

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

**IN RE: Application of the Narragansett :
Electric Company d/b/a National Grid : DOCKET NO. 4065
For Approval of a Change in Electric :
Base Distribution Rates :**

**POST-HEARING MEMORANDUM OF LAW OF THE
RHODE ISLAND ATTORNEY GENERAL**

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STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS
PUBLIC UTILITIES COMMISSION

In Re: APPLICATION OF THE NARRAGANSETT) Dkt. No. 4065
ELECTIC COMPANY D/B/A NATIONAL GRID)
FOR APPROVAL OF A CHANGE IN ELECTIC)
BASE DISTRIBUTIONS RATES)

Memorandum of Law of the
Rhode Island Attorney General

I. INTRODUCTION

Narragansett Electric Company, d/b/a National Grid (“Company” and “National Grid”) filed its rate application with the Rhode Island Public Utilities Commission (“Commission” and “PUC”) on June 1, 2009. At the time of filing the Company sought approval of an increase in its base rate distribution revenue of \$75.3 million dollars. Notably, since the date of its original filing the Company has modified its base rate request to \$73.338 million dollars (or a 34% percent increase of base rate distribution revenue). It should be noted that the requested 34% increase reflects the appeal to shift \$9.752 million dollars of uncollectible accounts from distribution service to standard offer service. Additionally, the Company is seeking an 11.6% return on equity and an overall rate of return of 8.98%.

After review of the Company's application, Patrick C. Lynch, Attorney General for the State of Rhode Island ("Attorney General"), pursuant to Rule 17 of the Rules of Practice and Procedure of the Division of Public Utilities and Carriers ("Division") and Rule 1.3 of the Rules of Practice and Procedure of the Commission, moved to intervene with full-party status in the above-captioned proceeding on June 12, 2009¹. It is no revelation that under common law, the Attorney General is the representative of the public, empowered to bring actions to redress grievances suffered by the public as a whole. The instant application for a rate increase was heard to conclusion, and the Commission requested that parties submit post-hearing briefs in the above-captioned matter². The Attorney General submits this memorandum of law pursuant to said request in his capacity as an advocate for the public.

II. REVENUE DECOUPLING RATEMAKING PLAN

A. Revenue Decoupling Ratemaking Plan Overview

The Company's Revenue Decoupling Rate Making Plan ("RDR Plan") consists of the following two elements: (1) base rates as set by the rate case; and (2) the RDR Plan adjustment factor ("Adjustment Factor"). The Adjustment Factor reflects the impact of the following factors: (1) decoupling revenues from kWh deliveries; (2) impact of

¹ As set forth in the Attorney General's Opening Statement, the Attorney General's intervention should not in any way be interpreted as a lack of confidence in the Division's examination of the Company's application; quite the contrary. The Attorney General is certainly confident in the Division's examination and supports its recommendations. However, in June the Attorney General decided to intervene after becoming aware of the Company's enormous request for an increase in its base rate distribution revenue of \$75.3 million dollars. According to Attorney General, this application lacks awareness in light of the current climate of Rhode Island's economy. 11/3/2009 Tr. at 6-7.

² The Attorney General supports and adopts the position that the Division has with respect to each of the principal issues that require resolution in this proceeding. In its direct and surrebuttal case, the Division recommended a downward adjustment of \$37.872 Million to the Company's rate revenue requirement (in other words 11.93% greater than the revenues produced by current base rates). Among other adjustments, the Division has recommended a return on equity of 10.1% and an overall rate of return of 7.54%. The Attorney General supports and adopts herein the Divisions recommendations to the Commission.

inflation since the rate case; (3) impact of cumulative capital additions since the rate case; and (4) impact of capital expenditures in the current year. The Company explains that each factor is introduced into a two-part equation for the purpose of providing the RDR Plan Adjustment Factor, which will adjust rates annually.

