

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS
PUBLIC UTILITIES COMMISSION

IN RE: APPLICATION FOR STANDARD CERTIFICATION :
AS ELIGIBLE RENEWABLE ENERGY RESOURCE : DOCKET NO. 4408
FILED BY HOWARD WIND LLC – HOWARD WIND FARM :

ORDER

On May 3, 2013, Howard Wind LLC (“Howard Wind”) filed an application with the Public Utilities Commission (“PUC”) seeking certification for Howard Wind Farm, a 55.35 MW wind energy generation unit located in Hornell, NY as an eligible New Renewable Energy Resource in accordance with the PUC’s Rules and Regulations Governing the Implementation of a Renewable Energy Standard (“RES Rules”).¹ A thirty day period for public comment was commenced by a notice from the PUC Clerk. While comments were received on two legal issues, as described below, no comments were received on the substance of whether the facility qualified for certification.

Because the generating unit is located in a control area outside of New England, Howard Wind is required, by R.I. Gen. Laws § 39-26-5(c) and RES Rule 5.1(ii)(a), to have a unit-specific bilateral contract for the sale and delivery of renewable energy into New England.² On May 7, 2013, Howard Wind filed a Motion for Waiver of Bilateral Contract. In support of its motion, Howard Wind described how it would participate in the ISO-NE market scheduling and

¹ The authorized representative was identified as George Henderson, Chief Commercial Officer, Howard Wind LLC, 24 W. 40th St., 12th Floor, New York, New York 10018, 646-442-9101, ghenderson@everpower.com.

² R.I. Gen. Laws § 39-26-5(c): “A generation unit located in an adjacent control area outside of the NEPOOL may qualify as an eligible renewable energy resource, but the associated generation attributes shall be applied to the renewable energy standard only to the extent that the energy produced by the generation unit is actually delivered into NEPOOL for consumption by New England customers. The delivery of such energy from the generation unit into NEPOOL must be generated by:

- (1) A unit-specific bilateral contract for the sale and delivery of such energy into NEPOOL; and
- (2) Confirmation from ISO-New England that the renewable energy was actually settled in the NEPOOL system; and
- (3) Confirmation through the North American Reliability Council tagging system that the import of the energy into NEPOOL actually occurred; or
- (4) Any such other requirements as the commission deems appropriate.”

settlement process to ensure energy is delivered to New England. On May 8, 2013, Energy Management, Inc. (“EMI”) filed a Protest and Objection to the motion on the basis that the language of the statute is clear and therefore, according to EMI, the PUC is without jurisdiction to waive the requirement.³ On May 11, 2013, RENEW, a non-profit association of renewable industry and environmental groups, filed comments questioning the PUC’s legal authority to grant the waiver. RENEW noted that the purpose of the bilateral contract requirement was to “ensure the state reaps some of the environmental and economic development benefits” from the development of renewable energy resources.⁴ RENEW stated that it did not “take a position as to whether these legislative objectives can be met without the bilateral contracting requirement and whether alternatives should be considered to amend the statute.”⁵

On October 28, 2013, prior to any PUC action regarding the motion, Howard Wind withdrew its Motion for Waiver and, instead, submitted a Confirmation Agreement between Howard Wind (seller) and EverPower Commercial Services LLC (buyer). Howard Wind LLC and EverPower Commercial Services LLC are separate but affiliated entities held by EverPower Wind Holdings, Inc. EverPower Commercial Services LLC is an entity with its own Federal Energy Regulatory Commission (“FERC”) Market Based Rates authority and ISO-NE market participant energy. It is the energy marketing subsidiary of EverPower Wind Holdings, Inc. Under the Confirmation Agreement, Howard Wind will sell energy to EverPower Commercial Services LLC at the Hourly Real Time locational marginal pricing in \$/MWh at the Delivery Point which is defined as a specific physical network point within ISO-NE. On November 5, 2013, EMI filed a Protest and Objection to the bilateral contract arguing that it was not really a bilateral contract, but rather, a one-sided contract which represented a wash trade “between

³ Energy Management, Inc. Protest and Objection to Motion for Waiver.

