State of Rhode Island and Providence Plantations

DEPARTMENT OF ATTORNEY GENERAL
150 South Main Street • Providence, RI 02903
(401) 274-4400 - TDD (401) 453-0410

Peter F. Kilmartin, Attorney General

February 2, 2011

Luly Massaro, Clerk
Division of Public Utilities and Carriers
89 Jefferson Blvd.
Warwick, RI 02888

RE: COMPLAINT OF BENJAMIN RIGGS RELATING TO TOWN OF PORTSMOUTH GENERATOR FACILITY – NET METERING
DOCKET No. D-10-126

Dear Ms. Massaro,

Enclosed for filing with the Division on behalf of the Advocacy Section is an original and four (4) copies of the Advocacy Section's Memorandum of Law in the above captioned matter.

Very truly yours,

Jon G. Hagopian
Special Assistant Attorney General

JGH/mec

Encls.

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS
DIVISION OF PUBLIC UTILITES AND CARRIERS

IN RE: COMPLAINT OF BENJAMIN RIGGS RELATING TO TOWN OF PORTSMOUTH GENERATOR FACILITY – NET METERING	:	**DOCKET No. D-10-126**

THE ADVOCACY SECTION OF THE DIVISION OF PUBLIC UTILITIES AND CARRIERS MEMORANDUM RELATING TO THE COMPLAINT OF BENJAMIN RIGGS AND THE TOWN OF PORTSMOUTH GENERATOR FACILITY

This case involves a Complaint filed on the 24th day of May, 2010 by Benjamin Riggs, (the "Complaint")[1] relating to the operation of the Town of Portsmouth Wind Generator Facility, (the "Facility"). The essential claim in the Complaint is that the Town of Portsmouth (the "Town" or "Portsmouth") receives an excessive rate for the output it sells to the Narragansett Electric Company d/b/a National Grid, ("National Grid") by reason of a 2009 arrangement between the parties. This transaction purports to be a net metering arrangement between the Town and National Grid.

The issues arising out of the Complaint for review in this case are as follows:

(i) Whether the Town receives an excessive rate for output it sells back to National Grid;

(ii) Whether the Facility is a net metering configuration or a wholesale generator according to federal law.

[1] See Complaint of Benjamin Riggs attached hereto.

I. FACTS

The facts surrounding the evolution of the Portsmouth Wind Generating Facility are essentially undisputed. It appears that in June of 2008 the Town of Portsmouth[2] applied to National Grid to interconnect a 1.5 MW wind generation turbine with National Grid's distribution line. The Facility went into service in March 2009 after review, revision, and reconfiguration of the Facility plan by Portsmouth and National Grid. According to National Grid, the initial plan provided for moving the metering point from three existing services, these being the high school, gym, and tennis courts, out to the high school's property line. This initial plan required the transfer of certain distribution assets, such as poles, wires, transformers, and cables from National Grid to the Town. The transfer would allow the Town of Portsmouth to take ownership of overhead and underground facilities at the school property line so that the proposed wind turbine could be situated behind a new primary meter designed to feed the high school, gym building, tennis courts, and the wind facility. Subsequent to this plan, however, the Town's engineer indicated to National Grid that it wanted an altogether different configuration in which service to the new wind turbine would be through a side-tap from National Grid's existing distribution facilities on school property. The Town engineer indicated that this new arrangement was permitted per state law, would not require the sale of distribution assets to the Town, and would still permit the Town to receive the Renewable Generation Credit[3] ("RGC"), which is akin to full net metering treatment. National Grid apparently concurred with this

[2] See, National Grid response to Div 1-1 for a detailed description of the Portsmouth application and its arrangement with National Grid.

[3] Per R.I. Gen. Laws § 39-26-2(22) the RGC is comprised of the standard offer rate, plus the distribution kWh charge, the transmission kWh charge, and the transition kWh charge.

arrangement and agreed to connect the Facility directly to its distribution line and afford the facility full-net metering treatment.

A. National Grid's Response to the Riggs Complaint

National Grid responded to the Complaint on September 3, 2010. According to National Grid's response, its arrangement with Portsmouth does not meet the definition of net metering as that term is understood in the industry. According to National Grid, "Net metering is understood in the industry as a means of allowing customers who have installed "behind-the-meter" generation to obtain credit for excess generation during those times that the production from the unit exceeds the on-site load." National Grid further explained that a stand-alone generating facility with no real associated distribution load could trigger FERC ("Federal Energy Regulatory Commission") jurisdiction under the Federal Power Act. Additionally, if the unit is a "qualifying facility" ("QF")[4] under federal law, National Grid believes "the sale of power from the facility should be governed by the federal requirement that the rate established for its output does not exceed the avoided cost of the purchasing utility."[5]

Subsequent to National Grid's September 3, 2010 response letter, the Division's Advocacy Section issued discovery questions, and has appended the responses to these to this memorandum in full.[6] These responses included the following assertions from National Grid:[7]

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[4] The Division's Advocacy Section search of FERC records indicated that in August of 2008, Portsmouth submitted FERC Form No. 556, Certification of Qualifying Facility Status for an Existing or a Proposed Small Power Production or Cogeneration Facility. This is appended to this report.

[5] See National Grid response to the complaint, letter to John Spirito, dated September 3, 2010.

[6] Most of the responses to Set 2 have been deemed to be confidential by National Grid, as they provide customer-specific data, so only the redacted portions of Set 2 are appended hereto.

- No Power Purchase Agreement has been executed for the Purchase and Sale of power between Portsmouth and National Grid.[8]
- National Grid agrees with and accepts the industry understanding of net metering as discussed in its September 3, 2010 letter. Further, FERC has defined net metering in a manner consistent with the aforementioned industry understanding.[9]
- The Portsmouth Facility is not a net metering configuration but is a wholesale generator making sales for resale to National Grid, which is subject to the jurisdiction of FERC. The net sale must be at an avoided cost rate consistent with PURPA and our (FERC's) regulations implementing PURPA.[10]
- Since the Rhode Island net metering statute would be unconstitutional to read it in such a manner as to allow self-standing generating facilities to sell power at a rate that is greater than the electric distribution company's avoided cost, it is reasonable to interpret the statute more narrowly, so as to be consistent with federal law. To avoid constitutional issues, Rhode Island law would not permit a self-standing generator with no material "on-site" load to be net metered and receive credits at a rate that is higher than the utilities avoided cost.[11]

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[7] In a related note, both the Public Utilities Commission (PUC) and National Grid raised serious concerns about the payment of above-market rates, lack of transparency associated with net metering, the expansion of net metering to over-sized generators with no or little native loads, and the potential of expanding the amount of subsidies included in electric rates. See August 17, 2010 letter from the PUC to Speaker Gordon Fox, along with its attachment, a July 6, 2010 letter from National Grid to the PUC, responding to PUC data requests on net metering.

[8] Response to Div 1-2.

[9] Response to Div 1-5(a).

[10] Response to Div 1-5(b), in part quoting MidAmerican Energy Company, 94 FERC ¶ 61,340 at 62,263 (March 28, 2001).

[11] Response to Div 1-5(c).

- The Portsmouth Wind Generating Facility receives a price for the energy that is greater than the market price of the energy.[12]
- The Town of Portsmouth, through the credits being paid the Town from the wind facility's production, is not paying for its share of the distribution system's cost. According to National Grid, "the credits being paid to the Town from the production at the facility are effectively reducing the Town's contribution to the cost of the distribution system through the cross subsidies inherent in the net metering mechanism, because all other distribution customers are paying a rate for power that is above market."[13]

II. APPLICABLE LAW

A. Net Metering & Wholesale Transactions Pursuant Federal Law

Industry terminology referring to a scenario whereby an electric customer installs a generation unit behind the meter in order to receive a generation credit or monetary compensation for excess output generated by the unit during periods when its output is greater than the on-site load requirements of the customer is known as net metering. National Grid Response to Division Data Request 1-5.[14] Further, FERC has interpreted the definition of net metering to describe circumstances whereby:

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[12] Response to Div 1-7.
[13] Response to Div 1-10.
[14] Pursuant to 16 U.S.C.§ 2621 (d) (11) "net metering service" means service to an electric consumer under which electric energy generated by that electric consumer from an eligible on-site generating facility and delivered to the local distribution facilities may be used to offset electric energy provided by the electric utility to the electric consumer during the applicable billing period.

> Net metering allows a retail electric customer to produce and sell power onto the Transmission System without being subject to the Commissions' jurisdiction. A participant in a net metering program must be a net consumer of electricity–but for portions of the day or portions of the billing cycle, it may produce more electricity than it can use itself. This electricity is sent back onto the Transmission System to be consumed by other end-users. Since the program participant is still a net consumer of electricity, it receives an electric bill at the end of the billing cycle that is reduced by the amount of energy it sold back to the utility. Essentially, the electric meter "runs backwards" during the portion of the billing cycle when the load produces more power than it needs, and runs normally when the load takes electricity off the system.

Sun Edison, LLC, 129 FERC ¶ 61,146, 61,620 (2009).[15]

On the other hand, a generating unit that is designed to stand alone with no meaningful distribution load may be more accurately characterized as a wholesale generator subject to the Federal Energy and Regulatory Commission ("FERC") jurisdiction pursuant to the Federal Power Act. National Grid Response to Division Data Request 1-5. The FERC possesses exclusive jurisdiction pursuant to the Federal Power Act (the "FPA") to, among other things, regulate the rates, terms and conditions of sales for resale of electricity in interstate commerce by public utilities. 16 USC §§ 824, 824d, 824e (2006); see e.g., Mississippi Power & Light Co. v. Mississippi ex rel. Moore, 487 U.S. 354, 108 S. Ct. 2428, 2439-2440 (1988).

[15] Sun Edison, LLC, 129 FERC ¶ 61,146, 61,620 (2009), citing Standardization of Generator Interconnection Agreements and Procedures, Order No. 2003-A, FERC Stats. & Regs. ¶ 31,160 at P 744, *order on reh'g*, Order No. 2003-B, FERC Stats. & Regs. ¶ 31,171 (2004), *order on reh'g*, Order No. 2003-C, FERC Stats. & Regs. ¶ 31,190 (2005), *aff'd sub nom.* NARUC v. FERC, 457 F. 3d 1277 (D.C. Cir 2007).

A brief historical review of state and federal regulatory regimes is in order to frame the issues properly in this matter. In 1978 the United States Congress enacted section 210 of the Public Utility Regulatory Policies Act ("PURPA"), 16 USC § 2601 et. sec., 16 U.S.C. § 824a-3.[16] PURPA was enacted in response to the OPEC oil embargo of 1973 triggered by U.S. support of Israel during its war with Egypt and Syria.[17] The purpose of section 210 of PURPA was to reduce the nation's dependence on foreign oil by encouraging inter alia the development of cogeneration and small power production projects. See, FERC v. Mississippi, 456 U.S. 742, 745-46, 750, 102 S. Ct. 2126 (1982). "Congress felt 'that two problems impeded the development of nontraditional generating facilities: (1) traditional electricity utilities were reluctant to purchase power from, and to sell power to, the nontraditional facilities, and (2) the regulation of these alternative energy sources by state and federal utility authorities imposed financial burdens upon the nontraditional facilities and thus discouraged their development.'" Greenwood v. New Hampshire Public Utilities Commission, 527 F.3d 8, 10 (2008); citing, FERC v. Mississippi, 456 U.S. 742, 750-51 102 S. Ct. 2126 (1982). PURPA mandated that FERC prescribe regulations "for implementing the statute, in particular, rules requiring utilities to enter into purchase and sale agreements with qualifying cogeneration and small power production facilities ("QF's")." Id.; 16 U.S.C. § 824a-3(a); see also, 16 U.S.C § 796 (17)-(18) (defining QF's); 18 C.F.R. § 292.204(a).

The FERC adopted rules and regulations pursuant to the enabling authority in 16 U.S.C. § 824a-3(a) relating to the purchase and sale of electricity to and from cogeneration and small power facilities. See, 18 C.F.R. § 292.101 et. seq. "These afford state regulatory

[16] Public Utility Regulatory Policies Act of 1978, Pub. L. No. 95-617, 92 Stat. 3117.
[17] See, 27 Energy L.J. 25 (2006); see also, Journal of Energy Security, October 2008 Issue, 35 Years After the Arab Oil Embargo by Jay Hakes, IAGS.

authorities...latitude in determining the manner in which the regulations are to be implemented." See, FERC v. Mississippi, 456 U.S. 742, 745-46, 751, 102 S. Ct. 2126 (1982). 16 U.S.C. § 824a-3(f) requires state regulatory authorities to implement FERC rules. Id. Pursuant to 16 U.S.C. § 824a-3(h)(2)(A) FERC is empowered to enforce in federal court any states failure to comply with the requirements of subsection (f); "if the FERC fails to act after request, any qualifying utility may bring suit." Id. "Thus, a state commission may comply with the statutory requirements by issuing regulations, by resolving disputes on a case-by-case basis, or by taking any other action reasonably designed to give effect to FERC's rules." Id. The enactment of 16 U.S.C § 824a-3(e)(1) exempts QF's from the Federal Power Act. See also, 18 C.F.R. § 292.601(a) (which includes specifically enumerated exemptions for qualifying facilities 20MW or smaller).

FERC regulation, 18 C.F.R.292.303(a) provides "that each electric utility shall purchase any energy and capacity that is made available from a qualifying facility" unless exempt under section 292.309. Similarly, FERC regulation, 18 C.F.R. 292.304(a)(i) requires that rates for purchases by an electric utility from a qualified facility shall "[b]e just and reasonable to the electric consumer of the electric utility and in the public interest; and (ii) [n]ot discriminate against qualifying cogeneration and small power production facilities." Notably, FERC regulations state that "[n]othing in this subpart requires any electric utility to pay more than the avoided costs for purchases." Id. at § 292.304(a)2.

According to section 210 of PURPA, the rules prescribed by the FERC shall not provide for a rate "which exceeds the incremental cost to the electric utility of alternative electric energy." 16 U.S.C. § 824a-3(b) (2006). As demonstrated here, qualified facilities are exempt from certain aspects of the Federal Power Act by reason of their qualified status according to 18

C.F.R. 292.601, however section 304 is not included in these specifically enumerated exemptions, therefore FERC has retained authority over purchase power rates in the net metering and qualified facilities context. These regulations have been interpreted further in a number of FERC and federal court decisions. FERC recently upheld an earlier ruling that FERC regulations provide rates shall be capped at the electric utility's full "avoided cost." California Public Utilities Commission, 132 FERC ¶ 61,047, 18, (2010) (citing 18 C.F.R. § 292.304(a)(2) (2010)). The FERC held in another case where a Connecticut municipal rate statute mandated that sales by a QF be at rates that exceeded avoided cost, that the statute was preempted by PURPA. Connecticut Power and Light, 70 FERC ¶ 61,012, 61,029 (1995). On reconsideration, which was denied in the Connecticut Power and Light case, the FERC further opined that:

> a QF is expressly a product of PURPA; PURPA defined what facilities would be QFs. PURPA gave states a specific but limited role to set wholesale rates pursuant to the statute and the Commission's regulations-a role that in most instances they would not otherwise have since QF sales primarily are sales for resale in interstate commerce. In other words, states have no authority outside of PURPA to set QF rates at wholesale. [Any] ...attempt to read into PURPA and the Commission's regulations a right for states to impose rates for QF sales for resale that exceed avoided cost [is an] attempt to read in a right that is simply not there ... a right that is contrary to the face of the statute which expressly states that such rates may not exceed 'the incremental cost to the electric utility,' i.e., not exceed avoided cost.

Connecticut Power and Light, 71 FERC ¶ 61,035, 61,153 (1995)

The FERC in the California Public Utilities Commission case revisited its earlier decision in Connecticut Power and Light, opining that the commission reasoned that "wholesale

QF rates cannot both be capped by full avoided cost (the federal statute) and exceed the avoided cost cap (the state statute)." California Public Utilities Commission, 132 FERC ¶ 61,047(2010).[18]

The cases cited here have clearly articulated the scope and extent of state regulatory authority with regard to the setting of rates for sales of output by QF's without preempting the Federal Power Act. See also, MidAmerican Energy Company, 94 FERC ¶ 61,340 (2001).

B. Net Metering Pursuant to Rhode Island Law

The Rhode Island General Assembly enacted R.I. Gen. Laws §§ 39-26-1et. seq., an act known as the "Renewable Energy Standard" for the purpose of facilitating "the development of new renewable energy resources to supply electricity to customers in Rhode Island with goals of stabilizing long-term energy prices, enhancing environmental quality, and creating jobs in Rhode Island in the renewable energy sector." R.I. Gen. Laws § 39-26-3.

According to R.I. Gen. Laws § 39-26-2(17) "Net Metering means the process of measuring the difference between electricity delivered by an electrical distribution company and electricity generated by a solar-net metering facility or wind net-metering facility, and fed back to the distribution company."

