

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS
PUBLIC UTILITIES COMMISSION

IN RE: ISSUANCE OF AN ADVISORY OPINION TO :
THE ENERGY FACILITY SITING BOARD REGARDING : DOCKET NO. 4609
INVENERGY THERMAL DEVELOPMENT LLC'S :
PROPOSAL TO SITE AND CONSTRUCT THE :
CLEAR RIVER ENERGY FACILITY :

MEMORANDUM OF LAW OF
THE DIVISION OF THE PUBLIC UTILITIES AND CARRIERS,
OFFICE OF ENERGY RESOURCES, AND DIVISION OF PLANNING

The Rhode Island Division of Public Utilities and Carriers (“DPUC”), the Rhode Island Office of Energy Resources (“OER”), and the Rhode Island Division of Planning (“Planning”) respectfully submit this memorandum of law.

I. INTRODUCTION

As detailed herein, the Rhode Island Public Utilities Commission (“PUC”) has shifted to an updated standard when determining need as compared to the old standard that was designed to protect Rhode Island ratepayers when they were exposed to significant risk within the vertically-integrated utility industry. We agree with this updated approach and the testimony of our consultant, Seth G. Parker of Levitan & Associates, Inc., is consistent with the rationale behind it.

Furthermore, the PUC should find that Mr. Parker’s testimony appropriately did not include an analysis of the environmental benefits and costs to ratepayers as that analysis falls outside the scope of this PUC Docket No. 4609.

II. ISSUES

The DPUC, OER, and Planning submit this memorandum to address (i) whether the legal standard to be applied when determining the need of a proposed generating facility has evolved since the enactment of the Energy Facility Siting Act, R.I. Gen. Laws § 42-98-1 et seq., and (ii) whether environmental benefits and costs fall within the scope of issues to be considered when

determining whether the proposed generating facility is cost-justified to the consumer. For the reasons set forth herein, we find that the legal standard has evolved and that environmental benefits and costs fall outside the scope of this PUC Docket No. 4609.

III. BACKGROUND

Through its Preliminary Decision and Order dated March 10, 2016, the Rhode Island Energy Facility Siting Board (“EFSB”) directed the PUC to render an advisory opinion in relation to an application filed by Invenergy Thermal Development LLC (“Invenergy”) to construct and operate the Clear River Energy Center (“Facility”). Specifically, the PUC was tasked with providing an opinion to the EFSB “as to (i) the need for the proposed Facility; (ii) whether it is cost-justified to the consumer consistent with the object of ensuring that the construction and operation of the Facility will be accomplished in compliance with all of the requirements of the laws, rules and regulations; and (iii) whether cost effective efficiency and conservation opportunities provide an appropriate alternative to the proposed Facility.” See EFSB Docket No. 2015-06, Preliminary Decision and Order, § VII (B) (1), (March 10, 2016).

From July 25, 2016 through July 27, 2016, the PUC conducted an evidentiary hearing to investigate the issues on which it was required to provide an opinion. Consistent with R.I. Gen. Laws § 42-98-9(d), the DPUC, OER, and Planning participated in the hearing and their position is reflected through the testimony of Mr. Parker. This memorandum does not alter their position but rather is being submitted to demonstrate that Mr. Parker’s testimony aligns with the two legal standards referenced in Section II above.

IV. ARGUMENT

- A. As the power system in New England has evolved, the determination of need under the Energy Facility Siting Act has also changed.**

In July of 1986, the Rhode Island General Assembly enacted the Energy Facility Siting Act (“EFSA”). See R.I. Pub. Laws, Ch. 531, § 1 (1986). When enacted, the EFSA required the PUC to conduct an investigation and render an advisory opinion to the EFSB as to the need of a proposed major electric generating facility. See *Id.* This statutory responsibility has not changed. See R.I. Gen. Laws § 42-98-9. However, the standard applied by the PUC when determining the need of a proposed facility has evolved to reflect the competitive power system that is being utilized in New England.

1. The PUC’s approach to determine need in 1987 is no longer applicable because it was based on ratepayer risk that has since shifted to merchant owners competing in the regional power market.

Less than a year after the enactment of the EFSA, Ocean State Power (“OSP”) applied for a license to site and construct an electric generating facility in Burrillville, RI. See EFSB Docket No. 87-1, Ocean State Power: Final Decision and Order, § I (a), (October 25, 1987). At that time the PUC applied a needs standard that was tailored to a regulated regional power market in which vertically-integrated utilities owned virtually all of the generation facilities. The EFSB’s final decision in the OSP case illustrates the rigidity of the needs standard. “No information was submitted to the Board which contradicts the conclusion that energy demand is growing in New England”; “the proposed units are ‘needed from the standpoint of pure self-sufficiency’” (quoting PUC’s conclusions) and “since all scenarios project the need for additional energy by the mid-1990s”. See EFSB Docket No. 87-1, Ocean State Power: Final Decision and Order, §§ II (a) and (b), (October 25, 1987).

