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2008 OCT 3 10 12 AM

Peter V. Lacouture
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October 3, 2008

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

Re: Petition for Review Under R.I.G.L. § 39-1-30
City of Newport, et al

Dear Luly:

Enclosed please find an original and nine copies of a Petition for Review under R.I.G.L. § 39-1-30 filed against the City of Newport. I am also sending these documents to you electronically.

Please acknowledge receipt on the enclosed copy of this letter and on the Petition and return with my messenger. Thank you.

Sincerely,



Peter V. Lacouture

PVL/lgo
Enclosures

cc: Joseph Nicholson, Esq.
Christopher J. Behan, Esq.
John Spirito, Jr., Esq.
Cindy Wilson Frias, Esq.
Patricia Lucarelli, Esq.
Paul J. Roberti, Esq.
Thomas Teehan, Esq.

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS
PUBLIC UTILITIES COMMISSION

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

v.

Docket No. _____

THE CITY OF NEWPORT; STEPHEN
C. WALUK; CHARLES Y. DUNCAN;
JUSTIN S. McLAUGHLIN; MARY C.
CONNOLLY; STEPHEN R. COYNE;
JEANNE-MARIE NAPOLITANO and
KATHRYN E. LEONARD, in their
official capacities as members of the
Newport City Council,
Defendants.

PETITION FOR REVIEW UNDER R.I.G.L. § 39-1-30

1. The Narragansett Electric Co. d/b/a National Grid (“National Grid”) brings this Petition under R.I. Gen. Laws § 39-1-30 and Rule 1.10 of the Public Utilities Commission’s (“PUC”) Rules of Practice and Procedure seeking review and nullification of recent actions by the City of Newport acting through its City Council (“Newport”) “affecting the placing, erection, and maintenance” of underground gas lines of National Grid, “a company under the supervision of the commission.”

JURISDICTION AND FACTS

2. National Grid is a Rhode Island chartered public utility under the supervision of the PUC.

3. National Grid serves approximately 245,000 natural gas customers in 33 towns and cities and approximately 475,000 electric customers in 38 towns and cities in Rhode Island.

4. As a Rhode Island chartered public utility, National Grid has the right and franchise to install its gas and electric lines within public ways of the State.

5. Upon information and belief, on or about July 9, 2008, Newport, acting through Defendants Waluk, Duncan, McLaughlin, Connolly, Coyne, Napolitano and Leonard or their predecessors, in their official capacity as members of the Newport City Council, enacted an ordinance entitled “An Ordinance In Amendment of Title Twelve of the Codified Ordinances of the City of Newport, Rhode Island, Revision of 1994, As Amended, Entitled ‘Streets, Sidewalks and Public Places’” (the “Ordinance”). A copy of the Ordinance is attached hereto as Exhibit A.)

6. The Ordinance requires curb-to-curb paving of any street in Newport that is excavated for the installation of utility facilities within five (5) years of “the construction, reconstruction, resurfacing or sealing” of the street.

7. The Ordinance also imposes on National Grid fees of “One Hundred Dollars (\$100) plus Two Dollars (\$2) per square foot of disturbed area proposed within the right-of-way.” It provides further “the area shall be calculated based upon standard mathematical principles and include all disturbed excavation related areas within the right-of-way.” [Emphasis supplied.]

8. National Grid did not receive a copy of the Ordinance until September 29, 2008 when Eric Earls, Newport Transportation Engineer, sent the language of the Ordinance to Patricia Desforges, National Grid’s permit coordinator. A copy of Mr. Earls’ e-mail is attached as Exhibit B.

9. The repaving demanded by Newport is structurally unnecessary.

10. Newport’s paving requirement imposes unwarranted and significant economic costs upon National Grid and its customers.

LEGAL CLAIMS

11. Newport's enactment of the Ordinance violates R.I. Gen. Laws § 45-6-1(a), which grants to cities and towns the power to adopt ordinances, inter alia, "to regulate the putting up and maintenance of telegraph and other wires and the appurtenances," but does not authorize Newport to impose unduly burdensome and improper costs and requirements relating to the locating, replacing, repairing, or installing underground gas or other utility lines.

12. Newport's repaving requirement interferes with the use of the public right-of-way which National Grid has the right to use in common with the public for its facilities. See R.I. Gen. Laws § 24-1-1.

