

September 5, 2008

**VIA HAND DELIVERY & ELECTRONIC MAIL**

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

**RE: Docket 3943 – National Grid Request for Change of Gas Distribution Rates  
Legal Memorandums on Low-Income Discount Rates and Gas Marketing Program**

Dear Ms. Massaro:

Enclosed please find eight (8) copies of brief legal memorandums prepared by National Grid<sup>1</sup> in the above-referenced proceeding on the issues of the proposed low-income discount and Gas Marketing Program. Please note that these memorandums are not intended to provide the Company's complete legal argument on whether it has met the standard for approval. Rather, the Company has attempted to provide a description of the basic legal analysis supporting the Commission's authority to approve these two proposals.

Thank you for your attention to this transmittal. If you have any questions, please feel free to contact me at (401) 784-7667.

Very truly yours,



Thomas R. Teehan

Enclosures

cc: Docket 3943 Service List

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<sup>1</sup> The Narragansett Electric Company d/b/a National Grid ("Company").



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

National Grid Application to Change Rate Schedules	) ) ) ) )	Docket 3943
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**Memorandum Regarding Legal Basis of Low Income Discount Rate**

As part of its base-rate proposal in this docket, National Grid (the “Company”) has proposed the adoption of a low-income 10 percent discount from the distribution rates ultimately approved by the Commission. This distribution rate discount would be available to customers whose household income qualifies them for participation in the LIHEAP program. If approved by the Commission, the discount would be permissible under Rhode Island law. As described below, the proposed discount would not constitute a discriminatory rate under R.I.G.L. §39-2-2 and, moreover, would be specifically exempted by the provisions of R.I.G.L. §39-2-5. Thus, the Commission is authorized to approve the proposed the low income discount rate.

**DISCUSSION**

**1. The Company’s proposed low-income discount rate is not discriminatory.**

In general, under Rhode Island law, a gas utility may not charge discriminatory rates. Specifically, R.I.G.L. §39-2-2 prohibits a public utility from charging some customers more or less than it charges other customers “for a like contemporaneous service, under substantially similar circumstances and conditions.” In interpreting the provisions of Section §39-2-2, the Rhode Island Supreme Court has stated that they

“merely prohibit varying rates for a like and contemporaneous service provided under substantially similar circumstances or rates that confer an undue or unreasonable preference or advantage upon a customer group.” Energy Council of Rhode Island v. Public Utilities Commission, 773 A.2d 853 (R.I. 2001). Thus, the charging of disparate rates in all circumstances is not prohibited. For instance, the Court has stated that where there are cost differentials in providing a service to different classes of consumers, disparate rates are not discriminatory. Violet v. Narragansett Electric Co., 505 A.2d 1149, 1151 (R.I. 1986). Moreover, the Court has held that even in the absence of cost differentials disparate pricing is not necessarily discriminatory. See Energy Council of Rhode Island, supra. (holding that residential and nonresidential customers are not in substantially similar circumstances where residential customers have a “dearth of opportunity” to secure alternative sources of power).

Consequently, the disparate utility rates are prohibited under Rhode Island law only where the following two threshold determinations apply: (1) the classes in question are deemed to have substantially similar circumstances, and (2) the disparate rates confer an “undue or unreasonable preference or advantage.” Energy Council of Rhode Island, supra (R.I. 2001)(emphasis added). Neither of those two determinations applies here.

In this case, the Company’s proposed low-income discount does not differentiate among customers who are in “substantially similar circumstances,” although those customers are residential customers served in the same rate class as other residential customers. In other words, not all residential customers are similarly situated. Customers who would qualify for the proposed low-income discount have incomes below the federal poverty level. By objective criteria, their resources (and therefore their ability

to pay) are significantly different from other members of the same class. For that reason, the proposed discount does not violate the first prong of the Court's definition of a discriminatory rate. Consequently, the concept of a modest low-income discount rate, such as that proposed in this proceeding, is perfectly at harmony with what the legislature and this Commission have in the past deemed to be reasonable.

**2. Section 39-2-5 specifically exempts the Company's proposed low-income discount rate.**

Section 39-2-5 creates exceptions for certain types of rate discounts that benefit disadvantaged customer classes, including the elderly, blind, and low income. See e.g. § 39-2-5(5) (elderly customers); § 39-2-5(6) (customer 65 years of age or older or traveling with a blind person).

Section 39-2-5(2) also creates a broad exception to the prohibition against discriminatory rates, which is found in Section 39-2-2. Section 39-2-2 provides that “[w]ith the approval of the division” a public utility may grant special rates for service “to any special class or classes of persons ...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.” Although this provision references the “division,” the provision was put in place at the time when the division had ratemaking authority. The law was later revised in 1969, giving ratemaking authority to the Commission. Thus, the reference to the “division” is an historic hold-over from the period of time prior to 1969 when all authority to regulate utilities and to set and approve rates was vested in the “Division of Public Utilities.” See generally Narragansett Electric Company v. Harsch, 368 A.2d 1194 (1977). In any event, based on the filings in this case, the Division has raised no objection to the proposed low income discount rate in this docket. Thus, there is

statutory authority for the low income discount to be approved by the Commission, provided that the Commission finds that it is just and reasonable and not unjustly discriminatory.

