

Statutory Authority  
Granted to the  
Governor of Rhode  
Island to Declare a  
State of Emergency  
During an Energy  
Crisis

## GOVERNOR'S EMERGENCY POWERS DURING AN ENERGY CRISIS

Based on current conditions, the governor could have issued an executive order declaring the existence of an energy crisis in Rhode Island and then utilize emergency powers to address this crisis. "Whenever the governor finds that existing or impending abnormal, energy resource-related market disruptions threaten the ... welfare of the citizens of this state," the governor can issue an executive order declaring "the existence of an energy crisis." R.I.G.L. § 42-60-5 (see Attachment 1). An "energy crisis" is defined as "a condition of danger to the ... welfare or economic well being of the citizens of this state due to existing or impending abnormal market disruptions as they relate to energy resources." R.I.G.L. § 42-60-2 (see Attachment 2). An "energy resource" includes "crude petroleum, ... natural gas, ... electricity."

The Rhode Island Public Utilities Commission (RIPUC) recently approved a significant increase in electric rates for effect October 1, 2022 and is considering a large increase in gas rates for effect November 1, 2022. These two increases are interrelated. As explained by a witness for the public utility, Rhode Island Energy, "natural gas prices are a primary factor in setting the spot price of wholesale electricity in New England" (RIPUC Docket No. 4978, Testimony of Joseph Cavicchi, at 15) (see Attachment 3).

These large increases in natural gas and electricity prices are the result of abnormal, energy resource-related market disruptions arising from the Russo-Ukrainian War. A witness for Rhode Island Energy explained: "*this is not a normal year.*" The impact of the Russian invasion of Ukraine has fundamentally changed international markets for natural gas, including LNG. Russia's invasion of Ukraine and intentional restriction of natural gas exports to Europe have thrown international markets for natural gas and LNG, and the U.S. balance of supply and demand, into disarray. As a result, over the past year, natural gas purchasers in the U.S., and in particular in New England, have faced extreme and sustained increases in the cost of natural gas" (RIPUC Docket No. 22-20-NG, Testimony of Paul J. Hibbard, at 19, 29) (see Attachment 4). Another witness for Rhode Island Energy stated: "electricity and natural gas prices in New England are typically higher in winter than in summer due to high demand for heating; however, forward natural gas and electricity prices for the coming winter have also increased dramatically relative to the prices that prevailed last winter. A key factor causing this increase is Russia's invasion of Ukraine in February 2022 and the associated *disruptions* to the natural gas markets caused by Europe's heavy dependence on Russia for natural gas, Europe's sanctions of Russia, and the ensuing disputes over natural gas supply. Europe's efforts to replace Russian natural gas supplies with supplies from other sources increase the price of natural gas in the U.S." (RIPUC Docket No. 4978, Testimony of Joseph Cavicchi, at 19 (*italicize added*)) (see Attachment 5).

The Russo-Ukrainian War has caused a disruption in global natural gas markets and a shortage in natural gas supplies worldwide. In turn, this led to dramatic increases in natural gas and electric prices in New England. Therefore with the current natural gas and electric prices not reflective of normal market conditions, the governor can declare the existence of an energy crisis.

The declaration of the existence of an energy crisis due to the Russo-Ukrainian War's impact on natural gas supplies would be comparable to the type of events that first led to the enactment of

the "State Energy Crisis Management Act", R.I.G.L. § 42-60-1, et seq (see Attachment 6). This law was enacted in 1980 after the oil crisis of 1979 which was triggered by Iran's Islamic Revolution (P.L. 1980 c. 326) (see Attachment 7). Furthermore, this law was modeled on the "Emergency Crisis Management Act", which had been adopted in 1974 during the Arab oil embargo, but had expired (P.L. 1974 c. 12) (see Attachment 8).

After declaring the existence of an energy crisis in Rhode Island, the governor has extensive remedies and emergency powers to address the crisis. The governor can "establish and implement any programs and plans ... necessary to *control and regulate all energy or energy resources*." R.I.G.L. § 42-60-6 (italicize added) (see Attachment 9). Also, the "governor may make, amend, and rescind any orders, rules, and regulations." R.I.G.L. § 42-60-9 (see Attachment 10). For example, the governor could use his or her emergency powers to amend or rescind a RIPUC order which increased electric or gas rates. The RIPUC is part of the executive branch. Through its decisions, it regulates utility energy rates, and these decisions are referred to as "orders". R.I.G.L. § 39-3-11 (see Attachment 11); R.I.G.L. § 39-5-1 (see Attachment 12). The justification for amending or rescinding a RIPUC order would be that the recent increase in electric or gas rates reflect an abnormal disruption in natural gas supplies and that such a large increase threatens the welfare and economic well-being of Rhode Islanders. The associated electric and gas supply costs not charged to customers would then be deferred and recovered from customers at a later date when prices came down. For instance, a witness for RI Energy noted that prices for December 2023 forward contracts are "well below the prices of December 2022 contracts" which indicates that natural gas and wholesale electricity prices "are expected to fall by the 2023-24 winter season" (RIPUC Docket No. 4978, Testimony of Joseph Cavicchi, at 21) (see Attachment 13).

Furthermore, the governor has the ability to issue executive orders to address an energy crisis by suspending "any regulatory statute prescribing the procedures for the conduct of state business." R.I.G.L. § 42-60-9 (see Attachment 14). This power could potentially be used to suspend the collection of the gross receipts tax on electric and gas utility bills under R.I.G.L. § 44-13-4 (see Attachment 15). The justification for suspending the gross receipts tax on electric and gas bills would be to reduce the overall utility bill in order to protect the welfare and economic well-being of Rhode Islanders from the high energy costs caused by the abnormal disruption in natural gas supplies.

In recent years, governors have suspended a variety of statutes utilizing their emergency powers. Under the "Rhode Island Emergency Management Act", the governor can "suspend the provisions of any regulatory statute prescribing the procedures for conduct of state business." R.I.G.L. § 30-15-9(e)(1) (see Attachment 16). During the pandemic, both Governor Raimondo and Governor McKee relied, in part, on R.I.G.L. § 30-15-9(e)(1) to suspend and modify the operation of a variety of statutes including laws which: (1) calculated the unemployment tax on businesses (E.O. 20-19; E.O. 21-19); (2) set the rates for child care providers (E.O. 20-39); (3) determined the eligibility to receive government services (E.O. 20-26); and (4) changed the date of an election (E.O. 20-11). If a governor has the emergency power to suspend and modify statutes that assess unemployment taxes on business, then presumably the governor has the power during an emergency to suspend the collection of a gross receipts tax on utilities and their customers. Furthermore, the provisions

of the State Energy Crisis Management Act are to be “construed liberally.” R.I.G.L. § 42-60-11 (see Attachment 17). Also, the Rhode Island Superior Court has determined that a governor has “broad emergency powers.” (Southwell v. McKee) C. A. No. PC-2021-05915, at 33 (R.I. Super. 2021) (see Attachment 18).

Lastly, it should be noted that there are checks on the governor’s authority during an energy crisis emergency. For example, an executive order declaring an energy crisis can be rescinded by a “concurrent resolution of the general assembly at any time after the energy crisis declaration has been in effect for at least sixty days.” R.I.G.L. § 42-60-5 (see Attachment 19). Also, “orders by the governor to amend or suspend certain state rules and regulations ... become effective no sooner than forty-eight (48) hours after the governor has notified the Joint Committee on Legislative Services.” R.I.G.L. § 42-60-9 (see Attachment 20). These executive orders “become effective unless the committee disapproves the orders within forty-eight (48) hours by a majority vote.”

## APPENDIX

Exhibit 1:	<b>Memo</b> Outlining Statutory Authority Granted to Governor During an Energy Crisis
Attachment 1:	<b>R.I.G.L. 42-60-5:</b> Energy Crisis Management: Declaration of Energy Crisis
Attachment 2:	<b>R.I.G.L. 42-60-2:</b> Energy Crisis Management: Findings, purposes, and policy
Attachment 3:	<b>Testimony of A. Joseph Cavicchi:</b> natural gas prices set price of wholesale electricity in New England
Attachment 4:	<b>Testimony of Paul J. Hibbard:</b> Russia's invasion of Ukraine has thrown international markets into disarray
Attachment 5:	<b>Testimony of A. Joseph Cavicchi:</b> Key factor causing increase is Russia's invasion of Ukraine ... disruptions to natural gas markets
Attachment 6:	<b>R.I.G.L. 42-60-1:</b> Energy Crisis Management: Short title
Attachment 7:	<b>Public Law 1980 Chapter 326:</b> <i>An Act Relating to Energy Crisis Management</i>
Attachment 8:	<b>Public Law 1974 Chapter 12:</b> <i>An Act Providing for State Emergency Crisis Management</i>
Attachment 9:	<b>R.I.G.L. 42-60-6:</b> Energy Crisis Management: Powers of the governor
Attachment 10:	<b>R.I.G.L. 42-60-9:</b> Energy Crisis Management: Orders, rules, and regulations
Attachment 11:	<b>R.I.G.L. 39-3-11:</b> Authority to amend or rescind a RIPUC order which increased electric or gas rates
Attachment 12:	<b>R.I.G.L. 39-5-1:</b> Authority to amend or rescind a RIPUC order which increased electric or gas rates
Attachment 13:	<b>Testimony of A. Joseph Cavicchi:</b> Energy prices are expected to fall by the 2023-2024 winter season
Attachment 14:	<b>R.I.G.L. 42-60-9:</b> Authority to issue executive orders to address an energy crisis
Attachment 15:	<b>R.I.G.L. 44-13-4:</b> Power to suspend the collection of the gross receipts tax on electric and gas utility bills
Attachment 16:	<b>R.I.G.L. 30-15-9:</b> Authority to suspend provisions of regulatory statutes prescribing procedures for conduct of state business
Attachment 17:	<b>R.I.G.L. 42-60-11:</b> Energy Crisis Management: Liberality of construction
Attachment 18:	<b><i>Southwell v. McKee, 2021:</i></b> A governor has broad emergency powers
Attachment 19:	<b>R.I.G.L. 42-60-5:</b> Energy Crisis Management: Declaration of Energy Crisis
Attachment 20:	<b>R.I.G.L. 42-60-9:</b> Energy Crisis Management: Orders, rules, and regulations

# Attachment 1

**R.I.G.L. 42-60-5: Energy Crisis Management: Declaration  
of Energy Crisis**

# **Title 42**

## **State Affairs and Government**

### **Chapter 60**

#### **Energy Crisis Management**

##### **R.I. Gen. Laws § 42-60-5**

###### **§ 42-60-5. Declaration of energy crisis.**

Whenever the governor finds that existing or impending abnormal, energy resource-related market disruptions threaten the health, safety, or welfare of the citizens of this state, he or she shall by executive order declare the existence of an energy crisis in any or all sections of the state. This declaration shall fully describe the nature of the energy crisis and shall be filed with the secretary of state and the city and town clerks in the affected areas and shall remain in effect in any or all sections of the state until it is rescinded by a subsequent executive order or by concurrent resolution of the general assembly at any time after the energy crisis declaration has been in effect for at least sixty (60) days.

History of Section.

P.L. 1980, ch. 326, § 1; P.L. 1992, ch. 484, § 1.

# Attachment 2

R.I.G.L. 42-60-2: Energy Crisis Management: Findings,  
purposes, and policy



# **Title 42**

## **State Affairs and Government**

### **Chapter 60**

### **Energy Crisis Management**

#### **R.I. Gen. Laws § 42-60-2**

##### **§ 42-60-2. Findings, purposes, and policy.**

The legislature finds and declares that energy in its various forms is essential for the preservation of the safety, health, and welfare of the people of this state. The legislature further finds that events of recent years have demonstrated that abnormal market disruptions, as they relate to energy supplies, could be imminent due to both natural and man-made causes. It is therefore declared that the purpose of this chapter and the policy of this state is to grant to the governor powers to manage abnormal market disruptions as they relate to energy in order to protect the health, safety, and welfare of the people of this state and to preserve their lives and property.

History of Section.

P.L. 1980, ch. 326, § 1; P.L. 1992, ch. 484, § 1.

**PRE-FILED DIRECT TESTIMONY**

**OF**

**A. JOSEPH CAVICCHI**

**July 21, 2022**

1   **I.    Introduction**

2   **Q.    Mr. Cavicchi, please state your name and business address.**

3   A.    My name is A. Joseph Cavicchi. My business address is 111 Huntington Avenue,  
4        Boston, MA 02199.

6   **Q.    On whose behalf are you testifying in this matter?**

7   A.    The Narragansett Electric Company, d/b/a Rhode Island Energy (the “Company” or  
8        “RIE”).

10   **Q.   By whom are you employed and in what capacity?**

11   A.    I am employed by Analysis Group as a Vice President.

13   **Q.   Please summarize your professional and educational background.**

14   A.    I provide economic analysis and expert testimony in various state and federal regulatory  
15        proceedings related to electricity markets. In particular, I work with clients on a variety  
16        of state regulatory and Federal Energy Regulatory Commission (“FERC”) proceedings,  
17        and often file testimony and affidavits supported by economic analyses. Throughout my  
18        career I have been directly involved with corporations, private and public institutions, and  
19        state and federal regulatory authorities in connection with the economics of the electricity  
20        industry. For the past 25 years I have been working almost exclusively on the regulatory  
21        economics of the electricity industry, and, in particular, performing economic analyses of

1 wholesale electricity markets. I hold Masters degrees in Technology and Policy and in  
2 Environmental Engineering from the Massachusetts Institute of Technology and Tufts  
3 University, respectively.  
4

5 **Q. Have you ever testified before the Rhode Island Public Utilities Commission**  
6 **("PUC") or any other regulatory body?**

7 A. Yes. I have previously testified on power supply procurement plans in Pennsylvania and  
8 Ohio. In addition, I have testified on several occasions regarding wholesale electricity  
9 market competitiveness and design issues at FERC. I have also testified on qualifying  
10 facility pricing policy and wholesale market design policy in the state of California.  
11 Finally, I have written articles on electricity industry structure and issues associated with  
12 procuring wholesale electricity supplies for delivery to retail customers. Additional detail  
13 regarding my credentials and experience can be found in my *curriculum vitae*, which is  
14 attached as **Appendix A** to this testimony.  
15

16 **II. Purpose of Testimony**

17 **Q. What is the purpose of your testimony?**

18 A. I was asked by the Company to review the proposed Last Resort Service ("LRS") rates  
19 filed in this proceeding and assess the changes presented by the proposed LRS rates  
20 relative to recent and future wholesale and retail electricity market conditions in New  
21 England.

1   **III.   LRS Supply**

2           **A. LRS Overview**

3   **Q.    What is LRS?**

4   A.    LRS is the commodity component of electricity service provided to utility customers that  
5           do not receive their electric supply service from a competitive retail supplier referred to  
6           as a non-regulated power producer in Rhode Island. LRS is composed primarily of the  
7           wholesale electricity supply procured and delivered by a utility to its residential,  
8           commercial, and industrial customers. The total LRS rate typically includes the cost of  
9           the electric energy, capacity, ancillary services, renewable energy certificates (“RECs,”  
10          which are procured separately to comply with renewable energy standards as applicable)  
11          and other miscellaneous expenses.

13   **Q.    Is LRS common in states that have introduced retail competition?**

14   A.    Yes. All states that have introduced retail competition require the provision of electric  
15          service for customers that do not choose an alternative retail supplier. LRS is identified  
16          using a number of different names—default, basic, provider of last resort, standard offer,  
17          etc. However, regardless of the name, the provision of LRS requires utilities to issue  
18          wholesale power supply solicitations to obtain the power supply components necessary to  
19          service customers that do not shop for their electric supply.

1 **Q. How is LRS supply acquired?**

2 A. LRS is acquired through a combination of competitive wholesale electric supply  
3 solicitations and, in some instances, wholesale electricity spot market purchases. The  
4 most significant portion of the cost of LRS is the electric energy to serve customers'  
5 loads. Moreover, the price of the energy component of the LRS supply is the most  
6 volatile input. Thus, LRS wholesale energy supply procurement is carried out using a  
7 number of solicitations designed to track wholesale market price changes while  
8 minimizing significant rate volatility. Depending upon the overall procurement structure,  
9 other supply components can be purchased simultaneously, or separately. Notably, the  
10 market prices of the other components of the LRS supply are not as volatile and the risk  
11 that cost changes will result in rate volatility is low.

12  
13 **Q. How does the LRS procurement structure reduce LRS rate volatility?**

14 A. To reduce abrupt pricing changes, LRS energy procurement structures specify varied  
15 power supply contract terms, procurement dates, and retail customer supply obligation  
16 percentages to avoid situations where all contracts expire at the same time. For example,  
17 electricity supply for non-shopping residential or small commercial customers can be  
18 split up into a number of blocks (or "tranches" defined by seller percentage supply  
19 obligations). The contract terms for the supply products can vary (e.g., 6-month, 12-  
20 month, etc.) and the procurement timing can be defined to renew contracts as little as  
21 once per year to as many as a few times per year. Numerous permutations can be

1 envisioned with each resulting in rates changes that will be more or less volatile. These  
2 procurement structures are often referred to as “laddered” and these types of structures  
3 are used in practically all states with retail competition.<sup>1</sup>  
4

5 **Q. What factors are taken into account when defining procurement laddering**  
6 **structures?**

7 A. Laddering seeks to strike a balance between ensuring reasonably frequent, low-volatility  
8 price adjustments for non-shopping customers and providing an opportunity for non-  
9 shopping customers to seek service from competitive retail suppliers.<sup>2</sup> In other words,  
10 laddering typically intends to limit customer exposure to unacceptable price volatility, but  
11 not produce LRS rates that are not regularly updating as power market conditions  
12 change.<sup>3</sup> The common objective is for non-shopping customers to still have an  
13 opportunity to shop when competitive retail suppliers can provide a better or more  
14 specialized retail offer. However, shopping should not be encouraged by establishing a  
15 volatile LRS rate that can be especially disruptive to residential and small commercial  
16 customers.  
17

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<sup>1</sup> It is important to note that laddered structures are used primarily for residential and small commercial customers. LRS for larger non-shopping customer loads is renewed quarterly or may also simply be priced based on hourly wholesale electricity spot market prices.

<sup>2</sup> Laddering can also allow for LRS supplier diversity and minimize the impact of supplier financial difficulties.

<sup>3</sup> Alignment of the procurement approach with state legislation and regulatory policy may also be an important consideration.

1 **Q. Are some laddering structures definitively better than others?**

2 A. No. LRS power supply mixtures can vary considerably and still achieve the same  
3 objectives. There will always be times when the LRS pricing under one supply approach  
4 appears better than another, or when LRS pricing better aligns with changing market  
5 conditions. However, these observations do not readily allow one to conclude  
6 definitively that one approach is better than another.

7  
8 **B. LRS Supply Products**

9 **Q. What is the most common energy supply product used for LRS?**

10 A. Based on my experience, the most common energy supply product is a full-requirements,  
11 load-following supply product.

12  
13 **Q. Please describe a full-requirements, load-following supply product.**

14 A. A full-requirements, load-following electricity supply product obligates a wholesale  
15 electricity seller to supply a fixed-percentage (tranche) of LRS during every hour of a  
16 product's term. By assuming this obligation, sellers are responsible for managing the  
17 acquisition of energy, capacity, ancillary services, and other related products (net of  
18 transmission and distribution losses) to meet LRS hourly loads. The pricing for a full-  
19 requirements, load-following product is specified based on the type of LRS load being  
20 supplied. However, the pricing is typically fixed for the term of the product and does not



1 vary regardless of the number of LRS customers being served.<sup>4</sup> Fixed-price, full-  
2 requirements, load-following electricity supply products are standard for LRS.  
3

4 **Q. How do fixed-price, full-requirements, load-following electricity supply products**  
5 **facilitate the delivery of LRS?**

6 A. Fixed-price, full-requirements, load-following products allow the utility to directly pass  
7 through the costs of the energy supply because the price does not vary as customer load  
8 changes. Thus, suppliers plan for and manage load changes due to weather, LRS  
9 customers switching to competitive retail suppliers, economy-wide changes, etc.<sup>5</sup> The  
10 utility simply uses the supply product prices as inputs into LRS rates and the costs  
11 associated with these products is directly passed through to customers.  
12

13 **Q. Does a fixed-price, full-requirements, load-following electricity supply product**  
14 **cover all the costs incurred by the utility to provide LRS?**

15 A. No, not always. For example, LRS often requires that the utility obtain RECs to comply  
16 with renewable energy standard requirements. RECs can be procured separately, and the  
17 costs passed through to customers either as a component built into the LRS rate or, as in  
18 Rhode Island, through a separate factor that is included on customer bills and added to

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<sup>4</sup> There are full-requirements, load-following supply products that are priced based on wholesale electricity market hourly prices. These products are often used as LRS for large electricity consumers that rarely use LRS.

<sup>5</sup> Wholesale suppliers specialize in managing these risks and compete to provide the lowest prices in LRS solicitations.

1 the base LRS rate. However, a significant portion of the LRS rate is comprised of the  
2 fixed-price, full-requirements, load-following electricity supply products.  
3

4 **Q. Do fixed-price, full-requirements, load-following electricity supply products capture**  
5 **wholesale electricity market conditions?**

6 A. Yes. Wholesale suppliers rely on wholesale futures/forwards markets to manage the  
7 costs of LRS supply obligations and hedge against possible shifts in fuel and power  
8 markets during a product delivery term. LRS suppliers project the expected hourly loads  
9 that will be served in a tranche of supply obligation and put in place “hedges” that fix the  
10 cost of energy the supplier must serve as a result of an LRS auction award. Thus, at the  
11 time of an LRS solicitation, the costs of locking in market prices for future supply to  
12 serve LRS customers is a key determinant of the LRS supply costs. LRS supplier prices  
13 rise and fall as wholesale futures/forward markets respond to changes in expected future  
14 market supply/demand balances (i.e., electricity and fuel markets).  
15

16 **C. The Company’s LRS Product Mixture**

17 **Q. Does the Company rely on a laddered LRS product mixture?**

18 A. Yes, for its residential and commercial customer groups.<sup>6</sup> The Company obtains 90% of  
19 its LRS energy supply for the residential and commercial customer groups using

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<sup>6</sup> The Company also procures three months of fixed-price, full-requirements, load-following electricity supply for its industrial customer group on a quarterly basis, resulting in three monthly fixed prices. See Direct Testimony of Jeffrey D. Oliveira and James Ruebenacker, RIPUC Docket No. 4978, July 21, 2022.

1 quarterly procurements and contract terms of 6-, 12-, 18- and 24-months (20%, 20%,  
2 20%, and 30% respectively).<sup>7</sup> In addition, the Company obtains 10% of its LRS energy  
3 supply from the ISO New England wholesale electricity spot market.<sup>8</sup> The Company's  
4 total LRS supply services energy rate combines the cost of these laddered energy supply  
5 components (including losses) with generation capacity, RECs, and administrative costs.<sup>9</sup>  
6

7 **Q. How often are the residential and commercial LRS rates updated?**

8 A. The residential and commercial LRS rates are updated biannually with prices being set  
9 separately for the months October - March (Fall/Winter) and April-September  
10 (Spring/Summer) (See Figure 1). As Figure 1 shows, the Company's rates rise in the  
11 Fall/Winter months consistent with the seasonal variation in New England's wholesale  
12 electricity and natural gas prices. In the Spring/Summer months, the Company's rates  
13 decline as wholesale electricity and natural gas market prices typically decline. Finally,  
14 Figure 1 shows the noticeable increase in the Company's upcoming Fall/Winter prices as  
15 wholesale market futures/forward prices have risen considerably over the last several  
16 months (See **Section IV**, below).

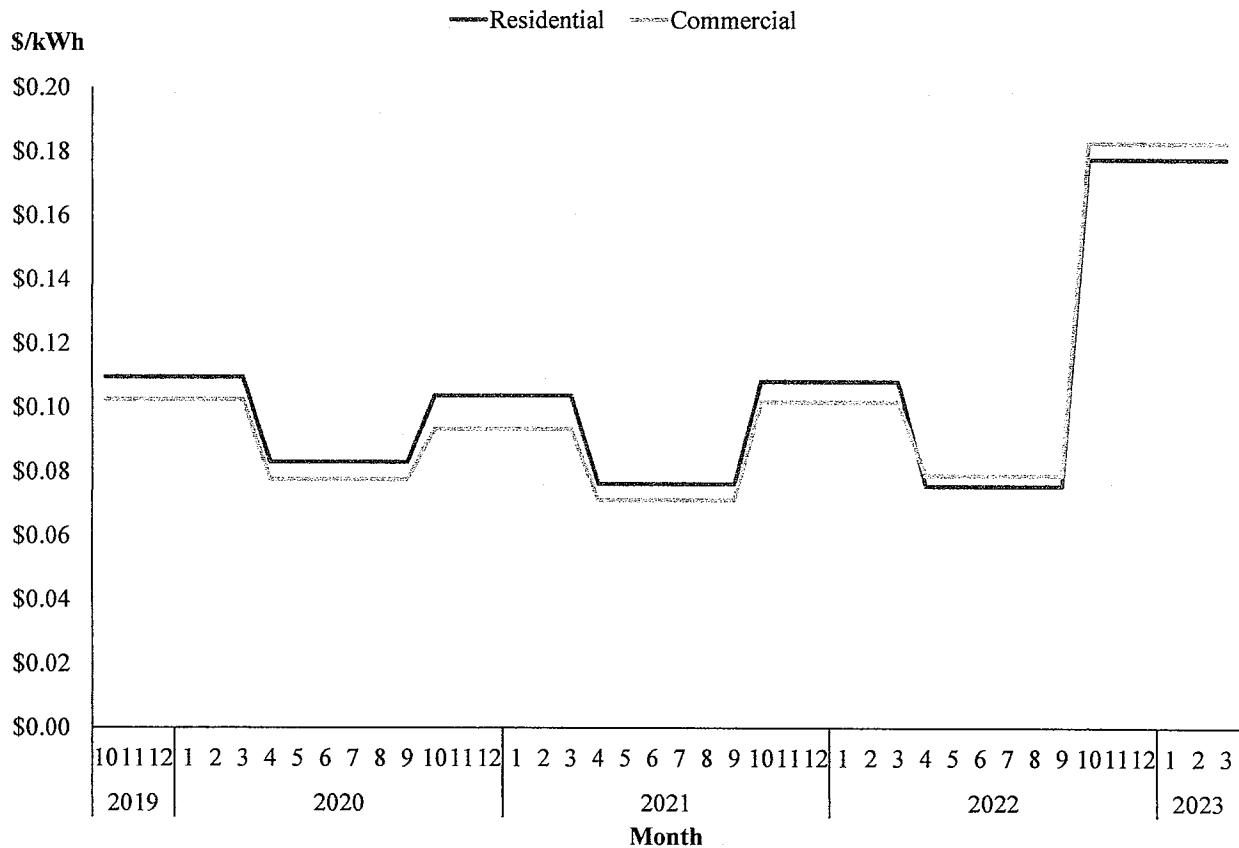
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<sup>7</sup> See Schedule 7 — Approved 2021 LRS Plan, Direct Testimony of Jeffrey D. Oliveira and James Ruebenacker, RIPUC Docket No. 4978, July 21, 2022, for a graphical schedule of the Company's laddered procurement.

<sup>8</sup> Id.

<sup>9</sup> Id. at Schedule 1.

**Figure 1: The Company's Residential and Commercial Seasonal LRS Rates<sup>10</sup>  
October 2019 – March 2023**



<sup>10</sup> "Last Resort Service (LRS) Rates for All Customers," National Grid, available at [https://www.nationalgridus.com/media/pdfs/billing-payments/electric-rates/rhode-island/sos-rates-all\\_customers.pdf](https://www.nationalgridus.com/media/pdfs/billing-payments/electric-rates/rhode-island/sos-rates-all_customers.pdf); "Proposed Last Resort Service Rates for the Residential Group for the months of April 2022 through September 2022," National Grid, RIPUC Docket No. 4978, January 19, 2022, available at <https://ripuc.ri.gov/sites/g/files/xkgbur841/files/eventsactions/docket/4978-NGrid-LRS-Rates-Residential%2C-Commercial%2C-Industrial-%28April-2022%29%28R%29%28PUC-1-19-22%29.pdf>; "Proposed Last Resort Service Rate for the Residential Group for the Months of October 2022 through March 2023," Narragansett Electric Company d/b/a Rhode Island Energy, RIPUC Docket No. 4978, July 21, 2022.

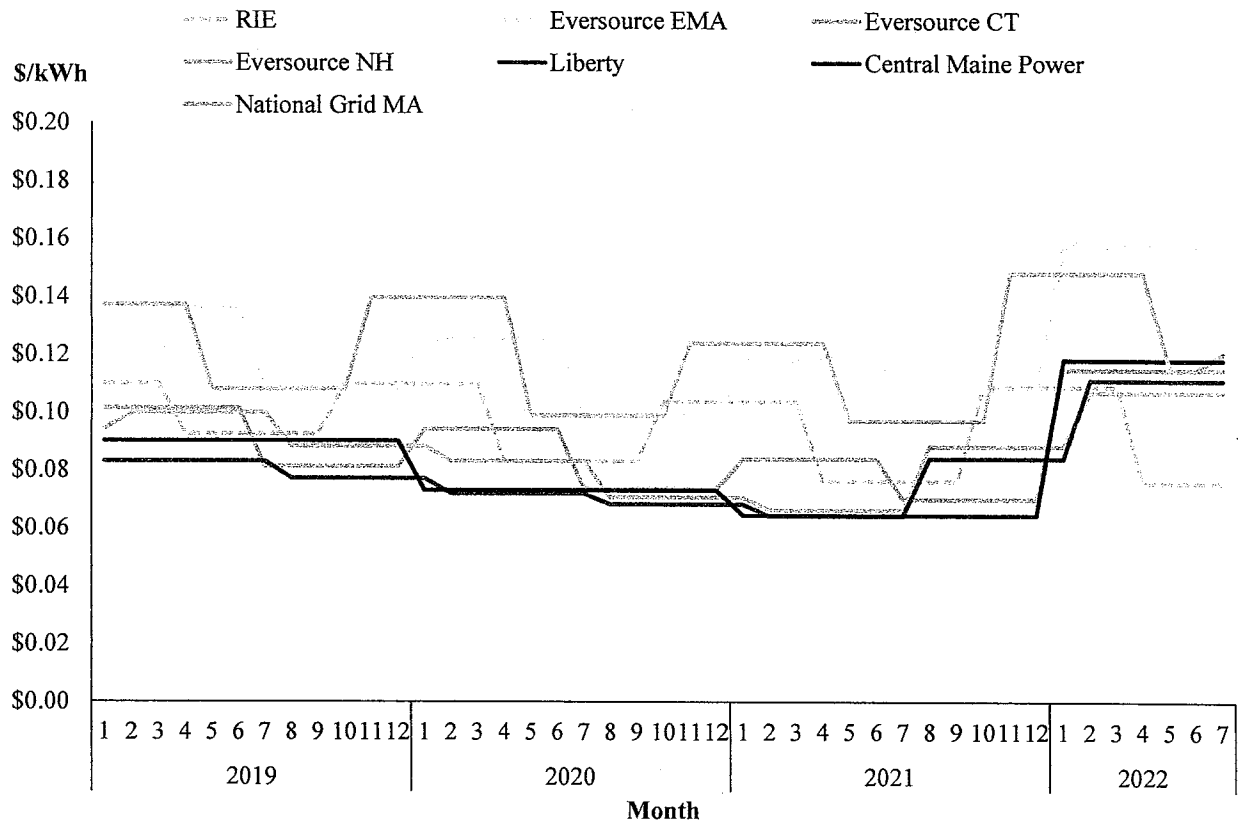
1 **Q. Have you examined how the Company's LRS rates compare to other New England**  
2 **utilities?**

3 A. Yes. Figure 2 compares the Company's LRS rates to other selected New England  
4 utilities' rates.<sup>11</sup> Figure 2 shows that the Company's LRS rates are in line with the rates  
5 of other New England utilities. The Company's rates exhibit relative stability and did not  
6 experience the steep increases in prices during 2022 that resulted at some other utilities.  
7 However, recent increases in wholesale electricity and natural gas prices have now driven  
8 up the Company's upcoming Fall/Winter LRS rates.

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<sup>11</sup> Figure 2's rate comparisons do not account for the different product mixtures used in the various utilities' LRS or the utility's geographic location. The comparison provides an example of how different procurement mixtures can result in comparable LRS rates.

