STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS
PUBLIC UTILITIES COMMISSION

IN RE: EXAMINATION OF THE FEASIBILITY OF IMPLEMENTING A DEBT FORGIVENESS PLAN	)	DOCKET NO. 3400

MEMORANDUM OF NEW ENGLAND GAS COMPANY

I. INTRODUCTION

Docket No. 3400 concerns the propriety and feasibility of a proposal by various consumer advocacy groups ("Advocacy Groups") and filed with the Commission entitled "Long-Term Arrearage Management Solutions for Rhode Island" (the "Proposal"). The Proposal, designed to supplement many pre-existing low-income energy assistance programs in Rhode Island, would provide forgiveness of existing arrears, and would create discounted rates for qualifying low-income customers. The Proposal envisions that eligibility for such arrearage forgiveness and discounted rates would be based upon eligibility criteria for the Low Income Home Energy Assistance Program ("LIHEAP"). The Proposal relies in part upon the federal LIHEAP dollars and existing utility-sponsored programs to fund the arrearage forgiveness and the discounted rates. The Proposal also envisions the implementation of a mandatory surcharge on utility customers' bills in order to fully fund the Proposal.

This memorandum of law sets forth the position of New England Gas Company (the "Company") in response to the Commission's request for legal briefing on 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; (2) whether the Commission could order a surcharge during a distribution rate freeze period (Docket 3401); and (3) whether the proposed surcharge would violate any provision of state or federal law. See Docket 3400, Memorandum from the Commission dated July 11, 2003.

II. THE GENERAL AUTHORITY AND POWERS OF THE COMMISSION.

The Public Utilities Commission obtains its plenary authority to regulate public utilities from Title 39 of the Rhode Island General Laws. In its creation of the Commission, the General Assembly stated the policy that should guide the Commission in the exercise of its powers:

> It is hereby declared to be the policy of the state to provide fair regulation of public utilities and carriers in the interest of the public, to promote availability of adequate, efficient, and economical energy . . . services . . . to the inhabitants of the state, to provide just and reasonable rates and charges for such services and supplies, without unjust discrimination, undue preferences or advantages, or unfair or destructive competitive practices . . .

R.I. Gen. Laws § 39-1-1(b). In order to insure that utility rates are just and reasonable, the Commission is vested with the general authority to:

> [S]upervise, regulate and make orders governing the conduct of companies offering to the public in intrastate commerce energy . . . services for the purpose of increasing and maintaining the efficiency of the companies, according desirable safeguards and convenience to their employees and to the public, and protecting them and the public against improper and unreasonable rates, tolls, and charges by providing full, fair, and adequate administrative procedures and remedies.

R.I. Gen. Laws § 39-1-1(c). More specifically, the Commission sits as a quasi-judicial body that regulates utilities:

> The commission shall serve as a quasi-judicial tribunal with jurisdiction, powers, and duties to implement and enforce the standards of conduct under § 39-1-27.6 and to hold investigations and hearings involving the rates, tariffs, tolls, and charges, and the

> sufficiency and reasonableness of facilities and accommodations of [various] public utilities . . . .

R.I. Gen. Laws § 39-1-3.

The statutory scheme of Title 39 also delineates the judicial attributes of the Commission's authority. For example, R.I. Gen. Laws § 39-1-7 vests the Commission with the "powers of a court of record...[to] make orders and render judgments and enforce the same by any suitable process issuable by the superior court." Additionally, the Commission is required by statute to "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." R.I. Gen. Laws § 39-1-11. The Commission is empowered to exercise its quasi-judicial powers in the context of its "exclusive jurisdiction to determine the rates of public utilities." Town of New Shoreham v. Rhode Island Public Utilities Commission, 464 A.2d 730, 737 n.5 (R.I. 1983).

The Commission has authority to address a utility's rate schedule in one of two situations. The rate-making provision of Title 39, § 39-3-11, is comprised of two separable parts. First, pursuant to a rate-change application by a utility company, the Commission is required to "hold a public hearing and make investigation as to the propriety of the proposed change or changes." Under this portion of § 39-3-11, the Commission has the jurisdiction to review rate-change applications of public utilities, to hold hearings and investigations, and to issue orders pertaining to those rate-change applications. O'Neil v. Interstate Navigation Company, 565 A.2d 530, 532 (R.I. 1989). Second, the Commission has the authority to monitor tariff provisions by periodically holding public hearings on utility rates in the absence of any proposed rate change. R.I. Gen. Laws § 39-3-11; Providence Gas Co. v. Burke, 380 A.2d 1334 (R.I. 1977).

Moreover, the Commission possesses broad supervisory powers as to regulated public utilities. See In re Island Hi-Speed Ferry, LLC, 746 A.2d 1240, 1244 (R.I. 2000) ("[The Supreme Court of Rhode Island has] recognized that '[t]itle 39 is replete with examples of the broad reach of the Commission's authority.'" citing Town of East Greenwich v. O'Neil, 617 A.2d 104, 110 (R.I. 1992)); see also Pine v. Malachowski, 659 A.2d 674, 676 (R.I. 1995) ("We are mindful of our limitations in reviewing orders of the PUC in light of the broad statutory authority that has been conferred upon the commission."). The Commission is bound, however, by the scope if its statutory authority and is limited by judicial review. See New England Telephone & Telegraph Co. v. Public Utilities Commission, 358 A.2d 1, 7 (R.I. 1976); Rhode Island Consumers' Council v. Smith, 302 A.2d 757, 762-63 (R.I. 1973). A reviewing court does not sit as a fact finder; its role is to determine whether the Commission's decision is lawful and reasonable and whether its findings are fairly and substantially supported by legal evidence. Rhode Island Consumers' Council v. Smith, 302 A.2d at 762.

III. THE AUTHORITY OF THE COMMISSION TO ORDER A SURCHARGE TO FUND THE PROPOSAL.

A. Statutory Prohibitions Against Discriminatory Rates.

Although the Commission is generally vested with broad powers, its powers are limited by statute and legal precedent. Notably, R.I. Gen. Laws § 39-2-2(a) prohibits rate discrimination:

> If any public utility...shall directly or indirectly by any device whatsoever, or otherwise, charge, demand, collect, or receive from any person, firm or corporation a greater or less compensation for any service rendered or to be rendered by it in, or affecting, or relating to...the production, transmission, delivery, or furnishing of heat...than it charges, demands, collects, or receives from any other person, firm, or corporation for a like and contemporaneous service, under substantially similar circumstances and conditions, the public utility shall be guilty of unjust discrimination which is hereby prohibited and declared to be unlawful...

Similarly, R.I. Gen. Laws § 39-2-3(a) prohibits unreasonable preferences or prejudices:

> If any public utility shall make or give any undue or unreasonable preference or advantage to any particular person, firm, or corporation, or shall subject any particular person, firm, or corporation to any undue or unreasonable prejudice or disadvantage in any respect whatsoever, the public utility shall be guilty of a misdemeanor...

These sections generally prohibit preferential treatment of utility customers through reduced rates or otherwise. The Proposal in this Docket seeks to provide reduced or preferential rates to LIHEAP recipients, and to pass a portion of the costs for providing such preferential rates onto all ratepayers. On its face, the Proposal clearly violates the prohibition against preferential and discriminatory rates in R.I. Gen. Laws §§ 39-2-2 and 39-2-3.

Section 39-2-5 of the General Laws, however, provides exceptions to the anti-discrimination provisions. Most applicable to this Docket is R.I. Gen. Laws § 39-2-5(2)[1] which provides:

> With the approval of the division[2], any public utility may give free transportation or service, upon such conditions as the public utility

[1] Section 39-2-5(10) may appear to warrant consideration, but such provision is limited in application to the percentage of income payment plan (PIPP) in which the Company previously participated, and does not appear to authorize the type of plan outlined in the Proposal. At most, such provision provides some authority for the Commission to approve the forgiveness portion of the Proposal. Regardless, such provision, like the other subsections of R.I. Gen. Laws § 39-2-5, is permissive only, and is subject to the case law outlined below that otherwise limits the authority of the Commission to mandate such a subsidy.

[2] The Company believes that the reference to "division" in this statute should be read to mean the Commission. As the Commission is well aware, prior to 1969, all authority to regulate utilities and to set and approve rates was vested in the Division of Public Utilities within the Department of Business Regulation. With the enactment of P.L. 1969, ch. 240, § 1, the General Assembly effected a major revision of the processes by which proposed rate changes were to be scrutinized and by which utilities were generally to be regulated. Unfortunately, the statute that resulted was not completely clear in its renaming of the proper parties to administer various functions, nor in its delineation of the powers of the Commission and Division respectively. As outlined above, it has become clear through the years, however, that the Commission is the body with the authority to regulate rates. In O'Neil v. Interstate Navigation Company, 565 A.2d 530 (R.I. 1989), the court analyzed the statutory authority establishing the jurisdiction of the Commission and the Division and determined that the Commission has jurisdiction to consider rate change applications. The court relied on its prior decisions interpreting Title 39 and determined that "the Legislature intended to 'segregate the judicial and administrative attributes of rate-making and utilities regulation and to vest them separately and respectively in the commission and the administrator (or division).'" Id. at 531 (quoting Narragansett Electric Co. v. Harsh, 368 A.2d 1194 (1977)). Accordingly, it is the Commission, and not the Division, that has the power to approve or disapprove of special rates pursuant to R.I. Gen. Laws § 39-2-5. See Re Narragansett Electric Co., 57 PUR4th 120 (R.I. PUC 1983).

> may impose, or grant special rates therefor...to any special class or classes of persons, not otherwise referred to in this section, in cases where the same shall seem to the division just and reasonable, or required in the interests of the public, and not unjustly discriminatory.

Such section provides the Commission with authority to approve an otherwise preferential rate so long as such rate is just and reasonable, in the public interest, and not unjustly discriminatory.

B. The Commission is not Authorized to Mandate Preferential Rates.

Although the Commission has the authority to approve a preferential rate pursuant to R.I. Gen. Laws § 39-2-5(2), the Commission is not authorized to mandate such a preferential rate. In Rhode Island Consumers' Council v. Smith, 302 A.2d 757, 775 (R.I. 1973), the Rhode Island Supreme Court struck down a Commission order requiring New England Telephone & Telegraph Company to offer a $1.00 per month discount for certain persons 65 years of age or older. The Commission relied in part on R.I. Gen. Laws § 39-2-5(5) that provides: "Nothing in this section nor any other provision of the law shall be construed to prohibit the giving by any public utility, free or reduced rate service to an elderly person...." Despite this clear exception to the anti-discrimination provisions, the court reasoned that the Commission was not authorized by §§ 39-2-2, -3, or -5 to mandate preferential rates to elderly persons. The court observed:

> "While those sections generally prohibit preferential treatment to utility customers, they do, by way of exception, authorize the division to permit a utility to offer 'free or reduced rate service' to an elderly person. But the authority to grant that limited exception does not carry with it the power to compel a utility to afford a reduced rate to senior citizens. Under the statutes the initiative rests with the utility, and the commission cannot, unless so authorized by the legislature, compel its exercise."

Id. at 775. Similarly, in Narragansett Electric Co. v. Harsh, 368 A.2d 1194 (R.I. 1977) and in Blackstone Valley Chamber of Commerce v. Public Utilities Commission, 396 A.2d 102 (R.I. 1979) the court held that preferential rates that were designed for the benefit of elderly or poor

residential users could not be ordered by the Commission. The court in those cases quoted with approval language from a Supreme Court of Washington case where the court asserted:

> "...public service companies are not eleemosynary institutions, and they cannot be compelled to devote their property to a public use except upon the well-recognized basis of a fair and reasonable return therefor. Through general taxation only, in common with all taxpayers, can they be compelled to contribute to the relief of the distressed."

Narragansett Electric Co., 368 A.2d at 1213 (quoting State ex rel. Puget Sound Power & Light Co. v. Department of Pub. Works, 38 P.2d 350, 353 (Wash. 1934)). The Rhode Island Supreme Court extended this principle and held:

> "...the customers of a public utility engaged in commercial, industrial and nonresidential enterprise are similarly not eleemosynary institutions. These customers cannot be compelled to devote their property in the form of utility payments for the benefit of those deemed worthy by the commission to be subsidized, particularly in the absence of any specific statutory authority for the commission to mandate such a result. In view of our past decisions, utility rate design is susceptible only to limited social engineering."

Blackstone Valley Chamber of Commerce, 396 A.2d at 106.

Therefore, based upon the relevant statutory provisions and the above-mentioned rulings by the Rhode Island Supreme Court, the Commission's broad powers are limited in the area of preferential rates. The Commission is prohibited from requiring a utility to impose a surcharge on its customers' bills in order to subsidize a class of customers unless specifically authorized by the General Assembly to do so.

C. Sufficient Evidence Must be Presented.

Even if the Commission was vested with the authority to mandate the type of surcharge sought by the Advocacy Groups in their Proposal, or even if the utilities voluntarily sought approval of the proposed surcharge, the Commission would still be required to find

substantial or ample evidence that the funding proposal complies with the requirements of R.I. Gen. Laws § 39-2-5(2). As indicated above, § 39-2-5(2) requires that any preferential rate plan must be "just and reasonable, or required in the interests of the public, and not unjustly discriminatory." In the area of rate design, any decision by the Commission must be fairly and substantially supported by legal evidence and must be reasonable in its effect and application. Rhode Island Consumers' Council v. Smith, 302 A.2d at 762.

In Re Narragansett Electric Co., 57 PUR4th 120 (R.I. PUC 1983), the Commission denied a request by Narragansett Electric to implement a special rate for electric customers who had exhausted their unemployment benefits. The Commission reasoned that the proposed rate was discriminatory and that Narragansett could not show a reasonable basis for the differentiation that served the public interest. Id. at 128. The Commission held Narragansett to a high standard of proof. In fact, the Commission commented that "although the company was able to demonstrate that the said tariff would be helpful to an unspecified number of unemployed customers, it never attempted to establish that the effect of implementing Rate A-66 would benefit the company's aggregate public or ratepayer population." Id.; compare Violet v. Narragansett Electric Co., 505 A.2d 1149 (R.I. 1986) (affirming the Narragansett plan pursuant to § 39-2-5(2) because ample evidence was presented by Narragansett Electric to support the Commission's conclusion that such discount plan was just and reasonable and in the public interest).

In the present Docket, in order to approve the Advocacy Groups' funding proposal, the Commission must be presented with substantial or ample evidence that the proposed surcharge is required in the interests of the public and not unjustly discriminatory. Although these terms are generally undefined and somewhat amorphous, the Commission provided some direction in its Order in the above-mentioned Re Narragansett Electric Co.

decision. Based upon such decision, it is clear that in order to approve a surcharge for a preferential rate, the Commission will require, at a minimum, substantial evidence of the benefit to the aggregate ratepayer population of implementing the proposed surcharge. It is insufficient to simply establish a benefit to the recipients of the proposed subsidy. In other words, the Commission must closely examine the impact of the proposed surcharge on all Rhode Island ratepayers to determine if such surcharge is in the ratepayers' best interest. Furthermore, the Commission will require substantial evidence of the efficacy of the Proposal; such evidence must indicate that the Proposal may succeed in addressing the issues for which it is designed. See Violet, 505 A.2d at 1152. Finally, in order to justify the proposed increase in rates as just and reasonable, the Commission must require substantial evidence that such program is cost justified. Without these elements of proof, the Proposal cannot cross the threshold established by § 39-2-5(2) that was specifically enacted to protect the ratepayers from discriminatory rates and rates that are unrelated to the cost of providing service.

IV. RATE FREEZE

Pursuant to the Order and Settlement Agreement in Docket No. 3401, base rates are frozen through June 30, 2005, subject only to Exogenous Events. Exogenous Events are defined in the Settlement Agreement of Docket No. 3401 to include the occurrence of a State Initiated Cost Change. Such a change includes "any state legislative or state regulatory mandates that impose new obligations, duties or undertakings, or remove existing obligations, duties or undertakings that individually decrease or increase the Company's costs." Docket No. 3401 Settlement Agreement at 7-8. If the Commission mandates the proposed surcharge in this Docket, it appears that such a mandate would qualify as a State Initiated Cost Change as defined in the Docket No. 3401 Settlement Agreement. Accordingly, because the proposed surcharge

would change the Company's revenue requirement in excess of $350,000, the Company would be required to adjust its distribution rates.

V. CONCLUSION.

Although the Commission is vested with broad regulatory powers, the Commission's powers are limited in scope by the relevant statutory scheme and by Rhode Island case law. Specifically, the Commission is constrained by the anti-discrimination provisions of R.I. Gen. Laws § 39-2-1 et seq. Furthermore, the Commission is not authorized to compel a public utility to afford preferential rates to a certain class of ratepayers. Even if the Commission was vested with the authority to mandate the type of surcharge sought by the Advocacy Groups in their Proposal, or even if the utilities voluntarily sought approval of the proposed surcharge, the Commission would still be required to find substantial or ample evidence that the funding proposal complies with the requirements of R.I. Gen. Laws § 39-2-5(2).

NEW ENGLAND GAS COMPANY

By its Attorneys,

PARTRIDGE SNOW & HAHN LLP

Daniel S. Crocker, Esq. (#6309)
180 South Main Street
Providence, RI 02903
(401) 861-8200
(401) 861-8210 (FAX)

Dated: August _____, 2003

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EXAMINATION OF THE FEASIBILITY	)	DOCKET NO. 3400
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CERTIFICATE OF SERVICE

I hereby certify that I have served, via first class mail, the foregoing Memorandum of New England Gas Company on the parties of record in the proceedings.

Date: August ____, 2003

Daniel S. Crocker, Esq. (#6309)
PARTRIDGE SNOW & HAHN LLP
180 South Main Street
Providence, RI 02903
(401) 861-8200
(401) 861-8210 (FAX)

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