



State of Rhode Island and Providence Plantations

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Division of Public Utilities and Carriers
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In Re: Docket No. D-19-04

The Advocacy Section writes to provide the Division of Public Utilities and Carriers (“Division”) its observations and analysis following the evidentiary hearing held on April 9, 2019. This Docket was established upon the City of East Providence’s (“the City”) Petition of February 1, 2019 seeking resolution of a dispute with Narragansett Electric Company d/b/a National Grid (“Grid”) relating to the purchase of municipal streetlights from the electric distribution company as contemplated in Rhode Island General Laws §39-30-1 *et seq*, designated “The Municipal Streetlight Investment Act” (“the Act”). Upon passage of this Act in 2013, the General Assembly tasked the Division with resolving disputes “regarding the terms of the alternative tariff, the compensation to be paid the electric distribution company, or any other matter arising in connection with the exercise of the option [to purchase provided in the Act.]” RIGL §39-30-3(e). In sum, the City alleges Grid violated the law as follows: (1) failed to comply with the sixty (60) day time provision for purchase of the lighting equipment, (2) relied on a violative governing tariff rate (Tariff S-05), (3) offered a violative agreement of sale and attachment agreement, and (4) required purchase of lighting for which the City has no legal property interest. The Advocacy Section will address each allegation seriatim.

The 60-Day Timeline:

The City alleges that Grid “knowingly, willfully, and purposefully refused to respond to the City’s requests” to purchase the streetlights and “failed to provide the City with a proper cost estimate of the purchase price within 60 days of said request in accordance with R.I. Gen. Laws §39-30-3(b) [] as of September 27, 2016.” See City Petition, Claim 1.¹ The evidence on record,

¹ Rhode Island General Laws §39-30-3(a) provides that “[a]ny city or town receiving street lighting service from an electric distribution company pursuant to an electric rate tariff providing for the use by such municipality of lighting equipment owned by the electric distribution company, at its

Joint Exhibits 3-9, supports the parties agreed-upon timeline that the City provided Grid a notice of intent to purchase by letter dated July 29, 2016. See Exhibit 3. Grid responded by email roughly 13 days later, on August 11, 2016, with a purchase price of \$300,281.50, along with closing instructions, supporting documents such as pricing sheets and billing inventory, as well as tariff and other pertinent reference information necessary for the City to understand and complete the transaction. See Exhibit 4. More than one year later, Grid emailed the City on November 20, 2017 with a revised purchase price of \$274,453.73 with similar supportive and closing documents with the same instructions originally provided. See Exhibit 5. Roughly six months later, on May 30, 2018, Grid sent a similar email making reference to the City’s “recent meeting with National Grid” and providing a revised purchase price of \$218,024.40. See Exhibit 6. On August 15, 2018, the City’s Director of Public Works, Mr. Stephen Coutu, emailed Mr. Jacques Afonso, a Grid community and municipal customer account manager, both parties to prior correspondence, stating, “The City respectfully requests an updated cost of purchase of the streetlight inventory. Thank you as always for your assistance.” See Exhibit 7. Although it is unclear what other communications may have transpired between the City and Grid, Grid provided to the City on November 8, 2018 another standard email with attachments and updated purchase price of \$208,951.72. See Exhibit 9. Just prior, on September 18, 2018, a majority of the East Providence City Council voted to 4-1, along with the Mayor, to approve the purchase and sale of municipal streetlights for up to \$218,000, subject to the City entering into an acceptable contract with Siemens. See Exhibit 8.

To the Advocacy Section’s knowledge, the timing provisions of the Act have yet to be formally interpreted until now. Hence, as an issue of first impression, it is important first to understand the obligations of the parties pursuant to the Act to determine whether a violation occurred. As will be discussed, the timing obligations of the parties may not be as simple or clear as the City suggests. Although the Act provides that a city or town may purchase its streetlighting equipment “upon sixty (60) days notice to [Grid,]” RIGL §39-30-3(a), the practical reality is that the complete acquisition process, to include compliance with the conditions articulated in RIGL §39-30-3(b)-(e), may well require more than sixty (60) days from the date of initial notice of intent to purchase. The transactions, obligations and considerations necessitated by the Act – all which require time - include the utility compiling an accurate inventory of all “public lighting equipment [] in the municipality[,]” the city or town conducting “due diligence, including an analysis of the cost impact to the municipality[,]” and a reasonable negotiation and closing process resulting in full remittance to the utility for the purchase price. RIGL §39-30-3(a)(3), and (b). Further, the city or town may also choose to negotiate the purchase of electric energy from a competitive supplier and/or negotiate and secure a contract for maintenance of the equipment. See RIGL §39-30-3(a)(2)

option, **upon sixty (60) days notice to the electric company** and to the department, and subject to the provisions of subsections (b) through (e), may” purchase all of the public street and area lighting equipment of the electric distribution company in the municipality, convert its street lighting service to an alternative tariff, be exempt from facilities charges, and have choice in its electric energy supplier. Id. at sections (1)-(3) (emphasis added).