13. R.I. Gen. Laws § 39-1-1(c) vests in the PUC "the exclusive power and authority to supervise, regulate, and make orders governing the conduct of companies offering to the public in intrastate commerce energy"

14. Newport's repaving requirement and fees constitute unlawful exercises of authority and are preempted by state law. Town of East Greenwich v. O'Neil, 617 A.2d 104 (R.I. 1992).

15. Newport's repavement requirement and fees are arbitrary, capricious, and serve no reasonable purpose.

16. Newport seeks to impose unreasonable and unjustified burdens, costs and requirements upon National Grid, its facilities, and its customers.

WHEREFORE, National Grid respectfully requests that the PUC, pursuant to R.I. Gen. Laws § 39-1-30,

(a) review and nullify, or in the alternative, modify, the Ordinance; and

(b) issue such other and further relief as is within its power and is just and proper.

Respectfully submitted,

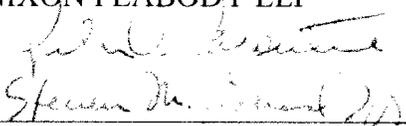
THE NARRAGANSETT ELECTRIC CO.
d/b/a NATIONAL GRID

By its attorneys,

Of Counsel:

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National Grid
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NIXON PEABODY LLP


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(401) 454-1000
(401) 454-1030 (fax)

Dated: October 2, 2008

CERTIFICATION

I hereby certify that a copy of this Petition for Review Under § 39-1-30 has been sent via First Class Mail and E-mail on this ^{3rd} ~~2nd~~ day of October, 2008 to the following counsel:

Joseph Nicholson, Esq.
Christopher J. Behan, Esq.
Newport City Solicitor
Newport City Hall
45 Broadway
Newport, RI 02840

Cindy Wilson Frias, Esq.
Patricia Lucarelli, Esq.
Public Utilities Commission
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Warwick, RI 02888

Paul J. Roberti, Esq.
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150 South Main Street
Providence, RI 02903

John Spirito, Jr., Esq.
Chief of Legal Services
Rhode Island Division of Public Utilities
89 Jefferson Boulevard
Warwick, RI 02888

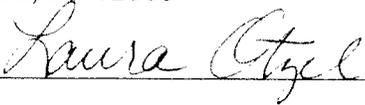


EXHIBIT A

CITY OF NEWPORT

ORDINANCE

OF THE

COUNCIL

NO. 2008-24

AN ORDINANCE IN AMENDMENT OF TITLE TWELVE OF THE CODIFIED ORDINANCES OF THE CITY OF NEWPORT, RHODE ISLAND, REVISION OF 1994, AS AMENDED, ENTITLED, "STREETS, SIDEWALKS AND PUBLIC PLACES."

BE IT ORDAINED by the City of Newport:

Chapter 12.08 of the Codified Ordinances of the City of Newport, entitled, "Streets, Sidewalks and Public Places," is hereby further amended by **DELETING IN ITS ENTIRETY CHAPTER 12.08, "EXCAVATIONS AND CURB CUTS," AND ADDING IN LIEU THEREOF THE FOLLOWING:**

"12.08. EXCAVATIONS AND CURB CUTS

- 12.08.010. Notice required prior to beginning new work.
- 12.08.020. Approval of Director of Public Services required.
- 12.08.030. Conditions precedent--Agreement between applicant and city.
- 12.08.040. Permit applications--Restoration of surface--Bonds--Insurance.
- 12.08.050. Excavations and obstructions of public ways--Permits required--Fees--Barricades--Emergencies.
- 12.08.060. Removal of barricades and warning lights prohibited.
- 12.08.070. Responsibilities of permit holders.
- 12.08.080. Failure to Comply.

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12.08.010. Notice required prior to beginning new work.

At least two weeks prior to commencing work in any street in the city for which a specific appropriation has been made by council for new construction or permanent pavement, the Director of Public Services shall give notice to the public by U.S. mail.

12.08.020. Approval of Director of Public Services required.

- A. No person shall alter or modify any portion of the city right-of-way in order to install an entrance, curb cut or driveway in such public street or sidewalk, or make any other physical alteration or modification to the city right-of-way without first making application to the Director of Public Services. The applicant shall file a plat or plan, in the manner and form prescribed by the Director, showing the proposed location and dimensions of such alteration (ie. entrance, curb cut, driveway, sidewalk improvement, etc.) being petitioned for approval.
- B. The Director shall, within fifteen (15) business days of the receipt of the complete application, examine into the necessity of such alteration and in so doing shall take into consideration the public welfare, traffic hazards, danger to pedestrians and the public generally and any and all matters pertaining thereto, and shall act upon and approve or disapprove the application. All applications that include any type of curb and sidewalk reconstruction or modification shall include provisions for transition curbing and wheelchair accessibility to the extent practicable.
- C. If the Director disapproves the application, he or she shall notify the applicant of his or her action. The applicant shall have the right to appeal the action of the Director within ten (10) calendar days thereafter, and council shall, after hearing the matter, affirm or reverse the action of the Director without amendment or alteration.

