State of Rhode Island and Providence Plantations

DEPARTMENT OF ATTORNEY GENERAL

150 South Main Street • Providence, RI 02903
(401) 274-4400
TDD (401) 453-0410

Patrick C. Lynch, Attorney General

October 10, 2007

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

Re: Docket No. 3565

Dear Ms. Massaro,

Enclosed for filing with the Commission, please find the Division's Recommendation in connection with above-entitled matter. On September 8, 2006, National Grid filed a Motion for Approval of Settlement Agreement along with a Settlement Agreement jointly executed by National Grid and the Rhode Island Resource Recovery Corporation ("RIRRC"). On November 22, 2006, RIRRC and National Grid filed a Joint Statement in Support of the Settlement Agreement.

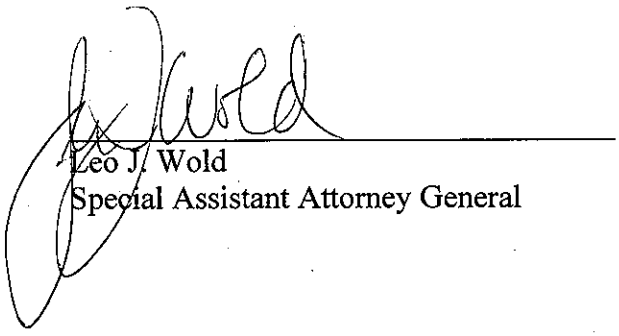
On September 27, 2007, the Commission held an open meeting for the purpose of discussing Docket No. 3565, among other dockets. According to an e-mail of the same date, "the Commission reasoned it *appears* that RIRRC would be acting as a public utility," (emphasis added), and therefore, rejected the settlement *sua sponte*. In arriving at its preliminary assessment of the settlement, the Commission, unfortunately, did not have the benefit of the Division's Recommendation or the responsive briefs of RIRRC or National Grid, respectively. Before proceeding to oral argument, it might be prudent (and by this letter, the Division formally requests) that the Commission reconsider its initial impression of the settlement with the benefit of full briefing and oral argument of the parties.[1] If the Commission believes that the Division's Recommendation possesses merit with respect to the "RIRRC – public utility" issue, then the Commission can conclude Docket No. 3565 simply by granting National Grid's Motion for Approval of

[1] Although the Commission has "unsuspended" its September 20, 2007 Procedural Schedule for the purpose of receiving oral argument and responsive briefs, the Commission must provide assurance to the parties that its final decision will include a reconsideration of the "rejected" settlement. Without such assurance, it is hard to conceive how the Commission can address the merits of RIRRC's petition fairly and impartially. The issue that the Commission addressed at the September 27, 2007 open meeting is one of two principal issues that the Commission must adjudicate in any decision on the merits of RIRRC's petition.

Settlement Agreement, which technically remains pending. Alternatively, if the Commission decides that its initial impression of the settlement still possesses merit, then the Commission can so inform the parties through a written order adjudicating the merits of all of the issues raised by RIRRC's petition, as amended.

Thank you for your attention to this matter.

Respectfully submitted,
Division of Public Utilities and Carriers



Leo J. Wold
Special Assistant Attorney General

Service List

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS
PUBLIC UTILITIES COMMISSION

IN RE: RHODE ISLAND RESOURCE RECOVERY CORPORATION PETITION FOR DECLARATORY JUDGMENT	)))	**DOCKET NO. 3565**

RECOMMENDATON OF THE DIVISION OF PUBLIC UTILITIES AND CARRIERS TO THE PUBLIC UTILITIES COMMISSION

Leo J. Wold
Special Assistant Attorney General
150 South Main Street
Providence, Rhode Island

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I. RIRR's Request for Relief and the Issues Presented

Rhode Island Resource Recovery Corporation ("RIRR") filed a declaratory judgment petition with the Public Utilities Commission ("Commission") pursuant to Rule 1.10(c) and G.L. § 42-35-8. As filed, RIRR "seeks a declaration pursuant to G.L. §§ 39-1-2 and 39-1-2(20)(ii), that connection to the Project for the purposes of producing and delivering electricity to end-users within the Industrial Park in accord with the Agreement, as approved and incorporated into the licensure of the Project, is exempted from the definition of 'Public Utility', 'Electric Distribution' and/or 'Non-Regulated Power Producer', thus, enabling the consumption of said electricity without the requirement that the Corporation and/or the Industrial Park tenants pay any distribution and/or stranded cost recovery charges or any form of so-called exit or transition fees." RIRR Petition at 3.[1] Based on the parties' briefs, RIRR's petition, the parties' data responses, and the testimony adduced at hearing, the Division of Public Utilities and Carriers ("Division") could not determine how a declaration that RIRR was not an "EDC," in and of itself, would allow RIRR to avoid these charges and fees.

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[1] In the first sentence of Paragraph 10(c) of an Option and Purchase and Sales Agreement entered into between RIRR and Reliant Energy Hope, L.P. ("Hope" and FPL Energy, LLC's predecessor), Hope agreed to provide the Industrial Park Tenants, "in the aggregate, with up to 12 MWs of total power supply at any time the Project is in operation." The next sentence provides that the "total power supply cost" is to be calculated pursuant to a particular formula. The third sentence of Paragraph 10(c) specifies that: "To the extent that future changes in Rhode Island law or regulation allow the Industrial Park Tenants to avoid transmission/distribution and/or stranded cost recovery charges (transition fees) and direct electrical connection of the Industrial Park Tenants to the Project [is] consistent with Hope's exemptions from Federal and State regulation, Hope will allow direct electrical connection of the Industrial Park Tenants to the Project, at the expense of the Industrial Park Tenants and in accordance with the rules and regulations of Hope, and Hope will not impose any charges for such connection" (Agreed Statement of Facts, Para. 6).

Although the fourth sentence of Paragraph 10(c) and Paragraph 6 (iii) of the petition discusses the provision of "transmission level service" by "direct electrical connection," the focus of the specific relief requested by RIRR in its Petition is limited to the first, second and third sentences of Paragraph 10(c) (11/22/2004 Transcript at 16, lines 1-20). The extent of the relief requested by RIRR in its petition, likewise, restricts the scope of the factual and legal recommendations of the Division as set forth herein.

Discussions with counsel for RIRR, during and after hearing, refocused RIRR's position into two distinct lines of contention. First, RIRR seeks a declaration that it is not a "public utility," and therefore, is not an "EDC" under Title 39. From this conclusion, RIRR seeks to avoid Commission jurisdiction, and therefore, the application of G.L. § 39-3-1. That section bars "public utilities" from distributing electricity in any city or town in which any other public utility—like Narragansett Electric Company ("Narragansett")—is already distributing electricity unless the second public utility first obtains a certificate of public convenience and necessity from the Division. The Division, however, is barred from granting any such certificate if the incumbent EDC "offers to provide distribution service to all customers . . . on comparable prices and terms . . . pursuant to § 39-1-27.4." G.L. § 39-3-1. Secondly, RIRR seeks a determination as to whether Narragansett's existing back-up/supplemental tariffs (B-32 and B-62) apply in the circumstances of this docket so that RIRR may avoid paying transmission, "stranded cost recovery charges or any form of so-called exit or transition fees."[2]

When RIRR's request for relief is examined in light of these clarifications, it can be reformulated to require the Commission to address the following two issues:

(i) Whether RIRR is a "public utility" under Title 39 if it provides electricity to end-users (who may be either tenants or property owners) over RIRR or end-user owned "Direct Connect"[3] facilities within the confines of the Industrial Park?

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[2] Narragansett's Back Up Tariffs (B-32 and B-62), by their terms, require end-users to pay distribution demand charges but not transmission charges. In discussions held between the Division and RIRR during the hearing, RIRR conceded as much (11/11/2004 Transcript at 67, lines 18-23).

[3] The term "Direct Connect" has not been well defined by RIRR in this proceeding. The Division assumes that RIRR roughly intends to define the term as the physical facilities that permit the conveyance of electricity from FPLE's plant to a parcel owner's or tenant's building(s).

(ii) Whether Narragansett's Back-Up Tariffs (B-32 and B-62) require Narragansett to provide "backup/supplemental" electric distribution service to RIRR end-users by means of a duplicate set of distribution facilities within the Industrial Park when RIRR provides electric service to the same end-users via "Direct Connect" facilities from FPL Energy, LLC ("FPLE")—the owner of a 500 MW, merchant power plant located on FPLE owned property within the Industrial Park?