⁴ Comments of RENEW, dated May 11, 2013 at 2.

⁵ *Id.*

affiliates under common ownership that serve[s] no economic purpose other than to manipulate and evade the trading rules”⁶ EMI asserted that this type of contract is prohibited by FERC orders and NYMEX rules.⁷ EMI requested the PUC to reject the contract as an attempt to circumvent clear statutory provisions.⁸

On December 11, 2013, the PUC’s consultant, GDS Associates, Inc., submitted a Recommendation summarizing its review of the Howard Wind application and recommending approval subject to the PUC’s ruling on whether Howard Wind’s bilateral contract was consistent with the statutory provisions set forth in R.I. Gen. Laws § 39-26-15(ii)(c). The consultant opined that the Howard Wind generation unit meets the definition of a renewable energy resource as set forth in R.I. Gen. Laws § 39-26-5(a)(2). The consultant confirmed that the facility entered into commercial operation on December 23, 2011, qualifying it for status as a New Renewable Energy Resource under R.I. Gen. Laws § 39-26-2(15).

At an Open Meeting held on December 20, 2013, the PUC certified Howard Wind as an eligible new renewable energy resource, finding that it had met all of the legal requirements. The first issue is whether Howard Wind meets the legal requirement that it must have a unit-specific bilateral contract for the sale and delivery of the project’s energy into NEPOOL. Black’s Law Dictionary defines bilateral contract as “denoting a contract in which both the contracting parties are bound to fulfill obligations reciprocally towards each other; as a contract of sale, where one becomes bound to deliver the thing sold, and the other to pay the price of it.”⁹

Despite the fact that the agreement is signed by the same person and is between affiliates, legally, each is a separate entity and Howard Wind is required to deliver the energy to ISO-NE

⁶ EMI Protest and Objection to bilateral contract at 1.

⁷ *Id.* at 2.

⁸ *Id.*

⁹ Black’s Law Dictionary 163 (6th ed. 1990).

and EverPower Commercial Services LLC is required to purchase the energy at the market rate. A review of R.I. Gen. Laws § 39-26-5 suggests that the purpose of the bilateral contract requirement was to ensure delivery into New England. The contract submitted by Howard Wind appears to accomplish this by identifying the Delivery Point as “[t]he physical network point within ISO New England (ISONE) identified as NEPOOL.I.ROSETON_345_1 or its successor.”¹⁰

Furthermore, a review of the transaction suggests that ratepayers in Rhode Island will not be harmed by this agreement and, in fact, may benefit from the availability of more renewables entering the New England system, allowing for possible price suppression of renewable energy certificates (“RECs”). The general concern with affiliate transactions has traditionally been to protect against the risk that an unregulated affiliate will inflate the cost to the regulated entity. The regulated entity will then request recovery of those costs through rates, and then seeks to pass the revenues back to the unregulated affiliate. That situation does not exist here. There is no requirement that National Grid (the only rate-regulated Obligated Entity in Rhode Island) purchase RECs from the Howard Wind project and further, because National Grid purchases RECs primarily through a competitive solicitation, there is little risk that the REC prices could be inflated. Finally, the other requirements of the RES Rules provide sufficient protections that the power is being delivered to New England.¹¹

In its objection, EMI cited for support prohibitions against wash trades in FERC orders. A review of the FERC orders suggests that the purpose of the prohibition is to avoid manipulation of market rules. In this case, there are two distinct legal entities and the pricing is

¹⁰ Confirmation Agreement between Howard Wind Farm LLC and EverPower Commercial Services LLC at 1.