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- D. If the Director approves the application, or if council, CITY upon appeal, approves the application, then the Director shall notify the applicant of such approval, and the applicant shall hire a suitable contractor to do the work required, which work shall be done only under the supervision of the Department of Public Services Engineering Division and in the manner prescribed by the Department, and the applicant shall pay all costs of such work.

12.08.030. Conditions precedent--Agreement between applicant and city.

A condition precedent to any work done under Section 12.08.020 shall be an agreement, on a form approved by the city solicitor, wherein the applicant agrees, for himself or herself and his or her heirs, assigns and successors, that the alteration (ie. entrance, curb cut, driveway, sidewalk improvement etc.) shall at all times be kept clean, free of grease and oil and safe for pedestrians and others passing on or over such entrance, curb cut or driveway, that he or she will make such repairs as may be, from time to time, ordered by the Director of Public Services, and that he or she will indemnify the city for any and all damage that may arise by reason of the use of the entrance, curb cut, driveway, or sidewalk improvement, etc. For any breach of the agreement, the Director may revoke the permit granted under Section 12.08.020 and may pursue any and all other legal and equitable remedies available to him or her. The agreement shall be recorded in the land evidence records of the city by the applicant and shall bind all subsequent owners of the land improved by work done hereunder.

12.08.040. Permit applications--Restoration of surface--Bonds--Insurance.

- A. Every person who files an application for a permit to make an excavation in a sidewalk or street shall, in such application, state the exact location of the proposed excavation and the dimensions thereof and shall also agree to restore the sidewalk or pavement in accordance with the specifications prescribed by the Director of Public Services.

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- B. Every person making application shall further agree that if, in the opinion of the Director, the work or restoration is not in strict accordance with the specifications, then the applicant shall correct the work to the satisfaction of the Director within 14 days. If the applicant does not act within 14 days, the city may restore the same and charge to the person the associated costs incurred by the Director in making the restoration plus a penalty of \$500 or 100% of the associated cost whichever is greater.
- C. Every person making application for excavations as aforesaid shall also be required to file in the office of the Department of Public Services Engineering Division a performance bond in the sum of five thousand dollars (\$5,000.00), conditioned upon the applicant performing the work for which he or she has applied in a first-class and workmanlike manner and restoring the sidewalk, curb or pavement in accordance with the specifications prescribed by the Director, and with the understanding that if, in the opinion of the Director, the work or restoration is not in strict accordance with the specifications, then the city may do the work or restore the sidewalk, curb or pavement and charge to such person the cost thereof plus a penalty of \$500 or 100% of the associated cost whichever is greater. Thorough clean-up shall be accomplished at the end of each working day.
- D. Before commencing excavation work covered by this chapter, the person seeking the permit shall establish, by means of an insurance binder, that he or she has in full force and effect, a certificate of insurance for a comprehensive general liability policy with a minimum coverage of five hundred thousand dollars (\$500,000.00) combined single limit or three hundred thousand dollars (\$300,000.00) bodily injury limit/six hundred thousand dollars (\$600,000.00) bodily injury limit/one hundred thousand dollars (\$100,000.00) property damage limit to include broad form property damage and explosion/collapse/ underground coverage and completed operations coverage. For sidewalk and street obstructions the applicant must provide a certificate of insurance for a

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comprehensive general liability policy with a minimum coverage of three hundred thousand dollars (\$300,000.00). All policies must run to the benefit of the city to indemnify the city for any liability it may incur as a result of issuing a permit under this chapter.

**12.08.050. Excavations and obstructions of public ways--
Permits required--Fees--Barricades--
Emergencies.**

- A. No person shall alter or modify city right-of-way in any way or for any purpose (ie connect any land or premises with any main drain or common sewer, or open any drain or sewer belonging to the city, or break ground or make any excavation in any of the sidewalks, streets or public places in the city, for the purpose of making a drain or sewer or laying or placing gas pipes or water pipes or for any other purpose,) without first obtaining a permit therefore from the Director of Public Services, who shall first ascertain the feasibility of such excavations in relation to associated engineering standards for proposed work. Such person applying for a permit shall provide such information as the Director may require. For such permit, the person obtaining the same shall pay the City through its Department of Public Services Engineering Division, a fee as set forth in subsection B of this section and such person shall provide for proper traffic control and properly light and barricade such excavation to the satisfaction of the Director. All fees received shall, from time to time, be deposited with the Director of Finance.