The Public Utilities Commission was required pursuant to R.I.Gen Laws § 39-26-6 to adopt regulations for implementing the Renewable Energy Standard. These included the

[18] It is important to note that FERC in Connecticut Power and Light, 70 FERC ¶ 61,012, at fn 46 (1995) explained that "a rate in excess of avoided cost is, by definition, a rate higher than what ratepayers would pay if the utility had generated the electric energy itself or purchased it elsewhere." See 18 C.F.R. § 292.101(b)(6) (1994); Independent Energy Producers Association v. California Public Utilities Commission, 36 F.3d 848, 858 (9th Cir. 1994). By stating that states cannot impose rates in excess of avoided cost, section 210 of PURPA and the Commission's regulations balance the competing Congressional concerns of promoting cogeneration and small power production and yet not burdening ratepayers; imposing a rate in excess of avoided cost would subsidize QFs and burden ratepayers. 36 F.3d at p. 858."

implementation of changes relating to distributed generation from renewable energy systems to include a provision that customers entitled to renewable credits such as municipalities, unless otherwise requested, shall be compensated monthly by a check from the distribution company pursuant to rates set forth in R.I.Gen. Laws §§ 39-26-2(19) and 39-26-2(22). See, R.I.Gen. Laws § 39-26-6 9(g)(ii). The PUC approved changes made to National Grid's QF tariff in 2008 and 2009 to comport with amendments made to the law in those legislative sessions.[19]

The specified rate for Renewable Generation Credits in R.I. Gen. Laws § 39-26-2(22) means a credit equal to the excess kWhs by the time of use billing period (if applicable) multiplied by the sum of the distribution company's:

(i) Standard offer service kWh charge for the rate class applicable to the net metering customer;

(ii) Distribution kWh charge;

(iii)Transmission kWh charge; and

(iv) Transition kWh charge.

A review of the definition of renewable energy credit indicates that the purchase price to be paid here by statute would resemble a retail rate rather than a full "avoided cost", the latter being the federal mandate for output purchases from a QF by a distribution company.

C. National Grid Tariff for Qualified Facilities Power Purchase Rate

National Grid possesses a Tariff, R.I.P.U.C. No. 2035, approved in Rhode Island Public Utilities Commission Docket 4079, (the "Tariff") which governs its purchase of electrical output

[19] See RIPUC Order 19590 in Docket 3999 (issued 3/11/09) and Order 19821 in Docket 4079, (issued 11/4/09).

from any qualifying facility as defined pursuant to PURPA. According to the terms of the Tariff, qualifying facilities include small power facilities producing 20 megawatts or less using biomass, waste, renewable resources, or any combination thereof for at least 75% of their total energy input.[20]

The Tariff includes rates for purchases by National Grid from a QF for its output.[21] More particularly, the Tariff provides that for QF's employing wind technology that is 3.5 MW or less and are entirely owned by cities and towns, National Grid will permit a Net Metering Facility, ("NMF") to deliver electricity to National Grid according to specified terms among others that:

> The customer's usage and generation will be netted for a twelve-month period beginning on January of each year. If the electricity generated by the NMF during a billing period exceeds the customer's kWh usage during the billing period, the customer shall be billed for zero kilowatt hour usage and a renewable generation credit (which has the same meaning as defined in R.I. Gen. Laws §39-26-2(22)) shall be applied to the customers account. Unless the customer requests otherwise, the customer will be compensated monthly by check for the RGC.[22]

The power purchase terms in the Tariff are identical to the statutory provisions in Title 39 Chapter 26.

III. FINDINGS

Applying the law to the facts of the instant matter the Advocacy Section has reached the following conclusions:

[20] See, Tariff, R.I.P.U.C. No. 2035, Sheet 1.
[21] Id. at Sheet 5.
[22] Id. at Sheet 5-6

- National Grid has inappropriately permitted a self-standing generator with no material on site load to be net metered and receive credits at a rate that is higher than its avoided cost. By National Grid's own admission in discovery responses, its interpretation of state law as it applies to net metering was done in a manner that violates federal law. National Grid indicated that the Rhode Island statute should be interpreted more narrowly to avoid constitutional issues.[23] National Grid did not follow its own stated position in administering its transaction with Portsmouth.
- The Portsmouth Wind facility meets the criteria for a Qualifying Facility under FERC regulations. As discussed above, FERC caps QF purchases at avoided cost. This requirement must be followed by state regulatory authorities when satisfying their obligation to implement PURPA.
- The Advocacy Section's review of cases addressing net metering and qualifying facilities at the FERC leads it to conclude that the Facility does not meet the FERC definition of a net metered facility. National Grid's data responses, as well as its response to the Complaint, also support this conclusion.
- It appears that the Facility has self-certified as a QF by virtue of its submission of Form No. 556 to the FERC in 2008. Although it has been certified, it has not executed National Grid's standard QF contract. It receives a rate that is higher than National Grid's tariffed QF rate per R.I.P.U.C No. 2035, Section III, Rates For Qualifying Facilities. According to the tariff the QF rate is equal to the payments received by National Grid for the sale of such QF's output into the ISO-

[23] See, National Grid Response to Div. 1-5(c).

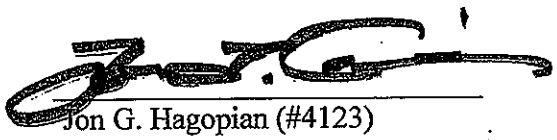
NE administered markets for the hours in which the QF's facility generated electricity in excess of its requirements. This is the rate the Portsmouth Facility is eligible to be paid as a QF under the Tariff and under Federal law. National Grid has incorrectly treated the Portsmouth Wind Facility as a net metered customer and has paid a rate equivalent to the Standard Offer charge, plus the kWh component of the distribution, transmission, and transition charge. This payment is in excess of the avoided cost.

- To the extent National Grid has recovered from its customers any lost revenues associated with its arrangement with the Portsmouth Wind Facility, this recovery would appear to be inappropriate based on the conclusion that the payments to the Facility are excessive. At a minimum, any further recoveries of costs by National Grid associated with net metering of the Portsmouth Wind Facility, or any similarly situated arrangement should cease immediately.
- The Division should order the parties to comply with the mandates of PURPA as set forth in this memorandum. All payments to the Facility should be at the Qualifying Facilities rate as per National Grid tariff No. 2035.

Respectfully submitted,

ADVOCACY SECTION,
STATE OF RHODE ISLAND
DIVISION OF PUBLIC
UTILITIES AND CARRIERS

By its Attorney,



Jon G. Hagopian (#4123)
Special Assistant Attorney General
150 South Main Street
Providence, Rhode Island 02903
Phone: (401) 274-4400
Fax: (401) 222-3016

CERTIFICATION OF SERVICE

I hereby certify that on the 2nd day of February, 2011, that I transmitted an electronic copy of the within Memorandum to the attached service list and to Luly Massaro, Division Clerk via electronic mail and regular mail.

Benjamin C. Riggs, Jr.
15D Harrington St.
Newport, RI 02840

Thomas R. Teehan, Esq.
National Grid.
280 Melrose St.
Providence, RI 02907

Attachments to

Advocacy Section's Memorandum of Law

Attachment 1

BCR

Benjamin C. Riggs, Jr.
15D Harrington Street
Newport, RI 02840
Tel. 401/846-2540 Fax. 846-1032
rmcriggs@earthlink.net

May 19, 2010

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

Re: Complaint: Portsmouth Windmill

Dear Ms. Massaro:

The Town of Portsmouth appears to me, unless I'm missing some authorizing document, to be selling the output of its windmill in violation of R.I.G.L. 39§26.2.

Section 2 defines "net metering" as authorizing the sale back to the utility of the net difference between the customer's usage and their own production. As appears from the letter Portsmouth wrote to Nicholas Ratti on April 1st (copy attached), and my e-mail exchanges with the writer of that letter (copy attached), the Portsmouth deal calls for the sale back of 100% of the customer's production.

I would appreciate your looking into this on behalf of all Rhode Island citizens who are affected to make sure it is not in violation of the law.

Very truly yours,

Benjamin C. Riggs, Jr.

Attachments (2)

Town of Portsmouth

2200 East Main Road / Portsmouth, Rhode Island 02871
www.portsmouthri.com

GARY R. CROSBY
Assistant Town Planner
Zoning Enforcement Officer

Office: (401) 643-0332
Fax: (401) 683-6804
email: gcrosby@portsmouthri.com

April 1, 2010

Nicolas Ratti, Jr.
28 Hydraulion Avenue
Bristol, Rhode Island 02809

Dear Sir:

With regard to the following statement made by you in a letter to the Block Island Town Council dated March 8, 2010, I fear you are woefully misinformed and in desperate need of correction.

> *"Portsmouth boasts that its windmill saves money, but its claim is based on a fictitious, unjustified rate of 15.4 cents per kWH. At the real-world, PUC-set residential rate of 9.2 cents, it loses money."*

Portsmouth's wind turbine is not a "behind-the-meter" facility. Every kWH that the turbine generates goes directly onto the grid. In theory, you used some of that electricity when you made your coffee this morning. We do not "save" money by using power from the turbine that we would otherwise have to purchase from NGrid. We make money by selling power to NGrid. The distinction is important.

Our wind turbine generates two revenue streams for the Town. First, we are paid by check by NGrid for every kWH we generate at the PUC-set, legislatively-mandated, "real-world" rate of $0.11.388 per kWH. This is NGrid's standard rate for industrial-scale facilities. Second, we have a 10-year contract with Energy Consumers Alliance of New England (ECANE), dba Rhode Island People's Power and Light, wherein they purchase Renewable Energy Certificates (RECs) from us at the rate of $0.04 per kWH for every kWH we produce. Both ECANE and NGrid read the same meter and pay us directly for our production.

For the production year just ending (April, 2009 – March, 2010) our wind turbine generated 3,712,800 kWH of electricity. At the combined rate of $0.15388 per kWH, that amounts to $571,325 revenue to the Town. Our expenses for the same period, including debt service, operations & maintenance and contributions to two reserve funds amount to approximately $314,250, leaving a net annual income to the Town of $257,075. Mr. Ratti, this is not a "boast," this is fact. As an aside, a quick calculation reveals that we would still make money, albeit not very much, at your fictitious rate of "9.2 cents."

You would do well to get your facts straight before entering into the public discussion over renewable energy financing.

Gary Crosby
Portsmouth Wind Turbine Coordinator

Cc: Block Island Town Council

Subject: Re: Wind Turbine
From: Ben Riggs <rmcriggs@earthlink.net>
Date: Wed, 14 Apr 2010 17:26:23 -0400
To: "Gary R. Crosby" <gcrosby@portsmouthri.com>
BCC: "pmank@verizon.net" <pmank@verizon.net>

(3) To explain it simply, I understand NGRID normally pays about 6 cents/KWH for power, and resells it to us at about 9.2 cents, a rate that includes their overhead of doing business. (Fair enough.) Portsmouth sells its power for a combined rate of 15.388 cents. (This includes 11.388 directly from NGRID, and the rest from ECANE, correct?) Unless I'm missing something, the difference between what NGRID can buy power for and what it is forced to buy it for from you is a little over 9 cents. The residents of RI are picking up the tab for the difference through increased NGRID bills and whatever vehicle is used to finance ECANE.

My point is, Portsmouth is making out just fine; the rest of us are getting screwed by having to subsidize this. I don't expect you to have the same opinion, but are we on the same page now?

Ben Riggs

Gary R. Crosby wrote:

> Mr. Riggs -
> In my letter to Mr. Ratti, I made no such claim "that the device saved Portsmouth $257,075 last year." I simply tried to explain to him that the $257K was our net income after expenses in operating the wind turbine. Apparently I did not explain it thoroughly enough, at least to your satisfaction.
>
> (2) To put it simply, the Town of Portsmouth is in the power generation business. Every kilowatt we produce goes straight to NGrid. In exactly the same way NGrid buys power from the coal-fired Brayton Point power plant, or a hydroelectric facility in Vermont, or any of the multiple power generation sources that they do business with, they buy power from us and distributes it to you and me, their rate paying customers. It is a very simple arrangement. We produce power, they buy it from us. Period. The rate that they purchase this power from us is set by the the Public Utilities Commission.
> We own and operate a machine that produces a revenue stream, has operation and maintenance expenses and has capital costs that the Town must retire. It is a matter of income and expenses, nothing more. I fail to understand how you can characterize this arrangement as NGrid ratepayers "subsidizing" the Town of Portsmouth.
> Gary
>
> **From:** Ben Riggs [mailto:rmcriggs@earthlink.net]
> **Sent:** Tuesday, April 13, 2010 05:12 PM
> **To:** Gary R. Crosby
> **Subject:** Wind Turbine

(1) Dear Mr. Crosby:

I have reviewed your letter of April 1st to Nicholas Ratti, Jr. in which you rebut his statement claiming that the Portsmouth Wind Turbine does not actually save money. If I read it right, you claim the device saved Portsmouth $257,075 last year.

Perhaps I'm missing something, but where exactly did this money really come from? Unless it was the Fairy Godmother, it looks like it came from the rest of us National Grid ratepayers, who have unknowingly been subsidizing your town. Is that correct? If so, that's not a "savings" in any sense of the word.

Ben Riggs
Newport, RI

Attachment 2

Form Approved
OMB Control No. 1902-0075
Expires 7/31/2009

FERC Form No. 556
18 C.F.R. § 131.80

CERTIFICATION OF QUALIFYING FACILITY STATUS FOR AN EXISTING OR A PROPOSED SMALL POWER PRODUCTION OR COGENERATION FACILITY

INFORMATION ABOUT COMPLIANCE

Compliance with the information collection requirements established by the FERC Form No. 556 is required to obtain and maintain status as a qualifying facility. *See* 18 C.F.R. § 131.80 and Part 292. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number.

SUBMITTING COMMENTS ON PUBLIC REPORTING BURDEN

The estimated burden for completing FERC Form No. 556, including gathering and reporting information, is 4 hours for self-certifications and 38 hours for applications for Commission certification. Send comments regarding this burden estimate or any aspect of this collection of information, including suggestions for reducing this burden, to the following: Michael Miller, Office of the Executive Director (ED-34), Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426; and Desk Officer for FERC, Office of Information and Regulatory Affairs, Office of Management and Budget, Washington, DC 20503 (oira_submission@omb.eop.gov). Include the Control No. 1902-0075 in any correspondence.

GENERAL INSTRUCTIONS

Complete this form by replacing bold text below with responses to each item, as required.

PART A: GENERAL INFORMATION TO BE SUBMITTED BY ALL APPLICANTS

1a. Full name of applicant: [Note: Applicant is the legal entity submitting this form, not the individual employee making the filing. Generally, the Applicant will be a company, corporation or organization, unless the facility is owned directly by an individual or individuals.]

Town of Portsmouth, Rhode Island

Docket Number assigned to the immediately preceding submittal filed with the Commission in connection with the instant facility, if any:

"none"

Purpose of instant filing (self-certification or self-recertification [18 C.F.R. § 292.207(a)(1)], or application for Commission certification or recertification [18 C.F.R. §§ 292.207(b) and (d)(2)]):

Self-certification

1b. Full address of applicant:

2200 East Main Road, Portsmouth, Rhode Island 02871

1c. Indicate the owner(s) of the facility (including the percentage of ownership held by any electric utility or electric utility holding company, or by any persons owned by either) and the operator of the facility.

Town of Portsmouth, Rhode Island
2200 East Main Road
Portsmouth, RI 02871

Additionally, state whether or not any of the non-electric utility owners or their upstream owners are engaged in the generation or sale of electric power, or have any ownership or operating interest in any electric facilities other than qualifying facilities.

N/A

In order to facilitate review of the application, the applicant may also provide an ownership chart identifying the upstream ownership of the facility. Such chart should indicate ownership percentages where appropriate.

1d. Signature of authorized individual evidencing accuracy and authenticity of information provided by applicant: [Note: A signature on a filing shall constitute a certificate that (1) the signer has read the filing and knows its contents; (2) the contents are true as stated, to the best knowledge and belief of the signer; and (3) the signer possesses full power and authority to sign the filing. A person submitting a self-certification electronically via eFiling may use typed characters representing their name to show that the person has signed the document. *See* 18 C.F.R. § 385.2005.]

David Faucher, Finance Director

2. Person to whom communications regarding the filed information may be addressed:

Name: **Robert Driscoll**

Title: **Town Administrator**

Telephone number: **401-683-3255**

Mailing address: **2200 East Main Road, Portsmouth, Rhode Island 02871**

3a. Location of facility to be certified:

State: **Rhode Island**

County: **Newport**

City or town: **Portsmouth**

Street address (if known): **120 Education Lane, Portsmouth, Rhode Island 02871**

3b. Indicate the electric utilities that are contemplated to transact with the qualifying facility (if known) and describe the services those electric utilities are expected to provide:

National Grid

Indicate utilities interconnecting with the facility and/or providing wheeling service [18 C.F.R. §§ 292.303(c) and (d)]:

National Grid

Indicate utilities purchasing the useful electric power output [18 C.F.R. §§ 292.101(b)(2), 292.202(g) and 292.303(a)]:

National Grid

Indicate utilities providing supplementary power, backup power, maintenance power, and/or interruptible power service [18 C.F.R. §§ 292.101(b)(3), (b)(8), 292.303(b) and 292.305(b)]:

National Grid

4a. Describe the principal components of the facility including boilers, prime movers and electric generators, and explain their operation. Include transmission lines, transformers and switchyard equipment, if included as part of the facility.

Facility consists of:

- **AAER 1.5 MW wind turbine, with a wound rotor, 60 Hz, induction generator, 690V, 65m tower, utilizing 77m diameter rotor blades**
- **1600A frame, trip at 1500A, 3 phase, 3 wire, 690V main switch**
- **2000KVA, 13,800-690V, 3 phase, 4 wire pad mounted transformer,**

wired delta (primary), wye (secondary)

4b. Indicate the maximum gross and maximum net electric power production capacity of the facility at the point(s) of delivery and show the derivation. [Note: Maximum gross output is the maximum amount of power that the facility is able to produce, measured at the terminals of the generator(s). Maximum net output is maximum gross output minus (1) any auxiliary load for devices that are necessary and integral to the power production process (fans, pumps, etc.), and (2) any losses incurred from the generator(s) to the point of delivery. If any electric power is consumed at the location of the QF (or thermal host) for purposes not related to the power production process, such power should not be subtracted from gross output for purposes of reporting maximum net output here.]