B. Look Back and Look Ahead Equations

The First part of the equation is the RDR Plan revenue reconciliation or the “Look Back” portion. The second part of the equation is the RDR plan revenue Adjustment Factor or the “Look Ahead” portion. The Look Back is designed to decouple the Company’s revenue from the quantity of the Company’s sales. This is accomplished by reconciling revenues billed in the prior year with the revenue amount the company was permitted to recover (in other words, the Annual Target Revenue “ATR”). The Look Ahead will address the impact of net inflation and net capital additions in the year in which these adjustments take effect.

C. Rhode Island Ratemaking Policy and Practice

The Company claims that on a national level, “the use of revenue decoupling for electric utilities has been less common, but growing in recent years.” Tierney Direct at 49. National Grid, further asserts that its RDR Plan “is grounded in long-standing Rhode Island ratemaking policy and practice.” Id. at 4. However, with respect to electric utilities, the RDR plan and revenue decoupling reflect the minority position. More importantly, at the local level neither is imbedded in Rhode Island’s ratemaking history. Most recently, this Commission rejected decoupling in Narragansett Electric, Docket No. 3943, Order 19563.

Staying with the Company's contention that decoupling is a growing trend at the national level, only three utility companies (each located in California) have adopted revenue-decoupling strategies remotely comparable to the Company's proposal. In addition to California, the Company has acknowledged six other States, which "rely on rate mechanisms that incorporate revenue decoupling." Id. at 49. Namely, Wisconsin, In Re: Wisconsin Public Service Corp. for Authority to Adjust Electric and Natural Gas Rates, 6690-UR-119 (December 30, 2008); Connecticut, Application of the United Illumination Co. to Increase its Rates and Charges, Docket No. 08-07-04, (February 4, 2009); Maryland, In Re: Application of Delmarva Power & Light Co. for Authority to Revise its Rates and Charges for Electric Service and for Certain Rate Design Changes, Case No. 9093, order No. 81518 (July 19, 2007); New York, Proceeding on Motion of the Commission as to the Rates, Charges, Rules and Regulation of Consolidated Edison Co. of New York, Inc. for Electric Service, Case 07-E-0523 (March 25, 2008); Idaho, In Re: Matter of Investigation of Financial Incentives to Investment in Efficiency by Idaho Power Co., Case No. IPC-E-04-15, Order no. 30267 (March 12, 2007); and Oregon, In Re: Portland General Electric Co., Order No. 09-176 (May 19, 2009). Notably, however, Florida, Report to the Legislature on Utility Revenue Decoupling at 23-25 (Fla. December 1, 2004); Maine, Maine Public Utilities Comm'n Report on Utility Incentives Mechanisms for the Promotion of Energy Efficiency and System Reliability, at 26 (February 1, 2004); New Mexico, In Re: Petition of Public Service Co. of New Mexico Revision of its Rates, Rules and Charges Pursuant to Advice Notice Nos. 755 and 756, Case No. 06-00210-UT at 39 (July 2, 2007); and Washington, Washington Utilities

Transp. Comm'n v. PacifiCorp d/b/a Pacific Power & Light Co., Docket UE-050784, Order 3 (April 17, 2006) have rejected decoupling for electric utilities.

In 1991 the State of Maine implemented a decoupling program for Central Maine Power Company ("CMP"). This particular program allowed for an annual adjustment to revenue based on changes in CMP's number of customers. The facts reveal that at the time of the Maine program there was a recession that resulted in decreased sales, which observably resulted in decreased revenue. By the end of fiscal year 1992 deferrals reached \$52 million dollars, and "[t]he consensus was that only a very small portion of this amount was due to CMP's conservation efforts and that the vast majority of the deferrals resulted from the economic recession." Maine Report at 26-27. Moreover, conservation and energy efficiency was prompted by ratepayers' efforts rather than by CMP's actions. Id. at 27. The commission resolved that the decoupling mechanism was "[i]ncreasingly viewed... as shielding CMP against the economic impact of the recession, rather than providing the intended energy and efficiency and conservation incentive impact." Unsurprisingly, Maine's experimental decoupling program came to a conclusion at the expiration of the experimental period.