In providing the Commission with the Division's recommendation regarding these issues, the Division does so, as always, with the caveat that the Rhode Island Supreme Court is the final arbiter of Rhode Island law. Martone v. Johnston School Committee, 824 A.2d 426, 431 (R.I. 2003). Furthermore, as intimated above, some of the material facts that comprise the record are unclear.

For example, it is unknown which or how many parcels will be rented or owned. It is unknown which parcels will possess a "Direct Connect" facility (11/22/2004 Transcript at 52, lines 4-10), how "Direct Connect" facilities will interconnect and interoperate with Narragansett facilities (11/22/2004 Transcript at 136-37, lines 7-10), or how "Direct Connect" facilities will traverse the Industrial Park (11/22/2004 Transcript at 51, lines 1-6). No electrical engineering design work has been undertaken with respect to the "Direct Connect," itself, or to determine the location of or the nature of the required transformer and associated hardware that must be installed to effect the proposed "Direct Connect" facilities (11/22/2004 Transcript at 136, lines 7-10). Specific tenant or owner electricity requirements also are completely unknown (11/22/2004 Transcript at 137, lines 14-20), and the record is bereft of any evidence regarding the cost of constructing, maintaining and operating "Direct Connect" facilities. Thus, whether the distribution of electricity via "Direct Connect" facilities makes economic sense for RIRR end-users is unknown at this time.

The Rhode Island Supreme Court has held that declaratory judgment actions should not be used for the determination of "abstract questions or rendering advisory opinions." Lamb v. Perry, 225 A.2d 521, 523 (R.I. 1967). "Justiciability," according to the Supreme Court, is present when "facts postulated yield to some conceivable legal hypothesis which will entitle the plaintiff to some relief against the defendants." Goodyear Loan Co. v. Little, 269 A.2d 542, 543 (R.I. 1970).

To date, no party has objected to RIRR's petition on the ground of "ripeness." Moreover, the Court appears to have approved of the Commission's use of the declaratory judgment procedure in a factual setting somewhat similar to the pending matter. City of East Providence v. Public Utilities Comm'n, 566 A.2d 1305 (R.I. 1989). Since the Division is able to glean from the record a set of facts upon which the Commission may base its decision, and has been able to formulate the issues with sufficient concreteness to enable their resolution, the Division will proceed to provide the Commission with its recommendation in this docket.

II. RIRR's Legal Status Under Title 39

A. Introduction

Narragansett contends that "under the statutory definition of 'electric distribution company,' an entity becomes an EDC in one of two ways: (i) by engaging in the distribution of electricity, or (ii) by owning, operating, or controlling distribution facilities." Narragansett Brief at 4. The Division believes that Narragansett's construction of § 39-1-2(12) and § 39-1-2(20) omits a critical third criterion, namely, that in order for an entity to be an EDC, the entity also must constitute a "public utility." This conclusion follows from the express language of both sections.

An EDC is defined as a "company engaging in the distribution of electricity or owning, operating or controlling distribution facilities and shall be a public utility pursuant to § 39-1-1(20)." G.L. § 39-1-2(12). Under § 39-1-2(20), the term "public utility" "means and includes every company that is an electric distribution company." EDCs, then, comprise a subset of entities that resides entirely within the set of entities known in Rhode Island as "public utilities." It follows that if an entity fails to satisfy an essential characteristic common to all Rhode Island "public utilities," then it cannot constitute an EDC.

To eliminate RIRR from the entire category of entities known as "public utilities," RIRR relies on two theories: (a) G.L. § 39-1-2(20)(ii) and (b) the judicially created *de minimus* exception to the Commission's jurisdiction over public utilities[4] (11/22/2004 Transcript at 20-21). As will be seen below, based on principles of statutory construction established by the Rhode Island Supreme Court in countless numbers of cases, the Division does not believe that § 39-1-2(20)(ii) provides RIRR with grounds to escape categorization as a "public utility." Nonetheless, in the circumstances of this matter, the services that RIRR proposes to deliver to its end-users cannot be characterized as delivered "to or for the public" pursuant to three other well-recognized doctrines.[5] Ultimately therefore, RIRR does not constitute a "public utility" under Title 39.

Since RIRR is not "public utility," it immediately follows that RIRR is not an EDC under Rhode Island law. Narragansett, then, cannot raise G.L. § 39-3-1 as a bar to

[4] The Division does not take RIRR's other contention of *res judicata* seriously. See RIRR Brief at 8. Narragansett was not a party in SB-98-1 and cannot be bound by that decision. E.g., Rhode Island Student Loan Authority v. NELS, Inc., 600 A.2d 717, 720 (R.I. 1991).

[5] They are: (i) the "landlord-tenant" exception to the definition of "public utility," (ii) the *de minimus* exception to the definition of "public utility," and (iii) an entity's classification as a Non-Regulated Power Producer.

RIRR's proposed venture to provide electricity via "Direct Connect" facilities within the confines of the Industrial Park.

B. G.L. § 39-1-2(20)(ii)

In construing statutes, the Rhode Island Supreme Court has held that the Court's ultimate goal is to give effect to the General Assembly's intent. Martone, 824 A.2d 426, 431 (R.I. 2003); Champlin's Realty Associates L.P. v. Tillson, 823 A.2d 1162, 1165 (R.I. 2003). In determining legislative intent, the Court has held that adjudicative bodies "must look at the language of the statute and examine its legislative history." Nugent ex rel. Manning v. La France, 164 A.2d 230, 231 (R.I. 1960); Briggs Drive, Inc. v. Moorehead, 239 A.2d 186, 190 (R.I. 1968).

To comply with the Supreme Court's directive in this regard, the Division has researched the legislative history of G.L. § 39-1-2(20). In the first material iteration reported at P.L. 1988, Ch. 421, the statute appears in the following form:

> ..."public utility" shall not include any company (a) producing or distributing steam~~,~~ or heat ~~or electricity~~ from a fossil fuel fired ~~cogenerative~~ cogeneration plant located at the University of Rhode Island in South Kingston, Rhode Island and (b) not engaged in the retail sale of electricity.

(marked changes in the original).

Then in its second iteration reported at P.L. 1991, Ch. 49, the statute was further amended as follows:

> ..."public utility" shall not include any company;
>
> (i) producing or distributing steam or heat from a fossil fuel fired cogeneration plant located at the university of Rhode Island in South Kingston, Rhode Island, and

(ii) ~~not engaging in the retail sale of electricity;~~ producing and/or distributing thermal energy and/or electricity to a state owned facility from a plant located on an adjacent site regardless of whether distribution line cross a public highway.

(marked changes in the original).

In 1993, a third iteration incorporated the 1991 amendments into the form of the statute so that it appears as follows:

..."public utility" shall not include any company;

(i) producing or distributing steam or heat from a fossil fuel fired cogeneration plant located at the University of Rhode Island in South Kingston, Rhode Island, and

(ii) producing and/or distributing thermal energy and/or electricity to a state owned facility from a plant located on an adjacent site regardless of whether distribution lines cross a public highway.

P.L. 1993, Ch. 103.

Lastly, as observed by Narragansett in footnote 4 of its brief, the statute contains one further amendment, the substitution of the word "steam" for the word "distribution." Thus, the statute in its fourth and final iteration appears as follows:

..."public utility" shall not include any company;

(i) producing or distributing steam or heat from a fossil fuel fired cogeneration plant located at the university of Rhode Island in South Kingston, Rhode Island, **and**

(ii) producing and/or distributing thermal energy and/or electricity to a state owned facility from a plant located on an adjacent site regardless of whether ~~distribution~~ steam lines cross a public highway.

P.L. 1996, Ch. 316 (marked changes in the original) (bold added).

Although it was not apparent from a review of RIRR's brief, at the November 22, 2004 hearing, it became apparent that RIRR contends that the statute creates two distinct

exemptions to the definition of "public utility." In other words, RIRR reads the word "and" (appearing above in bold-faced type) disjunctively rather than conjunctively.

> THE CHAIRMAN: So you're saying ["]and["] in the ~~agreement~~ [statute] means ["]or["], correct?
>
> MR. RUSSO: I don't think the word ["]and["] means ["]or["]. I think it's read that there are two situations that are exempted, it's the URI situation and the situation such as the Howard Industrial Park where they're transmitting from across the street and it applies here. Was the drafting as artful as it could have been? Probably not. But to construe it in a way that you have to be URI and – makes no sense, so we['']re taking the position that there were two exemptions.