**Figure 2: Selected New England Utility Residential Customer Fixed Price Electricity Rates<sup>12</sup>  
January 2019 – July 2022**



<sup>12</sup> "Last Resort Service (LRS) Rates for All Customers," National Grid, available at [https://www.nationalgridus.com/media/pdfs/billing-payments/electric-rates/rhode-island/sos-rates-all\\_customers.pdf](https://www.nationalgridus.com/media/pdfs/billing-payments/electric-rates/rhode-island/sos-rates-all_customers.pdf); "Proposed Last Resort Service Rates for the Residential Group for the months of April 2022 through September 2022," National Grid, RIPUC Docket No. 4978, January 19, 2022, available at <https://ripuc.ri.gov/sites/g/files/xkgbur841/files/eventsactions/docket/4978-NGrid-LRS-Rates-Residential%2C-Commercial%2C-Industrial-%28April-2022%29%28R%29%28PUC-1-19-22%29.pdf>; "Electric Supply Rates Archive," Eversource Eastern Massachusetts, available at <https://www.eversource.com/content/ema-c/residential/account-billing/manage-bill/about-your-bill/rates-tariffs/electric-supply-rates/electric-supply-rates-archive>; "Administrative Proceeding to Review The Connecticut Light and Power Company d/b/a Eversource Energy's Standard Service and Supplier of Last Resort Service 2022 Procurement Results and Rates," PURA Docket No. 22-01-01; "Administrative Proceeding to Review The Connecticut Light and Power Company d/b/a Eversource Energy's Standard Service and Supplier of Last Resort Service 2021 Procurement Results and Rates," PURA Docket No. 21-01-01; "Administrative Proceeding to Review The Connecticut Light and Power Company's Standard Service and Supplier of Last Resort Service 2020 Procurement Results and Rates," PURA Docket No. 20-

1 **IV. New England Wholesale Electricity and Natural Gas Markets Drive LRS Rates**

2 **Q. Is the increase in the Company's LRS rates starting in October 2022 consistent with**  
3 **recent changes in wholesale electricity and natural gas spot prices?**

4 A. Yes. Figure 3 shows the spot prices for on-peak and off-peak wholesale electricity at ISO  
5 New England's Internal Hub and the spot price of natural gas at Algonquin City Gates  
6 from January 2020 to June 2022.<sup>13</sup> As shown in the figure, since July 2021, when the  
7 Company's LRS rates were set for October 2021 to March 2022, the prices of natural gas  
8 and wholesale electricity have increased. In particular, summer on-peak wholesale  
9 electricity spot prices in ISO New England increased from approximately \$40/MWh in  
10 July 2021 to more than \$70/MWh in June 2022. Similarly, the summer spot price of  
11 natural gas at Algonquin City Gates increased from approximately \$3/mmBtu in July  
12 2021 to approximately \$7/mmBtu in June 2022. Moreover, relative to spot prices during  
13 the 2020-21 winter season, the maximum monthly average spot price for on-peak  
14 wholesale electricity in ISO New England increased by about \$80/MWh to more than

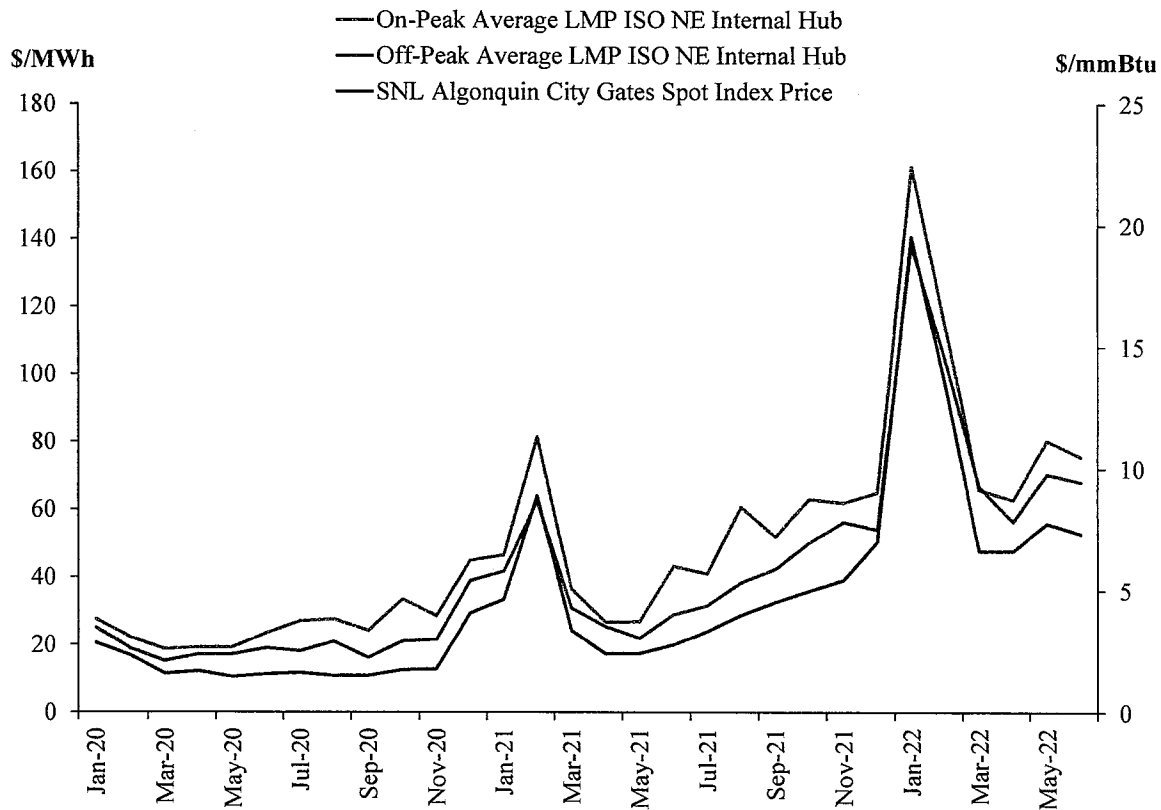
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01-01; "Administrative Proceeding to Review The Connecticut Light and Power Company's Standard Service and Supplier of Last Resort Service 2019 Procurement Results and Rates," PURA Docket No. 19-01-01; "2021 Energy Service Solicitation," Eversource NH, NHPUC Docket No. 21-077; "2020 Energy Service Solicitation," Eversource NH, NHPUC Docket No. 20-054; "Petition for Approval of Energy Service Solicitation and Resulting Rates," Eversource NH, NHPUC Docket No. 19-082; "Petition Requesting Approval of Energy Service Solicitation and Resulting Rates," Eversource NH, NHPUC Docket No. 18-002; "Rates and Tariffs Archive," Liberty Utilities NH, available at <https://new-hampshire.libertyutilities.com/bath/residential/rates-and-tariffs/archive-electrical.html#navbar-rates-and-tariffs-residential>; "Standard Offer Rates for Residential and Small Commercial Customers," Central Maine Power, available at <https://www.maine.gov/mpuc/regulated-utilities/electricity/standard-offer-rates/cmp>; "Basic Service Rates for Customers on the following Residential rate classes: Regular Residential (R-1), Residential Low Income (R-2)," National Grid MA, available at <https://www.nationalgridus.com/media/pdfs/billing-payments/electric-rates/ma/resitable.pdf>.

<sup>13</sup> Algonquin City-Gates is the nearest natural gas trading hub to Rhode Island. See, e.g., "Northeast Natural Gas Market Assessment," FERC, July 2022, p. 1.

\$160/MWh during the 2021-22 winter season, and the maximum monthly average spot price for natural gas at Algonquin City Gates increased by about \$11/mmBtu to nearly \$20/mmBtu during the 2021-22 winter season.

**Figure 3: Spot Prices for On-Peak and Off-Peak Wholesale Electricity and Natural Gas<sup>14</sup>**  
**January 2020 – June 2022**



Note: The prices shown are monthly averages.

**Q. Why are natural gas prices relevant to wholesale electricity prices?**

<sup>14</sup> "SNL Algon Gates Spot Natural Gas Index," S&P Global Market Intelligence; "Day-Ahead and Real-Time Monthly LMP Index Report," ISO New England.



# Attachment 3

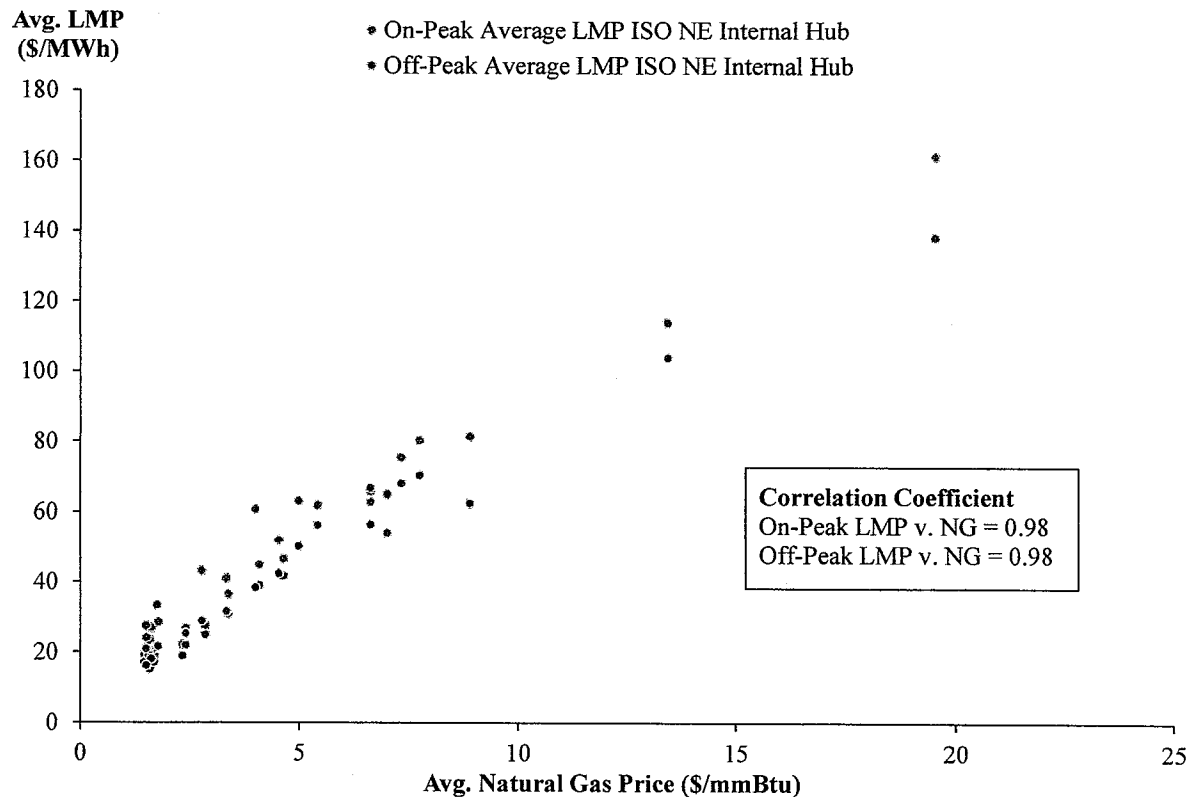
**Testimony of A. Joseph Cavicchi:** Natural gas prices set  
price of wholesale electricity in New England

1 A. Natural gas is typically the marginal fuel in New England, that is, natural gas is typically  
2 the fuel being used by the highest cost generator dispatched to meet demand in New  
3 England. As wholesale electricity spot prices are set at the price of the highest cost  
4 generator dispatched, and the price offered by each generator is set largely based on fuel  
5 costs, natural gas prices are a primary factor in setting the spot price of wholesale  
6 electricity in New England.<sup>15</sup> As shown in Figure 4, ISO New England wholesale  
7 electricity spot prices are highly correlated with the Algonquin City Gates spot price of  
8 natural gas.

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<sup>15</sup> See, e.g., Micek, Kassia, "US EIA sees summer power prices climbing on fuel costs, delivery constraints," *S&P Global Market Intelligence*, June 17, 2022.

**Figure 4: Correlation between ISO NE Spot Electricity Prices and Algonquin City Gates  
Spot Natural Gas Prices<sup>16</sup>  
January 2020 to June 2022**



**Note:** The prices shown are monthly averages.

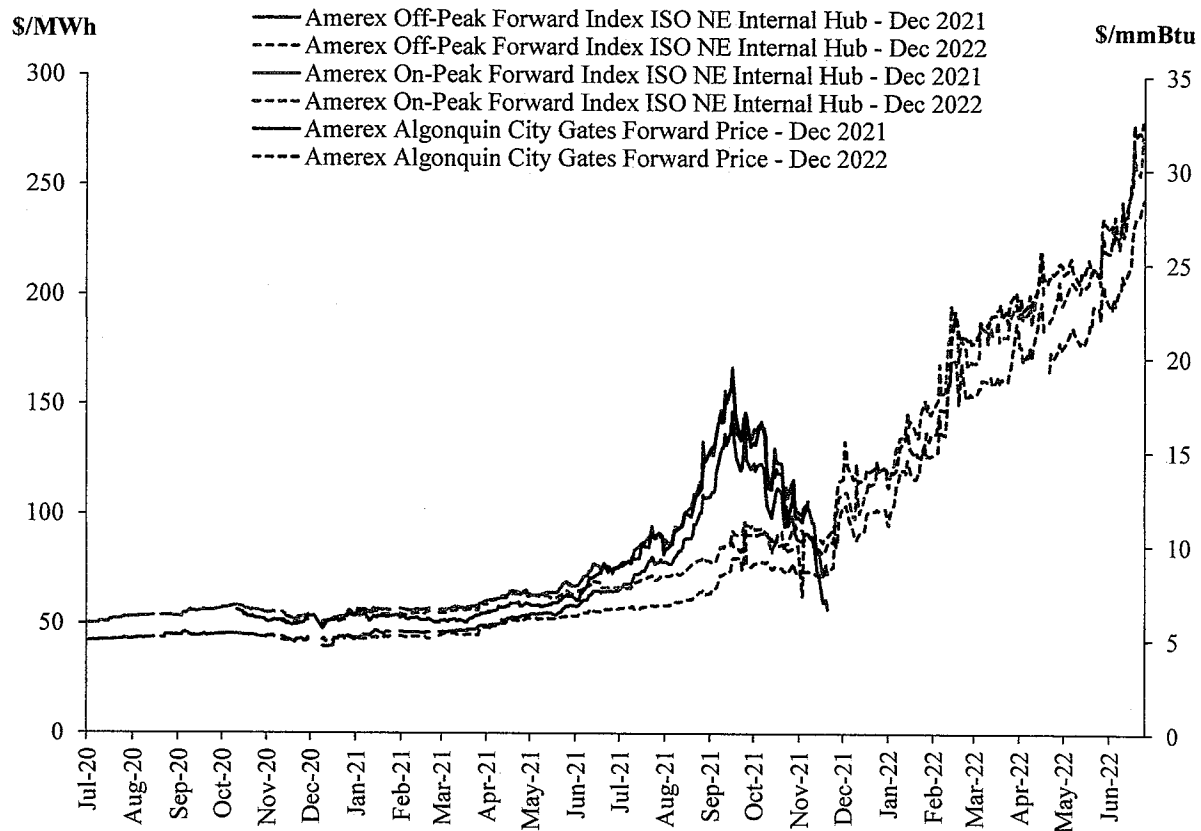
As forward prices for electricity are based on expectations of the price of electricity in the future, forward prices for electricity are similarly influenced by forward prices for natural gas. Thus, wholesale electricity prices vary with the expected future supply and demand conditions in natural gas markets.

<sup>16</sup> "SNL Algon Gates Spot Natural Gas Index," S&P Global Market Intelligence; "Day-Ahead and Real-Time Monthly LMP Index Report," ISO New England.

1 **Q. You showed that spot prices for natural gas and wholesale electricity in New**  
2 **England have increased in recent months, have forward prices for the coming**  
3 **winter also increased?**

4 A. Yes. Figure 5 shows the forward prices for the December 2021 and December 2022  
5 contracts for on-peak and off-peak wholesale electricity at ISO New England's Internal  
6 Hub as well as the forward prices for the same contracts for natural gas delivered to  
7 Algonquin City Gates. As shown in the figure, the forward prices of natural gas and  
8 wholesale electricity for December 2022 are dramatically higher than the forward prices  
9 for December 2021. In particular, on-peak wholesale electricity forward prices for ISO  
10 New England's Internal Hub settled at roughly \$70/MWh for December 2021 and are  
11 currently trading at nearly \$270/MWh in July 2022. Similarly, the forward price of  
12 natural gas delivered to Algonquin City Gates settled at roughly \$12/mmBtu for  
13 December 2021 and is currently trading at more than \$30/mmBtu in July 2022.

**Figure 5: Forward Prices for On-Peak and Off-Peak Wholesale Electricity  
and Natural Gas<sup>17</sup>  
December 2021 and December 2022 Contracts**



**Q. What are the key factors driving the increase in forward natural gas prices in New England for the coming winter?**

<sup>17</sup> "Amerex Forward Power Index Internal Hub On-Peak," "Amerex Forward Power Index Internal Hub Off-Peak," and "Amerex Algon Gates Natural Gas Full Value Monthly," S&P Global Market Intelligence.

# Attachment 5

**Testimony of A. Joseph Cavicchi:** Key factor causing increase is Russia's invasion of Ukraine ... disruptions to natural gas markets

1 A. Electricity and natural gas prices in New England are typically higher in winter than in  
2 summer due to high demand for heating;<sup>18</sup> however, forward natural gas and electricity  
3 prices for the coming winter have also increased dramatically relative to the prices that  
4 prevailed last winter, as discussed above. A key factor causing this increase is Russia's  
5 invasion of Ukraine in February 2022 and the associated disruptions to the natural gas  
6 markets caused by Europe's heavy dependence on Russia for natural gas, Europe's  
7 sanctions of Russia, and the ensuing disputes over natural gas supply.<sup>19</sup> Europe's efforts  
8 to replace Russian natural gas supplies with supplies from other sources increase the  
9 price of natural gas in the U.S. due, in part, to the ability of the U.S. to export natural gas

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<sup>18</sup> See, e.g., Micek, Kassia, "US EIA sees summer power prices climbing on fuel costs, delivery constraints," *S&P Global Market Intelligence*, June 17, 2022.

<sup>19</sup> Wallace, Joe and Jenny Strasburg, "Ukraine Reduced Russian Gas Flowing to Europe Through Key Pipeline," *The Wall Street Journal*, May 11, 2022; Pancevski, Bojan and Jenny Strasburg, "Europe Fears Widespread Economic Fallout if Russian Gas Outage Drags On," *The Wall Street Journal*, July 18, 2022; "Short-Term Energy Outlook: Natural Gas," U.S. Energy Information Administration, July 12, 2022, available at <https://www.eia.gov/outlooks/steo/report/natgas.php>.

Other factors influencing the increase in natural gas and electricity prices since 2021 include the continued economic recovery, limited natural gas production increases, forecasts of a colder winter in 2022-23 than 2021-22, smaller than average inventories of natural gas in the U.S., and limited switching to coal-fired generation due to generator retirements, fuel delivery issues, and low stocks. See "Short-Term Energy Outlook: Natural Gas," U.S. Energy Information Administration, July 12, 2022, available at <https://www.eia.gov/outlooks/steo/report/natgas.php>; Weber, Maya, "Spot gas prices to top \$8/MMBtu in H2'22 despite production growth, EIA predicts," *S&P Global Market Intelligence*, June 7, 2022; Micek, Kassia, "US EIA sees summer power prices climbing on fuel costs, delivery constraints," *S&P Global Market Intelligence*, June 17, 2022.

1 in liquefied form (“liquefied natural gas” or “LNG”).<sup>20</sup> As demand for natural gas in  
2 Europe strengthens, so does the price Europeans are willing to pay for natural gas, which  
3 strengthens the incentive for U.S. producers to export natural gas to Europe.<sup>21</sup> With more  
4 supply going to Europe, the price of natural gas in the U.S. increases, including in New  
5 England. For example, in the first quarter of 2022, the U.S. supplied 47% of the  
6 European Union’s LNG imports, representing a 235% increase in year-on-year LNG  
7 exports from the U.S. to the European Union.<sup>22</sup> Similarly, the U.S. Energy Information  
8 Administration expects that total LNG exports from the U.S. in 2022 will be 22% higher  
9 than in 2021.<sup>23</sup>

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<sup>20</sup> See, e.g., Weber, Maya, “‘Uncomfortable questions’ seen ahead for global gas supply dynamics,” *S&P Global Market Intelligence*, July 15, 2022; “Short-Term Energy Outlook: Natural Gas,” U.S. Energy Information Administration, July 12, 2022, available at <https://www.eia.gov/outlooks/steo/report/natgas.php> (“LNG prices in Europe remain high amid supply uncertainties because of Russia’s invasion of Ukraine and the need to replenish Europe’s natural gas inventories, which has kept Europe’s demand for LNG elevated... The Henry Hub spot price averaged \$6.07 per million British thermal units (MMBtu) in 1H22, rising steadily from an average of \$4.38/MMBtu in January to \$8.14/MMBtu in May... The increase through May resulted from continued demand for LNG exports, increased demand in electric power generation as a result of limited natural gas-to-coal switching, and decreased production compared with the end of 2021.”).

<sup>21</sup> “Short-Term Energy Outlook: Natural Gas,” U.S. Energy Information Administration, July 12, 2022, available at <https://www.eia.gov/outlooks/steo/report/natgas.php> (“Strong natural gas demand and high LNG prices in Europe and Asia drove the continued growth in U.S. LNG exports in the first half of this year.”).

<sup>22</sup> “Quarterly Report on European Gas Markets,” European Commission, Vol. 15, Issue 1, Q1 2022, available at [https://ec.europa.eu/info/sites/default/files/energy\\_climate\\_change\\_environment/quarterly\\_report\\_on\\_european\\_gas\\_markets\\_q1\\_2022.pdf](https://ec.europa.eu/info/sites/default/files/energy_climate_change_environment/quarterly_report_on_european_gas_markets_q1_2022.pdf), p. 16. See also Weber, Maya, “‘Uncomfortable questions’ seen ahead for global gas supply dynamics,” *S&P Global Market Intelligence*, July 15, 2022 (“In the first half of 2022, [the International Energy Agency’s] report showed European LNG imports rose by more than 50% compared to last year, while two-thirds of the increase in global LNG trade came from the U.S. alone.”).

<sup>23</sup> Weber, Maya, “Spot gas prices to top \$8/MMBtu in H2’22 despite production growth, EIA predicts,” *S&P Global Market Intelligence*, June 7, 2022.



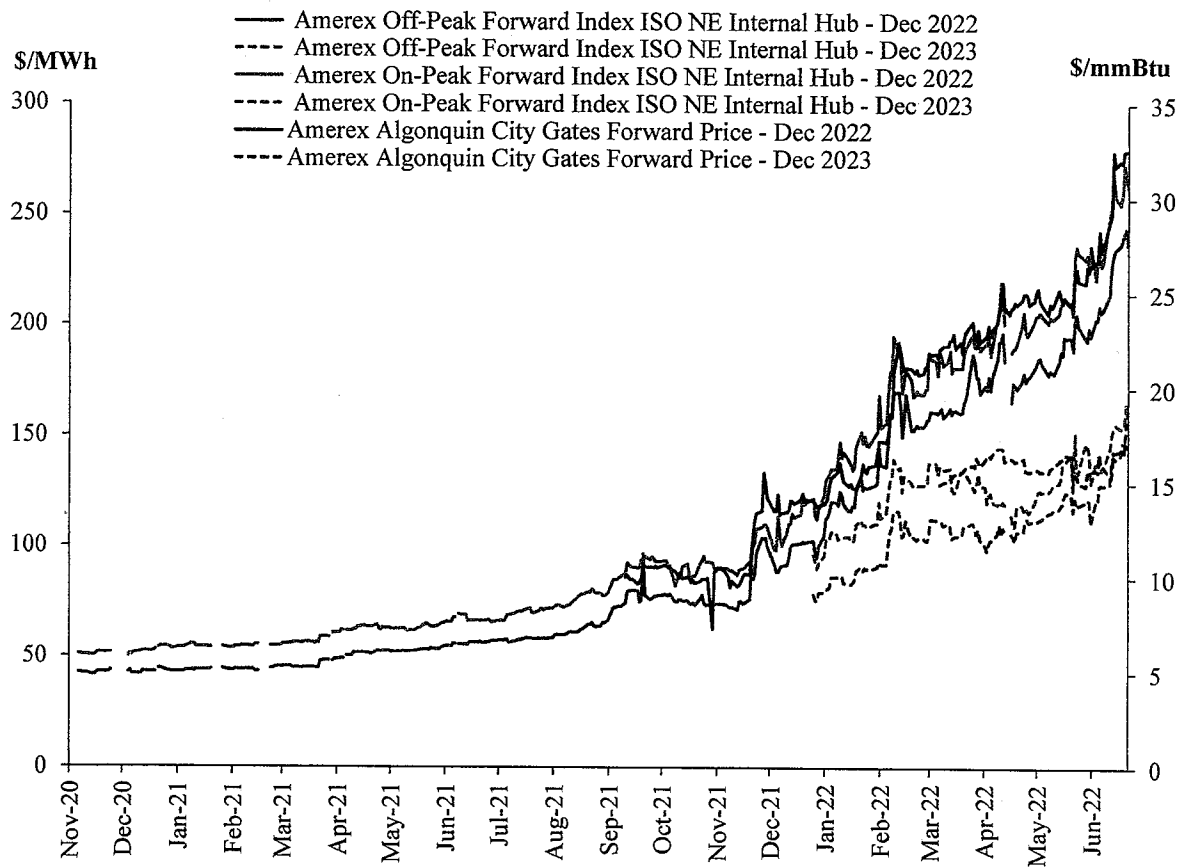
# Attachment 13

**Testimony of A. Joseph Cavicchi:** Energy prices are expected to fall by the 2023-2024 winter season

1 **Q. Are New England natural gas and wholesale electricity prices, expected to be this**  
2 **high for the 2023-24 winter season?**

3 A. No, as shown in Figure 6, current prices for the December 2023 forward contracts for  
4 Algonquin City Gates and ISO New England's Internal Hub are ~~well below the prices of~~  
5 the December 2022 contracts, indicating that prices are expected to fall by the 2023-24  
6 winter season.

**Figure 6: Forward Prices for On-Peak and Off-Peak Wholesale Electricity  
and Natural Gas<sup>24</sup>  
December 2022 and December 2023 Contracts**



**V. The Company Faces the Same LRS Rate Increases that Other New England Utilities Face**

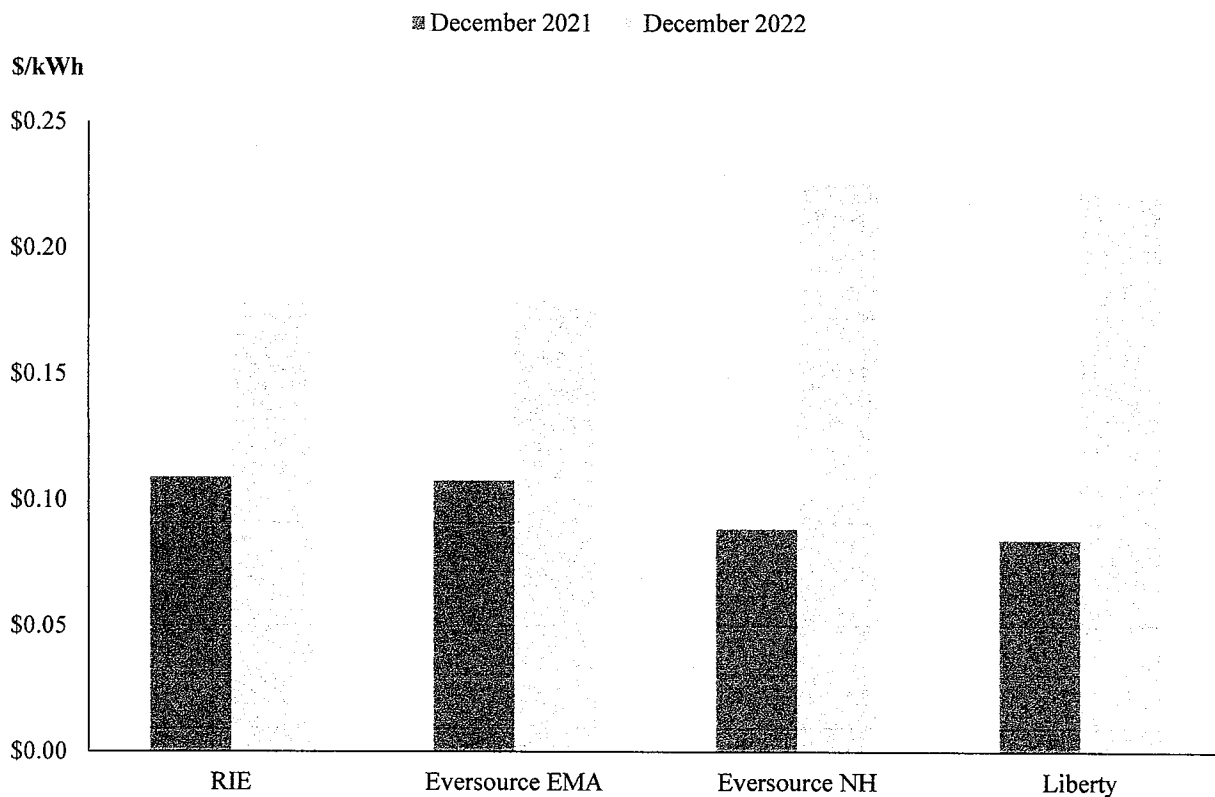
**Q. Have retail rates also increased for other New England utilities?**

**A.** Yes, as shown in Figure 7, residential rates for Eversource EMA, Eversource NH, and Liberty—New England utilities that have recently procured power for Fall/Winter 2022-

<sup>24</sup> "Amerex Forward Power Index Internal Hub On-Peak," "Amerex Forward Power Index Internal Hub Off-Peak," and "Amerex Algon Gates Natural Gas Full Value Monthly," S&P Global Market Intelligence.

23 and published the resulting rates—will also be higher for December 2022 than they were for December 2021 as a result of the market disruptions and other factors discussed above.

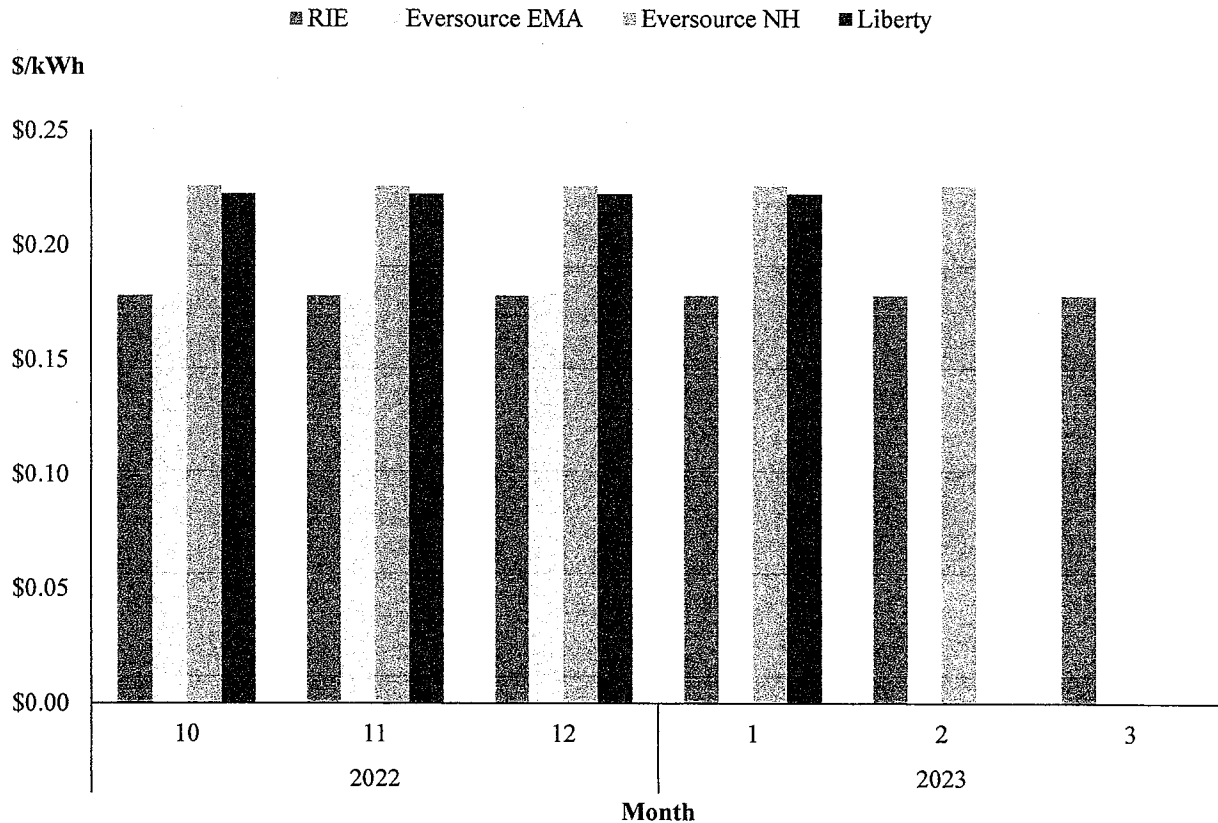
**Figure 7: Residential Retail Electric Supply Rates at Select New England Utilities<sup>25</sup>  
December 2021 versus December 2022**



<sup>25</sup> “Proposed Last Resort Service Rate for the Residential Group for the Months of October 2022 through March 2023,” Narragansett Electric Company d/b/a Rhode Island Energy, RIPUC Docket No. 4978, July 21, 2022; “Electric Supply Rates,” Eversource Eastern Massachusetts, available at <https://www.eversource.com/content/ema-c/residential/account-billing/manage-bill/about-your-bill/rates-tariffs/electric-supply-rates>; “2022 Energy Service Solicitation,” Eversource NH, NHPUC Docket No. 22-021; “Cost of Electricity Price Increase,” Liberty NH, available at <https://new-hampshire.libertyutilities.com/concord/residential/my-account/my-bill/rates-tariffs/electricity-price-increase-residential-nh-electric-liberty.html>.

1 Further, as shown in Figure 8, the Company's rates throughout the 2022-23 Fall/Winter  
2 season are in line with the rates other utilities in New England have set. Finally, as  
3 discussed above, the futures prices for December 2023 are lower than those for December  
4 2022, indicating that the 2022-23 Fall/Winter season price increases are currently  
5 expected to be temporary.

