

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS
PUBLIC UTILITIES COMMISSION

IN RE: THE NARRAGANSETT ELECTRIC COMPANY :
d/b/a/ NATIONAL GRID’S PROPOSED DISTRIBUTED : DOCKET NO. 4277
GENERATION ENROLLMENT APPLICATION :
AND PROCESS RULES :

ORDER

I. Introduction

The Narragansett Electric Company d/b/a National Grid (National Grid or Company) is required to file distributed generation enrollment reports with the Distributed Generation Board (Board), the Office of Energy Resources (OER), and the Public Utilities Commission (PUC or Commission) following each distributed generation enrollment period. These reports, filed pursuant to R.I. Gen. Laws §39-26.2-8, disclose the aggregate amount of nameplate capacity and prices awarded pursuant to all of the standard contracts executed during the applicable enrollment. Each year, the Company holds three enrollment periods and files three enrollment reports.

The Commission files these reports in Docket No. 4277. The Commission often receives these reports after an order has been issued in Docket No. 4277, when the docket is closed. The Commission continues to receive these reports and files them in Docket No. Docket No.4277, notwithstanding the docket being closed. The Commission first opened Docket No. 4277 in 2011 when the Company filed its Distributed Generation Enrollment Application and Process Rules (Rules) pursuant to the Distributed Generation Standard Contracts Act.¹ The Commission approved the Company’s Rules in 2011 and has approved updated versions of the Rules in subsequent years. On July 2, 2014, the Commission issued an order approving the Company’s Distributed Generation Enrollment Application and Process Rules submitted on March 27,

¹ R.I. Gen. Laws §39-26.2-1 - §39-26.2-14.

2014.² Unless otherwise specified, all references to Rules in this Order shall mean the Rules approved by the Commission at open meeting on March 19, 2014, per Order No. 21507 issued July 2, 2014.

II. Objection by WED Coventry One, LLC.

On December 23, 2014, National Grid filed the Third 2014 RI DG Enrollment Report (See Attached.) On January 2, 2015, WED Coventry One, LLC (Petitioner) filed an Objection to National Grid's Third 2014 Enrollment Report and requested that the Commission grant the following relief: order National Grid to acknowledge WED Coventry One's eligibility for the Third Enrollment in the Distributed Generation Standard Contract program and properly consider and process its enrollment application; order National Grid to refund the performance guarantee deposit paid by WED Coventry One pursuant to a contract executed on August 2, 2013; order National Grid to pay WED Coventry One reasonable attorneys' fees and costs; and order any and all other relief deemed reasonable and appropriate.

The relevant facts leading up to WED Coventry One's Objection involve a contract dispute between National Grid and WED Coventry One. On August 2, 2013, WED Coventry One signed a distributed generation contract with National Grid. Pursuant to the contract, WED Coventry One paid a non-refundable performance guarantee deposit of \$46,905.³ The purpose of the performance guarantee deposit is to promote adherence to construction milestones and to promote projects reaching commercial operation.⁴ National Grid is statutorily required to demand a performance guarantee deposit from developers of distributed generation projects.⁵ The performance guarantee deposit is calculated based on a statutory formula which multiplies

² Order No. 21507(Docket No. 4277).

³ WED Coventry One Objection to Third Enrollment Report at 2.

⁴ Transcript at 97-98, Testimony of Jerry Elmer (11/09/11), (Docket No. 4288)

⁵ R.I. Gen. Laws §39-26.2-7.

the estimated number of renewable energy certificates (REC) to be generated from a project by a statutory dollar amount.⁶

