STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS
PUBLIC UTILITIES COMMISSION

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

REPORT AND ORDER

I. Overview/Travel

On October 22, 2003, Rhode Island Resource Recovery Corporation ("RIRRC") filed a Petition for Declaratory Judgment with the Public Utilities Commission ("Commission") seeking a determination that connection to the power plant owned by FPLE Energy, LLC ("FPLE")[1] in Johnston, Rhode Island ("Project"), "for the purpose of producing and delivering electricity to end-users within the Industrial Park in accord with [a prior] Agreement, as approved and incorporated into the licensure of the Project, is exempted from the definition of 'Public Utility', 'Electric Distribution Company', 'Distribution Facility' and/or 'Non-Regulated Power Producer'..."[2] as defined in R.I. Gen. Laws §§ 39-1-2 and 39-1-2(20)(ii). According to RIRRC, if the Commission found such an exemption, Industrial Park electrical consumers would not have to pay distribution or transition charges to Narragansett Electric Company ("NGrid").[3] By agreement of the parties, NGrid and FPLE intervened as full parties to the docket on

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[1] FPLE is the successor to Hope Energy, L.P. For purposes of the Action currently before the Commission, FPLE stepped into the shoes of Hope Energy, L.P. under the Agreement between RIRRC and Hope Energy, L.P. Therefore, where Hope Energy is discussed, such discussion also refers to FPLE.

[2] Petition for Declaratory Judgment, p. 3. The Petition for Declaratory Judgment was filed in accordance with Commission Rule of Practice and Procedure 1.10(c), promulgated to comply with R. I. Gen. Laws § 42-35-8 ("Each agency shall provide for the filing and prompt dispositions for declaratory rulings as to the applicability of any statutory provision or of any rule or order of the agency).

[3] Narragansett Electric Company is now legally known as Narragansett Electric Company d/b/a National Grid.

December 17, 2003. The Division of Public Utilities and Carriers ("Division") was also granted full party status in accordance with state law.[4]

During the first year of this case, discovery was exchanged between the parties and was provided in response to Commission data requests. RIRRC and NGrid filed Briefs and FPLE filed a letter in lieu of a Brief. An Agreed Statement of Facts was filed by RIRRC, NGrid and FPLE. An evidentiary hearing was held on November 22, 2004. Settlement discussions ensued during the next two years of this case, culminating with the filing of a Settlement Agreement between RIRRC and NGrid on September 8, 2006. The Division filed a letter indicating it had no objection to the Settlement. NGrid and RIRRC subsequently filed a Joint Statement in Support of the Settlement Agreement.

At an Open Meeting held by the Commission on September 27, 2007, after the parties waived oral argument, the Commission rejected the Settlement Agreement, reasoning that it appeared by the terms of the Settlement Agreement that RIRRC would be acting as a public utility under state law. The Division then filed its Brief regarding the underlying Declaratory Judgment Action, suggesting that perhaps the Commission would reconsider its decision regarding the Settlement Agreement. RIRRC subsequently filed a Motion for Reconsideration to which NGrid conditionally objected, stating that a hearing should be conducted before the Commission ruled on the Motion for Reconsideration. RIRRC and NGrid also filed Briefs in response to the Division's Brief. On November 8, 2007, the Commission conducted a hearing for the purposes of allowing

[4] *See* R.I. Gen. Laws §§ 39-1-3, 39-1-11, *Providence Gas Co. v. Burke*, 419 A.2d 263 (R.I. 1980).

Oral Argument on the Motion for Reconsideration and the underlying Declaratory Judgment Action.[5]

On December 20, 2007, the Commission denied the Motion for Reconsideration of its denial of the Settlement. The Commission also ruled on the underlying Declaratory Judgment Action, finding that the facts presented by RIRRC did not support its request for an exemption under R.I. Gen. Laws § 39-1-2 and in fact, the evidence supported a determination that RIRRC would be acting as an electric distribution company. As a result, the Commission never ruled on whether or not RIRRC would be an NPP.[6]

II. Applicable Law

The statutes to be reviewed to determine whether the facts support RIRRC's request are R.I. Gen. Laws §§ 39-1-2(10), 39-1-2(12), 39-1-2(19), 39-1-2(20), 39-2-1.4(a), 39-3-1, 39-26-2(4), and 39-26-2(20).

R.I. Gen. Laws § 39-1-2(10) states, "'Distribution facility' means plant or equipment used for the distribution of electricity and which is not a transmission facility". R.I. Gen. Laws § 39-1-2(12) states, "'Electric distribution company' means 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)".

R.I. Gen. Laws § 39-1-2(19) states:

> 'Nonregulated power producer' means a company engaging in the business of producing, manufacturing, generating, buying, aggregating, marketing or

[5] During oral argument, Counsel for RIRRC and NGrid confirmed that by its terms, if the Commission denies the Settlement Agreement, that is not an appealable issue based on paragraph 25 of the Settlement Agreement which states, "This Settlement Agreement shall be subject to approval by the Commission. If the Commission should withhold approval of this Settlement Agreement, or should condition its approval upon any condition or modification that is unacceptable to any of the Parties, the Settlement Agreement shall be null and void and of no effect, and no Party shall cite it or use it for any purpose whatsoever." Therefore, the Commission will not address the terms of the Settlement Agreement, nor provide further analysis of its rationale in this written order.

[6] Open Meeting Minutes, 12/21/07.

brokering electricity for sale at wholesale or for retail sale to the public; provided however, that companies which negotiate the purchase of electric generation services on behalf of customers and do not engage in the purchase and resale of electric generation services shall be excluded from this definition. A nonregulated power producer shall not be subject to regulation as a public utility except as specifically provided in the general laws.

R.I. Gen. Laws § 39-1-2(20) states in part:

'Public utility means and includes every company that is an electric distribution company ... and provided further, that the term "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 South Kingstown, 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 steam lines cross a public highway.

R.I. Gen. Laws § 39-2-1.4(a) states in part:

Electricity 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 producer. Subject to compliance with applicable rules governing such service, public utilities shall provide transmission or distribution service to enable a retail customer to transmit electrical power generated by the customer at one location to the customer's facilities at another location..."

R.I. Gen. Laws § 39-3-1 states in part:

No public utility whether privately owned or a quasi public agency shall distribute electricity or furnish or sell gas in any town or 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....The division shall not grant any such certificate to any electric distribution company if the electric distribution company that is distributing electricity in the town or city offers to provide distribution service to all customers served by any nonregulated power producer, whether affiliated or not, on comparable prices and terms approved pursuant to this title, including the transition charge pursuant to § 39-1-27.4.

R.I. Gen. Laws § 39-26-2(4) states, "'Customer-sited generation facility' means a generation unit that is interconnected on the end-use customer's side of the retail electricity meter in such a manner that it displaces all or part of the metered consumption of the end-use customer".

R.I. Gen. Laws § 39-26-2(20) states, "'Self-generator' means an end-use customer in Rhode Island that displaces all or part of its retail electricity consumption, as metered by the distribution utility to which it interconnects, through the use of a customer-sited generation facility".

Finally, a review of the Rhode Island General Laws shows that while the Rhode Island General Assembly has determined that distributed generation which is economically beneficial is to be supported as a policy, it has not defined the term.

III. Agreed Statement of Facts

The Agreed Statement of Facts states, "The parties agree to the factual accuracy of the following statements, but reserve their rights to object and leave it to the discretion of the Commission to determine relevancy. Moreover, the following statements of fact are not to be deemed conclusions of law."[7] The parties then set forth the following 26 statements:[8]

1. Petitioner, Rhode Island Resource Recovery Corporation (the "Corporation") is a corporation expressly established and organized by the Rhode Island General Assembly pursuant to R.I. Gen. Laws § 23-19-1 *et seq.*

2. The Rhode Island General Assembly, pursuant to R.I. Gen. Laws § 23-19-3 and 10, has mandated as a policy of the State of Rhode Island that the Corporation

[7] Joint Exhibit 1, p. 1.
[8] *Id.* pp. 1-5. The Agreed Statements of Fact are reproduced in the body of the Order in full without the referenced attachments. However, the referenced attachments are part of Joint Exhibit 1.

develop an industrial park (the "Industrial Park") on real property owned by the Corporation in Johnston, Rhode Island.