**Figure 8: Selected New England Utility Residential Customer Electricity Supply Rates<sup>26</sup>  
October 2022 – March 2023**



<sup>26</sup> "Last Resort Service (LRS) Rates for All Customers," National Grid, available at [https://www.nationalgridus.com/media/pdfs/billing-payments/electric-rates/rhode-island/sos-rates-all\\_customers.pdf](https://www.nationalgridus.com/media/pdfs/billing-payments/electric-rates/rhode-island/sos-rates-all_customers.pdf); "Proposed Last Resort Service Rate for the Residential Group for the Months of October 2022 through March 2023," Narragansett Electric Company d/b/a Rhode Island Energy, RIPUC Docket No. 4978, July 21, 2022; "Electric Supply Rates Archive," Eversource Eastern Massachusetts, available at <https://www.eversource.com/content/ema-c/residential/account-billing/manage-bill/about-your-bill/rates-tariffs/electric-supply-rates/electric-supply-rates-archive> "Electric Supply Rates," Eversource Eastern Massachusetts, available at <https://www.eversource.com/content/ema-c/residential/account-billing/manage-bill/about-your-bill/rates-tariffs/electric-supply-rates>; "2022 Energy Service Solicitation," Eversource NH, NHPUC Docket No. 22-021; 2021 Energy Service Solicitation, Eversource NH, NHPUC Docket No. 21-077; "Cost of Electricity Price Increase," Liberty NH, available at <https://new-hampshire.libertyutilities.com/concord/residential/my-account/my-bill/rates-tariffs/electricity-price-increase-residential-nh-electric-liberty.html>; Rates and Tariffs Archive, Liberty NH, available at <https://new-hampshire.libertyutilities.com/bath/residential/rates-and-tariffs/archive-electrical.html#navbar-rates-and-tariffs-residential>.

1 VI. Conclusion

2 Q. Please summarize your conclusions.

3 A. The Company's proposed increases to its LRS rates for October 2022 to March 2023 are  
4 consistent with the increasing cost of New England wholesale electricity supply. The  
5 Company relies on wholesale electricity markets to procure LRS electricity supply for its  
6 customers. The cost of New England wholesale electricity supply has been increasing  
7 and futures markets show even higher expected prices for the upcoming Fall/Winter as  
8 global natural gas market demand pushes prices higher. Thus, the Company's proposed  
9 LRS rates are rising as the costs of securing future electricity supply increases. Finally,  
10 the Company's proposed LRS rate increases are also consistent with the rate increases of  
11 other New England utilities whose rates incorporate the increased cost of securing power  
12 supply for the upcoming Fall/Winter.

13  
14 Q. Does this complete your testimony?

15 A. Yes.

**PRE-FILED DIRECT TESTIMONY**

**OF**

**PAUL J. HIBBARD**



1 I. **Introduction and Qualifications**

2 Q. **Mr. Hibbard, please state your name and business address.**

3 A. My name is Paul J. Hibbard. My business address is 111 Huntington Avenue, Boston,  
4 MA 02199.  
5

6 Q. **On whose behalf are you testifying in this matter?**

7 A. The Narragansett Electric Company, d/b/a Rhode Island Energy (the “Company” or  
8 “Rhode Island Energy”).  
9

10 Q. **By whom are you employed and in what capacity?**

11 A. I am employed by Analysis Group as a Principal.  
12

13 Q. **Please summarize your professional and educational background.**

14 A. I provide consulting services to clients in the areas of energy and environmental markets,  
15 regulation, and policy. I have been with Analysis Group for approximately sixteen years,  
16 since 2003. First, from 2003 to April 2007, and most recently, from August 2010 to the  
17 present. In between, from April 2007 to June 2010, I served as Chairman of the  
18 Massachusetts Department of Public Utilities (“Department”). While Chairman, I also  
19 served as a member of the Massachusetts Energy Facilities Siting Board, the New  
20 England Governors’ Conference Power Planning Committee, and the NARUC Electricity  
21 Committee and Procurement Work Group. I also served as State Manager for the New

1 England States Committee on Electricity and as Treasurer to the Executive Committee of  
2 the 41-state Eastern Interconnect States' Planning Council.  
3

4 I previously worked in energy and environmental consulting with Lexecon, Inc. from  
5 2000 to 2003. Prior to working with Lexecon, I worked in state energy and  
6 environmental agencies for almost ten years. From 1998 to 2000, I worked for the  
7 Massachusetts Department of Environmental Protection on the development and  
8 administration of air quality regulations, Clean Air Act State Implementation Plans, and  
9 emission control programs for the electric industry with a focus on criteria pollutants and  
10 carbon dioxide, as well as various policy issues related to controlling pollutants from  
11 electric power generators within the Commonwealth of Massachusetts. From 1991 to  
12 1998, I worked in the Electric Power Division of the Department on cases related to the  
13 setting of utility rates, restructuring of the electric industry in Massachusetts and New  
14 England, quantification of environmental externalities, integrated resource planning,  
15 energy efficiency, utility compliance with state and federal emission control  
16 requirements, regional electricity market structure development, and coordination with  
17 other states on electricity and gas policy issues through the staff subcommittee of the  
18 New England Conference of Public Utility Commissioners.  
19

1 **Q. Have you ever testified before the Rhode Island Public Utilities Commission**  
2 **("PUC") or any other regulatory body?**

3 A. Yes. While I have not testified before the Rhode Island PUC, I have submitted testimony  
4 before the Federal Energy Regulatory Commission ("FERC") and state public utility  
5 commissions and siting boards on a variety of subject areas. I have testified numerous  
6 times on behalf of the New England Independent System Operator ("ISO-NE") and the  
7 New York Independent System Operator ("NYISO") on a range of wholesale electricity  
8 market issues including the setting of capacity market demand curves, changes to  
9 wholesale market designs, and the cost impact of new wholesale market rules. I have  
10 also submitted testimony to FERC on jurisdictional ratemaking issues. I have testified in  
11 state public utility commission natural gas and electric utility proceedings related to  
12 company mergers, the prudence of natural gas system investments, rate design,  
13 environmental impacts, and natural gas and electric integrated resource planning. I have  
14 testified before siting boards related to the proposed siting of new power plant  
15 infrastructure in New England. Finally, I have testified before New England state  
16 legislators on environmental policy and before the U.S. Congress on natural gas-electric  
17 system coordination issues and on interstate transmission. Additional detail regarding my  
18 credentials and experience can be found in my *curriculum vitae*, which is attached as  
19 Attachment PJH-1 to this testimony.  
20

1   **II.    Purpose and Summary of Testimony**

2   **Q.    What is the purpose of your testimony?**

3   A.    I have been asked by the Company to provide background on regional and international  
4       factors that affect the pricing of natural gas supply and transportation, as context for the  
5       gas supply costs that underlie the Company's Gas Cost Recovery ("GCR") filing. In  
6       particular, my testimony explains context for the purchase of natural gas in, and delivery  
7       of natural gas to, the New England region; the region's unique reliance on liquefied  
8       natural gas ("LNG") delivery and storage for supply during winter months; and how  
9       recent events have affected the pricing and supply of natural gas to customers in the New  
10      England region.

11  
12   **Q.    Please summarize your findings.**

13   A.    The Company's GCR includes expected increases in rates associated with changes in the  
14       underlying costs to procure, store, and transport natural gas for use in Rhode Island.  
15       These increases are fully consistent with fundamental changes in underlying factors  
16       affecting natural gas supply and demand in the U.S. and, in particular, in New England.  
17       The natural gas market factors driving the increased GCR costs are being experienced by  
18       natural gas (as well as electric) local distribution companies, and are due to at least the  
19       following factors:  
20       (1) New England has a strong winter peak due to (i) widespread use of natural gas for  
21       heating homes and businesses in the region, and (ii) a dependence on spot market

1 purchases of natural gas for operating power plants needed to maintain winter electric  
2 system reliability;

3 (2) New England has significant constraints on the delivery of natural gas for meeting the  
4 combined heating and electricity demand in the winter. The region has no indigenous  
5 sources of natural gas and sits effectively at the end of the pipeline system delivering gas  
6 from the south and west. Although there is a pipeline connection to Eastern Canada, the  
7 primary source of deliveries from Canada historically – Sable Island – shut down in  
8 2018. Finally, the New England region, in recent years, has been unable to develop  
9 additional natural gas supply and transportation infrastructure to alleviate the persistent  
10 winter natural gas transportation constraints. As a result, the natural gas delivery  
11 infrastructure that does exist in the region is at or near capacity on most winter days and  
12 is operating at maximum capacity on many cold winter days each year.

13 (3) Finally, these conditions leave New England strongly dependent on international  
14 shipments of LNG to meet natural gas demand during cold winter periods. Yet since  
15 power plant owners have little incentive to pre-contract for LNG supplies, the availability  
16 of LNG for injection on cold winter days in sufficient quantities to meet combined  
17 heating and electricity demand is relatively expensive and highly uncertain, adding  
18 pricing volatility and uncertainty to the region's natural gas markets.

19  
20 In a normal year, these conditions can lead to elevated and highly variable natural gas  
21 prices in New England during winter months, and correspondingly high pricing in natural

1 gas futures markets, with relatively minor variations in the conditions of supply and  
2 demand. Yet, this is not a normal year. The impact of the Russian invasion of Ukraine  
3 has fundamentally changed international markets for natural gas, including LNG. The  
4 increased demand for global supplies of natural gas from Europe has increased the price  
5 of natural gas throughout the U.S. and in much of the world, resulting in increasing  
6 exports from the U.S. to Europe and increasing the cost of securing LNG supplies for the  
7 LNG import terminals serving New England.

8  
9 **Q. How is your testimony organized?**

10 A. In **Section III**, I summarize the key factors affecting natural gas prices in New England,  
11 including the nature of the region's demand for natural gas, supply and delivery sources  
12 and challenges, and the pricing dynamics associated with a constrained system and  
13 reliance on imported LNG. In **Section IV**, I describe how the circumstances of supply  
14 and demand, and the impact of recent turmoil in the market for natural gas, have affected  
15 and are affecting the expected cost of natural gas delivered to New England and Rhode  
16 Island, in particular. In **Section V**, I describe how the Company's customers are not  
17 alone – that other natural gas local distribution company ("LDC") customers are and will  
18 see similar impacts, as will electric utility customers. Finally, in **Section VI**, I summarize  
19 my observations and conclusions.  
20

1    **III.    The Drivers of Natural Gas Pricing in New England**

2    **Q.    Please summarize the key drivers affecting the cost of natural gas supply in New**  
3    **England.**

4    A.    There are three key drivers of natural gas costs in Rhode Island and, more generally, New  
5    England. The first involves the nature and timing of natural gas demand. The second  
6    relates to the significant constraints on the interstate natural gas infrastructure used to  
7    supply and deliver natural gas to the region. The third involves New England's unique  
8    reliance on LNG to meet winter natural gas demand. While all three of these are related,  
9    I will discuss each separately.

11   **Q.    Please describe the nature of natural gas demand in New England.**

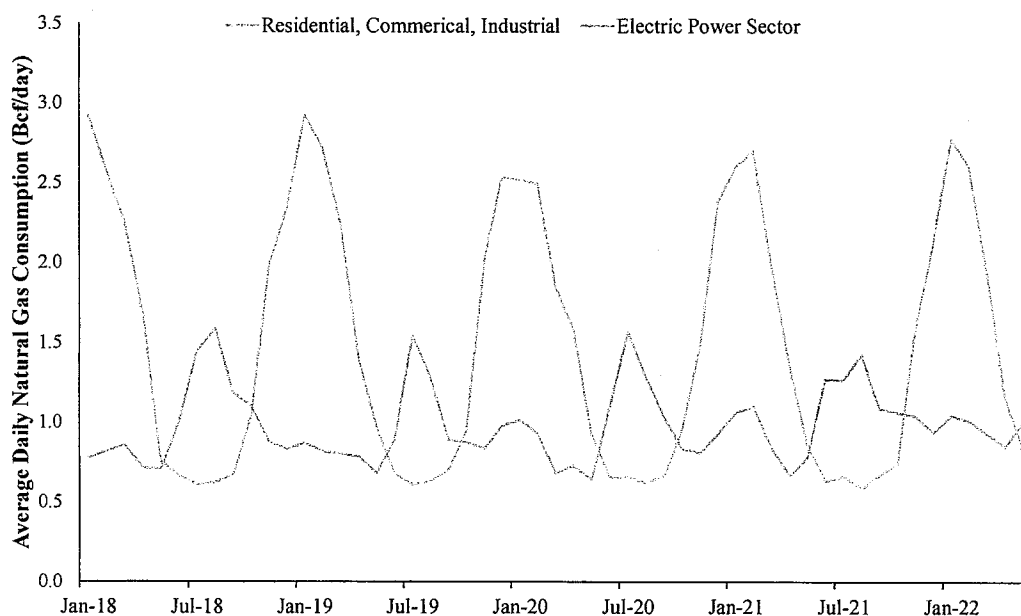
12   A.    There are two main components of natural gas demand in Rhode Island and the rest of  
13   New England. One is LDC demand associated primarily with heating, cooking, and  
14   water heating in homes and businesses across the region. This demand is dominated by  
15   heating, and reaches its highest levels during winter months when heating is needed. The  
16   second is the demand for natural gas to generate electricity in power plants located across  
17   New England. This demand is year-round and strongest in the summer, but as described  
18   below, has a major influence on winter natural gas price levels and volatility.

19  
20   As can be seen in **Figure 1**, the total demand for natural gas for (primarily) heating,  
21   cooking, and water heating in the residential, commercial, and industrial sectors

dominates natural gas demand, reaching peak demand levels of approximately 3.0 Bcf/day on average during the coldest winter months. Electric sector demand for natural gas in turn peaks in the summer, when electricity demand is highest in the region, reaching 1.5 Bcf/day on average during the peak months of summer electricity demand. However, electric sector demand has an important second (albeit lower) peak in the winter, adding 1.0 Bcf/day on average on top of the natural gas demand served by LDCs during the cold winter months.

**Figure 1: New England Natural Gas Demand by End-Use Sector<sup>1</sup>**

**January 2018 – May 2022**



**Notes:**

- [1] Average daily New England natural gas consumption is the sum of monthly consumption across Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island and Vermont divided by the number of days in the month.  
[2] Natural gas use in the transportation sector is minimal and is not included.

<sup>1</sup> "Natural Gas Consumption by End Use," EIA, available at [https://www.eia.gov/dnav/ng/ng\\_cons\\_sum\\_dc\\_u\\_svt\\_m.htm](https://www.eia.gov/dnav/ng/ng_cons_sum_dc_u_svt_m.htm).



1 **Q. Please describe how the procurement of natural gas in the electric sector differs**  
2 **from the supply of natural gas to LDCs.**

3 A. Natural gas LDCs have an obligation to reliably meet the demand of their customers, and  
4 thus contract for supply, including pipeline transportation, conventional natural gas, and  
5 LNG, in advance and over the long-term to ensure firm supply and delivery of sufficient  
6 natural gas to meet expected and “design day” peak demand during winter months. This  
7 need for long-term, firm supply and delivery of natural gas, and the associated contracts,  
8 provide the financial basis for investment in the natural gas infrastructure needed to  
9 ensure aggregate LDC regional peak demand can be met on the coldest of winter days.

10  
11 The gas procurement incentives and practices of gas-fired power plants needed to meet  
12 electricity demand are very different. Power plant owners are not subject to rate  
13 regulation, and generally do not have an obligation to reliably meet the electricity needs  
14 of retail customers.<sup>2</sup> Opportunities to earn revenues (and profits) in electricity markets  
15 are instead contingent on being able to supply electricity at the lowest possible cost, with  
16 offers that are lower than those of competing power plants. Power plants cannot earn  
17 revenues in the energy market if they do not offer competitive prices, and the lower the  
18 cost of running the plant, the greater the profit margin. Any increase in the cost to obtain  
19 power plant fuel over short-term commodity prices (from, for example, obtaining firm

---

<sup>2</sup> Power plants earn revenues in the capacity market for being available to generate electricity if called upon, but the ability to earn capacity market revenues is not contingent on any obligation to demonstrate forward procurement of the fuel needed to operate.

1 transportation service) by definition increases costs relative to competitors and reduces  
2 (or eliminates) opportunities for profit in electricity markets.

3 Thus, there is little to no incentive for power plant owners to contract for natural gas  
4 supply any sooner than the day before they offer to provide electricity, if doing so would  
5 increase fuel costs and make them less competitive in wholesale electricity markets. As  
6 noted by the New England Independent System Operator (“ISO-NE”):

7 *Because generators have no guarantee for when or how long*  
8 *they’ll be called to run—and there’s no practical way for them to*  
9 *store excess pipeline gas or electricity on site—contracting for*  
10 *pipeline capacity only when needed helps natural-gas-fired*  
11 *generators keep their costs as low as possible to maintain*  
12 *competitiveness in the wholesale electricity markets.*

13 *While that strategy works for most of the year, on cold days the*  
14 *pipelines are running at or near maximum capacity solely to meet*  
15 *heating demand. During several recent winters, this situation has*  
16 *severely limited the delivery of fuel to much of the region’s power*  
17 *plants, which, in turn, threatened the reliable supply of electricity*  
18 *and drove up wholesale electricity prices and air emissions.<sup>3</sup>*

19 This practice of just-in-time natural gas procurement provides little incentive for  
20 the pipeline or LNG supply industry to commit to capital investments to develop  
21 infrastructure needed by the region’s gas-fired power plants.  
22

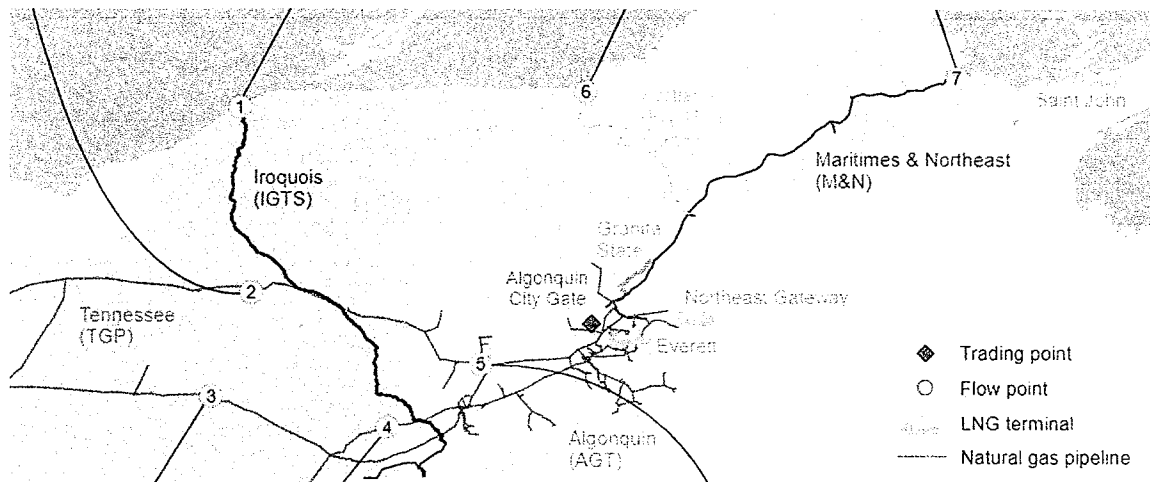
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<sup>3</sup> “Natural Gas Infrastructure Constraints,” ISO New England, available at  
<https://www.iso-ne.com/about/what-we-do/in-depth/natural-gas-infrastructure-constraints>

1 **Q. How does the status of New England’s supply and transportation infrastructure, in**  
2 **combination with the electric sector’s participation in natural gas markets,**  
3 **influence the levels and volatility of natural gas prices in winter months?**

4 A. The pricing of natural gas in the Northeast in winter months is sensitive to the  
5 circumstances of supply and demand. Unfortunately, these conditions have grown worse  
6 over the last several years due to events related to the loss of a major supply source from  
7 the eastern end of the system and failure to increase interstate pipeline capacity from the  
8 west. As shown in **Figure 2**, several pipelines transport natural gas to New England from  
9 the south and west with additional flows arriving on the pipeline systems connected to  
10 Canada. There are also three LNG import terminals in the area: Everett in Massachusetts,  
11 the Northeast Gateway buoy offshore of Massachusetts, and the St. John facility in New  
12 Brunswick Canada, which is connected into New England by the Maritimes and  
13 Northeast (“MNE”) pipeline.

Figure 2: New England Natural Gas Infrastructure<sup>4</sup>



Beginning in 1999 and for many years thereafter, the Sable Offshore Energy Project (“Sable”) in Eastern Canada provided significant injections of natural gas of 12 million cubic meters/day (or approximately 0.4 Bcf/day) or more into the northeastern end of New England (that is, from the opposite direction of the major interstate pipeline supply from the south and west) via the MNE pipeline connecting New England to Eastern Canada. See **Figures 3 and 4**. However, Sable’s production declined relatively quickly, and was shut down completely in December 2018.<sup>5</sup> See **Figure 4**. While there is LNG storage and regasification capacity in Eastern Canada (the St. John facility), it has provided less than 30 Bcf/year (0.08 Bcf/day on average) of natural gas into New

<sup>4</sup> “New England natural gas infrastructure map,” EIA, as of August 26, 2022, available at [https://www.eia.gov/dashboard/new-england-energy-api/archives/202208/20220826\\_new\\_england\\_dashboard.pdf](https://www.eia.gov/dashboard/new-england-energy-api/archives/202208/20220826_new_england_dashboard.pdf).

<sup>5</sup> “Sable Offshore Energy Project,” CNSOPB, available at <https://www.cnsopb.ns.ca/offshore-activity/current-activity/sable-offshore>.

1 England since 2013.<sup>6</sup> Sable was the largest supplier of gas for the MNE pipeline  
2 connecting New England to Eastern Canada, and its declining production and subsequent  
3 closure has switched the MNE pipeline from an importer of Canadian gas to (primarily)  
4 an exporter of U.S. gas.<sup>7</sup> See **Figure 3**. Moreover, other supplies from Canada have not  
5 increased sufficiently to replace the lost production from Sable. For example, although  
6 the Portland Natural Gas Transmission System (“PNGTS”), shown in green in **Figure 2**,  
7 has approximately doubled its capacity in recent years, this increase amounted to less  
8 than 0.2 Bcf/day, less than half of Sable’s production at its peak.<sup>8</sup>  
9

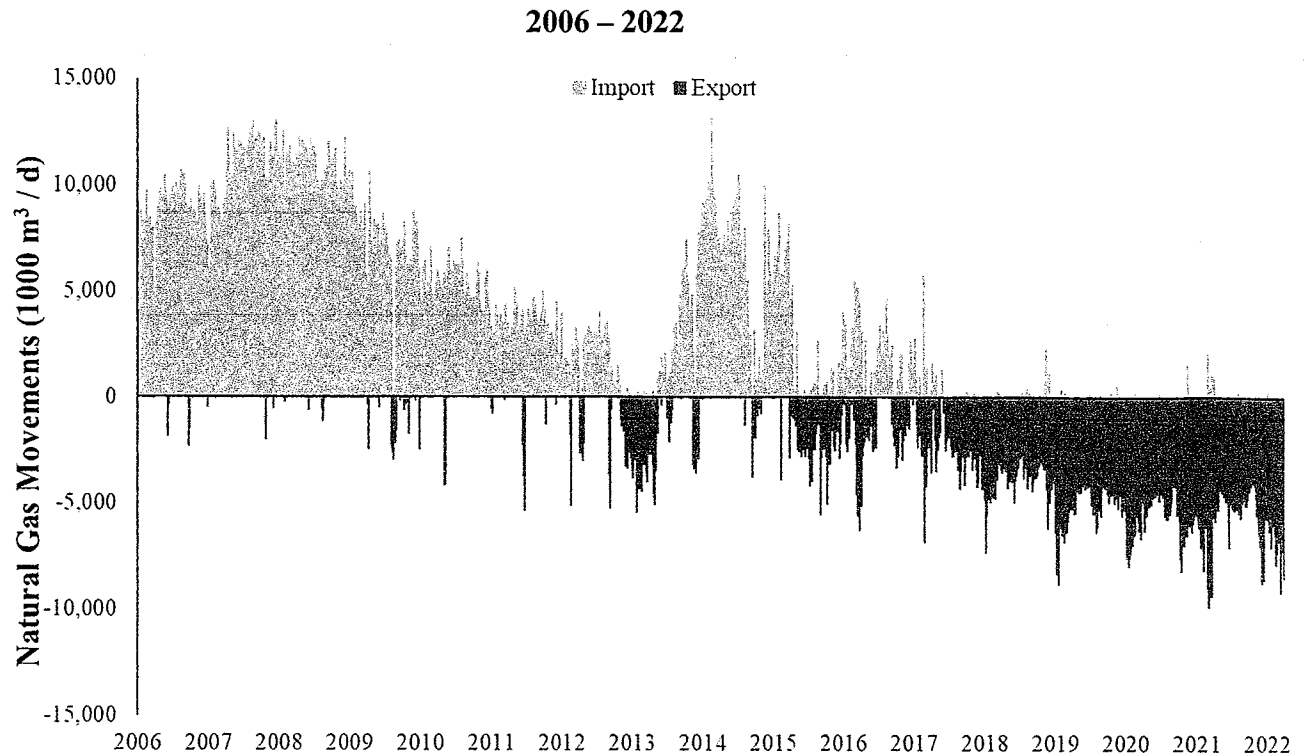
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<sup>6</sup> “LNG Imports, Northeast Terminals, 2011-21,” Northeast Gas Association, available at [https://www.northeastgas.org/pdf/lng\\_annual0222.pdf](https://www.northeastgas.org/pdf/lng_annual0222.pdf); “Description of Pipelines/LNG Import Facilities Serving the Northeast Market,” Northeast Gas Association, available at [https://www.northeastgas.org/pdf/lng\\_importers0722.pdf](https://www.northeastgas.org/pdf/lng_importers0722.pdf).

<sup>7</sup> “Market Snapshot: The end of natural gas production in the Maritimes increases reliance on imports,” Canadian Energy Regulator, February 27, 2019, available at <https://www.cer-rec.gc.ca/en/data-analysis/energy-markets/market-snapshots/2019/market-snapshot-end-natural-gas-production-in-maritimes-increases-reliance-imports.html>.

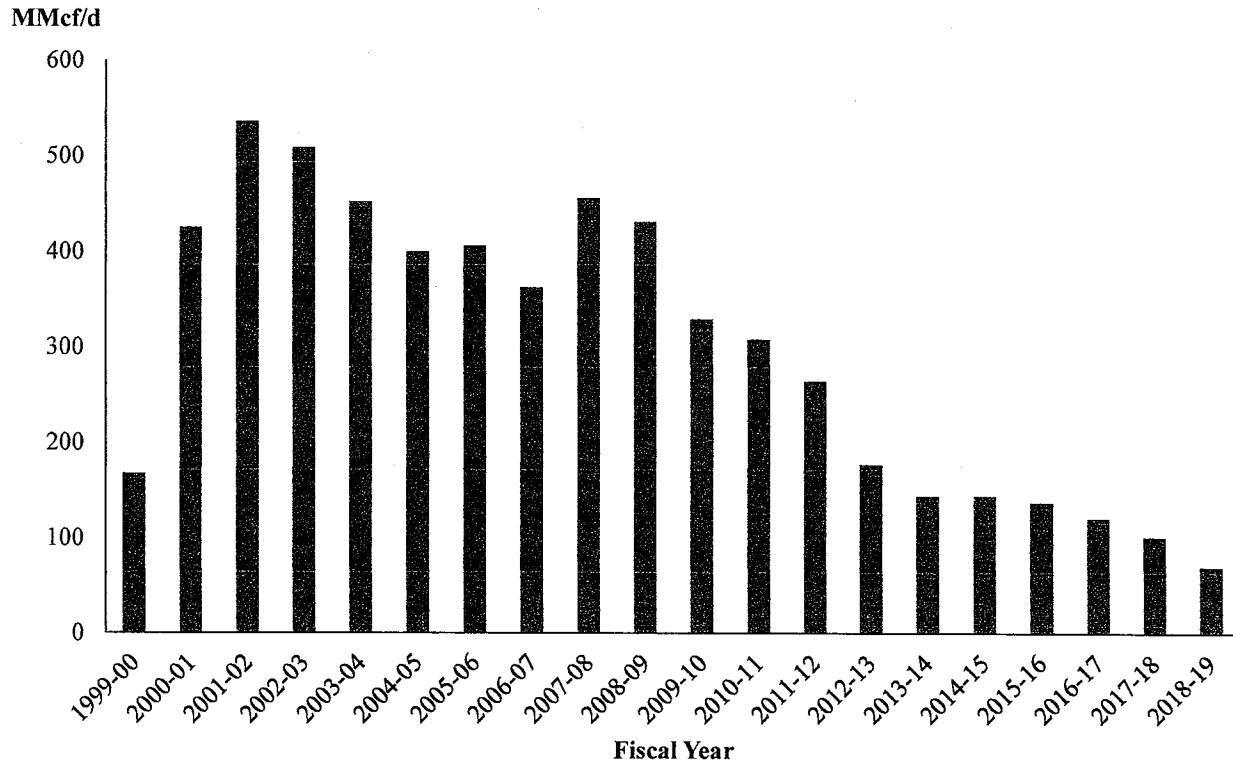
<sup>8</sup> “Portland Natural Gas Transmission System,” TC PipeLines, LP, available at <https://www.tcpipelineslp.com/assets/pngts/>.

Figure 3: Natural Gas Imports to the U.S. from Canada and Exports from the U.S. to Canada on the MNE Pipeline<sup>9</sup>



<sup>9</sup> “Pipeline Throughput and Capacity Data, Maritimes,” Canada Energy Regulator, available at <https://open.canada.ca/data/en/dataset/dc343c43-a592-4a27-8ee7-c77df56afb34>.

**Figure 4: Sable Average Gas Production per Day by Fiscal Year<sup>10</sup>**  
**1999/00 – 2018/19**



In addition to the loss of Sable, New England has been unable to add natural gas transportation capacity into the region. Most noticeably, in 2016, Kinder Morgan suspended work and spending on a proposed new 430 mile pipeline project to deliver gas through New York and into New England.<sup>11</sup> Similarly, in 2017, Enbridge and its utility partners in New England suspended further work on the Access Northeast pipeline

<sup>10</sup> "SOEP Average Gas Rate by Fiscal Year," Canada-Nova Scotia Offshore Petroleum Board, available at [https://www.cnsopb.ns.ca/sites/default/files/resource/sable\\_final.pdf](https://www.cnsopb.ns.ca/sites/default/files/resource/sable_final.pdf).

<sup>11</sup> "Kinder Morgan Generates More Than \$1.2 Billion of Distributable Cash Flow for First Quarter 2016," Kinder Morgan, April 20, 2016, available at <https://ir.kindermorgan.com/news/news-details/2016/Kinder-Morgan-Generates-More-Than-12-Billion-of-Distributable-Cash-Flow-for-First-Quarter-2016/default.aspx>.

1 expansion project, another major pipeline project that would have increased natural gas  
2 transportation capacity into New England from the Pennsylvania shale gas region.<sup>12</sup>  
3 The combined impact of growing demand from the electric sector and its reliance on  
4 short-term spot markets for procuring supplies, the potential for significant increases in  
5 demand for natural gas for heating during extreme cold weather events, the loss of supply  
6 from Eastern Canada, and the lack of a meaningful increase in transportation capacity  
7 into New England all combine to put pressure on delivered natural gas price indices  
8 within New England, and make prices very sensitive to relatively small perturbations in  
9 supply and demand.

10  
11 **Q. Please describe the changing role that LNG plays in meeting U.S. energy needs and**  
12 **in meeting New England's winter supply needs.**

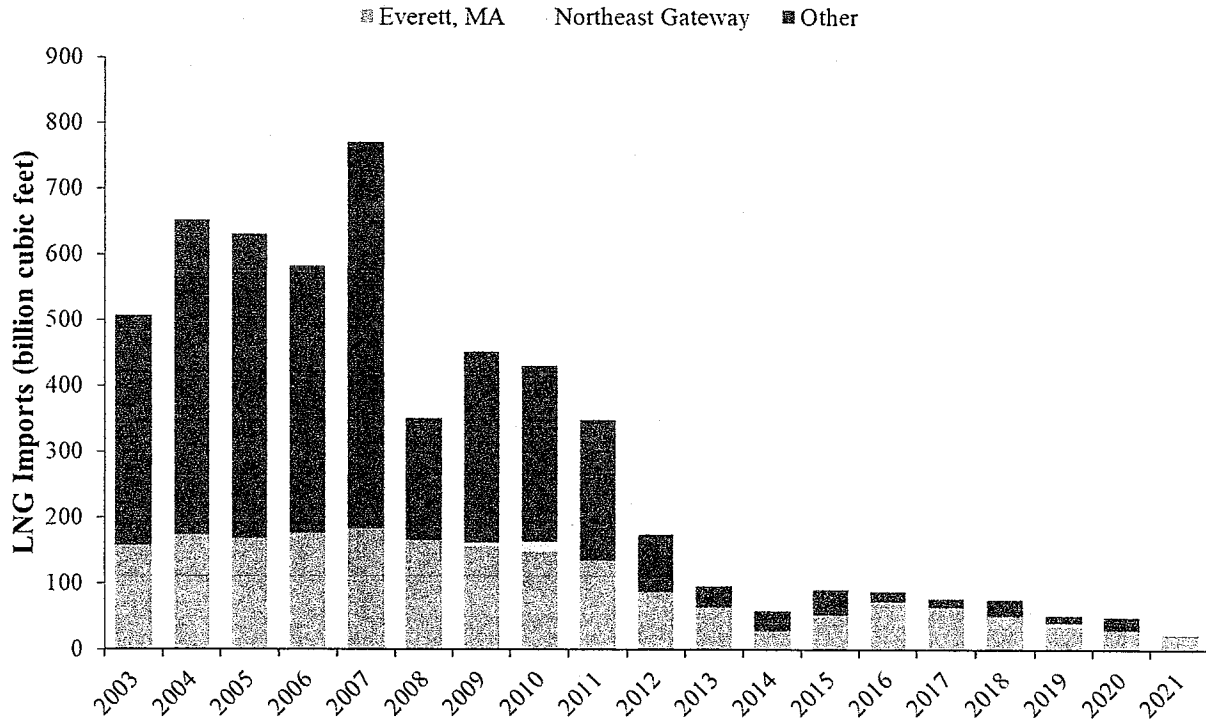
13 A. The U.S., as a whole, has a long history of importing LNG, with peak imports in 2006-  
14 2008, but the emergence of shale gas as a plentiful, relatively low-cost domestic resource  
15 has led to plummeting LNG import volumes over the last ten to twelve years, with the  
16 Everett facility in Massachusetts becoming the primary import terminal. See **Figure 5**.

