

RECEIVED

2018 DEC 21 AM 11: 18

PUBLIC UTILITIES COMMISSION

WILLIAM M. DALEY

One Financial Plaza, Suite 1430
Providence, RI 02903-2485
Main (401) 709-3300
Fax (401) 709-3378
wdaley@rc.com
Direct (401) 709-3335

Also admitted in Massachusetts

December 21, 2018

Rhode Island Public Utilities Commission
89 Jefferson Blvd.
Warwick, RI 02888

Re: **Petition of Energy Development Partners, LLC for Declaratory Judgment on R.I. Gen. Laws § 39-26.4, the Net Metering Act.**

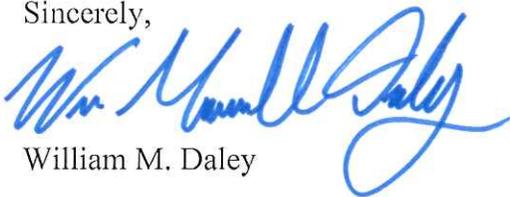
Dear Clerk:

Please note that this office represents Energy Development Partners, LLC. Enclosed for filing, please find an original of the following document, along with nine copies:

1. Petition of Energy Development Partners, LLC for Declaratory Judgment on R.I. Gen. Laws § 39-26.4, the Net Metering Act.

Should you have any questions concerning this filing please contact me at either the telephone number or email address listed above.

Sincerely,



William M. Daley

Enclosures

**STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS
PUBLIC UTILITIES COMMISSION**

IN RE: PETITION OF ENERGY DEVELOPMENT PARTNERS, LLC FOR DECLARATORY JUDGMENT ON RHODE ISLAND GENERAL LAWS § 39-26.4-1, <i>ET SEQ.</i>, THE NET METERING ACT	: : : : : : : : : :	Docket No.:
--	--	--------------------

PETITION FOR DECLARATORY JUDGMENT

I. INTRODUCTION

Energy Development Partners, LLC, a Rhode Island limited liability company (“EDP”), files this Petition for Declaratory Judgment (the “Petition”) seeking a determination from the Rhode Island Public Utilities Commission (“PUC”) that—for purposes of entering into a Net-Metering Financing Arrangement, as defined by G.L. 1956 § 39-26.4-2(14)(i) (the “Act”), with a public entity, educational institution, hospital, nonprofit, or multi-municipal collaborative—the requirement that “[t]he eligible net-metering resource is located on property owned or controlled by the public entity” (the “Site Control Requirement”) is satisfied by granting an irrevocable license over the property.¹

EDP brings the instant Petition pursuant to R.I. Gen. Laws § 42-35-8 and the PUC’s Rules of Practice and Procedure, Rule 1.10(c). The PUC has already declared that a properly worded easement satisfies the Site Control Requirement, as required by § 39-26.4-2(14)(i).² The purpose of this Petition is to clarify that an irrevocable license also satisfies the Site Control

¹ Although the instant Petition may only reference “public entit[ies]” at times, that term should be read to also include an educational institution, hospital, nonprofit, or multi-municipal collaborative.

² See *Petition of Southern Sky Renewable Energy Rhode Island, LLC for Declaratory Judgment on R.I. Gen. Laws §39-26.4, The Net Metering Act*, PUC docket number 4694, (May 2017).

Requirement. Similar to the PUC's Order in *In Re Southern Sky*, granting the instant Petition will advance the declared purpose of the Act by, *inter alia*, allowing for developers to enter into financing agreements, while still adhering to the Act's mandates by using leases, easements, and irrevocable licenses.

II. PERTINENT FACTUAL BACKGROUND

EDP is a professional renewable energy project development company with a combined thirty years of experience in developing energy infrastructure projects, both in Rhode Island and internationally. Currently, the company is developing over one hundred fifty megawatts of renewable energy projects throughout New England. EDP provides a full breadth of services relating to energy infrastructure projects including permitting, construction management, operations, and maintenance services. The company also offers to operate and maintain renewable energy facilities over the life of the facility, securing stability and encouraging efficient operation.

As noted, EDP is a Rhode Island based company that works to provide solutions for public and private sector energy needs—combining traditional systems with renewable energy solutions through energy infrastructure projects. In order to qualify a system owned by a third-party as an “eligible net-metering system,” the Act's Site Control Requirement must be satisfied, which then permits the parties to enter into a Net-Metering Financing Arrangement. Indeed, these types of financing arrangements are directly contemplated by the Act.

In the instant case, EDP is unable to offer either a ground lease or an easement to the relevant public entity, given certain restrictions in place on the subject land, but it can grant an irrevocable license. After consultation with the landowner, EDP is proceeding with the

development of the underlying project, and it will grant an irrevocable license to the public entity, granting control of the property, and thereby satisfying the Act.

