STATE OF RHODE ISLAND PROVIDENCE PLANTATIONS
BEFORE THE
PUBLIC UTILITIES COMMISSION

IN RE: NATIONAL GRID GAS APPLICATION TO IMPLEMENT NEW RATES **DOCKET NO. 3943**

INITIAL BRIEF OF THE RHODE ISLAND OFFICE OF ENERGY RESOURCES

Rhode Island Department of Energy Resources
By Its Attorney,

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I. INTRODUCTION

As part of its general rate case filing in this docket, National Grid ("NG") has asked the Commission to approve a revenue decoupling mechanism that would allow the Company to reconcile and adjust its rates for certain customers in response to their usage, in order that the Company might be assured of recovering certain fixed costs.

The Office of Energy Resources intervened in this proceeding to address this decoupling issue, because of its importance to Rhode Island's energy future. As a result of its review of the record in this case, and for the reasons set forth hereinafter, the OER is convinced that the record does not provide either a logical or a legal basis for adopting the proposed decoupling adjustment at this time.

II. ARGUMENT

NG proposes to (1) "redesign some of its rates to recover more of its distribution revenue through fixed charges instead of usage-dependent charges" and (2) to guarantee the recovery of a portion of its annual fixed charges from certain customers by reconciling in a subsequent year the annual amount of such charges actually collected against the annual fixed charges the rates were designed to recover, through a comparison of those customers' actual gas sales volumes versus the gas sales volumes used to design NG's rates. NG Ex. 2, p.13, ll. 9-15.

A. National Grid has not shown its claimed disincentive to be anything more than a theoretical construct.

In support of this proposal, NG argues that there is a disincentive for NG to pursue gas efficiency programs under present regulation in that, as NG's Mr. Stavropoulos testified, the reduction in gas usage from the Company's gas efficiency programs will result in a revenue loss for the Company. NG Ex. 2, p. 13, l. 16-p.15, l.20. Mr.

Stavropoulos explained that this revenue loss resulted from "…the combination of (1) reduced usage per customer that has been experienced, and (2) the additional reductions that will inevitably result from the Company's investment in gas efficiency…." Id. P.15, ll. 9-12. NG's Mr. Simpson explained in his testimony that the prior reduced usage resulted from a combination of factors, including, among others, high energy prices, improved appliance efficiency and a desire to reduce usage for environmental reasons. NG Ex. 12, p. 18, l. 1-p. 23, l. 12.

NG has somewhat muddied the waters. Past reductions in gas usage are traditionally captured for ratemaking purposes through historical usage under the historical test year method of determining the Company's costs and revenues, and the Company made whole thereby. If there is a change anticipated to future usage that is "known and measurable", for example, the loss of a significant customer, then an adjustment to historical usage is allowed. Indeed, Mr Czekanski has proposed a one percent per year reduction in residential and small C&I volumes to account for anticipated reductions in gas volumes due to additional conservation and more energy efficient equipment and appliances. NG Ex. 15, p. 7, l. 3-p.8, l.3. So, there would appear to be no further significance to decoupling for past reductions that are already captured in historical usage or to anticipated reductions that do not satisfy traditional "known and measurable" ratemaking adjustments. Moreover, there is no "disincentive" to promote future gas efficiency from such past or "known and measurable" reductions. The balance of NG's "disincentive" arguments focus on anticipated gas usage reductions resulting from new efficiency programs and make no attempt to show that past experience is sufficient to establish a disincentive for the NG employees involved in the gas efficiency programs approved by this Commission and funded by ratepayers.

Moreover, the claimed disincentive appears to be entirely theoretical. NG has simply failed to establish the existence, nature and extent of this disincentive. Gas distribution companies such as NG are heavily regulated, in large part, precisely because what is in the economic self-interest of the Company is not in the public interest. There is nothing insidious or sinister about this, it is simply a matter of the public interest requiring companies such as NG to act against their own self-interest with regard to certain aspects of their business. NG's Mr. Stavropolous acknowledged that, absent regulation, NG "would make different economic decisions and choices than it makes under regulation." Tr. 10/22/08, p.101, ll. 9-13. Accordingly, this Commission should ask what it is about these gas efficiency programs that makes them so different from the other instances in which NG is required to act against its own narrow self-interest.