However, in the case of an emergency occurring weekdays between the hours of five p.m. and eight a.m. or any other time during any weekend or holiday, necessitating an excavation in a street or public place for the purpose of making repairs to a gas main, water main, cable or electric conduit or for any other purpose, the person required to make such excavation shall not be first required to obtain a permit from the Director of Public Services. Such person, however, shall, before making such excavation, advise the police department of the location where such excavation is to be made, and the police department, upon receipt of such notice,

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shall forthwith notify the fire department of the location where the excavation is to be made. However, the person making an excavation as aforesaid because of an emergency shall, between the hours of nine a.m. and twelve noon of the next working day following, file a written application as herein provided.

- B. The fee for all excavations within any city right of way, whether in a public street or sidewalk, shall be as follows:
1. One hundred dollars (\$100.00) plus two dollars (\$2.00) per square foot of disturbed area proposed within the right-of-way. The area shall be calculated based upon standard mathematical principles and include all disturbed excavation related area within the right of way.
 2. The Director of Public Services shall give ninety (90) days advance notice to all public utilities when a street or sidewalk is to be constructed, reconstructed, or resurfaced. This will afford the utility companies an opportunity to complete any necessary work in such road or sidewalk prior to the paving work. For five (5) years thereafter any construction, reconstruction or resurfacing, any longitudinal excavation associated with new mains and/or conduits, including the maintenance of existing ones, will require pavement restoration from curb to curb for the entire length of the excavation.
 3. For five (5) years following the construction, reconstruction, resurfacing or sealing of a street, any excavator of a lateral trench shall restore the surface as set forth in this section. The existing pavement will be completely removed and replaced, in kind, for a distance of ten feet on either side of the centerline of the trench, from curb to curb. With regard to lateral cuts, the Director need not give notice as required in subsection B.2 of this section.

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- C. The fee for obstructing or barricading a public street or sidewalk shall be twenty-five dollars (\$25.00) per calendar day, or part thereof, for the first thirty (30) days of the obstruction, and one hundred dollars (\$100.00) per calendar day, or part thereof, after the first 30 days, which shall be paid to the City through the Department of Public Services Engineering Division. Obstruction permits associated with obstructing or barricading a public street or sidewalk shall be in addition to other appropriate fees for any and all excavation within the right-of-way.
- D. The fee associated with any curb cut permit application shall be as follows:

Residential Applications:

1. Single Family - One hundred dollars (\$100) plus two dollars (\$2.00) per square foot of disturbed area proposed within the right-of-way.
2. Multi Family - 5 units or less - Two hundred dollars (\$200) plus two dollars (\$2.00) per square foot of disturbed area proposed within the right-of-way.
3. Multi Family - 6- 49 units - Five hundred dollars (\$500) plus two dollars (\$2.00) per square foot of disturbed area proposed within the right-of-way.

Commercial/Industrial Applications:

1. Less than 25,000 square feet building - One thousand dollars (\$1,000.00) plus two dollars (\$2.00) per square foot of disturbed area proposed within the right-of-way.
2. 25,000 to 300,000 square feet building - One thousand five hundred dollars (\$1,500.00) plus two dollars (\$2.00) per square foot of disturbed area proposed within the right-of-way.

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3. 300,001 to 750,000 square feet building - Two thousand dollars (\$2,000.00) plus two dollars (\$2.00) per square foot of disturbed area proposed within the right-of-way.
 4. Greater than 750,000 square feet building - Three thousand dollars (\$3,000.00) plus two dollars (\$2.00) per square foot of disturbed area proposed within the right-of-way.
- E. The fee associated with any road closure shall be \$100.00 per day.
- F. The fee associated with a drain layers permit shall be \$25.00 per connection.
- G. References throughout this chapter to "the city" mean the Director of Public Services and his or her authorized representative.

12.08.060. Removal of barricades and warning lights prohibited.

No person shall remove any barrier or lantern which is required to be placed by the Director of Public Services, or under his or her authority and direction, to protect the public from injury while any street or public place is being made or repaired, or while any work or improvement therein is being performed by or for the city.