Gross output: **1.5 MW @ 12 m/s wind speed**

Net output: **1487 KW @ 12 m/s; 231 KW @ 6 m/s**

Derivation (assumptions about losses, auxiliary load or lack thereof, and calculation of gross and net output):

Derivation:

1. **Gross output includes auxiliary load.**
2. **Padmount transformer efficiency is 99.3%, per NEMA Class 1 efficiency levels for liquid filled distribution transformers.**
3. **Line losses are .16% for 650 feet of #2 aluminum, 13,800 volt cable.**
4. **Total net efficiency = 99.3% - .16% = 99.14%**
5. **Net output = 99.14% x 1500 KW = 1487 KW**

4c. Indicate the actual or expected installation and operation dates of the facility, or the actual or expected date of completion of the reported modification to the facility:

December 2008

4d. Describe the primary energy input (e.g., hydro, coal, oil [18 C.F.R. § 292.202(l)], natural gas [18 C.F.R. § 292.202(k)], solar, geothermal, wind, waste, biomass [18 C.F.R. § 292.202(a)], or other). For a waste energy input that does not fall within one of the categories on the Commission's list of previously approved wastes, demonstrate that such energy input has little or no current commercial value and that it exists in the absence of the qualifying facility industry [18 C.F.R § 292.202(b)].

Wind

5. Provide the average annual hourly energy input in terms of Btu for the following fossil fuel energy inputs, and provide the related percentage of the total average annual hourly energy input to the facility [18 C.F.R § 292.202(j)]. For any oil or natural gas fuel, use

lower heating value [18 C.F.R § 292.202(m)]:

Natural gas: **None**

Oil: **None**

Coal (applicable only to a small power production facility): **None**

6. Discuss any particular characteristic of the facility which the cogenerator or small power producer believes might bear on its qualifying status.

None

PART B: DESCRIPTION OF THE SMALL POWER PRODUCTION FACILITY

Items 7 and 8 only need to be answered by applicants seeking certification as a small power production facility. Applicants for certification as a cogeneration facility may delete Items 7 and 8 from their application, or enter "N/A" at both items.

7. Describe how fossil fuel use will not exceed 25 percent of the total annual energy input limit [18 C.F.R §§ 292.202(j) and 292.204(b)]. Also, describe how the use of fossil fuel will be limited to the following purposes to conform to Federal Power Act section 3(17)(B): ignition, start-up, testing, flame stabilization, control use, and minimal amounts of fuel required to alleviate or prevent unanticipated equipment outages and emergencies directly affecting the public.

N/A

8. If the facility reported herein is not an eligible solar, wind, waste or geothermal facility, and if any other non-eligible facility located within one mile of the instant facility is owned by any of the entities (or their affiliates) reported in Part A at item 1c above and uses the same primary energy input, provide the following information about the other facility for the purpose of demonstrating that the total of the power production capacities of these facilities does not exceed 80 MW [18 C.F.R § 292.204(a)]: [*See* definition of an "eligible facility" below. Note that an "eligible facility" is a specific type of small power production facility that is eligible for special treatment under the Wind, Waste and Geothermal Power Production Incentives Act of 1990, as subsequently amended in 1991, and should not be confused with facilities that are generally eligible for QF status.]

Facility name, if any (as reported to the Commission):

N/A

Commission Docket Number:

N/A

Name of common owner:

N/A

Common primary energy source used as energy input:

N/A

Power production capacity (MW):

N/A

An eligible solar, wind, waste or geothermal facility, as defined in Section 3(17)(E) of the Federal Power Act, is a small power production facility that produces electric energy solely by the use, as a primary energy input, of solar, wind, waste or geothermal resources, for which either an application for Commission certification of qualifying status [18 C.F.R § 292.207(b)] or a notice of self-certification of qualifying status [18 C.F.R § 292.207(a)] was submitted to the Commission not later than December 31, 1994, and for which construction of such facility commences not later than December 31, 1999, or if not, reasonable diligence is exercised toward the completion of such facility, taking into account all factors relevant to construction of the facility.

PART C: DESCRIPTION OF THE COGENERATION FACILITY

Items 9 through 15 only need to be answered by applicants seeking certification as a cogeneration facility. Applicants for certification as a small power production facility may delete Items 9 through 15 from their application, or enter "N/A" at each item.

9. Describe the cogeneration system [18 C.F.R §§ 292.202(c) and 292.203(b)], and state whether the facility is a topping-cycle [18 C.F.R § 292.202(d)] or bottoming-cycle [18 C.F.R § 292.202(e)] cogeneration facility.

N/A

10. To demonstrate the sequentiality of the cogeneration process [18 C.F.R § 292.202(s)] and to support compliance with other requirements such as the operating and efficiency standards (Item 11 below), provide a mass and heat balance (cycle) diagram depicting

average annual hourly operating conditions. Also, provide:

Using lower heating value [18 C.F.R § 292.202(m)], all fuel flow inputs in Btu/hr., separately indicating fossil fuel inputs for any supplementary firing in Btu/hr. [18 C.F.R § 292.202(f)]:

N/A

Average net electric output (kW or MW) [18 C.F.R § 292.202(g)]:

N/A

Average net mechanical output in horsepower [18 C.F.R § 292.202(g)]:

N/A

Number of hours of operation used to determine the average annual hourly facility inputs and outputs:

N/A

Working fluid (e.g., steam) flow conditions at input and output of prime mover(s) and at delivery to and return from each useful thermal application, including flow rates (lbs./hr.), temperature (deg. F), pressure (psia), and enthalpy (Btu/lb.):

N/A

11. Compute the operating value [applicable to a topping-cycle facility under 18 C.F.R § 292.205(a)(1)] and the efficiency value [18 C.F.R §§ 292.205(a)(2) and (b)], based on the information provided in and corresponding to item 10, as follows:

Pt = Average annual hourly useful thermal energy output
Pe = Average annual hourly electrical output
Pm = Average annual hourly mechanical output
Pi = Average annual hourly energy input (natural gas or oil)
Ps = Average annual hourly energy input for supplementary firing (natural gas or oil)

Operating standard = 5% or more

Operating value = Pt / (Pt + Pe + Pm)

N/A

Efficiency standard applicable to natural gas and oil fuel used in a topping-cycle facility:

= 45% or more when operating value is less than 15%, or 42.5% or more when operating value is equal to or greater than 15%.

Efficiency value = (Pe + Pm + 0.5Pt) / (Pi + Ps)

N/A

Efficiency standard applicable to natural gas and oil fuel used for supplementary firing component of a bottoming-cycle facility:

= 45% or more

Efficiency value = (Pe + Pm) / Ps

N/A

FOR TOPPING-CYCLE COGENERATION FACILITIES

Items 12 and 13 only need to be answered by applicants seeking certification as a topping-cycle cogeneration facility. Applicants for certification as a small power production facility or bottoming-cycle cogeneration facility may delete Items 12 and 13 from their application, or enter "N/A" at each item.

12. Identify the entity (i.e., thermal host) which will purchase the useful thermal energy output from the facility [18 C.F.R § 292.202(h)]. Indicate whether the entity uses such output for the purpose of space and water heating, space cooling, and/or process use.

N/A

13. In connection with the requirement that the thermal energy output be useful [18 C.F.R § 292.202(h)]:

For process uses by commercial or industrial host(s), describe each process (or group of similar processes using the same quality of steam) and provide the average annual hourly thermal energy made available to the process, less process return. For a complex system, where the primary steam header at the host-side is divided into various sub-uses, each having different pressure and temperature characteristics, describe the processes associated with each sub-use and provide the average annual hourly thermal energy delivered to each sub-use, less process return from such sub-use. Provide a diagram

showing the main steam header and the sub-uses with other relevant information such as the average header pressure (psia), the temperature (deg.F), the enthalpy (Btu/lb.), and the flow (lb./hr.), both in and out of each sub-use. For space and water heating, describe the type of heating involved (e.g., office space heating, domestic water heating) and provide the average annual hourly thermal energy delivered and used for such purpose. For space cooling, describe the type of cooling involved (e.g., office space cooling) and provide the average annual hourly thermal energy used by the chiller.

N/A

FOR BOTTOMING-CYCLE FACILITIES

Item 14 only needs to be answered by applicants seeking certification as a bottoming-cycle cogeneration facility. Applicants for certification as a small power production facility or topping-cycle cogeneration facility may delete Item 14 from their application, or enter "N/A."

14. Provide a description of the commercial or industrial process or other thermal application to which the energy input to the system is first applied and from which the reject heat is then used for electric power production.

N/A

FOR NEW COGENERATION FACILITIES

Response to Item 15 is only required for certain applicants for qualified cogeneration facility status, as described below. Applicants for small power production facilities or for cogeneration facilities not meeting the criteria outlined below may delete Item 15 from their application, or enter "N/A." In addition, per 18 C.F.R. § 292.205(d)(4) all cogeneration facilities 5 MW and smaller are presumed to comply with the requirements of 18 C.F.R. § 292.205(d)(1) and (d)(2), and therefore need not respond to Item 15. For those applicants required to respond to Item 15, *see* 18 C.F.R. § 292.205(d) and Order No. 671 for more information on making the demonstrations required in Item 15.

15. For any cogeneration facility that had not filed a notice of self-certification or an application for Commission certification under 18 C.F.R. § 292.207 prior to February 2, 2006, also show:

(i) The thermal energy output of the cogeneration facility is used in a productive and beneficial manner [18 C.F.R §§ 292.205(d)(1), (d)(4) and (d)(5)]; and

(ii) The electrical, thermal, chemical and mechanical output of the cogeneration facility is used fundamentally for industrial, commercial, residential or institutional purposes and is not intended fundamentally for sale to an electric utility, taking into account technological, efficiency, economic, and variable thermal energy requirements, as well as

state laws applicable to sales of electric energy from a qualifying facility to its host facility [18 C.F.R §§ 292.205(d)(2), (d)(3) and (d)(4)].

N/A

Attachment 3

nationalgrid

Thomas R. Teehan
Senior Counsel

September 3, 2010

VIA HAND DELIVERY & ELECTRONIC MAIL

John Spirito, Esq.
Chief of Legal Services
Rhode Island Division of Public Utilities and Carriers
89 Jefferson Boulevard
Warwick, RI 02888

RE: Portsmouth Wind Generator Facility

Dear Mr. Spirito:

At the request of the Division of Public Utilities and Carriers (the "Division"), National Grid[1] is providing this response to a letter from Benjamin C. Riggs, Jr., questioning whether the Town of Portsmouth's wind generating plant conforms to the requirements of R.I.G.L. §39-26-2.

As background, the Town of Portsmouth applied to interconnect a 1.5 MW wind turbine in May 2008, which eventually came on line in March 2009. The initial layout called for the Town of Portsmouth to assume ownership of National Grid overhead and underground facilities at the school property line so that the wind turbine could be behind a new primary meter feeding two school accounts and a town account (tennis courts). Due to the fact that the process of selling Company-owned equipment can be quite burdensome and would have required the Town to maintain utility grade equipment, the Company agreed to connect the turbine directly to its distribution line. This arrangement reduced the amount of construction costs that would be borne by the town to interconnect the generator.

Net metering is understood in the industry as a means of allowing customers who have installed "behind-the-meter" generation to obtain credit for excess generation during those times that the production from the unit exceeds the on-site load. Where a generating facility is fashioned as a stand-alone facility, with no real associated distribution load, it may be more accurately viewed as a wholesale generator, which could trigger FERC jurisdiction under the Federal Power Act. In addition, if the unit is a "qualifying facility" under federal law, as smaller renewable electricity projects would typically be, recent decisions on this issue would indicate that the sale of power from such a facility should be governed by the federal requirement that the rate established for its output does not exceed the avoided cost of the purchasing utility. 16 U.S.C §824a-3; See In re California Public Utilities Commission, FERC Docket No. EL10-64-000 (attached).

Given the set of facts at the Portsmouth site, the Company made an accommodation to help the town avoid otherwise significant costs. The resulting configuration is not net metering as that term has traditionally been understood, but rather has been inadvertently labeled net metering as one of the multiple interpretations of state law in Rhode Island. Although the Company recommends that, given the

[1] The Narragansett Electric Company d/b/a National Grid ("National Grid" or the "Company").

circumstances of the Company's accommodation to the town, the Portsmouth project be grandfathered, the Company believes there is at present uncertainty around the interaction of federal and state statutes, and that additional consideration of these issues by the Division and the Commission is warranted.

After the Portsmouth facility came on line, additional amendments to R.I.G.L. §39-26-6 changed the way towns could apply excess renewable generation credits. In July of 2009, the statute was amended to allow, among other things, a city or town to be compensated for excess renewable generation credits by a check from the utility. Thus, the excess generation credits no longer have to be applied to another town account or rolled forward from month to month. In the Company's view, the evolution to paying excess credits by check highlights the fact that a stand-alone generating facility that is not used to supply an existing customer load at the location may instead fall under the "qualified facility" rules of the Public Utility Regulatory Policies Act, despite having some "station service" or parasitic load on site.

The Company would welcome the opportunity to work with the Division to develop new regulations that will help to clearly interpret R.I.G.L. §39-26-6 to ensure net metering in Rhode Island works to the benefit of all customers and in accordance with federal law. The Company suggests that the Division consider requesting that the Commission establish a moratorium on certifying facilities that are not behind the meter at a location with an expected associated customer load, such that the expected energy output of the facility is equal to or less than the expected customer usage, as eligible net metered energy systems until such regulations can be promulgated.

Thank you for your attention to this transmittal. If you have any questions, please feel free to contact me at (401) 784-7667.

Very truly yours,

Thomas R. Teehan

Enclosure

cc: Steve Scialabba, Division
Luly Massaro, Division Clerk

132 FERC ¶ 61,047
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;
Marc Spitzer, Philip D. Moeller,
John R. Norris and Cheryl A. LaFleur.

California Public Utilities Commission — Docket No. EL10-64-000

Southern California Edison Company — Docket No. EL10-66-000
Pacific Gas and Electric Company
San Diego Gas & Electric Company

ORDER ON PETITIONS FOR DECLARATORY ORDER

(Issued July 15, 2010)

1. On May 4, 2010, in Docket No. EL10-64-000, the California Public Utilities Commission (CPUC) submitted a petition for declaratory order in which it requests that the Commission find that sections 205 and 206 of the Federal Power Act (FPA),[1] section 210 of the Public Utility Regulatory Policies Act of 1978 (PURPA)[2] and Commission regulations do not preempt the CPUC's decision to require California utilities to offer a certain price to combined heat and power (CHP) generating facilities of 20 MW or less that meet energy efficiency and environmental compliance requirements. On May 11, 2010, in Docket No. EL10-66-000, Pacific Gas and Electric Company (PG&E), Southern California Edison Company (SCE), and San Diego Gas & Electric Company (SDG&E) (collectively, Joint Utilities) filed a separate petition for declaratory order in which they argue that the CPUC's decision is preempted by the FPA insofar as it sets rates for electric energy that is sold at wholesale.

2. In this order, the Commission addresses these petitions. As discussed below, the Commission finds that the CPUC's decision is not preempted by the FPA, PURPA or Commission regulations, as long as the program meets certain requirements.

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[1] 16 U.S.C. §§ 824d, 824e (2006).

[2] 16 U.S.C. § 824a-3 (2006); *see generally* 16 U.S.C. § 2601 *et seq.* (2006).

I. Background

3. Through the California "Waste Heat and Carbon Emissions Reduction Act," Assembly Bill (AB) 1613, the California legislature amended the California Public Utilities Code to require "electrical corporations" in California (i.e., investor-owned utilities (IOUs) regulated by the CPUC) to offer to purchase, at a price to be set by the CPUC, electricity that is generated by certain CHP generators and delivered to the grid.[3] In particular, CHP generators must have a generating capacity of not more than 20 MW and must meet certain efficiency and emissions standards. The legislation requires California electrical corporations to file standard ten-year purchase contracts (AB 1613 feed-in tariffs) with the CPUC that require them to offer to purchase at the CPUC-set price for electricity generated by CHP generators. The California Public Utilities Code, as amended, states that the tariff shall "provide for payment for every kilowatt hour delivered to the electrical grid by the combined heat and power system at a price determined by the commission."[4] In addition, AB 1613 requires that the CPUC set the rates at which the utilities must offer to purchase from CHP generators at a level that "ensure[s] that ratepayers not using [CHP] systems are held indifferent to the existence of [the AB 1613 feed-in] tariff."[5]

4. In the CPUC's decision implementing AB 1613 (AB 1613 Decision), which became effective on December 17, 2009, the CPUC stated that it is not setting a price for wholesale power sales, but is requiring California utilities under its jurisdiction to offer to purchase electricity at a CPUC-set price intended to encourage development of highly efficient CHP generators in order to reduce greenhouse gas emissions. The Joint Utilities and Southern California Gas Company[6] sought rehearing and stay of the CPUC's AB 1613 Decision, arguing that the CPUC exceeded its authority to set the wholesale price for electric energy in violation of the Supremacy Clause of the United States Constitution and the FPA. The CPUC granted extensions of time to June 21, 2010 for utilities to file AB 1613 feed-in tariffs. The CPUC, however, denied the Joint Utilities' request for rehearing (AB 1613 Rehearing Order) of the CPUC's AB 1613 Decision, asserting that, through the AB 1613 program, the CPUC is exercising its jurisdiction over the

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[3] CPUC Petition at 2-3.

[4] Cal. Pub. Util. Code § 2841(b)(2) (2010). The term "the commission" in the code refers to the CPUC.

[5] *Id.* § 2841(b)(4).

[6] Southern California Gas Company does not join the Joint Utilities in their petition for declaratory order in Docket No. EL10-66-000.

procurement practices of the purchaser utilities, and that the program does not regulate the conduct of the seller/CHP generators.