NG could not provide a satisfactory explanation of the nature and extent of the practical effect of this disincentive, at various times characterizing the effort the Company would make on these efficiency programs under this alleged disincentive as "minimal regulatory compliance", Tr. 10/22/08, p. 16, ll. 4-5, or "just do the bare minimum and don't do one iota beyond that", Id. P. 28, ll. 7-8. Subsequently, the Company acknowledged that "we will do the best we can", but would not "aggressively pursue beyond (full regulatory compliance) to the financial detriment of the Company. Makes no sense." Id., p.31, l. 13-p.32, l. 1. What, in practical terms, is the difference

between these minimal standards and the aggressive standards which NG sets for itself in other areas? The record is silent.

Given the vagueness of the nature and extent of the proposed adjustment, the Commission has no choice but to reject it. As the Rhode Island Supreme Court has consistently held, a proposed adjustment must be supported by legal evidence sufficiently specific to facilitate review. Narragansett Electric Co. v. Harsch, 117 R.I. 395, 368 A.2d 1194 (1977). Moreover, the burden of proof is on the utility proponent. Valley Gas Co. v. Burke, 122 R.I. 374, 406 A.2d 366 (1979). Where NG has not demonstrated that its proposal is reasonable, the Commission has no duty to fashion an alternative for the regulated utility. New England Tel & Tel. Co. v. PUC, 446 A.2d 1376 (R.I 1982).

Also, it is doubtful that NG's management is as powerless as it suggests in motivating the NG employees charged with administering these gas efficiency programs. NG is a large, profitable, well-managed company. It simply makes no sense to believe that NG cannot create goals and incentives for the relevant employees to cause them to implement these gas efficiency programs as efficiently and effectively as possible. Moreover, as Mr. Stavropolous acknowledged, there are negative consequences at NG for poor performers. Therefore, it would seem that NG has the tools it needs to offset any alleged incentive perceived by those NG employees charged with implementing these gas efficiency programs. Accordingly, that NG is required to act contrary to its own narrow self-interest in carrying out the Commission-approved and ratepayer-funded efficiency programs should not cause a breakdown in NG management's ability to see that these programs are effectively and efficiently implemented and carried out.

B. Precedent in other jurisdictions is conflicting and cannot be substituted for evidence and a reasoned analysis of why this proposal is in the public interest.

The Company also makes much of the fact that a number of jurisdictions have approved decoupling for one or more of the companies subject to their regulation. However, other jurisdictions have either rejected decoupling or, so far, failed to adopt it. OER believes that decoupling is worthy of serious consideration, but that little is to be gained by counting other jurisdictions' determination. Such jurisdictions have their own concerns and considerations. What this Commission should do is to focus on what is best for the public interest, from the point of view of both ratepayers and NG, in light of the record in this proceeding and what it shows or does not show about this decoupling proposal. For example, the claimed disincentive is speculative and undefined. How can the Commission to be expected to conclude that this disincentive justifies adopting NG's decoupling proposal when the Commission can neither quantify the potential disincentive nor conclude that NG is as powerless to overcome it as NG implies?

NG's proposal is also supported by Environment Northeast ("ENE") and the Conservation Law Foundation ("CLF"). These parties urge essentially two arguments in support of the Company's proposal: (1) that RIGL Section requires that the Commission

approve the Company's decoupling proposal, and (2) that denying the proposal will create a disincentive for conservation and energy efficiency.

C. A careful analysis of R. I. Gen. Laws Section 39-1-27.7(d) and its context indicates that the Commission is not compelled thereby to approve the Company's proposal.

