

**STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS
PUBLIC UTILITIES COMMISSION**

IN RE: PETITION FOR REVIEW PURSUANT :
R.I.G.L. §39-1-30 FILED BY NARRAGANSETT : **DOCKET NO. 3858**
ELECTRIC D/B/A NATIONAL GRID :

ORDER

On August 10, 2007, Narragansett Electric d/b/a National Grid (“NGrid”) filed a Petition for Review Under 39-1-30 with the Public Utilities Commission (“Commission”). In its Petition, NGrid requested the Commission to review and nullify or modify a Town of Portsmouth (“Town”) ordinance that requires NGrid to pay a fee based on linear feet of excavation in connection with the excavation of a public road for the purpose of locating, replacing, repairing or installing underground utilities lines or other facilities. The ordinance, number 96-2-20 was enacted on February 20, 1996 but was never enforced against NGrid since its enactment. By invoice dated June 18, 2007, the Town notified NGrid that prior to the issuance of a permit to install 3,000 feet of gas main piping in the Town, NGrid would be required to pay a fee of \$4,836.00 to the Town pursuant to the ordinance.¹

In response to the invoice, Fred Amaral, Manager of Gas Operations for NGrid, wrote to the Public Works Department Manager, David Kehew, requesting reissuance of the necessary permit absent the fees.² On August 1, 2007, the Town Administrator, Robert Driscoll, responded to Mr. Amaral and informed him that NGrid would be

¹ Petition for Review Under §39-1-30, Attachment, Letter dated August 1, 2007 to Fred Amaral from Robert Driscoll, filed August 10, 2007.

² Plaintiff’s Objection to Motion to Dismiss, Attachment A, filed September 14, 2007.

required to pay the fee which he identified as a reasonable cost.³ In response to that letter, NGrid filed the Petition for Review.

On August 30, 2007, the Town filed a Motion to Dismiss asserting that because NGrid's Petition was not filed within ten (10) days of the enactment of the ordinance, the Commission lacked jurisdiction to hear the matter.⁴ R.I. Gen. Laws §39-1-30 reads:

Every ruling, decision, and order of a zoning board of review and of a building, gas, water, health, or electrical inspector of any municipality 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, shall be subject to the right of appeal by any aggrieved party to the commission within ten (10) days from the giving of notice of the ruling, decision, or order. The commission, after hearing, upon notice to all parties in interest shall as speedily as possible determine the matter in question, weighing the consideration of public convenience, necessity, and safety against the consideration of public zoning, and shall have jurisdiction to affirm or revoke or modify the ruling, decision, or order to make any order in substitution thereof.

Every ordinance enacted, or regulation promulgated by any town or city 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 commission, shall be subject to the right of appeal by any aggrieved party to the commission within ten (10) days from the enactment or promulgation. The commission, after hearing upon notice to all parties in interest, shall determine the matter giving consideration to its effect upon the public health, safety, welfare, comfort, and convenience.

NGrid filed an objection to the Town's Motion to Dismiss stating the Town's enforcement of the ordinance is preempted by state law and imposes arbitrary and unreasonable costs. It rebutted the Town's allegation that the Petition was not timely filed by asserting that its challenge is to the Director of Public Works' decision to enforce the ordinance. NGrid asserted that the matter was timely filed because it was filed within

³ Petition for Review Under §39-1-30, Attachment, Letter dated August 1, 2007 to Fred Amaral from Robert Driscoll, filed August 10, 2007.

⁴ Motion to Dismiss filed August 30, 2007.

10 days of the notice from the Town Administrator that the fees would be due. In addition to addressing the jurisdictional issue, NGrid also asserted that the Town provided no evidence to support its statement that the fee is reasonable and that the Commission should not give any weight to this allegation.⁵

The Division of Public Utilities and Carriers (“Division”) also filed an Objection to the Town’s Motion to Dismiss. The Division made a number of arguments in support of its Objection. It argued that the ten day time period in the statute is directory as opposed to mandatory. The Division claimed that at the time the ordinance was enacted, NGrid did not own the gas company. The Division also argued that the Discovery Rule applies and that the statute of limitations did not toll until the party discovered the action or in the exercise of reasonable diligence should have discovered the action. The Division asserted that the doctrine of laches applies and the Town’s failure to enforce the ordinance for 11 years estops the Town from now trying to enforce the same. Lastly, the Division argued that the Commission has exclusive power and authority to supervise, regulate and make orders governing utility companies and that, as it had in other cases, even absent compliance with the statutory time requirements by NGrid, the Commission has the plenary authority to review the ordinance.⁶

In order to have jurisdiction to hear this matter, the Commission must find that NGrid appealed the matter in accordance with the requirements of the statute, either that the appeal was within 10 days of a ruling, decision and order of a building, gas, water, health or electrical inspector or within 10 days of the enactment of the ordinance. The

⁵ Plaintiff’s Objection to Motion to Dismiss, Attachment A, filed September 14, 2007.

⁶ Memorandum of Law of the Division of Public Utilities and Carriers in Support of its Objection to Defendant’s Motion to Dismiss filed October 24, 2007.

ordinance was passed in 1996, and therefore the ten days from the enactment of the ordinance within which NGrid could have appealed has clearly passed. In *Town of East Greenwich v. Narragansett Electric Company*, 651 A.2d 725 (R.I. 1994), Justice Murray stated that:

[p]ursuant to §39-1-30 an aggrieved utility may file a petition with the PUC to challenge any enactment that affects the “mode or manner of operation or the maintenance of the plant and equipment of any company” under the PUC’s supervision within ten days from its passage. *Outside this ten-day statutory period, the utility has waived its right to contest the enactment to the PUC.*” (emphasis added).

Therefore, the Commission does not have jurisdiction to hear the matter under this section of the statute.

NGrid asserted in its Objection to the Town’s Motion to Dismiss that the decision of the Town Administrator to assess the permitting fee, after never enforcing it in the eleven (11) years since its enactment, is subject to review by the Commission, because both the Town Administrator and the Public Works Director constitute inspectors whose decisions to assess the permitting fee is subject to review by the Commission. Further, NGrid argued that because the appeal was within ten (10) days of the August 1, 2007 letter from Town Administrator Driscoll, it was timely. The Commission agrees and finds that the Town’s decision to apply the ordinance in this instance constitutes a decision by a municipal inspector subject to review by the Commission and that NGrid’s appeal of this decision was within ten (10) days of that decision and thus timely. The Commission does not believe that the legislature intended to preclude any review of the application of an ordinance after it is enacted, especially in this instance where NGrid had

no interest in gas distribution assets until well after enactment of the ordinance and had no opportunity to appeal the ordinance when it was enacted.

Accordingly, it is hereby

(19189) ORDERED:

1. The Motion to Dismiss filed by the Town of Portsmouth is denied.

EFFECTIVE AT WARWICK, RHODE ISLAND, PURSUANT TO AN OPEN MEETING DECISION ON JANUARY 17, 2008. WRITTEN ORDER ISSUED JANUARY 24, 2008.



PUBLIC UTILITIES COMMISSION



Elia Germani, Chairman



Robert B. Holbrook, Commissioner



Mary E. Bray, Commissioner