II. Filings, Notices of Filings, and Responsive Pleadings

A. CPUC Petition, Docket No. EL10-64-000

5. The CPUC requests that the Commission find that the FPA, PURPA and Commission regulations do not preempt the CPUC's AB 1613 Decision to require California utilities to offer to purchase electricity at a CPUC-set price from CHP generators[7] of 20 MW or less that meet environmental compliance requirements. The CPUC argues that the purpose of its AB 1613 Decision and AB 1613 Rehearing Order (together, AB 1613 decisions) is environmental protection, particularly the reduction of greenhouse gas emissions. The CPUC states that its decision achieves this goal by requiring California utilities to offer ten-year standard contracts to eligible CHP generators that meet certain environmental requirements as specified in the statute. According to the CPUC, the rates that it requires the California utilities to offer to pay to such CHP generators reflect the additional costs necessary to meet all of the environmental requirements under AB 1613. In addition, the CPUC states that, for CHP generators located in congested areas, there is a ten percent bonus to reflect the avoided cost of the construction of additional distribution and transmission upgrades. The CPUC does not dispute that the Commission has exclusive authority over rates for wholesale sales under the FPA. Rather, the CPUC contends that it has only required that California electric utilities (the buyer) must offer to purchase under contracts with CPUC-set prices to encourage CHP generators to be constructed, but the CPUC does not require a CHP generator (the seller) to accept that offer. The CPUC also explains that, in its AB 1613 Rehearing Order, it recognized that most, if not all CHP generators, could obtain Qualifying Facility (QF) status at the Commission.[8]

6. The CPUC argues that its AB 1613 Decision should not be preempted by federal law due to the compelling nature and urgency of reducing greenhouse gas emissions. The CPUC relies on environmental data and Environmental Protection Agency reports on climate change to support its argument that climate change is being accelerated by greenhouse gas emissions, and that climate change is posing a threat to the state of California. The CPUC states that electric generation sources account for 25 percent of California's greenhouse gas emissions, and asserts that CHP generators are key elements

[7] CPUC Petition at 9. On rehearing of its AB 1613 decision, the CPUC stated that the price offered under the AB 1613 program should be based on the cost of operating and building a combined cycle gas turbine. AB 1613 Rehearing Order at 8-9.

[8] CPUC Petition at 9-10 (citing AB 1613 Rehearing Order at 6).

to achieving California's goal of cutting greenhouse gas emissions to 1990 levels by 2020. The CPUC also states that California policy makers have identified feed-in tariffs as an important mechanism for promoting efficient CHP systems of 20 MW or less, and that AB 1613 is a statutory directive to establish a feed-in tariff, which seeks to encourage a substantial increase in the use of CHP generators throughout the state. The CPUC asserts that, given the need for immediate action to reduce greenhouse gas emissions, the Joint Utilities' threat to delay the resolution of the dispute over AB 1613 through litigation is contrary to the public interest. The CPUC also asserts that the importance of the Commission's ruling on the CPUC's petition has much greater ramifications than just the dispute between it and the Joint Utilities.

7. The CPUC also argues that its AB 1613 Decision would not be preempted by federal law given the legal authority that states already have over the resource portfolios and procurement of utilities, and due to the different purposes of the environmental protection objectives of AB 1613, compared to the economic objectives of the FPA and PURPA. In addition, the CPUC contends that, based on principles of cooperative federalism, the Commission and state commissions should cooperate to reduce greenhouse gas emissions, and therefore the Commission should find that the CPUC's decisions are not preempted.[9]

8. The CPUC asserts that a preemption analysis (i.e., whether Congress intended to displace state law) would find the presumption is against the preemption of state environmental laws.[10] The CPUC also argues that the Joint Utilities have relied upon outdated Commission cases from the mid-1990s to claim that states are preempted from adopting feed-in tariffs because: (1) the mid-1990s Commission cases did not take into account the urgent need to combat climate change;[11] (2) the FPA and PURPA do not preempt state regulation of discretionary procurement decisions of utilities serving retail

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[9] *Id.* at 24-26 (citing *Connecticut Light & Power Co. v. FPC*, 324 U.S. 515, 525-26 (1945)).

[10] *Id.* at 27 (citing *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996)).

[11] *Id.* at 29 (citing *Midwest Power Systems, Inc.*, 78 FERC ¶ 61,067 (1997) (*Midwest Power Systems*); *Southern California Edison Co.*, 70 FERC ¶ 61,215, *reconsideration denied*, 71 FERC ¶ 61,269 (1995) (*Southern California Edison*); *Connecticut Light and Power Co.*, 70 FERC ¶ 61,012, *reconsideration denied*, 71 FERC ¶ 61,035 (1995), *appeal dismissed, Niagara Mohawk Power Corp. v. FERC*, 117 F.3d 1485 (1997) (*Connecticut*)).

markets;[12] (3) the Commission's recent precedent supports states' efforts to reduce greenhouse gas emissions consistent with the spirit of cooperative federalism underlying the FPA and PURPA;[13] and (4) the Joint Utilities have ignored that, in implementing section 1253(a) of the Energy Policy Act of 2005, the Commission clarified that QFs with 20 MW or less of capacity could still be regulated under state law.[14] Finally, the CPUC requests that, to the extent any relief that it seeks requires waiver of the Commission's regulations, the Commission "should waive any requirements in order to find that the CPUC's feed-in tariffs are not preempted."[15]

9. Notice of the CPUC's petition was published in the *Federal Register*, 75 Fed. Reg. 27,340 (2010), with interventions and protests due on or before June 3, 2010. Timely motions to intervene were filed by: Alliance for Retail Energy Markets, the California Cogeneration Council, the California Municipal Utilities Association, Calpine Corporation, the Cogeneration Association of California (Cogeneration Association), the Electric Power Supply Association (EPSA), Golden State Water Company, NRG Companies, Sacramento Municipal Utility District (SMUD),[16] the Cities of Anaheim, Azusa, Banning, Colton, Pasadena and Riverside, California (collectively, Six Cities), and the Vermont Department of Public Service. A late motion to intervene was filed by the City of Santa Clara, California (City of Santa Clara). Timely motions to intervene or notices of intervention and comments were filed by: the California Energy Commission, the Clean Energy Group, the Edison Electric Institute (EEI), the Feed-In Tariff Coalition, FuelCell Energy, Inc. (FuelCell), the People of the State of California, *ex rel.* Edmund G. Brown, Jr., Attorney General (California Attorney General), San Joaquin Refining Company, Inc. (San Joaquin Refining), and jointly by the Solar Alliance, the Interstate

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[12] *Id.* at 33 (citing *New York v. FERC*, 535 U.S. 1, 20, 23, 28; *Connecticut Light and Power Co. v. FPC*, 324 U.S. at 523-531; *Ameren Energy Marketing Co.*, 96 FERC ¶ 61,306, at 62,189 & n.18 (2001)).

[13] *Id.* at 34- 37 (citing *Southern California Edison*, 70 FERC ¶ 61,215 at 61,675-76; *American Ref-Fuel Co.* 107 FERC ¶ 61,016, at P 2-3 (2004) (*American Ref-Fuel*); *Wheelabrator Lisbon v. Connecticut Dept. of Pub. Util. Control*, 531 F.3d 183, 189 (2d Cir. 2008)).

[14] *Id.* at 40-41 (citing *Revised Regulations Governing Small Power Production and Cogeneration Facilities*, Order No. 671, FERC Stats. & Regs. ¶ 31,203, at P 99, *order on reh'g*, Order No. 671-A, FERC Stats. & Regs. ¶ 31,219, at P 17 (2006)).

[15] *Id.* at 41.

[16] On June 10, 2010, SMUD filed an amendment to its motion to intervene that includes comments on the CPUC's petition.

Renewable Energy Council, the Solar Energy Industries Association, the California Solar Energy Industries Association, and the Vote Solar Initiative (together, Solar Energy Parties). A late motion to intervene and comments were filed by the Energy Producers and Users Coalition (Energy Producers and Users).[17] In addition, a timely motion to intervene, protest and answer was filed by the Joint Utilities.

10. On June 18, 2010, San Joaquin Refining filed an answer to the protest and answer filed by the Joint Utilities and to the comments filed by EEI. On June 23, 2010, the Joint Utilities filed an answer to the comments, protests and motions to intervene of various intervenors in both Docket Nos. EL10-64-000 and EL10-66-000.

11. In its petition, the CPUC requests that, pursuant to Rules 207 and 108 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.207(c) and 18 C.F.R. § 381.108(a) (2010), the Commission grant it an exemption from paying any filing fees for its petition for declaratory order because it is a state agency established under the laws of the state of California.

12. The CPUC submitted a request for official notice concurrently with its petition for declaratory order. In its request, the CPUC asks that the Commission, pursuant to Rules 212 and 508(d) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.212 and 18 C.F.R. § 385.508 (2010), take official notice of the documents and statements attached to its petition as Exhibits PUC-1 through PUC-19, which include documents from the CPUC and California Energy Commission's AB 1613 implementation proceedings, including the CPUC's AB 1613 decisions, various federal and state agency reports concerning climate change, and comments filed by SCE and PG&E in the CPUC's separate rulemaking proceeding in R.06-04-009. In support of its request for official notice, the CPUC argues that Rule 508 of the Commission's Rules of Practice and Procedure allows the Commission to "'take official notice of any matter that may be judicially noticed by the courts of the United States, or of any matter about which the Commission, by reasons of its functions, is expert.'"[18] The CPUC filed the same request for official notice in Docket No. EL10-66-000.

13. The California Energy Commission also requests that the Commission take official notice of documents filed with its comments as Exhibits CEC-1 through CEC-4, pursuant to Rule 508 of the Commission's Rules of Practice and Procedure.

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[17] The Energy Producers and Users state that they timely filed this motion to intervene but misstated the Docket Number as ER10-64-000, and mistakenly filed the motion in that proceeding on June 3, 2010.

[18] CPUC Request for Official Notice at 4 (quoting 18 C.F.R. § 385.508(d) (2010)).

14. On May 18, 2010, the CPUC submitted, in both Docket Nos. EL10-64-000 and EL10-66-000, a motion to consolidate the proceeding on its petition and the proceeding on the Joint Utilities' petition on the grounds that both proceedings are petitions for declaratory order involving the same issues of law and fact, the same parties, and the same CPUC orders. The CPUC states that Commission precedent supports consolidating proceedings when similar issues are present in order to ensure administrative efficiency and uniform results.[19] In its comments, the California Energy Commission joins the CPUC's motion to consolidate Docket Nos. EL10-64-000 and EL10-66-000. The Joint Utilities, EEI, and the Feed-In Tariff Coalition support consolidation of Docket Nos. EL10-64-000 and EL10-66-000.

15. On June 14, 2010, in both Docket Nos. EL10-64-000 and EL10-66-000, Solutions For Utilities, Inc. (Solutions for Utilities) filed an email that it sent to President Obama and to the Secretary of Energy that discusses the CPUC's feed-in tariff programs.

B. Joint Utilities' Petition, Docket No. EL10-66-000

16. In their separate petition for declaratory order, the Joint Utilities argue that the CPUC's petition "fails to directly present the clear and precise legal issue before this Commission," namely, "[c]an a state, in furtherance of its own policy interests, demand that wholesale power be purchased from public utilities at a price set by the state, or does the FPA preempt such action?"[20] The Joint Utilities claim that, contrary to the CPUC's argument, the central issue raised by the CPUC's AB 1613 Decision is not a question of fact, policy, or environmental concern, but rather is a question of law.

17. The Joint Utilities contend that the CPUC's implementation of AB 1613 is preempted by the FPA. Specifically, they argue that the Commission's jurisdiction over wholesale power sales by public utilities is exclusive because Congress has preempted the field, and they argue that the CPUC requirement that California utilities purchase wholesale power at state-set prices is preempted by the FPA, and is not "regulation of procurement." The Joint Utilities further argue that the Commission directly addressed this issue in *Midwest Power Systems*, where it found that the Iowa Utilities Board lacked authority to set the rate for wholesale sales of electricity. The Joint Utilities also argue that the CPUC's efforts in its AB 1613 Rehearing Order to re-characterize its decision as merely establishing an "offering price" by the purchaser of power are unavailing because an order requiring a utility to "offer" to buy wholesale power at a CPUC-set price is an

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[19] CPUC Motion for Consolidation at 4 (citing *Columbia Gas Transmission, LLC*, 130 FERC ¶ 61,265, at P 29 (2010); *Unocal Pipeline Co.*, 129 FERC ¶ 61,275, at P 13 (2009); *Pacific Gas and Electric Co.*, 83 FERC ¶ 61,212, at 61,938 (1998)).

[20] Joint Utilities' Petition at 2.

order to actually buy wholesale power at a CPUC-set price, insofar as the Joint Utilities have no flexibility to "offer" a different price.[21] The Joint Utilities contend that because the mandatory offer cannot be withdrawn without CPUC direction, the "offer" is a requirement to purchase at the price established by the CPUC.[22] The Joint Utilities also argue that the CPUC is not regulating retail sales service because it is regulating the price of wholesale energy sold by CHP generators. In addition, the Joint Utilities state that other statutes, which have not yet been implemented, such as Senate Bill 32 and AB 920, will require the CPUC to set the price for wholesale power.

18. In addition, the Joint Utilities argue that the Commission's PURPA precedent supports a finding that the states have no authority outside of PURPA to set the price at which wholesale energy must be purchased.[23] The Joint Utilities assert that, although PURPA allows the CPUC to require the Joint Utilities to purchase from QFs at no more than the utility's avoided cost, the pricing structure adopted in the CPUC's AB 1613 Decision results in a price above avoided cost.[24] According to the Joint Utilities, allowing states to set wholesale power prices will start the Commission down a slippery slope, because, if the Commission were to abandon the mandates of the FPA and *Midwest Power Systems*, and to agree that the CPUC's action falls within a state's jurisdiction over procurement, retail sales, energy efficiency, the environment, or any combination of the above, the Commission would open a door to state regulation of wholesale electric energy sales that could not be closed again. The Joint Utilities also request expedited action on their petition.[25]

19. Notice of the Joint Utilities' petition was published in the *Federal Register*, 75 Fed. Reg. 28,604 (2010), with interventions and protests due on or before June 10, 2010. Timely motions to intervene were filed by: the Alliance for Retail Energy Markets, the California Cogeneration Council, Calpine Corporation, the City of Santa Clara, EPSA, Golden State Water Company, the Northern California Power Agency, Six Cities, Southern Company Services, Inc., and the Vermont Department of Public Service. A notice of intervention was filed by the CPUC.

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[21] *Id.* at 16-17.

[22] *Id.* at 17 (citing *Consolidated Edison Co. of New York v. Pub. Serv. Commission of State of New York*, 472 N.E. 2d 981 (N.Y. Ct. App. 1984), *appeal dismissed*, 470 U.S. 1075 (1985) (*Consolidated Edison*)).

[23] *Id.* at 20-21 (citing *Connecticut*, 71 FERC ¶ 61,035 at 61,151).

[24] *Id.* at 7.

[25] EEI supports the Joint Utilities' request for expedited action on their petition.

20. Timely motions to intervene or notices of intervention and comments were filed by the California Municipal Utilities Association, California Energy Commission,[26] the Clean Energy Group, EEI, the Feed-In Tariff Coalition, FuelCell, and SMUD.

21. In addition, timely motions to intervene and protests were filed by the California Attorney General, the Cogeneration Association, Energy Producers and Users, San Joaquin Refining, and the Solar Energy Parties. The CPUC filed a notice of intervention and a protest to the Joint Utilities' petition. On June 25, 2010, San Joaquin Refining filed an answer to the comments submitted by EEI. On July 2, 2010, in both Docket Nos. EL10-64-000 and EL10-66-000, the CPUC filed an answer to the Joint Utilities' answer and a request for official notice in which it asks that the Commission take official notice of the documents and statements attached to its July 2 answer as Exhibits PUC-20 and PUC-21.

III. Protests and Comments

A. Joint Utilities' Protest and Answer to CPUC Petition

22. In their protest and answer to the CPUC's petition, the Joint Utilities argue the FPA does not allow state regulation of wholesale sales to achieve state environmental goals, and that federal preemption cannot be avoided based on the purpose of the preempted state regulation. The Joint Utilities also argue that, although they fully support the environmental goals of the state of California, the CPUC's discussion of environmental issues is irrelevant to the legal issues presented by the CPUC's AB 1613 Decisions. They also state that the proceedings implementing AB 1613 contain none of the record on global warming that is discussed in the CPUC's petition.

23. The Joint Utilities further argue that, because the Commission has exclusive jurisdiction to regulate the price of wholesale energy sales by public utilities, there can be no exception for CHP generators of 20 MW or less.[27] The Joint Utilities argue that, because Congress has not amended the FPA to enable states to address climate change by regulating interstate wholesale energy rates, the Commission's order in *Midwest Power Systems* is still controlling precedent. The Joint Utilities assert that the CPUC's citations to principles of cooperative federalism and to the enactment of PURPA as an example of such cooperation do not support the CPUC's desired expansion of state authority in the

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[26] The California Energy Commission filed the same timely motion to intervene and comments in both Docket Nos. EL10-64-000 and EL10-66-000.

[27] Joint Utilities' Protest at 12-13 (citing *FPC v. Southern California Edison Co.*, 376 U.S. 205, 215-16 (1964); *Public Util. Dist. No. 1 of Grays Harbor County Washington v. IDACORP, Inc.*, 379 F.3d 641, 646-47 (9th Cir. 2004)).

field of wholesale energy regulation, because the Commission cannot delegate its ratemaking authority to the states.

