STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS
PUBLIC UTILITIES COMMISSION

IN RE: TARIFF ADVICE FILING REGARDING NET METERING PURSUANT TO R.I.G.L. § 39-26.2-1.

Docket No. 4268

UNITARY MEMORANDUM OF LAW OF CONSERVATION LAW FOUNDATION

Conservation Law Foundation (CLF) respectfully submits its single, unitary memorandum of law addressing all of the questions and issues that, at the scheduling conference on September 8, 2011, the Public Utilities Commission (PUC or Commission) asked the parties to address.

The Commission asked the parties to address three questions. For purposes of this memorandum, CLF has disaggregated the third question into its three component parts. These are the three questions:

> (1) Is the defined "avoided cost" rate set forth in R.I. Gen. Laws § 39-26.2-2(4) consistent with standards set forth in PURPA and FERC law and regulations? That is, does the Rhode Island General Assembly have the authority to define the applicable "avoided cost" rate?
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> (2) Whether, in a situation where an eligible net metering system is not physically connected to an end-user, the issuance of checks versus credits for the incremental portion of energy up to 100% of the net metering customer's own consumption creates a wholesale transaction under federal law?
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> (3) (a) Referencing proposed R.I.P.U.C. No. 2075, Sheet 4, under Terms and Conditions, is there a conflict between paragraphs three (3) and four (4) regarding checks and credits?
> (b) If yes, how could the paragraphs be reconciled consistent with state law?
> (c) As a matter of policy, should the PUC seek to reconcile these two paragraphs?

This memorandum proceeds in two parts. First, CLF surveys the contours of law applicable to net metering. Second, CLF applies that applicable law to the precise questions posed by the PUC.

Law Applicable to New Metering

A leading Federal Energy Regulatory Commission (FERC) case defines net metering this way:

> Net metering allows a retail electric customer to produce and sell power onto the Transmission System without being subject to the Commissions' jurisdiction. A participant in a net metering program must be a net consumer of electricity—but for portions of the day or portions of the billing cycle, it may produce more electricity than it can use itself. This electricity is sent back onto the Transmission System to be consumed by other end-users. Since the program participant is still a net consumer of electricity, it receives an electric bill at the end of the billing cycle that is reduced by the amount of energy it sold back to the utility. Essentially, the electric meter "runs backwards" during the portion of the billing cycle when the load produces more power than it needs, and runs normally when the load takes electricity off the system.

Sun Edison LLC, 129 FERC ¶ 61,146, 61,620 (2009).

The above definition comports with the definition of net metering found in Section 1251 of Energy Policy Act of 2005:

> Net metering service means . . . service to an electric consumer under which electric energy generated by that electric consumer from an eligible on-site generating facility and delivered to the local distribution facilities may be used to offset electric energy provided by the electric utility to the electric consumer during the applicable billing period.

16 U.S.C. § 2621(d)(11).

FERC, in MidAmerican Energy Co., 94 FERC ¶ 61,340 (2001), expressly held that net metering is governed and controlled by state law, not by federal law. As FERC

explained in MidAmerican, there are net metering and net billing policies in place in at least 20 states. The net metering policies of no two states are identical; but in all cases, net metering policies are governed by state law. In MidAmerican, FERC expressly held that Iowa's net metering policies "are not preempted by Federal law." MidAmerican, 94 FERC at ¶ 61,340.

The very first sentence of the quotation from Sun Edison LLC cited above makes exactly the same point: "Net metering allows a retail electric customer to produce and sell power onto the Transmission System without being subject to the Commissions' jurisdiction." [Emphasis supplied]. That is, net metering allows a retail customer to sell power without being subject to Federal jurisdiction – because net metering is governed by state law.

In MidAmerican, FERC also explained the exact reason that net metering is governed and controlled by state law and not by federal law. In order for federal law to be implicated, there must be, pursuant to the Federal Power Act, a wholesale sale of electricity for resale. 16 U.S.C. § 824(b)(1) (FERC only has jurisdiction over "the sale of electricity at wholesale"); 16 U.S.C. § 824(d) ("wholesale" is defined as "a sale of electric energy to any person for resale"). Normally, a net-metering self-generator is "merely" offsetting its own electricity use; thus, according to FERC, there is no wholesale sale of electricity for resale; thus, there is no federal jurisdiction, and net metering is governed solely by state law.

Eight years after the MidAmerican decision, FERC reiterated this same reasoning in Sun Edison:

> The Commission has explained that net metering is a method of measuring sales of electric energy. Where there is no net sale over the billing period, the Commission does not view its jurisdiction as being implicated; that is, the Commission does not assert jurisdiction when the end-use customer that is also the owner of the generator receives a credit against its retail power purchases from the selling utility.