CLF's witness Mr. Kaplan interpreted R. I. Gen. Laws Section 39-1-27.7(d) to require the Commission to approve NG's decoupling proposal. Ex. No. CLF-2, p.3, ll. 11-18. This is incorrect. When properly interpreted in light of the plain language of this section in light of the law prior to the enactment of this subsection, the Legislature's intent to give this Commission an option, not a pair of handcuffs.

Section 39-1-27.7(d) provides that:

> If the Commission shall determine that the implementation of system reliability and energy efficiency and conservation procurement has caused or is likely to cause over or under-recovery of overhead and fixed costs of the company implementing such procurement, the commission may establish a mandatory rate adjustment clause for the company so affected in order to provide for the full recovery of reasonable and prudent overhead and fixed costs.

In Carson v. McLyman, 77 R.I 177, 180-181, 74 A.2d 853 (1950), the court held that while the ordinary meaning of the word "may" as used in a statute was permissive and not compulsory, the meaning in a particular case could be mandatory if it were shown that such was the intent of the Legislature.

As can be readily seen from the state of the law prior to the passage of this statute, the plain intent of the statute was to create an exception to the longstanding judicially created rule against retroactive ratemaking. The rule against retroactive ratemaking provides that, subject to narrow exceptions, the Commission is prohibited from using current rates to recover past losses or gains. In re Island Hi-Speed Ferry, LLC, 852 A.2d 524 (R.I. 2004); Providence Gas v. Malachowski, 600 A.2d 711 (R.I. 1991); Providence Gas Co. v. Burke, 475 A.2d 193 (R.I. 1984). The policy reasons for the rule include the desirability of a ratepayer knowing what rate is being paid for the service consumed and the undesirability of shifting the cost of serving a customer to another customer if the former customer leaves the system prior to the payment of any reconciliation.

Certainly, if the Legislature intended to make the proposed adjustment compulsive instead of permissive in this statute, it would have used the word "shall" instead of "may", as it in fact did in numerous other locations in Section 39-1-27.7. Accordingly, subsection (d) merely authorizes, but does not compel, a decoupling adjustment such as that proposed by NG, subject to the Commission's discretion, as is the practice with nearly all regulatory treatments.

D. The record fails establish any material environmental harm from the rejection of the Company's decoupling proposal.

Both ENE and CLF were concerned with the possibility of harm to the environment if the claimed disincentive interfered with the implementation of the gas efficiency programs. However, NG's Mr. Simpson testified that if the adjustment were not allowed, it would not prevent the achievement of the desired conservation, but merely delay it. Tr. 9/26/08, pp. 176-177. Mr. Simpson could not say by how much or for how long such a delay might be, nor was he aware of any evidence or studies in this case that might establish the amount or extent of such a delay, if any there were. Id., pp. 177-178. Accordingly, all we know is that there may be some undefined delay if the adjustment is not granted. This is an inadequate basis upon which to base a decision to allow the proposed decoupling adjustment.

E. Additional technical issues that would arise from approval of the Company's decoupling proposal indicate that its approval would generate needless complexity.

In addition to the foregoing, there were a number of technical issues raised by the Division trough the testimony of Mr. Oliver and through cross-examination. The OER believes that these issues cast further doubt on the wisdom of approving the proposed decoupling adjustment. As was noted in the hearing, the adoption of such an adjustment would also require cascading adjustments to NG's return on equity and other cost of service items such as, for example, rate case expense. In other words, NG is asking this Commission to abandon its long-standing straight forward practice of allowing for anticipated changes in volumes through known and measurable adjustments to historical volumes and to replace it with a combination of retroactive ratemaking and a series of other adjustments to compensate for such retroactive ratemaking. One is reminded of the principle of "Occam's razor," which is a scientific and philosophic rule that entities should not be multiplied unnecessarily or, to put it another way, that the simplest of competing solutions is to be preferred to the more complex. On the record in this case, OER believes that the simplest solution, i.e., dealing with the problem of changing volumes as the Commission has for many years, should continue to be followed.