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<sup>12</sup> "Spectra Energy Partners Reports Second Quarter 2017 Results," Spectra Energy Partners, August 2, 2017, available at <https://www.spectraenergypartners.com/investors/press-releases?id=122495>.



**Figure 5: U.S. LNG Imports by Import Terminal<sup>13</sup>  
2003 – 2021**



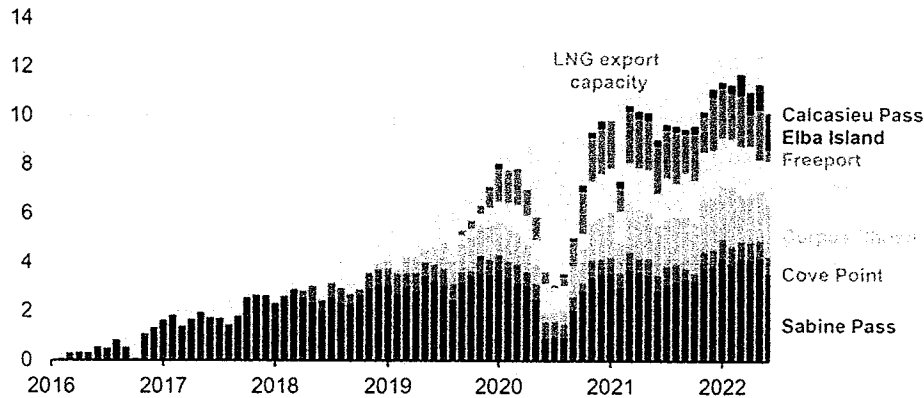
With the growth in shale gas production, the U.S. increased its LNG export capability, with export volumes keeping pace with the growth in export capability over time. See **Figure 6**. In the first half of 2022, U.S. LNG exports increased to 11.2 Bcf/day on average, a 12 percent increase compared to the second half of 2021, making the U.S. the world's largest LNG exporter.<sup>14</sup>

<sup>13</sup> "US Natural Gas Imports by Point of Entry, Liquefied Natural Gas Volumes," EIA, available at [https://www.eia.gov/dnav/ng/ng\\_move\\_poe1\\_a\\_EPG0\\_IML\\_Mmcf\\_a.htm](https://www.eia.gov/dnav/ng/ng_move_poe1_a_EPG0_IML_Mmcf_a.htm).

<sup>14</sup> "The United States became the world's largest LNG exporter in the first half of 2022," EIA, July 25, 2022, available at <https://www.eia.gov/todayinenergy/detail.php?id=53159>.

**Figure 6: Monthly U.S. LNG exports<sup>15</sup>**

Monthly U.S. liquefied natural gas (LNG) exports (Jan 2016–Jun 2022)  
billion cubic feet per day



Data source: U.S. Energy Information Administration, *Liquefaction Capacity Table*, and U.S. Department of Energy *LNG reports*  
Note: June 2022 LNG exports are EIA estimates based on tanker shipping data. LNG export capacity is an estimated peak LNG production capacity of all operational U.S. LNG export facilities.

Despite the major changes in the U.S. LNG import/export picture, LNG imports have continued to play a critical role in meeting New England’s winter natural gas demand. According to data from the U.S. Energy Information Administration (“EIA”), New England has been responsible for more than 60 percent of imports each year since 2016 and was the recipient of 100 percent of the LNG imports in 2021.<sup>16</sup> See **Figure 5**.

**Q. Why are these factors important to consider in the context of natural gas pricing in New England?**

**A.** These conditions – constrained transportation infrastructure, just-in-time procurement of a significant amount of natural gas by power plants needed for winter power system

<sup>15</sup> “The United States became the world’s largest LNG exporter in the first half of 2022,” EIA, July 25, 2022, available at <https://www.eia.gov/todayinenergy/detail.php?id=53159>.

<sup>16</sup> “US Natural Gas Imports by Port of Entry, Liquefied Natural Gas Volumes,” EIA, available at [https://www.eia.gov/dnav/ng/ng\\_move\\_poel\\_a\\_EPG0\\_IML\\_Mmcf\\_a.htm](https://www.eia.gov/dnav/ng/ng_move_poel_a_EPG0_IML_Mmcf_a.htm).

1 reliability, and the region's reliance in the winter on international shipments of LNG –  
2 put upward pressure on natural gas price indices and introduce pricing uncertainty and  
3 volatility to New England's markets in "normal" years. This upward pressure translates  
4 into higher natural gas supply costs and upward pressure on futures markets that set  
5 prices for longer-term procurements. Perhaps more importantly, *this is not a normal*  
6 *year*. The impact of the Russian invasion of Ukraine has fundamentally changed  
7 international markets for natural gas, including LNG. The increased demand for global  
8 supplies of natural gas from Europe has increased the price of natural gas throughout the  
9 U.S. and in much of the world, resulting in increasing exports from the U.S. to Europe  
10 and increasing the cost of securing LNG supplies for the LNG import terminals serving  
11 New England.

12  
13 **IV. The Impact of Market Factors on Natural Gas Prices in New England**

14 **Q. You have indicated that recent events – in particular the war in Ukraine – are**  
15 **creating an environment for high natural gas prices in New England. Could you**  
16 **please explain in general how these international events and market dynamics affect**  
17 **natural gas prices in this region?**

18 **A.** As discussed above, natural gas prices in New England are typically higher in winter than  
19 in summer due to the demand for heating in winter. Yet as presented in more detail  
20 below, the price of natural gas in spot and forward/futures markets – in particular for this  
21 winter but also next winter – have increased well beyond prices experienced historically.

1 The EIA cites to a number of reasons why natural gas prices in 2022 are elevated relative  
2 to 2021, including the continued economic recovery, limited natural gas production  
3 increases, forecasts that winter 2022-23 will be colder than winter 2021-22, smaller than  
4 average inventories of natural gas in the U.S., and limited switching to coal-fired  
5 generation due to generator retirements, as well as limited stocks of coal and issues with  
6 coal delivery.<sup>17</sup>

7 Yet, an additional major influence on gas pricing for the New England region is related to  
8 the impact of international events on U.S. markets and prices for LNG shipments.

9 Russia's invasion of Ukraine in February 2022 caused – and continues to cause –  
10 upheavals in markets for natural gas in Europe, given Europe's heavy dependence on  
11 Russia for natural gas supply, Europe's sanctions of Russia, and the ensuing disputes  
12 over natural gas supply.<sup>18</sup> Specifically, Russia's pipeline exports to Europe and the  
13 United Kingdom in the first seven months of 2022 dropped by almost half compared to  
14 the previous five-year average.<sup>19</sup> See **Figure 7**. In turn, prices for natural gas in Europe  
15 were trading at over \$100/MMBtu in onshore markets as of August 26, 2022 while spot

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<sup>17</sup> See "Short-Term Energy Outlook: Natural Gas," EIA, July 12, 2022, available at <https://www.eia.gov/outlooks/steo/archives/Jul22.pdf>; Weber, Maya, "Spot gas prices to top \$8/MMBtu in H2'22 despite production growth, EIA predicts," S&P Global Market Intelligence, June 7, 2022; Micek, Kassia, "US EIA sees summer power prices climbing on fuel costs, delivery constraints," S&P Global Market Intelligence, June 17, 2022.

<sup>18</sup> Wallace, Joe and Jenny Strasburg, "Ukraine Reduced Russian Gas Flowing to Europe Through Key Pipeline," The Wall Street Journal, May 11, 2022; Pancevski, Bojan and Jenny Strasburg, "Europe Fears Widespread Economic Fallout if Russian Gas Outage Drags On," The Wall Street Journal, July 18, 2022; "Short-Term Energy Outlook: Natural Gas," EIA, July 12, 2022, available at <https://www.eia.gov/outlooks/steo/archives/Jul22.pdf>.

<sup>19</sup> "Russia's natural gas pipeline exports to Europe decline to almost 40-year lows," EIA, August 9, 2022, available at <https://www.eia.gov/todayinenergy/detail.php?id=53379>.

1 LNG import prices in Europe set a record for the third day in a row at \$74.49/MMtu

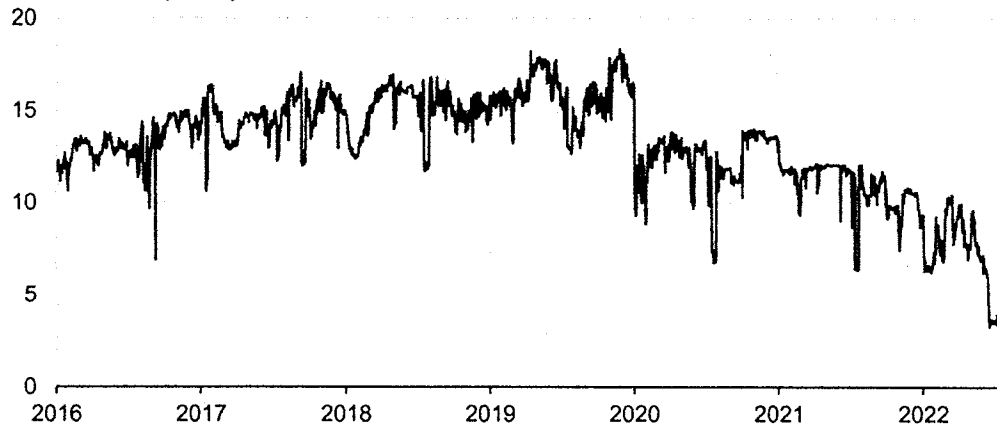
2 “putting pressure on U.S. LNG export terminals to step up production.”<sup>20</sup>

3 **Figure 7: Daily Natural Gas Pipeline Exports from Russia to Europe<sup>21</sup>**

Daily natural gas pipeline exports from Russia to Europe (Jan 1, 2016–Jul 31, 2022)

billion cubic feet per day

cia



Data source: Refinitiv Eikon, based on data provided by the European Transmission System Operators

Note: Russia's natural gas exports by pipeline include exports to the European Union and the United Kingdom as measured by daily flow volumes at the main entry points in Germany, Slovakia, and Poland.

4 Europe's efforts to replace Russian natural gas supplies with supplies from other sources

5 increase the price of natural gas in the U.S. given the increasing expansion of U.S. LNG

<sup>20</sup> “US LNG export terminals stage production push as European gas prices top \$100/MMBtu,” S&P Global Commodity Insights, August 26, 2022, available at <https://www.spglobal.com/commodityinsights/en/market-insights/latest-news/natural-gas/082622-us-lng-export-terminals-stage-production-push-as-european-gas-prices-top-100mmbtu>.

<sup>21</sup> “Russia's natural gas pipeline exports to Europe decline to almost 40-year lows,” EIA, August 9, 2022, available at <https://www.eia.gov/todayinenergy/detail.php?id=53379>.

1 export capability, discussed above (see **Figure 6**).<sup>22</sup> As demand for natural gas in Europe  
2 strengthens, so does the price Europeans are willing to pay for natural gas, which  
3 strengthens the incentive for U.S. producers to export natural gas to Europe.<sup>23</sup> With more  
4 domestic supply going to Europe, the price of natural gas delivered in the U.S. increases,  
5 including in New England. For example, in the first quarter of 2022, the U.S. supplied 47  
6 percent of the European Union's LNG imports, representing a 235 percent increase in  
7 year-on-year LNG exports from the U.S. to the European Union.<sup>24</sup> Similarly, the EIA  
8 expects that total LNG exports from the U.S. in 2022 will be 22 percent higher than in  
9 2021.<sup>25</sup>

10 Moreover, New England's expected and realized natural gas prices are tied in part to the  
11 region's critical dependence on LNG for reliable winter gas supply. Yet for this supply,

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<sup>22</sup> See, e.g., Weber, Maya, "'Uncomfortable questions' seen ahead for global gas supply dynamics," S&P Global Market Intelligence, July 15, 2022; "Short-Term Energy Outlook: Natural Gas," EIA, July 12, 2022, available at <https://www.eia.gov/outlooks/steo/archives/Jul22.pdf> ("LNG prices in Europe remain high amid supply uncertainties because of Russia's invasion of Ukraine and the need to replenish Europe's natural gas inventories, which has kept Europe's demand for LNG elevated... The Henry Hub spot price averaged \$6.07 per million British thermal units (MMBtu) in 1H22, rising steadily from an average of \$4.38/MMBtu in January to \$8.14/MMBtu in May... The increase through May resulted from continued demand for LNG exports, increased demand in electric power generation as a result of limited natural gas-to-coal switching, and decreased production compared with the end of 2021.").

<sup>23</sup> "Short-Term Energy Outlook: Natural Gas," EIA, July 12, 2022, available at <https://www.eia.gov/outlooks/steo/archives/Jul22.pdf> ("Strong natural gas demand and high LNG prices in Europe and Asia drove the continued growth in U.S. LNG exports in the first half of this year.").

<sup>24</sup> "Quarterly Report on European Gas Markets," European Commission, Vol. 15, Issue 1, Q1 2022, available at [https://ec.europa.eu/info/sites/default/files/energy\\_climate\\_change\\_environment/quarterly\\_report\\_on\\_european\\_gas\\_markets\\_q1\\_2022.pdf](https://ec.europa.eu/info/sites/default/files/energy_climate_change_environment/quarterly_report_on_european_gas_markets_q1_2022.pdf), p.16. See also Weber, Maya, "'Uncomfortable questions' seen ahead for global gas supply dynamics," S&P Global Market Intelligence, July 15, 2022 ("In the first half of 2022, [the International Energy Agency's] report showed European LNG imports rose by more than 50% compared to last year, while two-thirds of the increase in global LNG trade came from the U.S. alone.").

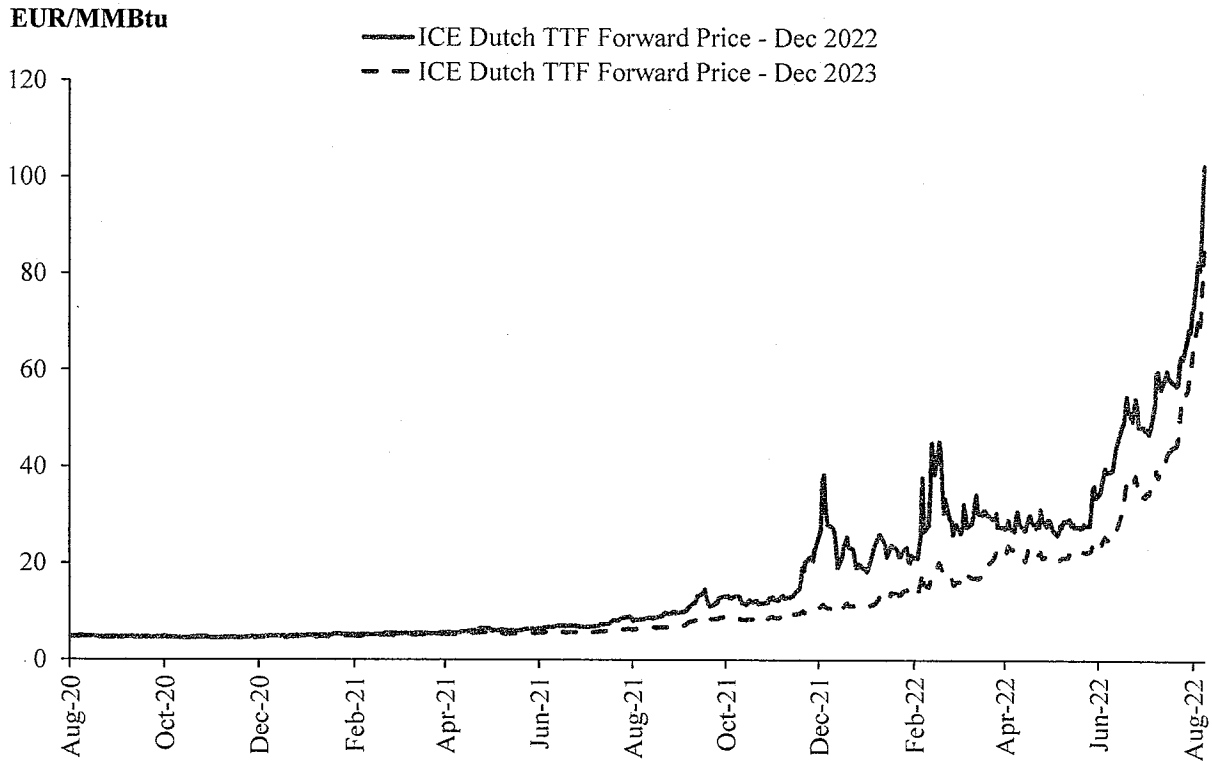
<sup>25</sup> Weber, Maya, "Spot gas prices to top \$8/MMBtu in H2'22 despite production growth, EIA predicts," S&P Global Market Intelligence, June 7, 2022.

1 New England competes for LNG cargoes in a global market where buyers in Western  
2 Europe are moving aggressively to secure supplies given the uncertainty over gas supply  
3 from Russia, at the same time that demand from Asian utilities for LNG cargoes is also  
4 increasing.<sup>26</sup> This means that New England natural gas suppliers have been, and over the  
5 next year, will be, competing for LNG cargoes in a market of rapidly-increasing  
6 international prices. See **Figures 8** and **9** for the prices of Dutch TTF natural gas forward  
7 contracts in Europe and spot LNG prices in Asia, respectively.

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<sup>26</sup> Benjamin Storrow, "How the Ukraine war could make New Englanders shiver," E&E News, May 10, 2022, available at <https://www.eenews.net/articles/how-the-ukraine-war-could-make-new-englanders-shiver/>.

**Figure 8: Forward Prices for Natural Gas in Europe<sup>27</sup>**  
**December 2022 and December 2023 Contracts**

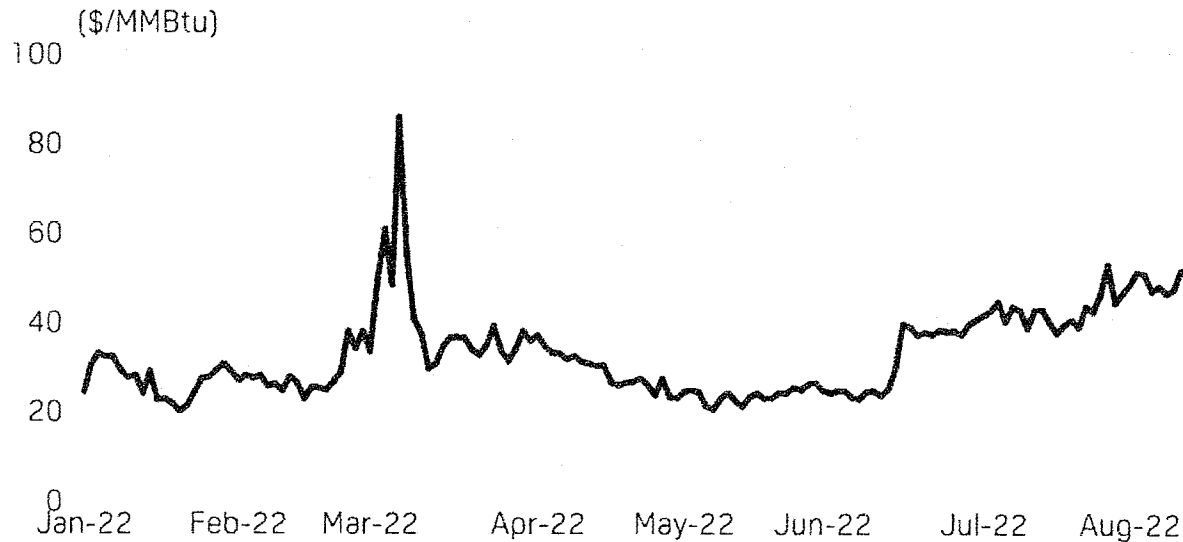


**Note:** The unit of measurement has been converted from the original EUR/MWh to EUR/MMBtu

<sup>27</sup> "Dutch TTF Gas Futures," Intercontinental Exchange, available at <https://www.theice.com/products/27996665/Dutch-TTF-Gas-Futures/data?marketId=5419234>.



**Figure 9: Asian Spot LNG Prices<sup>28</sup>**  
**January 2022 – August 2022**



Source: S&P Global Commodity Insights

**Q. Please describe how the factors you have been describing are affecting U.S. and New England spot prices for natural gas.**

**A.** Spot prices for natural gas at the Henry Hub more than doubled over the past year. Specifically, spot prices at Henry Hub went from \$3.86/MMBtu on August 19, 2021 to \$9.42/MMBtu on August 19, 2022.<sup>29</sup> Spot prices at Henry Hub have not been above \$8/MMBtu since 2008.<sup>30</sup> Similarly, the spot price at the Algonquin City Gate increased

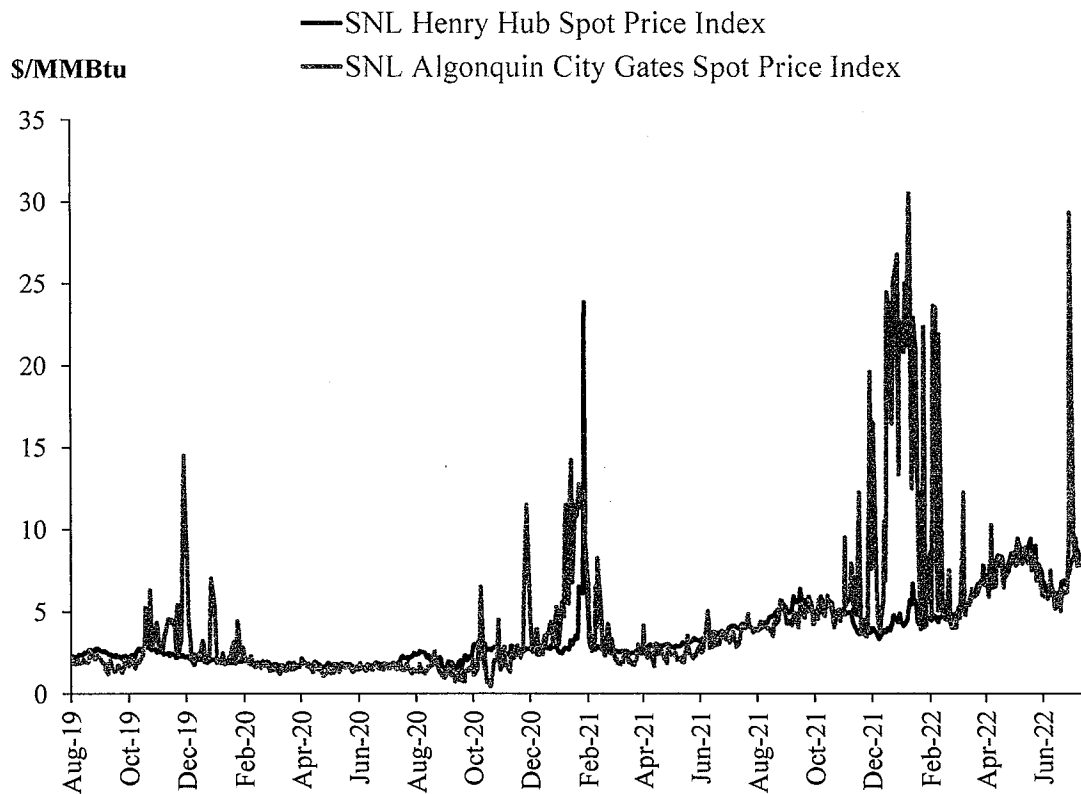
<sup>28</sup> "Asia's LNG winter procurement activity heats up despite strengthening prices," S&P Global Commodity Insights, August 18, 2022, available at <https://www.spglobal.com/commodityinsights/en/market-insights/latest-news/natural-gas/081822-asias-lng-winter-procurement-activity-heats-up-despite-strengthening-prices>.

<sup>29</sup> "SNL Henry Hub Spot Natural Gas Index," S&P Global Market Intelligence.

<sup>30</sup> "U.S. monthly average Henry Hub spot price nearly doubled in 12 months," EIA, July 14, 2022, available at <https://www.eia.gov/todayinenergy/detail.php?id=53039>.

by over two hundred percent over a one year period, increasing from \$3.86/MMBtu on August 19, 2021, to \$8.85/MMBtu on August 19, 2022.<sup>31</sup> See Figure 10.

**Figure 10: U.S. and New England Natural Gas Spot Prices<sup>32</sup>**  
**August 2019 – August 2022**



<sup>31</sup> "SNL Algon Gates Spot Natural Gas Index" and "SNL Henry Hub Spot Natural Gas Index," S&P Global Market Intelligence.

<sup>32</sup> "SNL Algon Gates Spot Natural Gas Index" and "SNL Henry Hub Spot Natural Gas Index," S&P Global Market Intelligence.

1 **Q. Are forward prices for the U.S. and New England showing similar trends?**

2 A. Yes. On August 4, 2022, the Henry Hub front-month natural gas futures contract settled  
3 at \$8.12/MMBtu, rising from \$2.39/MMBtu on July 1, 2022.<sup>33</sup> On two days in June 2022  
4 the front-month natural gas futures price topped \$9.00/MMBtu.<sup>34</sup> Forward prices and  
5 expectations are even more severe for New England. Winter gas prices in New England  
6 are hitting record highs in recent trading; Algonquin City Gate peak-winter gas prices for  
7 the upcoming season have more than doubled since the start of this year.<sup>35</sup> The January  
8 2023 contract is now priced at a record high of over \$40/MMBtu, while the December  
9 2022 contract recently settled at a new high of over \$34/MMBtu.<sup>36</sup> The pace of change  
10 in forward prices has been significant; as of October 4, 2021 the forward price for  
11 December 2022 was \$10.05/MMBtu; by August 11, 2022, the price had more than tripled  
12 to \$31.54/MMBtu.<sup>37</sup> See **Figure 11**. This trend is consistent both with the influence of  
13 this past year's events, with the expectation that New England prices will be driven in  
14 part by competition for LNG cargoes with Europe, and with the high price of natural gas

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<sup>33</sup> "Short-Term Energy Outlook: Natural Gas Market Review," EIA, August 9, 2022, available at <https://www.eia.gov/outlooks/steo/marketreview/natgas.php>.

<sup>34</sup> "Short-Term Energy Outlook: Natural Gas Market Review," EIA, August 9, 2022, available at <https://www.eia.gov/outlooks/steo/marketreview/natgas.php>.

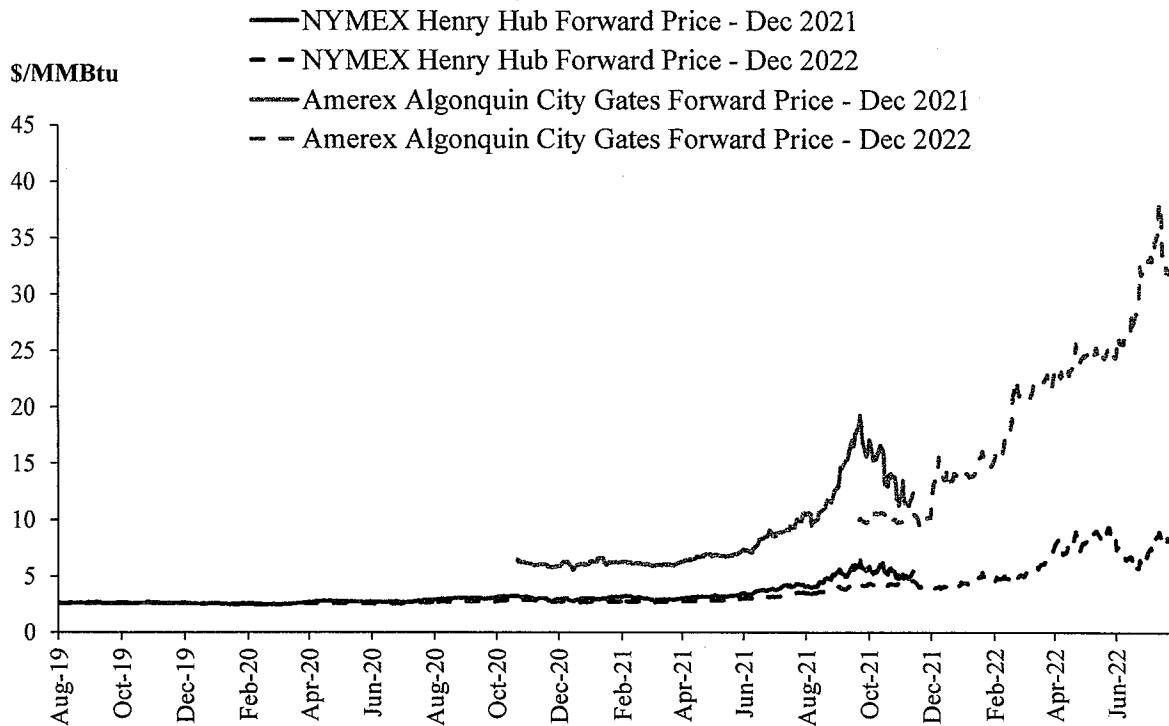
<sup>35</sup> "New England winter natural gas prices top \$40 as global LNG market tightens," S&P Global Commodity Insights, July 22, 2022, available at <https://www.spglobal.com/commodityinsights/en/market-insights/latest-news/natural-gas/072222-new-england-winter-natural-gas-prices-top-40-as-global-lng-market-tightens>.

<sup>36</sup> "New England winter natural gas prices top \$40 as global LNG market tightens," S&P Global Commodity Insights, July 22, 2022, available at <https://www.spglobal.com/commodityinsights/en/market-insights/latest-news/natural-gas/072222-new-england-winter-natural-gas-prices-top-40-as-global-lng-market-tightens>.

<sup>37</sup> "Amerex Algon Gates Natural Gas Full Value Monthly," S&P Global Market Intelligence.

contracts at the Dutch TTF hub in Europe, which are now trading at more than 100 Euro/MMBtu for December 2022. See **Figure 8**.

**Figure 11: U.S. and New England Natural Gas Forward Prices<sup>38</sup>  
December 2021 and December 2022 Contracts**



<sup>38</sup> "NYMEX Henry Hub Natural Gas Futures" and "Amerex Algon Gates Natural Gas Full Value Monthly," S&P Global Market Intelligence.

# Attachment 4

**Testimony of Paul J. Hibbard:** Russia's invasion of Ukraine has thrown international markets into disarray

1   **Q.     What do you conclude based on your review of changes in regional, national, and**  
2       **international markets for the supply of natural gas?**

3   **A.**    The cost to supply natural gas to retail customers in Rhode Island has always varied – at  
4       times significantly – with changes in the forces of supply, demand, and pipeline  
5       transportation utilization.

6       In addition to the better-known risks affecting natural gas prices – such as regional  
7       supply and transportation limitations and the ever-present risk of severe weather – this  
8       past year introduced into the equation extreme forces outside of the control of natural gas  
9       suppliers in Rhode Island and New England. Russia’s invasion of Ukraine and  
10      intentional restriction of natural gas exports to Europe have thrown international markets  
11      for natural gas and LNG, and the U.S. balance of supply and demand, into disarray. As a  
12      result, over the past year, natural gas purchasers in the U.S., and in particular in New  
13      England, have faced extreme and sustained increases in the cost of natural gas. These  
14      factors and the impact they have had on natural gas markets in the U.S. and New England  
15      are fully consistent with and responsible for the increase in supply costs that underlie the  
16      Company’s GCR filing.