24. In addition, the Joint Utilities argue that the CPUC cannot justify its AB 1613 Decisions under PURPA, and that section 210(m) of PURPA and Order No. 671 are inapplicable because the CPUC's AB 1613 Decisions held that CHP generators do not need to be QFs, and adopted a price that is not related to avoided cost rates currently in effect. The Joint Utilities state that the CPUC's petition cannot substitute its AB 1613 pricing scheme as an alternative method for determining the long-term avoided cost for affected CHP generators because the CPUC had not previously provided notice that it would adopt a price intended to be a "substitution of alternative method" under section 292.302(d) of the Commission's regulations or an avoided cost price pursuant to section 292.304(e) of the Commission's regulations. The Joint Utilities argue that, contrary to the CPUC's interpretation, section 292.302(d) does not establish an alternative method for setting the avoided cost.

25. Further, the Joint Utilities assert that, even if the Commission reviewed the CPUC's rate for CHP generators for consistency with PURPA, the CPUC has not met the standard for "real environmental costs" set forth in *Southern California Edison*.[28] The Joint Utilities conclude that "the CPUC 'may not set avoided cost rates ... by imposing environmental adders or subtractors that are not based on real costs' because it 'would result in rates which exceed the incremental cost to the electric utility and are prohibited by PURPA.'"[29] They also contend that state authority to set a price for environmental benefits separate from the rate for electricity does not support the CPUC's action here because the CPUC is pricing electricity only.[30] They also contend that the Commission has chosen not to regulate small QFs, and that "it has affirmatively indicated that the states may only regulate them pursuant to the PURPA avoided cost scheme."[31]

26. In their answer to the comments and protests on the two petitions, the Joint Utilities argue that the CPUC never intended to adopt an avoided cost rate pursuant to PURPA, and that the CPUC did not undertake any analysis of the facts necessary to determine the actual costs a state utility would avoid through its purchase of AB 1613 power. The Joint Utilities also argue that simply calling the AB 1613 mandatory purchase price a long-term avoided cost does not change the fact that the price adopted in

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[28] *Id.* at 19 (citing 71 FERC ¶ 61,269 at 62,080).

[29] *Id.*

[30] *Id.* at 20 (citing *American Ref-Fuel*, 107 FERC ¶ 61,016).

[31] *Id.* at 21 (citing 18 C.F.R. § 292.602(c)(1) (2010)).

the CPUC's AB 1613 Decisions is not the same as the currently effective avoided-cost rate for purchases from QFs, either short-run or long-run.[32] In addition, the Joint Utilities state that the energy and capacity payment formulas are different under the CPUC AB 1613 Rehearing Order and the CPUC's QF pricing decision.[33]

27. The Joint Utilities argue that the Commission should not waive any requirements implicated by the CPUC's actions to implement AB 1613 because the CPUC does not identify which requirements it wants waived, as required by Commission regulations.[34] Finally, the Joint Utilities argue that the CPUC's assertion that the Joint Utilities have threatened to slow down California's progress through prolonged litigation should be disregarded.

B. CPUC Protest to the Joint Utilities' Petition

28. In its protest to the Joint Utilities' petition, the CPUC disagrees with the Joint Utilities' assertion that the CPUC failed to present the legal issue, and the CPUC argues that it relied on the following three distinct legal arguments: (1) the CPUC's regulation of what the utility must offer in a contract to a CHP generator does not constitute regulation of the seller in the wholesale market; (2) the FPA and PURPA do not occupy the field of environmental regulation; and/or alternatively (3) to the extent that PURPA is implicated, the modifications in the AB 1613 Rehearing Order clarify that the CPUC's feed-in tariff does not exceed the Joint Utilities' long-term avoided costs.

29. The CPUC argues that the Joint Utilities mischaracterize the CPUC's AB 1613 Decision and AB 1613 Rehearing Order, and states that the Joint Utilities are mistaken in their assumption that the regulation of wholesale rates is so broad that it extends to either: (1) the state's regulation of the retail utility's procurement activities; or (2) state efforts to promote its citizens' health and welfare by reducing greenhouse gas emissions that result from consumption of fossil fuels and the consumption of electricity. The CPUC argues that, where the presumption of state police powers is at issue, the Supreme Court has concluded that the scope of preemption should be narrowly construed.[35] The CPUC argues that the FPA did not occupy the field of all utility regulation affecting wholesale

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[32] Joint Utilities Answer, Docket Nos. EL10-64-000 and EL10-66-000, at 26 (filed June 23, 2010).

[33] *Id.* (citing CPUC Rulemaking 04-040003/04-04-025, Opinion on Future Policy and Pricing for Qualifying Facilities, CPUC Decision 07-09-040 (Sept. 20, 2007)).

[34] Joint Utilities Protest at 21 (citing 18 C.F.R. § 35.13(a) (2010)).

[35] CPUC Protest at 6 (citing *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996)).

transactions, but rather preserved the states' authority to regulate retail sales, procurement, and the resource portfolios of the retail utilities.[36] The CPUC contends that its AB 1613 feed-in tariff simply requires that utilities offer to buy power at a price sufficient to encourage the development of highly efficient CHP. The CPUC also contends that the cases cited in the Joint Utilities' petition do not support the Joint Utilities' expansive reading of field preemption.[37]

30. The CPUC argues that the Commission's ratemaking authority under sections 205 and 206 of the FPA does not provide the Commission with authority to decide environmental matters.[38] The CPUC also asserts that the Joint Utilities fail to address *American Ref-Fuel*, where the Commission found that state law controlled the disposition of renewable energy credits (RECs), and that PURPA's avoided cost provisions did not contemplate the inclusion of environmental attributes, and therefore that state law controls. According to the CPUC, a premium paid though a feed-in tariff is indistinguishable from a premium paid for a REC in a state-mandated renewable portfolio standards (RPS) program.[39] In addition, the CPUC argues that the Joint Utilities should be estopped from arguing that the FPA's preemption of the regulation of wholesale transactions extends to state regulations with an environmental purpose, because their position in this case conflicts with the position they took in the CPUC's AB 32 implementation proceeding.

31. The CPUC argues that, in its AB 1613 Rehearing Order, it clarified that the AB 1613 feed-in tariff does not exceed the Joint Utilities' long-term avoided cost. The CPUC explains that its AB 1613 Rehearing Order corrected numerous findings distinguishing between short-run avoided costs and the utilities' environmental

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[36] *Id.* at 8-12 (citing *Connecticut Light and Power Co. v. FPC*, 324 U.S. at 525-26 (1945); *New York v. FERC*, 535 U.S. at 24; *Consolidated Edison Co. of N.Y. v. Pub. Serv. Comm'n of State of N.Y.*, 472 N.E.2d 981 (N.Y. Ct. App. 1984); *Northwest Central Pipeline Corp. v. State Corporation Commission of Kansas*, 489 U.S. 493 (1989); *Northern Natural Gas Co. v. State Corporation Commission of Kansas*, 372 U.S. 84 (1963); *Ameren Energy Marketing*, 96 FERC ¶ 61,306, at 62,189 n.18 (2001); *Central Vermont Pub. Serv. Corp.*, 84 FERC ¶ 61,194, at 61,975 (1998)).

[37] *Id.* at 6 (citing *PG&E v. State Energy Resources and Conservation and Development Commission*, 461 U.S. 190, 212-13 (1983)).

[38] *Id.* at 13 (citing *Grand Council of Crees (of Quebec) v. FERC*, 198 F.3d 950, 956-57 (D.C. Cir. 2000); *Monongahela Power Co.*, 39 FERC ¶ 61,350, at 62,097 (1987); *Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440 (1960)).

[39] *Id.* at 16.

compliance requirements, and that references to "avoided costs" in the AB 1613 Decision "should have been to 'short-term avoided costs' and, therefore, the short-term avoided cost determination [set by the CPUC in a different proceeding] should not set the limit on the price that the utilities must offer for CHP systems under AB 1613."[40] The CPUC states that, in making this clarification, it was not conceding that it was setting prices above avoided costs, but rather was distinguishing between its previous determination of "short-run" avoided costs and "long-term" avoided costs.[41] The CPUC also asserts that its AB 1613 Rehearing Order noted that the Joint Utilities' long-term procurement costs would include environmental compliance costs, and that such environmental costs could be considered avoided costs by the CPUC's AB 1613 feed-in tariff.

32. Finally, the CPUC argues that the Joint Utilities contradict the main purpose of PURPA by claiming that the CPUC's decisions, which try to encourage CHP generators, are preempted by PURPA. In this regard, the CPUC argues that the main reason that section 210 of PURPA was enacted was to encourage cogeneration and other small power production facilities. The CPUC also points out that the Joint Utilities' petition does not address the exemption under Order No. 671 of small QFs of 20 MW or less from FPA sections 205 and 206.[42] The CPUC disagrees with the Joint Utilities' argument that the Commission only allows state commissions to set wholesale rates if they exercise their authority under PURPA to set avoided cost prices for small QFs, citing the Commission's statement in Order No. 671-A "that having QF sales regulated at the state level is sufficient, and will allow us to close the regulatory gap while not dramatically or inappropriately increasing the regulatory burden on QFs...."[43] The CPUC also asserts that in Order No. 688 the Commission, in relieving utilities of the obligation to enter into contracts with QFs if it finds that the QFs have nondiscriminatory access to the specified markets, created a rebuttable presumption that utilities should be required to enter into contracts with QFs with 20 MW or less of capacity.[44]

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[40] *Id.* at 19.

[41] The CPUC also adds that to the extent that the Commission deemed it necessary, "pursuant to 18 C.F.R. § 292.302(d)(2), more than 30 days ago the CPUC provided notice to the [Commission] of this substitution of an alternative method for long-term avoided costs for CHP facilities of 20 MW or less." *Id.* at 21.

[42] *Id.* at 22 (citing Order No. 671, FERC Stats. & Regs. ¶ 31,203 at P 99).

[43] *Id.* at 23 (citing Order No. 671-A, FERC Stats. & Regs. ¶ 31,219 at P 17-18).

[44] *Id.* at 24 (citing *New PURPA Section 210(m) Regulations Applicable to Small Power Production and Cogeneration Facilities,* Order No. 688, FERC Stats. & Regs. ¶ 31,233, at P 6, 76-78 (2006)).

C. Other Comments and Protests

33. The California Attorney General, the California Energy Commission,[45] the Clean Energy Group,[46] the Cogeneration Association, the Energy Producers and Users, the Feed-In Tariff Coalition,[47] FuelCell, San Joaquin Refining, and the Solar Energy Parties support the CPUC's petition, and argue that the Commission should find that the CPUC's AB 1613 feed-in tariff for CHP generators is *not* preempted by federal law, and that the Joint Utilities' petition should be denied.

34. The Joint Utilities and EEI oppose the CPUC's petition, and argue that the Commission should reject the request made by the CPUC, and find that the CPUC's AB 1613 program is preempted by the FPA.

35. The California Municipal Utilities Association, SMUD and Solutions For Utilities filed comments on issues that they contend are raised by the two petitions.

1. Comments Supporting CPUC Petition and Opposing Joint Utilities' Petition

36. The California Attorney General, the California Energy Commission and the Clean Energy Group argue that the CPUC's feed-in tariff does not set a wholesale rate for generators, but rather creates an offer to buy as part of utility procurement designed to promote energy efficiency and reduction of greenhouse gas emissions.[48] The California

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[45] The California Energy Commission states that it is the primary energy policy and planning agency of the state of California, and has a statutory obligation to support the development of CHP generators. It states that it "has a 'vested interest' in seeing that the role of the CPUC under AB 1613 is allowed to be performed as intended by the legislature...." California Energy Commission, Comments, Docket Nos. EL10-64-000 and EL10-66-000, at 2, 9 (filed June 3, 2010). The California Energy Commission also states that its role is to ensure that eligible CHP generators meet rigorous environmental standards primarily concerning efficiency and greenhouse gas emissions reductions. *Id.* at 10-11.

[46] The Clean Energy Group states that it is a non-profit organization that works with states on development of renewable energy policy.

[47] The Feed-In Tariff Coalition is a California-based entity that advocates for feed-in tariffs, wholesale distributed generation and other renewable energy policy solutions.

[48] The California Attorney General submitted a protest to the Joint Utilities' petition that is substantially the same pleading as its comments filed in support of the (continued...)

Attorney General asserts that under the CPUC's feed-in tariff program, the CHP generator retains the authority to sell at any rate its sees fit and to any buyer, while benefiting from the option to sell to the utilities at the feed-in tariff rate, and the Commission retains its authority to review the contract, including the feed-in rate, once entered.[49] The Solar Energy Parties similarly argue that because the CPUC's AB 1613 program is a must-offer program, not a must-buy program, it does not establish rates for the sale of power at wholesale by public utilities.[50]

37. The California Attorney General argues that by setting an offer for purchase, the CPUC's feed-in tariff is part of its management of utility procurement, which is an essential element of the state's traditional authority and function, and does not constitute a wholesale rate.[51] The California Attorney General argues that there is a presumption against preemption of the CPUC's AB 1613 Decision because the CPUC's implementation of AB 1613 relates to state health and safety, and therefore falls within one of the traditional police powers of the state of California.[52]

38. The California Energy Commission agrees with the CPUC that AB 1613 is an environmental protection law, and that the Commission should consider the CPUC AB 1613 decisions in light of recent efforts by the state of California to combat climate change and as a part of California's greenhouse gas emissions reduction plan. In addition, the California Energy Commission argues that the Commission should find that the CPUC AB 1613 feed-in tariff is not a sale subject to the Commission's FPA jurisdiction because AB 1613 states that the legislature's intent was not to permit eligible generators to operate as *de facto* wholesale generators with guaranteed purchasers for their electricity.[53]

CPUC's petition. The California Energy Commission also submitted the same pleading and exhibits in both Docket Nos. EL10-64-000 and EL10-66-000.

[49] California Attorney General, Comments, Docket No. EL10-64-000, at 8 (filed June 2, 2010).

[50] Solar Energy Parties, Comments, Docket No. EL10-66-000, at 11 (filed June 10, 2010).

[51] California Attorney General, Comments, Docket No. EL10-64-000, at 9 (filed June 2, 2010) (citing *Southern California Edison*, 71 FERC ¶ 61,269 (1995)).

[52] *Id.* at 5 (citations omitted).

[53] California Energy Commission, Comments, Docket Nos. EL10-64-000 and EL10-66-000, at 14 (filed June 3, 2010) (citing Cal. Pub. Util. Code § 2843, subd. (b);

(continued...)

39. The California Attorney General also contends that *Midwest Power Systems* and *Connecticut* both concerned state-created obligations for power purchase and contracts for sale, not a requirement simply for the utility to provide an offer to purchase. The Solar Energy Parties argue that *Midwest Power Systems* and *Connecticut* are not controlling on state programs that establish prices that utilities must offer to pay, so long as contracts entered into are subject to the Commission's approval under the FPA. The California Energy Commission argues that because these cases precede California's environmental laws by about a decade, the Commission should consider the CPUC AB 1613 decisions in a different light from that of these mid-1990's Commission orders.[54] The California Energy Commission also argues that the Commission should establish precedent in response to the CPUC and Joint Utilities' petitions "that state commissions may compel utilities to offer feed-in tariffs, under contract prices set by the state...."[55] The Clean Energy Group similarly argues that the Commission should reexamine decade old precedent in *Midwest Power Systems* and *Connecticut* that suggests that states are bound by PURPA's avoided cost caps even where they act under state law to set rates for offers to purchase that apply to entities with QF status.[56] The Feed-In Tariff Coalition states that the Commission should distinguish *Midwest Power Systems* because the AB 1613 feed-in tariff is not an above avoided cost rate.

40. The California Attorney General and the Solar Energy Parties also argue that because the Commission has exempted QFs under 20 MW from sections 205 and 206 of the FPA, and because the CPUC's feed-in tariff for excess power from CHP generators applies only to generators that are 20 MW or smaller, the CPUC has authority to set feed-in tariff rates. However, the Solar Energy Parties state that non-QF CHP generators that sell power at wholesale will be subject to the Commission's rate regulation under FPA sections 205 and 206.

41. The California Attorney General argues that, to the extent the Commission's decisions in *Midwest Power Systems* and *Connecticut* can be read to require state-set

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Renewable Energy Prices in State-Level Feed-in Tariffs: Federal Law Constraints and Possible Solutions, Technical Report, NREL/TP-6A2-47408 (NREL January 2010) pp. 23-26, available at *www.nrel.gov/docs/fy10osti/47408.pdf*) (NREL Feed-In Tariff Report).

[54] *Id.* at 12.

[55] *Id.* at 14.

[56] Clean Energy Group, Comments, Docket No. EL10-64-000, at 9 (filed June 3, 2010); Clean Energy Group, Comments, Docket No. EL10-66-000, at 16 (filed June 10, 2010).

rates to comply with PURPA avoided cost requirements, even if the sellers are not certified as QFs, that issue does not arise with respect to the CPUC feed-in tariff. According to the California Attorney General, under the California law, the CPUC must set the offer to purchase at rates that "'ensure that the ratepayers not utilizing combined heat and power systems are held indifferent to the existence of this tariff,'" and that this, by definition, is an avoided cost rate.[57] The Solar Energy Parties argue that the CPUC's implementation of AB 1613 is consistent with the FPA, PURPA and Commission regulations because the CPUC is limited in its rate setting ability by the statutory caveat that it ensure that ratepayers are held indifferent to the feed-in tariff.[58] The Solar Energy Parties assert that by statutorily overlaying the customer indifference standard on the rate to be set, the California legislature ensured that the CPUC would not exceed its ratemaking authority under PURPA. They also argue that the CPUC's pricing mechanism for CHP generators reflects utilities' avoided cost, because the CHP contracts will typically be 10-year contracts, and because the utilities will be avoiding a significant amount of environmental compliance costs, as well as the avoided cost associated with distribution and transmission upgrades when the CHP systems are located in congested transmission areas and load pockets.

