject to the approval by the commission."

Low-income energy assistance plans resembling that in the present case have been successfully defended in cases around the country, and those cases have been cited in the opening section of this memorandum. There is no legal impediment to such a Plan, and this commission should so hold.

**Conclusion**

The Rhode Island Public Utilities Commission has the legal authority to approve the Long-Term Arrearage Management Solutions for Rhode Island — and fund it with a rate surcharge — notwithstanding the distribution rate freeze. There is no legal impediment, and it is the enlightened and compassionate thing to do.

THE GEORGE WILEY CENTER and
THE LOW-INCOME ADVOCACY GROUPS
By their attorney:

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**Certification**

I certify that on August 25, 2003, I served the foregoing on all parties by mail and email.

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