

Memorandum

From: Seth Handy, on behalf of the Washington County Regional Planning Council

To: RI Public Utilities Commission

Date: October 26, 2011

Regarding: Docket # 4288 Distributed Generation Ceiling Prices and Standard Contract

42 Weybosset Street
Providence
Rhode Island 02903
401 626.4839
401 753.6306 FAX

On behalf of the Washington County Regional Planning Council I submit the following comments on the Office of Energy Resources proposed ceiling prices and standard contract.

First, we commend the Office of Energy Resources and all involved with this effort on the good work they have done with these challenging tasks under a very tight schedule.

I. Ceiling Prices

- 1) Overall we are very impressed and pleased with the design and execution of this process used to generate ceiling prices that will incent development of renewable energy at cost effective prices. It is a great challenge to get these proposed prices right the first time but, subject to the comments provided below, we believe this is a very strong start that will serve the State well, particularly if comments are heeded and responded to and the effectiveness of this program is monitored carefully and corrected as necessary.
- 2) The process used to develop ceiling prices preceded the development of the standard contract form. Therefore, it failed to consider some consequences of that contract.
 - a. As one example, the contract places significant administrative burdens on the developer in association with ensuring that National Grid qualifies for the forward capacity market and for renewable energy certificates. That burden was not anticipated by developers engaged in the process used to develop ceiling prices, nor is it contemplated in the NREL model.
 - b. As another example, the contract (wrongfully) puts a developer at risk of having to pay a termination fee for any economic loss National Grid suffers if the contract is terminated as a result of the developer's default before the end of the contract term. The statute does not contemplate any such termination penalty and developers could not have anticipated having to bear any such risk at the time ceiling prices were developed.

The ceiling prices should be adjusted based on all practical impacts of the standard contract as/when adopted.

3) Rhode Island needs to officially adopt the ceiling prices as its definition of “avoided cost” (pursuant to federal law) for the sources addressed in the pricing. Section 210(b) of PURPA requires that any mandates that utilities purchase wholesale renewable energy (i.e., energy bought for resale) must be at rates that are: (1) just and reasonable to electric consumers and in the public interest; (2) not discriminatory against QFs; and (3) not in excess of “the incremental cost to the electric utility of alternative electric energy.” 16 U.S.C. § 824a-3 (2006). Section 210(d) of PURPA defines “incremental cost of alternative electric energy” as “the cost to the electric utility of the electric energy which, but for the purchase from [the QF], such utility would generate or purchase from another source.” *Id.* Avoided cost rates may “differentiate among qualifying facilities using various technologies on the basis of the supply characteristics of the different technologies.” 18 C.F.R. § 292.304(c)(3)(ii) (2010). FERC’s recent guidance makes it clear that State’s have the authority to define avoided cost for renewable energy according to the characteristics of specific generating sources. California Public Utilities Commission, 133 FERC ¶61,059 at pp. 13-14 (Oct. 21, 2010).

Thus, under *SoCal Edison*, if a state required a utility to purchase 10 percent of its energy needs from renewable resources, then a natural gas-fired unit, for example, would not be a source “able to sell” to that utility for the specified renewable resources segment of the utility’s energy needs, and thus would not be relevant to determining avoided costs for that segment of the utility’s energy needs. Stated more generally, *SoCal Edison* supports the proposition that, where a state requires a utility to procure a certain percentage from generators with certain characteristics, generators with those characteristics constitute the sources that are relevant to the determination of the utility’s avoided cost for that procurement requirement.

See also Signal Shasta, 41 FERC ¶ 61,120 at 61,294 and 61,296, n. 4 (standard offer contracts containing different avoided costs for the different types of QF sales that are subject to each of the standard offer contracts is consistent with PURPA and FERC regulations).

Rhode Island law clearly requires that our utilities purchase energy from renewable resources. R.I. Gen. Laws §§39-26-4 (utilities must obtain three percent of electricity sold at retail from renewable resources); 39-26.1-3 (requiring utilities to enter long-term contracts for renewable energy); 39-26.2-4(a) (utility must contract for forty megawatts of distributed generation projects by end of 2014). Therefore, Rhode Island is in a position to define avoided cost for specific generating sources of renewable energy.

