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September 14, 2007

VIA HAND DELIVERY

Ms. Luly Massaro, Clerk
Rhode Island Public Utilities Commission
89 Jefferson Boulevard
Warwick, RI 02888

Re: THE NARRAGANSETT ELECTRIC COMPANY d/b/a NATIONAL GRID
v. TOWN OF PORTSMOUTH, et al.,
(Docket No. 3858)

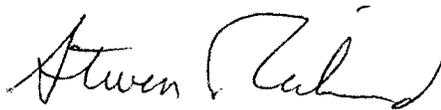
Dear Luly:

We enclose originals and nine copies of the following documents:

1. Plaintiff's Objection to Defendants' Motion to Dismiss; and
2. Plaintiff's Memorandum in Support of its Objection to Defendants' Motion to Dismiss.

Thank you for your assistance.

Very truly yours,



Steven M. Richard

SMR:crp
Enclosures

cc: Kevin P. Gavin, Esq.
Leo Wold, Esq.
John Spirito, Esq.
James Lanni
Robert DiMeglio, Esq.
Laura Olton, Esq.

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS
PUBLIC UTILITIES COMMISSION

THE NARRAGANSETT ELECTRIC :
COMPANY d/b/a/ NATIONAL GRID, :
Plaintiff, :

v. :

Docket No. 3858

THE TOWN OF PORTSMOUTH; :
ROBERT G. DRISCOLL, in his official :
capacity as Town Administrator; :
DAVID KEHEW, in his capacity as :
Director of Public Works; and :
DENNIS M. CANARIO, JAMES A. :
SEVENEY, KAREN GLEASON, :
LEONARD B. KATZMAN, HUBERT :
LITTLE, PETER J. MCINTYRE, and :
WILLIAM E. WEST, in their official :
capacity as members of the Town Council, :
Defendants. :

PLAINTIFF'S OBJECTION TO
DEFENDANTS' MOTION TO DISMISS

The Narragansett Electric Co. d/b/a National Grid ("Narragansett") objects to the motion to dismiss filed by the Town of Portsmouth Defendants. Narragansett has concurrently filed a supporting memorandum of law in support of its objection.

THE NARRAGANSETT ELECTRIC CO.
d/b/a NATIONAL GRID

By its attorneys,

Of Counsel:

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Dated: September 14, 2007

CERTIFICATION

I hereby certify that a copy of Plaintiff's Objection to Defendants' Motion to Dismiss was served electronically and by first-class mail on September 14, 2007 to the following individuals:

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STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS
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THE NARRAGANSETT ELECTRIC :
COMPANY d/b/a/ NATIONAL GRID, :
Plaintiff, :
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**PLAINTIFF’S MEMORANDUM IN SUPPORT OF ITS
OBJECTION TO DEFENDANTS’ MOTION TO DISMISS**

The Narragansett Electric Co. d/b/a National Grid (“Narragansett”) submits this memorandum in support of its objection to the motion to dismiss filed by the Town of Portsmouth Defendants (“Town”).

I. INTRODUCTION

The Town’s motion to dismiss is analogous to a Rule 12(b)(6) motion in a judicial proceeding alleging a failure state a claim upon which relief may be granted. Consequently, the Commission should apply the same rigorous standard of review utilized by the courts, which strongly disfavors the early dismissal of a proceeding on the merits before the development of a factual record.

The Town's motion to dismiss raises both procedural and substantive arguments seeking the early dismissal of Narragansett's petition. The Town's arguments fail on both fronts. Contrary to the Town's contention, Narragansett filed a timely petition pursuant to R.I.G.L. § 39-1-30. Further, the Town is arguing improperly that the Commission should just simply accept the reasonableness of the disputed permitting fee without any development of an appropriate factual record. For the reasons stated below, the Commission should deny the Town's motion to dismiss.

II. STANDARD OF REVIEW

Rhode Island Superior Court Rule of Civil Procedure 12(b)(6) imposes a strong presumption against the early dismissal of pleadings for a failure to state a cognizable claim for relief. Applying this Rule by analogy here, the Commission should presume the allegations pled in Narragansett's petition to be true and apply all inferences in the utility's favor. Also, the Commission should view the pleadings in the light most favorable to Narragansett. *See, e.g., Ellis v. Rhode Island Pub. Transit Auth.*, 586 A.2d 1055, 1057 (R.I. 1991).

In judicial proceedings, Rule 12(b)(6) dismissals are strongly disfavored and rarely granted. A claim will be dismissed under Rule 12(b)(6) only when it is clear beyond a reasonable doubt that the plaintiff would not be entitled to relief under any set of facts that could be proven. *See, e.g., Retirement Bd. of the Employees' Retirement System of Rhode Island v. DiPrete*, 845 A.2d 270, 286 (R.I. 2004). Likewise, the Commission should apply the same strong presumption against dismissal in its review of the Town's motion.