1 V. **The Regional Impact of Market Factors on Prices of Natural Gas in Other States**  
2 **and on the Price of Electric Power**

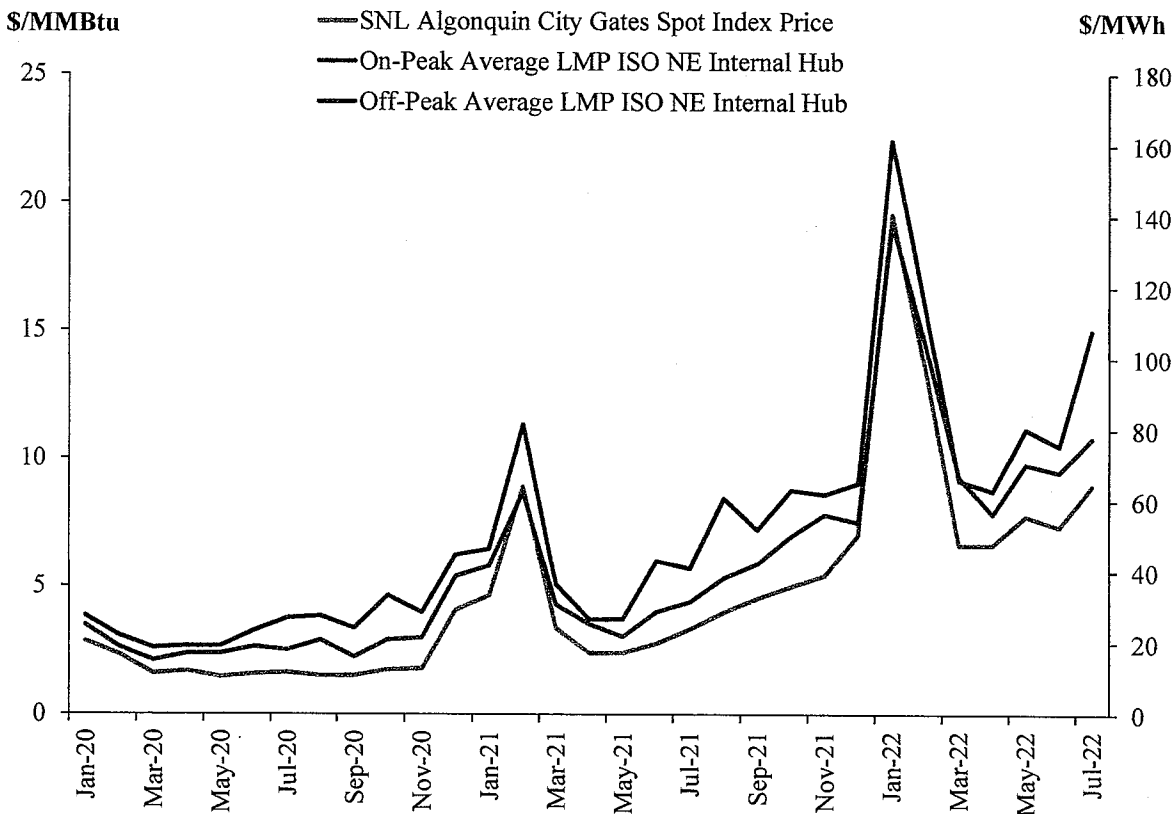
3 Q. **Is the Company's need to adjust rates to incorporate the rising cost of natural gas**  
4 **unique?**

5 A. No. To the contrary, not only are all natural gas LDCs going to need to adjust rates to  
6 address increasing natural gas supply costs, but this is also likely to be the case for  
7 electric utilities.

8  
9 Q. **Please describe how the price of electricity has been changing over the past year.**

10 A. Since natural gas is the fuel on the margin most hours of the year in New England's  
11 wholesale electricity markets, and because power plant owners in New England largely  
12 secure natural gas through spot market transactions, wholesale electricity market prices  
13 have increased in lock step with increases in the cost to procure natural gas over the past  
14 year. See **Figure 12**.

**Figure 12: Spot Prices for Natural Gas and Electricity in New England<sup>39</sup>**  
**January 2020 – August 2022**



**Note:** The prices shown are monthly averages.

**Q. Have you reviewed whether other natural gas LDCs are experiencing and/or have requested similar increases in rates to cover increases in gas supply costs?**

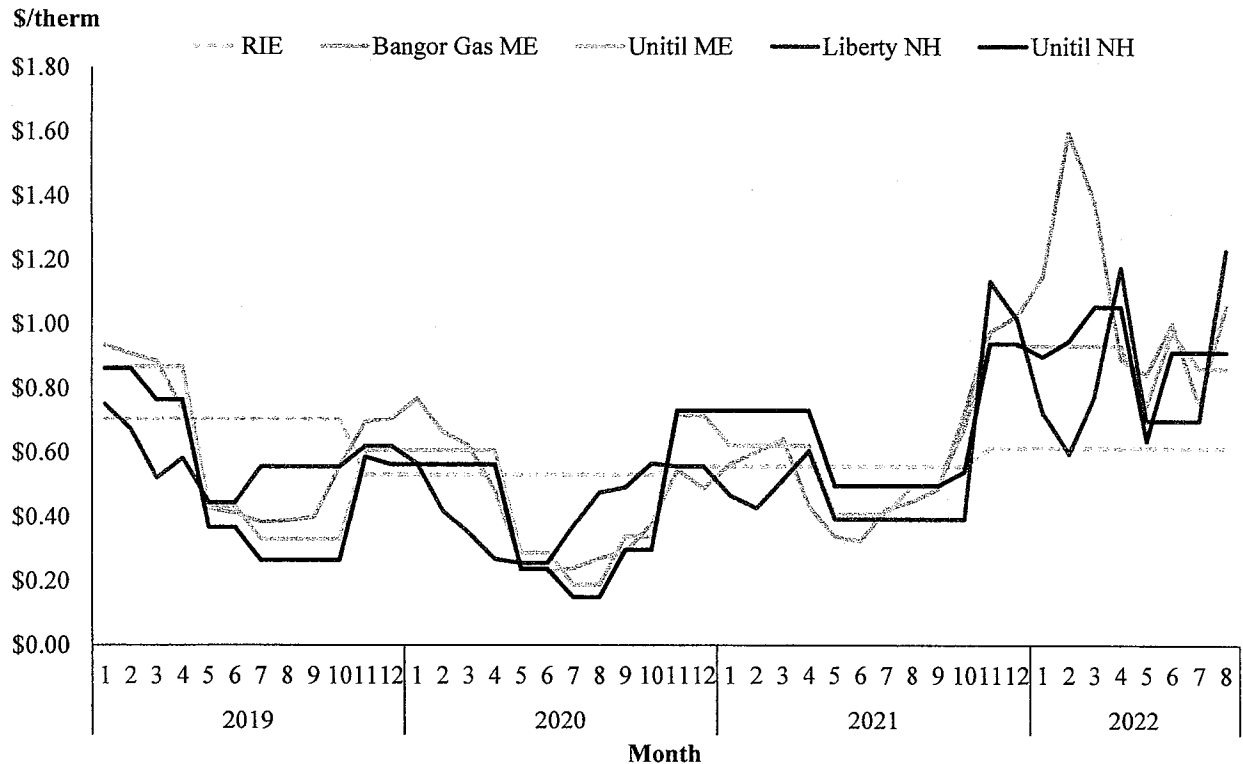
**A. Yes.** It is important to recognize that it is difficult to construct a true apples-to-apples comparison of natural gas LDC supply costs. This is because the New England states

<sup>39</sup> "SNL Algon Gates Spot Natural Gas Index," S&P Global Market Intelligence; "Day-Ahead and Real-Time Monthly LMP Index Report," ISO New England.



1 have different requirements for recovery of fixed and variable costs; different states and  
2 utilities have different timelines for supply planning, procurement and contracting;  
3 companies change rates at different times and with different frequencies; and different  
4 costs are often collected over different time frames. Nevertheless, for purpose of  
5 illustration at a high level, I compared natural gas supply rates for several LDCs in New  
6 England. As can be seen in **Figure 13**, while there are meaningful differences month to  
7 month and season to season, utilities across New England are dealing with the same set of  
8 market impacts on their costs to acquire natural gas for service to their customers. In  
9 particular, it is clear that underlying market forces over the past year are leading to  
10 substantial increases in costs, and thus in rates, across the region.

**Figure 13: Natural Gas Supply Rates for Select New England Utilities 2019-2022<sup>40</sup>**



<sup>40</sup> RIPUC Docket No. 4872, Order No. 23693; RIPUC Docket No. 5040 and Docket No. 5066, Order No. 23963; RIPUC Docket No. 5165 and Docket No. 5180, Order No. 24275; "Understanding Natural Gas Rates," Summit Natural Gas Maine, available at <https://www.summitnaturalgasmaine.com/rates-tariff>; "Natural Gas Costs," Bangor Natural Gas, available at <https://www.bangorgas.com/about-us/natural-gas-costs/>; "ME Historical Gas Supply Rates (Excel)," Until, available at <https://unitil.com/suppliers/energy-supplier-resources#historical>; Maine PUC Docket No. 2021-00249; Maine PUC Docket No. 2022-00044; "NH Historical Gas Supply Rates (Excel)," Until, available at <https://unitil.com/suppliers/energy-supplier-resources#historical>; "New Hampshire Monthly Cost of Gas Report, Winter Period, December 2021 Summary, Table 1" Northern Utilities, available at [https://www.puc.nh.gov/Regulatory/Docketbk/2021/21-131/LETTERS-MEMOS-TARIFFS/21-131\\_2021-12-21\\_NORTHERN\\_DEC-COG-RPT.PDF](https://www.puc.nh.gov/Regulatory/Docketbk/2021/21-131/LETTERS-MEMOS-TARIFFS/21-131_2021-12-21_NORTHERN_DEC-COG-RPT.PDF); NPUC Docket No. DG 21-131, Order No. 26,539; "New Hampshire Monthly Cost of Gas Report, Summer Period, April 2022 Summary, Table 1" Northern Utilities, available at [https://www.puc.nh.gov/Regulatory/Docketbk/2021/21-131/LETTERS-MEMOS-TARIFFS/21-131\\_2022-04-22\\_NORTHERN\\_APRIL-COG-RPT.PDF](https://www.puc.nh.gov/Regulatory/Docketbk/2021/21-131/LETTERS-MEMOS-TARIFFS/21-131_2022-04-22_NORTHERN_APRIL-COG-RPT.PDF); NPUC Docket No. DG 21-131, Order No. 26,627; "Gas Archive," Liberty Utilities NH, available at <https://new-hampshire.libertyutilities.com/allentown/residential/rates-and-tariffs/archive-natural-gas.html>; NPUC Docket No. DG 20-141, Calculation of the Projected Over or Under Collection of the 2020 - 2021 Winter Cost of Gas Filing.

1 **VI. Conclusions**

2 **Q. Please summarize your findings.**

3 A. The Company's GCR includes expected increases in rates associated with changes in the  
4 underlying costs to procure, store, and transport natural gas for use in Rhode Island.

5 These increases are fully consistent with fundamental changes in underlying factors  
6 affecting natural gas supply and demand in the U.S. and, in particular, in New England.

7 The natural gas market factors driving the increased GCR costs are being experienced by  
8 natural gas (as well as electric) local distribution companies, and are due to at least the  
9 following factors:

10 (1) New England has a strong winter peak due to (i) widespread use of natural gas for  
11 heating homes and businesses in the region, and (ii) a dependence on spot market  
12 purchases of natural gas for operating power plants needed to maintain winter electric  
13 system reliability;

14 (2) New England has significant constraints on the delivery of natural gas for meeting the  
15 combined heating and electricity demand in the winter. The region has no indigenous  
16 source of natural gas, and sits effectively at the end of the pipeline system delivering gas  
17 from the south and west. Although there is a pipeline connection to Eastern Canada, the  
18 primary source of deliveries from Canada historically – Sable Island – shut down in  
19 2018. Finally, the New England region, in recent years, has been unable to develop  
20 additional natural gas supply and transportation infrastructure to alleviate the persistent  
21 winter natural gas transportation constraints. As a result, the natural gas delivery

1 infrastructure that does exist in the region is at or near capacity on most winter days, and  
2 is operating at maximum capacity on many cold winter days each year;  
3 (3) Finally, these conditions leave New England strongly dependent on international  
4 shipments of LNG to meet natural gas demand during cold winter periods. Yet since  
5 power plant owners have little incentive to pre-contract for LNG supplies, the availability  
6 of LNG for injection on cold winter days is sufficient quantities to meet combined  
7 heating and electricity demand is relatively expensive and highly uncertain, adding  
8 pricing volatility and uncertainty to the region's natural gas markets;  
9

10 In a normal year, these conditions can lead to elevated and highly variable natural gas  
11 prices in New England during winter months, and correspondingly high pricing in natural  
12 gas futures markets, with relatively minor variations in the conditions of supply and  
13 demand. Yet, this is not a normal year. The impact of the Russian invasion of Ukraine  
14 has fundamentally changed international markets for natural gas, including LNG. The  
15 increased demand for global supplies of natural gas from Europe has increased the price  
16 of natural gas throughout the U.S. and in much of the world, resulting in increasing  
17 exports from the U.S. to Europe and increasing the cost of securing LNG supplies for the  
18 LNG import terminals serving New England.  
19

20 **Q. Does this complete your testimony?**

21 **A. Yes.**

# Attachment 6

R.I.G.L. 42-60-1: Energy Crisis Management: Short title

# **Title 42**

## **State Affairs and Government**

### **Chapter 60**

### **Energy Crisis Management**

#### **R.I. Gen. Laws § 42-60-1**

##### **§ 42-60-1. Short title.**

This chapter may be cited as the "State Energy Crisis Management Act".

History of Section.

P.L. 1980, ch. 326, § 1.

# Attachment 7

**Public Law 1980 Chapter 326:** *An Act Relating to Energy  
Crisis Management*

## CHAPTER 326.

## AN ACT Relating to Energy Crisis Management.

80-S 2323  
Approved  
May 16, 1980.

It is enacted by the General Assembly as follows:

Section 1. Title 42 of the general laws entitled "State affairs and government" is hereby amended by adding thereto the following chapter:

## "42-60"

## STATE ENERGY CRISIS MANAGEMENT ACT

State energy  
crisis manage-  
ment act

42-60-1. SHORT TITLE. — This chapter may be cited as the state energy crisis management act.

Findings,  
purposes and  
policy

42-60-2. FINDINGS, PURPOSES AND POLICY. — The legislature finds and declares that energy in its various forms is essential for the preservation of the safety, health and welfare of the people of this state. The legislature further finds that events of recent years have demonstrated that shortages of energy supplies could be imminent due to both natural and man-made causes. It is therefor declared that the purpose of this chapter and the policy of this state is to grant to the governor powers to manage energy shortages in order to protect the health, safety and welfare of the people of this state and to preserve their lives and property.

Definitions.

42-60-3. DEFINITIONS. — Terms used in this



title shall be construed as follows, unless another meaning is expressed or is clearly apparent from the language or context.

**“Energy resource”** means the various fuels derived from crude petroleum, coal, natural gas, wood, electricity and all other resources yielding energy.

“Energy resource.”

**“Energy crisis”** means a condition of danger to the health, safety, welfare or economic well-being of the citizens of this state due to an existing or impending shortage of an energy resource.

“Energy crisis.”

**42-60-4. INFORMATION COLLECTION.** — In order to determine whether or not an energy emergency exists or is impending, the governor is authorized and empowered to conduct investigations, studies and surveys and to collect data on energy supplies, prices, demand and consumption. In conducting said investigations, studies and surveys, the governor is authorized and empowered to compel by subpoena the attendance of witnesses and the production of books, papers, records and documents of individuals, firms, associations and corporations. All officers, boards, commissions and departments of the state, and the political subdivisions thereof, having informations with respect thereto shall cooperate with and assist the governor in conducting said investigations, studies and surveys.

Information collection.

**42-60-5. DECLARATION OF ENERGY CRISIS.** — Whenever the governor finds that an

Declaration of energy crisis.

existing or impending shortage of an energy resource threatens the health, safety or welfare of the citizens of this state, he shall by executive order declare the existence of an energy crisis in any or all sections of the state. Such declaration shall fully describe the nature of the energy crisis and shall be filed with the secretary of state and the city and town clerks in the affected areas and shall remain in effect in any or all sections of the state until it is rescinded by a subsequent executive order or by concurrent resolution of the general assembly at any time after the said energy crisis declaration has been in effect for at least sixty (60) days.

Powers of the  
governor.

**42-60-6. POWERS OF THE GOVERNOR. —**  
Upon the issuance of an executive order declaring the existence of an energy crisis, the governor shall have the following powers:

(a) Cooperation with Federal and State Governments.

Cooperation  
with federal and  
state  
government

To cooperate with the president of the United States of America and federal departments, agencies and independent establishments, and the offices and agencies of other states in matters pertaining to the energy crisis; and in connection therewith, to take any measures which he may deem proper to carry into effect any request of the president and such other federal officers and agencies as may be charged with responsibilities related to the energy crisis management effort, the protection of the public peace, health and safety,

or the preservation of life, property and the operation of the economy and society within this state; and

(b) Use of Property, Services, and Resources.

Use of property  
services and  
resources.

To use and employ within the state, from time to time, and as he may deem expedient any of the property, services and resources of the state for the purposes set forth in this chapter; and

(c) Compliance

Compliance.

To employ such measures and give such directions to state and local officers and agencies as may be reasonable and necessary for the purpose of securing compliance with the provisions of this chapter and with the orders, rules and regulations made pursuant thereto; and

(d) Organization

Organization.

To utilize the services and facilities of existing officers, offices, departments, commissions, boards, bureaus, institutions and other agencies of the state and of the political subdivisions thereof and all such officers and agencies shall cooperate with and extend their services and facilities to the governor as he may request; and

(e) Implementation.

Implementa-  
tion.

To establish and implement such programs and

plans as he deems necessary to control and regulate all energy or energy resources; and

To take such other action as may be necessary to protect the health, safety and welfare of the people of this state and to preserve their lives and property during the energy crisis. Such powers or actions including all contracts, transfers, leases or loans executed pursuant to the provisions of this chapter shall terminate and be revoked upon termination of the crisis as set forth in this chapter, and such termination provisions shall be included in all contracts, transfers, leases or loans entered into pursuant to this chapter.

Energy powers  
of political  
subdivisions.

**42-60-7. EMERGENCY POWERS OF POLITICAL SUBDIVISIONS.** — To protect life and property, the governing body of each political subdivision of the state is hereby authorized after the declaration of an energy crisis by the governor to carry out within its jurisdiction such measures as may be ordered by the governor and such additional measures as such governing body may deem necessary, subject to the limitations and provisions of this chapter; provided, that no such action shall be inconsistent with any order, rule, regulation, or action of the governor.

Enforcement.

**42-60-8. ENFORCEMENT.** — The law enforcing authorities of the state and of the political subdivisions thereof shall enforce the orders, rules, and regulations issued pursuant to this chapter.

**42-60-9. ORDERS, RULES AND REGULATIONS.** — A. The governor may make, amend, and rescind such orders, rules and regulations as he may deem advisable to carry out the provisions of this chapter.

Orders, rules  
and regulations.

B. All orders, rules and regulations promulgated by the governor shall become effective immediately except as provided in paragraph C of this section.

C. All orders by the governor to amend or suspend certain state rules and regulations in effect prior to the declaration of an energy crisis may become effective no sooner than forty-eight (48) hours after the governor has notified the joint committee on legislative affairs of such orders and the effective dates thereof. Such orders to amend or suspend states rules and regulations shall become effective unless said committee disapproves the same within forty-eight (48) hours by a majority vote, provided however, that such orders shall be effective immediately if approved by the majority of said committee. Thereafter, all such effective orders, rules or regulations shall have the full force and effect of law, when, in the event of issuance by the governor, a copy thereof is filed in the office of the secretary of state. All existing provisions of any regulatory statute prescribing the procedures for the conduct of state business, rules and regulations inconsistent with the provisions of this chapter, or inconsistent with any order, rule or regulation issued under the author-

ity of this chapter shall be suspended during the period of time and to the extent that such conflict exists. All orders, rules and regulations promulgated by the governor pursuant to this chapter shall terminate with the termination of the energy crisis.

D. In order to attain uniformity so far as practicable throughout the country in measures taken to aid in energy crisis management, all action taken under this chapter and all orders, rules, and regulations made pursuant thereto where not already specifically provided for herein, shall be taken or made with due consideration to the orders, rules, regulations, actions, recommendations and requests of federal authorities relevant thereto and, to the extent permitted by law, shall be consistent with such orders, rules, regulations, actions, recommendations and requests.

Violation.

42-60-10. VIOLATION. — Every person shall obey, observe and comply with the provisions of this chapter and with every effective order, rule or regulation promulgated pursuant to this chapter. Violations of any provision of this chapter or of any order, rule or regulation promulgated hereunder shall constitute a misdemeanor and shall be punishable by a fine not to exceed five hundred dollars (\$500) or imprisonment not to exceed thirty (30) days. Every violation pursuant thereto shall be a separate and distinct offense, and, in the case of continuing violation, every day's continuance thereof shall be a separate and distinct offense.

**42-60-11. LIBERALITY OF CONSTRUCTION.**  
— This chapter shall be construed liberally in order to effectuate its purpose.

Liberality of  
construction.

**42-60-12. SEVERABILITY.** — If any provision of this chapter, or the application thereof to any person or circumstances, is held invalid, such invalidity shall not affect other provisions or application of the chapter which can be given effect without the invalid provision or application, and to this end the provisions of this chapter are declared to be severable.

Sec. 2. This act shall take effect upon passage.

Act effective,  
when.

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## CHAPTER 327.

### AN ACT Relating to Retirement of National Guard Officers.

80S 2362A  
Approved  
May 16, 1980.

It is enacted by the General Assembly as follows:

Section 1. Section 30-3-38 of the General Laws in Chapter 30-3 entitled "National guard" is hereby amended to read as follows:

**30-3-38. RETIREMENT OF NATIONAL GUARD OFFICERS.** — (a) Every commissioned officer or warrant officer of the National Guard shall, upon reaching the age of retirement as provided by the laws of the United States,

National guard  
officers:

Retirement

# Attachment 8

**Public Law 1974 Chapter 12:** *An Act Providing for State  
Emergency Crisis Management*



tained within twenty (20) days of its issuance. If the sheriff fails to execute said mandates within the said prescribed time, said sheriff shall appear before a justice of the court issuing said execution at the regular session of said court next following said twenty (20) days to show cause why the mandates of said execution have not been carried out.

Costs.

All costs including reasonable moving costs incurred by the sheriff in carrying out the mandates of the execution may be added to said execution by the clerk upon approval of the court upon presentment of evidence of said costs."

Act effective,  
when.

Sec. 2. This act shall take effect upon its passage.

---

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## CHAPTER 12.

74-H 7047  
Approved  
Feb. 22, 1974.

### **AN ACT Providing for State Emergency Crisis Management.**

It is enacted by the General Assembly as follows:

Section 1. Title 42 of the general laws, 1956, as amended, entitled "State affairs and government", is hereby further amended by adding thereto the following chapter:

"42-60

"State Emergency Crisis Management

"42-60-1. SHORT TITLE.—

State  
emergency  
crisis manage-  
ment act.

This chapter may be cited as the state emergency crisis management act.

**"42-60-2. FINDINGS, PURPOSES AND POLICY.—** Findings.

It is hereby found and declared that it is necessary because of the crisis in the availability of essential resources and transportation and the operation of the economy now threatening the health, safety and welfare of the people of this state and of the United States of America to grant to the governor of this state and its political subdivisions emergency powers of crisis management and the incidents thereof enumerated herein. It is further declared to be the purpose of this chapter and the policy of the states thereby to assist the president of the United States in effective management and control of such factors and situations which occasion and contribute to this emergency, to cooperate with other states and the federal government in matters relating to the crisis effort, to meet the extraordinary conditions and problems resulting in this state from the crisis by establishing such organizations and taking such steps as are necessary and appropriate to carry out the provisions of this chapter; and, generally, to meet this crisis, protect peace, health and safety and preserve the lives and property of the people of the state.

**"42-60-3. GENERAL EMERGENCY CRISIS MANAGEMENT POWERS OF THE GOVERNOR.—** Emergency powers of governor.

The governor is authorized and empowered:

(a) Cooperation with Federal and State Governments.

To cooperate with the president of the United States of America and federal departments, agencies and independent establishments, and the offices and agencies of other states in matters pertaining to the crisis

Same.

and the common defense of state and nation and the incidents thereof; and in connection therewith, to take any measures which he may deem proper to carry into effect any request of the president and such other federal officers and agencies as may be charged with responsibilities related to the crisis effort, for any action looking to effective management of the crisis, the protection of the public peace, health, and safety, or the preservation of life, property and the operation of the economy and society within the state; and

(b) Use of Property, Services, and Resources.

To use and employ within the state, from time to time, and as he may deem expedient any of the property, services and resources of the state for the purposes set forth in this chapter; and

(c) Compliance.

To employ such measures and give such directions to state and local officers and agencies as may be reasonable and necessary for the purpose of securing compliance with the provisions of this chapter and with the orders, rules and regulations made pursuant thereto; and

(d) Organization.

To utilize the services and facilities of existing officers, offices, departments, commissions, boards, bureaus, institutions and other agencies of the state and of the political subdivisions thereof and all such officers and agencies shall cooperate with and extend their services and facilities to the governor as he may request; and

(e) Implementation.

To recommend to the legislature the establishment of such agencies and offices and any additional action that he deems necessary to carry out the provisions of this chapter or any broadening of the policies or authorizations contained herein.

**"42-60-4. INVESTIGATIONS, SURVEYS TO ASCERTAIN THE DEGREE AND IMPACT OF THE CRISIS ON INDUSTRIAL PRODUCTION, MATERIALS, SUPPLIES, TRANSPORTATION AND FACILITIES IN THIS STATE.—**

The governor is authorized and empowered to ascertain and identify the number and situation and need for regulation or control of factors creating or contributing to an emergency including but not limited to the following: food, fuel, energy, power, clothing, transportation, facilities, chemicals, chlorine gas, petro chemicals, toxic poisons, steel plates, bolts, insecticides, fertilizers, forage, and domestic animals and fowl, and other necessities of life, and the production, manufacture or processing and distribution of the same; to make such other surveys of the industries, resources and facilities of the state and the possibilities and means of coordinating and implementing their provision in this state and those from other states as are necessary to carry out the purposes of this chapter; and in making such investigations and surveys, to compel by subpoena the attendance of witnesses, and the production of books, papers, records, and documents of individuals, firms, associations, and corporations; and all officers, boards, commissions and departments of the state, and the political subdivisions thereof, having information with

Investigations  
concerning  
emergencies.

respect thereto, shall cooperate with and assist him in making such investigations and surveys.

**"42-60-5. EFFECTUATION OF EMERGENCY CRISIS MANAGEMENT.—**

Effectuation  
of emergency  
crisis  
management.

To provide for emergency resource management, and pursuant to a proclamation by the governor that an emergency exists, due to a threatened disruption of the social order imperiling health and safety, the governor may by rule or executive order:

(a) Control, restrict and regulate by rationing, freezing, use of quotas, allocations, prohibitions on shipments, price fixing, allocation or other means, the use, sale or distribution of food, feed, fuel, and other sources of energy, clothing and other commodities, materials, goods and services;

(b) Prescribe and direct activities in connection with but not limited to use, conservation, salvage and prevention of waste of materials, services and facilities, including production, transportation, power and communication facilities, training and supply of labor, utilization of industrial plants, health and medical care and other essential civil needs; and

(c) Take such other action as may be necessary for the management of resources during an emergency declared by the governor. Such emergency powers or actions including all contracts, transfers, leases or loans executed pursuant to the provisions of this chapter shall terminate and be revoked upon the governor's declaration, or by resolutions of each house of the general assembly that the emergency no longer exists, or by the termination date as set forth in this chapter, whichever shall come first.

**"42-60-6. TRAFFIC CONTROL.—**

The governor may formulate and execute plans and regulations for the control of traffic in order to provide for orderly and safe movement over public highways and streets of vehicles, people, and materials at a desirable rate of energy consumption and may coordinate the activities of the departments or agencies of the state and of the political subdivisions thereof concerned directly or indirectly with public highways and streets, in a manner which will effectuate the effective conservation management of fuels and energy.

Traffic  
control.

**"42-60-7. LEASE OR LOAN OF STATE PROPERTY; TRANSFER OF STATE PERSONNEL.—**Notwithstanding any inconsistent provision of law, general, special or local:

Lease or loan  
of state  
property;  
transfer  
of state  
personnel.

Action by Governor. Whenever he deems it to be in the public interest, to meet a crisis the governor may:

(1) Authorize any department or agency of the state to lease or lend, on such terms and conditions as he may deem necessary to promote the public welfare and protect the interests of the state, any real or personal property of the state, or authorize the temporary transfer or employment of personnel of the state.

(2) Enter into a contract on behalf of the state for the lease or loan, on such terms and conditions as he may deem necessary to promote the public welfare and protect the interests of the state, of any real

Same.

or personal property of the state, or the temporary transfer or employment of personnel of the state to or by any political subdivision of the state.

(3) Provided, however, that no contract, lease, loan, transfer or any other action taken or executed by virtue of the authority of this chapter shall extend beyond the termination date as set forth in this chapter, or by a declaration of the governor, or resolutions of each house of the general assembly that the emergency no longer exists, whichever shall come first. Any contract, lease, loan or transfer entered into pursuant to this chapter shall provide that said contract, lease, loan or transfer may be terminated pursuant to this section and section 5 (c) above.

#### **"42-60-8. EMERGENCY POWERS OF POLITICAL SUBDIVISIONS.—**

Emergency  
powers of  
municipalities.

To protect life and property, the governing body of each political subdivision of the state is hereby authorized to carry out in its jurisdiction such measures as may be ordered by the governor and such additional measures as such governing body may deem necessary, subject to the limitations and provisions of this chapter; provided, that no such action shall be inconsistent with any order, rule, regulations, or action of the governor.

Enforcement.

#### **"42-60-9. ENFORCEMENT.—**

The law enforcing authorities of the state and of the political subdivisions thereof shall enforce the orders, rules, and regulations issued pursuant to this chapter.

**"42-60-10. ORDERS, RULES AND REGULATIONS.—**

(a) By the Governor. The governor may make, amend, and rescind such orders, rules, and regulations as he may deem advisable to carry out the provisions of this chapter.

Orders,  
rules and  
regulations by  
the governor.

(b) **Supplementary Actions and Recommendations by Political Subdivisions and Other Agencies.** The political subdivisions of the state and other agencies designated or appointed by the governor are authorized and empowered to make recommendations concerning the orders, rules, or regulations promulgated by the governor and to undertake necessary actions pursuant to such orders, rules or regulations.

Supplementary  
actions and  
recommendations by  
municipalities.

(c) **Effect of Orders, Rules, and Regulations.** All orders, rules or regulations promulgated by the governor may become effective no sooner than forty-eight (48) hours after the governor has notified the joint committee on legislative affairs of such order, rule or regulation and the effective date thereof. Such orders, rules or regulations shall become effective unless said committee disapproves the same within forty-eight (48) hours by a majority vote, provided however, that such orders, rules or regulations shall be effective immediately if approved by the majority of said committee. Thereafter all such effective orders, rules or regulations shall have the full force and effect of law, when, in the event of issuance by the governor, a copy thereof is filed in the office of the secretary of state. All existing laws, ordinances, rules and regulations inconsistent with the provisions of this chapter, or of any order, rule or regulation is-

Effect of  
orders, rules  
and regulations



Same.

sued under the authority of this chapter shall be suspended during the period of time and to the extent that such conflict exists.”

Inconsistency  
with federal  
action.

(d) **Not Inconsistent with Federal Action.** In order to attain uniformity so far as practicable throughout the country in measures taken to aid in crisis management, all action taken under this chapter and all orders, rules, and regulations made pursuant thereto where not already specifically provided for herein, shall be taken or made with due consideration to the orders, rules, regulations, actions, recommendations, and requests of federal authorities relevant thereto and, to the extent permitted by law, shall be consistent with such orders, rules, regulations, actions, recommendations and requests.

**“42-60-11. LIBERALITY OF CONSTRUCTION.—**

Liberal  
construction.

This chapter shall be construed liberally in order to effectuate its purposes.

**“42-60-12. SEVERABILITY.—**

Severability.

If any provision of this chapter, or the application thereof to any person or circumstances, is held invalid, such invalidity shall not affect other provisions or application of the chapter which can be given effect without the invalid provision or application, and to this end the provisions of this chapter are declared to be severable.

**Sec. 2. EFFECTIVE DATE; TERMINATION.—**

Act effective,  
when,  
Termination.

This act shall take effect immediately and shall remain in force until January 15, 1976.

# Attachment 9

**R.I.G.L. 42-60-6: Energy Crisis Management: Powers of  
the governor**

# **Title 42**

## **State Affairs and Government**

### **Chapter 60**

### **Energy Crisis Management**

#### **R.I. Gen. Laws § 42-60-6**

##### **§ 42-60-6. Powers of the governor.**

Upon the issuance of an executive order declaring the existence of an energy crisis, the governor shall have the following powers:

- (1) To cooperate with the president of the United States and federal departments, agencies, and independent establishments, and the offices and agencies of other states in matters pertaining to the energy crisis; and in connection with the energy crisis, to take any measures which he or she may deem proper to carry into effect any request of the president and any other federal officers and agencies that may be charged with responsibilities related to the energy crisis management effort, the protection of the public peace, health, and safety, or the preservation of life, property, and the operation of the economy and society within this state; and
- (2) To use and employ within the state, from time to time, and as he or she may deem expedient, any of the property, services, and resources of the state for the purposes set forth in this chapter; and
- (3) To employ any measures and give any directions to state and local officers and agencies that may be reasonable and necessary for the purpose of securing compliance with the provisions of this chapter and with the orders, rules, and regulations made pursuant to this chapter; and
- (4) To utilize the services and facilities of existing officers, offices, departments, commissions, boards, bureaus, institutions, and other agencies of the state and of the political subdivisions of the state; and all officers and agencies shall co-operate with and extend their services and facilities to the governor as he or she may request; and
- (5) To establish and implement any programs and plans that he or she deems necessary to control and regulate all energy or energy resources; and
- (6) To take any other action that may be necessary to protect the health, safety, and welfare of the people of this state and to preserve their lives and property during the energy crisis. These powers or actions including all contracts, transfers, leases, or loans executed pursuant to the provisions of this chapter shall terminate and be revoked upon termination of the crisis as set forth in this chapter, and these termination provisions shall be included in all contracts, transfers, leases, or loans entered into pursuant to this chapter.

History of Section.

P.L. 1980, ch. 326, § 1.