At that time, a rigid needs standard was essential to the siting process because the costs of an unneeded facility were borne by the ratepayers. It was “clearly in the ratepayers’ interest to assure that more projects were not approved than were needed to meet their projected usage so that they would not have to pay for surplus capacity.” See R.I. PUC Docket No. 2818, R.I. Hope

Energy: Advisory Opinion for a Generating Plant in Johnston, (November 1998). Given the risk to ratepayers, had there been information that contradicted the conclusion that energy demand was growing in New England, or had not all of the scenarios projected a need for additional energy, or if the facility was not needed from the standpoint of pure self-sufficiency, it is possible, if not likely, that OSP's proposed facility would have failed the needs assessment. The need for this heightened level of scrutiny remained until the deregulation of the regional power market.

2. In light of the evolution to a competitive regional power market, the Utility Restructuring Act of 1996 changed the PUC's approach to determining need.

New England's process for procuring electricity fundamentally changed about twenty years ago. First, generation facilities heretofore owned by vertically-integrated regulated utilities, backstopped by their captive ratepayers, were sold to independent, i.e. merchant, owners. In doing so, the financial risk associated with these plants was shifted – along with the physical asset – from ratepayers to new owners. Second, the Independent System Operator for New England (“ISO-NE”) was created to administer newly-created competitive power markets and to operate the region's generation and transmission system. See “Our History”, ISO-NE, August 2016, <http://www.iso-ne.com/about/what-we-do/history>. Third, the Rhode Island Utility Restructuring Act (“URA”) was passed in Rhode Island, recognizing and promoting the benefits of competitive power markets at the state level. See R.I. Pub. Laws, Ch. 316 (1996).

Consistent with these changes, the PUC recognized that the legal standard for the determination of need had evolved beyond the standard applied when the EFSA was enacted. In a 1997 advisory opinion submitted to the EFSB, the PUC “considered the spirit and letter of the Energy Facilities Siting Act (‘EFSA’)” and the more recently enacted Utility Restructuring Act of 1996 (‘URA’)”. See R.I. PUC Docket No. 2600, Tiverton Power Associates Advisory Opinion, (November 21, 1997). Upon reviewing the EFSA and URA, the PUC “**discerned obvious**

inconsistencies and anachronisms relative to the prescribed regulatory treatment of major energy facilities in Rhode Island.” Emphasis Added. See Id.

The PUC took specific note of the “new era of competitive rather than regulatory economics” and concluded “[s]imply stated, we believe that a court of competent jurisdiction could find the recently enacted URA effectively repeals by implication the much older ‘need’ assessment provisions of the EFSA.” See Id. The language in this Opinion, including the conclusion, demonstrates that the PUC recognized the evolution of the regional power market and adopted an updated standard consistent with that evolution.

3. Following enactment of the URA, the PUC has applied a needs standard that aligns with “the new era of competitive rather than regulatory economics”.

In its first major needs assessment following the enactment of the URA, the PUC stated that “[w]e agree that the heightened level of scrutiny for determining need, once absolutely necessary when ratepayers alone faced the cost of additional generation facilities, is no longer required.” See R.I. PUC Docket No. 2600, Tiverton Power Associates Advisory Opinion, (November 21, 1997). The “obvious inconsistencies and anachronisms” between the EFSA and the URA were again highlighted by the PUC in its 1998 advisory opinion regarding an application submitted to the EFSB by Rhode Island Hope Energy Limited Partnership (“Hope Advisory Opinion”). See R.I. PUC Docket No. 2818, RI Hope Energy: Advisory Opinion for a Generating Plant in Johnston, (November 24, 1998).

In the Hope Advisory Opinion, the PUC quoted the DPUC: “Traditionally in Rhode Island, need determinations for new electric generating facilities have been performed using measures of projected supply vis a vis demand for the utility building or purchasing power from the plant ... The Commission is well aware of the new era of competitive rather than regulatory economics ... In this new era, determination of need for generating plants is to be performed by the free market

rather than by regulators... Even if sufficient generation exists, replacement of inefficient old plants with clean, efficient new plants may have economic as well as environmental value. Absent a gap between supply and demand, new plants may still be considered 'needed' by the region. In the end, it is the market that will supply the answers." See Id.

In its findings, the PUC referred back to its Tiverton Advisory Opinion (November 21, 1997) and concluded "we opined that the more recently enacted URA effectively repealed by implication the much older 'need' assessment provision of the EFSA [R.I. PUC Order No. 15456, pp. 8-10]. **Our opinion on this issue has not changed.**" Emphasis Added. See R.I. PUC Docket No. 2818, RI Hope Energy: Advisory Opinion for a Generating Plant in Johnston, (November 1998). Consistent with the Tiverton Advisory Opinion, the PUC concluded "...there is a State and regional need for Hope Energy's proposed...facility...." See Id.