3. A site plan of the Industrial Park is attached hereto as Exhibit A.

4. On or about June 23, 1998, the Corporation and Reliant Energy Hope, L.P., f/k/a RI Hope Energy, L.P. (the "Generator") entered into an Option and Purchase and Sales Agreement, as amended on or about July 13, 1998, as further amended on or about July 31, 1998, September 10, 1998, September 30, 1998 and July 1, 1999 (the "Agreement"). A true and accurate copy of the Agreement and related amendments is attached hereto as Exhibit B.

5. The Agreement provided for the purchase of property within the Industrial Park for the construction of a 500 megawatt, combined cycle, gas-fired power plant (the "Project").

6. The Agreement at Section 10(c) provides as follows:

"To the extent permitted by law, Hope agrees to arrange with a third party for that third party to contract with the Industrial Park tenants located on lots 2 – 22 inclusive as more particularly described on Attachment 3 hereinafter "Industrial Park Tenants" to provide them, in the aggregate, with up to 12 MWs of total power supply at any time the Project is in operation (total power supply to mean energy, capacity, and ancillary services for generation supply only and shall not include any arrangements for distribution, transmission or other non-generation services). The total power supply cost to such tenants shall equal Hope's fuel cost (natural gas delivered at the burner tip) multiplied by the applicable heat rate plus debt service (interest and principal on the financing of the Project) allocable to such tenants on a cents per kw/h [sic] basis. 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 consistent with Hope's exemptions from the 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. Further, to the extent permitted by Rhode Island law or regulation and consistent with Hope's exemptions from Federal and State regulation, Hope will allow Industrial Park Tenants, at no cost or expense to Hope, and up to a maximum aggregate load of 40 MWs, to directly connect to Hope's switchyard, in accordance with the rules and regulations of Hope, in order to obtain transmission levels of service."

7. The Generator's obligations were subsequently assumed by FPLE Rhode Island Energy, L.P. which is currently operating the Project.

8. Right, title and interest in the real property comprising the Industrial Park, except for real property owned by the Generator, is currently held by the Corporation. It is envisioned that the Corporation may sell real property to third-party tenants of the Industrial Park.

9. The infrastructure within the Industrial Park, except for the property owned by the Generator, including roadways, conduits, pipes and other common amenities (excepting electric distribution facilities identified in ¶ 10, below) shall be furnished, installed and owned by the Corporation.

10. It is envisioned that Electric Distribution facilities will be installed in the Industrial Park and owned by Narragansett Electric. The terms and conditions of Narragansett Electric's tariffs shall determine whether Narragansett Electric and/or the Corporation are responsible for the cost of furnishing and installing electric distribution cable and related electrical equipment.

11. The Project, as represented to the Rhode Island Energy Facility Siting Board (the "EFSB") in the Generator's application (the "Application"), shall provide an energy services package to the Industrial Park which includes electric power discounts, direct electrical connection, and access to high voltage switch gear, subject to ¶ 10(c) of the Agreement, quoted in ¶ 6 above.

12. The necessary infrastructure to deliver the energy services identified in ¶ 11 above, under the Agreement would be furnished, installed and owned by the Corporation and/or FPLE.

13. A license to construct and operate the Project as a major energy facility was granted by the EFSB on May 24, 1999, pursuant to the Application referenced in ¶ 11 above.

14. The Corporation issued an advisory opinion (the "Advisory Opinion") to the EFSB pursuant to R.I. Gen. Laws § 42-98-10. The Advisory Opinion was accepted by the EFSB and is attached hereto as Exhibit C.

15. In issuing the license for the Project as a major energy facility, the EFSB held that R.I. Gen. Laws § 42-98-11(B)(3), was satisfied, in part, due to the fact that the Project would be a catalyst for other industries to locate in the Industrial Park and that the occupants of the Industrial Park would benefit from discounted power supply,

engineering assistance with heating and cooling systems for the area and the ability for direct interconnection at elevated voltage, all made possible by the Project and its contractual commitments to the Industrial Park.

16. The EFSB held that the public-private collaboration between the Project and the Corporation with regard to the Industrial Park promotes Element 2.12 of the Industrial Land Use Plans of the State Guide Plan.

17. The Narragansett Electric Company is a Rhode Island chartered Public Utility.

18. Narragansett Electric is an "electric distribution company" ("EDC") as defined in R.I Gen. Laws § 39-1-2.

19. Narragansett Electric is the only EDC providing electric distribution service to retail customers within the municipality of Johnston, Rhode Island.

20. No other public utility may distribute electricity in the municipality of Johnston without a certificate from the Rhode Island Division of Public Utilities, pursuant to R.I. Gen. Laws § 39-3-1.

21. Narragansett Electric is willing to provide electric distribution service to the tenants of the Industrial Park.

22. FPLE Rhode Island Energy, LP and FPL Energy Power Marketing, Inc. are both non-regulated power producers, registered with the Rhode Island Division of Public Utilities and Carriers pursuant to § 39-1-27.1.

23. Neither of such FPL entities nor FPL Energy, LLC is an electric distribution company under Rhode Island law.

24. The Corporation has not registered with the Division as a non-regulated power producer and is not an electric distribution company.

25. On January 27, 1999, Steven Davies, Project Manager for Hope Energy, testified before the EFSB. True and accurate excerpts of Mr. Davies' testimony from Tr. 1/26/99, pp. 65-69 are attached hereto as Exhibit D.

26. Narragansett Electric is not a party to the Agreement nor a party to or participant in EFSB proceedings.

IV. Initial Briefs

A. RIRRC Brief

On August 23, 2004, RIRRC submitted its Brief addressing the legal issues raised by its Petition for Declaratory Judgment. RIRRC maintained that "the production and delivery of the Project output reserved for the benefit for the Industrial Park should not be subject to the existing tariffs establishing charges for the distribution and transmission of electricity, as well as transition, demand-side management and conservation charges..."[9] In support of its position, RIRRC argued (1) that R.I. Gen. Laws § 39-1-2(20)(ii) provides an exemption, (2) that the EFSB proceeding and decision constitute *res judicata* or administrative finality on the issue, (3) that because of arguments one and two, there would be no violation of NGrid's franchise rights as defined by R.I. Gen. Laws § 39-3-1, (4) that R.I. Gen. Laws § 39-2-1.4(a) provides for the direct connection, (5) that the Industrial Park is self-generating power within the boundaries of the Industrial Park site and would not need to utilize NGrid's distribution system, and (6) that even if distribution and/or transmission service were required from NGrid, it should be provided without distribution charges under R.I. Gen. Laws § 39-2-1.4(a).

RIRRC argued that by reading R.I. Gen. Laws § 39-1-2(20)(ii) alone, stating that there is an exception for an entity "[p]roducing and/or distributing thermal energy and/or

[9] RIRRC Brief, p. 2.

electricity to a state owned facility from a plant located on an adjacent site regardless of whether steam lines cross a public highway," the exception applies because the Generator would be producing electricity for the benefit of the Industrial Park, which RIRRC argued was a state-owned facility adjacent to the Generator.[10] RIRRC further stated that the contract between the Generator and RIRRC was designed to advance the development of the Industrial Park through discounted electric costs from the Generator to the Industrial Park.[11] RIRRC notes that the Generator is not a public utility. RIRRC then states that in building the direct connection from the Project to the Industrial Park, RIRRC is also exempt from the definition of public utility and therefore, from the definition of electric distribution company.[12]

RIRRC stated that part of the reason the Project was licensed by the EFSB was because of the fact that the Project should be a catalyst for other companies to locate in the Industrial Park due to the possibility of a reduced cost electric supply. Therefore, RIRRC argued that because the EFSB licensed the Project after considering the benefits of the public-private collaborative, the EFSB actually made the determination that in

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[10] *Id.* at 4-6.