# Attachment 10

R.I.G.L. 42-60-9: Energy Crisis Management: Orders,  
rules, and regulations

# **Title 42**

## **State Affairs and Government**

### **Chapter 60**

### **Energy Crisis Management**

#### **R.I. Gen. Laws § 42-60-9**

##### **§ 42-60-9. Orders, rules, and regulations.**

- (a) The governor may make, amend, and rescind any orders, rules, and regulations that he or she may deem advisable to carry out the provisions of this chapter.
- (b) All orders, rules, and regulations promulgated by the governor shall become effective immediately except as provided in subsection (c).
- (c) All orders by the governor to amend or suspend certain state rules and regulations in effect prior to the declaration of an energy crisis may become effective no sooner than forty-eight (48) hours after the governor has notified the joint committee on legislative services of the orders and the effective dates of these orders. The orders to amend or suspend state rules and regulations shall become effective unless the committee disapproves the orders within forty-eight (48) hours by a majority vote; provided, however, that the orders shall be effective immediately if approved by the majority of the committee. Thereafter, all of the effective orders, rules, or regulations shall have the full force and effect of law, when, in the event of issuance by the governor, a copy is filed in the office of the secretary of state. All existing provisions of any regulatory statute prescribing the procedures for the conduct of state business, rules and regulations inconsistent with the provisions of this chapter, or inconsistent with any order, rule, or regulation issued under the authority of this chapter shall be suspended during the period of time and to the extent that the conflict exists. All orders, rules, and regulations promulgated by the governor pursuant to this chapter shall terminate with the termination of the energy crisis.
- (d) In order to attain uniformity so far as practicable throughout the country in measures taken to aid in energy crisis management, all action taken under this chapter and all orders, rules, and regulations made pursuant to this chapter, where not already specifically provided for, shall be taken or made with due consideration to the orders, rules, regulations, actions, recommendations, and requests of federal authorities relevant to these and, to the extent permitted by law, shall be consistent with these orders, rules, regulations, actions, recommendations, and requests.

History of Section.  
P.L. 1980, ch. 326, § 1.

# Attachment 11

**R.I.G.L. 39-3-11:** Authority to amend or rescind a RIPUC order which increased electric or gas rates

# **Title 39**

## **Public Utilities and Carriers**

### **Chapter 3**

#### **Regulatory Powers of Administration**

##### **R.I. Gen. Laws § 39-3-11**

###### **§ 39-3-11. Notice of change in rates — Suspension of change — Hearings.**

(a) No change shall be made in the rates, tolls, and charges that have been filed and published by any public utility in compliance with the requirements of § 39-3-10, except after thirty (30) days' notice to the commission and to the public published as provided in § 39-3-10, which shall plainly state the changes proposed to be made in the schedule then in force, and the time when the changed rates, tolls, or charges will go into effect. Whenever the commission receives notice of any change or changes proposed to be made in any schedule filed under the provisions of § 39-3-10, the commission shall hold a public hearing and make investigation as to the propriety of the proposed change or changes. After notice of any investigation, the commission shall have power, by any order served upon the public utility affected, to suspend the taking effect of the change or changes pending the decision thereof, but not for a longer period than eight (8) months beyond the time when the change or changes would otherwise take effect. Each hearing and investigation shall be conducted as expeditiously as may be practicable, and with a minimum of delay. Within ninety (90) days after the completion of any hearing, the commission shall make such order in reference to any proposed rate, toll, or charge as may be proper. Notwithstanding the provisions of this section, the commission shall periodically hold a public hearing and make investigation as to the propriety of rates when charged by any public utility and shall make such order in reference to the rate, toll, or charge as may be just. The hearing prescribed by this section may be held simultaneously with the hearing prescribed by § 39-3-7. In the event of an appeal from an order of the commission in any hearing under this section, the order shall remain in full force and effect during the pendency of said appeal.

(b) Upon receipt from a common carrier of persons and/or property upon water of a notice of any change proposed to be made in any schedule filed pursuant to § 39-3-10, the commission shall give notice as it may prescribe of the pendency of the proposal and of the time and place of the hearing thereon to the mayor and also any city manager of each city, and to the president of the town council and also any town manager of each town in which the carrier picks up or discharges passengers. The commission shall also publish a notice of the hearing at least ten (10) days prior to the date thereof in a newspaper of general circulation in each city or town in which the carrier picks up or discharges passengers. In all other respects, hearings and investigations with respect to the proposals by the carriers shall be governed by the provisions of subsection (a) of this section.

(c) The Kent County Water Authority shall provide notice by certified mail of rate increase requests to the several fire districts that purchase water from the authority.

(d) Costs incurred by electric distribution companies for filing rates, tolls, and charges, for participating in hearings and investigations prior to December 31, 2000, or for appealing commission decisions rendered prior to December 31, 2000, pursuant to this section shall not be included in the rates, tolls, or charges established by the commission pursuant to this section.

History of Section.

# Attachment 12

**R.I.G.L. 39-3-11:** Authority to amend or rescind a RIPUC order which increased electric or gas rates



# **Title 42**

## **State Affairs and Government**

### **Chapter 60**

### **Energy Crisis Management**

#### **R.I. Gen. Laws § 42-60-9**

##### **§ 42-60-9. Orders, rules, and regulations.**

(a) The governor may make, amend, and rescind any orders, rules, and regulations that he or she may deem advisable to carry out the provisions of this chapter.

(b) All orders, rules, and regulations promulgated by the governor shall become effective immediately except as provided in subsection (c).

(c) All orders by the governor to amend or suspend certain state rules and regulations in effect prior to the declaration of an energy crisis may become effective no sooner than forty-eight (48) hours after the governor has notified the joint committee on legislative services of the orders and the effective dates of these orders. The orders to amend or suspend state rules and regulations shall become effective unless the committee disapproves the orders within forty-eight (48) hours by a majority vote; provided, however, that the orders shall be effective immediately if approved by the majority of the committee. Thereafter, all of the effective orders, rules, or regulations shall have the full force and effect of law, when, in the event of issuance by the governor, a copy is filed in the office of the secretary of state. All existing provisions of any regulatory statute prescribing the procedures for the conduct of state business, rules and regulations inconsistent with the provisions of this chapter, or inconsistent with any order, rule, or regulation issued under the authority of this chapter shall be suspended during the period of time and to the extent that the conflict exists. All orders, rules, and regulations promulgated by the governor pursuant to this chapter shall terminate with the termination of the energy crisis.

(d) In order to attain uniformity so far as practicable throughout the country in measures taken to aid in energy crisis management, all action taken under this chapter and all orders, rules, and regulations made pursuant to this chapter, where not already specifically provided for, shall be taken or made with due consideration to the orders, rules, regulations, actions, recommendations, and requests of federal authorities relevant to these and, to the extent permitted by law, shall be consistent with these orders, rules, regulations, actions, recommendations, and requests.

History of Section.  
P.L. 1980, ch. 326, § 1.

# Attachment 15

**R.I.G.L. 44-13-4:** Power to suspend the collection of the gross receipts tax on electric and gas utility bills

# **Title 44**

# **Taxation**

## **Chapter 13**

## **Public Service Corporation Tax**

### **R.I. Gen. Laws § 44-13-4**

#### **§ 44-13-4. Rate of taxation.**

The tax imposed will be at the following rates:

- (1) In the case of every corporation whose principal business is a steamboat or ferryboat business as a common carrier, every common carrier steam or electric railroad corporation, every street railway corporation, every common carrier dining, sleeping, chair, or parlor car corporation, every corporation whose principal business is selling and distributing water to the public, and every toll bridge corporation, one and one-fourth percent (1.25%) of its gross earnings;
- (2) In the case of every corporation whose principal business is manufacturing, selling, distributing and/or transmitting currents of electricity to be used for light, heat, or motive power, four percent (4%) of its gross earnings, but deductions shall be made of gross earnings from the transmission or sale of electricity to other public utility corporations, non-regulated power producers, or municipal utilities for resale, whether within or outside of this state; provided, that the tax measured by the portion of the utility's gross earnings as is derived from the manufacture and sale of illuminating and heating gas and its by-products and the merchandising of gas appliances shall be computed at the rate of three percent (3%);
- (3) In the case of every express corporation carrying on its business on steamboats, steam or electric railroads, or street railways and of every public service corporation whose principal business is that of a telegraph corporation, four percent (4%) of its gross earnings;
- (4) In the case of every telecommunications corporation providing telecommunications service, ten percent (10%) of its gross earnings; provided, that the rate shall be nine percent (9%) effective July 1, 1985, eight percent (8%) effective July 1, 1986, seven percent (7%) effective July 1, 1987, six percent (6%) effective July 1, 1988, and five percent (5%) effective July 1, 1997. For purposes of this chapter, "telecommunications service" means the transmission of any interactive two-way electromagnetic communications including voice, image, data, and other information, by means of wire, cable, including fiber optical cable, microwave, and radio wave, or any combinations of these media. This definition does not include value added non-voice services in which computer processing applications are used to act on the form, content, code, and protocol of the information to be transmitted;
- (5) In the case of every public service cable corporation, eight percent (8%) of its gross earnings;
- (6) In the case of every corporation whose principal business is manufacturing, selling and/or distributing to the public illuminating or heating gas, three percent (3%) of its gross earnings.

#### **History of Section.**

P.L. 1942, ch. 1212, art. 6, § 2; P.L. 1947, ch. 1887, art. 6, § 1; G.L. 1956, § 44-13-4; P.L. 1969, ch. 197, art. 3, § 1; P.L. 1969, ch. 198, art. 4, § 1; P.L. 1971, ch. 265, § 12; P.L. 1972, ch. 205, § 9; P.L. 1983, ch. 264, § 1; P.L.

# Attachment 16

**R.I.G.L. 30-15-9:** Authority to suspend provisions of  
regulatory statutes prescribing procedures for conduct of  
state business

# **Title 30**

## **Military Affairs and Defense**

### **Chapter 15**

### **Emergency Management**

#### **R.I. Gen. Laws § 30-15-9**

##### **§ 30-15-9. Governor's responsibilities relating to disaster emergencies.**

- (a) The governor shall be responsible for meeting the dangers to the state and people presented by disasters.
- (b) A state of emergency shall be declared by executive order or proclamation of the governor if he or she finds a disaster has occurred or that this occurrence, or the threat thereof, is imminent. The state of disaster emergency shall continue until the governor finds that the threat or danger has passed or the disaster has been dealt with to the extent that emergency conditions no longer exist and terminates the state of disaster emergency by executive order or proclamation, but no state of disaster emergency may continue for longer than thirty (30) days unless renewed by the governor. The general assembly, by concurrent resolution, may terminate a state of disaster emergency at any time. Thereupon, the governor shall issue an executive order or proclamation ending the state of disaster emergency and what actions are being taken to control the emergency and what action the public should take to protect themselves. All executive orders or proclamations issued under this subsection shall indicate the nature of the disaster, the area or areas threatened, and the conditions that have brought it about or that make possible termination of the state of disaster emergency. An executive order or proclamation shall be disseminated promptly by means calculated to bring its contents to the attention of the general public and, unless the circumstances attendant upon the disaster prevent or impede, promptly filed with the agency, the secretary of state, and the city and town clerks in the area to which it applies.
- (c) An executive order or proclamation of a state of disaster emergency, shall activate the state and local disaster emergency plans applicable to the political subdivision or area in question and shall be authority for the deployment and use of any forces to which the plan or plans apply and for the use or distribution of any supplies, equipment, and materials and facilities assembled, stockpiled, or arranged to be made available pursuant to this chapter or any other provision of law relating to disaster emergencies.
- (d) During the continuance of any state of disaster emergency the governor is commander-in-chief of the organized and unorganized militia and of all other forces available for emergency duty. To the greatest extent practicable, the governor shall delegate or assign command authority by prior arrangement embodied in appropriate executive orders or regulations, but nothing herein restricts the governor's authority to do so by orders issued at the time of the disaster emergency.
- (e) In addition to any other powers conferred upon the governor by law, the governor may exercise the following powers, subject to the provisions of subsection (g) of this section, limited in scope and duration as is reasonably necessary for emergency response:
- (1) Suspend the provisions of any regulatory statute prescribing the procedures for conduct of state business, or the orders, rules, or regulations of any state agency, if strict compliance with the provisions of any statute, order, rule, or regulation would in any way prevent, hinder, or delay necessary action in coping with the emergency, provided that the suspension of any statute, order, rule or regulation will be limited in duration and scope to the

emergency action requiring said suspension;

(2) Utilize all available resources of the state government as reasonably necessary to cope with the disaster emergency and of each political subdivision of the state;

(3) Transfer the direction, personnel, or functions of state departments and agencies or units thereof for the purpose of performing or facilitating emergency services;

(4) Subject to any applicable requirements for compensation under § 30-15-11, commandeer or utilize any private property if the governor finds this necessary to cope with the disaster emergency;

(5) Direct and compel the evacuation of all or part of the population from any stricken or threatened area within the state if the governor deems this action necessary for the preservation of life or other disaster mitigation, response, or recovery;

(6) Prescribe routes, modes of transportation, and destinations in connection with evacuation;

(7) Control ingress and egress to and from a high risk area, the movement of persons within the area, and the occupancy of premises therein;

(8) Suspend or limit the sale, dispensing, or transportation of alcoholic beverages, firearms, explosives, and combustibles;

(9) Make provision for the availability and use of temporary emergency shelter;

(10) Make and promulgate such rules and regulations as the governor may deem advisable for the assigning, detailing, and making available for duty and use in any city or town of this state any of the personnel, apparatus, or equipment of any police or fire department of any other city or town, or of any volunteer fire company, or of any fire district, and that personnel shall have the same powers, duties, rights, privileges, and immunities as if performing their duties in the city or town in which they normally would be employed, but the personnel shall obey the orders of the police and fire authorities of the city or town to which assigned, detailed, or made available. When assigned, detailed, or made available as aforesaid, the city or town in which the police or firefighters shall perform outside duties shall provide them with subsistence or pay them a reasonable allowance therefor, and shall also be liable for any damage to the apparatus or equipment incurred while being so used; provided, however, that a city or town shall be reimbursed by the state out of the general fund of the state for all expenses incurred under the foregoing provisions of this subsection;

(11) Designate as a special emergency health and sanitation area, any area within the state that has been seriously damaged by disaster, or in which the existence of any military, naval, or air establishment of the United States of America or of any industrial establishment constructed or enlarged for purposes of national defense, has caused an increase in the population of that area to such an extent as to produce unusual problems of health and sanitation. It is the duty of state health authorities and the local code enforcement officials to make and enforce rules and regulations designed to prevent the introduction of any contagious or infectious disease and to safeguard the public health within the area. The governor may promulgate and enforce additional rules and regulations for the protection of the public health within areas as may be necessary;

(12) Whenever, in the governor's opinion, due to a disaster there is liable to be a serious shortage in the supply of food, fuel, clothing, antitoxins, serums, immunizing agents, or any other pharmaceutical agents or medical supplies, or any other necessity of life or defense, and the federal authorities are not adequately dealing with the situation, promulgate such rules and regulations as he or she, from time to time, deems necessary to regulate the sale, purchase, or distribution of those necessities and to prohibit and prevent the wasting, secreting, hiding, or hoarding of, or profiteering from, those necessities; additionally, during a declared time of state or national emergency, no person, firm, or corporation shall increase the price of any item it sells or offers for sale at retail immediately prior to the proclamation of emergency or during the proclaimed state of emergency. Nothing in this

section shall prohibit the fluctuation in the price of items sold at retail that occurs during the normal course of business. Any person, firm, or corporation who or that violates any provision of this subsection shall be fined not more than one hundred dollars (\$100);

(3) Do all other things necessary to effectively cope with disasters in the state not inconsistent with other provisions of law;

(14) Adopt and enforce measures to provide for the safe disposal of infectious waste as may be reasonable and necessary for emergency response due to a state disaster emergency. Such measures may include, but are not limited to, the collection, storage, handling, destruction, treatment, transportation, and disposal of infectious waste;

(15) Adopt and enforce measures to provide for the safe disposal of corpses as may be reasonable and necessary for emergency response due to a state disaster emergency. Such measures may include, but are not limited to, the embalming, burial, cremation, interment, disinterment, transportation, and disposal of corpses; and

(16) Compel a person to submit to a physical examination and/or testing as necessary to diagnose or treat the person. The medical examination and/or testing may be performed by any qualified person authorized by the department of health and must not be reasonably likely to result in serious harm to the affected individual. The medical examination and/or testing shall be performed immediately upon the order of the department of health without resort to judicial or quasi-judicial authority. If the department of health is uncertain whether a person who refuses to undergo medical examination and/or testing may have been exposed to an infectious disease or otherwise poses a danger to public health, the department of health may subject the individual to isolation or quarantine pursuant to § 23-8-4.

(f) Nothing contained herein shall be construed to limit or restrict the power of the general assembly to appropriate any federal funds received by the state of Rhode Island pursuant to § 35-4-22.1.

(g) Powers conferred upon the governor pursuant to the provisions of subsection (e) of this section for disaster emergency response shall not exceed a period of one hundred eighty (180) days from the date of the emergency order or proclamation of a state of disaster emergency, unless and until the general assembly extends the one hundred eighty (180) day period by concurrent resolution.

(h) Nothing contained in subsection (g) of this section shall be construed to apply to the following executive orders issued by the governor that shall remain in effect and may be extended by further executive order up to, but not beyond, September 1, 2021:

(1) 20-06;

(2) 20-19;

(3) 20-37;

(4) 20-46 as amended by 21-60;

(5) 20-72;

(6) 21-26;

(7) 21-67; and

(8) 21-68, limited to paragraph 8.

History of Section.

# Attachment 17

R.I.G.L. 42-60-11: Energy Crisis Management: Liberality of  
construction



# **Title 42**

## **State Affairs and Government**

### **Chapter 60**

### **Energy Crisis Management**

#### **R.I. Gen. Laws § 42-60-11**

##### **§ 42-60-11. Liberality of construction.**

This chapter shall be construed liberally in order to effectuate its purpose.

History of Section.

P.L. 1980, ch. 326, § 1.

## Southwell v. McKee

Decided Nov 12, 2021

C. A. PC-2021-05915

11-12-2021

RICHARD SOUTHWELL, et al., Plaintiffs, v. DANIEL J. MCKEE, in his official capacity as the Governor of the State of Rhode Island; and NICOLE ALEXANDER-SCOTT, in her official capacity as the Director of the Rhode Island Department of Health, Defendants.

For Plaintiff: Gregory P. Piccirilli, Esq. For Defendant: Chrisanne E. Wyrzykowski, Esq.; Michael W. Field, Esq.; Morgan Andrew Lombard Goulet, Esq.; Jonathan J. Whitney, Esq.

LANPHEAR, J.

For Plaintiff: Gregory P. Piccirilli, Esq.

For Defendant: Chrisanne E. Wyrzykowski, Esq.; Michael W. Field, Esq.; Morgan Andrew Lombard Goulet, Esq.; Jonathan J. Whitney, Esq.

### DECISION

LANPHEAR, J.

This matter is before the Court on Plaintiffs' Motion for a Preliminary Injunction and the ensuing Objection by Defendants Daniel J. McKee, in his official capacity as the Governor of the State of Rhode Island (Governor McKee or the Governor), and Dr. Nicole Alexander-Scott, in her official capacity as the Director of the Rhode Island Department of Health (Director Alexander-Scott or the Director) (collectively, Defendants). Plaintiffs, the parents of children affected by the state's school mask mandate, seek a preliminary injunction against the \*1 Executive Orders and

emergency regulation underlying the mandate. Jurisdiction is pursuant to G.L. 1956 §§ 8-2-13 and 9-30-1.

<sup>1</sup> In addition to Richard Southwell, the Plaintiffs are Jonathan Barrett, Scott Belford, Thomas Boylan, Orlando Braxton, Beverly Chatterley, Charles Chatterley, Maddalena Cirignotta, Bill Connell, Jr., Kiela Daley, Jill DiGiglio, Jeffrey DiStefano, Rebecca DiStefano, Daryl Evans, Danielle Ferguson, Melissa Fitzgerald, Meredith Fortune, Christina Geremia, Susan Graham, Cheryl Greathouse, Zachary Greathouse, Peter Lawrence, Jessica LeBlanc, Daniel Medeiros, Julie McKenney, Paul McKenney, Amy Miller, Carissa Moglia, Carolyn Moretti, Daniel Penengo, Rachel Penengo, Peter Phelps, Edward Quattrini, Lenix Ramos, Ana Roque, Aimee Sayers, Ellen Schaffer, Shanley Swain, and Lori Wycall. Verified Amended Compl.

### I Findings of Fact

On September 30, 2021, the Court began its hearing on Plaintiffs' Motion for a Preliminary Injunction. After conducting a seven-day hearing on Plaintiffs' Motion, the Court makes the following findings of fact.

In March 2020, in response to the onset of the COVID-19 pandemic in Rhode Island, then-Governor Gina Raimondo declared a state of emergency by Executive Order. Exec. Order 20-02. The SARS-CoV-2 virus, which is responsible for COVID-19, was first identified in Rhode Island in February 2020. At that time, no one was

known to be immune and no vaccine was available, so pursuant to the declaration the Governor ordered quarantines, stay-at-home orders, and the wearing of masks in public settings.

The COVID-19 infection is transmitted person-to-person, but not all of those infected have symptoms. The disease spreads primarily by respiratory droplets from the breath which can contain particles of the virus that causes COVID-19. These droplets can spread by talking, singing, and exhaling, and can project some six feet. Air circulation and humidity are factors which affect the droplets in the air. The disease may also spread, but to a lesser extent, through contact with droplets on objects.

As will be discussed in more detail below, multiple parents testified concerning the mask mandate's effects on their children's days at school. The Court finds that these children are suffering and reasonably infers that children across the state are suffering with the mask mandate. The parents discussed how their children's ability to learn has been affected, how uncomfortable \*2 masks can be for the children through the day, and their concern for their children overall. There is no doubt that the parents who testified share the same concern for the quality of their children's lives as do other parents across the state.

Defendants' expert witness Dr. James McDonald serves as the Medical Director for the Rhode Island Department of Health (Department or DOH). He received his Baccalaureate degree at Siena College, and his M.D. at Loyola University. He interned with the National Naval Medical Center in Bethesda in pediatrics and has consistently practiced in pediatrics since 2003. He completed his residency in preventative medicine at the State University of New York and received his Master's Degree in public health from the University of North Carolina. He is a member of the faculty at the Brown University Schools of

Medicine and Public Health. Board certified in both pediatrics and preventative medicine the Court found him to be qualified as an expert in both fields. Dr. McDonald's duties at the DOH include developing policy and dealing with stakeholders; he has also been the Medical Director of the COVID Leadership Team within the Department since November 2020.

In April 2020, Dr. McDonald and others approached then-Governor Raimondo to recommend masking in schools. In May 2021, after about 68% of the state's population was fully vaccinated against COVID-19 and as the number of infected people was declining, the mask mandate was lifted. In the summer of 2021, however, the Delta variant of the SARS-CoV-2 virus became the dominant strain in Rhode Island. Compared to the original strain of the virus, the Delta variant is more contagious, more transmissible, and makes those who have it more ill. The number of viral particles in an infected person is larger, making transmission more probable. On August 14, 2021, some 468 persons in the state were infected. As state officials hoped to return more children to school in the fall of 2021, social distancing would be reduced from six to three feet. \*3

Therefore, the COVID Leadership Team recommended a school mask mandate. The Team, on which Dr. McDonald serves, met daily and made recommendations to the Governor. Dr. McDonald claimed that studies show that masking was effective, and so the Team followed Dr. McDonald's advice and recommended masking, ventilation, and then distancing, in that order, as priorities to protect students. Specifically, Dr. McDonald relied on:

1. A May 2021 Centers for Disease Control (CDC) science brief regarding masking (Exhibit B);
2. A March 2021 CDC study on the effect of mask mandates in a peer reviewed journal (Exhibit C);

3. A February 2021 peer-reviewed study on maximizing the fit of cloth and surgical masks (Exhibit E);

4. A May 2021 study on mask use and ventilation in elementary schools (Exhibit F);

5. A September 2021 peer-reviewed study of SARS outbreaks (Exhibit G).

On August 19, 2021, Governor McKee declared a state of disaster emergency for the Delta variant of the SARS-CoV-2 virus. Exec. Order 21-86. Originally set to expire after thirty days on September 18, 2021, that state of emergency has been extended by two additional Executive Orders and is currently in effect until November 13, 2021. Exec. Orders 21-97, 21-103. A school mask mandate was also instituted on August 19, 2021 through Executive Order 21-87, which ordered local educational agencies that had not adopted a universal indoor masking requirement to abide by a universal indoor masking protocol to be developed by the DOH. On August 20, 2021, the DOH issued that Protocol. Executive Order 21-87 has also been extended and is currently in effect until November 13, 2021. Exec. Orders 21-97, 21-103. There was no direct evidence submitted regarding the basis of the Governor's Orders.

On September 16, 2021, Plaintiffs filed suit against Governor McKee. In their Verified Complaint, Plaintiffs sought a declaratory judgment that the Governor exceeded his constitutional and statutory authority in issuing Executive Orders 21-86 and 21-87. Plaintiffs also

4 filed a Motion \*4 for a Preliminary Injunction restraining the enforcement of Executive Orders 21-86 and 21-87, any DOH emergency regulations or protocols issued pursuant to those Orders, and any other Executive Orders relating to the August 19, 2021 emergency declaration. On September 23, 2021, the DOH enacted 216-RICR-20-10-7, emergency regulations mandating masks in schools. Exhibit H. On September 28, 2021 Plaintiffs filed an Amended Verified Complaint

naming additional Plaintiffs, adding Director Alexander-Scott as a Defendant, and seeking declaratory and injunctive relief against the enforcement of 216-RICR-20-10-7.

At the hearing on Plaintiffs' Motion, Mr. Richard Southwell testified how his children were learning in school pre-COVID, how they changed to distance learning when the pandemic began, and how they had done some home schooling. He was particularly concerned of a learning loss as children wore masks all days, were distanced, rooms were realigned, and breaks were limited. Desks face the same direction. This was a large change from summer programs where the children were not required to mask. As things grew worse, one child was withdrawn from high school as the Southwells tried to homeschool. Mr. Southwell assesses risks for his occupation as an actuary. He explained how he worked on models and his hypotheses were challenged regularly. He questioned whether Dr. McDonald used actuarial sciences for his conclusion.

Ms. Maddalena Cirignotta is a Spanish teacher with master's degrees in education and Spanish.<sup>2</sup> She described how her two children's classes went from distance learning to in-person learning to masking. As her children were enrolled but would not mask, they were released from school and she is applying for homeschooling. When masked, the children complained of headaches and nausea. Snacks were refused and her children became grumpy and lethargic. Ms. Cirignotta explained that parents were told there would be breaks but in

5 practice talking is not \*5 allowed. Her children were in fear of getting caught without masks. Teachers were not allowed to be near the students for personal assistance.

<sup>2</sup> The parents are from different communities.

Mr. Orlando Braxton and his wife have four children of various ages. With the children being masked, they were removed from school for homeschooling. He described how difficult it was

for them to come home with dirty masks while complaining. His wife picked up the children at school to limit their time at school with masks. Some teachers gave breaks, others did not. The children were nervous of getting in trouble if masks were not worn properly. Masks were then worn at sports events after school. Talking was limited, even at lunch.

Ms. Julie McKenney has two children at school, is an active member of the PTO and participated in many meetings on the masking proposals. Prior to the state mandate, masks were recommended but optional. The children react differently to masking, sometimes concerned that the teacher won't hear them through the masks, sometimes withdrawing more. One child with allergies was sent home often because of the coughing. PCR tests were required. The children don't wear masks, except in school. Ms. McKenney has met with parents from across the state who object to masking.

Dr. Andrew Bostom testified as an expert witness for the Plaintiffs. While Dr. Bostom received his M.D. from the State University of New York in 1990, followed by a Master's Degree in epidemiology from Brown University, he acknowledged that he no longer maintains a practice. He has served at Pawtucket Memorial Hospital since 2013. At the hearing, he claimed to be working with Brown University Center for Primary Care and Prevention, though his present role became unclear during cross-examination. He specialized in cardiac intervention with epidemiology but does not appear to be currently certified in any field, having last been recertified in internal medicine in 2014. Dr. Bostom has studied raw data of tests involving COVID-19, \*6 having used scientific methods for other afflictions. He has been qualified as an expert on vaccine mandates in other jurisdictions. The Court found him qualified to give expert testimony as an epidemiologist.

Dr. Bostom claimed that where there are more test results, there is a higher likelihood of positive test results, and explained it as a higher viral load. He then criticized several of the studies relied upon by Dr. McDonald, as they were not peer reviewed or not randomized control studies. Dr. Bostom testified that he examined hundreds of death certificates to review the causes of death and noted that COVID-19 was not usually listed as the primary cause. He acknowledged that people had died with COVID-19 but questioned whether it was the primary cause. He stated that as intensive care units are often filled to accommodate others in the hospital, it was not surprising that they were filled now. He suggested the total occupancy rate should be considered as a more reliable indicator of hospital overcrowding, and that the DOH's conclusions on overcrowding therefore relied on improper measures.

Dr. Bostom testified two months after the state needed to determine if masking in schools was necessary. While that may appear close in time, most of the studies noted by both physicians are recent, as COVID-19 only became a pandemic in 2020. For example, Dr. Bostom criticized Dr. McDonald's concern for the lingering symptoms in COVID-infected children but relied on a study in the Pediatric Infectious Disease Journal that noted the absence of a control group. Exhibit 13. Dr. Bostom prepared Exhibit 23 to support his conclusion that there was no relationship between the mask mandate and the continued transmission of the virus. He then noted the similarities of a 1918 study (for a different pandemic) by a Dr. Kellogg as a randomized control study which doubted the efficiency of masks. \*7

Dr. Bostom also prepared Exhibit 27, which he claimed to be a pool of twelve randomized control trials on masking involving about 18, 000 participants which were "meta-analyzed" to demonstrate that masking did not reduce transmission. Dr. Bostom then analyzed whether masks could be harmful and concluded that they may be, reviewing a variety of studies. He

acknowledged that there were few randomized control studies for children under age eighteen. On cross-examination, Dr. Bostom noted that he had not been licensed to practice in Rhode Island since 2018 and does not currently see patients. He has never treated a COVID patient.

Defendants' expert witness Dr. McDonald testified that the mask mandate was imposed for children as they are in a fixed location in school for a long period of time, during a period of asymptomatic spread and in a high-risk setting. The Delta variant would make the spread easier. Adults are more likely to move about, can be vaccinated, and have more options for treatment if infected. It was Dr. McDonald's opinion that if masks were removed from schools, the incidence of COVID-19 transmission would increase as "SARS can be spread by aerosols," more people would be infected, and more people would need to be quarantined. Meanwhile, emergency hospital beds were still available, but did not need to open as the incidence of COVID-19 appeared to be stable.

Dr. McDonald explained that some COVID-19 treatments are now available for persons over twelve years old. He opined that the death rate from COVID-19 in Rhode Island is now relatively low because of the countermeasures the state has employed including vaccinations, masking, distancing, ventilation, hand washing, staying at home, and the like. The high quality of our state's health care also contributes to its success. Dr. McDonald also explained that children are prone to multi-system inflammatory symptomology. While rare, with twenty-three cases \*8 identified in Rhode Island, it can be life-threatening. Vaccinations were not currently available for children under twelve years.<sup>3</sup>

<sup>3</sup> COVID-19 vaccinations are now becoming available for children aged 5-11, after the close of evidence and well after the challenged regulations were promulgated.

Testifying after Dr. Bostom, Dr. McDonald agreed that double blind randomized controlled studies were an excellent means of scientific testing for medical treatments and were considered the "gold standard." Dr. McDonald noted that it could be difficult to find a control group to study masking on children as it would be unethical to place children at unprotected risk. Hence, he surmised that an independent research board would be unlikely to approve such a study. Observational studies, which look back at what has happened in similar situations (*e.g.*, Exhibit G) have been helpful in supplying information. Such studies which have been peer-reviewed have increased reliability.

Dr. McDonald testified that the DOH and the State continue to monitor the COVID pandemic by use of a COVID Data Dashboard, produced two times a week and containing a summary of critical data. Testing rates, the number of cases, laboratory times, hospital admissions, available beds, ventilators in use, and time in waiting rooms are all included. Dr. McDonald particularly focused on the Dashboards for August to demonstrate how the rates of infection were increasing after having declined in July. Exhibits N-Q. He reviewed the statistics in the dashboards at length. He noted the increased use of hospitals and their overcrowding. Dr. McDonald had telephone conversations with chief executives and medical officers of hospitals on August 21, 2021 where this overcrowding was discussed. Dr. MacDonald had also learned from the DOH laboratory that the rate of the Delta variant infection was increasing in the state, which \*9 he found "very concerning." From all of this he concluded that the Delta strain was more contagious, a return to school would increase risks, and masks were appropriate.

Dr. McDonald stated that three pediatric deaths in Rhode Island were related to COVID, although there may be multiple causes of death. On cross-examination he would minimize this, noting that of the three children, two of them had other significant causes of death.

Continuing his direct examination, Dr. McDonald discussed more studies which he seemed to reference (and possibly locate) after Dr. Bostom's testimony. Dr. McDonald relied on a document issued by the Journal of the American Medical Association (JAMA) (Exhibit T) to conclude that there were few or no adverse effects from masking children in school settings. He also discussed the Provincetown study (Exhibit S) which influenced him by showing that even vaccinated people can spread the variant, so they should continue to mask. He opined that all children should wear masks in a school setting.

On cross-examination, Dr. McDonald agreed that the state was not intending to impose a mask mandate on schools at the end of July but added that the situation had changed through the summer, so new regulations were issued. Dr. McDonald assisted in drafting the emergency regulations. He suggested that a full (non-emergency) regulation would take up to 120 days to establish, with the required hearing, but that there was insufficient time before the start of school. He considered there to be "imminent peril" as of July 21, 2021. He admitted he had not done a "cost-benefit analysis" when considering masking. He acknowledged that 65% of the kindergarten through twelfth grade students who were found to be infected, showed no symptoms of COVID-19. He added that the May 7, 2021 CDC publication was highly influential for him.