This Commission has never approved an adjustment mechanism in any other matter that is comparable to any feature of the Company's RDR plan. In fact, the Commission has never been offered the chance to review a plan analogous to the RDR Plan at issue. Most recently, in Narragansett Electric, the Commission settled that "[r]egardless of decoupling, most customers have an incentive to conserve because reduced usage translates directly into lower commodity charges... which account for over two thirds of the average residential bill." Id. at 58. The Commission, similar to the

Maine Report, held that the adoption of “revenue decoupling would protect the company from revenue declines attributable to any cause, not just conservation and efficiency efforts.” Id. Irrespective of the facts here, the Company erroneously contends that its RDR Plan and Revenue decoupling are “grounded in long standing Rhode Island ratemaking policy and practice.” This is simply not the case.

D. Economic Considerations

In addition to the findings of the Maine Report, the Supreme Court of Rhode Island has found that the Commission should take into account Rhode Island’s economic climate when considering rates. In Michaelson v. Kennelly, 113 A.2d 121, (R.I. 1955), the Court further interpreted their decision in United Electric Rys. Co. v. Kenelly, 90 A.2d 775 (R.I. 1952). In United Electric, the court found that “the administrator was in error in thus refraining from fully considering and weighing the evidence in relation to the conditions which he found to exist and in balancing reasonably and fairly according to the law the equitable interests of the company on the one hand and the public convenience and welfare on the other.” United Electric at 778. In Michaelson the Court reaffirms their position and stated, “We did not there hold that he was not entitled to consider the existing economic conditions, but rather that such conditions were factors which he should consider in rendering his decision.” Id. at 122. As was the case in the Maine Report, the State of Rhode Island, as well as the United States as a whole, is currently experiencing a deep and far reaching recession. See John Kostrzewa, A slow recovery forecast for R.I., Providence Journal, January 10, 2010. If the Commission refrains from considering economic conditions it will fall short of performing its full duty under the law. United Electric at 778 (stating that the Commission must consider and

weigh all evidence). For these reasons not only should this Commission deny the Company's RDR Plan³ they should especially deny its request for an annual inflation adjustment mechanism and a capital expenditures tracker.

E. Annual Inflation Recovery

Of the seven states that have approved a comparable decoupling plan (Wisconsin, Connecticut, Maryland, New York, Idaho and Oregon) not one has sanctioned recovery of annual inflation or capital expenditures. The Rhode Island system reliability and least-cost procurement statute, R.I. Gen. Laws § 39-1-27.7 (2006), contains a provision allowing the Commission the ability to provide for any over or under recoveries due to energy efficiency and conservation. *Id.* at d. However, this section maintains that only "reasonable and prudent overhead and fixed costs" may be recovered.

When reading a clear and unambiguous statute to interpret its meaning, one should give each word its plain and ordinary meaning. School Committee of Cranston v. Bergin-Andrews, 984 A.2d 629 (R.I. 2009); State v. Oliveira, 882 A.2d 1097, 1110 (R.I. 2005). In this case, Black's Law dictionary defines fixed costs as "a cost whose value does not fluctuate with changes in output or business activity, especially overhead expenses such as rent, salaries and depreciation." Black's Law Dictionary (8th ed. 2004) Overhead is defined as "business expenses that cannot be allocated to a particular product, service or ordinary operating costs." *Id.*

National Grid wishes to include annual inflation adjustments in their RDR Plan. Inflation coincides with the real value of money at any given time. *Id.* Due to the fluctuation in the value of money on a daily basis, inflation is never static, and thus, by

³ For purposes of this brief, the Company's RDR Plan refers to the Company's RDR Plan in its entirety. With regards to the term "Revenue Decoupling", as used in this brief, is referring to The "Look Ahead" and "Look Back" portions of the RDR Plan, which represents the annual revenue reconciliation mechanism.