[11] *Id.* at 6-7, citing the following contract language in support of its argument: 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 consistent with Hope's exemptions from the 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. Further, to the extent permitted by Rhode Island law or regulation and consistent with Hope's exemptions from Federal and State regulation, Hope will allow Industrial Park Tenants, at no cost or expense to Hope, and up to a maximum aggregate load of 40 MWs, to directly connect to Hope's switchyard, in accordance with the rules and regulations of Hope, in order to obtain transmission levels of service.

[12] *Id.* at 7.

building the direct connection, the public-private collaborative would not be a public utility.[13]

Addressing the fact that the contract between RIRRC and the Generator is contingent upon future changes in law after 1998 allowing the Industrial Park Tenants to avoid transmission, distribution and/or stranded cost recovery charges, RIRRC relied on a 2002 law which refers to self-generation and co-generation, arguing that the direct connection would be akin to a customer providing generation to itself from another location.[14] RIRRC then argued that neither RIRRC nor the Industrial Park Tenants will utilize distribution and/or transmission facilities. RIRRC stated that it would "design, construct, and maintain the infrastructure necessary to deliver the electricity for the Project to the Industrial Park [and] [a]s a result of the public private collaborative, the Industrial Park is generating up to 40 MW on-site." Therefore, RIRRC argued that it should be treated as a self-generator and the Industrial Park Tenants should be exempt from distribution, transmission, and other non-bypassable charges.[15] Because of these arguments, RIRRC further argued that it would be exempt from the prohibition against operating within NGrid's franchise area.[16]

Finally, RIRRC maintained that when reading the "public utility" statutory definition together with R.I. Gen. Laws § 39-2-1.4 and the EFSB ruling that the public-private collaborative was consistent with the State Guide Plan, there can be no other logical outcome than to grant RIRRC's request for declaratory judgment in its favor.

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[13] *Id.* at 8. The "public-private collaborative" was between RIRRC and Hope Energy, L.P., now considered to be a collaborative between RIRRC and FPLE.
[14] *Id.* at 9-10.
[15] *Id.* at 10-14.
[16] *Id.* at 14-15.

RIRRC also appeared to argue that the EFSB licensure of the Hope Energy power plant provided all exemptions RIRRC would need to undertake its project.[17]

B. NGrid's Brief

On October 15, 2004, NGrid submitted its Brief addressing the legal issues raised by RIRRC's Petition for Declaratory Judgment and RIRRC's Brief. NGrid argued that allowing RIRRC's requested declaration "would be in clear violation of not only the law, but also the franchise rights of [NGrid]".[18] NGrid maintained that RIRRC's proposal to "own, provide and maintain the electrical infrastructure that would be needed to make a 'direct connection' between the FPLE power plant and the Industrial Park tenants" would render RIRRC an electric distribution company.[19] In addition, purchasing power from the FPLE plant to resell to the Industrial Park tenants would put RIRRC within the definition of an NPP according to NGrid.[20]

NGrid noted that in a data response, RIRRC had indicated that if the direct connect were constructed, "electricity from the power plant would be stepped down from 115kV in the FPLE switchyard to distribution voltage in order to distribute electricity to the Industrial Park tenants for their use."[21] Therefore, according to NGrid, such infrastructure would constitute "distribution facilities" and should be fully regulated by the Commission. Where RIRRC would be designing, constructing, and maintaining such infrastructure, it would be an electric distribution company and by definition, a public utility.[22] Furthermore, NGrid argued, RIRRC's reliance on the statutory exemption set

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[17] *Id.* at 15-17.
[18] NGrid Brief, p. 2
[19] *Id.* at 3.
[20] *Id.*
[21] *Id.* at 4.
[22] *Id.* at 4-5.

forth in R.I. Gen. Laws § 39-1-20(ii) would not apply because the exemption requires an entity to meet two criteria: "it must be producing or distributing steam or heat from a cogeneration plant at the University of Rhode Island ("URI") in South Kingstown, Rhode Island and producing and/or distributing thermal energy and/or electricity to a state-owned facility on an adjacent site."[23] According to NGrid, even if it were appropriate to read the "and" as an "or", allowing an entity to qualify for an exemption if it met the second criteria, RIRRC would not qualify because "RIRRC is not proposing to distribute electricity to a state-owned facility. The Industrial Park and its end-users do not constitute a state-owned facility. NGrid argued that the "public-private collaborative" does not turn the Industrial Park into a state-owned facility where RIRRC intends to sell the parcels to end-users and will continue to own the infrastructure such as water, sewer and electric and intends to charge the end-users to provide and maintain the infrastructure services.[24]

NGrid next argued that if RIRRC would be an electric distribution company, contrary to RIRRC's argument that it would not be infringing on NGrid's franchise rights, NGrid maintained that R.I. Gen. Laws § 39-3-1 "protects the exclusive right of public utilities to deliver electricity in their service territories by prohibiting any other public utility from such distribution without a certificate from the Division..."[25] and further, the law does not allow the Division to grant such a certificate where the incumbent electric distribution company is willing to provide service to all customers in the territory at comparable prices. According to the Agreed Statement of Facts, NGrid is

[23] *Id.* at 6 (emphasis in NGrid's Brief). NGrid noted that the Supreme Court of Rhode Island has held that where the General Assembly chooses to use the word "and", it cannot be construed as an "or." *Id.* at 6.
[24] *Id.* at 6-7.
[25] *Id.* at 8.

willing and able to provide such distribution service to the Industrial Park tenants.[26] NGrid also claimed that its franchise right is a property right which cannot be taken for public use without just compensation and maintains that denying it the right to be the exclusive distribution company at the Industrial Park would constitute such a taking.[27]

NGrid then argued that RIRRC's reliance on R.I. Gen. Laws § 39-2-1.4 as providing it with an exemption from the definition of electric distribution company or public utility is misplaced because FPLE, the generator, is neither a small power producer nor a cogenerating station for RIRRC or the Industrial Park tenants. However, even if the Commission were to determine that the statute should apply to a merchant generator, one which is capable of producing in excess of 500MW of electricity and which delivers all or virtually all of its electricity to the electric grid for resale, according to NGrid, the statutory exemption from transmission and distribution charges is inapplicable.[28] NGrid noted that the statute allows the exemption "'to enable a retail customer to transmit electric power generated by the customer at one location to the customer's facility at another location'"[29] but that under RIRRC's proposal, there would be a "commercial transaction among FPL, RIRRC and a third party for the sale of power produced by the FPL plant."[30] NGrid stated that "[t]o the extent RIRRC would be taking power from FPL, RIRRC would not be self-generating electricity."[31]

Next, NGrid argued that R.I. Gen. Laws § 39-1-27.4(a) requires all customers to pay NGrid a nonbypassable transition charge. NGrid maintained that RIRRC cannot on

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[26] *Id.* at 8-9.
[27] *Id.* at 21-23.
[28] *Id.* at 9-11.
[29] *Id.* at 11.
[30] *Id.* at 11-12.
[31] *Id.* at 12. NGrid noted in this argument that because there would be no self-generation by RIRRC, Back-Up rates would not apply. *Id.*

the one hand, take advantage of the benefits of electric utility restructuring and on the other hand, avoid the obligations that accompany those benefits. According to NGrid, there is nothing in the law that exempts RIRRC from the requirement that all customers pay transition (stranded) costs.[32] Furthermore, NGrid argued that, contrary to RIRRC's argument that the EFSB licensing of the Hope Energy generator constituted a change in law that would allow RIRRC to avoid distribution and/or transition fees, in fact, the EFSB contemplated that the energy produced by the generator would be subject to discounts, but that the electricity would still be put onto the grid and would flow through the NGrid distribution system to the end-users who would "pay all of the regulated fees for the transition charge, the stranded investment charge, the conservation, the distribution charges, everything that's in the bill."[33] From this, NGrid concluded, "it is clear, however, that the parties understood that under the law and regulations, all customers must pay electric distribution rates and that the Industrial Park tenants may not connect directly to the power plant in an effort to avoid transition charges or other delivery charges."[34] NGrid noted that although RIRRC argues that Industrial Park tenants would not require use of NGrid's distribution facilities, RIRRC also claims that Industrial Park tenants would be eligible for NGrid's back-up service, which, according to NGrid, would entail connection to NGrid's distribution system, with all of the associated charges. NGrid also maintained that under its current tariffs, the Industrial Park end-users would not qualify for back-up service.[35]

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[32] *Id.* at 13-15.
[33] *Id.* at 15-17 (citations omitted).
[34] *Id.* at 17.
[35] *Id.* at 17-19.