Sun Edison, 129 FERC at ¶ 61,620 (footnotes citing MidAmerican omitted; emphasis supplied).

FERC law is admirably clear and unequivocal on these points. Net metering is governed by state law, not federal law. The reason that net metering is governed by state law and not federal law is that when a self-generator uses net metering to offset its own consumption of electricity – even where the self-generator sometimes feeds electricity back to the utility – FERC deems that there is no wholesale sale of electricity for resale such that would trigger federal law. This is true as long as, as FERC stated in Sun Edison, the net metering self-generator remains "a net consumer of electricity." That is, as long as the net metering self-generator produces less electricity in the applicable billing period than it consumes, state law (not federal law) controls the transaction.

There is no case from any administrative agency or court of competent jurisdiction anywhere in the country that contradicts the basic points set forth in the preceding paragraph.

But what if the net metering self-generator produces more electricity in the applicable billing period than it consumes? In that event, a two-tiered structure controls

the amount that the utility must pay the net metering self-generator. In the first tier, state net-metering law sets the applicable rate up to the level of the self-generator's own consumption. (In Rhode Island, that is the full retail rate.) In the second tier, just for the incremental additional power produced by the self-generator above and beyond the self-generator's own consumption during the applicable billing period, federal law sets the rate. This is the familiar "avoided cost" rate set forth in Section 210 of the Public Utilities Regulatory Act of 1978 (PURPA). 16 U.S.C. § 824a-3.

Crucially, although federal law requires that (just) this incremental portion of power above and beyond the self-generator's own consumption during the applicable billing period not exceed the avoided cost rate, FERC has expressly held that state law can define avoided cost, and the state can set different avoided cost rates for different technologies. California Public Utilities Commission, 133 FERC ¶ 61,059 (October 21, 2010). Specifically, FERC held that state law can define avoided cost rates based on the environmental attributes of a generation technology. Id. at ¶¶ 26-31.

All of the foregoing law is unremarkable because it comports completely with the underlying public-policy purposes of PURPA's Section 210. Section 210 "seeks to encourage the development of . . . small power production facilities. Congress believed that increased use of these sources of energy would reduce the demand for traditional fossil fuels." FERC v. Mississippi, 456 U.S. 742, 750, 102 S. Ct. 2126, 2132, 72 L.Ed.2d 532 (1982).

That is, part of the public-policy underpinning of PURPA was to encourage small distributed generation energy facilities. As the Congressional Research Service put it, "The original intent of § 210 of PURPA was to encourage alternative sources of electricity beyond traditional generation facilities, without these facilities being subject to all existing federal and state utility regulations." Amy Abel & Jon Shimabukuro, Electricity Restructuring Bills: A Comparison of PURPA Provisions (Congressional Research Service, Apr. 7, 1999), available at http://ncseonline.org/nle/crsreports/energy/eng-50.cfm.

In short, the law applicable to net metering can be summed up as follows:

1. Net metering (including setting the rate at which a utility pays a self-generator) is controlled by state law, not federal law, where a net metering self-generator is producing an amount of electricity up to the amount the self-generator is itself consuming. This is because FERC deems that in this circumstance the self-generator is merely off-setting its own consumption of electricity for the applicable billing period; thus there is no wholesale sale of electricity for resale and federal law is not implicated.

2. Where a net metering self-generator produces more electricity than it itself consumes, the payment for just the incremental amount of electricity produced beyond the self-generator's own consumption cannot exceed the avoided cost rate; however, FERC looks to state law to define "avoided cost," and state law may properly consider environmental attributes of generation in setting an avoided cost rate.

Addressing the PUC's Specific Questions

Question 1: Is the defined "avoided cost" rate set forth in R.I. Gen. Laws § 39-26.2-2(4) consistent with standards set forth in PURPA and FERC law and regulations? That is, does the Rhode Island General Assembly have the authority to define the applicable "avoided cost" rate?

Answer: As a threshold matter, it is important to note that the General Assembly has set two separate rates for net metering self-generators. The General Assembly has power to set both of these rates.

First, the General Assembly set the rate that net metering self-generators are to receive up to the amount of the self-generators' own consumption of electricity. The General Assembly set this rate at the full retail rate applicable to the self-generator's rate class. FERC deems that the state General Assembly has the power to do this because Federal law is not implicated in this situation.

Second, the General Assembly set the rate that net metering self-generators are to receive just for the incremental portion of the power they produce above their own consumption. This is the avoided cost rate, which the General Assembly defined as the SOS rate applicable to the self-generator's rate class. The General Assembly has the power to define the avoided cost rate. As noted above, FERC has expressly held that state law can define avoided cost, and the state can set different avoided cost rates for different technologies. California Public Utilities Commission, 133 FERC ¶ 61,059 (October 21, 2010). (In addition, FERC held that state law can define avoided cost rates based on the environmental attributes of a generation technology. Id. at ¶¶ 26-31.)

