State of Rhode Island and Providence Plantations

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Patrick C. Lynch, Attorney General

October 13, 2009

Luly Massaro, Clerk
Public Utilities Commission
89 Jefferson Blvd
Warwick, RI 02888

Docket No. 4069

Dear Ms. Massaro,

I write on behalf of the Division of Public Utilities and Carriers ("Division") relative to proposed Rules 5.3[1] and 6.1[2] of the Commission's proposed "Rules and Regulations Governing Long-Term Contracting Standards for Renewable Energy." As proposed, both rules can be construed to impose a continuing duty on an electric distribution company ("EDC") to fulfill the designated minimum long-term contract capacity percentage past the respective December 30 "phased schedule" deadlines. It is generally acknowledged as a fundamental tenet of statutory construction that when interpreting a statute one must "attribute the plain and ordinary meanings to [the statute's] words." E.g., Moore v. Ballard, 914 A.2d 487, 490 (R.I. 2007); Arnold v.

[1] Rule 5.3, in pertinent part, provides: "In the event a Long-Term contract is so terminated, the Electric Distribution Company will not be found non-compliant with this regulation because of termination, and it shall be required to make additional annual solicitation and enter into additional Long-Term Contracts in order to replace the energy, capacity and/or NEPOOL GIS Certificates lost as a result of the termination."

[2] Rule 6.1 provides: "Compliance with the Long-Term Contract standard shall be demonstrated through procurement pursuant to the provisions of a Long-Term Contract of energy, capacity and attributes reflected in NE-GIS certificates relating to generating units certified by the Commission as using Newly Developed Renewable Energy Resources."

Rhode Island Dept. of Labor and Training Bd. Of Review, 822 A.2d 164, 168 (R.I. 2003). The "ultimate goal" always is "to give effect to the purpose of the act as intended by the Legislature." E.g., Webster v. Perrotta, 774 A.2d 68, 75 (R.I. 2001). The Division is concerned that these proposed rules appear contrary to the statute's intended purpose and plain language.

The stated purpose of Ch. 26.1 is to "encourage" and "facilitate" the creation of commercially reasonable long-term contracts between EDC's and developers of newly developed renewable energy resources. G.L. § 39-26.1-1. That is, with the consummation of long-term contracts, private developers will have sufficient revenue assurance in order to be able to finance, and therefore, construct and operate renewable energy projects in the State. Long-term contracts will help achieve the goal of "facilitating the financing of renewable energy generation" within Rhode Island. G.L. § 39-26.1-1. Project failures, thus, will be minimized; nonetheless, they constitute an assumed risk of any start-up venture, and, therefore, are a basic assumption of Ch 26.1.

By requiring EDCs to maintain minimum long-term contract percentages beyond the designated deadlines, upon the failure of particular projects, Rules 5.3 and Rule 6.1 (as interpreted by some parties to this proceeding) do not conform to the intended purpose of the statute. Ninety (90) megawatts, after adjustment for capacity factor[3], is not an insignificant portion of National Grid's total Rhode Island energy load. Moreover, the cost per KW-hr reflected in contracts consummated by EDCs under Ch. 26.1 may possibly be significantly higher than energy from traditional energy sources. Thus, overall electric costs for Rhode Islanders could be higher than they would otherwise be under the Commission's interpretation of Ch. 26.1, as reflected in the proposed Rules and Regulations. To impose a duty upon EDCs to perpetually attempt to consummate contracts that reflect such costs crosses the line between the stated purpose of the statute—to create an environment that facilitates renewables development by private entrepreneurs—to imposing a mandate that requires indefinite ratepayer support for renewables development, regardless of overall cost.

The continuing duty imposed on EDCs in proposed Rule 5.3 and Rule 6.1 also appears contrary to the plain language of the relevant section of Ch. 26.1. The proposed duty relies on § 39-26.1(3)(d), which in pertinent part provides:

[3] RIGL 39-26.1-2 states "In determining whether the minimum long-term contract capacity has been reached, *the capacity under contract shall be adjusted by the capacity factor of each renewable generator as determined by the ISO-NE rules*...a contract with a one hundred (100) megawatt facility with a thirty percent (30%) capacity factor would be counted as providing (30) megawatts to the minimum long-term contract capacity requirement." (Emphasis added). The Division estimates 90 MW under this definition would require purchases of energy equivalent to approximately 10% of the State's annual needs.

> that "[c]ompliance with the *long-term contract standard* shall be demonstrated through procurement pursuant to the provisions of a long-term contract, capacity and attributes reflected in NE-GIS certificates relating to generating units certified by the commission as using newly developed renewable energy resources, as evidenced by reports issued by the NE-GIS administrator and the terms of the contract;..." (Emphasis added).

The term "long-term contract standard" that appears in this section and elsewhere in Ch. 26.1 is undefined. At most, it is associated with the duration, commercial reasonableness or type of energy resources associated with long-term contracts, which EDC's are required to purchase under Ch. 26.1. See e.g., § 39-26.1-3(a).

Section 39-26.1-3(c)(2), by contrast, establishes the quantity of renewable energy which must be purchased by EDC's pursuant to "long-term contracts" as December 30, 2010, 2011, 2012 and 2013. It also expressly defines the quantity of such purchases in terms of percentages of the "minimum long-term contract capacity," and, expressly instructs that EDCs "shall not be required to enter into long-term contracts . . . that exceed" the designated schedule. Section 39-26.1-3(c)(2) does not contain any language (either express or implied) that, in the event of project failure or dormancy, imposes a duty on EDCs to enter into long-term contracts in order to maintain percentages of the minimum-long term contract capacity beyond the designated deadlines. Nor does Ch. 26.1 contain a long-term contract renewal mechanism, which would require EDCs to re-solicit contracts in order maintain the designated percentages upon the expiration of the initial contracts.

As expressed in Section 39-26.1-3(c)(2), Ch. 26.1 contains language that is in explicit conformity with its stated purpose—namely, to facilitate and encourage (but not mandate indefinite support for) renewables development in Rhode Island. For the foregoing reasons, the Division recommends that the Commission delete the last sentence of Rule 5.3, and add language to Rule 6.0 expressly indicating that EDCs will be deemed to have complied with the designated "minimum long-term contract capacity" percentages of Ch. 26.1 when they enter into Commission-approved long-term contracts with renewable generators that satisfy those percentages.

Respectfully submitted,

Division of Public Utilities and Carriers

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