Finally, NGrid argued that the EFSB did not approve the direct connection as part of its licensure of the Hope Energy generating plant, and even if it did, neither the doctrines of administrative finality nor *res judicata* would apply. NGrid notes that the EFSB's order approving the licensure of the Hope Energy generating plant cites the possibility of providing discounted power to the Industrial Park tenants and also discussed the possibility that other suppliers could offer even more attractive rates. Additionally, NGrid maintained that the doctrine of administrative finality does not apply because this is not a situation where a single agency is being asked to make a determination regarding the same issue that had previously been addressed and denied. Likewise, according to NGrid, the doctrine of *res judicata* also does not apply because not all factors are present: (1) the parties are not the same; (2) the issues are not the same; and (3) the claims for relief are not the same. NGrid also notes that the Commission, not the EFSB, has jurisdiction to interpret its enabling legislation under R.I. Gen. Laws § 39-1-1 et. seq.[36]

C. FPL Energy, LLC

On October 15, 2004, FPLE submitted Correspondence in Lieu of its Initial Brief. FPLE noted that the generator is registered as an NPP with the purpose to generate and sell power as a merchant plant. FPLE indicated it was taking no position with regard to RIRRC's Petition for Declaratory Judgment. However, FPLE cautioned the Commission not to render a decision that would alter the generator's legal status as an Exempt Wholesale Generator ("EWG") under federal law. FPLE noted that "[a]s an EWG, the Facility is allowed to sell power at market-based rates and is allowed to be owned by an

[36] *Id.* at 19-21.

electric utility company as long as the EWG does not operate in its own service territory."[37]

V. Evidentiary Hearing

On November 22, 2004, following public notice, the Commission conducted a hearing at its offices at 89 Jefferson Boulevard, Warwick, Rhode Island for the purposes of receiving evidence regarding RIRRC's proposal. The following entered appearances:

FOR RIRRC:	Mark Russo, Esq.
FOR NARRAGANSETT:	Peter V. Lacouture, Esq. Laura Olton, Esq.
FOR FPLE:	Craig Eaton, Esq.
FOR THE DIVISION:	Leo Wold Special Assistant Attorney General
FOR THE COMMISSION:	Cynthia G. Wilson Senior Legal Counsel

Following opening arguments by counsel, RIRRC presented Claude Cote, Director of Regulatory Compliance, Planning and Policy for RIRRC. Mr. Cote explained that "on a direct connect what would happen is that all the hardware – such as the stepdown transformers, switch gears, lines, overhead or underground, would be physically owned and operated by [an entity] other than the [NGrid], in terms of the direct connect would be by some end user which is not the existing distribution network."[38] He testified that a final determination regarding the owner of the distribution facilities had not yet been made. However, he envisioned "an industrial condominium" as the best analogy where street plowing and repair, and the provision of water, sewer and electricity would be undertaken through contractual arrangements to operate and

[37] FPLE Correspondence In Lieu of Brief, p. 1.
[38] Tr. 11/22/04, p. 47-48.

maintain the facilities which would then be billed to the ultimate user. He stated that RIRRC had not determined whether or not all parcels would be sold or leased.[39]

With regard to the configuration of the facilities in the Industrial Park, Mr. Cote agreed that "without knowing which parcels are going to be sold or leased, it's difficult to know where the distribution facilities that are the so-called direct connect distribution facilities will be located."[40] He explained that he envisioned only the parcels closest to the FPLE plant would warrant the capital investment into the direct connect and there will be "a mix of utility consumers and others who would be direct connect and either cogenerate or be backup with the utility...[while] a number of people, their electric 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."[41]

Addressing the construction and maintenance of the facilities, Mr. Cote explained that RIRRC would most likely use contract employees to construct the direct connect. He indicated that he did not view the direct connect differently from other infrastructure such as "building the road system, building the sewer pipes, building the...water mains, and direct connect to the extent they have to be constructed....and to the extent that these facilities have to be operated and maintained through time, the[re] would be standing contracts to do that."[42] Once the direct connect was constructed, RIRRC would own it, just like sewer and water pipes which go through common areas of the Industrial Park.[43] However, he also indicated that it might be possible the tenant would own the direct connect if the tenant were on one of the few parcels adjacent to the FPLE plant and the

[39] *Id.* at 48-50.
[40] *Id.* at 51-52.
[41] *Id.* at 53-54.
[42] *Id.* at 56-57.
[43] *Id.* at 58.

tenant were not utilizing infrastructure provided by RIRRC, though he reiterated that RIRRC would be responsible for the distribution infrastructure through its roads. "To connect high voltage electricity for distribution there are certain devices required such as transformers and switch gears...they physically have to be installed to deliver the electricity."[44] He noted that RIRRC would not contract for the construction of a direct connect prior to having a consumer needing the connection.[45]

Addressing the economic transaction, Mr. Cote agreed that RIRRC will be purchasing power from FPLE and selling it to the Industrial Park Tenants. He was clear on this point where there were multiple users on the system, but indicated that if there were only one tenant directly connected to the FPLE generating plant adjacent to the FPLE generating plant, the transaction would depend on contractual agreements.[46] According to Mr. Cote, with regard to billing, metering and collection of funds where RIRRC's facilities were being utilized, he envisioned a scenario where RIRRC would charge the tenants and collect fees just like with other utilities. RIRRC would own the meters and would be responsible for maintaining and repairing the infrastructure on its side of the meters. These costs would be recovered from Industrial Park tenants as overhead costs. Any related disputes would be subject to arbitration.[47] Pricing would be

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[44] *Id.* at 60, 62. Mr. Cote indicated that in order to provide continuous power, end-users would have to contract with NGrid for some type of service which NGrid would provide through the construction of "similar structures and infrastructure to it as though it were delivering power in the first place. He explained that a customer could choose to take power solely from NGrid and not contract with RIRRC for electricity, that customers could contract with RIRRC and have their own generator for service when none was coming from FPLE, or could contract with RIRRC for power through the direct connect and also with NGrid for service when FPLE was not providing power. In cases where NGrid was providing power, Mr. Cote believed their tariffs would apply and that the issue before the Commission was whether distribution fees would apply. *Id.* at 65-67, 97. Mr. Cote agreed that tenants could buy electricity from FPLE at the discount provided for in the Agreement between Hope Energy and RIRRC and still have the power distributed through the NGrid distribution system. *Id.* at 84.

[45] *Id.* at 57.