On April 17, 2014, National Grid sent WED Coventry One an interconnection impact study which estimated the total amount of interconnection costs to be paid by WED Coventry One for interconnecting the proposed project to the distribution system, as well as a neighboring project, WED Coventry Two. The impact study also included an estimated timeframe for completing the system modifications necessary for interconnecting WED Coventry One to the distribution system. According to the Objection filed by WED Coventry One, the estimated, combined interconnection costs for the two neighboring projects, WED Coventry One and WED Coventry Two, was \$1,125,540.⁷ The pleading filed by WED Coventry One does not reveal the cost specifically attributable to WED Coventry One. In the impact study, National Grid projected that it would take approximately 18 to 24 months for the Company to complete system modifications necessary to interconnect the WED Coventry One project to the Company's distribution system.⁸

On November 5, 2014, WED Coventry One informed National Grid in writing that the August 2, 2013 contract was terminated immediately due to WED Coventry One's inability to comply with the production deadlines required in the contract. National Grid replied that the contract could not be terminated unilaterally and required WED Coventry One to sign an agreement forfeiting the statutorily mandated performance guarantee deposit to ratepayers.⁹

⁶ R.I. Gen. Laws §39-26.2-7(2)(ii).

⁷ According to WED Coventry One, the combined interconnection costs of \$1,125,540 for the two projects, WED Coventry One and Two, are broken down as follows: \$907,000 for System Modifications to the Company Electric Power System (EPS); \$22,400 for Interconnection Facilities including engineering review and acceptance, and compliance verification of the ICIFs including all required drawings and equipment spec reviews, relay settings, and construction; and \$197,140 for interconnection taxes. Objection of WED Coventry One at 3.

⁸ Objection of WED Coventry One at 3.

⁹ Id. at 4.

WED Coventry One refused to forfeit the performance guarantee deposit alleging that the interconnection costs and delays associated with getting the project to commercial operation were caused by National Grid. WED Coventry One also alleged the interconnection costs demanded by National Grid rendered the project economically unsustainable.¹⁰ WED Coventry One applied for a new contract (for the same project) in the Third DG Enrollment of 2014. National Grid denied WED Coventry One's enrollment application stating it would not be eligible for enrollment unless it formally terminated the August 2 contract, as the same project could not be the subject of two separate contracts. In the August 2 contract, the parties agreed to the exclusive jurisdiction of the state and federal courts of Rhode Island over any legal proceedings arising out of the August 2 contract.

III. Briefs

As previously noted, the pleading filed by WED Coventry One seeks, among other things, that the Commission order National Grid to refund a contractual performance guarantee deposit and acknowledge WED Coventry One LLC's eligibility for the Third 2014 Enrollment in the Distributed Generation Standard Contract Program. Given that the Petitioner in this action is a signatory to a contract executed with National Grid, in which the parties agreed to the exclusive jurisdiction of Rhode Island's state and federal courts for any legal proceedings arising out of or in connection with the contract, the Commission requested briefs on the preliminary issue of whether the Commission has jurisdiction to order the relief requested by WED Coventry One, LLC.¹¹ The parties were asked to brief this issue since WED Coventry One's prayers for

¹⁰ Objection of WED Coventry One at 3.

¹¹ An exact copy of the contract executed by WED Coventry One and National Grid was not provided to the Commission; however, Petitioner represented that the August 2, 2013 contract executed by WED Coventry One and National Grid was the same standard contract approved by the Commission on November 30, 2011 (Written Order

relief would arguably require the Commission to make an initial determination as to whether the August 2 contract was terminated and, as previously noted, the parties had previously agreed to leave such a determination to the courts. The Commission informed the parties that the matter would be dismissed if the Commission determined that it lacked jurisdiction to order the relief requested in Petitioner's Objection. Conversely, a hearing would be scheduled if the Commission determined that it possessed the requisite jurisdiction to adjudicate the Petitioner's Objection.

