



State of Rhode Island and Providence Plantations

DEPARTMENT OF ATTORNEY GENERAL

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*Patrick C. Lynch, Attorney General*

April 1, 2009

Ms. Luly Massaro, Clerk  
Public Utilities Commission  
89 Jefferson Blvd.  
Providence, RI 02888

**Re: Docket No. 4028**

Dear Ms. Massaro,

Enclosed please find the Response of the Division of Public Utilities and Carriers (“Division”) to the Motion for Summary Judgment<sup>1</sup> of the Narragansett Electric Company, d/b/a National Grid (“National Grid”). In providing the Commission with this Response, the Division has reviewed National Grid’s motion, as well as the oppositions to that motion that have been filed to date. It is the Division’s understanding that the City of Providence (the “City”) has, or will shortly, amend chapter 23 of the Providence Code of Ordinances (the “Ordinance”) deleting Section 23-35 in its entirety. Accordingly, the opinions expressed herein only address Sections 23-33 and Section 23-34.

In its motion, National Grid contends that 49 U.S.C. § 60104(c) “contains an express federal preemption that preempts state regulation in the area of intrastate pipeline safety...” absent receipt by the state authority promulgating the regulation of certification from the Secretary of Transportation. Since the City is not a certified state authority, National Grid contends that the Ordinance is expressly preempted by § 60104(c). National Grid Motion at 4.

If the Ordinance is viewed strictly as a “safety” measure, the Division concurs with National Grid’s conclusion that the Ordinance is expressly preempted. 49 U.S.C. § 60104(c) only permits *certified* state authorities to adopt safety standards for intrastate pipeline facilities, and only if the standards are compatible with federal standards. The section reflects Congressional intent to preempt all other state or local laws. See Olympic Pipeline Co. v. City of Seattle, 437 F.3d 872, 880 (9th Cir. 2006) (non-certified city preempted from imposing additional safety regulations on hazardous liquid pipeline

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<sup>1</sup> More properly designated as a Motion for Summary Disposition. See Rule 1.15(e), Rules of Practice and Procedure (1998).

operator); Shell Oil Co. v City of Santa Monica, 830 F.2d 1052, 1065 (9th Cir. 1987) (when a federal statute expressly requires certification in order for a state agency to promulgate a compatible safety standard, an enactment by an uncertified state agency will be preempted). See generally Algonquin LNG v. Loqa, 79 F. Supp.2d 49, 50 (D.R.I. 2000) (defining express preemption); Lynch v. Southern Union Co., 321 F. Supp.2d 328, 341 (D.R.I. 2004) (§ 60104(c) preemption applies at least as far as the customer's gas meter). Since the City is not certified, § 60104(c) prohibits the City from enacting safety standards for intrastate pipelines, such as the Ordinance. E.g., Olympic Pipeline, 437 F.3d at 880.

If the Commission concludes that the Ordinance is not a safety measure, a court would still, more likely than not, conclude that the Ordinance is preempted. The Ordinance requires that National Grid obtain a homeowner's written consent prior to installing a meter, meter equipment or a regulator on the exterior of his or her residential structure. The scope of the Ordinance falls within an area, which the federal government has chosen to occupy with such pervasiveness of regulation as to displace all local regulation. See e.g. 49 C.F.R. § 192.353 (identifying criteria for the placement of gas meters). See Schneidewind v. ANR Pipeline Co., 485 U.S. 293, 300-02 (1988) (discussing the theory of field preemption). See also Algonquin LNG v. Loqa, 79 F. Supp.2d 49, 51 (D.R.I. 2000) (discussing field preemption and vast regulatory scope of the NGPSA).<sup>2</sup>

Preemption at the state level is an even more likely result. The Rhode Island Supreme Court has held that a municipal ordinance in direct and material conflict with a state law of general character or statewide concern is invalid. E.g., Town of Gloucester v. R.I. Solid Waste Management Corp., 390 A.2d 348, 349 (R.I. 1978). As discussed above, by its terms, the Ordinance requires that National Grid obtain a homeowner's written consent before installing a meter, meter equipment or a regulator on the exterior of his or her residential structure. This consent requirement directly conflicts with provisions of National Grid's gas and electric tariffs, which expressly allow the company to install gas and electric meters at "points most convenient" or at "locations designated" by the company, respectively. See RIPUC NG-GAS No. 101, Schedule A, Sheet 11 (National Grid may install "all meters, services and other gas equipment . . . at points most convenient for the Company's access and service and in conformance with public regulations in force from time to time"); RIPUC No. 1197, Sheet 3 (providing that "[m]eters of either the indoor or outdoor type shall be installed by the Company at locations to be designated by the Company"). As these published tariff provisions are given the effect of law, Henley Drilling Co. v. McGee, 36 F.3d 143, 146 (1st Cir. 1994), the Ordinance, in all probability, cannot stand.<sup>3</sup> See Town of Gloucester, 390 A.2d at 349.

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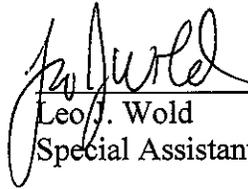
<sup>2</sup> The Ordinance governs the installation "any meter, meter equipment or regulator," and thus, by its terms, is not restricted to gas meters. The Division restricts the scope of its legal review of the federal preemption issue to gas meters and associated equipment; however, other areas of federal law may afford other types of utilities with a similar claim that the Ordinance is preempted.

<sup>3</sup> Section 23-34 of the Ordinance vests the Providence Housing Court with the authority, upon citation, to fine a utility up to \$250.00 per residential structure if it "shall install a meter, meter equipment or regulator

Based upon the foregoing, the Division does not oppose National Grid's Motion for Summary Judgment.

Respectfully submitted,

Division of Public Utilities  
and Carriers



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Leo J. Wold  
Special Assistant Attorney General

cc: Service List

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anywhere on the exterior of a residential structure.” G.L. § 39-1-30, however, vests this Commission with the “exclusive power to supervise, regulate and make orders governing the conduct of public utilities.” East Greenwich v. O’Neil, 617 A.2d 104, 110 (R.I. 1992). Section 23-34 directly conflicts with the Commission’s exclusive jurisdiction, and therefore, is preempted as well.