[46] *Id.*

[47] *Id.* at 71-74

based on formulas rather than fixed pricing over time. If costs increase, Mr. Cote indicated that the price of the electrical service would increase. The formula would take into account RIRRC's costs plus a percentage for overhead and that disputes would have to go to arbitration or Superior Court.[48]

Mr. Cote testified that as of November 22, 2004, there had been no planning in connection with the construction of duplicate facilities with NGrid because in order to undertake such planning, RIRRC would need to know the identity and needs of potential end-users. Additionally, no design work had been undertaken with regard to the direct connect facilities.[49]

NGrid presented Carlos Gavilondo, Vice President of Distribution Regulatory Services for Narragansett Electric Company for cross-examination. Mr. Gavilondo discussed the process for an NPP to connect to the NGrid system to export power.[50]

FPLE presented Peter Holzapfel, Plant General Manager of FPL Energy's Rhode Island State Energy Center and John Lessin, an electrical engineer for FPL's technical services group, which supports all of the FPL and FPLE power plants, for cross-examination. Mr. Holzapfel testified that there were several possible scenarios for the construction of a direct connect, but that no planning had been undertaken between FPLE and RIRRC.[51] He agreed, however, that unless end-users had their own on-site generation, they would require service from NGrid because the FPLE plant runs less than 365 days per year, with average run-time each day of 12-16 hours.[52] With regard to the definition of a direct connect, Mr. Holzapfel stated that "when somebody asks a question

[48] *Id.* at 86-87.
[49] *Id.* at 77-78.
[50] *Id.* at 104-05.
[51] *Id.* at 113-14.
[52] *Id.* at 116-20, 130.

of me about direct connection, to me I physically envision somebody coupling up to our switch yard instead of the Narragansett grid directly." He agreed that that included a situation where RIRRC connected its equipment to FPLE's switchyard and then connected multiple users to those facilities.[53]

Mr. Lessin indicated that because no studies had yet been completed, he could not described the process by which a direct connect from a tenant/owner to FPLE's facilities would occur. He stated that from an engineering standpoint, it is probably feasible, but could not provide a direct answer regarding design. He also could not provide an estimate of cost.[54]

VI. Division's Brief and Responsive Briefs

A. Division's Brief

On October 11, 2007, the Division filed its Brief, arguing that RIRRC should not be considered a public utility and therefore, should not be considered an electric distribution company under the facts presented. The Division argued that rather than reading R.I. Gen. Laws § 39-1-2(12) as automatically rendering an electric distribution company a public utility, one must first determine if an entity is a public utility under R.I. Gen. Laws § 39-1-2(20) before even reaching the definition of electric distribution company.[55] After setting forth the definition of both electric distribution companies and public utilities, the Division concluded that "[electric distribution companies], 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

[53] *Id.* at 134.
[54] *Id.* at 136-37.
[55] Division's Brief, p. 4.

characteristic common to all Rhode Island 'public utilities,' then it cannot constitute an [electric distribution company]."[56]

The Division asserted that although it disagreed with RIRRC that RIRRC could rely on R.I. Gen. Laws § 39-1-2(20)(ii) to except it from the definition of public utility, RIRRC should be able to rely on the following three exceptions: (1) the "landlord-tenant" exception recognized in other jurisdictions; (2) the *de minimus* exception recognized in Rhode Island and in other jurisdictions; and (3) the NPP exception.[57] The rationale behind the first two exceptions is that RIRRC would not be delivering the service "to or for the public," thus failing to satisfy one of the criteria for a "public utility."[58] Because, the Division's analysis concluded that RIRRC would fail to meet the criteria for a public utility, it could not be considered an electric distribution company.[59] With regard to the "NPP Exception," the Division stated, "[as RIRRC's] function is limited to operating as a business engaged in buying electricity for retail to end-users, RIRR[C], in these circumstances, would constitute a NPP under the specific definitional exclusion of G.L. § 39-1-2(19), not a public utility."[60]

Finally, the Division provided the Commission with a detailed interpretation of NGrid's Back-Up Tariffs in relation to the facts presented in this case. The Division concluded that the tariffs are ambiguous, but that a review of the statutory requirement behind the tariff provides sufficient clarity to conclude that the tariffs apply to back-up power supplied to cogeneration and small power production facilities, not a 500 MW

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[56] *Id.* at 5.
[57] *Id.* at 6-11 (explaining that using proper statutory construction, the word "and" must be read in the conjunctive, not as an "or"); 15.
[58] *Id.* at 15.
[59] *Id.* at 28.
[60] *Id.* at 27.

merchant power plant such as FPLE.[61] Furthermore, because of requirements in the NGrid Back-Up Tariffs, which require the customer to allow NGrid to install meters on their generating units and to allow NGrid reasonable access to read the meters in addition to designating the equipment as the customer's generation meters, the Division concluded that the scenario described by RIRRC would not apply to these tariffs.[62] The Division also noted that "in the fence" is not the same as "on-site" generation, noting that "the FPLE plant is operated and controlled by a completely different team of managers and employees than those who control and operate RIRR[C] or its end-users."[63]

B. NGrid's Responsive Brief

On October 25, 2007, NGrid responded to the Division's Brief, arguing that the Division's reading of the definition of an electric distribution company is incorrect, that the three exceptions cited by the Division do not apply to RIRRC, and that the Division is correct that the Back-Up tariffs do not apply to RIRRC's scenario. NGrid argued that the Division misread R.I. Gen. Laws § 39-1-2(12), stating that "the Division has it backward – under the law, if an entity is an electric distribution company, by definition it is a public utility."[64] NGrid asserted that the definition of electric distribution company is unambiguous and can be read in harmony with the definition of public utility because the definition of public utility merely confirms that electric distribution companies are public utilities. According to NGrid, there is no further inquiry needed.

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[61] *Id.* at 34-36.
[62] *Id.* at 36.
[63] *Id.* at 37.
[64] NGrid Response Brief, p. 1.

C. RIRRC's Responsive Brief

RIRRC first set forth its issues and facts, noting that it sold 30 acres of real property to Hope Energy, LP to develop a major energy facility and entered into a contract with the buyer to "retain the right to 40 MW of the output" of the generator. RIRRC stated that "the electrical power at issue is to be transmitted within the Industrial Park via a direct interconnection with the major energy facility." RIRRC states further that the first question is whether the "public-private" initiative must pay distribution and/or stranded cost charges. The second issue, according to RIRRC, "arises from the reality that end-users within the Industrial Park may well take advantage of the Direct Connect and still need backup or supplemental power to be distributed by [NGrid]... the question ... is whether those end-users can take advantage of the requirement that backup and supplemental services be provided pursuant to R.I. Gen. Laws § 39-2-1.4."[65]

Although RIRRC agreed with the Division's conclusion that RIRRC should not be considered a public utility, RIRRC maintained that rather than focusing on whether RIRRC would be distributing electricity to or for the public, the Commission should find that the agreement between Hope Energy and RIRRC is a "form of self-generation."[66] RIRRC points to the New Jersey legislature's definition of self-generation, arguing that its situation falls under this definition.[67] RIRRC again argued that the EFSB's licensure of the Project was dispositive of whether or not the direct connect would be a form of self-generation.[68] RIRRC also argues that regardless of the size of the generator, in this

[65] RIRRC Reply Brief, pp. 1-2.
[66] *Id.* at 2. RIRRC argues that "it is not unusual in a self-generation scenario that an entity contracts with a third-party, wherein the third-party develops and operates an electric power plant for the benefit of its contractual power." *Id.* at 3.
[67] *Id.* at 3.
[68] *Id.* at 4.

case, it should be considered a provider of distributed generation because it is adjacent to the Industrial Park.[69] RIRRC summarizes its request by stating, "it is of critical importance that the Commission determine the Direct Connect structure to be a form of self-generation."[70] In the alternative, RIRRC requests the Commission adopt the Division's position that RIRRC would not be a public utility.[71]

RIRRC concedes that the issue would be much more straightforward if RIRRC had built the generating plant, but maintains that it "entered into a public-private collaborative in which private investment was utilized to create the equivalent of a 40 MW power plant within the Industrial Park." RIRRC stated, "[s]aid initiative should not be prevented by the technical arguments advanced by [NGrid]...."[72]

D. FPLE's Response to Commission Request for Clarification

In response to a request for clarification from the Commission, on November 2, 2007, FPLE explained that "an EWG is an entity that directly, or indirectly through one or more affiliates, is engaged 'exclusively in the business of owning or operating, or both owing and operating, all or a part of one or more eligible facilities and selling electricity at wholesale.'" FPLE noted that "[t]he type of activity that is important for maintaining status as an EWG is that the sales of electricity from the FPLE facility are wholesale in nature and not retail transactions." According to FPLE, to sell energy wholesale, it must sell the electric energy to a person or entity separate from the end-user who will then resell the electric energy to the end-user. Therefore, "the reference to 'operate in its own