III. THE ALLEGATIONS PLED IN NARRAGANSETT'S PETITION

In or about February 1996, the Town, acting through its Town Council, enacted an ordinance entitled "An Ordinance of the Town of Portsmouth, Rhode Island Regulating Street Excavations and Curb Cuts" ("Ordinance"). (Petition at ¶ 5). The Ordinance requires Narragansett to pay a fee of "sixty (\$60.00) dollars for the first fifteen linear feet or part thereof of any excavation, and eight (\$8.00) dollars for each additional five linear feet or part thereof," in connection with the excavation of a public road for, *inter alia*, the purposes of locating, replacing or installing underground utility lines or other facilities. (*Id.* at ¶ 6).

Of particular importance to this proceeding, the Town has not, prior to 2007, enforced the Ordinance against Narragansett or Providence Gas/New England Gas (which are now part of Narragansett). (*Id.* at ¶ 7). In 2007, the Town, acting through its Town Administrator and Director of Public Works, sought for the first time to enforce the Ordinance against Narragansett by requiring the payment of a fee for street excavation associated with the installment of utility facilities. (*Id.* at ¶ 8). In enforcing the Ordinance against Narragansett, the Town is requiring the utility to pay the fee as condition precedent to the issuance of the permit to begin the installation of three thousand (3,000) feet of gas main piping on Wapping Road. (*Id.* at ¶¶ 9-10). The Town issued an invoice to Narragansett and demanded its payment of four thousand eight hundred and thirty-six dollars (\$4,836.00). (*Id.*).

Promptly after Narragansett's receipt of the invoice, its Manager of Gas Operations, Alfred Amaral, wrote to the Town's Director of Public Works, inquiring about the basis for the excessive permitting fee and requesting that the Town reconsider its position. (*Id.* at ¶ 11). As stated in his letter, Mr. Amaral requested that the Town issue the necessary permits upon the payment of an administrative fee consistent with Narragansett's fee arrangements with other

Rhode Island municipalities. (A copy of Mr. Amaral's letter to the Town's Director of Public Works is attached hereto as Exhibit A).¹

In the Town's responsive letter dated August 1, 2007 (which was received by Narragansett on August 6, 2007), the Town Administrator conveyed the Town's final position that Narragansett "will be required to pay . . . \$4,836.00 prior to the issuance of any permits" and claimed that "\$4,836.00 is a reasonable cost." (*Id.* at ¶ 12). The Town continues to refuse to issue the permit to Narragansett unless it pays this fee. (*Id.* at ¶ 13).

Narragansett asserts that the Town's recent enforcement of the Ordinance against the utility violates various statutory provisions, is preempted by state law and imposes arbitrary and unreasonable costs. (*Id.* at ¶¶ 14-20).

IV. ARGUMENT

A. Narragansett's Petition Was Timely Filed Pursuant To R.I.G.L. § 39-1-30.

Section 39-1-30 provides for the review of two types of action. The first part of the statute pertains to the appeal of decisions of zoning boards of review or municipal inspectors "affecting the placing, erection, and maintenance of any plant, building, wires, conductors, fixtures, structures, equipment or apparatus of any company under the supervision of the commission." An aggrieved party must file its appeal within "ten (10) days from the giving of notice of the ruling, decision, or order." The second part of the statute refers to the Commission's review of ordinances "affecting the mode or manner of operation or the placing or maintenance of the plant and equipment of any company under the supervision of the

¹ By attaching hereto a copy of Mr. Amaral's letter to the Town's Director of Public Works dated July 30, 2007, Narragansett is not seeking to introduce extrinsic evidence beyond the allegations pled in its petition. The letter is referenced and described in paragraph 11 of the petition. Narragansett is simply attaching it here for the sake of completeness.

commission.” An aggrieved party must file its appeal within “ten (10) days of the enactment or promulgation.” See R.I.G.L. § 39-1-30; see also *Town of East Greenwich v. O’Neil*, 617 A.2d. 104, 108 (R.I. 1992). In its motion to dismiss, the Town focuses predominantly on the second part of the statute dealing with an appeal after the enactment of an ordinance, but makes only a passing reference to the first part of the statute entitling Narragansett to appeal the unreasonable enforcement of the Ordinance by a municipal inspector.²

As pled in Narragansett’s petition, the Town recently enforced the Ordinance for the first time against the utility in 2007 (approximately eleven years after the Ordinance’s enactment in 1996). Previously, the Town Administrator, Director of Public Works and their predecessors have not assessed such a fee against Narragansett and its predecessors. As noted above, Narragansett’s Manager of Gas Operations wrote to the Director of Public Works on July 30, 2007 to request the Town’s reconsideration of its decision to enforce the Ordinance against Narragansett and impose an unreasonable permitting fee. The Town’s responsive letter dated August 1, 2007 rejected Narragansett’s request for reconsideration and confirmed its final position that the utility must pay \$4,836.00 to obtain the permit required for the installation of three thousand (3,000) feet of gas main piping on Wapping Road. On August 10, 2007, Narragansett filed a timely petition under § 39-1-30 seeking the Commission’s review of the Town’s enforcement of the Ordinance and unreasonable assessment of the permitting fee.