Dr. McDonald discussed independent review boards and the need to avoid risk for children. He discussed the various studies cited by Dr. Bostom but noted that he did not rely on them for \*10 recommending a mask mandate for children. Dr. McDonald appears to have reviewed most of those studies for his cross-examination. Dr. McDonald testified that he relies on the many reports he reads to make conclusions, including those that favored and opposed masking, but concluded that masking was based on the best information available at the time, even though it was not always politically favored.

Dr. McDonald indicated that some other states' surgeon generals opposed masking and said he watched what other states were doing but studied Rhode Island far more closely. He noted that Rhode Island was more densely populated than other states. He discussed Exhibit 37 and was questioned on why it took so long to promulgate a regulation. He stressed that by mid-August 2021, there was not time for a full regulation, only an emergency regulation, which needed to be sufficiently detailed.

Dr. McDonald acknowledged that the Governor continued his Executive Order on October 15, 2021 (Exhibit 42), and that the extension had been discussed by the COVID Leadership Team. He also acknowledged that the positivity rate was more of a focus earlier in the pandemic. He explained and distinguished the multiple factors considered on the Dashboards. He admitted that the Dashboard did not detail the total occupancy of the hospitals and focused on intensive care beds. He acknowledged that infection trends, projected immunity, and total ICU occupancy were omitted from later Dashboard reports.

After the hearing concluded on October 19, 2021, both sides submitted additional briefs and this Court heard final arguments on November 3, 2021. \*11

## II

### Standard of Review

#### A

### Preliminary Injunction

Plaintiffs have asked this Court to issue a preliminary injunction that stays the enforcement of Executive Orders 21-86 and 21-87 and the DOH's emergency regulations and restrains the Governor from issuing any further executive orders related to COVID-19. Determining whether to grant a motion for a preliminary injunction requires this Court to consider:

"whether the moving party (1) has a reasonable likelihood of success on the merits, (2) will suffer irreparable harm without the requested injunctive relief, (3) has the balance of the equities, including the possible hardships to each party and to the public interest, tip in its favor, and (4) has shown that the issuance of a preliminary injunction will preserve the status quo." *Gianfrancesco v. A.R. Bilodeau, Inc.*, 112 A.3d 703, 708 (R.I. 2015) (quoting *Vasquez v. Sportsman's Inn, Inc.*, 57 A.3d 313, 318 (R.I. 2012)).

## B

### The Governor's Executive Powers

Article V of the Rhode Island Constitution provides that "[t]he powers of the government shall be distributed into three separate and distinct departments: the legislative, executive and judicial." R.I. Const. art. V. Under Article IX of the Rhode Island Constitution, "[t]he chief executive power of this state shall be vested in a governor" who "shall take care that the laws be faithfully executed." R.I. Const. art. IX, §§ 1, 2. "The executive power is the power to execute the laws, that is, to carry them into effect, as distinguished from the power to make the laws and the power to judge them." *In re Request for Advisory Opinion from House of Representatives (Coastal Resources Management Council)*, 961 A.2d 930, 940 (R.I. 2008) (citing 16A Am. Jur. 2d *Constitutional Law* § 255 (2d ed. 2020)).<sup>4</sup> \*12 The legislative power of the state inheres in the General Assembly. See R.I. Const. art. VI, §§ 1, 2.

<sup>4</sup> *Coastal Resources Management Council*, 961 A.2d at 932, is one of several advisory opinions issued by the Rhode Island Supreme Court that analyze executive and legislative powers under the state constitution. While not binding as precedent, these advisory opinions may

nonetheless be "highly persuasive[.]" *Woonsocket School Committee v. Chafee*, 89 A.3d 778, 792 (R.I. 2014).

When the Governor acts pursuant to the express statutory authorization of the General Assembly, "his authority is at its maximum, for it includes all that he possesses in his own right plus all that [the Legislature] can delegate." *Chang v. University of Rhode Island*, 118 R.I. 631, 638, 375 A.2d 925, 929 (1977) (quoting *Youngstown Sheet & Tube Co v Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring)) "If his act is held unconstitutional under these circumstances, it usually means that the Government as an undivided whole lacks power" *Youngstown*, 343 U.S. at 636-37 (Jackson, J., concurring).

In analyzing the scope of legislation that empowers the Governor to act, the Rhode Island Supreme Court has followed its standard approach of attempting to discern and effectuate the Legislature's intent. See *Pontbriand v. Sundlun*, 699 A.2d 856, 866 (R.I. 1997); see also *In re State Employees' Unions*, 587 A.2d 919, 921-25 (R.I. 1991) (upholding decision of trial justice that General Assembly had empowered Governor to balance budget by shutting down state agencies). The "'best indicator'" of the Legislature's intent is the plain language of the statute. *DeMarco v. Travelers Insurance Co.*, 26 A.3d 585, 616 (R.I. 2011) (quoting *State v. Santos*, 870 A.2d 1029, 1032 (R.I. 2005)). In this area, the Supreme Court has also applied the rule of statutory construction that "favor[s] [the interpretation] which presents no potential constitutional difficulties."

<sup>13</sup> *Pontbriand*, 699 A.2d at 866. \*13

One such potential constitutional difficulty is the nondelegation doctrine, which prohibits unconditional delegations of legislative authority to the executive branch. See, e.g., *Almond v. Rhode Island Lottery Commission*, 756 A.2d 186, 191-92 (R.I. 2000). The General Assembly may, however, delegate "limited portions of the legislative power, if confined in expressly defined channels[.]" *Almond*, 756 A.2d at 192 (quoting



*Opinion to the Governor*, 88 R.I. 202, 205, 145 A.2d 87, 89 (1958)). "In sum, the delegation of legislative functions is not a per se unconstitutional action. Instead, it is the conditions of the delegation-the specificity of the functions delegated, the standards accompanying the delegation, and the safeguards against administrative abuse-that [are] examine[d] in determining the constitutionality of a delegation of power." *Almond*, 756 A.2d at 192 (quoting *Milardo v. Coastal Resources Management Council of Rhode Island*, 434 A.2d 266, 270-71 (R.I. 1981)).

Among the specific powers that may permissibly be delegated to the executive branch is the "quasi-legislative" authority to promulgate rules and regulations. *Coastal Resources Management Council*, 961 A.2d at 939 n.14. "The power of the state to regulate for the protection of public health, safety, and morals . . . [is] also known as the police power[.]" *Milardo*, 434 A.2d at 269. "[W]here neither a suspect class nor a fundamental right is implicated, " judicial review of such regulations is limited to ensuring that "a rational relationship exists between the provisions of the statute [or ordinance] and a legitimate state interest." *Federal Hill Capital, LLC v. City of Providence by and through Lombardi*, 227 A.3d 980, 984-85 (R.I. 2020) (quoting *Riley v. Rhode Island Department of Environmental Management*, 941 A.2d 198, 206 (R.I. 2008)). "When the court finds that a statute is within a proper exercise of the police power it will not inquire into the wisdom, propriety or adequacy of such legislation, unless it plainly appears that the conclusion of the legislature in the matter was clearly not well founded, but was arbitrary and unreasonable." \*14 *Opinion to the Governor*, 75 R.I. 54, 62, 63 A.2d 724, 729 (1949); see also *Berger v. State Board of Hairdressing*, 118 R.I. 55, 59, 371 A.2d 1053, 1055 (1977). As a result, and as will be described in more detail below, the Governor has broad powers under state law to respond to an emergency.

### III

#### Analysis

##### A

#### Irreparable Harm

A party seeking a preliminary injunction "must demonstrate that it stands to suffer some irreparable harm that is presently threatened or imminent and for which no adequate legal remedy exists to restore that plaintiff to its rightful position." *Nye v. Brousseau*, 992 A.2d 1002, 1010 (R.I. 2010) (quoting *National Lumber & Building Materials Co. v. Langevin*, 798 A.2d 429, 434 (R.I. 2002)). "Irreparable injury must be either 'presently threatened' or 'imminent'; injuries that are prospective only and might never occur cannot form the basis of a permanent injunction." *Id.* (quoting *National Lumber & Building Materials Co.*, 798 A.2d at 434).

This Court heard credible testimony from multiple Plaintiffs that their children were suffering adverse effects from the requirement that they wear masks throughout the school day. These adverse effects include physical and emotional discomfort and interference with the children's ability to interact with teachers and peers. Plaintiffs themselves experienced the distress of witnessing their children's discomfort, and some Plaintiffs made the difficult decision to homeschool their children rather than send them to school with masks. While not disputing Plaintiffs' testimony on those facts, Defendants point to the lack of medical evidence on the health risks of wearing masks and state that Plaintiffs are attempting to shift their burden of proof on that issue. \*15

Regardless of the uncertainty surrounding potential long-term medical problems resulting from mask wearing, this Court finds that Plaintiffs' testimony regarding the ongoing impact of the mask mandate on their children suffices to establish a finding of irreparable harm. See, e.g., *Porretti v. Dzurenda*, 11 F.4th 1037, 1050 (9th Cir. 2021) ("Emotional injuries, [or] psychological

distress . . . may constitute irreparable harm."); *Harris v. Board of Supervisors, Los Angeles County*, 366 F.3d 754, 766 (9th Cir. 2004) (finding that patients' increased pain and suffering if hospital closed constituted irreparable harm); *Al-Joudi v. Bush*, 406 F.Supp.2d 13, 20 (D.D.C. 2005) ("[W]here the health of a legally incompetent or vulnerable person is at stake, irreparable harm can be established."); *Texas Health & Human Services Commission v. Advocates for Patient Access, Inc.*, 399 S.W.3d 615, 630-31 (Tex. Ct. App. 2013) (finding that "decline in [child's] condition and progress" due to interruption of speech-therapy services was irreparable harm).

## B

### Status Quo

"[T]he office of a preliminary injunction is not ordinarily to achieve a final and formal determination of the rights of the parties or of the merits of the controversy, but is merely to hold matters approximately in status quo, and in the meantime to prevent the doing of any acts whereby the rights in question may be irreparably injured or endangered." *DiDonato v. Kennedy*, 822 A.2d 179, 181 (R.I. 2003) (quoting *Fund for Community Progress v. United Way of Southeastern New England*, 695 A.2d 517, 521 (R.I. 1997)).

"[T]his status quo is the last peaceable status prior to the controversy." *E.M.B. Associates, Inc. v. Sugarman*, 118 R.I. 105, 108, 372 A.2d 508, 509 (1977). In the instant case, the parties dispute the proper point of reference for determining the status quo. Plaintiffs argue that the "last peaceable status" was the point in time just prior to August 19, 2021 when the challenged mask mandate was not in effect. Defendants argue that the relevant moment was the last peaceable status prior to the beginning of litigation on September 16, 2021, when the mask mandate was <sup>\*16</sup> already in effect. Defendants also note that schools were not in

session in August 2021, and that masks were required throughout the 2020-2021 school year.

Preliminary injunctions undoing a defendant's prior actions may be awarded "when it is necessary to compel defendant to correct injury already inflicted by defining the status quo as 'the last peaceable uncontested status' existing between the parties before the dispute developed." 11A Wright & Miller, *Federal Practice and Procedure* § 2948 (3d ed. Apr. 2021 Update); see also *E.M.B. Associates, Inc.*, 118 R.I. at 108, 372 A.2d at 509 ("[A] restraining order is meant to preserve or restore the status quo and . . . this status quo is the last peaceable status prior to the controversy.").

At the same time, this Court cannot ignore that a statewide school mask mandate is currently in place and that the preliminary injunction, no less than the ultimate relief Plaintiffs seek, would change that state of affairs. A careful consideration of the equities at play is thus more important than precise identification of the "last peaceable status." See *Fund for Community Progress*, 695 A.2d at 521 (quoting *Coolbeth v. Berberian*, 112 R.I. 558, 564, 313 A.2d 656, 659 (1974)) ("In considering the equities, the hearing justice should bear in mind that 'the office of a preliminary injunction is . . . merely to hold matters approximately in status quo, and in the meantime to prevent the doing of any acts whereby the rights in question may be irreparably injured or endangered.'").

### C Balance of the Equities

To obtain a preliminary injunction, a moving party must have the "balance of the equities . . . tip in its favor." *Gianfrancesco*, 112 A.3d at 708 (quoting *Vasquez*, 57 A.3d at 318). This inquiry requires this Court to weigh "the hardship to the moving party if the injunction is denied, <sup>\*17</sup> the hardship to the opposing party if the injunction is granted and the public interest in denying or granting the requested relief." *Fund for Community Progress*, 695 A.2d at 521.

Plaintiffs argue that the long-term physical and emotional well-being of their children is being sacrificed for a public health intervention of questionable efficacy. In this regard, they assert that COVID-19 presents minimal risks to children and those without underlying medical conditions. Plaintiffs also challenge the testimony of Dr. McDonald regarding the efficacy of masks in reducing COVID-19 transmission. In response, Defendants assert that because the primary benefit of masks lies in reducing the exhalation of contagious particles, removing the mask mandate would lead to adverse consequences for other children and families who suffer from underlying conditions. Defendants also assert that the public interest is best served by requiring universal school masking, as it balances the need to protect children and the public from COVID-19 and the Delta variant with the strong interest in allowing children to attend school in person.

The Court has no doubt that Plaintiffs are motivated by a legitimate desire to act in the best interests of their children. At the same time, the Governor and DOH are tasked with protecting the health and safety of all Rhode Islanders, and have presented substantial evidence that the mask mandate is a reasonable and appropriate means to minimize the serious risk posed by COVID-19. Each party presented significant medical testimony and studies. As this new affliction quickly spread to become a worldwide affliction, additional studies were conducted. Reports concerning this novel field were being released even as testimony was being taken, giving each side ample authority for their respective positions. While many scientific and medical issues related to masking are disputed by the parties, there is no question that COVID-19 is a deadly and contagious disease that has had dire consequences for the state. Even with the recognition that the wearing of masks creates some irreparable harm to students, that harm is significantly outweighed by the harm \*18 caused by the unmasked spread of the disease, particularly among children. Children

could not be vaccinated and there were few treatments available for younger patients. Even if students were not symptomatic, COVID-19 is highly transmissible. Given the strong public interest in maintaining a safe environment for in-school learning, and the fact that granting the preliminary injunction would interfere with the abilities of the Governor and the DOH to adequately respond to the rapidly changing dangers posed by COVID-19, the public interest weighs against granting the preliminary injunction. As a result, the Court concludes that the balance of equities tips against Plaintiffs.

#### D Likelihood of Success on the Merits

To obtain a preliminary injunction, "[t]he moving party must . . . show that it has a reasonable likelihood of succeeding on the merits of its claim at trial." *Fund for Community Progress*, 695 A.2d at 521. This element has been described as the "sine qua non" of the preliminary injunction analysis. *New Comm Wireless Services, Inc. v. SprintCom, Inc.*, 287 F.3d 1, 9 (1st Cir. 2002). The moving party need not demonstrate "a certainty of success," but it must "make out a prima facie case." *Fund for Community Progress*, 695 A.2d at 521. "Prima facie evidence is the amount of evidence that, if unrebutted, satisfies the burden of proof on a particular issue." *DiLibero v. Swenson*, 593 A.2d 42, 44 (R.I. 1991) (quoting *Paramount Office Supply Company, Inc. v. D.A. MacIsaac, Inc.*, 524 A.2d 1099, 1101 (R.I. 1987)).

Here, Plaintiffs assert that Executive Orders 21-86 and 21-87 are *ultra vires* because the Governor has neither statutory nor constitutional authority to promulgate the Orders. Specifically, Plaintiffs attack the Governor's authority under each of the legal bases cited in the Orders: Article IX of the Rhode Island Constitution and Title 23, Chapter 8 and Title 30, Chapter 15 of the Rhode \*19 Island General Laws. In their post-hearing brief, Plaintiffs argue that strict scrutiny of the school mask mandate is necessary because the mandate implicates fundamental rights to bodily integrity

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and education. Plaintiffs also raise substantive and procedural challenges to the DOH's promulgation of emergency regulation 216-RICR-20-10-7 under the Administrative Procedures Act (APA). This Court will consider each argument in turn.

### 1 The Governor's Statutory Authority to Issue the Executive Orders

Plaintiffs challenge the Governor's authority to issue the Executive Orders under Title 23, Chapter 8 and Title 30, Chapter 15 of the Rhode Island General Laws. Pls.' Mem. at 3. First, they assert that nothing in Title 23, Chapter 8 could give the Governor the power to issue an executive order mandating mask wearing. *Id.* at 4-5. Plaintiffs also challenge the Governor's authority to issue the Orders under G.L. 1956 § 30-15-9, which they characterize as "the crux of this case[.]" Pls.' Mem. at 5. According to Plaintiffs, when the General Assembly amended that statute in July 2021 by adding two provisions addressing the expiration of emergency declarations, they prohibited the Governor from issuing any further executive order or proclamation of disaster emergency in connection with COVID-19. *Id.* Per Plaintiffs, the Governor's invocation of the "Delta Variant" in Executive Order 21-86 was an ineffective attempt to evade that prohibition. *Id.* at 5-6. Plaintiffs also assert that their reading of § 30-15-9 is necessary to avoid the constitutional non-delegation issue that would result if the Governor were able to exercise "unlimited" powers by declaring every variant of COVID-19 a "new pandemic." *Id.* at 6-7.

In response, the Governor argues that the Executive Orders are legitimate exercises of his authority under state law. Governor's Mem. 14. The Governor rejects the Plaintiffs' interpretation of the recent amendments to § 30-15-9 and asserts that Title 30, Chapter 15 charges him with the \*20 primary responsibility for emergency management and delegates the expansive powers necessary to fulfill that responsibility. Governor's Mem. at 15-17. Specifically, the Governor argues that the Act

allows him to declare a state of emergency in response to an extant or imminent disaster and that the determination of what qualifies as an emergency is a political question left to the legislative and executive branches of state government. Defs.' Mem. in Opp'n 12-13. If the emergency declaration is reviewed, the Governor points to evidence that the Delta Variant is a disaster that threatens the public health. *Id.* at 15. His Excellency also argues that the masking mandate was a legitimate exercise of his emergency powers and that the delegation of the masking protocol to DOH was valid under § 30-15-9(e)(13), which allows the Governor to "[d]o all other things necessary to effectively cope with disasters in the state not inconsistent with other provisions of law[.]"<sup>5</sup> Defs.' Mem. in Opp'n 19-21.

<sup>5</sup> Executive Orders 21-86 and 21-87 also reference the Governor's powers under Title 23, Chapter 8 of the General Laws. This Chapter governs the imposition of quarantine; for example, G.L. 1956 § 23-8-18 states that "whenever the governor shall deem it advisable for the preservation of public health and the prevention of the spread of infectious diseases, he or she may, by proclamation, place under quarantine the whole state or that portion of the state that he or she may deem necessary, and he or she shall authorize and empower the state director of health to take any action and make and enforce any rules and regulations that may be deemed necessary to prevent the introduction and to restrict the spread of infectious diseases in the state." Plaintiffs challenge the applicability of this statute, noting that neither the Orders nor the DOH's emergency rule reference a proclamation of quarantine. *See* Pls.' Post-Hearing Mem. at 20. In his post-hearing brief, the Governor relies primarily on his emergency powers under § 30-15-9(e). *See* Defs.' Mem. in Opp'n at 19. This Court will focus its analysis on Title 30, Chapter 15 of the

General Laws, as that Chapter is dispositive of the issue of the Governor's statutory authority to issue the Orders.

### **a The Governor's Authority Under Title 30, Chapter 15**

Title 30, Chapter 15 of the Rhode Island General Laws is also known as the "Rhode Island Emergency Management Act." Section 30-15-1. The Emergency Management Act vests broad powers in the Governor, who "shall be responsible for carrying out the provisions of this [Act] and

21 \*21 shall be primarily responsible for emergency management in the state." Section 30-15-7. The plain text of the Act gives the Governor the express authority to "[i]ssue executive orders, proclamations, and regulations" that "have the force and effect of law." Section 30-15-7. The Act also specifically provides that "[a] state of emergency shall be declared by executive order or proclamation of the governor if he or she finds a disaster has occurred or that this occurrence, or the threat thereof, is imminent." Section 30-15-9. A "disaster" is defined as the "occurrence or imminent threat of widespread or severe damage, injury, or loss of life or property resulting from any natural or man-made cause, including but not limited to . . . [an] [e]pidemic." Section 30-15-3(2) (vi).

When a state of emergency is in effect, the Governor may exercise the sixteen additional powers that are specifically enumerated in § 30-15-9(e), "limited in scope and duration as is reasonably necessary for emergency response." These powers include the ability to "[u]tilize all available resources of the state government as reasonably necessary to cope with the disaster emergency and of each political subdivision of the state," to "[c]ontrol ingress and egress to and from a high risk area, the movement of persons within the area, and the occupancy of premises therein," and to "[d]o all other things necessary to effectively cope with disasters in the state not inconsistent with other provisions of law." Section 30-15-9(e)(2)(13).

From the plain text of the Emergency Management Act, it is apparent that the challenged Orders were enacted pursuant to the Governor's authority under state law to respond to an ongoing threat to public health and safety. In Executive Order 21-86, the Governor declared a state of emergency "due to the dangers to health and life posed by the Delta Variant and other emerging variants" of the SARS-CoV-2 virus. The Order begins by referencing the "dangers to health posed by the original strain of SARS-CoV-2, the virus that is responsible for COVID-19." It goes on to

22 \*22 note the increased risks of transmission and infection posed by the "Delta variant of the SARS-CoV-2," including the risk of "breakthrough infection" in those who have been fully vaccinated, the high level of community transmission of the Delta Variant in Rhode Island since August 11, 2021, and the concurrent rise in COVID-19 cases, including among children. After referencing DOH's statistical analysis that "without continued and improved mitigation measures, the Delta Variant may cause an increase in the rate of deaths by the end of September 2021," the Order logically concludes that "this increase in prevalence of the Delta Variant poses a significant and imminent risk to Rhode Islanders of increased symptomatic disease, hospitalization, and death."

While the Governor has argued that his decision to declare a state of emergency in response to those findings is a nonjusticiable political question, the Court need not go that far. A political question may exist where there is "a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion[.]" *Baker v. Carr*, 369 U.S. 186, 217 (1962); *see also City of Pawtucket v. Sundlun*, 662 A.2d 40, 58 (R.I. 1995)

(discussing "the absence of judicially discoverable and manageable standards" for claimed right to education under state constitution).

In support, the Governor cites to federal cases declining to review a President's declaration of a national emergency. *See, e.g., Center for Biological Diversity v. Trump*, 453 F.Supp.3d 11, 31-33 (D.D.C. 2020). But the National Emergency Act at issue in those cases provides "no guidance to help courts assess whether a situation is dire enough to qualify as an 'emergency.'" *Id.* at 33. By contrast, Rhode Island's Emergency Management Act contains definitions and policies that both direct the Governor and provide guideposts for potential review. *See, e.g.,* § 30-15-2 (purposes of Act include "reduc[ing] vulnerability of people and communities of this state to \*23 damage, injury, and loss of life and property resulting from natural or man-made catastrophes[.]"); § 30-15-3 (defining a "disaster"); *see also Opinion to the Governor*, 75 R.I. at 62, 63 A.2d at 729 ("To justify recourse to [emergency] power, the declaration of an emergency must rest upon findings of fact by the legislature as to the existence of unusual circumstances which, unless temporarily relieved, would endanger the public health, safety or morals.").

In any event, assuming for the moment that judicial review of the Governor's decision to declare a state of emergency is appropriate, Plaintiffs have not established a likelihood of success on the merits of this issue. The findings set forth in Executive Order 21-86 and supported by the testimony of Dr. McDonald establish the Delta variant as a "disaster" given the "occurrence or imminent threat of widespread or severe damage, injury, or loss of life or property resulting from any natural or man-made cause, including, but not limited to . . . [an] [e]pidemic." Section 30-15-3(2)(vi). Having made those findings, the Governor had the statutory power to declare a state of emergency. *See* § 30-15-9(b) ("A state of emergency shall be declared by executive order or proclamation of the governor if he or she finds a

disaster has occurred or that this occurrence, or the threat thereof, is imminent. . . . All executive orders or proclamations issued under this subsection shall indicate the nature of the disaster, the area or areas threatened, and the conditions that have brought it about or that make possible termination of the state of disaster emergency.").

Once the state of emergency was declared, the Governor also had the powers, "limited in scope and duration as is reasonably necessary for emergency response," to "[c]ontrol ingress and egress to and from a high risk area, the movement of persons within the area, and the occupancy of premises therein," and "[d]o all other things necessary to effectively cope with disasters in the state not inconsistent with other provisions of law." Section 30-15-9(e)(7)(13). To that end, Executive Order 21-87 set forth findings to support enacting a school mask mandate. The Order \*24 states that "it is critically important to protect unvaccinated students from COVID-19 and to reduce transmission of the new COVID-19 variants in the school setting and beyond[, ]" that "students benefit from in-person learning and safely returning to in-person instruction is a priority[, ]" and that "the use of masks and cloth face coverings is an important public health approach to slow the transmission of COVID-19, including the Delta and other variants[.]" The Order also notes that "in July 2021, the American Academy of Pediatrics (AAP) recommended that all children over the age of 2 wear masks regardless of vaccination status when returning to school this fall" and that "as of August 4, 2021, due to the circulating and highly contagious Delta variant, the Centers for Disease Control and Prevention (CDC) updated its guidance to recommend universal indoor masking for all students (ages 2 and older), staff, teachers, and visitors to K-12 schools, regardless of vaccination status[.]" Accordingly, just fifteen days later, Executive Order 21-87 concluded:

"LEAs<sup>6</sup> that have not adopted a universal indoor masking requirement shall be required to abide by a universal indoor masking protocol developed by the Rhode Island Department of Health (RIDOH). The RIDOH protocol shall require universal indoor masking by all students (age 2 and older), staff, teachers, and visitors to K-12 schools."

Against the Governor's findings in Executive Order 21-87, Plaintiffs have set forth evidence challenging the safety and efficacy of masks. In turn, Defendants offered Dr. McDonald's expert testimony and other evidence in support of the mask mandate.

<sup>6</sup> A LEA is a local educational agency, defined by 34 C.F.R. § 300.28 as "a public board of education or other public authority legally constituted within a State for either administrative control or direction of, or to perform a service function for, public elementary or secondary schools in a city, county, township, school district, or other political subdivision of a State, or for a combination of school districts or counties as are recognized in a State as an administrative agency for its public elementary schools or secondary schools."

25 In analyzing whether the Governor acted within his statutory authority in issuing Executive Order 21-87, which has "the force and effect of law[.]" the Court is mindful of the limits of its <sup>25</sup> review. Section 30-15-7. Through the Emergency Management Act, the General Assembly gave the Governor the power and responsibility to determine what steps are "reasonably necessary for emergency response." Section 30-15-9(e). By its nature, the Governor is acting on the cusp of an emergency using the best information available to him or her at that critical moment. The Governor has the statutory authority to make the "hard choices" about how best to deal with an ongoing emergency. *In re State Employees' Unions*, 587

A.2d at 925 ("Plainly, the legislature did not pass but the hilt of the sword to the Governor and, at the same moment, retain its blade."). As an exercise of the Governor's statutory authority to protect the public health, unless Executive Order 21-87 implicates a "suspect class or a fundamental right," this Court's review is limited to ensuring that "a rational nexus exists between the [Order] and a legitimate state interest."<sup>7</sup> *Federal Hill Capital, LLC*, 227 A.3d at 985; *see also Opinion to the Governor*, 75 R.I. at 62, 63 A.2d at 729 ("When the court finds that a statute is within a proper exercise of the police power it will not inquire into the wisdom, propriety or adequacy of such legislation, unless it plainly appears that the conclusion of the legislature in the matter was clearly not well founded, but was arbitrary and unreasonable.").

<sup>7</sup> In their post-hearing brief, Plaintiffs raised the argument that strict scrutiny of the mask mandate is appropriate because it implicates fundamental rights to bodily integrity and education. The Court finds those arguments unavailing. *See infra* Section III.D.2.c.

Demonstrating that a law bears no rational relation to a legitimate state interest is "a very high bar," and Plaintiffs have not shown a reasonable likelihood of success. *Federal Hill Capital, LLC*, 227 A.3d at 991. In addition to the findings set forth in Executive Orders 21-86 and 21-87, Defendants point to Dr. McDonald's expert opinion regarding the need for masks in school settings due to the Delta variant and the data and studies underlying his opinion. In turn, Plaintiffs' expert <sup>26</sup> witness Dr. Bostom offered a contrary opinion and cited to competing studies. But Plaintiffs' evidence and arguments, while sufficient to establish "a reasonable, good-faith policy disagreement with [the state's] approach to combating COVID-19," do not change the fact that the Governor could reasonably conclude that the school mask mandate was necessary in light of the Delta variant. *Let Them Play MN v. Walz*, 517

F.Supp.3d 870, 884-85 (D. Minn. 2021); *see also Casey v. Lamont*, 258 A.3d 647, 673 (Conn. 2021) ("It is likely that reasonable minds may differ as to when each restriction should be lifted, but . . . it is not the job of this court to second-guess those policy decisions."); *Friends of Danny DeVito v. Wolf*, 227 A.3d 872, 891 (Pa. 2020) ("[T]he policy choice in this emergency was for the Governor . . . to make and so long as the means chosen to meet the emergency are reasonably necessary for the purpose of combating the ravages of COVID-19, it is supported by the police power.").

### **b Effect of the July 2021 Amendments**

Despite the foregoing, Plaintiffs contend that the July 2021 amendments to § 30-15-9 enacted by the General Assembly operate to strip the Governor of his ability to declare states of emergency, and thus to exercise emergency powers, in connection with COVID-19. The clear and unambiguous language of those amendments precludes Plaintiffs' interpretation.

In July 2021, the General Assembly enacted § 30-15-9(g), which provides that:

"Powers conferred upon the governor pursuant to the provisions of subsection (e) of this section for disaster emergency response shall not exceed a period of one hundred eighty (180) days from the date of the emergency order or proclamation of a state of disaster emergency, unless and until the general assembly extends the one hundred eighty (180) day period by concurrent resolution."

Subsection (g) makes no mention of COVID-19 or any specific orders relating to COVID-19. By its terms, this subsection does not affect the Governor's authority and responsibility to declare a <sup>27</sup> state of disaster emergency and exercise emergency powers as necessary. The only restriction it imposes is a 180-day temporal limit on any exercise of the Governor's emergency powers under § 30-15-9(e), regardless of the

nature of the emergency and subject to the General Assembly's ability to extend the 180-day period. In the instant case, as Defendants note, subsection (g) thereby provides an expiration date for the Governor's exercise of emergency powers in connection with the August 19, 2021 emergency proclamation.

In July 2021, the General Assembly also enacted § 30-15-9(h), which carved out an limited exception to § 30-15-9(g) as to eight enumerated executive orders that "shall remain in effect and may be extended by further executive order up to, but not beyond, September 1, 2021[.]" The plain language of this amendment sets a specific end date for certain executive orders. While all the named executive orders stem from the COVID-19 state of emergency in effect from March 2020, they do not comprise an exhaustive list of all Executive Orders issued in connection with COVID-19. Moreover, as with subsection (g), nothing in the text of subsection (h) limits the Governor's authority and responsibility to act prospectively, whether in response to COVID-19 or any other form of disaster. Accordingly, there is no basis for interpreting either subsection to have any such effect. *See Coastal Resources Management Council*, 961 A.2d at 935 n.7 ("Repeals by implication are disfavored by the law."). As a result, Plaintiffs have not established a reasonable likelihood of success on the merits of their argument that the Governor lacked statutory authority to issue the Executive Orders.

### **2 Constitutional Challenges**

Plaintiffs assert that under the Rhode Island Constitution, the Governor has no general police power and may only exercise those powers either <sup>28</sup> delegated by the General Assembly or <sup>28</sup> specifically enumerated in the Constitution. Pls.' Mem. at 4. They argue that the Governor exceeded the permissible scope of the authority delegated by the Legislature and that without their interpretation of the July 2021 amendments to § 30-15-9 that statute is an unconstitutional



delegation of legislative power. *Id.* at 5-7. In their post-hearing brief, Plaintiffs also argue for strict scrutiny of the school mask mandate because it implicates fundamental rights to bodily integrity and education. Pls.' Post-Hearing Mem. at 13-15. In response, the Governor argues that the challenged Executive Orders were valid exercises of his constitutional authority to faithfully execute state law. Governor's Mem. at 14-15. Defendants also note that Plaintiffs did not raise their fundamental rights arguments in their Complaint. Defs.' Mem. in Opp'n 45.

### a The Governor's Authority

Article IX of the Rhode Island Constitution provides that "[t]he chief executive power of this state shall be vested in a governor" who "shall take care that the laws be faithfully executed." R.I. Const. art. IX, §§ 1, 2. In support of his authority to issue the Executive Orders, the Governor relies on his statutory powers under the Emergency Management Act. As this Court has explained, the Governor's Executive Orders were within the scope of the statutory authority delegated by the General Assembly through the Emergency Management Act. As a result, the Orders were also within the scope of the Governor's constitutional authority to carry the Act into effect.