[69] *Id.* at 4-5. Although the General Assembly has endorsed through legislation the idea of cost-effective distributed generation, no specific definition was provided in the Rhode Island General Laws.
[70] *Id.* at 5.
[71] *Id.* at 6.
[72] *Id.* at 6-7. RIRRC also argues that 40 MW should be considered small power production, regardless of the capacity of the plant, which is 500 MW. *Id.* at 6.

service territory'" in RIRRC's Letter in Lieu of Brief "means that EWG status will not allow FPLE to also act as a retail electric distribution company in Rhode Island."[73]

VII. Oral Argument

On November 8, 2007, the Commission conducted a hearing at its offices at 89 Jefferson Boulevard, Warwick, Rhode Island for the purposes of allowing oral argument on the Motion for Reconsideration of the Denial of Settlement and on the underlying Declaratory Judgment action.[74] The following entered appearances:

FOR RIRRC:	Mark Russo, Esq.
FOR NGRID:	Laura S. Olton, Esq. Peter V. Lacouture, Esq.
FOR FPLE:	Alan Shoer, Esq.
FOR THE DIVISION:	Leo Wold Special Assistant Attorney General
FOR THE COMMISSION:	Cynthia G. Wilson-Frias Senior Legal Counsel

Mr. Russo outlined each of the arguments contained in RIRRC's filings and stated that RIRRC's arguments are (1) that RIRRC fits within the statutory exemption to the definition of public utility, noting that the issue is whether the two-part exemption should be read in the conjunctive or not; (2) that the Agreed Statement of Facts indicates that RIRRC will not be using distribution facilities as defined by Title 39 of the R.I. Gen. Laws; (3) that RIRRC agrees with the Division's analysis of why RIRRC should not be considered a public utility; (4) that RIRRC "take[s] the position that as a matter of

[73] FPLE Correspondence to Cynthia Wilson-Frias, dated November 2, 2007, pp. 1-2.
[74] Because the Commission ultimately denied the Motion for Reconsideration and by its terms, the Settlement was deemed null and void and not subject to appeal, the Commission will only address the portion of the hearing which addressed the underlying Declaratory Judgment Action in this section.

contract, a matter of this public/private collaborative that was put together and approved by the EFSB under full licensure we are a form of self generation/on site generation and we cited to this Commission Title 39-2-1.4."[75]

Mr. Lacouture attempted to rephrase the issue, stating, "[t]he issue before you is whether Resource Recovery can construct this direct connect, legally connect to the FPL power plant for the purposes of distributing electricity to end users in the industrial park, and we believe that very clearly the answer is no."[76] He noted that there could be up to twenty-two separate end-users in the industrial park, that FPLE is a major fossil fired merchant generator, and that "the direct connect infrastructure to deliver the power to the lot owners in the industrial park" would be owned by Resource Recovery because FPLE had indicated it could not own the infrastructure.[77] Therefore, Mr. Lacouture concluded, because RIRRC would be owning infrastructure to deliver power, "you have, as a result, Resource Recovery owning the distribution facilities in the industrial park."[78]

Mr. Lacouture also maintained that the definitions of "electric distribution company" and "public utility" are clear and unambiguous, arguing that the law is clear that an electric distribution company under both its own definition and under the "public utility" definition is automatically a public utility and that no further analysis is needed. Therefore, according to Mr. Lacouture, if RIRRC will own facilities to distribute electricity in the industrial park, it would be a distribution company, and as a result, also a public utility. He maintained that, contrary to Mr. Russo's claim that RIRRC would not

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[75] Tr. 11/8/07, pp. 46, 50-51. In response to a question from the Commission, Mr. Russo indicated that while an independent contractor may build and operate a generating plant on a customer's site, in the case he referenced, Toray Plastics, he did not know who owned the generating plant. *Id.* at 53.
[76] *Id.* at 54.
[77] *Id.* at 55.
[78] *Id.*

be using distribution facilities to deliver the electricity to customers, the facilities they would build would be a distribution system within the industrial park to deliver electricity. Such action, according to Mr. Lacouture, would violate R.I. Gen. Laws § 39-3-1, which grants an exclusive franchise to NGrid.[79]

Finally, Mr. Lacouture argued that what RIRRC was proposing is not self-generation and therefore, not covered by R.I. Gen. Laws § 39-2-1.4, which allows a customer who self-generates to avoid certain costs when supplying excess power to another of its own facilities. Mr. Lacouture noted that, while not in the main definitions, the General Assembly has provided a definition of self-generation in R.I. Gen. Laws § 39-26-1. Mr. Lacouture suggested that although the definition is applicable to that chapter, the Commission could look to it for guidance. He pointed out that the same entity will not be generating the power as the entity that will be using the power.[80]

Mr. Wold argued that because the definition of "electric distribution company" ends with the words "pursuant to Section 39-1-2(20)", the "public utility" definition, then an electric distribution company is not automatically a public utility unless it would independently be a public utility. Mr. Wold maintained that in RIRRC's scenario, it would not be a public utility based on an exception previously accepted by the Commission, known as the *de minimus* exception and also based on a landlord/tenant exception which has been accepted in other jurisdictions. Mr. Wold argued that the *de minimus* exception would apply because during the course of testimony at the evidentiary

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[79] *Id.* at 56-58.

[80] *Id.* at 59. Mr. Lacouture suggested that Toray Power, which contracted with a third party to build a generating facility to support Toray's facilities, would fall within the definition of self-generation and would be covered by R.I. Gen. Laws § 39-2-1.4, noting that if Toray has a manufacturing plant in North Kingstown and a warehouse nearby, the statute requires the utility to transmit electricity that is generated at the co-generation or small power production facility from one Toray site to another, consistent with NGrid's distribution rules. However, according to Mr. Lacouture, the statute does not allow Toray to transmit the electricity to another company. *Id.* at 58, 61.

hearing, RIRRC's witness indicated that it may be that not all parcels would be served by the direct connect and therefore, the Commission should find that there are not a sufficient number of customers to trigger a sale "to or for the public." Additionally, relying on testimony from RIRRC's witness, it is no longer clear whether all of the parcels will be sold in fee simple and therefore, some of the tenants may be leasing the property. According to Mr. Wold, use of RIRRC's facilities should be considered a landlord/tenant situation and not a sale of electricity "to or for the public." Finally, Mr. Wold argued that because RIRRC's facilities would not be crossing public roads, there would be no sale to the general public, but to a discrete set of customers and therefore, RIRRC would not fit under the definition of "public utility."[81] However, Mr. Wold could not reconcile why there would be no sale to the public under the "public utility" definition, but RIRRC would, nonetheless fit within the NPP definition, which requires a sale be made "to the public."[82]

VIII. Commission Findings

A. Jurisdiction

Jurisdiction to rule on RIRRC's Petition for Declaratory Judgment is proper under R.I. Gen. Laws § 42-35-8. The Commission notes that a request for declaratory judgment is a request for a determination of a party's rights, status, and other legal relations under existing law or contract.[83] Therefore, in rendering its decision, the Commission must

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[81] *Id.* at 63-65, 67, 69-70. Mr. Wold also argued that the idea that what RIRRC was proposing would be on-site generation or co-generation is "from the Division's perspective, absurd." *Id.* at 67-68.

[82] *Id.* at 73-77. Mr. Wold also argued that the Commission should make the decision that would forward the policy of competition in the electric industry, but conceded that the URA requires competition in generation, not distribution. *Id.* at 65, 78-79.