12.08.070. Responsibilities of permit holders.

- A. The permit holder shall furnish all labor, materials, tools and equipment necessary for protection of the excavation, traffic control, backfilling the excavation, placing a compacted gravel foundation, temporary pavement, landscaping and placing the permanent service and shall perform all other work necessary to restore the condition of the right-of-way.

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- B. The permit holder shall notify the city, in writing, twenty-four (24) hours prior to doing any work.
- C. Backfill material, concrete, plant mix bituminous concrete pavement, crushed processed gravel, cold patch and top soil or loam shall be in accordance with engineering standards of the Department of Public Services Engineering Division and/or the Rhode Island Department of Transportation's Standard Specifications for Road and Bridge Construction, 2004, as amended.
- D. All excavations shall be protected with public safeguards and adequate traffic control and warning devices, such as traffic cones, traffic signs, barricades, lights, watchmen etc., to be provided and maintained by the permit holder. No open excavation shall be left unattended at any time.
- E. All material removed from the excavation shall be immediately removed from the site of the work and shall not be left on any public right-of-way. That portion of excavated material which is to be used for backfilling the excavation may be stored on the site only with the specific permission of, and in a manner approved by, the city.
- F. No construction materials or equipment shall be stored on any city property or public right-of-way without the written approval of the city.
- G. Placement of backfill, gravel foundation, temporary pavement and permanent pavement shall be in accordance with the standards of the Department of Public Services Engineering Division.
- H. Regarding permanent pavement, final pavement restoration shall be deferred for a time period designated by the Director of Public Services at the time of the placement of the temporary pavement. This time will be dependent upon soil characteristics, the depth of the excavation and the nature of the excavation. When this time has expired, the department shall give written notice to the permit holder to

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remove temporary pavement and replace it with permanent pavement within a period of ten working days or be subject to the penalty provided in Section 1.12.010 for each day of noncompliance.

- I. Concrete on roadways and concrete sidewalks shall be in accordance with standards of the Department of Public Services Engineering Division and/or the Rhode Island Department of Transportation's Standard Specifications for Road and Bridge Construction, 2004, as amended.
- J. Any individual, corporation, public utility or activity that performs work in, upon, or effecting the roadway of Bellevue Avenue shall be required, as a condition of the issuance of a permit to cut the roadway, to repair and replace the roadway only in full slab units. All costs relative to the repair and replacement of slabs is to be borne by the individual, corporation, public utility or activity requesting the slab for which the Director of Public Services shall require a completion bond for all such work. Contractors performing the work shall be approved by the Director of Public Services. The slabs shall be of the same color, texture, thickness, etc. All concrete roadway slab replacements shall be the same as the standards of the Department of Public Services Engineering Division and/or the Rhode Island Department of Transportation's Standard Specifications for Road and Bridge Construction, 2004, as amended and shall further be the same as the specifications of the Bellevue Avenue Reconstruction Contract, identified as Rhode Island Federal Aid Project No. CRP-FY89 (003).

12.08.080. Failure to Comply.

Failure to comply with application for permit procedures will be subject to a fine of \$150.00 per incident. All work shall halt while appropriate permits are applied for and obtained."

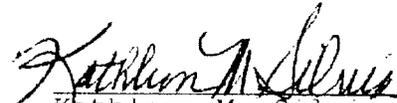
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SECTION 2. This ordinance shall take effect upon its passage and all ordinances or parts of ordinances inconsistent herewith are hereby repealed.

IN COUNCIL

READ AND PASSED
July 9, 2008



Kathleen M. Silvia
City Clerk

EXHIBIT B

From: Earls, Eric [mailto:EEarls@CityofNewport.com]
Sent: Monday, September 29, 2008 1:32 PM
To: Desforges, Patricia
Subject: Special Paving

Ms. Desforges,

Per your request I am providing the following clarification for what the City requires for "Special Paving" when referenced on the permits issued for excavations within the City right-of-way. As stated in section 12.08.050.B.3:

For five years following the construction, reconstruction, resurfacing or sealing of a street, any excavator of a lateral trench shall restore the surface as set forth in this section. The existing pavement will be completely removed and replaced, in kind, for a distance of ten feet on either side of the centerline of the trench, from curb to curb. With regard to lateral cuts, the director need not give notice as required in subsection (B)(2) of this section.

Please feel free to contact me with any other question.

Regards,
Eric

Eric J. Earls, P.E.
Transportation Engineer
City of Newport
280 Spring Street
Newport, RI 02840

phone 401-845-5842
fax 401-842-6919