and (b). All told, even the most motivated and well-advised city or town might be hard pressed to accomplish all this within sixty (60) days of notice of intent, most especially given that municipalities cannot bid contracts or fund purchases without undertaking a properly noticed and authorized approval process. While it may be reasonable to expect a cost estimate from the electric distribution company within sixty (60) days, as the record reflects that Grid did when it provided the City a purchase price on August 11, 2016, it seems reasonable to afford each party to the purchasing transaction a level of flexibility such that neither party is forced to enter into the transaction under duress of time.²

Although the protracted timeline in the instant matter falls well beyond 60 days, or September 27, 2016, from the City's July 29, 2016 letter initiating the purchase process, the Advocacy Section does not interpret the law or evidence as supportive of a finding that Grid "knowingly, willfully, purposely refused to respond" to the City's requests to purchase its streetlights. Likewise, the evidence does not support any bad faith or purposeful delay by either the City or Grid. Grid duly responded within two weeks to the City's July 29, 2016 letter of intention with a purchase price tailored to the City's inventory and with what appeared to be the closing documents standard to these types of transactions. Mr. Afonso testified at the hearing that the purchase process offered to the City was consistent with that of those Rhode Island communities falling within his purview that had purchased its streetlights, namely Barrington, Bristol, Warren, Tiverton and Little Compton. To be sure, the evidence does show long periods of time during which it is unclear precisely what actions the City and/or Grid were undertaking, or

² What, then, is a reasonable amount of time for complete acquisition of municipal streetlights? A quick review of the processes, interpretations, and recommendations in other states proves illustrative. Massachusetts law parallels Rhode Island law by calling for an agreement on purchase price within 60 days. See "Municipal Street Lighting Service," Massachusetts General Laws, Chapter 164, Section 34A. This provision has been interpreted as allowing the municipality the benefit of an agreed-upon purchase price within sixty (60) days, but also acknowledging that "the whole process of buying back streetlights can take between 90 days to 2 years, with an average of 6 months." See Metropolitan Area Planning Council's "Buy Back Streetlights From Utility." <http://www.mapc.org/wp-content/uploads/2017/09/Buy-Back-Streetlights-from-Utility.pdf> at p.1. New York's "Consolidated Laws, Public Service Law, PBS § 70-a. Street lights" passed in 2015, together with a New York State Public Service Commission ("PSC") Order of October 14, 2016 (Cases 15-E-0745-0749), allows a utility ninety (90) days to provide a purchase price estimate to the municipality and limits to once per twelve (12) months any request for a price quote. See generally, id. at pp. 3-8 (for insight into time and process considerations and acknowledgment that each negotiation process is unique). The New York process requires approval of the purchase agreement by the NY PSC, but in any case, it is widely understood that the purchase process can take anywhere from 6-13 months in order to allow time for the negotiation process, municipal board approval, and PSC approval. For helpful summary and discussion about New York's process and timeline, see <http://courtneyststrong.com/wp-content/uploads/2017/03/MHSC-Guide-for-CenHud-Munis-re-Street-Light-Purchase-032317.pdf>.

whether discussions simply stalled. However, at no time did the correspondence between the parties take a contentious or urgent tone, even after a period of years-long delay. The logical inference from this, then, is that neither party construed the other to have caused unreasonable delay. Instead, the evidence is patterned like any reasonable negotiation and considerations undertaken prior to a large-scale municipal ownership and maintenance shift. A close review of the Meeting Minutes from the City Council Meeting on September 18, 2018 – more than two years after the initial notice to Grid – demonstrates a robust and reasoned discussion amongst City officials about the obligations and restrictions of the purchase, as would be expected prior to any such undertaking. See Exhibit 8, pages 3-4. The City Councilors discussed issues of pole attachment, terms of the agreement, and a contract with Siemens, but at no time did they express frustration over Grid’s response time or downward trending price estimates. To the contrary, Councilman Faria’s representations at the meeting, summarized in the minutes cited below, sound of a negotiation process driven in part by the City and its efforts to carefully vet its options. The minutes reflect as follows:

“Councilman Faria states this is an issue he has been championing for the last year or longer. He has been negotiating and the first purchase price was \$300,000 they have held meetings with the city and national grid and this cost was reduced to \$218,000. In October of 2017, they approved the first bond and the consultant gave a presentation. There is a net savings of \$400,000 annually and those were conservative numbers. A couple of meetings ago Seimens came in a presented. Seimens can turn on all lights and just for safety purposes alone it would be a wash.” Exhibit 8 at p. 3.