contrast is *not* a “fixed cost” (or overhead for that matter). The Commission should therefore forbid the inclusion of annual inflation adjustments. In addition to the statutory negation of the inflation factor, the Commission’s own rules do not allow for this type of recovery. Commission Rule 2.6(a) (1998) requires test year data to be submitted in rate filings. This test year is based on historical actual data within nine months of said filing. Allowing for an inflation adjustment without this data is in clear contravention of Commission Rule 2.6(a). This Commission “[h]as an obligation to abide by its own regulations.” Rotinsulu v. Mukasey, 515 F.3d 68,72 (1st Cir. 2008). Failure to adhere to applicable agency regulation may provide an adequate basis on which an agency decision may be vacated. Id.

F. Capital Expenditures Recovery

With respect to National Grid’s insertion of a capital expenditures tracker in its RDR Plan, the Commission should prohibit this from being an allowable expense. A “[r]ate base” is the utility’s total investment in, or the fair market value of, the used and useful property necessarily devoted to the rendering of regulated services.” When determining rate base the Commission must determine whether the capital expenditures cited by the Company are used and useful, as a “utility cannot expect a customer to pay for property not used in the rendition of services.” Newport Electric Corp. v. PUC, 624 A.2d 1098, 1011 (R.I. 1993); Providence Gas Co. v. Burke, 448 A.2d 773, 774 n. 2 (R.I. 1982). “Only the reasonable value of property which is actually being used should be included in the rate base in determining a fair rate of return.” Narragansett Electric Co. v. Kennelly, 143 A.2d 709, 721 (R.I. 1958) *quoting* Willcox v. Consolidated Gas Co., 212 U.S. 19 (1909). The Division’s witness, Mr. Oliver, confirmed that the prudent, used and

useful standard requires “such determinations be made before costs for capital additions are included in rates.” Oliver Direct at 47.

National Grid’s own witness, Dr. Tierney, conceded that, “there could be dollar[s] associated with collection of a rate today for something that actually goes into service tomorrow because of a timing difference.” 11/4/2009 Tr. at 51. This concession, and the capital expenditures tracker itself, is a direct infringement of the used and useful standard. The “R.I. PUC has always required that an asset be used and useful before allowing it in rates...” Interstate Navigation Co., Docket 2484, Order No. 15300 (1997). If the Commission were to allow an annual recovery of estimated future capital costs it would be permitting the Company to improperly obtain funds for projects that are neither used nor useful. Accordingly, the Commission is required to disallow the Company’s petition for a capital expenditures tracker.

III. OPERATIONAL & MAINTENANCE EXPENSES

A. Consumer Assistance Advocates

It has been well settled that in order for an operational expense to be deemed legitimate, and thus includible in rates, such an expense must have a direct ratepayer benefit. Providence Gas v. Malachowski, 656 A.2d 949, 951 (R.I. 1995). In the Providence Gas case, the PUC denied the company’s proposed Supplemental Executive Retirement Plan because the evidence presented by the company showed that the program did not directly benefit ratepayers. In the case at bar, the Company is proposing two additional personnel to serve in consumer assistance advocacy roles (“Advocates”). National Grid submits, among other reasons, that the addition of said Advocates is necessary for the proper implementation of the Company’s public benefit programs. The

Attorney General supports programs and/or policies that seek to improve the administration and efficiency of any public-benefit program. Nevertheless, the Company has provided no adequate basis on which to justify this operational expense, and more importantly has provided no evidence of a tangible ratepayer benefit from this operational expense.

The Rhode Island Community Action Program (“RI CAP Agencies”) is comprised of eight non-profit companies, which are dedicated to serving the citizenry of Rhode Island. RI CAP Agencies dutifully inform low-income residents about qualifying programs and administer many of these same programs, including, but not limited to, Weatherization Assistance Programs and Low Income Home Energy Assistance Programs. The Company’s proposed Advocates are duplicative and excessive. The company has failed to show what such Advocates will do in addition to the services currently provided by RI CAP Agencies.