Following the Hope and Tiverton advisory opinions, the PUC again reiterated its new approach to determining need. "In this new era, the need for generating plants is performed by the free market, and therefore the [PUC] certifies 'need' to the EFSB **utilizing liberal standards.**" Emphasis Added. See R.I. PUC Docket No. 3094, Indeck: Assessment to Construct Gas-Fired Power Generating Facility, (August 17, 2000).

4. The updated needs standard recognized by the PUC in Hope, Tiverton and Indeck is the appropriate standard to utilize for Invenenergy and is consistent with the region's competitive market mechanisms.

Given the series of opinions addressed above, it is clear that applying an updated needs standard is more appropriate than applying the old standard that was used in 1987 for OSP's proposed facility. The pre-URA standard is no longer needed to protect ratepayers and the updated standard aligns with the objectives of the URA. Today, need is determined by the power market which is governed by a regionally accepted process that is also regulated at the federal level. In

its role of administering the competitive power markets, ISO-NE utilizes energy and capacity procurement mechanisms designed to ensure “the constant availability of competitively-priced wholesale electricity.” See “Administering the Wholesale Markets”, ISO-NE, August 2016: <http://www.iso-ne.com/about/what-we-do/three-roles>. ISO-NE administers day-ahead and real time energy markets and an annual forward capacity market to procure these most important power products on a least-cost basis. These regional competitive market mechanisms determine if a facility is needed by accepting or rejecting its energy and capacity bids, and the PUC’s position on need reflects those mechanisms.

B. When reviewing whether the proposed Facility is cost justified to the consumer, Mr. Parker appropriately did not consider environmental costs or benefits.

By statute, the EFSB has been given a specific time period in which it must review an application, review advisory opinions, and issue a final decision. See R.I. Gen. Laws §§ 42-98-10 and 42-98-11. The overlapping of agency roles or duplication of work would make it even more challenging for the EFSB to comply with the EFSA’s timing requirements. The EFSA stresses the importance of coordination between various state agencies and the elimination of overlap and duplication of work. “...the role of each agency in energy siting should be delineated, to eliminate overlap and duplication...” See R.I. Gen. Laws § 42-98-1(c). “The board shall limit the scope of any agency's investigation where it finds that more than one agency has jurisdiction over a matter at issue in the licensing process.” See R.I. Gen. Laws § 42-98-9(c). Accordingly, the EFSB’s directive to the PUC must be read as not to overlap with work being done by other state agencies or entities otherwise designated as having to render an advisory opinion.

Pertinent to the case at hand, the DPUC and OER did not ask their consultant, Mr. Parker, to consider environmental benefits or costs when examining whether the proposed Facility is cost-justified to the consumer. An examination by Mr. Parker of the environmental benefits and costs

would have overlapped with work being performed by other state agencies. As an example, OER and the Rhode Island Department of Environmental Management (“DEM”) were each separately tasked with examining various environmental impacts of the proposed Facility. See EFSB Docket No. 2015-06, Preliminary Decision and Order, § VII (March 10, 2016). In addition, Planning will be providing the EFSB with an advisory opinion relating to the socio-economic impact of the proposed Facility. See Id. Accordingly, Mr. Parker’s decision not to examine environmental benefits and costs for ratepayers is consistent with the EFSA’s theme of coordination and efficiency among state agencies.

V. CONCLUSION

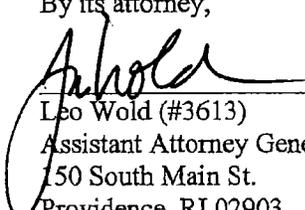
The determination of need must reflect the realities of today’s New England power system which has evolved since the enactment of the EFSA. In short, the competitive New England power market determines the need for a proposed facility. The PUC has issued a series of consistent advisory opinions and decisions confirming this concept of need.

In addition, state agencies other than the PUC have been tasked with submitting advisory opinions on the environmental costs and benefits of the proposed Facility. Consequently, environmental costs and benefits to consumers fall outside the scope of this PUC docket No. 4609.

Respectfully submitted,

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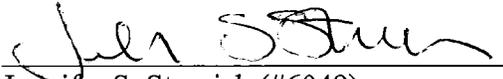
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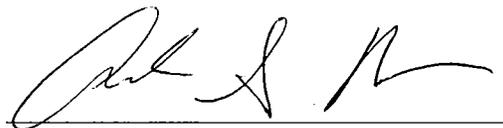
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CERTIFICATION OF SERVICE

I hereby certify that I filed the original and 10 hard copies of this Memorandum with the PUC via mail. In addition, I electronically served a copy of this Memorandum to the service list. I certify that all of the foregoing was done on August 18, 2016.

A handwritten signature in black ink, appearing to be "Paul S. N.", is written above a horizontal line.