Thus, the answer to this question is: Yes, the "avoided cost" rate set forth in R. I. Gen. Laws § 39-26.2-2(4) is fully consistent with PURPA and FERC law; yes, the General Assembly does have the authority to define the applicable "avoided cost" rate.

Question 2: Whether, in a situation where an eligible net metering system is not physically connected to an end-user, the issuance of checks versus credits for the incremental portion of energy up to 100% of the net metering customer's own consumption creates a wholesale transaction under federal law?

Answer: This question has not been decided. No federal statute and no FERC regulation addresses or resolves this issue. There is no FERC decision, nor any decision from any court of competent jurisdiction, that has ever addressed this issue, much less decided it. After the undersigned counsel was unable to find any applicable statute, regulation, case, or decision addressing this question, he consulted with FERC staff. Specifically, he consulted with FERC attorneys in the FERC Office of General Counsel and with staff in FERC's Office of Energy Market Regulation. FERC staff confirmed that there are no statutes, regulations, or cases that address or decide this question.

In this context, there are two ways that the question could be approached.

First, one could argue the issuance of a check – instead of a bill credit – is merely an accommodation to the utility, and that treating the receipt of a check differently from the receipt of a bill credit is exalting form over substance. This is the position that the Town of Portsmouth took in the so-called Riggs Case in the Division of Public Utilities and Carriers earlier this year, Docket D-10-126.

On the other hand, one could argue that common sense (and ordinary language) suggest that if a self-generator receives a check in exchange for electricity, this transaction constitutes a sale of power. After all, "[a] sale, in the ordinary sense of the word, is a

transfer of property for a fixed price in money or its equivalent." Iowa v. McFarland, 110 U.S. 471, 479, 4 S. Ct. 210, 214, 28 L.Ed. 198 (1884). Moreover, it is undisputed that, after the utility receives this power, the utility resells the power to end-use customers. Under this second interpretation, the situation described is a wholesale sale of power for resale that would trigger federal jurisdiction.

Two things are simultaneously true of these two opposite interpretations of the same situation. First, both of these opposite ways to view the same transaction are reasonable. Second, which interpretation is correct is something that is not decided by any Federal statute, FERC regulation, or case decided by FERC or any court.

The short of it is that the answer to this second question posed by the PUC is not known.

In response to Questions 3(b) and 3(c), below, CLF suggests how it believes the PUC can and should address this uncertainty.

Question 3(a): Referencing proposed R.I.P.U.C. No. 2075, Sheet 4, under Terms and Conditions, is there a conflict between paragraphs three (3) and four (4) regarding checks and credits?

Answer: Yes. There is plainly a conflict.

As a threshold matter, CLF notes that the paragraphs in question were copied verbatim from two subsections of the newly enacted Chapter 26.2 of Title 39, which CLF refers to herein as "The New Net Metering Law." Thus, in responding to the three sub-parts of this Question 3, CLF will be discussing, in part, canons of statutory interpretation.

Paragraph 4 obligates the utility to give only a credit to the customer, up to 100% of the customer's own generation:

> If the electricity generated by an Eligible Net Metering System during a billing period is equal to or less than the Net Metering Customer's usage during the billing period for Net Metered Accounts at the Eligible Net Metering System Site, the customer shall receive Renewable Net Metering Credits, which shall be applied to offset the Net Metering Customer's usage on Net Metered Accounts at the Eligible Net Metering System Site.

But Paragraph 3 contradicts this obligation and gives the utility the option of issuing a check:

> The Company also may elect (but is not required) to issue checks to any Net Metering Customer in lieu of billing credits or carry forward credits or charges to the next billing period.

The two paragraphs are in conflict because Paragraph (4) obligates the utility to give the customer only a credit for electricity up to the customer's own consumption. It does this by saying "the Customer shall receive Renewable Energy Credits" [emphasis supplied]; "Renewable Energy Credits" is a defined term in the New Net Metering Law; "Renewable Energy Credits" is defined as bill offsets only. But Paragraph (3) directly contradicts this by saying the the utility "may elect (but is not required) to issue checks to any Net Metering Customer in lieu of billing credits. . ." [Emphasis supplied.]

Question 3(b): If yes [that is, there is a conflict between these two paragraphs], how could the paragraphs be reconciled consistent with state law?

Answer: These two paragraphs can easily be reconciled following standard canons of statutory interpretation.