III. SUMMARY AND CONCLUSION

Based on all of the foregoing, OER requests that the Commission reject the proposed Decoupling adjustment. Should the Commission decide to approve the proposed Decoupling adjustment, OER requests that such approval only be granted on such terms and conditions and with such modifications as may be necessary to eliminate OER's concerns and objections regarding the adverse consequences to ratepayers and to the regulatory process that would result from Commission approval of the Decoupling adjustment as originally proposed.

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Appendix A – Proposed Findings of Fact

1. The record does not establish that the disincentive postulated by National Grid ("NG") would have an actual rather than a theoretical impact.
2. The record does not establish why NG management cannot overcome the disincentive it postulates through the management tools available to it.
3. Regulated utilities such as NG are required to do many things against their own narrow self-interest. Tr. 10/20/08, p.101,ll.9-13.
4. NG has failed to show how or why the purported disincentive is so unique or impossible to overcome as to justify the special treatment sought.
5. Past losses of volumes and known and measurable future losses have already been accounted for in NG's proposed rates. NG Ex. 15, p.7., l.3-p.8,l.3. Such past losses do not constitute a disincentive.
6. Even if the disincentive postulated by Mr. Stavropolous and Mr. Simpson were real and actually affected the implementation of the gas efficiency programs, the resulting conservation would merely be deferred. Tr. 9/26/08, pp.176-177.
7. Even if the disincentive postulated by Mr. Stavropolous and Mr. Simpson were real, there is no evidence in the record as to the degree or extent to which the disincentive would actually affect the implementation of the gas efficiency programs. See: Tr. 9/26/08, pp.176-177.
8. The Legislature's use of the word "shall" in numerous other locations in Section 39-1-27.7 indicates that it's use of "may" instead of "shall" in subsection (d) thereof was intended to leave that course of action to the Commission's discretion and not to make it mandatory.

Appendix B - Proposed Conclusions of Law

1. A proposed rate case cost of service adjustment, such as the proposed decoupling adjustment, must be supported by legal evidence sufficiently specific to facilitate review the RI Supreme Court. Narragansett Electric Co. v. Harsch, 117 R.I. 395, 368 A.2d 1194 (1977).
2. The burden of proof to provide such legal evidence sufficiently specific to facilitate review by the RI Supreme Court is on the utility proponent, in this case, NG. Valley Gas Co. v. Burke, 122 R.I. 374, 406 A.2d 366 (1979).
3. Where, as in this case, NG has failed to demonstrate that its proposal is reasonable, the Commission is under no duty to fashion an alternative for the regulated utility. New England Tel & Tel. Co. v. PUC, 446 A.2d 1376 (R.I 1982).
4. The usual meaning of the word "may" in a statute is permissive, not compulsory. However, it may be compulsory if it were shown that such was the intent of the Legislature. Carson v. McLyman, 77 R.I 177, 180-181, 74 A.2d 853 (1950); Nolan v. Representative Council, 73 RI 498, 502-507, 57 A.2d 730 (1948).
5. The judicially created rule against retroactive ratemaking provides that, subject to narrow exceptions, the Commission is prohibited from using current rates to recover past losses or gains. In re Island Hi-Speed Ferry, LLC, 852 A.2d 524 (R.I. 2004); Providence Gas v. Malachowski, 600 A.2d 711 (R.I. 1991); Providence Gas Co. v. Burke, 475 A.2d 193 (R.I. 1984).

CERTIFICATE OF SERVICE

I hereby certify that on the 7th day of November, 2008, I emailed a copy of this document to all parties on the service list for this docket providing email addresses. In addition, a hard copy of this document was sent by regular mail to all attorneys who appeared at the hearing and to any parties on the service list who have not provided email addresses.

//John R. McDermott//