42. The California Attorney General also argues that if the Commission determines that the CPUC feed-in tariff constitutes a wholesale rate, the CPUC nonetheless retains authority to set such a rate because under PURPA, states have the authority to set avoided cost rates for QFs, and the Commission provides to the state great deference for rate setting and "'wide latitude in implementing PURPA.'"[59] The Energy Producers and Users similarly argue that the feed-in tariff pricing adopted by the CPUC is simply another formulation of PURPA avoided cost pricing. FuelCell also argues that the CPUC's AB 1613 program is consistent with the CPUC's authority under PURPA, and asserts that given the parameters of the AB 1613 program, the fact that the pricing mechanism reflects the avoided cost and attributes of a clean marginal resource, and the significant discretion afforded the states in establishing avoided cost prices under

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[57] California Attorney General, Comments, Docket No. EL10-64-000, at 13 (filed June 2, 2010).

[58] Solar Energy Parties Comments, Docket No. EL10-64-000, at 8 (filed June 3, 2010) (quoting California Public Utilities Code Section 2841(b)(4) (2010)).

[59] California Attorney General, Comments, Docket No. EL10-64-000, at 11 (filed June 2, 2010) (quoting *Southern California Edison*, 70 FERC ¶ 61,215, at 61,675 & n.17; citing *FERC v. Mississippi*, 456 U.S. 742, 751 (1982); *Indep. Energy Producers and Users Ass'n v. Cal. Pub. Util. Comm'n*, 36 F.3d 848, 856 (9th Cir. 1994); *Metro Edison Co. and Pa. Elec. Co.*, 72 FERC ¶ 61,015, at 61,051-52, *reconsideration denied*, 72 FERC ¶ 61,224 (1995)).

PURPA, the Commission should find that the CPUC's AB 1613 program is consistent with PURPA requirements.[60] Further, FuelCell argues that there is nothing in PURPA or the PURPA regulations suggesting that the CPUC cannot establish a statutory CHP program that is open to both QFs and non-QFs, as long as the CPUC is properly exercising its authority under PURPA with respect to QF transactions.[61]

43. The Clean Energy Group argues that the Commission should conclude that the CPUC's AB 1613 feed-in tariff does not violate federal law so long as: (1) the CPUC maintains its feed-in tariff as a mandate to utilities to offer to purchase from CHP generators, not a wholesale transaction; and (2) the feed-in tariff applies to QF certified CHP generators of 20 MW or less, which the Clean Energy Group argues are exempt from the rate filings of FPA sections 205 and 206.[62] The Clean Energy Group contends that the FPA does not preempt states from setting prices for utility offers to purchase that a seller is free to reject, and argues that the feed-in tariff serves as a tool by which states can guide a utility's purchasing decision.[63]

44. The Clean Energy Group also argues that the Commission should provide guidance for future cases so that states have a clear path to move forward if they choose to implement feed-in tariffs, arguing that the Commission should clarify that states retain authority under state law (and independent of PURPA) to compel utilities to offer to purchase power at state-set rates, and to clarify whether QF status caps the utility's purchase obligation at the avoided cost when the purchase obligation is a state law obligation rather than a PURPA obligation.[64] The Clean Energy Group contends that the

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[60] FuelCell Comments, Docket No. EL10-64-000, at 8 (filed June 3, 2010).

[61] FuelCell Comments, Docket No. EL10-66-000, at 4 (filed June 10, 2010).

[62] Clean Energy Group, Comments, Docket No. EL10-64-000, at 8-9 (filed June 3, 2010); Clean Energy Group, Comments, Docket No. EL10-66-000, at 5 (filed June 10, 2010).

[63] Clean Energy Group, Comments, Docket No. EL10-66-000, at 12 (filed June 10, 2010) (citing *Central Vermont Public Serv. Corp.*, 84 FERC ¶ 61,194 (1998); *Philadelphia Elec. Co.*, 15 FERC ¶ 61,264 (1981); *Southern Company Services, Inc.*, 26 FERC ¶ 61,360 (1984); *Southern California Edison*, 71 FERC ¶ 61,269).

[64] In this regard, the Clean Energy Group argues that a finding of no cap, in the context of a state law mandate, would be logical because it would put the QF in the same position as non-QFs in terms of ability to sell outside of PURPA (i.e., being free from the avoided cost constraint). Clean Energy Group, Comments, Docket No. EL10-66-000, at 15-16 (filed June 10, 2010).

Commission should create safe harbor price caps to eliminate the need for a case-by-case review of feed-in tariff based contracts by the Commission in situations where a contract results from a seller's acceptance of a feed-in rate offer and requires approval under the FPA because the seller is a non-QF or is a QF larger than 20 MW.[65]

45. The Clean Energy Group argues that the Commission should revisit its determinations in *Southern California Edison* in order to supplement its explanation in that case on ways that states can reflect the added costs of environmental compliance in avoided cost rates without running afoul of PURPA. It also argues that the Commission should clarify that a state may always rely on its PURPA mandate to implement feed-in tariff rates, and that a state that chooses to do so may also supplement avoided cost payments by assigning renewable energy credits, making cash grants or additional payments to renewables through a systems benefits charge, or establishing a price that exceeds avoided cost but granting the purchasing utility a tax credit equal to the excess.[66]

46. The Cogeneration Association argues that the Commission can resolve the issues raised in the two petitions without reaching the question of federal preemption related to wholesale rates, and should allow the CPUC's AB 1613 program to move forward because the intent of the CPUC's AB 1613 program is to encourage CHP resources consistent with PURPA's express goals.[67] Both the Cogeneration Association and the Energy Producers and Users assert that if the Commission determines that the CPUC's feed-in tariff is preempted by federal law, it could create a broader program under which state-created mechanisms like the CPUC's feed-in tariff could be approved; and that program criteria to qualify for such a waiver of federal preemption could include requirements that the feed-in tariff be explicitly sanctioned by state law and earmarked to achieve greenhouse gas reductions. Both also argue that feed-in tariffs are "vital

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[65] The Clean Energy Group incorporates the suggestions from the January 2010 NREL Feed-In Tariff Report for structuring such a safe harbor. Clean Energy Group, Comments, Docket No. EL10-66-000, at 17-18 (filed June 10, 2010) (citing NREL Feed-In Tariff Report at 23-25).

[66] *Id.* at 18-19 (citing *Southern California Edison*, 71 FERC ¶ 61,269; *American Ref- Fuel Co.*, 105 FERC ¶ 61,004, at P 23 (2003); *CGE Fulton*, 70 FERC ¶ 61,290, *reconsideration denied*, 71 FERC ¶ 61,232 (1995)).

[67] The Cogeneration Association represents CHP interests of a number of cogeneration companies. The Energy Producers and Users is an association representing the large industrial and commercial consumer and CHP interests of its members. The Energy Producers and Users agree with and endorse the protest filed by the Cogeneration Association in Docket No. EL10-66-000. Energy Producers and Users, Protest, Docket No. EL10-66-000, at 3 (filed June 10, 2010).

weapons" in California's fight against climate change that the Commission should support, and contend that if the Commission smothers California's efforts on a feed-in tariff, it will establish precedent that could block renewable energy feed-in tariffs nationwide.

47. Similarly, the Feed-In Tariff Coalition urges the Commission to clarify that the CPUC is within its authority in setting the AB 1613 feed-in tariff rates and to encourage state utility commissions and legislatures to quickly bring robust feed-in tariffs online, and argues that feed-in tariffs are a proven policy tool for rapid acceleration of renewable energy deployment. The Feed-In Tariff Coalition also argues that the Commission should expand the question presented to feed-in tariff rate setting authority more generally, and find in favor of state authority for 20 MW and below CHP generators that are QFs.[68] The Feed-In Tariff Coalition also contends that California's existing renewable portfolio standard system and feed-in tariff program already set above avoided cost prices and the utilities have not previously objected.[69]

48. FuelCell argues that the CPUC's implementation of AB 1613 is consistent with the Commission's approach to regulating non-QF sellers because the CPUC-approved tariff and standardized contract prescribe terms and conditions that conform to state statutory requirements. FuelCell asserts that to the extent a jurisdictional non-QF seller participates in the AB 1613 program, it would remain subject to any applicable obligations under the FPA. In addition, FuelCell argues that the CPUC's AB 1613 program is consistent with section 201(b) of the FPA, and that the Commission should confirm that as long as a jurisdictional seller has complied with any applicable Commission requirements that it self-certify as a QF or comply with market-based rate seller filing and reporting requirements, it should be allowed to participate in the AB 1613 program.[70]

49. San Joaquin Refining states that its planned CHP project is the type of project that the California legislature intended to encourage in enacting AB 1613, but states that if its project is to succeed, it must obtain a contract for the sale of excess power produced by the project under reasonable terms and at reasonable prices. San Joaquin Refining also

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[68] Feed-In Tariff Coalition, Comments, Docket No. EL10-64-000, at 11 (filed June 3, 2010); Feed-In Tariff Coalition, Comments, Docket No. EL10-66-000, at 11 (filed June 10, 2010) (citing Order No. 671, FERC Stats. & Regs. ¶ 31,203 at P 50-51; Order No. 671-A, FERC Stats. & Regs. ¶ 31,219).

[69] Feed-In Tariff Coalition, Comments, Docket No. EL10-64-000, at 13-14 (filed June 3, 2010).

[70] FuelCell, Comments, Docket No. EL10-66-000, at 7 (filed June 10, 2010).

argues that PURPA provides the Commission with a means to support the CPUC's rulings because under PURPA, the CPUC has authority to regulate the avoided cost rates paid to QFs, and that Commission regulations exempt sales of energy or capacity made by QFs 20 MW or smaller from FPA sections 205 and 206.[71] In addition, San Joaquin Refining argues that the Commission may clarify that the CPUC's AB 1613 decisions are consistent with PURPA regardless of whether the CPUC made any such finding.[72] San Joaquin Refining argues that the record in the CPUC proceeding supports a finding that the AB 1613 adopted pricing option is a measure of the avoided cost of the California utilities insofar as the AB 1613 rate is based on the CPUC's market price referent (MPR), which is the key pricing benchmark used in California's Renewables Portfolio Standard (RPS) program. San Joaquin Refining concludes that because the CPUC has already adopted the use of the MPR as a key measure of the costs that the utilities avoid through their purchase of power from QFs, there is legal authority to support a finding that the MPR is a measure of long-term avoided cost.[73]

2. Comments Opposing CPUC Petition and Supporting Joint Utilities' Petition

50. EEI argues that the CPUC's AB 1613 program is preempted by the FPA because the CPUC is mandating the purchase price of wholesale electric energy from CHP generators. EEI asserts that the contracts the utilities would be required to enter into as a result of the CPUC AB 1613 Decision would be contracts for the wholesale sale of electricity, which are subject to the exclusive jurisdiction of the Commission under section 205 of the FPA.[74] EEI also argues that if states require wholesale power purchases from QFs, such purchases are subject to the Commission's PURPA regulations, and must be at avoided cost.[75] EEI asserts that the CPUC seeks to bypass PURPA's avoided cost limit, and makes no attempt to justify its pricing methodology as avoided cost. EEI argues that the Commission should reject the CPUC's reliance on

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[71] San Joaquin Refining, Comments, EL10-64-000, at 6 (filed June 3, 2010); San Joaquin Refining, Protest, Docket No. EL10-66-000, at 6 (filed June 10, 2010) (citing 18 C.F.R. § 292.601(c)(1) (2010)).

[72] San Joaquin Refining, Answer, Docket No. EL10-64-000, at 3-4 (filed June 18, 2010).

[73] *Id.* at 7.

[74] EEI, Comments, Docket No. EL10-64-000, at 4-5 (filed June 3, 2010) (citing *Midwest Power Systems*, 78 FERC ¶ 61,067 at 61,246).

[75] *Id.* at 9 (citing *Southern California Edison*, 70 FERC ¶ 61,215 at 61,676).

section 292.302(d)(2) of the Commission's regulations as an alternative method for establishing the long-term avoided cost of CHP generators of 20 MW or less. According to EEI, the CPUC's attempt to impose a ten percent surcharge on avoided cost does not meet the requirements of an alternative methodology because it constitutes a different rate design methodology in contravention of section 292.302(d)(2).

51. In addition, EEI takes issue with the CPUC's argument that the FPA and PURPA, as economic statutes, should not prevent the CPUC from implementing its AB 1613 program, because the CPUC is seeking to use economic regulation to promote its environmental agenda. EEI also argues that *American Ref-Fuel* is inapposite because the Commission, in that case, narrowly held that the ownership of RECs is not an issue controlled by PURPA, and "reaffirmed that 'PURPA does determine the rate which electric utilities must offer to purchase electric energy from QFs.'"[76]

52. In its comments in response to the Joint Utilities' petition, EEI reiterates the arguments it made in its comments on the CPUC's petition and agrees with the Joint Utilities that there is no legal basis for the CPUC to set wholesale power rates. EEI argues that the CPUC cannot, under the guise of environmental regulation, adopt an economic regulation that requires purchases of electricity at a wholesale price outside the framework of the FPA and PURPA, or if acting under PURPA, at a price that exceeds avoided cost. EEI also agrees with the Joint Utilities that the price that the CPUC's AB 1613 Decisions would impose exceeds avoided cost and applies broadly to CHP facilities, whether or not they are QFs, and notes that the CPUC admits that it is purposefully adopting a price above the utilities' short run avoided cost to compensate for "'societal benefits.'"[77] Further, EEI argues that *Midwest Power Systems* clearly and correctly determines that if a state exercises its authority to set rates for purchases from QFs, such action must be taken under PURPA, and the rates cannot exceed avoided cost.

53. The California Municipal Utilities Association states that its members "are not subject to the Commission's rate jurisdiction or the CPUC's jurisdiction" and therefore "there are no 'mandates' to buy in their programs because [California Municipal Utilities Association] members are both regulators and purchasers."[78] The California Municipal Utilities Association does not oppose arguments that characterize AB 1613 as an environmental statute; however, it argues that this characterization does not "validate

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[76] *Id.* (quoting 107 FERC ¶ 61,016 at P 1).

[77] EEI, Comments, Docket No. EL10-66-000, at 7 (filed June 10, 2010) (quoting CPUC AB 1613 Decision at 16-17).

[78] It is not clear who would be subject to such "mandates" or what programs the California Municipal Utilities Association is referring to in its comments.

otherwise-preempted state wholesale ratesetting."[79] The California Municipal Utilities Association asserts that a state cannot nullify a question of preemption by declaring legislative intent that falls within state authority, and argues that if price setting by the CPUC under the guise of AB 1613 was justified by the characterization of AB 1613 as an environmental law, this precedent would fundamentally alter the regulatory framework for wholesale markets in California. The California Municipal Utilities Association urges the Commission to focus narrowly on the specifics of the CPUC AB 1613 Decision so as to avoid unnecessarily disrupting net metering and small distributed-generation programs, which are regulated by locally-elected boards. Further, the California Municipal Utilities Association agrees with the Joint Utilities that there are a myriad of state initiatives to stimulate renewable development through standard offers.

3. Other Comments

54. The Clean Energy Group argues that the Commission should initiate a rulemaking, notice of inquiry, technical conference or other additional proceedings as needed in order to explore options by which states can implement feed-in tariffs consistent with federal law. The California Municipal Utilities Association argues that if the Commission finds that certain transactions must be considered subject to exclusive federal jurisdiction, the Commission should convene workshops, technical conferences or other procedural vehicles to explore how effective programs at the state and local level can be crafted to avoid federal preemption.

55. The California Municipal Utilities Association and FuelCell request that the Commission clarify that any ruling on the extent of the federal preemption of the CPUC's AB 1613 program does not apply to public agency sellers that are exempt from Commission jurisdiction under section 201(f) of the FPA.[80]

56. SMUD takes no position regarding the issues raised in the petitions for declaratory order, but urges the Commission to focus its determination narrowly so as to avoid unnecessarily addressing whether distribution-level feed-in tariffs, and related sales for resale from facilities connected to distributions systems, are subject to the Commission's jurisdiction.[81] SMUD asserts that the petitions offer no reason for the Commission to

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[79] California Municipal Utilities Association, Comments, Docket No. EL10-66-000, at 3 (filed June 10, 2010).

[80] 16 U.S.C. § 824(f) (2006).

[81] SMUD's June 10, 2010 amendment to its motion to intervene in Docket No. EL10-64-000 contains the same comments that it filed on June 10, 2010 in Docket No. EL10-66-000.

reach the question of whether distribution-level feed-in tariffs interconnecting generation facilities to utility distribution facilities are subject to Commission authority. Further, SMUD argues that distribution-level facilities and distribution-level feed-in tariffs do not implicate Commission jurisdiction because FPA section 201(b)(1) explicitly excludes from Commission jurisdiction facilities used in local distribution and any unbundled retail service occurring over those facilities.[82] SMUD also argues that sales of power under distribution-level feed-in tariffs cannot be interstate commerce because the power sold does not enter the bulk transmission system or interstate commerce, but remains on the state-regulated distribution system. SMUD argues that there is no reason for the Commission to address this jurisdictional question in this proceeding, and contends that a broad Commission ruling would call into question the scope of the Commission's distribution exemption under FPA section 201(b)(1). In this regard, SMUD asserts that a decision asserting Commission jurisdiction over all distribution-level power sales to utilities would bring within the Commission's regulatory reach millions of homeowners, farmers or businesses using rooftop solar panels or small wind turbines who sell power to the local utility, other than on a net-metering basis, creating potentially millions of Commission jurisdictional suppliers of power.

57. In their answer to the comments and protests to the two petitions, the Joint Utilities argue that the Commission should deny SMUD's argument that the Commission should clarify that distribution-level facilities and distribution-level feed-in tariffs do not implicate Commission jurisdiction. The Joint Utilities assert that SMUD ignores case law providing that the Commission has jurisdiction over any (non-government owned) facility used for a sale for resale, as well as sales for resale, regardless of the facilities used.