A. Brief of WED Coventry One, LLC.

WED Coventry One argued that there is no contract dispute in need of resolution in order to grant the relief requested; however, it conceded that the "contractual matter" of National Grid's "contractual default" will be resolved in court.¹² Citing R.I. Gen. Laws §39-26.2-7(2)(iv), WED Coventry One argued that the August 2 contract automatically terminated, by operation of statute, on February 2, 2015 when the production deadline was not met.¹³ The Petitioner further alleged that the Commission has authority to order the relief requested based on the state's legislative policy to promote distributed generation and the Commission's enabling legislation, including its implied and incidental powers. In support of this argument, Wed Coventry One relied on broad sweeping policy statements that distributing electrical energy is affected with a public interest, and referred to the state's policy to facilitate and promote installation of grid-

20676 issued March 15, 2012) (Docket No. 4288). WED Coventry One's Response to Comm 1-1. Subsequent to approving this standard contract, however, the Commission, on March 29, 2012 approved a revised standard contract for large distributed generation projects (Written Order 20700 issued April 11, 2012). This standard contract, approved by the Commission on March 29, 2012 (written Order issued April 11, 2012), was the last standard contract approved by the Commission prior to August 2, 2013 and, therefore, should be an exact copy of the contract executed by the parties. In any event, the standard contract forms approved by the Commission on March 15 and March 29 both contain a Paragraph 10 entitled "Dispute Resolution" which gives exclusive jurisdiction to the state and federal courts of Rhode Island for all legal proceedings arising out of the contract.

¹² Brief of WED Coventry One at 1 and 5.

¹³ *Id.* at 4. The Petitioner originally alleged in its Objection that the August 2 contract terminated on November 5, 2014 when it notified the Company of its intention to terminate the contract. WED Coventry One Objection at 3-4.

connected generation of renewable energy.¹⁴ The Petitioner argued that National Grid’s “wrongful denial” of WED Coventry One’s enrollment application amounted to “program misadministration” which impedes the state’s energy policies in favor of distributed generation, including reduced environmental impacts, economic development, and diversification of energy supply.¹⁵

Petitioner argued that its bid price submitted in the Third Enrollment was lower than other selected projects, that it met all other selection criteria, and that National Grid had no discretion to reject WED Coventry One’s bid.¹⁶ Petitioner alleged that the Company would have met its annual distributed generation capacity target of 13MW if it had awarded a contract to WED Coventry One in the Third Enrollment.¹⁷ Petitioner provided no evidence to support the allegation that it met all of the Company’s selection criteria, nor did it explain how WED Coventry One’s 1.5 MW project, when added to the 10.9 MW awarded in the Third Enrollment, would result in the Company achieving the annual target of 13 MW.

The Petitioner requested relief from “an improperly administered enrollment process” pursuant to Section 2.12 of National Grid’s Distributed Generation Enrollment Process Rules which allows prospective developers to file a complaint with the Commission concerning the conduct of distributed generation enrollments.¹⁸ The Petitioner distinguished which prayers for relief are appropriate for resolution by the Commission. Specifically, the Petitioner characterized its request for a refund of the performance guarantee as a contractual matter to be resolved in

¹⁴ Brief of WED Coventry One at 1-2, citing R.I. Gen. Laws §39-1-1(a)(1), (d)-(e) and §39-26.2-2.

¹⁵ Brief of WED Coventry One at 2-3.

¹⁶ Id. at 3.

¹⁷ “...National Grid had to accept the COV 1 bid in addition to all other accepted bids to meet the annual and total program goals for enrollment.” Id.

¹⁸ Brief of WED Coventry One at 4.

court but argued that WED Coventry One's eligibility for the Third Enrollment is properly before the Commission.¹⁹

B. Brief of National Grid

National Grid argued that the Commission lacks jurisdiction to address the relief requested in WED Coventry One's Objection. The Company's argument is inextricably tied to the issue of whether the August 2 contract was terminated. The Company contends that both of the Petitioner's primary prayers for relief, the project's eligibility for the Third 2014 DG Enrollment and the refund of the performance guarantee deposit, are based on the premise that the August 2 contract was terminated. The Company argued that in order to address the Petitioner's prayers for relief, the Commission would first have to determine whether the August contract was terminated. According to the Company, the Commission is prohibited from making such a determination because the August 2 contract gives exclusive jurisdiction to the courts over all disputes arising out of the contract.