[83] *See* R.I. Gen. Laws §§ 9-30-1, 9-30-2. In a response to a Commission data request, RIRRC initially maintained that this proceeding would be the change of law necessary to trigger the language of its contract with Hope Energy, LLC such that a Direct Connect could be constructed. However, the Commission finds

review the relevant facts presented in the case and apply them to the relevant Rhode Island law. The Commission notes that while there was an Agreed Statement of Facts filed by the parties, despite a disclaimer by the parties, some of those facts appeared to be the very legal conclusions upon which the Commission would have to rule. Furthermore, the evidence presented at the hearings and through discovery, appeared to conflict with certain of the Agreed Facts.[84]

B. Commission Determination

The question in this case is whether or not, under the facts presented for Commission review, there has been a change of law since 1998, such that RIRRC may construct, own and maintain a direct connect and use its own infrastructure to provide electrical service to Industrial Park Tenants so to allow those tenants the ability to avoid NGrid distribution charges, transmission charges, stranded charges and possibly other non-bypassable charges. The Commission finds there has not been such a change of law since 1998 applicable to RIRRC's proposed project and that if RIRRC undertook this project whereby it would construct, own and maintain the infrastructure necessary to deliver electrical service between FPLE and end-users in the Industrial Park, it would become an electric distribution company and therefore, a public utility. The Commission finds that based on the evidence presented, a direct connect does not mean a single wire from FPLE's facility to an end-user, but some connection from FPLE's facility, owned by a third-party, to a system designed to deliver electricity to one or more end-users. Therefore, based on the evidence, this would not be a form of self-generation or co-

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that a declaratory judgment action is not the proper place to "change the law", but rather, to apply existing law to a specific set of facts.

[84] All discovery responses were admitted full at the evidentiary hearing.

generation under the relevant statutes and would render RIRRC, the third-party owner of the direct connect, an electric distribution company and therefore, a public utility.[85]

B. Analysis

Certain facts are clear and were consistent throughout the case. First, it is undisputed that there are three distinct entities that would be involved in a transaction for electrical service. In the "direct connect" scenario, FPLE would be producing the energy when the plant is running, RIRRC would own and maintain the direct connect line, and industrial park end-users would be using the electricity produced and delivered. Furthermore, RIRRC clearly indicated that it would own the infrastructure that would be necessary to deliver electricity to industrial park end-users in the same manner as it would provide other utility services. In fact, RIRRC's witness used the term distribution facilities to explain what RIRRC would own. RIRRC does not own an electric generating facility. Additionally, it was undisputed that under all scenarios presented,

[85] The Commission notes there were some areas of inconsistency between what was filed and submitted as exhibits in the record and testimony by RIRRC's witness. The Commission does not suggest the witness was being dishonest or attempting to mislead the Commission, but rather, the Commission believes RIRRC does not know exactly how the direct connect would be designed, or how the economic transactions with potential Industrial Park tenants would be structured. The Commission notes that it will not render a decision which may jeopardize FPLE's EWG status where the facts show that a direct connect could be physically constructed without jeopardizing that status. The Commission also notes that RIRRC's witness testimony was not entirely consistent with the data responses or the Agreed Statement of Facts regarding ownership of the direct connect in all situations. In the Agreed Statement of Facts, the direct connect would be furnished, installed and owned by RIRRC and or FPLE. However, during the course of this case, it became clear that FPLE could not own the infrastructure and deliver electricity directly to end-users of the Industrial Park without a third-party in order to maintain its EWG status, thus leaving RIRRC as the owner of the facilities. This is consistent with RIRRC's witness testimony and data responses where the direct connect would be owned by RIRRC with power to be supplied to more than one end-user.

Also, in response to a Division hypothetical, RIRRC's witness indicated that he could envision a scenario where an end-user owned the direct connect and was the only end-user being supplied. The Commission believes this scenario would jeopardize FPLE's EWG status because it would constitute a retail sale of electricity. Therefore, the Commission will not embrace this scenario as feasible. A direct connect does not necessarily mean a single wire from FPLE's facility to an end-user, but some connection from FPLE's facility to a system designed to deliver electricity to one or more end-users.

industrial park end-users would have to also contract with NGrid for the delivery of power when the FPLE generating plant is not running.[86]

RIRRC relies on the concept of public-private collaborative to argue that the Direct Connect is a form of self-generation. However, the public-private collaborative is still made up of two distinct legal entities on two pieces of property held by those two distinct legal entities. FPLE owns a merchant generator with a capacity of 500 MW. RIRRC owns land upon which it plans to develop an Industrial Park. When RIRRC sold the property to Hope Energy, FPLE's predecessor, to build the merchant generator, it retained the right to a certain amount of *output* from the plant, *not ownership* in the plant. Therefore, RIRRC is not generating any electricity; FPLE is. FPLE agreed to sell electricity from its plant to Industrial Park Tenants, who may actually hold the land upon which they operate in fee simple. According to the evidence presented, RIRRC would construct, own and maintain the facilities needed to provide the electricity and would act as the broker for the economic transaction between FPLE and the end-users. According to the agreement entered into between FPLE and RIRRC (the public-private collaborative), in order to avoid distribution, transmission and stranded costs, there would

[86] RIRRC appears to rely on paragraphs 9, 10, 11, and 12 of the Agreed Statement of Facts to support its position that it would not be an electric distribution company and that paragraphs 18, 19, and 20 indicate only NGrid will be acting as an electric distribution company. However, paragraph 9 does not address electricity infrastructure except to indicate electrical distribution facilities will not be owned by RIRRC, something which appears to be a legal conclusion that is not sustainable when viewed together with the evidence in the record and with the statement of fact in paragraph 12. Paragraph 10 notes that electric distribution facilities will be installed in the Industrial Park, something which all parties agree will be necessary for times when FPLE is not operational. Paragraph 11 notes that FPLE, as successor to Hope Energy, will allow access to its switchyard for purposes of a direct connect. Paragraph 12 states that "the necessary infrastructure to deliver the energy services identified in paragraph 11 above, under the Agreement would be furnished, installed and owned by the Corporation and/or FPLE." Paragraph 18 appears to be a legal conclusion that NGrid is an electric distribution company, something which is clearly supported by the facts. Paragraph 19 recognizes that NGrid is (currently) the only electric distribution company providing electric distribution service to retail customers within the municipality of Johnston, RI. Paragraph 20 is a legal conclusion that NGrid has an exclusive franchise within the Town of Johnston to distribute electricity.

need to be a future change in law subsequent to 1998. RIRRC has failed to identify such a change in law which would apply to its situation.

RIRRC argued that its proposal falls under a statutory exemption which constitutes a change of law since the 1998 Agreement which would allow Industrial Park Tenants the ability to avoid distribution, transmission and stranded costs and would not render RIRRC a distribution company or electric distribution company. RIRRC maintained that R.I. Gen. Laws § 39-2-1.4(a), which was passed in 2006, constituted a change of law that would allow RIRRC's plan to proceed and would allow industrial park end-users to avoid distribution, transmission, transition, and other non-bypassable charges. RIRRC focused on the following provision of the law: "Subject to compliance with applicable rules governing such service, public utilities shall provide transmission or distribution service to enable a retail customer to transmit electrical power generated *by the customer* at one location *to the customer's facilities* at another location..."[87] RIRRC argued that it should be considered a co-generator and be allowed to rely on this statute because of the "public-private" partnership discussed by the EFSB when approving siting of the Hope Energy, LLC generating plant, now the FPLE generating plant. RIRRC argued that the General Assembly intended for this type of situation to be covered by the law. However, the Commission finds reliance on this provision of the law misplaced based on the plain language of the law. In order for R.I. Gen. Laws § 39-2-1.4(a) to apply, the electricity must be generated by the same customer who is ultimately using the electricity. Likewise, R.I. Gen. Laws § 39-2-1.4(b) does not apply to allow industrial park end-users to avoid all but back-up rates because this is not a self-generating situation. To reiterate, it has already been established that there will be three distinct

[87] R.I. Gen. Laws § 39-2-1.4(a) (emphasis added).

entities: a generator, RIRRC as the entity delivering the electricity produced by the generator, and end-users, the Industrial Park Tenants. FPLE will not be the end-user of the electricity, RIRRC will not be generating the electricity and then using it at one of its facilities, and the end-users will not be generating the electricity. The result is that this is not a situation of self-generation or co-generation as anticipated by the statute. Therefore, this change of law does not apply to RIRRC's situation and the Commission must determine whether RIRRC would be a distribution company, an electric distribution company and/or a public utility under R.I. Gen. Laws § 39-1-2.