² In footnote 3 of its memorandum, the Town address only summarily the first part of § 39-1-30 by stating that “[t]his petition does not arise out of a zoning matter or a decision of any town inspector.” Narragansett disputes the Town’s blanket assertion and, as argued herein, contends that the facts clearly support the Commission’s jurisdiction to hear this matter.

A fair and reasonable reading of § 39-1-30 supports the conclusion that both the Town Administrator and the Town's Director of Public Works constitute "inspectors" whose decision to assess the permitting fee is subject to appellate review under § 39-1-30. These two Town inspectors imposed an unreasonable permitting fee directly affecting "the placing, erection and maintenance of . . . fixtures, structures, equipment, or apparatus . . ." of a company under the Commission's supervision. Narragansett's appellate rights regarding the inspectors' decision began to accrue on August 1, 2007 – the date of the Town's letter stating the final decision. It is undisputed that Narragansett filed its petition within ten (10) days thereafter.³ As a result, Narragansett timely commenced this proceeding under § 39-1-30.

B. The Core Issue Of The Reasonableness Of The Town's Permitting Fee Cannot Be Decided On A Motion To Dismiss And Requires The Development Of A Factual Record In This Proceeding.

In support of its motion to dismiss, the Town makes a broad assertion that "the fee required by the Ordinance is not unreasonable or unduly burdensome." (Town's memo. at 2, n. 2). In doing so, the Town alludes only to unsubstantiated and undocumented references to its potential administrative staffing time and costs. The Commission should not give any weight to the Town's general assertions for two reasons. First, the Town's blanket denials and general assertions stated in its motion are irrelevant to a Rule 12(b)(6) type of analysis because the allegations in Narragansett's petition are presumed to be true. Second, the Town is wrongly asking the Commission to uphold the permitting fee without any meaningful development of a factual record.

³ In fact, as stated above, Narragansett did not receive the Town's letter until August 6, 2007, so it invoked its appellate rights within four days of its notice of the Town's final decision.

The Town also devotes a significant portion of its memorandum contending that it has acted in a manner consistent with its powers to maintain its roadways. Again, the Town is improperly seeking that the Commission simply accept the municipality's position regarding the merits without affording Narragansett any opportunity to present its countervailing evidence.

At this early stage of the proceedings, it is wholly premature to determine the merits in the manner sought by the Town's motion to dismiss. The central question is merely whether Narragansett has pled a petition that states claims upon which relief may be granted. A review of the petition shows that Narragansett has met its pleading obligations by providing sufficient notice of the underlying facts and the legal viability of its claims.⁴

V. CONCLUSION

For the above-stated reasons, the Commission should deny the Town's motion to dismiss. Narragansett respectfully requests that the Commission set a prompt schedule to allow for the full and proper adjudication of the claims asserted in Narragansett's petition.

⁴ Narragansett's petition complies with Commission Rule of Practice and Procedure 1.10(a), which requires a clear and concise statement of the grounds, facts relied upon and relief sought. The petition cites the appropriate statutory provisions and other authorities relied upon for relief.

THE NARRAGANSETT ELECTRIC CO.
d/b/a NATIONAL GRID

By its attorneys,

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Dated: September 14, 2007

CERTIFICATION

I hereby certify that a copy of the within document was served electronically and by first-class mail on September 14, 2007 to the following persons:

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EXHIBIT A

nationalgrid

July 30, 2007

David Kehew
Portsmouth Public Works
2200 East Main Road
Portsmouth, RI 02871

Re: National Grid's Street Opening Permits

Dear Mr. Kehew:

This letter is in reference to a recent street opening permit issued by your department to National Grid for street excavation in connection with necessary work on underground gas lines.

It is my understanding that Portsmouth is proposing to charge sixty dollars (\$60.00) for the first fifteen (15) linear feet of any excavation and eight dollars (\$8.00) for each additional five (5) linear feet of such excavation. This fee structure resulted in a \$4,836.00 permit fee for excavation work at Wapping Road. Although National Grid has no objection to paying reasonable administrative costs associated with the issuance of such permits, it believes the fee for the Wapping Road work is excessive and does not bear any relation to Portsmouth's actual costs for issuance of the permit. The fact that Portsmouth has made no attempt to collect such fees until the recent past, despite the authorizing ordinance allegedly being in force since 1996, casts further doubt upon their necessity.

I ask that you reissue any relevant permits, including, but not limited to, the permit for work at Wapping Road, minus all linear foot-based fees. In line with our agreements with other cities and towns, which have been approved by the Public Utilities Commission, National Grid believes an administrative fee of seventy-five dollars (\$75.00) is reasonable and fair, and should more than cover any administrative costs associated with issuance of the permits. Please let me know at your earliest convenience whether you will reissue all relevant permits on these terms.

Your continued cooperation and attention to this matter is appreciated.

Sincerely,



Fred Amaral
Manager of Gas Operations