### b Plaintiffs' Nondelegation Challenge

The nondelegation doctrine prohibits unconditional delegations of legislative authority to the executive branch. *See Almond*, 756 A.2d at 191-92. In reviewing Plaintiffs' nondelegation challenge, this Court must examine "'the specificity of the functions delegated, the standards \*<sup>29</sup> accompanying the delegation, and the safeguards against administrative abuse[.]'" *Id.* at 192 (quoting *Milardo*, 434 A.2d at 271). "[t]he delegation of legislative power will be upheld if the statute 'declares a legislative purpose, establishes a primary standard for carrying out the use, or lays out an intelligent principle to which an administrative officer or body must conform.'" *Bourque v. Dettore*, 589 A.2d 815, 818 (R.I. 1991)

(emphasis added) (quoting *Davis v. Wood*, 427 A.2d 332, 336 (R.I. 1981)). Conducting this inquiry requires the Court to "read the act as a whole; the provision[s] in question should not be isolated, but must be construed with reference to the entire act." *Davis*, 427 A.2d at 336. The Supreme Court "has consistently held that the stated purposes of a legislative enactment are relevant to the issue of whether the delegation was adequately cloaked with standards." *J.M. Mills, Inc. v. Murphy*, 116 R.I. 54, 63, 352 A.2d 661, 666 (1976).

While the emergency powers vested in the Governor under G.L. § 30-15-9(e) are broad, their expansive scope is consonant with the vital purposes of the Emergency Management Act. *See* § 30-15-19 ("This chapter shall be construed liberally, but those charged with the exercise or enforcement of its great powers are directed to act with restraint and moderation and with strict regard to the rights of the people."). The enumerated purposes of the Act are, *inter alia*, to "reduce vulnerability of people and communities of this state to damage, injury, and loss of life and property resulting from natural or man-made catastrophes," to "clarify and strengthen the roles of the governor, state agencies, and local governments in prevention of, preparation for, and response to and recovery from disasters," and to "provide the state with the ability to respond rapidly and effectively to potential or actual public health emergencies or disaster emergencies." Section 30-15-2(1)(4)(10). The threshold limitation on the exercise of the emergency powers of § 30-15-9(e) is the existence of a state of emergency, which "shall be declared by . . . the governor if he or she \*<sup>30</sup> finds a disaster has occurred or that this occurrence, or the threat thereof, is imminent." Section 30-15-9(b). A "disaster" is defined as the "occurrence or imminent threat of widespread or severe damage, injury, or loss of life or property resulting from

any natural or man-made cause, including, but not limited to" fifteen enumerated types of calamity. Section 30-15-3.

Taken together, the above provisions set forth an intelligible principle that directs when and how the emergency powers may be exercised. Briefly, the Act assigns to the Governor both the responsibility "for meeting the dangers to the state and people presented by disasters" and the ability to fulfill that weighty mandate. Section 30-15-9(a). Once an emergency is declared, the powers enumerated under § 30-15-9(e) are "limited in scope and duration as is reasonably necessary for emergency response[.]" In addition to this overarching limitation, each of the provisions listed under § 30-15-9(e) is limited either by the scope of the specific power granted, the addition of a purpose or standard for guiding the exercise of the power, or both. For example, under the "catch-all" provision of § 30-15-9(13), the Governor may also "[d]o all other things necessary to effectively cope with disasters in the state not inconsistent with other provisions of law."

Although the "reasonably necessary" standard used in § 30-15-9(e) does not provide the Governor with fine-grained guidance, the Supreme Court has recognized that "the adequacy of legislative standards may best be measured against their intended purposes." *J.M. Mills, Inc.*, 116 R.I. at 62, 352 A.2d at 665. A key purpose of the Emergency Management Act is to "provide the state with the ability to respond rapidly and effectively" to disasters of every stripe. Section 30-15-2(10). The open-ended definition of a disaster indicates the General Assembly's recognition that it would be impossible to foresee every conceivable hazard that the state might face. For that reason, the Governor "must have flexibility to effectuate the purposes of legislation"

31 by mounting \*31 an adequate response to the specific disaster at hand. *Town of East Greenwich v. O'Neil*, 617 A.2d 104, 113 (R.I. 1992). Similarly, because a rapid response is often crucial in a crisis, preventing the delegation of emergency

powers to the Governor would "unduly hamper the Legislature's exercise of its constitutionally vested powers." *Id.* at 112; *see also Almond*, 756 A.2d at 192 ("Moreover, the nature and scope of the duties of the Lottery Commission are such as to demand that the Legislature be permitted to delegate authority to operate such a massive enterprise.").

The Emergency Management Act also contains temporal limitations that serve as "safeguards against administrative abuse[.]" *Milardo*, 434 A.2d at 271. A state of emergency "shall continue until the governor finds that the threat or danger has passed or the disaster has been dealt with to the extent that emergency conditions no longer exist," but must be renewed by the Governor every thirty days in order to remain in effect. Section 30-15-9(b). As previously discussed, § 30-15-9(g) now limits the exercise of the emergency powers in § 30-15-9(e) to a period "of one hundred eighty (180) days from the date of the emergency order or proclamation of a state of disaster emergency, unless and until the general assembly extends the one hundred eighty (180) day period by concurrent resolution." The General Assembly also retains legislative oversight of the Governor's emergency powers, as "by concurrent resolution" it "may terminate a state of disaster emergency at any time." Section 30-15-9(b).

While our Supreme Court has not had occasion to apply the nondelegation doctrine to the Emergency Management Act, high courts of other states have considered and rejected nondelegation challenges to emergency statutes in the context of COVID-19. For example, the Supreme Court of Connecticut upheld a broad grant of emergency powers to that state's governor because "the General Assembly was as precise as it could be in defining the contours of the governor's authority given that there are myriad serious disasters that could arise and the actions \*32 the governor would be required to take could vary significantly from one serious disaster to another." *Casey*, 258 A.3d at 667. The Supreme Court of Kentucky approved the "necessarily broad and result-oriented"

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emergency powers

standards of Kentucky's emergency statute "[g]iven the wide variance of occurrences that can constitute an emergency, disaster or catastrophe[.]" *Beshear v. Acree*, 615 S.W.3d 780, 811 (Ky. 2020).

Conversely, the Supreme Court of Michigan held in a divided opinion that that state's Emergency Powers of the Governor Act was an unconstitutional delegation of legislative powers. *In re Certified Questions From United States District Court, Western District of Michigan, Southern Division*, 958 N.W.2d 1, 24 (Mich. 2020). Applying a test that balanced the subject matter and duration of the delegated powers against the standards governing their exercise, the majority held that the delegation was unrestrained because "the standards governing the Governor's exercise of emergency powers include only the words 'reasonable' and 'necessary.'" *Id.* at 22. The majority's analysis was challenged in a concurrence and dissent by the Chief Justice, who contended that the majority failed to recognize that the challenged statute did "not use 'reasonable' or 'necessary' in a vacuum[,]" but in connection with further limitations on the scope and intended purposes of the governor's emergency powers. *Id.* at 28 (McCormack, C.J., concurring and dissenting) ("The particular standards in the [Act] are as reasonably precise as the statute's subject matter permits."). *Id.* at 53.

The Chief Justice's approach is better aligned with Rhode Island Supreme Court precedent on the nondelegation doctrine, which indicates that "the stated purposes of a legislative enactment are relevant to the issue of whether the delegation was adequately cloaked with standards." *J.M. Mills, Inc.*, 116 R.I. at 63, 352 A.2d at 666; *see also Town of East Greenwich*, 617 A.2d at 112 ("As a practical matter, rigid adherence to doctrinaire notions of the nondelegation doctrine would unduly hamper the Legislature's exercise of its constitutionally vested powers."). Also relevant to whether Plaintiffs have established a likelihood of success on this issue is that they must establish the

unconstitutionality of the statute "beyond a reasonable doubt." *Federal Hill Capital, LLC*, 227 A.3d at 984. As a result, given the intelligible principles, standards, and safeguards that channel the Governor's exercise of his admittedly broad emergency powers, Plaintiffs have not established a reasonable likelihood of success on the merits of their nondelegation challenge.

### c Substantive Due Process

In their post-hearing brief, Plaintiffs argue that strict scrutiny is the proper standard of review for the Executive Orders. Pls.' Post-Hearing Mem. at 13-14. Plaintiffs' argument is based on their contention that the mask mandate implicates fundamental rights to bodily integrity and education. *Id.* at 14-15. In response, Defendants note that Plaintiffs did not allege constitutional violations in their pleadings. Defs.' Mem. in Opp'n 45. Nevertheless, the Court will touch upon Plaintiffs' arguments. *See Kaveny v. Town of Cumberland Zoning Board of Review*, 875 A.2d 1, 10 (R.I. 2005) (addressing constitutional arguments waived by appellants).

### i Bodily Integrity

By arguing that "the forcible masking of children implicates a fundamental right to bodily integrity[,]" Plaintiffs raise a substantive due process challenge to the mask mandate. Pls.' Post-Hearing Mem. at 14. The United States Supreme Court has held that the Due Process Clause of "the Fourteenth Amendment 'forbids the government to infringe [certain] 'fundamental' liberty interests at all, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest.'" *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997) (quoting

<sup>34</sup> *Reno v. Flores*, 507 U.S. 292, 302 (1993)).

While the United States Supreme Court has recognized protected liberty interests in the area of "bodily integrity," it has also "been reluctant to expand the concept of substantive due process" . . . lest the liberty protected by the Due Process Clause be subtly transformed into the policy

preferences" of the Court. *Id.* at 720 (quoting *Collins v. City of Harker Heights, Texas*, 503 U.S. 115, 125 (1992)); *see also State v. Germane*, 971 A.2d 555, 583 (R.I. 2009) ("This Court is similarly reluctant to recognize heretofore unarticulated fundamental rights.").

Accordingly, "fundamental" rights are only those "which are, objectively, 'deeply rooted in this Nation's history and tradition' . . . and 'implicit in the concept of ordered liberty,' such that 'neither liberty nor justice would exist if they were sacrificed[.]'" *Glucksberg*, 521 U.S. at 720-21 (1997) (first quoting *Moore v. City of East Cleveland, Ohio*, 431 U.S. 494, 503 (1977); then quoting *Palko v. State of Connecticut*, 302 U.S. 319, 325-26 (1937)). The United States Supreme Court has also required a "careful description" of the particular right asserted. *Id.* at 721 (quoting *Flores*, 507 U.S. at 302 (1993)); *see also Federal Hill Capital, LLC*, 227 A.3d at 988 ("We have held that the United States Supreme Court's explication of fundamental rights also applies to [the Rhode Island] Constitution."). Properly framed, Plaintiffs' claimed interest in bodily integrity is their children's right to refrain from wearing a mask.

Given the lack of proffered evidence that such a right is "objectively, 'deeply rooted in this Nation's history and tradition,'" Plaintiffs have not met the stringent standard required to establish the existence of a fundamental right. *Glucksberg*, 521 U.S. at 721 (quoting *Moore*, 431 U.S. at 503). Other courts confronted with substantive due process challenges to mask mandates have come to the same conclusion. *See, e.g., Oberheim v. Bason*, No. 4:21-CV-01566, 2021 WL 4478333, at \*7 (M.D. Pa. Sept. 30, 2021) ("[Plaintiffs'] children do not have a fundamental right \*35 to attend school without masks on."); *Klaassen v. Trustees of Indiana University*, CAUSE NO. 1:21-CV-238 DRL, 2021 WL 3073926, at \*38 (N.D. Ind. July 18, 2021) (collecting recent federal cases for proposition that "there is no fundamental constitutional right to not wear a mask.").<sup>8</sup> Nor

does the Rhode Island Constitution provide any additional protection in this regard. *See Federal Hill Capital, LLC*, 227 A.3d at 989 (R.I. 2020) ("In essence, while it remains this Court's prerogative to interpret the Equal Protection and Due Process Clauses of the Rhode Island Constitution in a manner that diverges from, and is more protective than, the Supreme Court's interpretation of the United States Constitution, we would need to be presented with a good reason to do so.").

<sup>8</sup> In cases addressing an individual's "general liberty interest in refusing medical treatment[,]" the United States Supreme Court has considered procedural due process challenges to the imposition of invasive medical interventions. *Cruzan v. Director, Missouri Department of Health*, 497 U.S. 261, 278 (1990) (artificial nutrition and hydration of comatose patient); *see also Washington v. Harper*, 494 U.S. 210, 236 (1990) (forced administration of antipsychotic drugs); *Vitek v. Jones*, 445 U.S. 480, 494 (1980) (involuntary psychiatric treatment). These cases do not indicate recognition of an overarching fundamental right to bodily integrity in the substantive due process context, which requires "carefully formulating the interest at stake." *Glucksberg*, 521 U.S. at 722 (citing *Cruzan*, 497 U.S. 261 at 279) ("For example, although *Cruzan* is often described as a 'right to die' case, . . . we were, in fact, more precise: We assumed that the Constitution granted competent persons a 'constitutionally protected right to refuse lifesaving hydration and nutrition.'"). In that regard, the Court notes that in comparison with cases such as *Cruzan* and *Harper*, the state's challenged intrusion is minimal. *See Klaassen*, 2021 WL 3073926, at \*41 ("In other contexts, the government has lawfully mandated wearing protective gear, like a mask, when it also provides benefits to the public-like

mandated bicycle helmets, hair nets, ear plugs, and any number of personal protective equipment.").

## ii Education

Plaintiffs also assert that "[a]ttending public school in Rhode Island is a fundamental right." Pls.' Post-Hearing Mem. at 15. The Rhode Island Supreme Court has explicitly stated that "the Rhode Island Constitution does not provide a fundamental right to education[.]" *Woonsocket School Committee*, 89 A.3d at 794; see also *City of Pawtucket*, 662 A.2d at 60 \*36 ("The United States Supreme Court has long held that the right to an education is a not a fundamental right afforded protection under the Federal Constitution, . . . and as discussed *supra*, education is not generally a judicially-enforceable right under article 12, section 1, of our State Constitution. . . . Therefore, the proper standard of review by this court is minimal scrutiny.") (citations omitted); *Kadrmas v. Dickinson Public Schools*, 487 U.S. 450, 458 (1988) ("Nor have we accepted the proposition that education is a 'fundamental right,' like equality of the franchise, which should trigger strict scrutiny when government interferes with an individual's access to it."). Obviously, the courts recognize education as an important function of the state that is key to the development of our children, but it has not been recognized as a fundamental right.

## iii Rational Basis Review

"[W]hen no fundamental right is at issue, a party seeking to establish a substantive due process violation must show that the challenged statute or action is 'clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare.'" *Woonsocket School Committee*, 89 A.3d at 794 (quoting *East Bay Community Development Corp. v. Zoning Board of Review of Town of Barrington*, 901 A.2d 1136, 1150 (R.I. 2006)).

"This is a very high bar and one that [Plaintiffs] must prove [they have] overcome beyond a reasonable doubt[.]" *Federal Hill Capital, LLC*, 227 A.3d at 991. As previously discussed, under 37 \*37 this standard of review, Plaintiffs are unable to establish a likelihood of success on the merits.<sup>9</sup> See *supra* Section III.D.1.a.

<sup>9</sup> In contesting the proper standard of review, parties have disputed the applicability of the United States Supreme Court's decision in *Jacobson v. Commonwealth of Massachusetts*, 197 U.S. 11 (1905), which applied a deferential standard of review to a mandatory vaccination law. See, e.g., *Hopkins Hawley LLC v. Cuomo*, 518 F.Supp.3d 705, 710-13 (S.D.N.Y. 2021) (discussing *Jacobson* standard and its application to COVID-19 cases). Plaintiffs' fundamental rights challenges cannot succeed under the traditional constitutional framework; accordingly, they would also not succeed under a more deferential standard of review. See *id.* at 713; *Delaney v. Baker*, 511 F.Supp.3d 55, 74 (D. Mass. 2021).

## 3 Plaintiffs' APA Challenges to Emergency Rule 216-RICR-20-10-7

Finally, Plaintiffs mount both procedural and substantive attacks on 216-RICR-20-10-7, the DOH's emergency rule mandating universal masking in schools. Procedurally, Plaintiffs challenge DOH's compliance with the publication requirements of § 42-35-2.10, the APA's emergency rule provision. Verified Am. Compl. 47. Substantively, Plaintiffs challenge DOH's finding that "an imminent peril to the public health, safety, or welfare" necessitated an emergency rule. G.L. 1956 § 42-35-2.10; Pls.' Post-Hearing Mem. 17.

Under the APA, an agency seeking to promulgate a rule or regulation must normally follow a set of specific procedures that include provision of

public notice, a public comment period, and preparation of a detailed regulatory analysis of the proposed rule. *See* §§ 42-35-2.7 to 42-35-2.9.

In certain situations, however, an agency can bypass these ordinary procedures and promulgate an emergency rule instead:

"If an agency finds that an imminent peril to the public health, safety, or welfare or the loss of federal funding for an agency program requires the immediate promulgation of an emergency rule and publishes in a record with the secretary of state and on its agency website reasons for that finding, the agency, without prior notice or hearing or on any abbreviated notice and hearing that it finds

38 \*38

practicable, may promulgate an emergency rule without complying with §§ 42-35-2.7 through 42-35-2.9." Section 42-35-2.10.

For emergency rules to take effect, they must be signed by both the head of the promulgating agency and the Governor or the Governor's designee. Section 42-35-2.10. The agency must also "file with the secretary of state a rule created under this section as soon as practicable given the nature of the emergency and publish the rule on its agency website." Section 42-35-2.10. Emergency rules promulgated under this statute "may be effective for not longer than one hundred twenty (120) days, renewable once for a period not exceeding sixty (60) days." Section 42-35-2.10.

In the instant case, the history of the challenged regulation complicates matters. The DOH promulgated 216-RICR-20-10-7 as an emergency rule on September 23, 2021. Prior to that, DOH had issued a "universal indoor masking protocol" for schools on August 20, 2021; in turn, creation of such a protocol was expressly mandated by the Governor in Executive Order 21-87. Executive Order 21-87 has been renewed twice and is currently in effect until November 13, 2021. Exec.

Orders 21-97, 21-103. By its own terms, the August 2021 protocol was to remain in effect "through September 18, 2021 unless renewed, modified, or terminated by a subsequent Executive Order or Protocol." Verified Complaint (Exhibit F). In their final arguments, the DOH represented that the August 2021 protocol had expired and that 216-RICR-20-10-7 was now the "universal indoor masking protocol" called for by Executive Order 21-87. The text of 216-RICR-20-10-7 states that, "[s]ubject to the provisions of R.I. Gen. Laws § 42-35-2.10, these regulations shall terminate 45 days from their promulgation or when Executive Order 21-87 (Requiring Masks in Schools) or its successor is terminated, whichever is later." Accordingly, the rule cannot remain in effect "longer than one hundred twenty (120) days, renewable once for a period not exceeding sixty (60) days," per § 42-35-2.10. The rule may also

39 expire before that period ends, when and if \*39 Executive Order 21-87 or its successor is terminated; if that contingency occurs before 45 days from the promulgation of the rule, the rule will remain in effect until those 45 days have passed.

#### a Procedural Requirements

To promulgate an emergency rule, an agency must "publish[] in a record with the secretary of state *and* on its agency website reasons for [its] finding" of imminent peril. Section 42-35-2.10 (emphasis added). As counsel for the Department noted at final arguments, the Secretary of State's website currently displays a "Brief statement of Reason for Finding Imminent Peril" in connection with 216-RICR-20-10-7. *Masking in Schools*, Rhode Island Department of State, <https://rules.sos.ri.gov/regulations/part/216-20-10-7> (as of Nov. 4, 2021) ("To protect students, a significant portion of whom are still ineligible for vaccination, against COVID-19 and reducing transmission of the new COVID-19 variants in the school setting and beyond."). The website also indicated that the rule was properly signed and submitted to the Secretary of State. *Id.*

But the Department has not indicated-and this Court has been unable to locate-where that statement may be found on the DOH's own website. In fact, the DOH's website also does not currently appear to display the text of the emergency rule. *See* § 42-35-2.10 (stating that agency must "publish the rule on its agency website."). Instead, under the headings of "COVID-19 Rhode Island Emergency Regulations" and "Rhode Island Department of Health Regulations," the DOH website's "Regulations" page contains links directing users to the Secretary of State's website, where the rule and the statement of reasons are available. *Regulations*, State of Rhode Island Department of Health, <https://health.ri.gov/regulations/> (last visited Nov. 4, 2021). This method does not satisfy the procedural requirements of § 42-35-2.10. *See Vapor Technology Association v. Raimondo*, No. PC-2019-10370, 2019 WL 5865900, at \*7 (R.I. Super. Nov. 05, 2019) ("Here,

40 \*40 while DOH posted the press release and link on its website, it failed to announce to the public, through posting on its website, the Statement. Accordingly, DOH failed to comply with the procedural requirements of § 45-35-2.10.").

#### **b "Imminent Peril" Requirement**

To publish an emergency rule, an agency must first find that "an imminent peril to the public health, safety, or welfare . . . requires the immediate promulgation" of the rule. Section 42-35-2.10. In attacking the DOH's determination that an imminent peril exists, Plaintiffs focus on the fact that the emergency rule was issued on September 23, 2021, 18 months after the initial emergency declaration due to COVID-19 in March 2020 and one year after Rhode Island schools opened with mandatory masking in September 2020. Pls.' Post-Hearing Mem. at 17. Plaintiffs also argue that DOH should have followed the APA's regular rule-making procedures, which include a public comment period and preparation of a regulatory analysis and speculate that the agency's failure to do so was

motivated by a desire to avoid public scrutiny. *Id.* at 18-19. Defendants respond that the DOH's determination of imminent peril is entitled to considerable deference and that the evidence supports the DOH's conclusion. Defs.' Mem. in Opp'n at 26-30, 35.

Plaintiffs' arguments regarding the DOH's purported delay in issuing the emergency rule ignore how the circumstances of the COVID-19 pandemic have changed over time. As Plaintiffs themselves point out, during the summer of 2021 the DOH initially believed a statewide school mask mandate would not be necessary for the 2021-2022 school year. Pls.' Post-Hearing Mem. 27. Dr. McDonald confirmed this in his testimony. During July and August 2021, however, the outlook changed due to the spread of the Delta 41 variant and the resulting increase in cases. As \*41 Executive Order 21-86 states, the number of COVID-19 cases per 100, 000 people over a seven-day period increased from 11.2 on July 4, 2021 to 195.6 on August 16, 2021. On August 11, 2021, Rhode Island passed the threshold for a high level of community transmission, which is defined as more than 100 cases per 100, 000 people over a seven-day period. Executive Order 21-86.

At that point, according to Dr. McDonald's testimony, there was no longer time to complete the typical rulemaking process before the beginning of the 2021-2022 school year. Based on his experience with the rulemaking process at the DOH, Dr. McDonald testified that promulgation of a non-emergency regulation could take up to 120 days. While Plaintiffs dispute that figure, once the high level of community transmission was reached on August 11, 2021, the 30-day public comment period alone would appear to have prevented the DOH from finalizing the rule before the start of the school year. Similarly, when 216-RICR-20-10-7 was promulgated on September 23, 2021, schools were already in session.



Plaintiffs' arguments that the DOH should have followed the regular rulemaking procedure due to the increased scrutiny it would have provided are also unavailing. Without denying the important benefits that a detailed public discussion can provide, the fact is that the DOH has the legal authority to promulgate an emergency rule as long as the statutory requirements of § 42-35.2.10 are met. In reviewing the emergency rule, this Court can only enforce the specific provisions of the APA, not its preference for which course an agency should have followed.

Turning to the DOH's determination of imminent peril itself, the parties dispute the level of scrutiny that the Court should apply. Defendants argue that the DOH's conclusion should be upheld so long as this Court can "find some plausible rationale" to support it. Defs.' Mem. in Opp'n at 25 (quoting *Vapor Technology Association*, 2019 WL 5865900, at \*9). Plaintiffs argue that that level of deference is inappropriate given the high stakes of the school mask mandate and <sup>42</sup> the "disgraceful ineptitude" displayed by the DOH in promulgating the rule. Pls.' Post-Hearing Mem. at 17, 24 (quoting *Park v. Rizzo Ford, Inc.*, 893 A.2d 216, 222 (R.I. 2006)).

This Court agrees with the conclusion of *Vapor Technology Association* that deference to an agency's reasonable determination of imminent peril is appropriate. In that case, the Superior Court discussed the proper level of judicial scrutiny when reviewing an emergency regulation and a finding of imminent peril and noted that "[o]n the few occasions our Supreme Court has addressed the validity of an emergency regulation, the Court has seemingly given a great deal of deference to the agency's finding." 2019 WL 5865900, at \*8. For example, in *State ex rel. Town of Middletown v. Watson*, the Supreme Court upheld a DOH emergency rule that served as a stopgap measure to ensure the proper certification of breathalyzer operators. 698 A.2d 181, 182- 83 (R.I. 1997). Noting that "the state's ability to enforce its drunk-driving laws is a matter of the

highest concern for the health, safety, and welfare of the public[,]" the Supreme Court approved the DOH's "'Statement of Need for Emergency Action,' [which] explained, 'Filing is necessary to establish approved preliminary breath testing instruments and procedures for testing breathalyzers, for reliable quantitative determinations and effective administrative practices to protect the safety and welfare of the public.'" *Id.*

In *Park*, which involved a Department of Transportation rule capping title fees at twenty dollars, the Supreme Court concluded that the regulation at issue was an emergency rule because its "cover letter made the requisite finding of imminent peril: 'The consuming public would be without a forum to redress infractions of [Chapters 31-5, 31-5.1]. The industry would be unregulated and the Department would be powerless to combat unfair business practices that occur daily in the sale, manufacture and distribution of new and used automobiles.'" 893 A.2d at 220. <sup>43</sup>

As the *Vapor Technology Association* Court noted, this deference is in line with the Supreme Court's general approach to reviewing legislative rules, which affords "'great deference to an agency's interpretation of its rules and regulations and its governing statutes, provided that the agency's construction is neither clearly erroneous nor unauthorized.'" 2019 WL 5865900, at \*8 (emphasis in original) (quoting *Endoscopy Associates, Inc. v. Rhode Island Department of Health*, 183 A.3d 528, 533 (R.I. 2018)). Eventually, the *Vapor Technology Association* Court concluded that because "the General Assembly failed to define the term 'imminent peril[,]' . . . this Court 'must defer to a reasonable construction by the [DOH, as it is] charged with [the statute's] implementation.'" *Id.* at \*9 (quoting *Labor Ready Northeast, Inc. v. McConaghy*, 849 A.2d 340, 346 (R.I. 2004)).

The statement of imminent peril for 216-RICR-20-10-7, which appears on the Secretary of State's website and within the rule itself, runs as follows: "protecting students, a significant portion of whom are still ineligible for vaccination, against COVID-19 and reducing transmission of the new COVID-19 variants in the school setting and beyond." As Plaintiffs point out, this brief rationale is more akin to the statements at issue in *Watson* and *Park* than the statement of imminent peril in *Vapor Technology Association*, which was "over eight-hundred words long" and incorporated "numerous findings and citations to the Centers for Disease Control, the Food and Drug Administration, and other studies" in support of its vaping ban. 2019 WL 5865900, at \*9.

In their post-hearing brief, Defendants attempt to buttress the statement by discussing the testimony and opinions of Dr. McDonald, multiple studies regarding the efficacy of masks, and data regarding the spread of the Delta variant in Rhode Island. Defs.' Mem. in Opp'n at 26-35. The Court agrees that this evidence provides a plausible rationale to support the DOH's finding of imminent peril. See *Vapor Technology Association*, 2019 WL 5865900, at \*9. The difficulty the <sup>44</sup> Court faces is that very little of the information available to the DOH appears in the statement of imminent peril. Under § 42-35-2.10, it is the DOH's responsibility to compile and publish the reasons for its finding. The Court is also disappointed to note that by failing to publish the statement of imminent peril on its own website, DOH has repeated the same easily avoidable procedural misstep at issue in *Vapor Technology Association*. See 2019 WL 5865900, at \*7 ("[T]he statement of Reason for Finding Imminent Peril . . . is only available on the Rhode Island Secretary of State's website.").

Ultimately, however, the Court cannot ignore that the DOH did not act in a vacuum when promulgating the rule. In Executive Orders 21-86 and 21-87, the Governor declared a state of emergency for the Delta variant, explicitly ordered

the DOH to institute a universal indoor masking protocol for schools and set forth sufficient findings to support both actions. 216-RICR-20-10-7, which differs from the original August 20, 2021 protocol by allowing several exceptions to the mask mandate, nonetheless complies with Executive Order 21-87's directive to DOH to develop a universal indoor masking protocol. The Executive Orders and their renewals have the force of law, and the specific findings they incorporate demonstrate a plausible rationale for DOH's determination of imminent peril. As a result, Plaintiffs have not demonstrated a reasonable likelihood of success on the merits of their substantive challenge to 216-RICR-20-10-7 under § 42-35.2.10.

Regarding the procedural requirements of § 42-35-2.10, this Court notes that Defendants have represented that 216-RICR-20-10-7 currently serves as the masking protocol directed by Executive Order 21-87. As a result, if the rule were to be invalidated on procedural grounds while Executive Order 21-87 remains in effect, the DOH would have the legal obligation to immediately promulgate an additional masking protocol. See *Vapor Technology Association*, 2019 WL 5865900, at \*10 <sup>45</sup> ("[T]he Court recognizes that invalidating the Emergency Regulations upon these grounds would simply result in the Defendants immediately adopting the same Emergency Regulations with the publication requirements fulfilled."). Counsel for Defendants have also indicated that the DOH may have refrained from updating its statement of imminent peril so as not to create a shifting target for this Court's review. Accordingly, in the interests of judicial efficiency and avoiding unnecessary confusion regarding the status of the mask mandate, this Court will provide Defendants with the opportunity to cure their procedural deficiencies by publishing, on both the DOH and Department of State websites, both 216-RICR-20-10-7 and an accompanying statement of imminent

peril incorporating the findings relied upon by the Governor in issuing Executive Orders 21-86 and 21-87. *See id.*

With all of that said, the Court is obviously concerned about "giving deference" to a department's determination of imminent peril during a public health crisis, particularly in regard to an emergency regulation that is likely to endure for some time and undergo public opposition. This is not the type of regulation that should omit a key statutory requirement and depend on a court to look outside the four corners of the regulation to find its justification. Only twenty-four months ago, the Court met a similar challenge in *Vapor Technology Association*. While the Department is clearly burdened with the awesome responsibility of meeting the needs of the state in a pandemic, a regulation enacted to meet a public health emergency should squarely meet the dictates of

the statute. The judiciary should not be left in the position of giving deference; the regulation should be clear.

The bottom line is that the Department failed to correct that which appears to be easily correctable even in the face of a challenge, placing the regulation itself at risk. While the rule passes muster today, the Department should tread  
46 carefully in promulgating new regulations or \*46 extending any existing regulations. This Court is particularly reluctant to provide a bottomless pit of deference in the future.

#### IV Conclusion

For the foregoing reasons, Plaintiffs' Motion for a Preliminary Injunction is denied. Counsel shall  
47 prepare the appropriate order for entry. \*47

# Attachment 19

*R.I.G.L. 42-60-5: Energy Crisis Management: Declaration of  
Energy Crisis*

# **Title 42**

## **State Affairs and Government**

### **Chapter 60**

### **Energy Crisis Management**

#### **R.I. Gen. Laws § 42-60-5**

##### **§ 42-60-5. Declaration of energy crisis.**

Whenever the governor finds that existing or impending abnormal, energy resource-related market disruptions threaten the health, safety, or welfare of the citizens of this state, he or she shall by executive order declare the existence of an energy crisis in any or all sections of the state. This declaration shall fully describe the nature of the energy crisis and shall be filed with the secretary of state and the city and town clerks in the affected areas and shall remain in effect in any or all sections of the state until it is rescinded by a subsequent executive order or by concurrent resolution of the general assembly at any time after the energy crisis declaration has been in effect for at least sixty (60) days.

History of Section.

P.L. 1980, ch. 326, § 1; P.L. 1992, ch. 484, § 1.

# Attachment 20

*R.I.G.L. 42-60-9: Energy Crisis Management: Orders, rules,  
and regulations*

# **Title 42**

## **State Affairs and Government**

### **Chapter 60**

### **Energy Crisis Management**

#### **R.I. Gen. Laws § 42-60-9**

##### **§ 42-60-9. Orders, rules, and regulations.**

(a) The governor may make, amend, and rescind any orders, rules, and regulations that he or she may deem advisable to carry out the provisions of this chapter.

(b) All orders, rules, and regulations promulgated by the governor shall become effective immediately except as provided in subsection (c).

(c) All orders by the governor to amend or suspend certain state rules and regulations in effect prior to the declaration of an energy crisis may become effective no sooner than forty-eight (48) hours after the governor has notified the joint committee on legislative services of the orders and the effective dates of these orders. The orders to amend or suspend state rules and regulations shall become effective unless the committee disapproves the orders within forty-eight (48) hours by a majority vote; provided, however, that the orders shall be effective immediately if approved by the majority of the committee. Thereafter, all of the effective orders, rules, or regulations shall have the full force and effect of law, when, in the event of issuance by the governor, a copy is filed in the office of the secretary of state. All existing provisions of any regulatory statute prescribing the procedures for the conduct of state business, rules and regulations inconsistent with the provisions of this chapter, or inconsistent with any order, rule, or regulation issued under the authority of this chapter shall be suspended during the period of time and to the extent that the conflict exists. All orders, rules, and regulations promulgated by the governor pursuant to this chapter shall terminate with the termination of the energy crisis.

(d) In order to attain uniformity so far as practicable throughout the country in measures taken to aid in energy crisis management, all action taken under this chapter and all orders, rules, and regulations made pursuant to this chapter, where not already specifically provided for, shall be taken or made with due consideration to the orders, rules, regulations, actions, recommendations, and requests of federal authorities relevant to these and, to the extent permitted by law, shall be consistent with these orders, rules, regulations, actions, recommendations, and requests.

History of Section.

P.L. 1980, ch. 326, § 1.