In support of its argument, the Company emphasized that forum selection clauses, such as the one contained in the August 2 contract, are prima facie valid in the state of Rhode Island and will not be disregarded unless 1) a court concludes it is not fundamentally fair, and the party claiming a lack of fundamental fairness bears a heavy burden of proof, or 2) the chosen forum lacks subject matter jurisdiction over the dispute.²⁰ National Grid contended there are no grounds for disregarding the forum selection clause in the August 2 contract. Accordingly, the Commission must enforce the forum selection clause and decline jurisdiction over the Petitioner's Objection.

¹⁹ Id. at 5.

²⁰ Brief of National Grid at 4, citing Tateosian v. Celebrity Cruise Services, LTD., 768 A.2d 1248 (R.I. 2001); Carnival Cruise Lines, Inc. v. Shute, 499 U.S. 585, 592, 595-97 (1991); and Sidell v. Sidell, 18 A.3d 499, 507 (R.I. 2011).

IV. Decision

At an open meeting on March 31, 2015, the Commission discussed whether it possessed jurisdiction to order the relief requested in Petitioner's Objection. It is evident, despite the rhetoric, that both parties acknowledge the existence of a contract dispute. The parties clearly disagree over whether the August 2 contract was terminated. They also disagree on the appropriate impact that the contractual issue should have on the within pleading. While the Petitioner initially denied the existence of a contract dispute as a condition precedent to resolving the pleading, it ultimately conceded that a "contractual matter" prevents the Commission from resolving one of the issues raised in its Objection.²¹ The Petitioner conceded that the contract dispute prohibits the Commission from determining whether or not the Petitioner is entitled to a refund of the performance guarantee deposit, but it does not prohibit the Commission from considering the Petitioner's eligibility for the Third 2014 DG Enrollment. National Grid, on the other hand, contends that resolution of the Petitioner's entire pleading requires a preliminary determination of whether the contract was terminated since both prayers for relief rely on the premise that the August 2 contract was, or should have been, terminated.²² Reinforcing this fact, according to National Grid, is the "clear and uncontested" fact that a single project cannot enter two separate DG contracts.²³ National Grid contended that the Commission is prohibited from ruling on both prayers for relief because the August 2 contract prohibits the Commission from making the prerequisite determination of whether the August 2 contract was terminated.

²¹ Brief of WED Coventry One at 1 and 5. "[T]here is no contract dispute for resolution as condition precedent to the Commission's grant of the requested relief." (Brief of WED Coventry One at 1) "COV 1 concedes that the specific question of whether National Grid must refund the performance guaranty deposit COV 1 paid under the DG Standard Contract is a contractual matter involving National Grid's contractual default and failure to honor the force majeure provision in the DG Contract, that is now to be resolved in court." (Brief of WED Coventry One at 5)

²² Brief of National Grid at 3.

²³ Id.

National Grid offers in support of this argument the longstanding case law in this jurisdiction upholding forum selection clauses.

The Commission agrees with the Petitioner that the contract dispute in this matter is limited to whether Petitioner is entitled to a refund of the performance guarantee deposit. The Commission finds that National Grid effectively rendered the August 2, 2013 contract impossible to perform when it issued an impact study to the Petitioner estimating that it would take approximately 18 to 24 months to complete the system modifications necessary to interconnect the Petitioner's project to the distribution grid. The Commission finds that the issue of whether the Petitioner's performance guarantee deposit should be refunded is reserved for the courts pursuant to the dispute resolution provision agreed upon by the parties in the August 2 contract.