This Commission has repeatedly denied recovery of duplicative expenses. In Re: Narragansett Bay Commission General Rate Filing, Docket 3162, Order 16751, Dissent of Chairman Germani, at 42 (“The evidence clearly shows that the Division is ready and able to carry out the oversight duties...Thus, the retention of an independent overseer is duplicative...and, therefore, a poor use of ratepayer funds.”); In Re: New England Gas Company’s Distribution Adjustment Clause, Docket 3548, Order 18365, at 14-17 (“[T]he bonus program for management personnel is essentially identical to the bonus program already existing for non-management personnel, and is thus duplicative...[T]his additional bonus program has not benefited ratepayers...Accordingly, the Commission will exclude...from the ESM calculation.”); In Re: Petitions for Review of Ordinances

Adopted by the City of Cranston, Docket 2641 and 2624, Order 15919, at 23 (“If public utilities were required to satisfy both the State’s restoration standard and the city of Providence’s restoration standard, they would in effect be facing a duplicative burden with duplicative costs...This redundant expense is not in the public interest.”).

These services are undoubtedly duplicative in that RI CAP Agencies (and other state and local agencies) are currently providing the same services and, hence, these services are carbon copies of each other and do not provide any new benefit to ratepayers. The operational expense requested from the Company’s proposed Advocates does not provide a direct ratepayer benefit, and therefore, is not allowable. Moreover, long standing Commission precedent repeatedly disallows any and all duplicative expenses.

B. Economic Development Program

Another aspect of the Company’s proposal that is duplicative is the Company’s proposed Pilot Economic Development Program (“Pilot Program”). The Company is requesting a total allowance of \$1 million dollars per year, which will be allotted to three separate components of its proposed Pilot Program. The annual funding will be allotted in the following manner: (1) \$400,000.00, Urban Revitalization; (2) \$400,000.00, Targeted Infrastructure; and (3) \$200.00, Strategic Business Development. Fields Direct at 11-13. In Providence Gas, Docket No. 2286, Order 14859 at 30, the Commission found that “[c]ost of service represents the total of the operating expenses and return which the Company is allowed to recover through its approved rates. These costs must be representative of ongoing expenses necessarily incurred in providing service to the Company’s ratepayers,” and must be necessary for distribution service. New England Tel. & Tel. Co., 446 A.2d at 1383; Bristol & Warren Gas Co., 384 A.2d at 300 n. 4.

In an effort to give further details about the intentions of the Pilot Program, the Company's witness, Ms. Fields, testified that the Pilot Program's three components are driven by "the company's keen desire to help create jobs, attract new business and assist in retaining and helping existing businesses expand." *Id.* at 6. All the same, Ms. Fields did not challenge the Division's indication that the "Rhode Island Economic Development Corporation's principle function is to create jobs, help companies expand and develop their workforce and identify opportunities to bring new companies into the State of Rhode Island," 11/13/2009 Tr. at 115. This is essentially a mirror image of the principle intentions of the proposed Pilot Program. Ms. Fields further acknowledged, "[t]here are several organizations, including Rhode Island Economic Development Corporation, which provides many of the services that [the] pilot program seeks to provide." *Id.* at 147. Nevertheless, the Company still desires that ratepayers absorb an additional \$1 million dollars. The Pilot Program is identical to programs currently administered through the State of Rhode Island, and thus is duplicative in nature, and therefore, not allowable. Furthermore, the Pilot Program is not necessary for distribution service. The Commission should bar the Company's request for ratepayers to fund its proposed Pilot Program.

C. Incentive Compensation

Mr. Dowd, National Grid's witness who offered testimony regarding the employee compensation program, explained that the program is intended to encourage employee performance. Providing more clarity, Mr. Dowd testified that 40% to 50% of the incentive pay is linked to individual objectives that are directly tied to established service quality measures (by way of example safety and reliability). Furthermore, "[t]he

remaining portion of incentive pay is tied to company financial performance...”Dowd Direct at 6-7. It seems that 50% to 60% of the incentive compensation plan is linked exclusively to “financial objectives.” Mr. Dowd’s definition of financial objectives includes, “earnings per share, net operating profit and cash flow”, which primarily benefit shareholders. Id. at 6.

