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

Dear Ms. Massaro and Commissioners:

Thank you for considering the following comments on the proposed Distributed Generation Long Term Contracts - Rhode Island Public Utilities Commission Docket No. 4288.

I also want to thank everyone on the DG Contract Working Group for their work, especially Ken Payne, Seth Handy and Paul Belval, who put in heroic effort. But I need to say, that like everyone else with any significant renewable energy project development experience that has reviewed the proposed contract, I am very concerned by much of the language resulting from the working group process.

Recently, an out of state solar firm hired me as a consultant to help them understand the market opportunities in Massachusetts. I persuaded them that thanks to the DG Contract legislation, they really should be setting up shop here in RI. They have invested in understanding the market, reaching out to local contractors and other potential partners and making preliminary sales efforts on some significant projects. They have been keeping abreast of developments as the deliberations over the DG Long Term Contracts pricing and contract language evolved. Neither they nor any of their finance partners consider this a remotely workable contract document.

After reviewing the proposed contract document, my primary client in Massachusetts has declined to spend any time or money here in Rhode Island because the banks and investors we work with would not be able to finance around the proposed contract unless we put up 100% cash collateral covering their exposure. Obviously, if we could do that, we wouldn't need financing.

I trust that everyone on the working group did what they thought was right. Unfortunately good intentions are not nearly enough when it comes to matters that require deep personal experience and very specialized expertise. The contract development process was far too short and limited in its inputs. The starting documents for the negotiations were completely inappropriate. The opportunity for the industry to provide feedback was completely inadequate. Even those at the negotiating table didn't have adequate time to take the document back to the experts in their own organizations to review and advise them.

Having been involved in the initial group of renewable energy professionals who conceived of this legislation and worked on it for well over a year, I couldn't be more disappointed by the process that relegated the most important aspect of the whole effort to just a couple weeks, with such limited and inadequate representation for the renewable energy industry allowed.

These contracts should not be comparable to what National Grid might enter will a dispatchable thermal generator or a large wholesale supplier. The risks to National Grid in these DG projects are de minimis. Those risks are spread over many small projects that will for the most part be successful. These contracts should be designed to make the risks to the sellers as equally negligible relative to the scale of their overall businesses as they are to National Grid.

Several specific concerns need to be addressed. I expect I missed others that are also unacceptable.

1) The Capacity Demonstration Test milestone has no basis in Distributed Generation Standard Contracts Act and is inappropriate for any contract intended to support project finance of small wind or solar projects. Under this provision, the contract is terminated if the project does not meet the Capacity Demonstration Test. While a Capacity Demonstration Test provision might have some relevance for a firm capacity project, it is entirely inappropriate for this kind of project. I presume the basis for this provision is 39-26.2-7(2)(iv), which reads that "...if the distributed generation facility has not generate the output proposed in its enrollment application within eighteen (18) months after execution of the contract, the contract is automatically voided and the security guarantee is forfeited." There are far better means to meet this goal. There is no requirement in law that projects include firm capacity in their enrollment application. Under this provision, the contract is terminated if the project does not meet the Capacity Demonstration Test. This is an example of how using a thermal, firm capacity contract as the basis for a contract with a small intermittent wind or solar contract has led to unnecessary burden and expense for the developer, contrary to the provisions of the enabling legislation. Regardless of whether or not this provision is appropriate for a distributed generation wind or solar contract, it is inappropriate for a contract intended to ease and enable project financing as these standard contracts were clearly intended. Default for failing to meet Capacity Demonstration Tests with no reasonable means to cure that default would be an unacceptable risk to most project lenders and investors. Most projects would not be able to get financing on the basis of this contract. This clause effectively defeats the fundamental purpose of the legislation and the entire program.

2) National Grid is not obligated to not buy any electricity and attributes over the projected generation capacity, while the seller can be declared in default and the contract canceled in its entirety for failing the bi-annual capacity tests or for a multitude of other seller default provisions. The upside of these contracts is far too limited and the downside is far too risky for a seller. There needs to be significant flexibility in these contracts regarding project output. These aren't gas fired generators we can just fire up at will.

3) Seller default penalties are unjustifiably onerous. The penalty should be simple: If you don't deliver power, you don't get paid, the contract is cancelled and any portion of the original bid bond still held is forfeited. There is no way these projects are viable without producing power and getting paid. The contracted payments are more than enough incentive for compliance. If a few of these small projects fail to produce, National Grid can easily replace the energy, RECs and Capacity. There are also far too many ways for National Grid to declare a seller default.