The methodology OER used to develop proposed ceiling prices is entirely consistent with FERC’s guidance to the States on developing technology-specific avoided costs for required purchases of renewable energy. In a well-coordinated stakeholder process, OER worked with consultants to gather input on project

economics for three sizes of solar project and one class of wind turbine project. The consultant gathered data from local stakeholders and other states and databases on developed and developing projects to ascertain standard development costs, generation and revenue projections and a market-appropriate rate of return on investment. This market data was then fed in to the National Renewable Energy Laboratory's peer reviewed CREST model in order to first calculate "strawman" proposed pricing and then, based on stakeholder comment and additional refining, develop proposed ceiling prices. These prices are carefully designed to both encourage development of these desired and mandated sources of energy, while ensuring that energy is produced at the lowest price possible for the benefit of our ratepayers. Fundamentally, this methodology created cost-effective, market-based pricing that should be viewed as the "avoided costs" for these generating sources.

It is important for Rhode Island to acknowledge and accept these carefully conceived ceiling prices as the "avoided cost" for the specific generation sources addressed and to consistently use that "avoided cost" for those renewable energy sources. In the absence of such consistency, it could be unclear how Rhode Island defines avoided cost for these generating sources. Such lack of clarity can give rise to confusion in the market that could threaten to impede achievement of our shared policy goals.

- 4) We are concerned about the limitation on the classes of technologies selected for pricing. While it is rational to select wind and solar given the short amount of time allowed for these 2011 projects to be completed, there are good reasons to include classes for other technologies as soon as possible. As one example, hydropower takes a long time to develop but part of the planning process is knowledge of the rate/contract a developer can be expected to generate as economic return for its investment. Setting a DG price category for this technology early will enable/facilitate such planning, even if those sources aren't ready to come on line in that pricing period.
- 5) Page 17: The last paragraph is a good start at exploring the implications of how the RES and the DG program interact. We strongly suggest that OER expand this paragraph to describe the implications of limited domestic production relative to our RES production goals.
- 6) Page 28: The decision to use the low range of input numbers (but not the lowest) appears inconsistent with the principal purpose of the statute, the enhancement of production. It caters more toward the secondary purpose, ensuring that the production is "cost effective." While both purposes are important, the purpose section of the statute clearly expresses the many reasons why enhanced production is of primary importance. Given that context it would have been more appropriate to at least use the mid range of the data in setting prices.
- 7) Page 33: The statute called for consideration of additional factors including

“environmental benefits, including, but not limited to, reducing carbon emissions, and system benefits.” OER’s report makes it clear that a meeting was held to discuss these additional factors but does not really indicate any specifics of how they were taken into consideration in setting pricing and any impact they may have had on the proposed prices. It is important to establish a real record of such considerations so that they can be included in any evaluation of the program’s results. We suggest that the best way to achieve this is to seek research on the avoided costs associated with traditional generation technology (eg, fuel extraction impact, climate impact, particulate emissions, health impacts, etc) in order to facilitate an apples-to-apples price comparison. The statute does anticipate reporting and evaluation of program results to determine, among other things, its cost effectiveness. In the absence of details on these additional factors, any evaluation of the “cost effectiveness” of this program (it’s cost relative to market) will be apples-to-oranges.

II. Standard Contracts

- 1) As a general matter, the legislative mandate to begin implementing this program in 2011, while laudable, left an extremely aggressive schedule for administrative implementation. OER did an excellent job of moving an impressive process forward on schedule, but there is no question that it was hugely rushed.

The contract was initially developed by National Grid based on a form of long-term contract that had been approved by the PUC (the Orbit contract). OER first received the contract on September 15, 2011, and distributed it to the contract working group on September 28. The working group’s first meeting was Friday afternoon, September 30, and at that meeting participants were asked to review the proposed form over the weekend and generate comments by the close of business Monday October 3 for consideration in a meeting at noon on October 4. Given the extent of the comments, National Grid asked to have until Friday October 7 to generate another draft. That draft was initially produced on October 6 but given additional comments, National Grid produced another redraft on Sunday October 9. The working group then met for more than five hours on Monday October 10 (Columbus Day) to work through remaining comments so that the form could be filed with the PUC on October 11 and keep program development on schedule (given the timing of the PUC review process and NGrid’s subsequent enrollment process).

