State of Rhode Island and Providence Plantations

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

Peter F. Kilmartin, Attorney General

October 14, 2011

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

Re: <u>Tariff Advice Filing to Amend R.I.P.U.C. No. 2035-Docket No. 4268</u>

Dear Ms. Massaro,

Enclosed for filing with the Commission are an original and Nine (9) copies of the Division of Public Utilities and Carriers (the "Division") Memorandum of Law in the above-captioned matter.

Thank you for your attention to this matter.

Very truly yours,

Jon G. Hagopian
Special Assistant Attorney General

cc: Service List (e-mail only)

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS
PUBLIC UTILITIES COMMISSION

NATIONAL GRID TARIFF ADVICE	:	
TO AMEND R.I.P.U.C NO. 2035	:	DOCKET NO. 4268
QUALIFYING PURCHASE POWER RATE	:	

THE DIVISION OF PUBLIC UTILITIES AND CARRIERS MEMORANDUM RELATING TO ISSUES POSED BY THE PUBLIC UTILITIES COMMISSION

I. ISSUES PRESENTED

(i) Is the defined "avoided cost" set forth in R.I. Gen. Laws § 39-26.2-2(4) consistent with standards set forth in PURPA and FERC law and regulations?

(ii) 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.

II. INTRODUCTION

A. FEDERAL AUTHORITY

The Federal Energy Regulatory Commission ("FERC") possesses exclusive jurisdiction pursuant to the Federal Power Act (the "FPA") to, among other things, regulate the rates, terms and conditions of sales for resale of electricity in interstate commerce by public utilities. 16 USC §§824, 824d, 824e (2006); see e.g., Mississippi Power & Light Co. v. Mississippi ex rel. Moore, 487 U.S. 354, 108 S. Ct. 2428, 2439-2440 (1988).

In 1978 the United States Congress enacted section 210 of the Public Utility Regulatory Policies Act ("PURPA"), 16 U.S.C §2601 et. sec.[1] PURPA was enacted in response to the OPEC oil embargo of 1973. The purpose of section 210 of PURPA was to reduce the nation's dependence on foreign oil by encouraging, inter alia, the development of cogeneration and small power production projects. *See* FERC v. Mississippi, 456 U.S. 742, 745-46, 750, 102 S. Ct. 2126 (1982). "Congress felt 'that two problems impeded the development of nontraditional generating facilities: (1) traditional electricity utilities were reluctant to purchase power from, and to sell power to, the nontraditional facilities, and (2) the regulation of these alternative energy sources by state and federal utility authorities imposed financial burdens upon the nontraditional facilities and thus discouraged their development.'" Greenwood v. New Hampshire Public Utilities Commission, 527 F.3d 8, 10 (2008) *citing* FERC v. Mississippi, 456 U.S. 742, 750-51, 102 S. Ct. 2126 (1982). PURPA mandated that FERC prescribe regulations "for implementing the statute, in particular, rules requiring utilities to enter into purchase and sale agreements with qualifying cogeneration and small power production facilities ("QF's")." Id.; 16 U.S.C. §824a-3(a); *see also* 16 U.S.C §796 (17)-(18) (defining QF's); 18 C.F.R. §292.204(a). FERC regulation 18 C.F.R.292.303(a) provides "that each electric utility shall purchase any energy and capacity that is made available from a qualifying facility" unless exempt under section 292.309. Similarly, FERC regulation 18 C.F.R.292.304(a)(i) requires that rates for purchases by an electric utility from a qualified facility shall "[b]e just and reasonable to the electric consumer of the electric utility and in the public interest; and (ii) [n]ot discriminate against qualifying cogeneration and small power production facilities."

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[1] Public Utility Regulatory Policies Act of 1978, Pub. L. No. 95-617, 92 Stat. 3117.

B. DELEGATION OF FEDERAL AUTHORITY TO THE STATES

The FERC adopted rules and regulations pursuant to the enabling authority in 16 U.S.C. §824a 3(a) relating to the purchase and sale of electricity to and from cogeneration and small power facilities. *See* 18 C.F.R. § 292.101 et. seq. "These afford state regulatory authorities…latitude in determining the manner in which the regulations are to be implemented." FERC v. Mississippi, 456 U.S. 742, 745-46, 751, 102 S. Ct. 2126 (1982). 16 U.S.C. §824a 3(f) requires state regulatory authorities to implement FERC rules. Id. Pursuant to 16 U.S.C. §824a 3(h)(2)(A) FERC is empowered to enforce in federal court any state's failure to comply with the requirements of subsection (f); "if the FERC fails to act after request, any qualifying utility may bring suit." Id. "Thus, a state commission may comply with the statutory requirements by issuing regulations, by resolving disputes on a case-by-case basis, or by taking any other action reasonably designed to give effect to FERC's rules." Id. The enactment of 16 U.S.C §824a-3(e)(1) exempts QF's from the Federal Power Act. *See also* 18 C.F.R. §292.601(a) (which includes specifically enumerated exemptions for qualifying facilities 20MW or smaller).