In this case, the discount is just and reasonable and not unjustly discriminatory. The low income discount proposed in our case is modest and consistent with low income discount rates that have been approved by the Commission for the benefit of electric customers in Rhode Island. Indeed, Section 39-2-5(13) approves of and continues any such Commission-approved discounts. Specifically, Section 39-2-5(13) has a residual provision that was passed into law at the time that an affordable energy fund was established. Although the provisions of the affordable energy fund were repealed in the last legislative session, the language in this section was not deleted.<sup>1</sup> It states:

A gas or electric distribution company may provide discounts to low income customers in accordance with the affordable energy plan provisions of subsection 42-141-5(d). Nothing contained herein shall prohibit the continuation of any low income discounts approved by the commission prior to January 1, 2006, and in effect as of that date.

It seems reasonable to assume that this section was simply missed by the legislature when section 42-141-5(d) was repealed. Although the repeal seems to have rendered the first sentence superfluous, it most certainly cannot be read to prohibit low income discounts. In fact, the second sentence clearly indicated legislative acceptance of the fact that there were prior discounts to low income customers approved by the Commission. The pre-existing electric distribution low-income discount, upon which the discount in this case was structurally modeled, is a case in point. The Commission lawfully approved the low income discount for electric distribution rates prior to the enactment of

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<sup>1</sup> The funding mechanism contained in Section 42-141-5(d) was repealed in July 2008.

Section 42-141-5(d). Similarly, the Commission can lawfully approve a low-income discount today after its repeal. Thus, the first sentence of this section does not affect the pre-existing authority of the Commission to approve such a rate.

**3. A gas utility's shareholders may not be required to pay for a low income discount rate.**

Lastly, in this rate case, the Division and certain other intervenors have proposed that the Company be required to contribute to the funding of the proposed low income discount. It is clear, however, that under Rhode Island law the Commission cannot order a public utility to make a shareholder contribution in order to fund a low income discount. For example, even where a state statute permitted a utility discount for the benefit of elderly customers, the Rhode Island Supreme Court has held that the Commission could not require a utility to, in essence, make a charitable contribution to pay for that customer discount. R.I. Consumer Council v. Smith, 111 R.I. 271, 302 (1973). Accordingly, while the low income discount is lawful, as proposed, it would not be lawful for the Commission to require the Company to absorb some portion of it, as proposed by some parties in this docket.

**CONCLUSION**

Under relevant Rhode Island case law, the company's proposed low income discount is not a prohibited discriminatory rate as such has been defined by the courts. Moreover, the discount is specifically authorized under R.I.G.L. §39-2-5 (2). In light of the foregoing, the Commission is authorized to approve the Company's proposed low income discount rate.

Respectfully submitted,

**NATIONAL GRID**

By its attorneys,



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Dated: September 5, 2008

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

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National Grid	)	
Application to Change Rate Schedules	)	Docket 3943
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**Memorandum Regarding Legal Basis of Gas Marketing Program**

As part of its base-rate proposal in this docket, National Grid (the “Company”) has proposed the adoption of a Gas Marketing Program, including the recovery of \$1.377 million in program costs through rates. The basic objective of the Company’s Gas-Marketing Program is to expand the number of customers responsible for paying the fixed costs of the distribution system through conversions of new and existing low-use customers to gas service. If approved by the Commission, the Gas Marketing Program would be permissible under Rhode Island law. As described below, the expenses proposed for recovery through rates would be permissible under R.I.G.L. Section 39-2-1.2(a). Thus, the Commission is authorized to approve the recovery of expenses through rates for the proposed Gas Marketing Program.

**DISCUSSION**

The inclusion of costs in the revenue requirement for National Grid’s proposed gas marketing program is allowed under Rhode Island law. Specifically, R.I.G.L. Section 39-2-1.2(a) states as follows:

**§ 39-2-1.2 Utility base rate – Advertising, demand side management and renewables.** – (a) In addition to costs prohibited in § 39-1-27.4(b), *no public utility* distributing or providing heat, electricity, or water to or for the public *shall include* as part of its base rate any *expenses for advertising, either direct or indirect, which promotes the use of its product or service, or is designed to promote the public image of the industry.* No public utility may furnish support of any kind, direct, or indirect, to any subsidiary, group, association, or individual for advertising and include the expense as part of its base rate. *Nothing contained in this section shall be deemed as prohibiting the inclusion in the base rate of expenses incurred for advertising, informational or educational in nature, which is designed to promote public safety conservation of the public utility's product or service.* The public utilities commission shall promulgate such rules and regulations as are necessary to require public disclosure of all advertising expenses of any kind, direct or indirect, and to otherwise effectuate the provisions of this section.