4) Default cure periods are far too short and thus pose unacceptable and unfair risk.

5) Requirements that sellers provide administrative services in all the REC markets in New York and New England on National Grid's behalf is not only onerous but violates the intention of the legislature that these contracts be used to meet the requirements of the Rhode Island Renewable Energy Portfolio Standard. Selling RECs into other jurisdictions is clearly contrary to that goal.

6) The Distributed Generation Standard Contracts Act allows the utility to "separate out pricing for each market product...provided that such accounting as specified in the contract does not affect the price and financial benefits to the seller as a seller of a bundled product." Clearly the numerous requirements in the proposed contract for the project to register with capacity markets, multiple REC markets, etc. impose a financial burden on the project, and this is in violation of the provision that any "separating out" not affect the financial benefits of the seller. A less burdensome approach would be for the contract to assign values to each of the products being sold, totaling up to the "bundled" price, and specify that it the seller's responsibility to undertake whatever minimal registrations, etc. are necessary with regard to each of the products, but leave actual compliance and participation in these markets up to the buyer acting as an aggregator and project representative.

7) Language requiring sellers to assume all administrative and other burdens to participate in future undefined and unknowable attribute markets as administrators on behalf of National Grid is a burden impossible to price. Those participating in the process setting ceiling prices for these contracts never imagined such unquantifiable requirements. How could anyone anticipate what such markets might evolve over fifteen years or possibly price the cost of such participation? Here again it would be fine for National Grid to receive those benefits and use meter data and other minimal project data to participate itself as an aggregator, but entering such undefined obligations as a contract condition would be unreasonable for any rational person or company to consider.

8) It appears that as written, the contract allows National Grid to change the pricing and terms of the contract if ISO-NE rules change, REC market rules change, FCM market rules change, etc. Since those rules are in constant flux, the fixed contract pricing would be effectively meaningless. This language undermines the whole concept of a fixed price long term contract and again challenges the ability of any project financers to establish a clear understanding of value and risk.

9) Third party ownership models are behind the majority of solar development in the country. Assignment for finance is an area that any such contract would need specialized language for the protection of investors and lenders. The proposed assignment clauses create unnecessary legal and administrative costs of approving specific contract assignments for financing rather than having such assignment as a contractual right of the seller within conventional bounds of such contract language. Because under this contract the seller has no affirmative right to assign the contract as security for a lender or investor, financing either through equity investors or through debt is significantly constrained. Section 11.1 is a Prohibition on Assignments, which while providing that consent for Assignment may not be unreasonably withheld, conditioned or delayed, also states that the Party requesting the other Party's consent to an assignment of this Agreement will reimburse such other Party for all costs and expenses such other Party incurs in connection with that consent, without regard to whether such consent is provided. On smaller projects that would be a very significant burden and deterrent to financing.

10) National Grid, on the other hand, has latitude to assign the contract. The seller could be left with a counter party with a credit rating below National Grid's current rating, a factor driving up the cost of financing these projects - presuming any financing could ever be found based on the rest of the contract.

11) There really should be no insurance requirements at all in this document beyond those required for interconnection. There are no added insurable risks for National Grid.

12) The indemnity clauses are one sided. All indemnity should be mutual.

13) Requiring monthly production forecasts and other such reporting are onerous and inappropriate burdens for the potential sellers, especially of small projects. The requirement of seller's financial statements cannot be justified in any way. The administrative burdens suggested are in clear contradiction to the intent of the legislature. None of that was anticipated in the call for pricing guidance issued by DOER. Administrative costs National Grid incurs will be passed on to the rate payers, so it is effectively free for them to engage in unnecessary bureaucracy. But those requirements would be an outsized burden on sellers, significantly increasing the costs anyone with understanding of them would have to bid in order to consider participating. These unnecessary burdens ultimately get passed to the ratepayers making the cost of renewable energy to ratepayers unnecessarily high and inviting PUC challenges to this entire effort.

14) One clause suggests that "Buyer may, in its sole discretion, direct Seller to deliver Energy through any other appropriate ISO-NE market mechanism." Depending on how that clause is interpreted, that could potentially be hugely expensive.

15) Though reduced from earlier drafts, seller obligations related to the ISO-NE Forward Capacity Market are completely inappropriate.