(11/22/2004 Transcript at 23, lines 4-16) (brackets and marked changes added).

A review of G.L. § 39-1-2(20)'s statutory history undermines RIRR's interpretation of the section. In its first iteration (P.L. 1988, Ch. 421), the word "and" can only be read in the conjunctive sense. That is, any company that is a fossil fuel cogeneration facility located at URI "and" is also "not engaged in the retail sale of electricity" may receive exempt "public utility" status.

The word "and," in this sense, was retained in the second iteration of the statute (P.L. 1991, Ch. 49) that substituted the clause "producing and/or distributing thermal energy and/or electricity . . . public highway" for the clause "not engaged in the retail sale of electricity." At this time, the General Assembly could have amended the word "and" to the word "or" had the Legislature intended the statute to create two distinct exemptions. Since this critical change was not made, the Division feels comfortable that the word "and" connecting G.L. § 39-1-2(20)(i) & (ii) should be read in the conjunctive sense and "should not be considered the equivalent of the disjunctive "or." Members of the Jamestown School Committee v. Schmidt, 405 A.2d 16, 20 (R.I. 1979). See Earle v. Zoning Bd. of Review of the City of Warwick, 191 A.2d 161, 163 (R.I 1963) ("and" is

not the equivalent of "or" unless reasonably necessary in order to give effect to the intention of the enacting body).

RIRR, however, opines that to construe § 39-1-2(20) as one exemption "makes no sense" (11/22/2004 Transcript at 23, line 14). However, when viewed in light of the entirety of the statute's language, the generally understood definition of "cogeneration," and the history of the statute, construing § 39-1-2(20)(i) & (ii) as a single exemption is the only reasonable interpretation of the statute. See Saber v. Dan Angelone, 811 A.2d 644, 650 (R.I. 2002) (intention of Legislature is gleaned from the nature and purpose of the enactment in light of the language used).

A cogeneration facility is a "power plant which produces both steam, for heat, and electricity, which may be transmitted to a local power grid and sold." URI Cogeneration Partners, L.P. v. Bd. of Governors for Higher Education, 915 F. Supp. 1267, 1273 (D.R.I. 1996). One economic advantage of cogeneration is that "the power sales subsidize the price of steam production, lowering the cost of heat available to the plant's owner." URI Cogeneration, 915 F. Supp. at 1273. It was "[f]or this reason, URI became interested in building a cogeneration facility on its Kingston campus in the mid-eighties..." Id. URI was "simultaneously trying to replace its decaying heating plant and cut its energy costs," id., and, therefore, had entered into a contract with Kingston Power Associates, L.P. (the general partner of which was Meridian Power Corporation, a Massachusetts Corporation) to design, construct and operate the project, first as a 28-megawatt, and then as a 54-megawatt facility. Id.

The first iteration of § 39-1-2(20) exempted from the term "public utility" any company producing or distributing steam or heat from a fossil fired cogeneration plant

located at the University of Rhode Island in South Kingstown, Rhode Island as long as the plant was "not engaged in the retail sale of electricity." In other words, if the cogeneration plant were to sell electricity at retail (*e.g.*, to URI), then the company could not take advantage of the exemption as written.

The second, third and fourth iterations of § 39-1-2(20) allow the generator and URI to take advantage of the economic benefits offered by cogeneration. In these versions of the statute, the prohibition against the plant engaging in the retail sale of electricity has been stricken. The generator is permitted to sell "electricity" at retail; however, the sales are restricted to a limited class of customers—state owned facilities, adjacently located to URI. The company thereby can garner additional revenues by means of the sale of electricity, as well as heat, without the regulatory burdens associated with "public utility" status. At the same time, URI (the "state owned facility") can achieve a lower overall cost of energy by purchasing cheaper co-generated electricity, in addition to heat. See C. F. Phillips, The Regulation of Public Utilities at 452 n. 92 (2d. ed. 1988) (cogeneration uses half as much fuel to produce electricity and heat as would be needed to produce the two separately).

Contrary to RIRR's contention, then, § 39-1-2(20)(i) & (ii) can and should be read as a single exemption that effectuates the intent of the legislature as gleaned from the language, nature and object of the statute—to encourage the construction and operation of a cogeneration facility at URI. Tinney v. Tinney, 799 A.2d 235, 236 (R.I. 2002); John Marandola Plumbing & Heating Co. v. Delta Mechanical, Inc., 769 A.2d 1272, 1275 (R.I. 2001). The construction also "makes sense" in light of the history of the statute. Nugent, 164 A.2d at 231; Moorehead, 239 A.2d at 190. Finally, the

interpretation possesses the advantage of not straining the word "and" to mean "or." The word "and," therefore, can be given its "plain and ordinary" meaning as required by countless Rhode Island Supreme Court decisions. E.g., Arnold v. Rhode Island Dept of Labor and Training Bd., 822 A.2d 164, 168 (R.I. 2003); Cummings v. Shorey, 761 A.2d 680, 684 (R.I. 2000).[6]

C. Other Exceptions

Narragansett contends that an entity can become an EDC in one of two ways: (i) by engaging in the distribution of electricity, or (ii) by owning, operating, or controlling distribution facilities. Narragansett Brief at 4. As intimated above, Narragansett's construction of these statutes omits a critical third criterion, namely, that in order for an entity to be an EDC, the entity also must constitute a "public utility."

Pursuant to § 39-1-2(12), an EDC is defined as a "company engaging in the distribution of electricity or owning, operating or controlling distribution facilities and shall be a public utility pursuant to § 39-1-2(20)." Under § 39-1-2(20), the term "public utility" means and includes every company that is an electric distribution company," as well as many other types of companies (*e.g.*, certain municipal water companies, the gas and telephone company). All EDCs, then, comprise a subset of entities that reside entirely within the set of entities known in Rhode Island as "public utilities." If an entity fails to satisfy an essential characteristic common to all "public utilities," then it cannot, constitute an EDC.

[6] To the extent that RIRR conveys electricity via "Direct Connect" facilities to private investors that have purchased rather than leased Industrial Park property from RIRR, the Division agrees with Narragansett that RIRR also would not be distributing electricity to "state-owned" facilities within the meaning of § 39-1-2(20)(ii). See Narragansett Brief at 7.

In a post-hearing dialog between the Division and Narragansett, Narragansett contended that the General Assembly had stricken the word "electric" from § 39-1-2(20) in the 1996 Amendments to Title 39 and incorporated the term into its own section, which defines the term EDC, *i.e.*, § 39-1-2(12). According to Narragansett, by this amendment, the Legislature no longer intended to impose the "to or for the public" requirement contained in § 39-1-2(20) upon EDCs.

Narragansett's interpretation, however, ignores the plain language of § 39-1-2(12) that graphs the definition of "public utility" contained in § 39-1-2(20) back into § 39-1-2(12). Section 39-1-2(12) defines "EDC" as a "company engaging in the distribution of electricity or owning, operating or controlling distribution facilities and shall be a public utility pursuant to § 39-1-2(20)." To give § 39-1-2(12) the narrower meaning urged by Narragansett, would completely ignore the words "and shall be a public utility pursuant to § 39-1-2(20)" and the extensive description contained in § 39-1-2(20) that delineates the nature of entities known as "public utilities." The Rhode Island Supreme Court does not sanction ignoring clauses or entire sections of statutes as an appropriate method of statutory construction. Champlin's Realty Assoc., L.P. v. Tillson, 823 A.2d 1162, 1165 (R.I. 2003) (presumption exists that the Legislature intended to attach significant meaning to every word, sentence or provision of statute); Rhode Island Depositors Economic Protection Corp. v. Coffey and Martinelli, Ltd., 821 A.2d 222, 228 (R.I. 2002) (presumption exists that every word of statute serves a useful purpose and should be given force and effect); State v. DeMagistris, 714 A.2d 567, 573 (R.I. 1998) (no construction of statute should be adopted that would demote any significant phrase or clause to mere surplusage); Rhode Island Dept. of Mental Health, Retardation and

Hospitals v. R.B., 549 A.2d 1028, 1030 (R.I. 1988) (court must give effect to all of statute's provisions with no sentence, clause or word construed as unmeaning or surplusage).

