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Luly E. Massaro, Clerk
Public Utilities Commission
89 Jefferson Boulevard
Warwick, RI 02888

September 22, 2016

RE: PUC Docket No. 4614 - PUC Advisory Opinion Regarding Need of The Narragansett Electric Co. d/b/a National Grid to Construct and Alter Certain Transmission Components in the Towns of Portsmouth and Middletown (Aquidneck Island Reliability Project)

Dear Ms. Massaro,

Enclosed please find for filing the Town of Middletown's Response and Objection to National Grid's recently filed Objection to and Motion to Strike Portions of Town of Middletown's Testimony of Steven M. Cabral or in the Alternative Motion for a Postponement of the Public Hearing in the above-referenced docket. Five copies of the testimony are being sent to you via regular mail.

The Town of Middletown will be effecting service upon all parties in the service list via electronic mail.

Thank you for your assistance in this regard.

Sincerely,

A handwritten signature in black ink, appearing to read 'M. Desautel', with a stylized flourish at the end.

Marisa A. Desautel

cc: Service List for Docket No. 4614

STATE OF RHODE ISLAND PUBLIC UTILITIES COMMISSION

IN RE: Docket No. 4614 – PUC Advisory Opinion Regarding Need of the Narragansett Electric Co. d/b/a National Grid to Construct and Alter Certain Transmission Components in the Towns of Portsmouth and Middletown (Aquidneck Island Reliability Project)

THE TOWN OF MIDDLETOWN’S RESPONSE AND OBJECTION TO NATIONAL GRID’S OBJECTION TO AND MOTION TO STRIKE OR IN THE ALTERNATIVE FOR A POSTPONEMENT OF THE PUBLIC HEARING

NOW COMES the Town of Middletown (“Middletown”) and hereby responds and objects to National Grid’s Objection to and Motion to Strike Portions of Middletown’s Testimony of, Steven M. Cabral, or in the Alternative, Motion for a Postponement of the Public Hearing (“National Grid’s Motion”). National Grid selects a narrow line of testimony to be stricken, the so-called “alternatives analysis.” However, this line of testimony was initially raised by National Grid’s own witnesses and was again raised by National Grid in its rebuttal testimony. Additionally, National Grid has continuously failed to refute this testimony and now seeks a continuance of the scheduled hearing to buy itself more time.

Middletown objects to National Grid’s Motion on the grounds that:

- By placing its own testimony on the record regarding the “alternatives analysis” and the feasibility of moving the Jepson Lane substation, National Grid has waived the right to object to Middletown’s testimony on the issue, and should be estopped from seeking to strike the same , and;
- Due process and fundamental fairness require that the testimony as filed remain in the record and that the hearing go forward as currently scheduled.

I. ARGUMENT

A. WAIVER AND ESTOPPEL PRECLUDE NATIONAL GRID’S DEMANDS

In Rhode Island, parties to an administrative matter are not allowed "to play fast-and-loose...by intentional self-contradiction as a means of obtaining an unfair advantage." 31 C.J.S.

Estoppel and Waiver §186 (2012). In its Motion, National Grid conveniently fails to inform the PUC that its own witness introduced the line of testimony it now seeks to have stricken. However, the record in this case shows that National Grid supplied information to all parties to the subject docket through the course of direct and rebuttal testimony, which related to “alternatives to the Project” and “alternative locations.” *See* Testimony of Endrit Fiku, P.E.: p. 3, Line 1; p. 4 Line 22 – p.5 Line 19. For example, Mr. Fiku stated, in his direct testimony that “[t]he reuse of the existing Jepson Substation property was rejected due to size constraints...” Testimony of Endrit Fiku, p. 5 Line 4-6.

Under the doctrine of equitable estoppel, “a party may be precluded from enforcing an otherwise legally enforceable right because of previous actions of that party.” *Ret. Bd. of the Employees Ret. Sys. v. DiPrete*, 845 A.2d 270, 284 (R.I. 2004). The elements of estoppel are:

“first, an affirmative representation or equivalent conduct on the part of the person against whom the estoppel is claimed which is directed to another for the purpose of inducing the other to act or fail to act in reliance thereon; and secondly, that such representation or conduct in fact did induce the other to act or fail to act to his injury.” *Lichtenstein v. Parness*, 81 R.I. 135, 138 (R.I. 1953).