¹¹ The RES Rules mirror the statutory requirements that in addition to a unit-specific bilateral contract, there needs to be confirmation from ISO-NE that the renewable energy was actually settled in the NEPOOL system and confirmation through the North American Reliability Council tagging system that the import of the energy into NEPOOL actually occurred. RES Rules, Section 5.1(c)(ii)(b)-(c).

driven by market-based rates as determined by the ISO-NE real time clearing price. It is unclear to the PUC how Howard Wind could manipulate the market through its arrangement with EverPower Services LLC. Regardless, as it relates to the Renewable Energy Standard and the PUC's RES Rules, the purpose of the bilateral contract requirement is to ensure that the only RECs available for use in New England are those which are tagged to the renewable energy actually delivered into NEPOOL for consumption in New England. That will happen through the arrangement between Howard Wind and EverPower Services LLC. Compliance with market rules is the responsibility of Howard Wind and EverPower Services LLC. Therefore, the PUC finds that the bilateral contract between Howard Wind LLC and EverPower Services LLC effectuates the intent of the statute and declines to rule on any market rule implications.

Having found that Howard Wind meets the legal requirement related to a bilateral contract, and having reviewed Howard Wind's application, supporting documentation, and GDS Associates' recommendation, the PUC certifies Howard Wind as an eligible new renewable energy resource. The PUC's determination in this docket is based on the information submitted by Howard Wind, and the PUC may reverse its ruling or revoke the certification if any material information provided proves to be false or misleading. Howard Wind shall, at the expiration or cancellation of the currently filed bilateral contract, provide copies of any new unit-specific bilateral contracts between Howard Wind and the entity taking delivery of power within the NEPOOL control area. If the unit-specific bilateral contracts are between affiliates, Howard Wind shall provide the following documentation when applicable: (1) certification from Howard Wind that none of the counterparty affiliates to the unit-specific bilateral contracts are subject to cost of service/rate of return regulation by the PUC, (2) evidence of authorization by FERC to

market/sell power at market based rates (by tariff or FERC order), and (3) a copy of an organizational chart showing the relationship between the affiliates.

Accordingly, it is hereby

(21297) ORDERED:

1. The Howard Wind Farm Generation Unit meets the requirements for eligibility as a New Wind Renewable Energy Resource with its 55.35 MW, Grid-Connected Generation Unit having a Commercial Operation Date of December 23, 2011 and located within a Control Area Adjacent to NEPOOL in Hornell, New York.
2. The Generation Unit's NEPOOL-GIS Identification Number is IMP36671.
3. The Howard Wind Farm's Generation Unit as identified above is hereby assigned unique certification number RI-4408-N13.
4. As a Generation Unit located in a control area adjacent to NEPOOL, eligibility is granted only to the extent that the energy produced by the Generation Unit is actually delivered into NEPOOL for consumption by New England customers, where delivery of such energy from the Generation Unit into NEPOOL is verified in accordance with RES Rules 5.1(ii) and 5.1(iii).
5. The facility's RECs become Rhode Island-eligible effective on the first day which the Rhode Island certification number is issued. All RECs associated with the production of eligible energy that are minted on or after the effective date are eligible for the RES. However, in no case can Howard Wind claim RECs as Rhode Island-eligible produced prior to the effective date of its bilateral contract, October 25, 2013.
6. Although the Commission will rely upon the documentation specified in Rules 5.1(ii) and 5.1(iii) and the NEPOOL GIS for verification of production of energy from the

Howard Wind's Generation Unit certified as eligible in this order, Howard Wind will provide information and access as necessary to the PUC, or persons acting at its behest, to conduct audits or site visits to assist in verification of continued eligibility for and compliance with RI RES Certification at any time at the PUC's discretion.

7. Howard Wind shall notify the PUC in the event of a change in the facility's eligibility status.

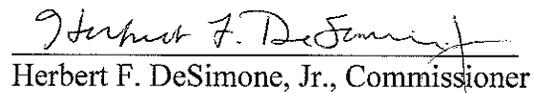
EFFECTIVE AT WARWICK, RHODE ISLAND ON DECEMBER 20, 2013
PURSUANT TO AN OPEN MEETING DECISION ON DECEMBER 20, 2013. WRITTEN
ORDER ISSUED JANUARY 9, 2014.

PUBLIC UTILITIES COMMISSION




Margaret E. Curran, Chairperson


Paul J. Roberti, Commissioner


Herbert F. DeSimone, Jr., Commissioner

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