Finally, regarding the City’s allegation that Grid failed to provide a “proper cost estimate” within time, the record is insufficient to support this position. Grid provided testimony at the hearing from Ms. Paula Roseen, the lead analyst for the outdoor lighting group in Rhode Island and Massachusetts, who explained that of the approximately 23 municipalities/fire districts in Rhode Island and 54 in Massachusetts that had purchased streetlights, the acquisition documents and procedures were uniform. Further, Ms. Roseen testified that although the purchase price estimate is calculated based on inventory that is unique to each customer (equipment type, quantity of poles, accounts, etc.), Grid did not stray from its standard process when providing the City purchase price estimates. She explained that Grid relies on inventory other than the purchasing city, for example, state and federal equipment, to calculate a base for the estimate purchase price, but she refuted any suggestion that the estimate provided to the City captured cost attributed to other entities/owners. It appears the City infers that because the estimates changed over time, the calculation process relied upon distinct methodologies and therefore the price provided on August 11, 2016 was flawed. However, the City provided no pricing experts or analysis to support this contention. As such, absent evidence to the contrary, the Advocacy Section must defer to the numbers provided by Grid and opine that the numbers were reasonable and provided in good faith, “based on the value of those assets at the time of the City’s request.” Grid’s Answer to Petition 8, p. 2.

The Governing Alternative Tariff, S-05:

The City alleges that the governing alternative tariff, named the Street and Area Lighting - Customer Equipment S-05 Tariff (“S-05 Tariff”), see Exhibit 1, approved by the Rhode Island Public Utilities Commission (“Commission”) in Docket 4442 (effective August 1 and 7, 2014) and memorialized by Order # 21704, see Exhibit 2, violates RIGL §39-30-3(a)(1) by imposing “an illegal rate hike” on municipalities who have not converted its street lights to new lighting equipment.” See City Petition, Claim 2. In support of this contention, the City references the portion of the Act that states, “...The new tariff **shall** use existing calculation methods and existing rates for any currently existing lighting equipment, only setting reasonable new rates for newly adopted lighting equipment.” (emphasis in City Petition).

Without herein detailing the complex rate calculation and allocation methods underlying the S-05 Tariff, suffice it to say that the Advocacy Section dedicated considerable time and effort to analyze the underlying rate structure and Grid’s recent tariff advice rate changes to determine whether this tariff in any way violates the precise requirements of the Act, the Order #21704 provisions, or ratemaking principles and methods generally. It found the tariff wholly compliant and consistent with both. It is important to note that the S-05 Tariff rates, as with rates under all rate classes, change over time in parallel with the electric distribution company’s annual revenue requirement filings which are vetted and approved by the Commission. A careful review of Grid’s current retail delivery rates shows that, except for the distribution charge which was vetted and approved by the Commission, the S-05 Tariff contains the same embedded charges and factors as that of the tariff for Grid-owned street area lighting. Moreover, privately-owned street area lighting is properly exempt from the “facility, support, maintenance, [and] accessory charges” as required by the Act. The Advocacy Section interprets and understands the language of the Act differently than the City; it does not read the Act as assigning a new tariff only to newly converted lighting equipment such as energy efficient LED lighting, but rather, provides for variations in the fixture charge categorizations within the tariff as new lighting technologies and conversions come about. At all times, the tariff allows for billing based on consumption and it does so uniformly.

Notwithstanding the above review, the City’s allegations are not properly before the Division for consideration. The Division’s authority is limited to enforcement and resolution of allegations that a utility is violating a Commission approved tariff. Here, the City alleges not that Grid is violating the S-05 Tariff, but rather, that the tariff as approved does not comport with the requirements of the Act or with the principles of fairness. The City has provided no evidence of violation of the tariff. Notably, the Commission carefully vetted this tariff via Docket 4442, providing an in-depth decision in support therein. Additionally, the Rhode Island League of Cities and Towns actively participated in Docket 4442 as intervenor and advocate for Rhode Island municipalities, to include East Providence. Finally, any challenge to the S-05 Tariff would need to have been asserted by way of an appeal of the Commission’s Report and Order issued on October 31, 2014; the decision was not appealed.

The Attachment Agreement & Agreement of Sale:

The City alleges that the agreement of sale and the attachment agreement, drafted by Grid and being “forced” upon the City, violate the Act. The City argues that the agreements limit the use and type of lighting equipment notwithstanding that the Act states that the City “shall have the right to use, alter, remove, or replace such acquired lighting equipment in any way the [City] deems appropriate.” RIGL §39-30-3(b). Further, the City contends that while the Act provides for an irrevocable right to attach purchased lighting equipment to other infrastructure and grants the right to use any technology it deems fit, that terms of the agreements hamper these rights. See City Petition, Claim 3.