The Commission finds that the plain reading of the definition of "electric distribution company" in conjunction with that of "public utility," means that if an entity is determined to be an electric distribution company, under R.I. Gen. Laws § 39-1-2(12), it is automatically a public utility. The language of each definition, one referencing the other, is clear and unambiguous. "'Electric distribution company' means 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)". (emphasis added). R.I. Gen. Laws § 39-1-2(20) states in relevant part, "'Public utility means and includes every company that is an electric distribution company ..." (emphasis added). The definition of public utility makes it clear that an electric distribution company is a public utility under all circumstances, except for a later statutory exception discussed below. Therefore, there is no need to first determine whether an entity is a public utility before determining whether or not it has the characteristics of an electric distribution company.

RIRRC, through its witness, testified that RIRRC would own the facilities necessary to deliver the electricity to end-users and would treat them in the same manner

as other utility services provided in the industrial park through RIRRC-owned facilities, such as sewer and water. These facilities would be used to deliver electricity at a stepped-down voltage to end-users from electricity produced by FPLE to end-users who will own or rent the parcels upon which they build. RIRRC would be building (through a contractor), owning, maintaining, operating and billing for the use of these facilities.[88] These are the types of activities undertaken by an electric distribution company. Therefore, under RIRRC's scenario, it would be acting as an electric distribution company and hence, would be a public utility. As such, it would be subject to the limits of R.I. Gen. Laws § 39-3-1.

Because the Commission finds the law to be clear that an electric distribution company is automatically a public utility, there is no need to analyze whether any non-statutory exceptions to the statutory definition of public utility, such as the de minimus exception or a landlord/tenant exception apply. That analysis would only be necessary if the Commission needed to analyze the definition of public utility, for example, if there was a question whether a water system were a public utility subject to regulation by the Commission.[89]

The only exception the Commission does need to address is the one specifically set forth in the public utility statute, stated: 'Public utility means and includes every company that is an electric distribution company ... and provided further, that the term "public utility" shall not include any company;

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[88] RIRRC would own any meters necessary for billing purposes. *See supra* n. 47 and accompanying text.

[89] The Commission notes that RIRRC's witness testimony was not consistent with data responses made part of the record regarding ownership of the parcels upon which end-users would construct their buildings. Paragraph 8 of the Agreed Statement of Facts states, "It is envisioned that the Corporation may sell real property to third-party tenants of the Industrial Park." Data responses confirmed this, but on cross-examination, RIRRC's witness testified that parcels will either be sold or leased. However, this distinction is irrelevant for the Commission's analysis of the law.

(i) Producing or distributing steam or heat from a fossil fuel fired cogeneration plant located at the university of Rhode Island South Kingstown, 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 steam lines cross a public highway.

RIRRC urges the Commission not to read the above-referenced exception to the definition of public utility in the conjunctive as a two-part test, but rather as an either/or situation and to find that FPLE, by supplying electricity to RIRRC which would then deliver the electricity to end-users would be the same as supplying electricity from a company to a state-owned facility. The Commission declines to follow RIRRC's reading of the statute for two reasons. First, as noted by NGrid, the Rhode Island Supreme Court has already found that where the General Assembly uses the word "and" rather than the word "or", it must have had a reason and that "the conjunctive 'and' should not be considered as the equivalent of the disjunctive, 'or'."[90] Therefore, the Commission finds that this exception is specific to URI and does not apply to RIRRC's proposal.

Second, even if the Commission were to adopt RIRRC's reading of the statute in the disjunctive, FPLE would not be producing and/or distributing electricity to a state owned facility because while RIRRC's functions are considered to be essential functions of the State, R.I. Gen. Laws § 23-19-6 (a) states that there is "authorized, created, and established a public corporation of the state, *having a distinct legal existence from the state and not constituting a department of the state government*, with the politic and corporate powers set forth in this chapter, to be known as the Rhode Island resource recovery corporation, ("the corporation") to carry out the provisions of this chapter."[91]

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[90] *See* NGrid Brief, p. 6 *citing*, *Asadoorian v. Warwick School Comm.*, 691 A.2d 573 (R.I. 1997); *Jamestown School Comm. v. Schmidt*, 122 R.I. 185, 191, 405 A.2d 16, 20 (1979).
[91] R.I. Gen. Laws § 23-19-6(a) (emphasis added).

Furthermore, the facilities to which the electricity would ultimately be provided have not been identified as state owned facilities. Therefore, even read in the disjunctive, RIRRC's proposal would not qualify for the statutory exemption.

Finally, the Commission finds that the EFSB proceeding in Docket No. SB-98-1, licensing the Hope Energy, LLC plant, now the FPLE generating plant, did not constitute *res judicata* or administrative finality for the reasons set forth in NGrid's Brief. The Commission finds, based on an independent review of the transcript of that case (made part of the record in this case), that the EFSB focused on the first part of paragraph 10(c) of the agreement between Hope Energy and RIRRC wherein the generator agreed to provide up to 12 MW of low cost power to the Industrial Park Tenants through an NPP type of agreement. This transaction can still occur between Industrial Park Tenants and FPLE whereby FPLE can provide the discounted power to an Industrial Park Tenant through a contractual relationship. The power will then be delivered by NGrid under its distribution rate tariffs. Nowhere in the record provided by RIRRC and made part of the record in this docket did the EFSB specifically consider the merits of a direct connect, noting only that it would be available under the terms of the Agreement between RIRRC and FPLE. Arguably, the terms of the Agreement have not been met where there has been no change in law applicable to the direct connect scenario.

Contrary to RIRRC's assertions, the EFSB in 1998 did not make a ruling that this agreement between FPLE and RIRRC would allow it to create a situation where end-users could avoid transmission, transition and system benefits charges. In fact, Chairman Malachowski asked those very questions and was told that this setup would allow end-users in the Industrial Park to purchase discounted energy over NGrid's distribution lines.

The only reference in the EFSB Order is to recognize that there was an agreement allowing tenants of the industrial park access to high voltage switchgear and the ability for direct interconnection at high voltage. According to the agreement between RIRRC and predecessor Hope Energy, this was all dependent upon a future change of law that has not yet been made.

C. Conclusion

This case is not about the Commission thwarting economic development that was already underway. Industrial Park end-users will still have the opportunity to contract for energy that is less expensive than NGrid's Standard Offer Se0rvice rate. They may decide to purchase energy directly from FPLE which is registered as an NPP and has a contractual obligation to provide up to a certain MW to the industrial park tenants at an agreed cost. They may also be able to purchase power less expensively from any other competitive supplier. Regardless, under RIRRC's proposal, tenants will still have to have lines from NGrid and will still be subject to transmission, transition, and nonbypassable statutorily mandated system benefits charges.

Accordingly, it is hereby

(19273) ORDERED:

1. Rhode Island Resource Recovery Corporation's request for a Declaratory Ruling that connection by Rhode Island Resource Recovery to the power plant owned by FPLE Energy, LLC in Johnston, Rhode Island ("Project") for the purpose of producing and delivering electricity to end-users within the Industrial is exempted from the definition of "Public Utility", "Electric

Distribution Company", and/or "Distribution Facility" is not supported by the evidence, and is denied.

2. There has not been such a change of law since 1998 applicable to RIRRC's proposed project and that if RIRRC undertook this project whereby it would construct, own and maintain the infrastructure necessary to deliver electrical service between FPLE and end-users in the Industrial Park, it would become an electric distribution company and therefore, a public utility.

3. The Commission declines to rule on whether or not Rhode Island Resource Recovery would be a Non-Regulated Power Producer.

4. The settlement agreement filed on September 8, 2006 is hereby denied.

EFFECTIVE AT WARWICK, RHODE ISLAND, PURSUANT TO AN OPEN MEETING DECISIONS ON SEPTEMBER 27, 2007 AND DECEMBER 20, 2007. WRITTEN ORDER ISSUED APRIL 21, 2008.

PUBLIC UTILITIES COMMISSION

*Elia Germani, Chairman

Robert B. Holbrook, Commissioner

Mary E. Bray, Commissioner

*Chairman Germani concurs but is unavailable for signature.