In this case, National Grid filed the initial testimony giving rise to its Motion. National Grid knew that Middletown would respond to the content of its testimony, which Middletown did. Middletown is now faced with having its response limited, *after* the deadline for providing testimony has passed. If Middletown had not provided testimony to refute the “alternatives analysis,” Middletown would have waived any argument in opposition.

Further, National Grid has assumed successive positions, in reference to the same issue of alternatives analysis, which are inconsistent with each other. Taking liberties with testimony already filed does not provide a basis for a relevance objection. National Grid should not have presented testimony on an issue it found “objectionable,” and as a result, they have waived their claims against the subject matter of Middletown’s response. Middletown is concerned with the course this proceeding has taken; National Grid continues to be unresponsive to the essential

elements of its testimony, which allows National Grid an unfair advantage here.

B. DUE PROCESS AND FAIRNESS DICTATE THAT THE TESTIMONY REMAIN AND THE HEARING PROCEED

Current case law in Rhode Island dictates that “due process in administrative procedures requires the opportunity to be heard ‘at a meaningful time and in a meaningful manner.’” *Millett v. Hoisting Engineers’ Licensing Division of Dept. of Labor*, 377 A.2d 229, 236 (R.I. 1977) (quoting *Raper v. Lucey*, 488 F.2d 748, 753 (1st Cir. 1973)). The requirement of “meaningful time” and “meaningful manner” is defined as those occasions where the parties timely receive and review information so that they may then timely respond to it. *Id.*

Despite its own introduction of the “alternatives analysis,” National Grid now seeks to strike those portions of Middletown’s testimony that are merely a direct response to items that National Grid voluntarily placed in the record. The principles of due process in the administrative context and fundamental fairness dictate that Middletown must have a meaningful opportunity to respond to all issues and facts raised by National Grid. Simply speaking, Middletown cannot be precluded from presenting expert opinion to the PUC on testimony already in the record. Granting National Grid’s Motion would essentially “gut” Middletown’s testimony, without giving it an opportunity to supplement the same.

Middletown takes issue with National Grid’s representation that “striking the testimony does not bar [Middletown] from presenting these comments to the proper designated agency or to the EFSB.” Motion, p. 4. The “alternatives analysis” issue is already before the PUC and is inherent throughout all of the testimony filed by National Grid and Middletown. The appropriate time for response and expert opinion is now. Further, there is no reasonable method by which the PUC could parse out the “alternatives analysis” areas of testimony, as National Grid demands. Middletown’s due process is paramount to National Grid’s error in its scope of testimony.

As this tribunal is aware, project need is included in the PUC's scope of review. It cannot be contested that discussion of need is inherent in the testimony presented by the parties because there are multiple siting locations under consideration. National Grid attempts to characterize Mr. Cabral's testimony regarding project need as "focus[ed] on the siting of the proposed new substation," and as a reason to strike his testimony. Motion, p. 4. Middletown asserts, however, that it is the siting of the proposed new substation, in and of itself, that represents project need. National Grid is attempting to prove to the PUC that a new site is *necessary*. National Grid set the parameters of this docket. National Grid presented testimony to support the siting of a new substation versus upgrading the current substation. Middletown is only responding to National Grid's testimony.

In its Motion, National Grid states that "additional time is necessary as National Grid's consultant is expected to deliver the new stormwater analysis and design to [Middletown] in late October." Motion, p. 4. The Motion is nothing more than an attempt to buy more time to respond to deficiencies likely to surface during the hearing. Support for this contention can be found on page 4 of the Motion, where National Grid states that the stormwater issue was pointed out by Middletown's expert, Mr. Cabral, in his surrebuttal testimony: "[n]o reply to my comments have been received to date. National Grid has effectively prevented me, and the Town of Middletown, from providing any surrebuttal testimony on the comments I provided in my direct testimony." The stormwater deficiencies have been ongoing and are not a new issue that warrants additional time. Cabral's Surrebuttal Testimony, p. 2 Lines 30-33.

Due process and fairness must control here: the "stormwater" issue is not an appropriate reason to defer the hearing or to strike testimony. It is an entirely separate issue. Middletown is

not a vehicle by which National Grid can correct deficiencies in its application and delay the hearing.

II. CONCLUSION

For all the reasons hereinbefore stated, Middletown respectfully requests that National Grid's Motion be denied.

Respectfully submitted,
Town of Middletown
By its Attorney



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CERTIFICATION

I hereby certify that I filed an original and five (5) copies of the within Objection with the PUC and sent a true copy, via electronic mail, of the within Objection to the parties listed on the docket service, on this 22nd day of September, 2016.