58. In its letter filed in Docket Nos. EL10-64-000 and EL10-66-000,[83] Solutions For Utilities states that there does not appear to be any oversight, once the California legislature and Governor direct the CPUC to implement programs, to ensure that those programs are implemented by the CPUC expeditiously and effectively so that there is actual, real, diverse participation by renewable generators. Solutions For Utilities states that the CPUC's delay in implementing California's feed-in tariff programs is causing private developers of renewable energy and renewable energy generators to have problems financing and constructing renewable generation projects.

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[82] SMUD Comments, Docket No. EL10-66-000, at 2-3 (filed June 10, 2010) (citing 16 U.S.C. § 824(b)(1) (2006)).

[83] Solutions for Utilities has not sought to intervene in Docket Nos. EL10-64-000 and EL10-66-000, and therefore is not a party to these proceedings.

IV. Determination

A. Procedural Matters

59. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2010), the notices of intervention and timely, unopposed motions to intervene serve to make the entities that filed them parties to the proceeding in which they intervened.

60. Pursuant to Rule 214(d) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214(d) (2010), the Commission will grant the Energy Producers and Users' late-filed motion to intervene given its interest in the proceeding, the early stage of the proceeding, and the absence of undue prejudice or delay.

61. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2010), prohibits an answer to a protest and/or an answer unless otherwise ordered by the decisional authority. We are not persuaded to accept the answers of San Joaquin Refining, the Joint Utilities and the CPUC and will, therefore, reject them.

62. In response to the requests that we formally consolidate the proceedings in Docket Nos. EL10-64-000 and EL10-66-000, given that we are addressing the two petitions in this order and not ordering a hearing, there is no need for formal consolidation.

63. With respect to the requests for official notice filed by the CPUC and the California Energy Commission, the documents submitted with their petitions are intended to support the environmental arguments advanced by the CPUC in support of its petition. We note, however, that the Commission's analysis of the CPUC's petition is based on a comparison of the CPUC's AB 1613 program with the federal statutes that this Commission is charged with implementing and does not depend upon the documents that the CPUC and the California Energy Commission ask that we take notice of in this proceeding.

B. Substantive Matters

64. The Commission's authority under the FPA includes the exclusive jurisdiction to regulate the rates, terms and conditions of sales for resale of electric energy in interstate commerce by public utilities.[84] While Congress has authorized a role for States in setting wholesale rates under PURPA, Congress has not authorized other opportunities for States

[84] 16 U.S.C. §§ 824, 824d, 824e (2006); *e.g.*, *Mississippi Power & Light Co. v. Mississippi ex rel. Moore*, 487 U.S. 354 (1988).

to set rates for wholesale sales in interstate commerce by public utilities, or indicated that the Commission's actions or inactions can give States this authority. We disagree with the characterization of the CPUC's AB 1613 Decisions as merely establishing an "offering price" by the purchaser of power. Rather, we agree with the Joint Utilities that the CPUC's AB 1613 Decisions constitute impermissible wholesale rate-setting by the CPUC. Because the CPUC's AB 1613 Decisions are setting rates for wholesale sales in interstate commerce by public utilities, we find that they are preempted by the FPA.

65. As noted above, however, a state commission may, pursuant to PURPA, determine avoided cost rates for QFs.[85] Although the CPUC has not argued that its AB 1613 program is an implementation of PURPA, we find that, to the extent the CHP generators that can take part in the AB 1613 program obtain QF status, the CPUC's AB 1613 feed-in tariff is *not* preempted by the FPA, PURPA or Commission regulations,[86] subject to certain requirements, as discussed below.

66. The Commission addressed issues concerning whether state statutes are consistent with the FPA, and whether they meet the requirements of PURPA, in *Midwest Power Systems* and *Connecticut*. In *Midwest Power Systems*, the Commission found that an Iowa statute and the implementing orders of the Iowa Utilities Board were consistent with federal law to the extent that they required utilities in Iowa to purchase from certain types of generating facilities, but also found that the orders of the Iowa Utilities Board were preempted to the extent they required sales by QFs be made at rates in excess of the purchasing utilities' avoided cost, and to the extent they set rates for wholesale sales of electric energy by non-QF public utilities.[87] In *Connecticut*, the Commission similarly found that, to the extent a Connecticut statute required sales by a QF be made at rates that exceeded avoided cost, the statute was preempted by PURPA.[88] The Commission reasoned there that wholesale QF rates cannot both be capped by full avoided cost (the federal statute) and exceed the avoided cost cap (the state statute). In its order denying reconsideration of *Connecticut*, the Commission found that, "even if a QF has been exempted pursuant to the Commission's regulations from the ratemaking provisions of the Federal Power Act, a state still cannot impose a ratemaking regime inconsistent with

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[85] *See* 16 U.S.C. § 824a-3 (2006); 18 C.F.R. § 292.304 (2010).

[86] 18 C.F.R. § 292.101 *et seq.* (2010).

[87] *Midwest Power Systems*, 78 FERC ¶ 61,067 at 61,246; *see id.* at 61,246-48.

[88] *Connecticut*, 70 FERC ¶ 61,012 at 61,029.

the requirements of PURPA and this Commission's regulations—i.e., a state cannot impose rates in excess of avoided cost."[89]

67. In light of this precedent, we find that, insofar as the CHP generators that can take part in the AB 1613 program obtain QF status pursuant to the Commission's regulations, the CPUC's program is *not* preempted by the FPA, PURPA or Commission regulations,[90] as long as the program meets certain requirements. Specifically, the AB 1613 program will *not* be preempted by the FPA and PURPA as long as: (1) the CHP generators from which the CPUC is requiring the Joint Utilities to purchase energy and capacity are QFs pursuant to PURPA; and (2) the rate established by the CPUC does not exceed the avoided cost of the purchasing utility.[91]

68. The Joint Utilities have not asked the Commission to find that the CPUC's offer price exceeds the purchasing utility's avoided cost. Nor have they filed a petition pursuant to section 210(h) of PURPA requesting the Commission to enforce its PURPA regulations.[92] Indeed, there is no record in these proceedings on which the Commission may determine whether the CPUC's offer price is consistent with the avoided cost rate requirements of section 210 of PURPA. Thus, nothing in this order shall be read as the Commission ruling on whether the CPUC's offer price is consistent with the avoided cost requirements of PURPA.

69. To the extent a CHP generator is *not* a QF, the CPUC's AB 1613 Decisions are not preempted by the FPA only to the extent that the CPUC is ordering the utilities to purchase capacity and energy from certain resources, but are preempted to the extent that the CPUC is setting wholesale rates for such transactions, as discussed above. Any CHP generator that is not a QF but is a public utility must, pursuant to section 205 of the FPA,

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[89] *Connecticut*, 71 FERC ¶ 61,035 at 61,153. *See* Order No. 671, FERC Stats. & Regs. ¶ 31,203 at P 99 (clarifying that a QF will retain exemption from sections 205 and 206 of the FPA when its sales are pursuant to a state regulatory authority's implementation of PURPA and distinguishing between a "state regulatory authority's implementation of PURPA" and "state programs that are not grounded in PURPA").

[90] 18 C.F.R. § 292.101 *et seq.* (2010).

[91] 18 C.F.R. § 292.304 (2010). Under section 210 of PURPA, the rules prescribed by the Commission shall not provide for a rate "which exceeds the incremental cost to the electric utility of alternative electric energy." 16 U.S.C. § 824a-3(b) (2006). Under the Commission's regulations, absent agreement of the parties to the contrary, rates shall be capped at the electric utility's full "avoided cost." 18 C.F.R. § 292.304 (2010).

[92] 16 U.S.C. § 824a-3(h) (2006).

file with the Commission the rates it proposes to charge under the CPUC's AB 1613 tariff, and, consistent with section 205 of the FPA, the CHP generator must demonstrate that such rates are just, reasonable and not unduly discriminatory or preferential.[93]

70. We disagree with the arguments of the CPUC and certain commenters that the Commission's orders in *Midwest Power Systems* and *Connecticut* are no longer controlling precedent. While we appreciate that the CPUC's AB 1613 feed-in tariff program is intended to reduce greenhouse gas emissions, the arguments concerning the environmental considerations underlying the CPUC's AB 1613 feed-in tariff program do not excuse the Commission of its statutory obligations.[94] In addition, we disagree with the argument that the Commission already has allowed the sale of energy and capacity by QFs at a rate that is higher than the purchasing utility's avoided cost, based on the exemption from scrutiny under FPA sections 205 and 206 of sales of energy and capacity from QFs that are 20 MW or smaller.[95] Various parties argue that this exemption from section 205 means that the sale of energy and capacity from smaller QFs do not need to comply with PURPA. However, contrary to this argument, whether a rate is filed under section 205 of the FPA for Commission approval, or is exempt from scrutiny from FPA sections 205 and 206 pursuant to the Commission regulations, the CPUC may not set rates for the sale for resale of energy and capacity by a QF that exceeds the purchasing utility's avoided cost.[96]

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[93] If the CPUC believes that it needs additional guidance on how CHP generators may establish rates that are just, reasonable and not unduly discriminatory or preferential, it may file a petition for declaratory order seeking guidance.

[94] *Cf. Free Enterprise Fund v. Public Company Accounting Oversight Board*, No. 08-861, slip op. at 18 (U.S. June 28, 2010) (fact that a given law or procedure may be, e.g., useful does not save it if it is contrary to the Constitution).

[95] 18 C.F.R. § 292.601(c) (2010).

[96] *See* Order No. 671, FERC Stats. & Regs. ¶ 31,203 at P 95 (describing the effect of the exemption as allowing QFs to "make sales that were not subject to either Commission or state regulatory authority oversight"). *Cf. Southern California Edison*, 70 FERC ¶ 61,215 at 61,675; *American REF-FUEL Company of Hempstead*, 47 FERC ¶ 61,161, at 61,533 (1989) (finding "states are allowed a wide degree of latitude in establishing an implementation plan for section 210 of PURPA, as long as such plans are consistent with our regulations. Similarly, with regard to review and enforcement of avoided cost determinations under such implementation plans, we have said that our role is generally limited to ensuring that the plans are consistent with section 210 of PURPA...."); *LG&E Westmoreland Hopewell*, 62 FERC ¶ 61,098, at 61,712 (1993).

71. With respect to the requests of the California Municipal Utilities Association and FuelCell that we clarify that any ruling on the extent of federal preemption of the CPUC's AB 1613 program does not apply to public agency sellers that are exempt from Commission jurisdiction under section 201(f) of the FPA, we clarify that for those facilities and sellers that are neither QFs nor public utilities selling at wholesale, but may, for example, be states or their subdivisions, agencies, authorities, or instrumentalities, rates for such sales are not within the Commission's authority.[97] That is, as relevant in this context, they are not subject to our regulation because they are not rates for QF sales at wholesale under PURPA, and they are not rates for public utility sales at wholesale under the FPA.[98] Such rates are accordingly not preempted by the FPA.

72. We deny SMUD's request that the Commission clarify that distribution-level facilities and distribution-level feed-in tariffs do not implicate Commission jurisdiction. The FPA grants the Commission exclusive jurisdiction to regulate sales for resale of electric energy and transmission in interstate commerce by public utilities.[99] The Commission's FPA authority to regulate sales for resale of electric energy and transmission in interstate commerce by public utilities is not dependent on the location of generation or transmission facilities, but rather on the definition of, as particularly relevant here, wholesale sales contained in the FPA.[100]

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[97] *Connecticut*, 70 FERC ¶ 61,012 at 61,030; *see also Midwest Power Systems*, 78 FERC ¶ 61,067 at 61,246-47.

[98] *See* 16 U.S.C. § 824(f) (2006). *But see* 16 U.S.C. § 824e(2) (2006) (providing that "[i]f an entity described in section 201(f) voluntarily makes a short-term sale of electric energy through an organized market in which the rates for the sale are established by Commission-approved tariff (rather than by contract) and the sale violates the terms of the tariff or applicable Commission rules in effect at the time of the sale, the entity shall be subject to the refund authority of the Commission under this section with respect to the violation."); *California Independent System Operator Corp.*, 128 FERC ¶ 61,103, at P 22-23, *order on reh'g*, 129 FERC ¶ 61,241, at P 101 (2009).

[99] *FPC v. Southern California Edison Co.*, 376 U.S. 205 (1964) (finding that Commission jurisdiction is plenary and extends to all wholesale sales in interstate commerce except those that Congress has made explicitly subject to regulation by the states).

[100] 16 U.S.C. § 824(d) (2006); *see Transmission Access Policy Study Group v. FERC*, 225 F.3d 667, 695-96 (D.C. Cir. 2000), *aff'd sub nom. New York v. FERC*, 535 U.S. 1 (2002); *Detroit Edison Co. v. FERC*, 334 F.3d 48, 51 (D.C. Cir. 2003). *See also FPC v. Florida Power & Light Co.*, 404 U.S. 453 (1972) (finding a utility with no direct connections to any out-of-state utility and that sold no power to out-of-state utilities to be (continued...)

C. Exemption from Filing Fees

73. The Commission's regulations provide that states are exempt from the filing fees required in Part 381.[101] The CPUC explains that it is a state administrative agency established under the laws of California. Accordingly, the CPUC is exempt from the filing fee otherwise required for a petition for declaratory order.

The Commission orders:

The petitions for declaratory order of the CPUC and the Joint Utilities are hereby granted in part and denied in part, as discussed in the body of this order.

By the Commission. Commissioner LaFleur voting present.

(S E A L)

Kimberly D. Bose,
Secretary.

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subject to the jurisdiction of the Commission due to the fact that power supplied to a bus from a variety of sources was merged and commingled).

[101] 18 C.F.R. § 381.108 (2010).

Attachment 4

nationalgrid

Thomas R. Teehan
Senior Counsel

November 12, 2010

VIA HAND DELIVERY & ELECTRONIC MAIL

Luly E. Massaro, Division Clerk
Rhode Island Division of Public Utilities and Carriers
89 Jefferson Boulevard
Warwick, RI 02889

RE: Complaint of Benjamin Riggs
Docket No. D-10-126

Dear Ms. Massaro:

I have enclosed for filing five (5) copies of National Grid's Reponses to the Division's First Set of Data Requests in the above-referenced matter.

Thank you for your attention to this transmittal. If you have any questions, please feel free to contact me at (401) 784-7667.

Very truly yours,

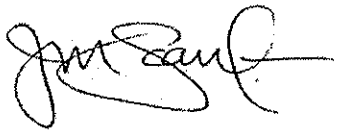
Thomas R. Teehan

Enclosure

cc: Jon Hagopian, Esq.
Steve Scialabba, Division

Certificate of Service

I hereby certify that a copy of the cover letter and/or any materials accompanying this certificate were electronically transmitted and sent via U.S. Mail to the individuals listed below. Copies of this filing were hand delivered to the RI Division of Public Utilities & Carriers.



November 12, 2010

Joanne M. Scanlon
National Grid

Date

Complaint Relating to the Town of Porstmouth Generator Facility – NetMetering
Docket No. D-10-126
Updated 10/28/10

Parties/Address	**E-mail Distribution**	**Phone**
Thomas R. Teehan, Esq. National Grid. 280 Melrose St. Providence, RI 02907	Thomas.teehan@us.ngrid.com Joanne.scanlon@us.ngrid.com	401-784-7667 401-784-4321
Jon Hagopian, Esq. (Division Advocacy) Dept. of Attorney General 150 South Main St. Providence, RI 02903	jhagopian@riag.ri.gov Mtobin@riag.ri.gov Dmacrae@riag.ri.gov	401-222-2424
Benjamin C. Riggs, Jr. 15D Harrington St. Newport, RI 02840	rmcriggs@earthlink.net	401-846-2540
File original and four (4) copies w/: Luly E. Massaro, Clerk Division of Public Utilities & Carriers 89 Jefferson Blvd. Warwick, RI 02888	lmassaro@puc.state.ri.us jspirito@ripuc.state.ri.us sscialabba@ripuc.state.ri.us dstearns@ripuc.state.ri.us acontente@ripuc.state.ri.us	401-780-2107
John McColloch	jkm927@cox.net	
Miles Bidwell	mbidwell@attglobal.net	
Nick Ucci, PUC	nucci@puc.state.ri.us	
Amy D'Alessandro, PUC	Adalessandro@puc.state.ri.us	
Courtney Feeley Karp, MA DOER	Courtney.karp@state.ma.us	617-626-7382

Division 1-1

Request:

State all facts surrounding the application in May, 2008 to interconnect the 1.5 MW wind turbine located in the Town of Portsmouth, which is referenced in the September 3, 2010 correspondence of Thomas R. Teehan, Senior Counsel for National Grid to the Division in response to the complaint of Benjamin C. Riggs, Jr.

Response:

National Grid received an interconnection application from the Town of Portsmouth, RI for installation of a 1,500 KW wind turbine at 120 Education Lane, Portsmouth, RI, account 03878-03009. The application was received on June 6, 2008, deemed complete on June 10, 2008 and assigned for review under tracking number RI-101. The site diagram submitted with the application indicated that a new primary metering pole was desired at the property line for the school grounds. This primary metering pole would define the new point of service for the loads and generator on the property. A site meeting was held on July 11, 2008 to discuss the application and potential location of new pole(s) to affect the new primary metering as requested. On July 21, 2008, National Grid completed its initial review of the proposed interconnection. An impact study was required and National Grid transmitted an Impact Study Agreement and invoice for the impact study fee of $5,000. On September 4, 2008, a site plan was issued to National Grid indicating that a new primary metering pole would be installed just inside the property line, before the riser pole for main electrical service to the high school. The new primary metering was to encompass three existing electric accounts and the new wind turbine service. The existing electric accounts for the high school, gym and tennis courts would all be behind the new primary meter along with the new wind turbine. Moving the metering point from the existing three services out to the property line would require the transfer to the Town of Portsmouth certain National Grid distribution assets on the customer side of the new primary metering point. This included several poles, primary and secondary overhead wires, aerial and pad-mounted transformers, and primary underground cables. Steps were taken to begin the process of estimating the residual value of those assets for sale to the Town of Portsmouth.