III. APPLICABLE LEGAL STANDARDS

Under the Net Metering Act, Rhode Island law expressly allows net metering of electricity from “eligible net-metering systems.” R.I. Gen. Laws § 39-26.4-3. Generally, in order for a system to qualify as an “eligible net metering system,” the system must “be owned by the same entity that is the customer of record on the net-metered accounts.” However, any “eligible net metering resource” that is owned by a “public entity”—or owned and operated by a renewable-generation developer on behalf of a public entity through a “public entity net metering financing arrangement”—shall be “treated as an eligible net-metering system[,] and all accounts designated by the public entity or multi-municipal collaborative for net metering shall be treated as accounts eligible for net metering within an eligible net-metering-system site.” R.I. Gen. Laws § 39-26.4-2(5)(ii).

More specifically, § 39-26.4-2(14) of the Act defines a “Net-Metering Financing Arrangement” as:

[A]rrangements entered into by a public entity, educational institution, hospital, nonprofit, or multi-municipal collaborative with a private entity to facilitate the financing and operation of a net-metering resource, in which the private entity owns and operates an eligible net-metering resource on behalf of a public entity, educational institution, hospital, nonprofit, or multi-municipal collaborative, where: (i) *The eligible net-metering resource is located on property owned or controlled by the public entity, educational institution, hospital, or one of the municipalities, as applicable,* and (ii) The production from the eligible net-metering resource and primary compensation paid by the public entity, educational institution, hospital, nonprofit, or multi-municipal collaborative to the private entity for such production is directly tied to the consumption of electricity occurring at the designated net-metered accounts.

(Emphasis supplied). The Act expressly mandates that it “shall be construed liberally in aid of its declared purposes.” R.I. Gen. Laws § 39-26.4-4; *see also* § 39-26.4-1 (supplying that the Act’s purpose is to facilitate and promote installation of customer-sited, grid-connected generation of renewable energy; to support and encourage customer development of renewable generation systems; to reduce environmental impacts; to reduce carbon emissions that contribute to climate change by encouraging the local siting of renewable energy projects; to diversify the state’s energy generation sources; to stimulate economic development; to improve distribution system resilience and reliability; and to reduce distribution system costs”).

IV. EDP’S POSITION

Consistent with the Commission’s Order in *Petition of Southern Sky Renewable Energy Rhode Island, LLC for Declaratory Judgment on R.I. Gen. Laws §39-26.4, The Net Metering Act*, PUC docket number 4694, (May 2017) and the liberal interpretation mandated by the Act, EDP submits that the Site Control Requirement in § 39-26.4-2(14)(i)—which requires that the eligible net-metering resource be located on property “owned or controlled” by the public entity—is satisfied by entering into an irrevocable license agreement which grants the public entity control over the subject property.

An irrevocable license agreement, just like an easement, will allow the municipality or public entity to exercise the requisite “ownership or control” over the property where the eligible net metering resource is located. In *Petition of Southern Sky Renewable Energy Rhode Island, LLC for Declaratory Judgment on R.I. Gen. Laws §39-26.4, The Net Metering Act*, PUC docket number 4694, (May 2017), the Commission found that “an easement agreement in which the public entity or municipality has control over the property” satisfies that Act’s mandate that the pertinent property be “owned or controlled” by the public entity. There, the PUC noted

petitioner's argument that "[l]ease agreements and easement agreements have long been recognized as enforceable interests in real estate and both grant control to the tenant or holder of the easement to the extent provided for in the instruments." *See Grady v. Narragansett Elec. Co.*, 962 A.2d 34, 46 (R.I. 2009) (quoting *Sharp v. Silva Realty Corp.*, 134 A.2d 131, 136 (R.I. 1957) ("it is an established principle that the unrestricted grant of an easement gives the grantee all such rights as are incident or necessary to the reasonable and proper enjoyment of the easement"). Similarly, for the reasons expounded upon below, an irrevocable license is the functional equivalent of an easement, and, therefore, it should also satisfy the requisite ownership or control element, noted in § 39-26.4-2(14)(i).

Although the Rhode Island Supreme Court has not had the opportunity to opine on the characteristics of an irrevocable license as compared to an easement, other courts and reputable treatises have provided that the two are "indistinguishable" and that "the term 'easement' includes an irrevocable license to enter and use land in the possession of another."³ For example, one authority provides that:

In actuality, an irrevocable license has all the features of a servitude or easement in the land and is treated that way by the courts. In fact, a license is not viewed as an encumbrance on the land, unless it has become irrevocable. Even though it may be called a license, once it becomes irrevocable, it should be viewed as an easement or as an equitable servitude.

