STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS
PUBLIC UTILITIES COMMISSION

IN RE: RULES AND REGULATIONS	:	
GOVERNING A LONG-TERM CONTRACTING	:	DOCKET NO. 4069
STANDARD FOR RENEWABLE ENERGY	:	

REPORT

I. Overview

On June 26, 2009, two identical Public Laws were enacted, creating a new Chapter to Title 39 of the Rhode Island General Laws. Chapter 26.1 of Title 39 is entitled Long-Term Contracting Standard for Renewable Energy. It requires one Electric Distribution Company in Rhode Island, currently Narragansett Electric Company d/b/a National Grid ("NGrid") to enter into Long-Term Contracts for Newly Developed Renewable Energy Resources up to a maximum of 90 MW, after adjustments for capacity factors, at a rate of 25% per year commencing in June 2010.[1] The statute requires the Public Utilities Commission ("Commission") to review the solicitation process proposed by NGrid. Additionally, the statute requires the Long-Term Contracts to be reviewed and approved by the Commission before they can become effective. The statute sets forth the standard of review, general procedure for review and a requirement that the Long-Term Contracts provide direct economic benefits to the State of Rhode Island. R.I.G.L. § 39-26.1-5(e) requires the Commission to promulgate Rules. Those Rules are the subject of this Report. Because of the mandate by the General Assembly to promulgate Rules, the Commission finds that no other Agency has a regulation which is duplicated or overlapped by the proposed regulation and further finds that the Rules will have no direct

[1] R.I.G.L. § 39-26.1-2(3) defines "Electric distribution company" as a company defined in subsection 39-1-2(12), supplying standard offer service, last resort service, or any successor service to end-use customers, but not including Block Island Power Company or Pascoag Utility District.

impact on Small Businesses in Rhode Island beyond the impact that the statute will impose on all ratepayers in Rhode Island.

II. Rulemaking Process

Because of the complexity and novelty of the subject matter set forth in R.I.G.L. § 39-26.1, rather than simply issuing Rules for comment, Commission Staff circulated a memorandum on July 1, 2009 to over one hundred (100) individuals who have previously expressed interest in energy procurement and/or renewable energy issues. These individuals included representatives of the legislative and executive branches of State government, competitive suppliers of electricity, renewable energy developers and suppliers, NGrid, Deepwater Wind, and various consultants. Through this communication, the Commission Staff invited interested persons to a meeting at the Commission's Offices on July 21, 2009.

Following the meeting, on July 24, 2009, Commission Staff circulated a first draft of Rules and Regulations Governing Long-Term Contracting Standards for Renewable Energy ("LTK Rules") for comment by meeting participants. Comments were received from several participants, including the Division of Public Utilities and Carriers ("Division"), NGrid, renewable energy developers, TEC-RI and one wholesale and retail power supplier.

On August 4, 2009, in preparation for a second meeting, Commission Staff circulated a second draft of LTK Rules and a summary of the changes made. On August 6, 2009, a second meeting was held at the Commission's Offices to discuss the second draft LTK Rules. This meeting served to narrow the contentious issues and a third draft LTK Rules were circulated for review by interested persons. Shortly thereafter,

Commission Staff provided the Commissioners with a fourth draft which represented editing from the participants. The two meetings and circulation of prior drafts were very fruitful and assisted greatly in the rulemaking process, mainly due to the willingness of participants to work cooperatively and engage in constructive debate. The process resulted in the Commission being presented with a document with only two areas of substantive disagreement.

There was an issue of statutory construction regarding the circumstances under which NGrid would be considered to be in compliance with the mandate to enter into Long-Term Contracts. NGrid maintained that it should be considered "in compliance" with the statute as long as it solicited Long-Term Contracts on the timeline set forth in the statute regardless of whether the project ever became operational whereas others read the statute as requiring NGrid to solicit new proposals if the project under contract failed. The second area of concern was the relationship between the "Commercially reasonable" standard and the Commission's general mandate to review costs in relation to their impact on reasonable rates. Some argued that the Commission must read "reasonable rates" into the definition of "Commercially reasonable" while others argued that as long as the terms of the Long-Term Contract fell within the definition of "Commercially reasonable," no further review was allowed by the Commission.

On September 2, 2009, the Commission voted to propose Rules and Regulations Governing Long-Term Contracting Standards for Renewable Energy ("Proposed Rules") at its Open Meeting. The Commission Clerk issued a Notice of Rulemaking and Public Hearing electronically to those interested individuals who had previously advised the

Commission Clerk of such interest. On September 4, 2009, the Notice of Rulemaking and Public Hearing was published in the Providence Journal.