III. AVOIDED COST

A. THE FEDERAL DEFINITION

There has been a proliferation of renewable energy projects throughout the United States in recent years as a result of local legislatures enacting renewable energy standards for their respective states. The State of Rhode Island is no exception with its own renewable energy standard and recently enacted amendments creating a new Net Metering statute found in R.I Gen. Laws 39-26.2-1 et. seq.. One of the more contested issues in the renewable and distributed generation arena is the price paid by local distribution companies for the output from small distributed generators. The interpretations of FERC orders in the applicable case law are few and have been criticized by some commentators as not based on sound precedent. Nonetheless, FERC has made certain rulings with a clear eye toward encouraging distributed generation and seems to be leaving a great deal of discretion to state regulators to fashion orders particularly with respect to issues such as "avoided cost."

The term "avoided cost" has been traditionally defined pursuant to FERC regulations as the "incremental costs to an electric utility of electric energy or capacity or both which, but for the purchase from the qualifying facility or qualifying facilities, such utility would generate itself or purchase from another source." 18 C.F.R. § 292.101(6). According to section 210 of PURPA, the rules prescribed by the FERC shall not provide for a rate "which exceeds the incremental cost to the electric utility of alternative electric energy." 16 U.S.C. § 824a-3(b) (2006).

Notably, FERC regulations state that "[n]othing in this subpart requires any electric utility to pay more than the avoided costs for purchases." Id. at §292.304(a)2.

B. THE RHODE ISLAND DEFINITION

The recent enactment by the Rhode Island General Assembly of R.I. Gen. Laws §39-26.2-2 has provided a definition of "avoided cost" to be applied by the Public Utilities Commission. The definition of "avoided cost" as set forth in R.I. Gen. Laws §39-26.2-2(4), is "hereby declared to be the electric distribution company's standard offer service kilo-watt hour charge for the rate class and time-of-use billing period (if applicable) applicable to the distribution customer account(s) at the eligible net metering system site."

C. AVOIDED COST CASES

1. Connecticut Light & Power

The FERC reviewed a petition that passed on whether a state statute regulating the sale of power to a utility from a resource recovery facility owned by a municipality was preempted by PURPA where a Connecticut municipal rate statute mandated that sales by the QF be at rates that exceeded avoided cost. The statute required that the utility pay the same rate for purchasing power from a municipal QF that it charges the municipality for output it purchases from the utility (the retail rate). The FERC held the statute was preempted by PURPA. Connecticut Light and Power, 70 FERC ¶ 61,012, 61,029 (1995). On reconsideration, which was denied, the FERC further opined that:

> a QF is expressly a product of PURPA; PURPA defined what facilities would be QFs. PURPA gave states a specific but limited role to set wholesale rates pursuant to the statute and the Commission's regulations-a role that in most instances they would not otherwise have since QF sales primarily are sales for resale in interstate commerce. In other words, states have no authority outside of PURPA to set QF rates at wholesale. [Any] …attempt to read into PURPA and the Commission's regulations a right for states to impose rates for QF sales for resale that exceed avoided cost [is an] attempt to read in a right that is simply not there … a right that is contrary to the face of the statute which expressly states that such rates may not exceed 'the incremental cost to the electric utility,' i.e., not exceed avoided cost.

Connecticut Light and Power, 71 FERC ¶ 61,035, 61,153 (1995).

2. MidAmerican Energy Co.,

In MidAmerican Energy Company, 94 FERC ¶ 61,340 (2001), MidAmerican energy filed a petition with FERC seeking a declaratory ruling that an Iowa Utilities Board order that MidAmerican interconnect with three alternate energy facilities and offer net billing arrangements to the facilities was preempted by PURPA. MidAmerican asserted that offering net billing arrangements would result in it paying the QF the retail rate for its output, arguing that such was in excess of its avoided cost and thus preempted by PURPA. The FERC did not reach the issue of avoided cost in MidAmerican.