The issue of whether National Grid should refund the performance guarantee deposit to WED Coventry One clearly arises out of the August 2 contract between the parties and must be resolved by the courts according to the terms of that contract. The Commission approved the standard contract form to be used for all distributed generation projects in 2012. WED Coventry One is a 1.5 MW project. The contract approved by the Commission for projects with a nameplate capacity of greater than 500 kW contained a dispute resolution provision which states,

The Parties agree to the exclusive jurisdiction of the state and federal Courts located in the State of Rhode Island for any legal proceedings that may be brought by a Party arising out of or in connection with this Agreement.²⁴

The August 2 contract required the payment of a performance guarantee pursuant to R.I. Gen Laws §39-26.6-7. The Petitioner originally contended that the August 2 contract was automatically terminated on November 5, 2014, when National Grid notified Petitioner that it would take 18 to 24 months to complete the system modifications necessary to interconnect the project to the distribution system. The Petitioner later contended that the August 2 contract

²⁴ Order No. 20700 issued April 11, 2012 (Docket No. 4288).

terminated on February 2, 2015, when the project failed to meet the production deadline. In any event, the Petitioner contends that National Grid's estimated cost to interconnect the Petitioner's project to the distribution system rendered the project economically unsustainable, and as a result of this, the Petitioner should receive a refund of the performance guarantee deposit. This issue clearly arises out the contract entered into between the parties and must be resolved by the courts pursuant to the express terms of the contract's dispute resolution provision.

Reserving the performance guarantee deposit to the courts does not preclude the Commission from making a determination on the Petitioner's other prayer for relief, namely, whether the Petitioner was eligible for the Third 2014 DG Enrollment. The August 2 contract does not prohibit the Commission from deciding on the merits whether WED Coventry One met all of National Grid's selection criteria and was otherwise eligible for the Third Enrollment.

During the Third 2014 DG Enrollment, which occurred during October and November of 2014, a renewable energy developer seeking a distributed generation contract with National Grid was required to file a Distributed Generation (DG) Enrollment Application.²⁵ In October of 2014, distributed generation contracts were awarded through an enrollment and solicitation process governed by R.I. Gen. Laws §39-26.2-6 and National Grid's DG Enrollment Process Rules. The Rules governing the DG enrollment process provide applicants recourse regarding the conduct of enrollments through filing a complaint with the Commission. Specifically, Section 2.12 of the Rules allows National Grid to alter, amend, withdraw and/or cancel any requirement, term or condition of an enrollment without liability to National Grid.²⁶ The Rules further state,

²⁵ National Grid's Third 2014 Distributed Generation Enrollment Report, filed December 23, 2014, does not include specific dates of the Third Enrollment.

²⁶ National Grid's DG Enrollment Process Rules. Commission Order 21507, Appendix B, Section 2.12. (issued July 2, 2014, Docket No. 4277)

[A]n Applicant agrees that the sole recourse that it may have with respect to the conduct of this enrollment is by submission of a complaint or similar filing to the Commission in a relevant docket pertaining to this Open Enrollment.²⁷

The Commission finds that given the plain language of the Rules which provide applicants with recourse regarding the conduct of enrollments, by filing a complaint with the Commission, that the Commission may hear and rule on WED Coventry One's request to acknowledge its eligibility for the Third 2014 DG Enrollment. This issue is within the Commission's jurisdiction.

Based on the foregoing findings, the Commission voted unanimously to accept jurisdiction, in part, over WED Coventry One's Objection. Specifically, the Commission voted unanimously to accept jurisdiction over that portion of the WED Coventry One Objection which requests an order acknowledging WED Coventry One's eligibility for the Third 2014 DG Enrollment and to properly consider and process its application. The Commission, however, voted unanimously to decline jurisdiction over whether WED Coventry One is entitled to a refund of the performance guarantee deposit from National Grid.

Accordingly, it is

(21875) ORDERED:

1. Based on the findings contained in this Order, the Commission accepts jurisdiction, in part, of WED Coventry One's Objection filed January 5, 2015. The Commission shall accept jurisdiction over the WED Coventry One Objection for the sole purpose of determining whether WED Coventry One was eligible for the Third 2014 DG Enrollment and whether National Grid should consider and process WED Coventry One's enrollment application.

²⁷ Id.

2. Based on the findings contained in this Order, the Commission lacks jurisdiction over the WED Coventry One Objection for the purpose of ruling on whether WED Coventry One is entitled to a refund of the performance guarantee deposit paid to National Grid pursuant to the contract executed by the parties on August 2, 2013.
3. The Objection of WED Coventry One, filed January 5, 2015, shall be scheduled for hearing, and the matter shall be heard on the merits consistent with the terms and provisions contained in this Order.

EFFECTIVE AT WARWICK, RHODE ISLAND ON MARCH 31, 2015 PURSUANT TO AN OPEN MEETING DECISION. WRITTEN ORDER ISSUED APRIL 20, 2015.

PUBLIC UTILITIES COMMISSION




Margaret E. Curran, Chairman

Paul J. Roberti, Commissioner *


Herbert DeSimone, Commissioner

*Commissioner Roberti concurs but is unavailable for signature.

NOTICE OF RIGHT OF APPEAL: Pursuant to R.I. Gen. Laws §39-5-1, any person aggrieved by a decision or order of the PUC may, within seven (7) days from the date of the order, petition the Supreme Court for a Writ of Certiorari to review the legality and reasonableness of the decision or order.

APPENDIX A

Third 2013 RI DG Enrollment Report

Pursuant to the provisions of the Distributed Generation (“DG”) Standard Contracts Act, R.I.G.L. §39-26.2-8(a), National Grid is submitting the attached report of the aggregate amount of project nameplate capacity that was the subject of the standard contracts entered into during the DG Standard Contract enrollment that occurred during October/November 2013 and the prices under each of the standard contracts that was executed. National Grid awarded six Standard Contracts in the Third 2013 Enrollment, totaling 2.996 MW of project nameplate capacity. Although the Company received applications for almost 20 MW of projects, the target of 8.324 MW was not satisfied. The shortfall for this enrollment period was associated with specified technology/technology classes being under represented or not being represented under the current class target allocations (e.g., no Anaerobic Digestion class proposals). In addition, certain projects that were awarded were unable to execute contracts.

Counterparty	Project & Location	Nameplate Capacity (kW)	Class	Price (cents/kWh)
Stillwater’s Edge Realty, LLC 40 Byron Randall Road North Scituate, RI 02857	<i>SER 23 Appian Way</i> 23 Appian Way Smithfield RI 02917	52	Solar-PV (50 - 100 kW DC)	27.757
RSM Solar, LLC 3299 K Street, NW, Suite 700 Washington, DC 20007	<i>RSM Solar 166 Valley Street</i> 166 Valley Street Providence, RI 02909	150	Solar-PV (101 - 250 kW DC)	27.990
Nexamp Richmond Solar, LLC 4 Liberty Square, 3 rd Floor Boston, MA 02109	<i>Nexamp 76 Stilson Rd</i> 76 Stilson Road Richmond, RI 02898	498	Solar-PV (251 - 500 kW DC)	19.488
Bella Energy Finance 500 South Arthur Ave., #300 Louisville, CO 80027	<i>Bella 574 Camp Ave</i> 574 Camp Avenue North Kingstown, RI 02852	498	Solar-PV (251 - 500 kW DC)	14.790
North Kingstown Solar 1, LLC 28 Jacome Way Middletown, RI 02842	<i>North Kingstown Solar 1720 Davisville Rd</i> 1720 Davisville Rd North Kingstown, RI 02852	500	Solar-PV (251 - 500 kW DC)	19.000
Bella Energy Finance 500 South Arthur Ave., #300 Louisville, CO 80027	<i>Bella 1600 Division Rd</i> 1600 Division Road West Warwick, RI 02818	1,298	Solar PV / Anaerobic Digestion (501 kW – 3000 kW)	14.790
		2,996		