While the contract working group did diligent work to produce a contract form to PUC on schedule, a little more than one week is just not sufficient time to thoroughly vet a contract as complex and important as this one. WCRPC tried to enlist the help of an expert attorney with significant experience negotiating these types of agreements all across the country, but there simply was not sufficient time for his review and input, especially given the very rapid evolution of the contract development process. Given the great

implications of this standard contract that will (hopefully) be used extensively to develop many renewable energy projects, it is extremely important that the contract terms are carefully considered and refined to ensure they meet the program's objectives.

Therefore, we ask that these additional comments be strongly considered for integration in the contract before its approval and use. We also strongly support OER's recommendation that this contract be reviewed by the contract working group and/or the Renewable Energy Coordinating Board and its advisory committee within four months of the first enrollment and at least annually thereafter so that amendments can be proposed to the PUC as necessary and appropriate.

- 2) Cover Sheet: what are the "criteria for substantial completion?" This is not defined anywhere and why would they be necessary in addition to milestones and criteria for "commercial operation"? If included, they need to be defined clearly.
- 3) Cover sheet, page 2: Why must this include a "projected project useful life?" Why should Seller have to make a representation and warranty that the projected useful life is at least 21 years (page 26, §7.2(k))? The statute doesn't require that.
- 4) Section 1, Definitions: It seems that many defined terms aren't necessary and unnecessarily complicate the document, including (but not limited to): affiliate, agreement, cash, control, effective date (not defined in first paragraph as mentioned), party/parties. We question whether it's necessary to include defined terms that simply refer to definition within the agreement (as is prevalent).
- 5) Page 10, §3.1: There is no good reason why NGrid should monitor these critical milestones or Seller should be required to comply with and administer them. The statute requires a deposit and energy production within 18 months – it is sufficient to require that (and simply leave the development and compliance issues to the developer) without the additional burden of meeting NGrid's administrative milestones.
- 6) Page 10, §3.1(d): The requirement of default for a failure to pass the capacity demonstration test is a problem for financing and should be relaxed. This problem derives from the statute, which warrants amendment, but could in the meantime be relaxed administratively in keeping with the intent of the law.
- 7) Page 10, §3.1(d)(i): Buyer does not "retain" the deposit but is required to credit the deposit to ratepayers.
- 8) Page 10, §3.1(d)(ii): The last sentence about liquidated damages is

unnecessary and should be removed.

- 9) Page 11, §3.3: There is no good reason why NGrid should monitor these criteria for “commercial operation” or Seller should be required to comply with them. The statute requires a deposit and energy production within 18 months – it is sufficient to simply require that as the indication of “commercial operation” (and simply leave the development and compliance issues to the developer) without the additional burden of meeting NGrid’s devised criteria for commercial operation.
- 10) Page 11, §3.3(a): Seller should be compensated for test energy (eg, energy produced during the capacity test). There is no reason NGrid should get a windfall for it.
- 11) Page 11, §3.3(b): If there must be yet another criterion for “substantial completion” it should be defined in the agreement rather than left open for definition in the Cover Sheet. The requirement that Seller comply with all ISO-NE requirements for the delivery of the Products to Seller is inconsistent with NGrid’s administrative responsibilities in §4.8 and should be subject to those responsibilities.
- 12) Page 12, §3.3(ix): the phrase “at market-based rates” should be removed.
- 13) Page 13, §3.4(d): these are Buyer’s obligation per §4.8 and should at least be subject to §4.8.
- 14) Page 13, Page 13, §3.4(d): these are Buyer’s obligation per §4.8 and should at least be subject to §4.8.
- 15) Page 13, §3.4(j): the phrase “at market-based rates” should be removed.
- 16) Page 13, §3.5(b): the words “performance or” should be removed.
- 17) Page 13, §4.1(b)(i): production and billing should be evaluated on a monthly rather than an hourly basis.
- 18) Page 13, §4.1(c): redundant given §4.1(a).
- 19) Page 14, §4.2(a): This should be subject to Buyer’s responsibilities per §4.8.
- 20) Page 15, §4.2(b): This should be subject to Buyer’s responsibilities per §4.8.
- 21) Page 15, §4.2(c): in the last line the word “except” should be removed.
- 22) Page 15, §4.3: This should be subject to Seller’s responsibilities pursuant to §4.8 and also subject to any Delivery Shortfalls caused by Buyer. The last

sentence on liquidated damages is unnecessary.