Indeed, in Ashness v. Tomasetti, 643 A.2d 802, 809 (R.I. 1994), overruled on other grounds, Kildeer Realty v. Brewster Realty Corp., 826 A.2d 961 (R.I. 2003), the Rhode Island Supreme Court held that "[w]hen a statute adopts the provisions of another statute by specific reference, the effect is as if the referenced statute has been incorporated into the adopting statute." See also Newman v. Cambridge Mut. Fire Ins. Co., 476 A.2d 113, 117 (R.I. 1984) (state statute's reference to provisions of federal statute made latter statute's provisions applicable to the former law); Palermo v. Stockton Theaters, Inc., 195 P.2d 1, 58-60 (Cal. 1948) (first statute's specific reference to second statute incorporates the provisions of the second statute into the first statute).

Thus, a reference in the enabling act of the Blackstone Valley District Commission ("Blackstone") authorizing the agency "to collect taxes in the same manner in which taxes are collected by municipalities with no additional charges . . . other than those provided for in Title 44, chapter 9," required the agency to send notice to mortgagees as required by chapter 9 of title 44. This was true even though Blackstone's own statute was "silent" on the issue. Ashness, 643 A.2d at 811.

Analogously, in the pending matter, the reference to § 39-1-2(20) in § 39-1-2(12) requires a finding that the entire definition of "public utility" (including the words "to or for the public") that is contained in the former statute is incorporated into the latter statute. By virtue of their incorporation into § 39-1-2(12), the characteristics that define "public utilities" also define those entities known as "EDCs."

Further, it is highly unlikely that by striking the term "electric" from § 39-1-2(20), the General Assembly intended to allow EDCs to avoid the "to or for the public" requirement imposed on "public utilities." In the 1996 Amendments, the General Assembly deleted the term "electric" and established a separate definition relating to EDCs because the Legislature, at the time, was dramatically restructuring the Rhode Island electric utilities industry. "Restructuring" involved, among other things, segregating the distribution operations of vertically integrated electric companies from the companies' generation operations. See G.L. § 39-1-27 (requiring EDCs to file plan with Commission to sell generation facilities).

To accomplish this end, the General Assembly had to craft the statute in such a way as to segregate electric utilities from the other classic utilities (*e.g.*, water, telephone and natural gas). See e.g., § 39-1-27.1 (retail electric licensing commission and NPP registration), § 39-1-27.3 (EDCs required to provide retail access, standard offer and last resort service, and § 39-1-27.3.1 (option to return to standard offer). By instituting this separation, the General Assembly created the legislative framework to restructure the electric industry without impacting the statutes that were applicable to the other types of utilities. The Legislature, however, did not intend to remove the regulatory requirements that were imposed on all "public utilities" from EDCs. In fact the Legislature intended just the opposite result. By inserting the clause "and shall be a public utility pursuant to § 39-1-2(20)" in § 39-1-2(12), the General Assembly expressly mandated that EDCs were still to be deemed "public utilities."

Whether an entity is an EDC under Rhode Island law, then, requires a finding that the entity is a "public utility" as well as distributing electricity, or by owning, operating,

or controlling distribution facilities. G.L. § 39-1-2(12). Classification as a "public utility," in turn, depends upon whether the service provided can be characterized as "service to or for the public." See G.L. § 39-1-2(20) (expressly contains the "to or for the public" requirement). E.g., In Re: Narragansett Bay Commission, 808 A.2d 631, 635 (R.I. 2002) (Title 39 vests the commission with regulating the conduct of certain companies offering energy, communication and transportation services "to the public"). See e.g., Independent Energy Producers Assoc., Inc. v. State Bd. Of Equalization, 125 Cal. App. 4th 425 (Ct. of Appeal, 4th Dist. 2004) (essential feature of public use is that it is not confined to privileged individuals, but is open to the indefinite public); UGI Utilities, Inc. v. Pennsylvania Public Utility Comm'n, 684 A.2d 225 (Commonweatlth Ct. of Pa. 1996) (public character is whether or not service is available to all members of the public who may require the service). See also Phillips, supra at 85-109 (discussing "public interest" requirement in connection with public utilities).

Judicial authorities generally recognize two instances when a service is not considered as being delivered "to or for the public" for the purposes of this definition: They are: (i) when the entity delivers the service as an incident of a landlord-tenant relationship, or (ii) when the provider's customer class is *de minimus.* In addition, Title 39 excludes a special category of entities—"Non-Regulated Power Producers ("NPPs")—from "public utility" status as well. G.L. § 39-1-2(19). As will be seen below, the first exception precludes categorization of RIRR as a "public utility" in the instance where its end-customers are tenants. The second exception, as well as the NPP exclusion, requires the conclusion that RIRR is not a "public utility" when its end-users are parcel owners based on the specific factual circumstances of this matter.

Although in its petition and brief RIRR presented the envisioned implementation of "Direct Connects" in a single, generic scenario, testimony at the hearing revealed "Direct Connects" could more properly be segregated into two types: (i) "Direct Connects" that do not use RIRR's road system, that are typically owned by the end-users and that are located on parcels adjacent to the FPLE plant, and (ii) "Directs Connects" that use the Industrial Park road system, that are typically owned by RIRR, and that are located on parcels not adjacent to the FPLE facility.

In describing the first scenario, RIRR's witness, Claude Cote, explained:

> If the park were to go through per the sales analysis that we have, there would be arguably 22 separate users, some of which would be leasehold, some of which would be direct sales of parcels. It's also envisioned that a very small number of those may have electrical needs that would warrant the the capital costs of a direct connect, and therefore, those parcels co-located closest to the source of the electricity would be the ones that would have that. That is the idea that's put forth. That's part of how they're attempting to sell the park.

(11/22/2004 Transcript at 53, lines 3-14). In this scenario, Mr. Cote further testified that generally where a "Direct Connect" does not have to utilize RIRR roads (*i.e.*, on parcels adjacent to the FPLE plant), the "Direct Connect" will be constructed and owned by the tenant or owner end-user (11/22/2004 Transcript at 59, lines 20-24) (FPLE Response to Commission Data Request 1-1).

Mr. Cote described the second possible scenario as follows:

> I don't believe direct connect is any different than the other infrastructure in terms of building the road system, building the sewer pipes, building the you know, the water mains, and direct connect to the extent they have to be constructed that we as the developer of the park would through third-party contractors, obviously, be constructing those facilities, and to the extent that these facilities have to be operated and maintained through time, they [sic] would be standing contracts to do that.

(11/22/2004 Transcript at 57, lines 3-13). In this scenario, RIRR would own, operate and maintain the "Direct Connect" facility as well as other infrastructure (11/22/2004 Transcript at 58, lines 3-17 and at 60, lines 18-22).

In both scenarios, the end-user may be either a tenant or a parcel owner (11/22/2004 Transcript at 55, lines 7-12). In both scenarios, RIRR, through a lease or contractual arrangement, would purchase electricity for, and then sell electricity to, the end-users for a fixed fee that is included as part of a broader "infrastructure system" package (RIRR Supplemental Data Response to Narragansett's Data Request 1-7). The package would consist of "periodic payments to RIRR for electricity consumed, sewer usage, and water consumption, plus a stipulated sum to reimburse RIRR for infrastructure maintenance" (RIRR Supplemental Data Response to Narragansett's Data Request 1-7). The fee "would enable [RIRR] to finance construction of the necessary infrastructure for the direct connect and to pay for the electricity" consumed by the particular Industrial Park end-user (RIRR Supplemental Data Response to Narragansett's Data Request 1-7).

(i) The "Landlord-Tenant" Exception

The overwhelming weight of judicial authority supports the proposition that a real estate developer who supplies utility services to its tenants is not a "public utility." E.g., Baker v. Public Service Co. of Oklahoma, 606 P.2d 567 (Okla. 1980); Arizona Corporation Comm'n v. Nicholson, 497 P.2d 815 (Ariz. 1972); City of Sun Prairie v. Public Service Comm'n, 154 N.W.2d 360 (Wisc. 1967). Drexelbrook Assoc. v. Pennsylvania Public Utility Comm'n, 212 A.2d 237 (Pa. 1965); Public Service Comm'n

of Maryland v. Howard Research and Development Corp., 314 A.2d 682 (Md. App. Ct. 1974).

Under the rule decided in these cases, sales of electricity made by a landlord to its tenants as an incident to that relation do not render the landlord subject to regulation as a "public utility." Howard Research, 314 A.2d at 688. The doctrine generally has been stated as follows:

> [T]hose to be serviced consist only of a special class of persons —those to be selected as tenants—and not a class open to the indefinite public. Such persons clearly constitute a defined, privileged and limited group and the proposed service to them would be private in nature.