The seemingly broad language of the Act must be read in conjunction with the routine regulatory constraints to which Grid and the City are subject. In keeping with the mandates of the Act, when the Commission vetted and approved the S-05 Tariff in Docket 4442, it queried whether its scope of review included these two agreements and whether either should be incorporated into the tariff. See Commission Order #21704 at 39. Although the Commission determined that approval of the sales agreement fell beyond its jurisdiction, the attachment agreement garnered “a great deal of evidence” and that it was appropriately vetted and approved, though not incorporated, by and through that tariff proceeding. Id. at 40, 48. The attachment agreement, the Commission reasoned, outlines ongoing rights and obligations of the parties relative to use of space on the poles, which is “akin to terms and conditions of distribution service for customer-owned street lighting.” Id. at 40. Notably, the Commission opined that the Division and Commission share discrete jurisdiction over the attachment agreements insofar as the Commission reviews and approves them at the outset [and] the Division resolves any disputes that arise under them.” Id. at 41. As such, the Commission, noting that the federal government (Federal Communications Commission) already regulates such agreements, fully vetted and approved a revised attachment agreement which incorporated input from Division expert consultant Richard Hahn. See id. at 42-43. The Commission approved this agreement notwithstanding the League of Cities and Towns’ objections to ensure that “the cities and town be treated like all others.” Id. at 43; accord RIGL §39-30-3(d)(i).

The Advocacy Section understands the City’s contentions about the attachment agreement to fall more in the nature of assailing the underlying terms and conditions, rather than a dispute that has arisen from compliance with these terms. As such, it must defer to the Commission’s jurisdiction and rely on the fact that the attachment agreement presented to the City, the same which was executed by other municipalities, was fully vetted and approved by the Commission. As with the S-05 Tariff, municipalities had a seat at the Docket 4442 table and their collective position on the attachment agreement was considered.

Property Interest of Street Lighting:

The City alleges that the attachment agreement and agreement of sale wrongfully require the City to purchase lighting equipment for which the City has no legal property interest given that

it requires municipalities to purchase all lighting equipment “within the boundaries of the municipality.” See City Petition, Claim 4. Upon careful review of both proposed agreements, the Advocacy Section does not read the language and effect of the agreements in the same way as the City. Although it is unclear precisely what portion of the agreements allegedly requires ownership of non-municipal lighting equipment, the Advocacy Section finds that the agreements adequately capture the purpose of the Act, namely, to effectuate cost savings for those municipalities “purchasing their streetlight systems from electric distribution companies and contracting for the maintenance independently.” RIGL §39-30-1(a)(5). Likewise, the plain language of the agreements appears to align with the definition of “lighting equipment” provided at RIGL §39-30-2(3), which includes “all equipment used to light streets in the municipality [] including ballasts, fixtures . . . but excluding the utility poles upon which the lighting equipment is fixed.” Moreover, as discussed, *supra*, the attachment agreement and agreement of sale provided by Grid are the same ones executed by other Rhode Island municipalities, see Testimony of Ms. Roseen, and the same ones vetted by the PUC in Docket 4442.

Conclusion:

The Advocacy Section participates as a party of right in contested Division dockets to ensure that ratepayer interests are adequately represented and protected. Indeed, the “ratepayer” includes municipalities such as East Providence, as well as all other ratepayers. To be sure, the Advocacy Section seeks to make certain that the policy and purpose of applicable laws such as the Municipal Streetlight Investment Act are effectuated, and to ensure fair process for the benefit of all. To that end, the Advocacy Section has carefully considered the allegations set forth by East Providence. All told, for the reasons stated herein, based on the applicable laws and facts evidenced in the record, it finds no violations. As such, in the interest of protecting all ratepayers, the Advocacy Section recommends that East Providence be required to pay its outstanding “facilities and maintenance” fees and remain current on any past due arrearage owed to Grid. Further, it recommends that Grid and East Providence come back to the negotiating table to discuss East Providence’s acquisition of its streetlights at the most recent, depreciated price estimate. The sooner this purchase can come to fruition, the sooner East Providence will reap the benefits of the cost savings contemplated by the Act. Although the Advocacy Section regrets that the parties have been unable to agree on a resolution thus far, it is encouraged by the professionalism and zealous advocacy demonstrated by both Grid and East Providence during the pendency of this docket, which make a cooperative resolution in the near future seem wholly achievable.

Respectfully Submitted,
Advocacy Section of the Division of Public
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