- 23) Page 15, §4.4: the last sentence on liquidated damages is unnecessary.
- 24) Page 15, §4.3: A “delivery shortfall” penalty is not contemplated by the statute and is inappropriate. The Buyer is not entitled to Seller’s production. The statute simply contemplates an “as available” agreement under which the utility is simply required to pay for energy produced – if energy is not produced Buyer is not required to pay for it. There is no cause for a delivery shortfall penalty. We have reviewed model power purchase agreements used to administer these kinds of programs across the country and none of them include this kind of provision.
- 25) Page 18, §4.8(a)(ii): these are not “existing capacity resources”
- 26) Beginning page 19, §5: The statute does not contemplate a requirement that Seller invoice in order for it to be compensated for its energy. Meter readings should be sufficient basis for regularly scheduled compensation. The program was designed to be as simple and efficient as possible to encourage production of this kind of energy with the minimum administrative hassle and, therefore, at the best possible price.
- 27) Page 21, §6.2: second sentence should read “Seller’s Performance Guaranty Deposit shall be refunded. . .” Third sentence should be deleted (inconsistent with statute which does not limit repayment to year one). Last sentence regarding liquidated damages is unnecessary and should be deleted.
- 28) Page 22, §6.3(b): the statute provides that any forfeited deposits should be credited to ratepayers.
- 29) Page 22, §6.3(d): the statute provides that any forfeited deposits should be credited to ratepayers.
- 30) Page 22-23, §6.3(e): This provision for Seller’s remedies makes no sense the way it is worded and provides little actual remedy to Seller upon Buyer’s default.
- 31) Page 23, §6.4: These rights relative to collateral should be mutual or should be deleted.
- 32) Page 26, §7.2(k): Why should Seller have to make a representation about the useful life of the project? That’s not required by statute.
- 33) Page 26, §8: Buyer should be deemed to have defaulted if it fails to meet its obligations under the agreement or under law, including (e.g.) a failure to meet the deadlines for interconnection developed in the recently passed

statute.

- 34) Page 27, §8.2(b): Seller should get a 30 day notice and opportunity to cure here.
- 35) Page 27, §8.3: A “termination payment” to Buyer is not contemplated by the statute and is inappropriate. The Buyer is not entitled to Seller’s production. The statute simply contemplates an “as available” agreement under which the utility is simply required to pay for energy produced – if energy is not produced the Buyer is not required to pay for it. There is no cause for a termination penalty payable to Seller. In contrast, it is appropriate for the contract to contemplate a termination payment for Seller upon Buyer’s default because Buyer will have then failed to fulfill the statute’s mandate and such a penalty is Seller’s only remedy for Buyer’s default. We have reviewed model power purchase agreements used to administer these kinds of programs across the country and none of them include this kind of termination payment.
- 36) Page 29, §8.3(b)(iii)(v): this clause is unnecessary.
- 37) Page 30, §9.1(a): the last sentence should be subject to delays or noncompliance caused, in part, by Buyer (eg, interconnection).
- 38) Page 31, §10: The last sentence should be deleted.
- 39) Page 32, §11.2: this section is redundant and should be deleted.
- 40) Page 32, §11.5: this section should be deleted (it goes without saying).
- 41) Page 33, §13.1: the last 2 sentences are redundant (covered above) and should be deleted.
- 42) Page 34, §14: there is a typo in line regarding notice to Seller.
- 43) Page 35, §16.4: This section, providing for a standard of review, should be deleted. There is no need for the parties to this contract to dictate a standard of review for disputes. That can safely be left to the neutral based on the arguments of the parties (if/as necessary). There is not sufficient time in this contract development process for us to review the cases proposed by NGrid to establish the review standard and it’s better to leave the determination of that standard to a neutral.