Drexelbrook, 212 A.2d at 240; Baker, 606 A.2d at 570 (quoting Drexelbrook). See Nicholson, 497 A.2d at 817 (trailer park owners who rented to mobile homes could not be classified as a public utility since the owners "only serve members of their own mobile trailer park"); Howard Research, 314 A.2d at 689 n. 6 (citing authority where it has been held that "sales of electricity made by a landlord to its tenant are private sales, nor subject to regulation"). City of Sun Prairie, 154 N.W.2d at 362 ("the word 'public' must be construed to mean more than a limited class defined by the relation of landlord and tenant").

Courts have supported this legal principle with the following additional logic. "Sales of electricity . . . are plainly incidental to the dominant relationship of landlord and tenant and cannot be said to engage the landlord in a 'utility business.'" Howard Research, 314 A.2d at 689 n. 5. The dominant landlord-tenant relationship, however, is by definition "competitive with that of other landlords" and cannot be characterized as a

monopoly service. Id. at 689. Accordingly, tenants can "escape the burden" of an unduly onerous charge by going elsewhere. Id.

Other courts have adopted the Howard Research Court's reasoning as well. In Nicholson, the Arizona Supreme Court observed that:

> Free enterprise and competition is the general rule. Governmental control and legalized monopolies are the exception...It was never contemplated that the definition of public service corporations as defined by our constitution be so elastic as to fan out and include businesses in which the public might be incidentally interested.

Nicholson, 497 P.2d at 819 (quoting General Alarm v. Underdown, 262 P.2d 671 (Ariz. 1953)). Thus, joint venturers who rented spaces to trailer park tenants and sold the same tenants water for domestic consumption were deemed to have engaged "incidental but necessary water service," which "in no way brings them under the Commission's regulation." Id.

Based upon this precedent, when RIRR leases parcels in the Industrial Park and then purchases, sells and distributes electricity to tenants over "Direct Connect" facilities, the Division does not believe RIRR can be considered as providing electric service "to or for the public." RIRR, therefore, cannot be deemed to constitute a "public utility" within the meaning of G.L. § 39-1-2(20) in this scenario.

(ii) The De Minimus Exception

When the limited customer class does not consist of tenants (*i.e.*, are property owners), courts require the delineation of the limited customer group by some other special means or relation in order for the provider to avoid characterization as a "public utility." For example, in Griffith v. New Mexico Public Service Commission, 520 P.2d 269 (N.M. 1974), the Commission had observed that the appellee, a real estate developer,

was ready to serve an indefinite portion of the public by furnishing water service to "all persons who bought lots from him." Id. at 272. "All lot owners [were] neither tenants nor employees of the appellee." Id. Since the class was ill-defined, the Supreme Court of New Mexico held that the appellee should be required to obtain a certificate of public convenience and necessity for the operation of his water system. Id. In Howard Research, the Maryland Court of Appeals distinguished a prior case in which a developer conveyed a tract of land to an individual and sought to supply water to parcel homeowners. In that case, the Court observed, "there was no landlord-tenant relation." Id. at 689. The developer conveyed the tract to a purchaser and "retained no control over it."

> [Thus], he [the developer] was not limited in his agreement to supply only a definite limited number of houses on the tract, nor was he prohibited to by that agreement from supplying other homes. He agreed to supply water to all houses to be built on the tract, and his sales were made to the general public.

Id.

In Nicholson, the Arizona Supreme Court distinguished a case where an entity not only furnished electricity to support a mine's operation but also provided electricity to residents located in the vicinity of the mine. The residential sales were not considered "incidental" to the mining business, and therefore, were not made to a restricted class of customers. Id. at 820. Alternatively, the Court explained, the mining company "had two distinct businesses, one of which was subject to regulation by reason of the commodity supplied to the public." Id. The other, which was not subject to regulation, by reason that the service was not provided to the public at large but was an "incidental" part of the company's principal business. Id. at 820.

In Cirese v. Public Service Comm'n of Missouri, 178 S.W.2d 788, 791 (Kan. City Ct. App. 1944), appellants were engaged in producing and distributing electricity for their own use as well that of their tenants and residents located within several blocks of their plant. Again, the electricity "was not produced as incidental to their operations for their own use." Id. at 791. Rather, the appellants "held themselves out as willing to sell to all comers who desired service in the immediate vicinity of their plant," and in fact "did sell to all such customers." Id.

Affirmation of these holdings can be found in City of Sun Prairie v. Public Service Comm'n. There, the Wisconsin Supreme Court approved a prior decision wherein the Court had ruled:

> tenants of a landlord are not the public; neither are a few of his neighbors, or a few isolated individuals with whom he may choose to deal, though they are part of the public. The word 'public' must be construed to mean more than a limited class defined by the relation of landlord and tenant, or *by the nearness of location, as neighbors, or more than a few, who, by reason of any peculiar relation to the owner of the plant can be served by him.*

City of Sun Prairie, 54 N.W.2d at 361 (emphasis added). Thus, even though a landlord tenant relationship does not exist, a service provider may still obtain an exemption from public utility status if the provider serves a limited class of customers that is delineated by some other special means or relation.

On two occasions, the Rhode Island Supreme Court has decided matters that follow the legal framework established by the aforementioned precedent. In City of East Providence v. Public Utilities Comm'n, 566 A.2d 1305 (R.I. 1989), Rhode Island Cogeneration Associates, Newbay Corporation and OEIG Limited Partnership (collectively referred to herein as "Newbay") filed an action with the Commission

seeking a declaration that Newbay was not a "public utility," and therefore, not a "company under the supervision of the commission" pursuant to § 39-1-30. Id. at 1307. Newbay had planned to construct, own and operate a combined-cycle cogeneration plant in East Providence that would sell approximately 72.5 megawatts of electricity to the New England Power Company and eleven member utilities of the Massachusetts Municipal Light Companies. Id. In addition, Newbay intended to "sell process steam to a manufacturing plant" by means of an underground steam pipe. Id.

The Court relied upon a number of grounds to support the holding that Newbay was not a "public utility" for the purposes of § 39-1-30 review. Of significance to the pending matter, however, was the Court's approval of the prior Commission declaratory judgment ruling that was rendered on February 3, 1989. In that matter, the Commission had held that "small customer bases such as this have invariably been deemed by the Commission as *de minimus* in scope and thereby insufficient to trigger the regulatory process." In Re: Pawtucket Power Assoc. Limited Partnership Petition for Declaratory Judgment at 3 (RIPUC, February 3, 1989).

Applying the *de minimus* doctrine to the Newbay matter, the Court observed that the "General Assembly intended the commission to supervise those electrical facilities which could impact the public." Id. Newbay had "no market share of the supply of electricity so as to require the supervision of the commission." Id. The Court's holding in City of East Providence represents approval of the principle that a "small customer base"—or, in the jargon of the aforementioned case law, a limited class of customers—enables a service provider to obtain exempt "public utility" status.

The Court had occasion to readdress the validity of the *de minimus* doctrine in Pawtucket Power Associates Limited v. City of Pawtucket, 622 A.2d 452 (R.I. 1993). In that case, appellants' cogeneration facility produced and sold steam to an adjacent manufacturing plant as well as electricity at wholesale to New England Power Company. Id. at 453. Appellant Pawtucket Power Associates ("PPA") claimed that it was exempt from City property tax pursuant to G.L. § 44-3-3(22), having purchased certain manufacturing equipment after December 31, 1974. Id. The Superior Court held that PPA was not exempt since the company satisfied the definition of "public utility." (Public utilities were not entitled to claim the G.L. § 44-3-3(22) exemption.) Id. at 456.

When the Rhode Island Supreme Court addressed the matter, the Court quoted verbatim from the Commission's February 3, 1989 declaratory judgment that provided in pertinent part as follows:

> Moreover, the Commission has historically waived jurisdiction in those instances where the necessary quantum of rate paying customers has not been realized. Specifically, in the instant set of facts, only one recipient of each type of service is involved. Small customer bases such as this have invariably been deemed by the Commission as de minimis [sic] in scope and thereby insufficient to trigger the regulatory process.

Id. at 456. Based principally on this reasoning, as well as a "deferential standard of review," the Court ruled that PPA was entitled to the tax exemption, *i.e.*, was not a "public utility." Id. at 457.