The Rhode Island Supreme Court has explained:

> This court has long applied a canon of statutory interpretation which gives effect to all of a statute's provisions, with no sentence, clause or word construed as unmeaning or surplusage. State v. Caprio, 477 A.2d 67, 70 (R.I. 1984); In re Rhode Island Commission for Human Rights, 472 A.2d 1211, 1212 (R.I. 1984); Murphy v. Murphy, 471 A.2d 619, 622 (R.I. 1984); Spikes v. State, 458 A.2d 672, 674 (R.I. 1983); Probate Court of East Providence v. McCormick, 56 R.I. 308, 320, 185 A. 592, 597 (1936), rearg. denied, 57 R.I. 157, 189 A. 2 (1937). "Where one provision is part of the overall statutory scheme, the legislative intent must be gathered from the entire statute and not from an isolated provision." State v. Caprio, 477 A.2d at 70; accord In re Rhode Island Commission for Human Rights, 472 A.2d at 1212.

R. I. Dep't of Mental Health, Retardation and Hosps. v. R.B., 549 A.2d 1028, 1030 (R.I. 1988) (internal quotation marks and case citations as in original). To put the same point another way: "[N]o construction of a statute should be adopted that would demote any significant phrase or clause to mere surplusage . . . the presumption [is] that the Legislature intended each word or provision of a statute to express significant meaning. . . ." State v. Clark, 974 A.2d 558, 572 (R.I. 2009) (internal quotation marks and internal case citations omitted).

In this case, it is easy to give effect to both portions of the New Net Metering Law. This can be done by requiring the utility to give net metering self-generators only Renewable Energy Credits up to the full amount of the self-generator's own consumption (in accordance with Paragraph 4); and permitting the utility to issue a check for electricity for any electricity produced above the self-generator's own consumption (in accordance with Paragraph 3). This follows the standard canon of statutory construction by giving effect to both parts of the New Net Metering Law.

Conversely, allowing the utility to issue a check in all circumstances renders all of Paragraph 4 surplusage; allowing the utility to issue a check in all circumstances effectively reads all of Paragraph 4 out of the Statute. This would violate a standard canon of statutory construction by not giving effect to both parts of the New Net Metering Law.

Question 3(c): As a matter of policy, should the PUC seek to reconcile these two paragraphs?

Answer: Yes. The purpose of the General Assembly in enacting the New Net Metering Law was to revise the legal framework for net metering in the state in a way that works and is not open to challenge. That is a goal that the Commission and all parties to this Docket share.

Allowing the utility to issue a check for any net metering would open the New Net Metering Law up to the same type of challenge that animated the Riggs Docket before the Division. This would be so because no one knows whether the issuing of a check for electricity up to the self-generator's own consumption would (or would not) trigger federal law (and the avoided-cost-rate requirement); this question has not ever been decided. But there is a substantial risk that, if tested, the answer to this question would be "yes," because as noted above, common sense suggests that if a self-generator receives a check in exchange for electricity, this transaction constitutes a sale of power.

The PUC can easily prevent this question from ever being presented. The way to do this is to give effect to all parts of the New New Metering Law. This requires that: (1) the utility must provide only Renewable Energy Credits up to the amount of the self-

generator's own consumption; and (2) the utility issues a check for just the incremental portion of the self-generator's electricity production above the self-generator's own consumption.

In this way, even if the New Net Metering Law (and this Commission's regulations) were to be challenged, the challenge would almost certainly be unsuccessful because Rhode Island would be operating net metering in strict and complete compliance with applicable federal law. Federal law permits states to set rules for net metering, including the price to be paid for electricity, up to a self-generator's own consumption. Rhode Island sets the full retail rate for net metering up to the self-generator's own consumption, and would be specifying that the utility provide (only) a bill offset, but not a check, up to the amount of the self-generator's own consumption. For the incremental amount of electricity that a self-generator produces above its own consumption, the PURPA avoided cost rate is applicable (which the state is setting at the SOS rate). For this incremental amount of electricity above the self-generator's own consumption, there is no problem with the utility issuing a check, because that incremental amount of electricity is being purchased at the federally-mandated avoided-cost rate.

This course is desirable for three reasons: (1) It ensures that the state's entire net metering schema comports fully with federal law; thus, in case the state's net metering schema were ever challenged, it would survive the challenge. (2) By ensuring that the state's entire net metering schema comports fully with federal law, it reduces the likelihood of a challenge being brought (because everyone knows in advance that the challenge would

be unsuccessful). (3) It does all of the foregoing in strict conformity with standard canons of statutory interpretation long applied by the Rhode Island Supreme Court.

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CERTIFICATE OF SERVICE

I certify that the original of this Memorandum, together with nine photocopies, was filed in person with the Clerk of the Public Utilities Commission, 99 Jefferson Blvd., Warwick, RI 02888. In addition, electronic copies of this Memorandum were served via e-mail on the the service list for this Docket. All of the foregoing was done on October 14, 2011.