The FERC rejected MidAmerican's arguments on other grounds holding that net billing does not constitute a sale for purposes of PURPA. FERC reasoned that when a small generator net meters and accounts for its power transaction with a utility through a procedure of net billing, then no sale occurs. Therefore no FERC jurisdictional wholesale transaction occurred *See also* Sun Edison, LLC, 129 FERC ¶ 61,146, 61,620-61,621 (November 19, 2009). FERC further held that net billing arrangements "would be appropriate in some situations, and left the decision when to do so to state regulatory authorities." Mid American at 62,263.

3. Southern California Edison (2010)

The importance of the FERC's clarification order in Southern California Edison Co., 133 FERC 61,059, issued on October 21, 2010, cannot be overstated because it has provided the means for states to incentivize the development of small distributive generators. FERC did so by reversing an earlier case that limited discretion of state regulators to set rates in a way that encouraged renewable development.

FERC originally ruled that in determining avoided cost the state commission must do so by considering prices from "all sources able to sell to the utility" (including non-renewable sources, which result in lower prices since non-renewable energy has been less costly than renewable energy). See Southern California Edison Co., 70 FERC 61,215 (1995). Fifteen years later, however, in Southern California Edison Co., 133 FERC 61,059 (2010), FERC revisited its earlier holding and ruled that if only particular sources are available to sell to the utility, such as a renewable generator, then the state regulators may decide avoided cost strictly with reference to the particular type of generating source. Stated more generally, Southern California Edison Co. supports the proposition that "where a state requires a utility to procure a certain percentage of its energy from generators with certain characteristics, generators with those characteristics constitute the sources that are relevant to the utility's avoided cost for that procurement requirement." Southern California Edison Co., 133 FERC 61,059 at P 28-29. This means that non-renewable sources capable of lowering the price need not be considered in such a determination.

Further, FERC held that "the concept of a multi-tiered avoided cost rate structure can be consistent with the avoided cost rate requirements set forth in PURPA and our regulations." Southern California Edison Co., 133 FERC 61,059 at P 26.

IV. DISCUSSION OF ISSUES PRESENTED

(i) Is the defined "avoided cost" set forth in R.I. Gen. Laws § 39-26.2-2(4) consistent with standards set forth in PURPA and FERC law and regulations?

The definition of "avoided cost" set forth in R.I. Gen. Laws § 39-26.2-2(4) complies with the standards set forth in PURPA as well as FERC law and regulations for the following reasons. As a general proposition, PURPA grants the states limited authority to set wholesale rates for a QF's sale of generation provided that the rate does not exceed the utility's "avoided cost." In its recent holding FERC has expanded its interpretation of the standards for determining avoided cost, which provided that state commissions consider all sources available to sell to the utility. In the most recent Southern California Edison Co. case *supra*, the FERC held that the states may set multi-tiered rates for the purchase and sale of QF generation and may also determine the rate based solely upon the cost of that subset of resources.[2] The decision now allows state regulators, when determining avoided cost, to exclude all other sources of generation available to sell to the utility except the type of generation source offering its output to the utility. The cases reviewed here demonstrate that multi-tiered rate structures may not violate PURPA or federal regulation. Furthermore, Connecticut Light and Power Co., *supra* states that even though in most instances QF sales primarily are sales for resale in interstate commerce, through PURPA state regulators have the power to set QF rates at wholesale. The key analysis is whether there is a QF at issue. As the FERC has repeatedly declared "states are allowed a wide degree of latitude in establishing an implementation plan for section 210 of PURPA." American REF-FUEL Company of Hempstead, 41 FERC ¶ 61,161 at 61,533 (1989). Similarly, FERC has held that "[f]or small power production facilities sized between 30 and 80 megawatts, the Commission has determined that avoided cost rates established by states that are consistent with the Commission's regulations generally will be accepted as the "just and reasonable" rate under section 205 of the Federal Power Act." Signal Shasta, 41 FERC ¶ 61,120 at 2 (1987).

In the instant matter, we must apply these rate setting principles to the statute here. The recently enacted state net metering statute provides that the avoided cost for eligible net metering QF's shall be the standard offer rate for their excess generation between 100% and 125% of consumption. R.I. Gen. Laws § 39-26.2-2(4). The QF shall be entitled to a credit for up to 100% of the eligible renewable self generators usage which credit shall be equal to the total kilowatt hours of electricity generated and consumed on-site during the billing period multiplied by the sum of the distribution companies standard offer rate, distribution charge, transmission

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[2] "PURPA gave the states a specific but limited role to set wholesale rates pursuant to the statute and the Commission's regulations-a role that in most instances they would not otherwise have had since QF sales primarily are sales for resale in interstate commerce. In other words, states have no authority outside of PURPA to set QF rates at wholesale." Connecticut Light & Power Co., 71 FERC ¶61,035 (1995) (Order Denying Reconsideration), appeal dismissed, 117 F.3d 1485 (D.C. Cir. 1997).