To the extent that RIRR's end-users are not tenants, the Division believes the pending matter is governed by the *de minimus* rule that the Rhode Island Supreme Court approved in City of East Providence and Pawtucket Power. There are 21 parcels available for development within the Industrial Park, consisting of 185 developable acres

(11/22/2004 Transcript at 95, lines 22-23; Agreed Statement of Facts, Para. 6). Even if all 21 parcels have access to "Direct Connect" facilities and all 21 parcels are sold by RIRR (both events, which as explained below, are highly unlikely), then the 21 end-users would still "consist only of a special class of persons . . . and not a class open to the indefinite public." Drexelbrook, 212 A.2d at 240.

All 21 end-users will be located proximate to RIRR's operations within the confines of the Industrial Park, which will not be open to the public at large and will not contain public roads (11/22/2004 Transcript at 54, lines 8-13). Further, the relationship between these end-users and RIRR will be defined in a "special" or "peculiar" manner by the "infrastructure system" package consisting of "periodic payments to RIRR for electricity consumed, sewer usage, and water consumption, plus a stipulated sum to reimburse RIRR for infrastructure maintenance" (RIRR Supplemental Data Response to Narragansett's Data Request 1-7). Like the landlord-tenant relationship, the infrastructure package between RIRR and end-users circumscribes the end-user group and prevents characterization of RIRR's services as "to or for the public." Based on the authorities cited above, the Division does not believe RIRR, in such circumstances, would constitute a "public utility." E.g., Drexelbrook, 212 A.2d at 240; City of Sun Prairie, 154 N.W.2d at 361.

The sale of all 21 parcels to investors, however, is not even a likely scenario. The record reflects that of the 21 parcels available for sale, it is most probable that only a few will end up with independent ownership and have access to "Direct Connect" facilities. Mr. Cote testified: "...it's also envisioned that a very small number of those may have electrical needs that would warrant the capital costs of a direct connect, and therefore,

those parcels co-located closest to the source of the electricity would be the ones that would have that. That is the idea that's put forth. That's part of how they're attempting to sell the park" (11/22/2004 Transcript at 53, lines 3-14).

Subsequently, the following testimony was elicited from Mr. Cote:

> Q. Is there a number of parcels that you're focusing on as parcels that would have the direct connect? Can you state a specific number?
>
> A. No. It's a function of who is coming in for sales and how many acres they want, what their usage is, but if your question is there going to be a mix of utility consumers and others who would be direct connect and either co-generate or be backup with the utility, the answer is that is the—you know, that is the belief at the moment. A number of people, their electrical needs would be such that it probably would not be cost effective to be part of that distribution network. They may wish to be on the grid for other reasons. So a mix is pretty much what is envisioned. It's not envisioned as being exclusive.

(11/22/2004 Transcript at 53-54, lines 15-23 and lines 1-7).

Later in the hearing, Mr. Cote reaffirmed this vision of the Industrial Park.

> Q. So it's fair to say in connection with the development of the industrial park that Narragansett is going to have duplicate facilities within the industrial park in order to provide backup or supplemental service to each of the parcel's owners or tenants, is that correct?
>
> A. Well, if you view it from each parcel's perspective, Narragansett in some instances may have the exclusive in that they would not be subject to this power agreement that we're discussing today. In other scenarios, if someone has this preferential power and has self-generated supplemental, there would be none, and the third scenario would be where they're provided power and when they're not peaking or this facility is not up that they would be taking from Narragansett there would obviously be Narragansett infrastructure. So those three scenarios are envisioned and that's what the utility structure would be.

(11/22/2004 Transcript at 65-66, lines17-24 and 1-12).

Based upon Mr. Cote's testimony, in the most likely scenario, only *"a very small number of [the 21 parcels] would have electrical needs that would warrant the capital costs of a direct connect," i.e.*, those parcels "co-located closest to the source of electricity..." (emphasis added). The parcels with "Direct Connect" facilities would constitute a small proportion of the overall energy supply "mix" (11/22/2004 Transcript at 53-54, lines 15-23 and lines 1-7). The mix would also include Narragansett as the exclusive distributor, as well as self-generation (11/22/2004 Transcript at 65-66, lines 17-24 and 1-12).

The Rhode Island Supreme Court and the Commission have both ruled that such "small customer bases such as this have invariably been deemed . . . as de minimus in scope and thereby insufficient to trigger the regulatory process." Pawtucket Power, 622 A.2d at 457; City of East Providence, at 1308. RIRR does not constitute a "public utility" in these circumstances.[7]

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[7]Ownership of distribution facilities by customers is not unusual in Rhode Island. In discovery responses in In Re: Complaint filed by Miles Avenue Property, Inc. Against Narragansett Electric, D-03-10, Narragansett identified three instances where the "customer owned primary and secondary cables in public ways in Rhode Island." They are: (i) "Brown University - East Side (extensive primary and secondary)," (ii) "Narragansett Bay Commission - Ernest Street (primary)," and (iii) "Rhode Island Hospital – off Eddy St. Providence (primary and secondary)" (Narragansett's Response to Hearing Officer's Data Request of April 30, 2004).

According to Narragansett, the utility "provides primary service to a connection point and the customer maintains its own underground distribution system of numerous cables within and under streets in the City of Providence." The utility contended that these arrangements do not implicate Narragansett's franchise since the customers are using connection under public streets to provide electricity purchased from or through Narragansett to other facilities owned by the same customer and are not distributing electricity to other entities. (Narragansett's Response to Hearing Officer's Data Request of June 7, 2004).

In the data response of April 30, 2004, Narragansett identified many other instances where customers owned secondary distribution facilities, and many pre-1994 installations where the customer owned the primary cable in a pole-to-pad configuration. Id.

(iii) The NPP Exception

G.L § 39-1-2(19) defines an NPP as a company "engaging in the business of producing, manufacturing, generating, buying, aggregating, marketing or brokering electricity for sale at wholesale or for retail sale to the public." The NPP definition further provides that NPPs shall not be subject to regulation "as a public utility except as specifically provide in the general laws." Thus, the Commission does not review NPPs rates pursuant to G.L. § 39-3-11. To engage in business in Rhode Island, NPPs need only file with the Division (with a copy to the Commission) a notarized registration application that includes specified information, along with an application fee $100, G.L. § 39-1-27.1(c) & (e), and comply with minimal requirements contained in the Commission's "Reliability Responsibility Regulations for NPPs."

The existence of the NPP exception in Rhode Island law further minimizes the likelihood that RIRR constitutes a *de facto* public utility where "Direct Connects" do not utilize RIRR roads and the parcel is owned by the end-user. In this scenario, the evidence reflects that end-users, most likely, would construct and own their own "Direct Connect" facilities, not RIRR (11/22/2004 Transcript at 59, lines 20-24) (FPLE Response to Commission Data Request 1-1). As RIRR's function is limited to operating as a business engaged in buying electricity for retail sale to end-users, RIRR, in these circumstances, would constitute a NPP under the specific definitional exclusion of G.L § 39-1-2(19), not a public utility.[8]

[8] There are a number of entities that provide a similar service in Rhode Island that have registered with the Division as an NPP. See e.g., Select Energy Inc., Docket 96-6(k), Constellation NewEnergy, Inc., Docket D-96-6(e) and TransCanada Power Marketing, Docket D-96-6(N1).

D. The Ramifications of Exempt "Public Utility" Status

Two consequences follow from the conclusion that RIRR is not a "public utility." First, RIRR cannot constitute an "EDC." Secondly, Narragansett may not raise § 39-3-1 as a bar to RIRR's petition because the statute simply does not apply. An examination of § 39-3-1 shows why these consequences readily follow from the aforementioned conclusion. The statute, in pertinent part, provides as follows:

> No ***public utility*** whether privately owned or a quasi public agency shall distribute electricity or furnish or sell gas in any town city in which any other public utility is at the time distributing electricity or furnishing or selling gas to the public generally, unless the ***public utility*** desiring to distribute electricity or to furnish or sell gas shall first have obtained a certificate from the division of public utilities and carriers certifying that public convenience and necessity require the same. (emphasis added).