The Commission, in Providence Gas Co. v. Malachowski did not permit expenses associated with the Company’s Supplemental Executive Retirement Plan (“SERP”). On appeal, Providence Gas argued that its SERP program is “a form of management compensation”...which cannot be disallowed ‘simply because it benefits shareholders.’” Id. at 51. The Rhode Island Supreme Court rejected this argument and concluded, “[t]he [Commission] rejected the Company’s attempt to reward executive talent for employment not dedicated to the company’s ratepayers. The [Commission’s] statement was clear: the SERP expense does not benefit ratepayers. The [Commission] rejected the SERP expense and called it an unreasonable excessive expense that does not directly benefit ratepayers.” In light of this, the Supreme Court reaffirmed the Commission’s decision with respect to SERP deciding that the Commission’s “decision regarding SERP expenses was just, reasonable, lawful, and supported by legal evidence.” Id.

In a Similar proceeding, the Utah Division of Public Utilities and Carriers (“UDPUC”) recommended that the Commission disallow the executive incentive compensation plan (which included stock options and job performances shares, both of which provided additional compensation to executives if the corporations stock prices increased.) for executives of U.S. West Communications Services, Inc. U.S. Communications, Inc. v. Public Service Comm’n of Utah, 901 P.2d 270, 276 (Utah

1995). The UDPUC reasoned that the costs associated with the company's plan "...[w]ere unreasonable in that they were tied exclusively to shareholder return and therefore provided no benefit to ratepayers." Id. The Utah Public Service Commission ("Utah Commission") granted the UDPUC's recommendation and the Utah Supreme Court sustained the Utah Commission's decision on appeal. The Utah Supreme court concluded that the Utah Commission properly "made the disallowance because it found that the long-term incentive compensation plan was designed to increase shareholder wealth only and provided no real benefit to ratepayers." Id. at 277.

Most importantly, this Commission has resolved that, "ratepayers are responsible for that portion of executive incentive compensation that directly benefits them" and the "shareholders should be responsible for that portion that benefits them." Providence Gas, Docket No. 2286, Order No. 14859 at 35. According to the aforementioned case law and the Commission's well-settled precedent, the Commission must accept the Division's recommendation of a downward adjustment of \$1.204 million dollars.

IV. CONCLUSION

The Commission should deny National Grid's Revenue Decoupling Ratemaking Plan, just as the Commission did in Docket 3943 for the gas portion of the Company's operations. Across the country, the majority of states do not utilize decoupling for electric utilities. Additionally, the Commission should eliminate the Company's proposed annual inflation adjustment and capital expenditures trackers as they violate the Commission's own rules in the former and are not used and useful in the latter.

In considering National Grid's request the Commission clearly must take into account the current economic conditions. The people of Rhode Island cannot afford

another rate increase. At public comment hearings the Attorney General heard the frustration of the Rhode Island ratepayers. One such customer, Judith Catchpole, emailed the Commission on June 3, 2006 stating that, "I will not be getting a COL (cost of living) increase anywhere near the rate they want and I am on a fixed disability income. I barely manage to make my bills now and this increase could be the difference between heat, meds and food." Another ratepayer, William Hall, also emailed the Commission on the same date stating that, "You know all jobs have been cutting hours and [implementing] wage freezes. How are we to come up with more money? I had to quit my health insurance just to pay the mortgage and now this. Please do not let [National Grid] kill the Rhode Island families." Through every public comment hearing person after person had similar statements to make. The ratepayers of Rhode Island cannot afford a substantial rate increase (or any increase for that matter). The Attorney General implores the Commission to deny National Grid's Revenue Decoupling Ratemaking Plan in its entirety and accept the Division's recommendations and downward adjustments.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of the within Brief was e-mailed to the Service List in Docket No. 4065 on the 22nd day of January, 2010.



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