R.I.G.L. Section 39-2-1.2(a) (emphasis added).

Thus, the plain language of the statute provides two directives in relation to the inclusion of the Gas Marketing Program costs in rates, which are that: (1) costs for advertising *may* be included in rates so long as the advertising is informational and educational in nature and directed at promoting the public safety or conservation of the natural gas sold by the public utility, and (2) costs *cannot* be included in rates if the advertising is designed to generally promote the use of natural gas or enhance the public image of the natural gas industry. This type of provision is common in public-utility regulation<sup>1</sup> and stands for the premise that customers should not pay for “branding” costs or advertising costs that may be incurred by the public utility to generally promote the image the company, the sale of natural gas or the natural gas industry.

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<sup>1</sup> For example, in Massachusetts, M.G.L. c. 164, § 33A prohibits the recovery of costs from customers for promotional or political advertising by a regulated utility, but like Rhode Island, specifically excludes from the prohibition any advertising that informs customers of ways to conserve energy, reduce peak demand for energy or other services, or otherwise use the services of any utility in a cost-efficient manner.

Without fully expounding on the Company's legal arguments for the adoption of the Gas Marketing Program, the Company's burden in this case is to show that the expenses associated with the Gas Marketing Program are not going to include the cost of advertising that is designed to generally promote the Company, the use of natural gas or the public image of the natural gas industry. To that end, the Company will show that any costs that could be considered to be "advertising" costs are actually costs that will be incurred to achieve the specific objectives of the Gas Marketing Program, and are limited to the dissemination of information and education regarding the conversion process and the energy efficiency and energy conservation benefits that arise therefrom.

In that regard, it is important to note that of the total funds requested by the Company for the Gas Marketing Program (\$1.377 million), only a portion relates to customer education and outreach. A portion of the total budget is for other program costs such as rebates, discounts, staffing and other expenses necessary to conduct the program, but not constituting costs of customer communications. This is important because the prohibition in Section 39-1-2.1 only applies to advertising expenses (and then only prohibits a certain category of advertising).

Thus, the Company's burden in this case will be to show that the portion of Gas Marketing Program funds apportioned to customer education and outreach are not the type of advertising expense that is prohibited under Section 39-1-2.1. As an initial matter, the Commission has not interpreted the term "advertising" to mean *any* communication from the utility to the public. For example, Providence Gas Company, Docket No. 2286, Order No. 14859 (1995), the Commission allowed recovery through rates of labor expenses associated with the utility's marketing staff. The Commission

stated that “the marketing staff is involved in a wide range of activities. It answers customer inquiries, it arranges for new services, it works with the Company’s trade allies and promotes increased sales.” The Commission further stated that the Company’s marketing activities “did not fit within the prohibition of R.I.G.L. Section 39-2-1.2,” while noting that the marketing activities included “providing information and service to existing and prospective customers to service their energy needs” and “promotions and direct mailings,” as well as performing “market research.” Id. The activities that will take place in the context of the Gas Marketing Program are of the same type.

In addition, R.I.G.L. Section 39-2-1.2 allows for the recovery of advertising costs if the advertising promotes energy conservation. For example, the Court has recognized that R.I.G.L. Section 39-2-1.2 does not prevent the utility having the costs of print advertisements included in rates if they extol “the efficiency with which certain gas furnaces, ranges, water heaters, and other major home appliances operate” or are “estimating the amount of money consumers would save by using these efficient products” See, Valley Gas v. Burke 518 A.2d 1363, 1367 (R.I. 1986). The Court found that “advertisements” that “primarily encourage the use of certain, more efficient gas appliances” is permitted because the advertisements “encourage conservation rather than merely promote the use of gas”. Id. In addition, the Commission has broadly interpreted the term “conservation” to include the conservation of energy in general. In Narragansett Electric Company, Docket No. 1499, Order No. 10299 (1980), the Commission indicated that “promotional advertising” does not include “advertising which informs electric consumers how they can conserve energy” or “advertising which promotes the use of

energy efficient appliances or equipment or services.” Significantly, this premise was stipulated to by the utility and the Division in Docket 1499.

In this docket, the Company will attempt to show that the focus of the Gas Marketing Program is to facilitate and achieve cost-effective conversions to natural gas heat, which necessitates the purchase of new heating equipment that will use less energy than the former heating system – and that the expenses incurred for customer education and outreach are incurred to convey this concept, which is allowed by statute, Rhode Island case law and Commission precedent.

### **CONCLUSION**

Under relevant Rhode Island case law, the Company’s proposal to recover the costs of the Gas Marketing Program through rates is not prohibited by the provisions of R.I.G.L. Section 39-2-1.2(a). To the contrary, the Company will show that the expenses are reasonable and appropriate and will benefit Rhode Island customers who will pay the Company’s cost of service in the future.

Respectfully submitted,

**NATIONAL GRID**

By its attorneys,



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