By the express terms of § 39-3-1, the statute only applies when the competing supplier is a "public utility." As RIRR does not constitute a "public utility," RIRR is not required to obtain a certificate of public convenience and necessity from the Division of Public Utilities and Carriers as a condition to furnishing electricity to end-users within the Industrial Park. Section 39-3-1, then, the Division believes cannot constitute a bar to RIRR's proposed operations.[9]

III. The Scope of Narragansett's Back-Up Tariffs (B-32 And B-62)

A. Introduction

In its petition, RIRR seeks a declaration that were it to buy, sell and distribute electricity by means of the proposed "Direct Connect," Industrial Park tenants or parcel owners would not be required to pay transmission, stranded cost recovery charges or any

[9] Since G.L. § 39-3-1 does not apply in this matter, Narragansett's "takings" defense under the Fifth and Fourteen Amendments to the United State Constitution and Article 1, Section 16 of the Rhode Island Constitution also fails.

form of so-called exit or transition fees. Essentially, RIRR seeks a ruling that the terms of R.I.P.U.C. 1172 (B-32) and 1173 (B-62) (referred to collectively herein as the "Back-Up Tariffs") govern Industrial Park end-users of electricity when their parcel possesses access to a "Direct Connect" facility. Neither Narragansett nor RIRR addressed this issue in any detail in their respective briefs. Narragansett does contend that the "500 MW FPL merchant generating plant is not 'on-site' customer generation that would qualify Industrial Park tenants to take service under one of Narragansett's back-up service rates..." Narragansett Brief at 19. Narragansett, however, does not explain why it believes the tariffs only apply to "on-site" customer generation based on the language of the tariffs, themselves.

The Division believes that it is necessary to examine the applicable tariff language in order to determine whether RIRR is entitled to the relief that it seeks in its petition. Accordingly, the Division first summarizes the terms and function of Narragansett's Back-Up Tariffs. The Division then sets out the body of law that governs tariff interpretation. Finally, the Division applies that body of law to determine whether Narragansett's Back-Up Tariffs permit RIRR "Direct-Connect" end-users to avoid transmission, transition, DSM charges and the like.

B. Narragansett's Back-Up Tariffs (B-32 and B-62)

Narragansett's Back-Up Tariffs are virtually identical to one another in form and function. The only material difference is that the B-32 tariff applies to commercial and industrial customers with a 12-month demand of less than 3,000 kW while the B-62 tariff applies to customers with a 12-month demand of greater than 3,000 kW.

Both tariffs further consist of two service rate categories: Back-Up Retail Delivery Service ("Back-Up Service") and Supplemental Retail Delivery Service ("Supplemental Service"). Back-Up Service is defined in the tariff as service that consists of the "Company standing ready to provide retail delivery service to the Customer's load when a non-emergency generator which supplies electricity to the Customer without using Company-owned distribution facilities does not supply all of the Customer's load" (R.I.P.U.C. Nos. 1172 & 1173, Sheet 2). Supplemental Service is defined as "delivery over Company-owned distribution facilities of electricity that is utilized at the Customer's facilities" (R.I.P.U.C. Nos. 1172 & 1173, Sheet 2).

To determine how much to charge customers for Back-Up Service, Narragansett must be able to install and read meters on all Generation Units that are providing electricity to the customer instead of Narragansett. The Back-Up Tariffs, in pertinent part, provide as follows:

> *The Customer shall permit the Company to install meter(s) on the Generation Units providing electricity to the Customer*, for purposes of Billing under the terms of this rate. The meter shall be in accordance with the Company's reasonable specifications. The Customer will reimburse the Company for the installed cost of the meter and any associated equipment. *The Customer shall provide reasonable access to the Company during normal business hours to read such meter in order to bill the Customer for service under this rate.*

(R.I.P.U.C. No. 1172 & 1173, Sheet 2) (emphasis added).

By reading these meters, Narragansett can determine the customer's Back-Up Service Demand, which in over-simplified form, is the greatest 15-minute reading (or a percentage thereof in kilovolt-amperes) from the customer's generation units. The Back-Up Tariffs, in pertinent part, provide as follows:

> The Back-Up Service Demand shall be the greater of 1) the fifteen-minute reading from the *Customer's generation meter(s)* as measured in kilowatts, or 2) through the billing month of December 2005, 80% of the fifteen-minute reading from the *Customer's generation meters(s)* as measured in kilovolt amperes, and 90% thereafter as measured at the time of the Billing Demand.

(R.I.P.U.C. Nos. 1172 & 1173, Sheet 2) (emphasis added).

To determine how much to charge customers for Supplemental Service, Narragansett must also be able to install and read meter(s) at the customer's service entrance(s). By reading these meter(s), Narragansett can determine the customer's actual KWh (or a percentage of KVAh) delivered by the company, otherwise known as "Supplemental Service Demand." Again, the Back-Up Tariffs, in pertinent part, provide as follows:

> For purposes of billing KWh charges for Supplemental Retail Delivery Service, Customers will be billed on the greater of (i) the actual kWh delivered by the Company or (ii) through the billing month of December 2005, 80% of the actual kVAh delivered, and 90% thereafter, less generated kWh usage.

(R.I.P.U.C. Nos. 1172 & 1173, Sheet 3).

Customers are billed based upon Billing Demand, which is the sum of the customer's Back Up Service Demand and Supplemental Service Demand (R.I.P.U.C. Nos. 1172 & 1173, Sheet 3). Thus, when a customer generates all of its own electricity and receives Back-Up Service from Narragansett, the customer will still incur a monthly Customer Charge and a Distribution Demand Charge per KW but no other charges. That is, the Customer's Supplemental Service Demand will equal zero and the customer will just incur the charges associated with Back Up Service Demand.

When the same customer cannot generate all of its requirements, and therefore, also requires Supplemental Service, the customer's load will be billed based upon an

allocation between Back-Up and Supplemental Service. In this scenario, B-32 and B-62 customers will be billed at Back Up Service rates for that portion of their load allocated to Back-Up Service. They will also be billed at Supplemental Service Rates (which are the same as G-32 and G-62 rates) for that portion of their load allocated to Supplemental Service. As a result of receiving Supplemental Service, the customer, therefore, will incur a Transmission Demand Charge, a Transmission Adjustment Factor, a Distribution Energy Charge, a Non-bypassable Transition Charge, a C&LM Adjustment and a Customer Credit—the very charges RIRR seeks to avoid (R.I.P.U.C. No. 1172 and 1173, Cover Sheet). The receipt of Supplemental Service will also require the customer to incur charges at either Standard Offer or Last Resort Service for that portion of their bill relating to the cost of electricity (R.I.P.U.C. No. 1172 and 1173, Cover Sheet).

C. Rules for Construing Tariffs

The Rhode Island Supreme Court has held that in determining the legality of a particular tariff interpretation, the Commission is required to focus its attention upon the provisions of the tariff and the relevant statutes. Providence Gas Co. v. Burke, 380 A.2d 1334, 1338 (R.I. 1977). Other courts have taken similar approaches. See Citoli v. City of Seattle, 61 P.3d 1165, 1178 (Wash. Ct. App. 2003) (in interpreting an ambiguous tariff, court must look to public utilities statutory and regulatory scheme as a whole to ascertain intent of tariff drafter); State Utilities Comm'n v. Thrifty Call, Inc., 571 S.E.2d 622, 626 (2002) (resort to extrinsic evidence is necessary in order to interpret an ambiguous tariff).

Over time, federal and state judicial authorities have refined this general principle of interpretation further by adopting the following five rules of tariff construction. First,

the terms in a tariff must be taken in the sense that they are generally used and are accepted and the tariff must be construed in accordance with the meaning of the words used. Secondly, the tariff should be construed strictly against the drafter and any ambiguity should be decided in favor of the party to whom the tariff applies. Third, ambiguity or doubt must be reasonable and should not be the result of strained language. Fourth, tariffs should be interpreted in such a way as to avoid unfair, unusual, absurd or improbable results. Fifth, strict construction is not justified where such construction ignores permissible and reasonable construction that conforms to the intentions of the framers of the tariff, which avoids possible violations of the law, and which conforms to practices in the industry. Coca-Cola Co. v. Atchison, Topeka and Santa Fe Railway Co., 608 F.2d 213, 220-21 (5th Cir. 1979); Penn Central Co. v. General Mills, Inc., 439 F.2d 1338, 1340-41 (8th Cir. 1971); Southern Pacific Transportation Co. v. United States, 596 F.2d 461, 464 (Ct. Cl. 1979); Info Tel Communications, LLC v. Minnesota Public Utilities Comm'n, 592 N.W.2d 880, 884 (Minn. 1999). See also Scope Imports, Inc. v. Interstate Commerce Comm'n, 688 F.2d 992, 997 (5th Cir. 1982) (resolving ambiguity against the drafter is "a facile way to solve the problem of interpretation"); Western Transportation Co. v. Webster City Iron & Metal Co., 657 F.2d 116, 118 (7th Cir. 1981) (tariff should be construed to avoid absurdity and in manner that is consistent with purpose of tariff); Baltimore & Ohio Railroad Co. v. Owens-Illinois Glass Co., 133 F. Supp. 680, 703 (N.D. Ohio 1954) (language in tariff must be construed reasonably in accordance with words used and not distorted by strained construction).