charge and transition charge. R.I. Gen. Laws § 39-26.2-2(12). The Division asserts that this rate structure is consistent with PURPA and FERC regulations. Here Rhode Island's renewable energy standard requires at least 5.5% of the distribution companies delivered energy come from renewable energy sources. R.I. Gen. Laws § 39-26-4. The FERC illustrated this very example and held where "a state requires a utility to procure a certain percentage of its energy from generators with certain characteristics, generators with those characteristics constitute the sources that are relevant to the utility's avoided cost for that procurement requirement." Southern California Edison Co., 133 FERC 61,059 at P 28-29. It appears therefore, based upon a survey of the applicable law and federal regulations, that the Rhode Island definition of "avoided cost" in the statute here was modeled in conformance with federal law.

(ii) 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.

The issue here is whether providing a payment of a sum of money rather than a credit constitutes a wholesale transaction under federal law. The distinction does not appear to matter under recent FERC orders though there does not seem to be a case directly on point regarding this issue.

Some argue that if a utility pays a sum of money in return for output then there is a sale that is subject to the Federal Power Act, which governs the sale of electricity for resale in interstate commerce. Whereas, in circumstances where a credit is given by a utility for the excess energy from a QF or net metering facility the resultant transaction is not a sale subject to FERC jurisdiction. These arguments could be interpreted as pure semantics after FERC's most recent ruling in Southern California Edison Co., 133 FERC 61,059 (2010). This case involved a feed in tariff and did not relate to or discuss net metering transactions, however the holding regarding "avoided cost" analysis seems equally applicable to both scenarios provided QF status is established. This is important since the Division is aware that Commission rules in PURPA section 292.303 "require each electric utility to purchase in conformance with § 292.304...any energy and capacity which is made available from a qualifying facility...."[3] These sections refer to purchases and not netting. The most recent Southern California Edison Co., case law refers to purchasing output by the utility from QF's through state mandated feed in tariffs (presumably by payment of a sum of money in consideration for output-no mention of netting processes). It can therefore be logically concluded that the issuance of checks to a facility not physically connected to the end-user does not constitute a wholesale transaction subject to federal jurisdiction. There is simply no known FERC order or case prohibiting such a payment.

Respectfully submitted,

Thomas Ahern, Administrator
State of Rhode Island
Division of Public Utilities and
Carriers

By his attorney,

Jon G. Hagopian, Esq. (#4123)
Special Assistant Attorney General
Department of Attorney General
150 South Main Street
Providence, R.I. 02903
Tel.: 401-274-4400

Dated: October 14, 2011

[3] *See* 18 C.F.R. § 292.303(a) (2010) and 18 C.F.R. § 292.304(a)(1).

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the within was sent via e-mail to the following on this 14th day of October, 2011.

Docket No. 4268– National Grid Electric – Tariff Advice Filing for Approval of Net Metering Provision and to Amend R.I.P.U.C. No. 2035, QF Power Purchase Rate - Service List as of 8/2/11

Name/Address	E-mail	Phone/FAX
Thomas R. Teehan, Esq. National Grid 280 Melrose St. Providence, RI 02907	Thomas.teehan@us.ngrid.com Joanne.scanlon@us.ngrid.com	401-784-7667 401-784-4321
Jon Hagopian, Esq. Dept. of Attorney General 150 South Main St. Providence RI 02903	Jhagopian@riag.ri.gov Sscialabba@ripuc.state.ri.us Dstearns@ripuc.state.ri.us Acontente@ripuc.state.ri.us mcorey@riag.ri.gov dmacrae@riag.ri.gov	401-222-2424 401-222-3016
Jerry Elmer, Esq. Conservation Law Foundation 55 Dorrance Street Providence, RI 02903	jelmer@clf.org	401-351-1102 Ext. 12
File an original & 10 copies w/: Luly E. Massaro, Commission Clerk Public Utilities Commission 89 Jefferson Blvd. Warwick RI 02888	Lmassaro@puc.state.ri.us Cwilson@puc.state.ri.us Adalessandro@puc.state.ri.us Anault@puc.state.ri.us Dshah@puc.state.ri.us Nucci@puc.state.ri.us	401-780-2107 401-941-1691
Benjamin Riggs	rmcriggs@earthlink.net	
Daniel W. Allegretti, VP, Energy Policy Constellation Energy	Daniel.W.Allegrett@Constellation.com	
Joseph Donovon, Constellation Energy	Joseph.Donovan@constellation.com	