III. Public Hearing

On September 29, 2009, the Commission held a public hearing at its Offices at 89 Jefferson Boulevard, Warwick, Rhode Island for the purpose of taking oral comment on its Proposed Rules. No public comment was provided at the hearing. However, the Division requested an additional week to submit written comments. The request was granted and the written comment period was extended to October 13, 2009 for all members of the public.

IV. Comments on the Proposed Rules

The Heartwood Group, Inc. advocated for a provision that would allow the utilities to purchase energy and/or RECs rather than requiring bundling. Such provision does not appear to be consistent with R.I.G.L. § 39-26.1-3(d). Heartwood Group also requests provisions in the Rules that would address specifics of the procurement process. However, such specifics will be addressed by the Commission pursuant to its review of NGrid's proposals regarding its procurement plans. Heartwood Group also requests that the Commission "release solar portion of RFP as soon as possible so developers can take advantage of ARRA Federal Grant." This is something that is not readily addressed by the Rules and would be addressed by the Commission pursuant to its review of National Grid's proposals regarding its procurement plans.

The remaining issue subject to comment referred to the circumstances under which NGrid would be in compliance with the Long-Term Contracting Standards in the event a Project under contract fails and no production ever occurs. NGrid and the

Division argue that the Commission included a provision that is not contemplated nor allowed by the statute.

The Commission included provisions for terminating the contracts and re-bidding them in the event a Project failed or was on track to fail. The Commission did so based on its reading of R.I.G.L. § 39-26.1-3(d)[2] which associates compliance by the electric distribution company with NE-GIS certificates which are not produced and do not exist unless the unit is operational. Therefore, the Commission initially determined that while NGrid may be in compliance with the initial four-year timeframe over which to enter into Long-Term Contracts for 90MW of renewable energy, NGrid cannot ultimately remain in compliance with the Minimum Long-Term Contract Capacity obligation if the project fails and therefore, would need to contract for additional energy, capacity and attributes if a project does fail to become operational. Thus, the Commission inserted a provision that would allow National Grid to terminate a contract, without penalty after three years of execution if material progress is not being made. National Grid would then have an obligation to solicit for additional Long-Term Contracts.

Conservation Law Foundation ("CLF") supported this proposal as a means to further the intent and plain language of the statute to encourage the development of newly developed renewable resources by avoiding contracting for phantom projects and to help assure that the Long Term Contracting statute will actually result in real contracts for actual renewable energy.

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[2] 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, as evidenced by reports issued by the NE-GIS administrator* and the terms of the contract; provided, however, that the NE-GIS certificates were procured pursuant to the provisions of a long-term contract. The electric distribution company also may purchase other attributes from the generator as part of the long-term contract. R.I.G.L. §39-26.1-3(d) (emphasis added).

NGrid and the Division of Public Utilities and Carriers ("Division") argued that as long as NGrid enters into Long-Term Contracts with Commission approval, in compliance with the timeline set forth in the rules (25% of 90MW over four years), there is no further requirement that NGrid enter into additional contracts in the event of failure of any of the Projects under contract. National Grid relied on R.I.G.L. § 39-26.1-3(c)(1) which states:

> As long as the electric distribution company has entered into long-term contracts in compliance with this section, the electric distribution company shall not be required by regulation or order to enter into power purchase contracts with renewable generation projects for power, renewable energy certificates, or any other attributes with terms of more than three (3) years in meeting its applicable annual renewable portfolio standard requirements set forth in section 39-26-4 or pursuant to any other provision of the law.

According to NGrid, this provision makes it clear that the General Assembly only meant for NGrid to enter into contracts over a four year period and as long as NGrid does so, there is no further obligation even if no power is ever produced by any of the projects and to require any additional contracting violates this section. NGrid argued that the Commission should not include any look-back provision and should address project failure in the future rather than addressing its potential directly in the Rules. With regard to the requirement that compliance refers to "NE-GIS certificates, as evidenced by reports issued by the NE-GIS administrator", NGrid argued that rather than actually requiring the reports to show that the project was producing RECs, this section simply describes the attributes that would be produced if the project were to be certified by the Commission in the future to qualify under the RES statute.

The Division agreed with NGrid. The Division also argued that the stated purpose of the law, encouraging and facilitating the creation of commercially reasonable

long-term contracts does not translate into a mandate to maintain the percentages of the minimum long-term contract capacity beyond the designated deadlines. The Division also pointed to the magnitude of the minimum contract capacity as costly.