1 DISPUTES BETWEEN ADJOINING LANDOWNERS-EASEMENTS § 5.02 (2018). Likewise, another well-respected authority has supplied that:

The difference between a license to enter and use land and an easement to make the same use is that the license is revocable at

³ Rhode Island courts have generally recognized the validity of irrevocable licenses. *See, e.g., Rocco v. Pagnano*, C.A. No. 90-7506, 1995 R.I. Super. LEXIS 105, at *5 (R.I. Super. Ct. Jan. 19, 1995) (same); *see also Pelletier v. Laureanno*, 46 A.3d 28, 36 (R.I. 2012) (discussing revocable licenses, which differ from the nature of the right discussed herein).

will by the owner of the burdened land. *If the license becomes irrevocable, or revocable only on the occurrence of a condition, it is indistinguishable from an easement.*

1 RESTATEMENT OF PROPERTY THIRD, § 1.2, comment g, p 16 (2000) (emphasis supplied); RESTATEMENT (THIRD) OF PROPERTY (SERVITUDES) § 1.2(4) (“[a]s used in this Restatement, the term ‘easement’ includes an irrevocable license to enter and use land in the possession of another . . .”).

Courts confronted with the issue have also held that an irrevocable license is to be construed no differently than an easement, and it grants a right to control the property. *See Alcaraz v. Vece*, 14 Cal. 4th 1149, 1177, 60 Cal. Rptr. 2d 448, 466, 929 P.2d 1239, 1258 (1997) (acknowledging there can be a “license-based right to control [the] premises”); *See also One Dupont Ctr., LLC v. Dupont Auburn, LLC*, 819 N.E.2d 507, 514 (Ind. Ct. App. 2004) (“an irrevocable license in legal effect is no different than an easement”) (internal quotation omitted); *Eske Props. v. Sucher*, 2003-Ohio-6520, ¶ 49 (Ohio Ct. App. 2003) (“an irrevocable license is said to be an easement rather than a license”).

Given the foregoing, EDP submits that an irrevocable license with the following characteristics satisfies the Act’s “owned or controlled” element. In pertinent part, the license must:

- be irrevocable by its terms;
- be granted to a public entity, educational institution, hospital, or one of the municipalities, as applicable; and
- grant to the public entity, educational institution, hospital, or one of the municipalities, the right to exercise control over the subject property.

If the Commission grants this Petition, there will still be procedural safeguards in place to ensure that any proposed Net-Metering Financing Arrangement satisfies the Site Control Requirement,

because: 1) net-metering applications are subject to review by The Narragansett Electric Company d/b/a National Grid, prior to approval; and 2) this Commission retains the ability to determine whether an application satisfies the requirements of the Act.

Lastly, if the Petition is granted, it will further facilitate the ability of EDP, and other energy developers, to enter into financing arrangements to construct, develop, and install renewable energy facilities, subject to approval by National Grid and the PUC, and to qualify such facilities for virtual net metering. That result is entirely consistent with the stated purpose of the Act and should guide the Commission to grant the Petition.

V. CONCLUSION

R.I. Gen. Laws § 39-26.4-2(14)(i) provides that in order for an energy developer to enter into a Net-Metering Financing Arrangement with a public entity, the eligible net-metering resource must be located on property that is “owned or controlled” by the relevant public entity, educational institution, hospital, nonprofit, or multi-municipal collaborative, as applicable. As set forth in R.I. Gen. Laws § 39-26.4-4, the Act must be liberally construed to meet its declared purpose, which includes, *inter alia*, facilitating and promoting installation of customer-sited, grid-connected generation of renewable energy; supporting and encouraging customer development of renewable generation systems; reducing environmental impacts; encouraging the local siting of renewable energy projects; diversifying the State’s energy generation sources; and stimulating economic development. *See also* Order, *Petition of Southern Sky Renewable Energy Rhode Island, LLC for Declaratory Judgment on R.I. Gen. Laws §39-26.4, The Net Metering Act*, PUC docket number 4694, (May 2017), at 3 (same).

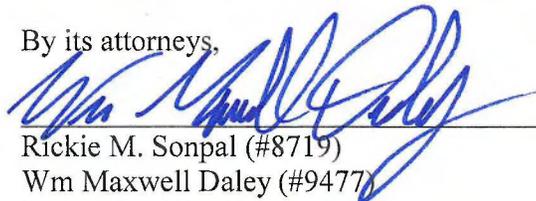
Granting this Petition, and simultaneously clarifying and establishing that an irrevocable license satisfies the Site Control Requirement found in R.I. Gen. Laws § 39-26.4-2(14)(i), will

further the Act's stated purposes noted above and, in particular, by facilitating developers' ability to qualify their projects for virtual net metering and encouraging the installation and development of eligible net-metering systems throughout Rhode Island. Accordingly, for the above-noted reasons, EDP respectfully requests that the Petition be granted.

Respectfully submitted,

ENERGY DEVELOPMENT PARTNERS, LLC,

By its attorneys,



Rickie M. Sonpal (#8719)

Wm Maxwell Daley (#9477)

ROBINSON & COLE LLP

One Financial Plaza, Suite 1430

Providence, RI 02903

(401) 709-3300 (Tel)

(401) 709-3399 (Fax)

wdaley@rc.com

Dated: December 21, 2018