On October 9, 2008, National Grid received a new electrical one-line diagram from the engineer working on the wind turbine project for the Town of Portsmouth. The new power one-line diagram changed the requested point of service. The diagram eliminated the need for a new

Division 1-1 (cont.)

primary metering point and indicated that the service to the new wind turbine would be via a side-tap from existing National Grid overhead distribution facilities on school property. The new side tap to the wind turbine was to have its own meter and be a separate electric account. The accompanying email from the Town's engineer stated that the Town was considering the new arrangement because the new RI regulations passed into law in July 2008 "would allow the Town to credit the wind turbine output to all of their metered accounts." The new proposed arrangement would eliminate the requirement to transfer National Grid distribution assets to the Town of Portsmouth, and all existing electrical accounts at the site would remain in place. Due to the complication associated with transferring utility company assets, the Company agreed with the Town's revised plan which would result in the creation of a new electric account for the wind turbine only. On October 14, 2008, the Town of Portsmouth confirmed that this new method of service was desired, and National Grid designed the appropriate service and estimated the cost of electrical construction.

On November 13, 2008, the Detailed Interconnection Study (Impact Study) was issued including an estimate for the cost of electric construction. National Grid sent a service agreement and invoice for the work, which was paid allowing construction to begin. The Interconnection Service Agreement for the new wind turbine was sent to the Town of Portsmouth for signature on December 12, 2008. A modified Interconnection Service Agreement, addressing concerns with the relay protection portion of the agreement, was transmitted to the Town of Portsmouth for signature on December 31, 2008. The Interconnection Service Agreement was signed by both parties in January 2009, and an original was mailed to the Town of Portsmouth on January 27, 2009. On February 5, 2009, National Grid transmitted RI Net Metering Schedule B to the Town of Portsmouth for completion. This form allowed the customer to designate disposition of credits earned through net-metering. The new service to the wind turbine was connected on February 19, 2009. Relay protection testing was conducted, and the Town of Portsmouth Wind Turbine came on-line and began commercial operation on March 18, 2009.

Prepared by or under the supervision of: Timothy R. Roughan

Division 1-2

Request:

Please provide copies of all Power Purchase Agreements between National Grid and the Town of Portsmouth with respect to the Portsmouth Wind Generating Facility, which is the subject of the complaint of Benjamin C. Riggs, Jr.

Response:

National Grid does not execute Power Purchase Agreements for accounts which are net metered. No Power Purchase Agreements were executed between National Grid and the Town of Portsmouth. As stated in the Company's response to Division 1-1, a Schedule B was completed to formalize the net metering arrangements. Please find attached as Attachment Division 1-2 a copy of Schedule B between National Grid and the Town of Portsmouth, RI.

Prepared by or under the supervision of: Timothy R. Roughan

R.I.P.U.C. No. 2010-A

Schedule B

THE NARRAGANSETT ELECTRIC COMPANY
NET-METERING APPLICATION OF CREDITS

The Agreement is between Town of Portsmouth, RI (600 KW Wind QF), a Net-Metered Facility ("NMF") and The Narragansett Electric Company (the "Company") for transfer of credits earned through net-metering as per section III.B(1) from the NMF located at Portsmouth High School, 120 Education Lane, Portsmouth, Rhode Island.

Agreement to apply credits earned by the NMF

Effective as of February 13, 2009, the Company agrees to transfer credits to the following account(s) designated by the NMF under the terms and conditions of the Company's Qualifying Facilities Power Purchase Rate Tariff as currently in effect or amended by the Company in the Company's sole discretion. The NMF agrees to comply with the provisions of the Qualifying Facilities Power Purchase Rate Tariff, the applicable retail delivery tariffs and terms and conditions for service that are on file with the Rhode Island Public Utilities Commission as currently in effect or as modified, amended, or revised by the Company, and to pay any metering and interconnection costs required under such tariff and policies.

Designated Account(s)

The following information must be provided for each individual designated account (five accounts maximum)

Name: PORTSMOUTH HIGH SCHOOL
Address: 120 EDUCATION LANE
Account number: 03878-03009
Percentage of monthly earned credit: ~~100%~~ 34%

Name: PORTSMOUTH MIDDLE SCHOOL
Address: 125 JEPSON LANE
Account number: 28272-65003
Percentage of monthly earned credit: ~~100%~~ 33%

Name: PORTSMOUTH TOWN HALL ST LIGHT
Address: 2200 EAST MAIN RD
Account number: 03361-89005
Percentage of monthly earned credit: ~~100%~~ 20%

Name: HATHAWAY SCHOOL
Address: 53 TOILMAN
Account number: 53347-55006
Percentage of monthly earned credit: ~~100%~~ 27%

Name: PORTSMOUTH TOWN HALL
Address: 2200 EAST MAIN RD
Account number: 16009 - 83007
Percentage of monthly earned credit: ~~100~~ 11%

The Company will credit the NMF and its designated account(s) the rates in effect at the time of delivery as provided for in the Qualifying Facilities Power Purchase Rate Tariff.

Notice

The Company or NMF may terminate this agreement on thirty (30) days written notice which includes a statement of reasons for such termination. In addition the NMF must re-file this agreement annually.

Agreed and Accepted

[signature] 2/11/09
Customer Date

[signature] 2/25/09
The Narragansett Electric Company Date

Division 1-3

Request:

State all facts surrounding any and all interconnection agreements between National Grid and the Town of Portsmouth to connect the Portsmouth Wind Generating Facility directly to National Grid's distribution lines, describing the reasons for direct connection, and the interconnection point.

Response:

Please refer to National Grid's response to Division 1-1 above. The original request for interconnection placed the point of service at a new primary metering pole at the school property line. This point of service would have encompassed the load from three existing electric accounts and the new wind turbine. One of the existing electrical accounts was a Town account, and the other two were School Department accounts. Due to legislation passed in July 2008, the Town requested a change to the point of service. This change eliminated the need for any transfer of distribution assets from National Grid to the Town of Portsmouth and also resulted in a simpler arrangement of primary electrical gear on the customer's property. It also allowed the Town and School Department accounts to remain separate. It did not change the engineering characteristics of the interconnection of the wind turbine to the primary electrical system, nor did it change the protection requirements. From an engineering standpoint, the change in point of service only moved the point of metering for the loads and generator on the property.

Prepared by or under the supervision of: Timothy R. Roughan

Division 1-4

Request:

Provide the date the Portsmouth Generating Facility came on line.

Response:

The Town of Portsmouth wind turbine generator came on line on March 18, 2009.

Prepared by or under the supervision of: Timothy R. Roughan

Division 1-5

Request:

In National Grid's correspondence of September 3, 2010 from Attorney Teehan it is stated that [n]et metering is understood in the industry as a means of allowing customers who have installed "behind the meter" generation to obtain credit for excess generation during those times when the production from the unit exceeds the on-site load. Where a generating facility is designed as a stand alone facility, with no real associated distribution load, it may be more accurately viewed as a wholesale generator, which could trigger FERC jurisdiction under the Federal Power Act. In addition, if the unit is a "qualifying facility" under federal law, as smaller renewable electricity projects would typically be, recent decisions on this issue would indicate that the sale of power from such a facility should be governed by the federal requirement that the rate established for its output does not exceed the avoided cost of the purchasing utility. 16 U.S.C §824a-3; See In re California Public Utilities Commission, FERC Docket No. EL 10-64-000.

(a.) Please indicate whether National Grid agrees with and accepts the industry understanding of net metering; also state whether National Grid's interpretation of R.I. Gen. Laws 39-26-2 et. seq. is consistent with the industry understanding; if not, provide all facts explaining the distinction.

(b.) Please provide all facts which lead National Grid to conclude that the Portsmouth Generating Facility fails to comport with either National Grid's or the industry's understanding of what constitutes a net metering generation configuration.

(c.) Please provide all facts indicating whether the Portsmouth Wind Generating Facility is a net metering configuration pursuant to RI Gen. Laws 39-26-2 et seq.

(d.) Please state whether the Portsmouth Wind Generator is a "Qualifying Facility" pursuant to National Grid's Qualifying Facility Tariff. If so, state all facts which support your response, including whether Portsmouth opts to receive a renewable generation credit in the form of a check or a bill credit.

Division 1-5

Response:

(a) Yes. National Grid accepts the industry understanding of net metering. However, R.I. Gen. Laws does not explicitly define a "net metering customer." Rather, it only defines the net metering "process." A "net metering customer" is one who is a "net consumer" of electricity from the on-site generator. FERC has defined net metering in a manner consistent with industry understanding as follows:

> Net metering allows a retail electric customer to produce and sell power onto the Transmission System without being subject to the Commission's jurisdiction. A participant in a net metering program must be a net consumer of electricity -- but for portions of the day or portions of the billing cycle, it may produce more electricity than it can use itself. This electricity is sent back onto the Transmission System to be consumed by other end-users. Since the program participant is still a net consumer of electricity, it receives an electric bill at the end of the billing cycle that is reduced by the amount of energy it sold back to the utility. Essentially, the electric meter "runs backwards" during the portion of the billing cycle when the load produces more power than [sic] it needs, and runs normally when the load takes electricity off the system.

Order No. 2003-A, Standardization of Generator Interconnection Agreements and Procedures, 106 FERC ¶ 61,220 at 744 (March 5, 2004).

(b) The Portsmouth Generating Facility is not a "net consumer of electricity." The generating unit is self-standing. Thus, there are no billing periods where the customer consumes all of the electricity produced on site. As such, the facility is a wholesale generator making sales for resale to National Grid, which is jurisdictional to FERC.

In a net metering case, FERC stated:

> There may be, over the course of the billing period, either a net sale from the individual to the utility, or a net purchase by the individual from the utility. When there is a net sale to a utility, and the individual's generation is not a QF, the individual would need to comply with the requirements of

Division 1-5 (cont.)

> the Federal Power Act. . . . When there is a net sale to a utility, and the individual's generation is a QF, that net sale must be at an avoided cost rate consistent with PURPA and our regulations implementing PURPA.

MidAmerican Energy Company, 94 FERC ¶ 61340 at 62263 (March 28, 2001).

(c) The law does not define a "net metering configuration" or a "net metering customer." Rather, Section 26-2 only describes the metering process. It states: "'Net metering' means the process of measuring the difference between electricity delivered by an electrical distribution company and electricity generated by a solar-net-metering facility or wind-net-metering facility, and fed back to the distribution company." Since the statute would be unconstitutional to read it in such a manner as to allow self-standing generating facilities to sell power at a rate that is greater than the electric distribution company's avoided cost, it is reasonable to interpret the statute more narrowly, so as to be consistent with federal law. Reading the statute to avoid constitutional issues, Rhode Island law would not permit a self-standing generator with no material "on-site load" to be net metered and receive credits at a rate that is higher than the utility's avoided cost.

(d) Because the Portsmouth Wind Generator produces power from wind generation, it meets the eligibility criteria for a Qualifying Facility under FERC regulations. However, the Company does not know whether the owner has filed at FERC to certify as a Qualifying Facility. If not, the Company believes that the facility has an obligation to make a filing under federal law in order to make lawful sales of electricity. The receipt of renewable generation credits under the circumstances of the Portsmouth configuration constitutes a sale of electricity that is jurisdictional to FERC.

Prepared by or under the supervision of: Legal Department

Division 1-6

Request:

If National Grid contends or otherwise believes that net metering is being used in an unintended manner, provide all facts and examples which support such a contention or belief, including whether the Portsmouth Wind Generating Facility complies with net metering provisions of RI Gen. Laws 39-26-2 et seq.

Response:

Please see the Company's responses to Division 1-5.

Prepared by or under the supervision of: Legal Department

Division 1-7

Request:

If National Grid contends or otherwise believes that net metering provides a means to pay for output at above market costs, state all facts which support such a contention or belief.

Response:

When a self-standing generating unit such as the Portsmouth Wind Generating Facility produces electricity and receives a payment in the form of a renewable generation credit, it receives a price for the energy that is greater than the market price of the energy. The difference between the total amount of the renewable generation credit and the market price of the energy is the above market cost.

Prepared by or under the supervision of: Jeanne Lloyd

Division 1-8

Request:

If National Grid contends or otherwise believes that net metering customers avoid paying for their use of the distribution system, state all facts which support this contention or belief and whether R.I. Gen. Laws 39-26-2 et seq. facilitates this issue.

Response:

When a net metering customer avoids distribution charges by generating some or all of their own load requirements, that customer is avoiding his or her full share of the distribution system costs. Every net metering customer uses the distribution system either for back up or for direct service. When that customer does not contribute to the cost of the distribution system or the contribution is substantially reduced because of net metering credits, it means that other distribution customers are paying for all or a portion of that customer's use of the distribution system.

Prepared by or under the supervision of: Jeanne Lloyd

Division 1-9

Request:

If National Grid contends or otherwise believes that net metering customers avoid paying for their use of distribution system when the generating facility is not producing electricity, provide all facts which support such a contention or belief.

Response:

Even a net metering customer who is a "net consumer" of electricity in a billing period uses the distribution system when the generating unit is not producing electricity However, even though a customer may not be generating electricity for part of a billing period, there may be other times during the billing period when the generator is operating, and the unit may be producing enough electricity to generate credits in an amount that is large enough to off-set distribution charges that might have accrued when the generating facility was not operating. Thus, in such circumstances, the net metering customer avoids paying its full share for the use of the distribution system. Further, all customers rely on the distribution system being available. Distribution system costs are fixed, therefore, the Company's cost to serve a full requirements customer is no different than the cost to serve a firm back-up service customer. To the extent no back up charges apply, as is the case with renewable generation, the net metering customer is not contributing his or her share of system costs.

Prepared by or under the supervision of: Jeanne Lloyd

Division 1-10

Request:

State how National Grid proposes that net metering customers should contribute for their use of the distribution system and whether it believes that Portsmouth Wind Generator Facility pays its share for use of the distribution system.

Response:

The Portsmouth Wind Generator Facility itself is not a "distribution customer." Rather, the facility is a wholesale generator, as currently configured, using the distribution system to sell power to National Grid. The problem is that the credits being paid to the Town from the production at the facility are effectively reducing the Town's contribution to the cost of the distribution system through the cross subsidies inherent in the net metering mechanism, because all other distribution customers are paying a rate for the power that is above market.

One alternative in this case would be to change the rate being paid to the Town for the production of electricity, so that the rate is at or below the standard offer rate. In turn, the Company could account for the output as a portion of standard offer supply that it otherwise would have purchased from its standard offer supplier. The energy from the Town's facility in such a scenario would effectively be a part of standard offer supply. This would allow Portsmouth to continue to receive revenue for the electric production, but eliminate the cross subsidies from other distribution customers that was occurring from the above market payments. While this would reduce the amount of revenue the Town is currently receiving from National Grid, the combination of revenue derived from the standard offer rate, plus the revenue the Town still receives from selling renewable energy certificates in the market, would still provide a significant revenue stream to the Town. If the credit received from National Grid is the same or lower than the standard offer rate and the energy actually displaces standard offer power that National Grid would need to purchase from its wholesale standard offer suppliers, the conflict with federal law may be mitigated or eliminated.

Prepared by or under the supervision of: Legal Department

Division 1-11

Request:

The local media has reported on a planned wind-farm which has been described as a 25 megawatt project of 8-10 wind turbines to be located in Tiverton, in or near the Tiverton Industrial Park (the "East Bay Energy Consortium Project" hereafter the "EBEC project"). The wind farm would be a joint effort of nine separate cities and towns. The project has received grants from the State Economic Development Corporation, among others. Attached to this data request is a .pdf file with a Providence Journal article about the planned wind farm which was printed on October 17, 2010.

(a.) Has National Grid been aware of the EBEC project?

(b.) Based on National Grid's understanding of the project, would the EBEC project qualify for net metering treatment under Rhode Island law?

(c.) Have there been any discussions or correspondence between National Grid and the EBEC or the Economic Development Corporation about the EBEC project? If so, please describe the nature of those communications.

(d.) If National Grid knows, aside from the fact that the EBEC project is a partnership among several communities, how does it differ from the Town of Portsmouth project?

Response:

(a) Yes.

(b) No.

(c) Although no formal application was submitted to the Company, one of the project's consultants made an informal inquiry regarding the possible net metering arrangements for the project. After considering the limited conceptual project outline provided by the consultant, the Company ultimately informed the consultant that the Company did not believe the project would be eligible for net metering.

Division 1-11 (cont.)

(d) There is no difference in the effect that federal law has on the project. As a stand-alone generating facility, the EBEC project would be FERC-jurisdictional. As such, National Grid should not be paying more than its avoided cost for any energy produced from the facility. Any law that is construed to set the rate to be paid (directly or indirectly) in an amount that exceeds National Grid's avoided cost, would be unconstitutional.

Prepared by or under the supervision of: Timothy R. Roughan and Legal Department

Attachment 5

nationalgrid

Thomas R. Teehan
Senior Counsel

December 20, 2010

VIA HAND DELIVERY & ELECTRONIC MAIL

Luly E. Massaro, Division Clerk
Rhode Island Division of Public Utilities and Carriers
89 Jefferson Boulevard
Warwick, RI 02888

RE: Complaint of Benjamin Riggs
Docket No. D-10-126

Dear Ms. