November 22, 2002

VIA HAND DELIVERY

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

Re: Docket No. 3459; Objection of New England Gas Company to the Motion of the Division of Public Utilities and Carriers to Strike Affidavit of Kenneth Hogan

Dear Luly:

Enclosed is an original and nine copies of the above-referenced Motion. Please note that New England Gas is objecting to the Motion to Strike the Affidavit of Kenneth Hogan, but is not objecting to the Division's Motion to Accept the Affidavit of David Effron. The Company also wishes to briefly comment on the cover letter Mr. Roberti submitted as part of the Division's Motion to Strike the Affidavit.

While the Division is correct that the Company used an ellipses regarding the block quote of Mr. Effron, the Company feels strongly that the use of this ellipses in no way "substantially alters" the context of Mr. Effron's testimony. The Company takes issue with the Division's characterization relating to the amount of IRP on Page 2 of the cover letter. The Division's characterization completely ignores the Company's response to data request COMM 1-10 which clearly lies out that the Company booked exactly what was required.

The Division "claims" that the Company exceeded the authorized IRP funding when in realty it is the overlapping three month period reflected in each of the 12-month reporting periods that gives the appearance of having reported more. This treatment of IRP funding corresponds exactly with the accounting treatment of all other revenues and expenses during ERI-2. Further, it must be stressed that as soon as the Company realized that it had failed to include actual cash expenditures for

environmental remediation costs rate base, the Division was immediately notified. Subsequently, a corrected data response to DIV-1-06 was filed.

Thank you for your attention to this objection.

Sincerely,

CRAIG L. EATON, #5515
Attorney for New England Gas Company

CLE/atn
Enclosures
cc: Service List

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STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS
PUBLIC UTILITIES COMMISSION

In Re: New England Gas Company	:	
Investigation of Distribution	:	Docket No. 3459
Adjustment Clause (DAC)	:	
Charge	:	

OBJECTION OF NEW ENGLAND GAS COMPANY
TO THE MOTION OF
THE DIVISION OF PUBLIC UTILITIES AND CARRIERS
TO STRIKE AFFIDAVIT OF KENNETH HOGAN

Now comes the New England Gas Company ("NEGC" or "Company") through its attorney, pursuant to Commission Rule 1.15(d), and hereby objects to the Motion of the Division of Public Utilities and Carriers (the "Division") to Strike Affidavit of Kenneth Hogan in the above-captioned docket ("Motion to Strike").[1]

The Commission should deny the Division's Motion to Strike because there is nothing in the Commission's Rules that precludes the filing of the Mr. Hogan's affidavit, nor has the Division cited any rule that has been "directly violated" or that would otherwise prohibit the incorporation of the affidavit to the record, as claimed by the Division (Motion at 1). To the contrary, it is clear Mr. Hogan's affidavit is allowed under the Commission's rules. Specifically, Commission Rule

1.20(m) provides that "the record in a proceeding shall close after the briefs, if any, have been filed, or otherwise after the dispositive open meeting . . . ." In fact, the Commission routinely accepts evidentiary materials into the record following a hearing, pursuant to requests for information on open issues that may have arisen at hearing. Therefore, in accordance with the Commission's rules, the record had not closed in this proceeding at the time that the Company filed Mr. Hogan's affidavit.

In accepting that evidence into the record, Commission Rule 1.22(a) states that the Commission is not bound by "technical evidentiary rules," and evidence may be submitted when necessary to ascertain facts not reasonably susceptible of proof under the rules, unless precluded by statute, if it is a type commonly relied upon by reasonably prudent persons in the conduct of their affairs.

In this case, the Commission is being called upon to determine the intent of the parties in relation to various provisions of the ERI-2 Settlement Agreement. This is because, under Rhode Island law, the main objective of the interpreting court is to construe contract terms consistent with the intent of the parties whether or not the contract is found to contain ambiguity. Capital Properties v. State of Rhode Island, 749 A.2d 1069, 1081 (R.I. 1999), citing, Johnson v. Western Nat. Life Ins. Co., 641 A.2d 47, 48 (R.I. 1994). Therefore, the fact that the Division

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[1] As discussed below, the Company has no objection to the acceptance of Mr. Effron's affidavit in this proceeding.

believes there is "no ambiguity in the ERI-2 settlement agreement," only highlights the Commission's obligation to consider evidence as to the intent of the Company through the affidavit of Mr. Hogan.

At the hearing, in response to Mr. Effron's repeated assertions that he was testifying to the "company's understanding" of the language in the settlement agreement, the Commission noted that "no one from the company who was present at those negotiations has come forward to indicate differently" (Tr. at 185, lns. 13-21). To that end, the Commission's rules give the Company the right to present evidence as to the issues under discussion (see Rule 1.20 (d)), and the evidence that has been submitted by the Company is necessary for the Commission to ascertain the "company's understanding" of the settlement language as presented by a witness who, as observed by the Commission, had participated in the ERI-2 negotiations on behalf of the Company. The Commission has broad discretion to allow the submission of evidence by parties to the proceeding, if it is a type commonly relied upon by reasonably prudent persons in the conduct of their affairs.[2] Therefore, in submitting the affidavit, the Company is in compliance with Commission rules, because the Company has provided the Commission with

[2] Mr. Hogan's affidavit represents a sworn statement that is an instrument commonly relied upon under Rhode Island law.

information that is directly relevant to the Commission's efforts to construe the settlement language.[3]

The Division also states that the Company determined during the "eleventh hour" that it had "inadvertently" excluded actual cash expenditures for environmental remediation costs in rate base, and apparently concludes that, because of the late filing, the Company should not have "an opportunity to present new evidence and "to launch a collateral attack" on Mr. Effron on this issue (Motion at 1-2).[4] However, it should be noted that the Company originally filed the earnings-sharing computation in response to data requests issued by the Division (see Response to DIV 1-06). Under Commission Rule 1.18(d), the Company has an affirmative obligation to "reasonably and promptly amend or supplement" a response that has previously been supplied if information is obtained that would have been required in the previous response. In this case, the Company's witness testified that it was because the funds were being tracked as a separate sub-account of the Company's accumulated depreciation account (in

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[3] Mr. Hogan is prepared to participate in an evidentiary hearing at the Commission should it be necessary in order to allow for cross-examination by the either the Division or the Commission. However, as discussed below, the Company is not objecting to the Division's Motion to Accept the Affidavit of David J. Effron, which the Division has indicated is intended to serve as a response to Mr. Hogan (Motion at 2).

[4] Contrary to the Division's assertion, the Company did not "use the brief" as an opportunity to present new evidence (Motion at 2). The Company filed the affidavit simultaneously with the brief and prior to the close of the evidentiary record, as allowed by the rules.

accordance with the ERI-2 Settlement Agreement) that an error had occurred in the calculation of accumulated depreciation for the earnings-sharing calculation that was provided in the Company's earlier responses to DIV 1-06 (Tr. 137-138). Therefore, the Company had an obligation to amend or supplement its earlier responses to correct for the error.[5]

In addition, because the issue under consideration is the intent of the settling parties with respect to the language in the ERI-2 Settlement Agreement on environmental costs and the earnings calculation, only a statement from a company representative who was present at the ERI-2 settlement negotiations and has come forward to correct the misrepresentations made by Mr. Effron as to the "company's understanding," could provide probative information for the record. By definition, this testimony had to be provided by someone not at the hearing, such as Mr. Hogan, since it was agreed by all that no one at the hearing on behalf of the Company had participated in those negotiations.

The Division claims that, as a matter of "procedure and fairness," it is "prejudiced" by the Company's filing of this evidence. Notwithstanding the fact that it is the Company's fundamental right to present evidence for the record in

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[5] The Division has not objected to the submission of this amended response, nor would it make sense for the Division to do so, since the policy underlying the Commission's rules is to ensure that respondents are providing timely and accurate information to be incorporated into the record.

accordance with the Commission's rules, the Division ignores the fact that this alleged unfairness is far outstripped by the unfairness and impropriety of the Division's witness testifying at the hearing as to the "company's understanding" of the settlement language in relation to the environmental response fund and the earnings calculation, without the benefit of a Company response. This is particularly true where the Commission specifically investigated the rate base treatment of environmental costs under the ERI-2 Settlement Agreement in Docket No. 2581 and referenced this treatment in its order approving the ERI-2 Settlement Agreement, and Mr. Effron's testimony is contradicting the results of that investigation.[6]

However, as noted above, the Company does not object to the filing of the affidavit of Mr. Effron, which was submitted by the Division in the alternative to its Motion to Strike. The Company has no objection to his statement because the Company welcomes a full and fair adjudication of this issue and that such adjudication will only reveal that the record supports the Company's earnings calculation with the inclusion of environmental costs in the accumulated

[6] The Division's only response to the clear reference in the Commission's order of the intent of the underlying the settlement language (and the transcript cited in the Commission's order) is that Mr. Hogan was referring to the ERI-1 calculations and not to the ERI-2 calculation. This claim is just plain wrong since the language referenced in transcript in Docket 2581, is part of a long discourse between Mr. Massaro and Mr. Hogan regarding the rate-base calculations under ERI-2, which starts with a question by Mr. Massaro as to

depreciation portion of rate base. Also as noted, Mr. Hogan is available for cross-examination by the Commission or the Division.

WHEREFORE, for all the above reasons, NEGC respectfully requests that the Commission deny the Division's Motion to Strike and, in the alternative, accept the Division's Motion to Accept the Affidavit of David Effron.

New England Gas Company,
By its attorney,

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rate base items "under the agreement" and as to the "going forward" calculations (Tr. at 81-82; see generally 81-91; see, also, Tr. at 122-131).