The Commission's role in promulgating these Rules is to reconcile the potential conflict in the statute in order to read both sections in harmony, attributing the plain and ordinary meanings to the statute's language. Therefore, the question is whether the requirement that compliance is shown through "procurement ... as reflected in NE-GIS certificates" requires actual certificates. If so, then the Project has to be operational and certified under the RES Rules before NGrid can show that it has procured the RECs through the NE-GIS reports. If so, then there is no conflict with the language that NGrid is not required to enter into other long-term contracts because the conditions for meeting the four-year timetable were not met and the Commission would not be requiring NGrid to enter into any Long-Term Contracts beyond the statutory requirement of 90 MW.

In reading the plain language of the statute and harmonizing two potentially conflicting provisions, the Commission needs to ensure that it is doing so under the context of the stated purpose of the statute:

> ...to encourage and facilitate the creation of commercially reasonable long-term contracts between electric distribution companies and developers or sponsors of newly developed renewable energy resources with the goals of stabilizing long-term energy prices, enhancing environmental quality, creating jobs in Rhode Island in the renewable energy sector, and facilitating the financing of renewable energy generation within the jurisdictional boundaries of the state or adjacent state or federal waters or providing direct economic benefit to the state.

Those who commented on these Proposed Rules have taken different positions regarding the meaning of this language as well. CLF argues that this means the State intends for Projects to produce renewable power. The Division argued that this means

the State intends for Project developers to 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 goals..." even if no power is delivered from a specific project.

At its Open Meeting on December 23, 2009, the Commission considered all of the comments received and voted unanimously to retain all of the provisions contained in the Proposed Rules. The Commission indicated that based on historical usage, the word "procurement" is clear and for example, "nobody would ever interpret standard offer procurement to mean that the electric distribution company executed a contract but the lights never, in fact, ever went on in Rhode Island."[3] Additionally, the Commission noted that the legislature allows the electric distribution company to seek approval of the Commission to contract for more than 90MW of capacity. In light of the use of the word procurement, the use of the phrase "as reflected in NE-GIS certificates", and the discretion to procure more than 90MW, it would not be practical to read the statute to mean that "not a kilowatt of power would ever be transmitted across the power lines from any of the resources that have been contracted for."[4] Thus, the Commission determined that the intent of the statute "is not to just have a contract but to actually be able to have the renewable power...."[5]

Finally, the Commission finds that its interpretation of R.I.G.L. § 39-26.1-3(d) is consistent with R.I.G.L. §39-26.1(c)(1). First, the Commission's Rules Governing Long-Term Contracting Standards for Renewable Energy simply do not require NGrid to enter into Long-Term Contracts in excess of the 90MW capacity requirement. Rather, the

[3] Tr. 12/23/09, p. 11.
[4] *Id.* at 10.
[5] *Id.* at 16.

Commission's Rules Governing Long-Term Contracting Standards for Renewable Energy require NGrid to enter into replacement contracts in the event a project fails and the contract with the Developer of that project is terminated. Second, even if an argument were made that the Commission was requiring NGrid to enter into Long-Term Contracts in excess of the 90MW capacity requirement because of the four year time frame in which the General Assembly expected the capacity requirement to be met, the Commission finds that the only reasonable reading of R.I.G.L. § 39-26.1-3(d) is that the capacity requirement is ultimately met through the production of energy and associated NE-GIS certificates. These certificates are not produced if a project is not producing renewable energy.

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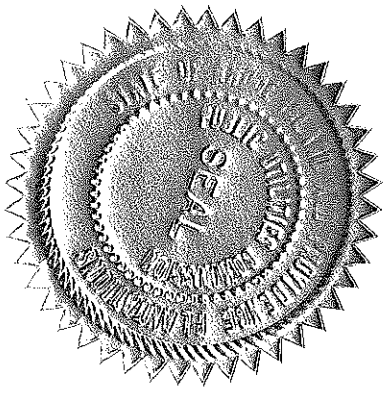
EFFECTIVE AT WARWICK, RHODE ISLAND ON JANUARY 28, 2010 PURSUANT TO AN OPEN MEETING DECISION ON DECEMBER 23, 2009. FINAL RULES FILED WITH THE SECRETARY OF STATE'S OFFICE ON JANUARY 8, 2010. REPORT ISSUED ON JANUARY 29, 2010.

PUBLIC UTILITIES COMMISSION



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