16) Buyer penalties have lots of wiggle room and could be negotiated and litigated by National Grid to a degree in excess of any actual value, all at the ratepayer's expense. Sellers don't get to bill ratepayers in that manner and thus can't afford to win such a dispute.

17) The tax clauses are unclear. The division between buyer and seller tax responsibilities needs to be clarified extensively or preferably just eliminated. It should be safe to presume that generators are responsible for any property taxes, income taxes, etc. on their generators and are selling energy and attributes wholesale to National Grid, so sellers would not responsible for sales taxes or other taxes on those sales.

18) Sections regarding milestones and project development are unnecessary and have no basis in the Distributed Generation Standard Contracts Act. While such provisions are typical of power purchase agreements with much larger facilities, which have much longer development periods, and upon which utilities may be relying on heavily to receive energy or capacity, or in which substantial amounts of ratepayer funds may be invested, they are inappropriate for projects of the scale and technology contemplated by the Distributed Generation Standard Contracts Act. The issue of contracts being signed but then no project being executed is clearly addressed in sections 39-26.2-7(2)(ii), (iii) and (iv). These sections simply require the project to make a performance deposit, and to achieve the "output proposed" within 18 months of the contract execution. There is no provision for milestones, nor are any necessary in the contract for the purposes of protecting the distribution company or ratepayers.

19) The following sections of the contract have no basis in the Distributed Generation Standard Contracts Act and are inappropriate for projects of the scale and technology being contemplated in this program, and impose unnecessary administrative and financial burdens on the project:
    a. Section 3.4(b), regarding outages
    b. Section 2.4(e), regarding forecasts
    c. Section 4.3, failure of seller to deliver
    d. Section 4.6(a), requiring annual testing of the meter
    e. Section 4.6(f), requiring telemetry from the meter
    f. Section 4.7(c), requiring seller to register RECs in states outside of Rhode Island
    g. Section 4.7(f), penalties for RECs not registered or transferred

h. Section 4.8, requiring project to participate in the Forward Capacity Market
i. Section 5.2(a), requiring presentation of a monthly invoice
j. Section 6.1, grant of security interest
k. Section 7.2 presumes seller is not a natural person
l. Section 7.2(k), regarding a projected useful life of 21 years
m. Section 13, regarding audits and financial reporting
n. All sections and clauses related to a Capacity Demonstration Test

As one of the original proponents of this legislation, I can assure you that we envisioned a simple metered transaction. National Grid should have a meter on the project and issue monthly checks based on meter readings and the contracted rate. In most states distributed generators can easily register as Qualified Facilities under FERC rules, deliver power to the utility meter and the utility deals with the rest of the requirements and simply issues a check. Net metering generators and those operating in places with Feed-In-Tariffs have similarly easy means of participation. That is clearly what we should have under these contracts.

We really need to start the contract drafting process over completely, based on documents that have successfully used in California, Colorado, Vermont, Ontario, or other places where Feed In Tariffs or utility SREC purchase requirements involve documents quite similar to what is really required here. Many have had those contract documents in place and working successfully for some time. Many of those documents are available for free on line and would be far more appropriate than the contract that was used as a basis for the document you are now considering.

I have circulated the proposed contract to numerous experienced industry professionals who are interested in working in Rhode Island. They all agree, without exception, that the document you are considering is not only egregiously burdensome for sellers, but it is not financeable by any reasonable standard.

Unfortunately, the contract working group has completely failed to meet the fundamental intent of the legislation with their proposed document. If this is the kind of contract language that anyone insists on or that the PUC might find appropriate, then it is very unlikely that distributed generation will ever play any significant role in this state and we will continue to be one of the few most difficult states in the entire country to build a clean energy project. It would be unfortunate if after the decade of false starts in renewable energy initiatives, Rhode Island completely fails yet again to provide any effective means to address our vulnerability to fuel cost volatility, disruptions to transmission lines, and ever increasing dependence on undependable imported energy resources.

Please do not allow short term considerations to compromise the long term goal of establishing a strong viable market mechanism to encourage distributed generation development. I hope you will decide to either address all of the matters of concern outlined above within the context of your own proceedings or that alternatively you will reject the proposed contract submission in its entirety and instruct the contract working group to establish a far more appropriate process and take the appropriate and necessary time to create a contract that at least begins to actually meet the intent of the legislature.

Thank you for considering this feedback

Fred Unger
President
Heartwood Group, Inc.