State of Rhode Island and Providence Plantations

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Peter F. Kilmartin, Attorney General

April 17, 2015

Luly Massaro, Clerk
Public Utilities Commission
89 Jefferson Blvd.
Warwick, RI 02889

Re: Docket No. 4539

Dear Ms. Massaro,

I write on behalf of the Division of Public Utilities and Carriers ("Division") to address the issue posed by the Commission: "whether R.I. Gen. Laws Sec. 39-1-30 applies to *municipal policies* or *decisions* made by municipalities and/or their police chiefs regarding the necessity and cost of police details" (emphasis added). G.L. § 39-1-30 provides in pertinent part as follows:

> Every ruling, decision, and order of a zoning board of review and of a building, gas, water, health or electrical inspector of any municipality affecting the placing, erection, and maintenance of any plant, building, wire, conductors, fixtures, structures, equipment or apparatus of any company under the supervision of the commission, shall be subject to the right of appeal by any aggrieved party to the commission within ten (10) days from the giving of notice of the ruling, decision, or order
> . . .
> Every *ordinance* enacted, or *regulation* promulgated by any town or city affecting the mode or manner of operation or the placing or maintenance of the plant and equipment of any company under the supervision of the commission, shall be subject to the right of appeal by any aggrieved party to the commission within ten (10) days from the enactment or promulgation (emphasis added).

A police chief "decision" to require a police detail based on the specifics of a particular utility job and/or a job location would not appear to fall within the letter of the second portion § 39-1-30 cited above. Case-by-case decision-making is neither an "ordinance enacted" nor a "regulation promulgated" under the statute. See Black's Law Dictionary (8th ed. 2004) (defining "ordinance" as "an authority law or decree; esp., a municipal regulation" and "regulation" as "a rule or order, having legal force, usu. issued by an administrative agency").

Nonetheless, a police chief's "decision" to the same effect could be considered akin to a "decision" of a "building, gas, water, health or electrical inspector of a municipality." Although the Division could not find a case on point, if this analogy is accurate then National Grid would possess a "right of appeal" within ten (10) days from the giving of notice of the decision under the first part of the § 39-1-30 cited above. Such a construction would certainly give effect to the General Assembly's intent to preclude municipalities from "assert[ing] control over the method of transmitting electrical power within its boundaries." Town of East Greenwich v. O'Neil, 617 A.2d 104, 112 (R.I. 1992)

While ultimately a decision for the courts, a police chief's *de facto* or explicit "policy" to require a police detail for all utility line or pole work within a municipality would seem to produce a similar result under the second part of § 39-1-30 cited above. In Docket No. 3485, the City of Providence's Public Works Department instituted certain requirements in the form of a diagram (*i.e.*, a city policy) that increased the cost of obtaining utility serve to a resident of the City from $375 to $14,500. The Commission assumed jurisdiction of the complaint pursuant to § 39-1-30, and granted the Division's Motion to Stay the diagram requirements as to the resident's property. Ultimately, the City of Providence and affected utilities entered into a partial settlement and settlement stipulation that, among other things, invalidated the diagram requirements as well as an ordinance and regulations that had been challenged in two pending dockets, Docket Nos. 2624 and 2641. See Petition for Review of Ordinances Adopted by the City of Cranston and by the City of Providence, Docket No. 2624, 2641 and 3485, Order No. 17857 at 2-4.

In Docket No. 3626, the Woonsocket Water Division ("WWD") had implemented a new City policy requiring curb to curb paving on all roads less than 5 years old. Although the issue of the policy's validity arose in the context of an abbreviated rate filing (Docket No. 3626), the Commission observed that "the policy is not an ordinance," consists "only of sketches," is "applied inconsistently to the utilities," and "triple[s] the utility's costs in one year." Based on these findings, the Commission held that "WWD should not utilize ratepayer funds for curb to curb paving unless the policy is applied equally to all utilities *after the opportunity for all utilities to challenge the policy*" (emphasis added). Thus, the

Commission recognized that it does possess jurisdiction to invalidate the policy which is not an ordinance or regulation under § 39-1-30 should a city or town attempt to enforce it. In Re: City of Woonsocket Water Department Application to Change Rate Schedules, Docket No. 3626, Order No. 18307 at 20.

The Commission's assertion of jurisdiction in these matters accords with instruction from the Rhode Island Supreme Court in Town of East Greenwich v. Narragansett Electric Company, 651 A.2d 725 (R.I. 1994). In that case, the Town adopted an amendment to its 1992 Comprehensive Plan that regulated the siting of high voltage transmission lines so as to reduce residents' exposure to electromagnetic fields. Id. at 727. Narragansett Electric challenged the amendments under § 39-1-30 contending that they interfered with the Company's right to construct and operate transmission facilities and other utility facilities within the Town. Id. The Commission assumed jurisdiction and invalidated four of the five plan amendments. Id. The Town then filed a petition for certiorari, contending that "amendments to its comprehensive plan" were "simply planning goals"—not ordinances or regulations. As mere planning goals they were not "self-executing in nature" but required further "public action" to implement such as regulatory ordinances. Id. The Commission, therefore, was without authority to invalidate the amendments under § 39-1-30. Id.

The High Court disagreed with the Town's position, finding that a "comprehensive plan" is not an "innocuous general-policy statement" but rather establishes "a binding framework or blueprint for the promulgation of conforming zoning and planning ordinances." Id. See generally East Bay Community Development Corp. v. Zoning Bd. of Review of the Town of Barrington, 901 A.2d 1136, 1154 (R.I. 2006) (upholding the holding and reasoning of Narragansett Electric under an analogous statutory framework). Since the Town's amendments "affect[ed] the mode or manner or operation or placing or maintenance of the plant and equipment" and required enactments that interfered with the Company's siting of power lines, the Court was persuaded that the amendments "were sufficient to give the PUC jurisdiction under § 39-1-30." Id. at 728. A municipal policy requiring a police detail on utility line or pole work seems qualitatively little different than a municipal siting requirement or a curb-to-curb paving requirement. Such a policy cannot be characterized as an "innocuous general-policy statement" but like the former policies, actually interferes with "the mode or manner of operation or the placing or maintenance of the plant and equipment" of National Grid which is "under the supervision of the commission." The Division, therefore, also believes that the Commission possesses jurisdiction pursuant to

the second part of G.L. § 39-1-30 to consider a utility's challenge to a municipal policy requiring a police detail on utility line or pole work.

Respectfully submitted,

Division of Public Utilities and Carriers
By its attorney,

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Assistant Attorney General

cc: Service List