D. Application of the Rules of Construction

An examination of the Back-Up Tariffs' language documents reveals the existence of a substantial ambiguity. On the one hand, the tariffs provide that the Back-Up and Supplemental Service apply to two classes of Customers. Those customers:

> (i) *who receive all or any portion of their electric supply from non-emergency generation unit(s)* with a nameplate rating greater than 30 kW ("Generation Units"), where electricity received by the Customer from the Generation Units is not being delivered over Company-owned distribution facilities pursuant to an applicable retail delivery tariff, and
>
> (ii) who expect the Company to provide retail delivery service to supply the Customer's load at the service location when the Generation Units are not supplying all of that load.

(R.I.P.U.C. No. 1172 and 1173, Sheet 1) (emphasis added).

On the other hand, customers who "install *on-site non-emergency generating units* powered by Eligible Renewable Energy Resources, as defined in 2004 R.I. Pub. Laws 205 up to an aggregate nameplate capacity of 3 MW..." are "exempt from the back up rates" (R.I.P.U.C. No. 1172 and 1173, Sheet 1) (emphasis added). Further, the tariffs require the customer to permit Narragansett to install the meters on the Generation Units, allow Narragansett reasonable access to read these meters, and specifically define this equipment as the "Customer's Generation meters" (R.I.P.U.C. Nos. 1172 & 1173, Sheet 2).

Nowhere then do the Back-Up Tariffs expressly require customers to possess "on-site" generation. Rather, the Back-Up Tariffs merely state that they apply to customers "who receive all or any portion of their electric supply from non-emergency generation unit(s)." Nonetheless, the tariffs provide an exemption from Back-Up rates for

customers' "on-site generating units with an aggregate nameplate capacity of less than 3 MW" and impose access requirements with respect to the units themselves.

Since a substantial ambiguity exists, the Division must arrive at a reasonable construction that conforms to the intentions of the framers of the tariffs, which avoids possible violations of the law, and which conforms to practices in the industry. E.g., Penn Central Co., 439 F.2d at 1340-41. To that end, the Division examines Rhode Island's public utilities statutory and regulatory scheme as a whole to ascertain intent of the tariffs' drafter. E.g., Providence Gas Co. v. Burke, 380 A.2d at 1338; Citoli, 61 P.3d at 1178.

That portion of Title 39, which requires Narragansett to provide Back-Up and Supplemental Service (G.L. § 39-2-1.4(a)), clarifies the meaning of the Back-Up Tariffs. At the outset, Subsection (a) provides that "[e]lectricity produced by *cogeneration* and *small power production* can be of benefit to the public as part of the total energy supply of the entire electric grid of the state or consumed by a cogenerator or small power production" (emphasis added).

As previously discussed, cogeneration is typically thought of as a mode of energy production where both heat and electricity are created in a single process. See 16 U.S.C. § 796(18)(A) (defining "cogeneration facility" as a facility that produces electric energy and steam for industrial commercial heating or cooling purposes). Further, as Narragansett observes in its brief at Page 10, pursuant to federal law, a "small power production facility" has power production capacity "not greater than 80 MW." 16 U.S.C. § 796(17)(A). Pursuant to Title 39 as well, "small scale" hydropower plants are those

that produce less than 100 MW. G.L. § 39-2-1.2.[10] Typically, these types of energy production have been thought of as forms of "distributed generation," which has been defined as "modular electric generation usually sited near the point of use." See A. Allen, *The Legal Impediments of Distributed Generation,* 23 Energy Law Journal 505 (2002). See also G.L. 39-2-1.4(c) (implicitly referring to cogeneration and small power production as "distributed generating facilities").

The FPLE facility cannot rationally be compared to these types of facilities. FPLE's 500 MW, natural gas fired generation facility is located on FPLE owned property (11/22/2004 Transcript 123-24, lines 23-24, 1-2), not on property owned or controlled by RIRR or its end-users. Just as importantly, a 500 MW merchant power plant is far vaster in size and scope than what is typically the norm for cogeneration and small power production facilities. Compare size of FPLE facility with URI Cogeneration, 915 F. Supp. at 1273. See also 16 U.S.C. § 796(17)(A) (defining small power production facility as not greater than 80 MW).

Various provisions of the Back-Up Tariffs, themselves, also support the framers' intent in this regard. These provisions: (i) require the customer to allow Narragansett to install meters on the Generation Units, (ii) require the customers to allow Narragansett reasonable access to read these meters and (iii) designates the equipment as "Customer's Generation meters" (R.I.P.U.C. Nos. 1172 & 1173, Sheet 2). The implication of these provisions is that the "Generation Units" must be located on premises owned or controlled by the customer so that the customer can grant Narragansett the right to access and read meters placed on the units. Only in this way would Narragansett be able to

[10] By contrast, "major energy facilities" are those that include gross capacity of 40 MW or more. G.L. § 42-98-3(d).

determine the correct amount to charge the customer for Back-Up and/or Supplemental Service.

The tariff's framers' use of the term "on-site" within an exemption to the tariffs further corroborates the Division's interpretation of the Back-Up Tariffs. Customers who install certain "on-site non-emergency generating units" are exempt from all backup rates (R.I.P.U.C. Nos. 1172 & 1173, Sheet 1). It is highly probable that the framers would not have included the express "on-site" requirement in a tariff exemption had they also not intended the same requirement to apply to the entire tariffs, themselves. See Powers v. Charron, 135 A.2d 829, 832 (R.I. 1957) (general terms in statute may be regarded as limited by subsequent more specific terms).

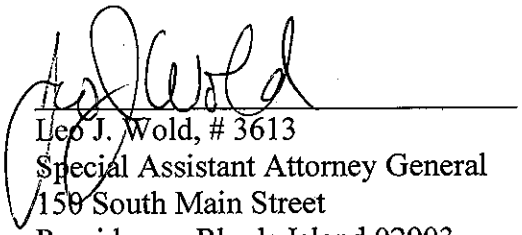
Finally, even if one were to construe the tariffs more broadly to contain a "within the fence" as opposed to an "on-site" requirement (which to repeat, the Division does not believe is a legally tenable interpretation), RIRR has made absolutely no showing that Narragansett possesses the right of reasonable access, *etc.* that the utility is entitled to under the Back-Up Tariffs vis-à-vis its typical self-generating customers. A showing in this regard is critical because the FPLE plant is operated and controlled by a completely different team of managers and employees than those who control and operate RIRR or its end-users (Letter dated June 6, 2002 from Ms. Mulhearn to Mr. Muoio; Agreed Statement of Facts, Paras. 1, 22). Without such a showing, it is impossible to determine whether Narragansett, in fact, can implement the Back-Up Tariffs in the "Direct Connect" scenarios envisioned by RIRR.

IV. Summary and Recommendation

Based on the facts presented on the record as a whole, the Division recommends that the Commission declare that RIRR is not a public utility, and therefore, is not an EDC under Title 39 of the Rhode Island General Laws. Section 39-3-1, therefore, is unavailable to Narragansett as a bar to RIRR's petition.

In order to avoid transmission, transition, demand-side management and renewable charges, *etc.*, RIRR's end-users must possess a cognizable, legal right to Back-Up Service from Narragansett. When the rules of tariff construction are applied, Narragansett's Back-Up Tariffs should be construed to contain an "on-site" generation term or condition that requires end-user ownership or control of the property upon which relevant generation unit(s) are situated. FPLE owns and controls its plant and facilities (the relevant generation unit(s) in the pending matter), not RIRR or its end-users. Accordingly, based on the facts presented on the record as a whole, the Division recommends that the Commission declare that RIRR and its end-users are not entitled to Back-Up Service from Narragansett under the existing Back-Up Tariffs. It follows that RIRR is not able to avoid the aforementioned charges contained in its petition.

DIVISION OF PUBLIC UTILITIES
AND CARRIERS
By its attorneys,



Leo J. Wold, # 3613
Special Assistant Attorney General
150 South Main Street
Providence, Rhode Island 02903
401-274-4400, ext. 2218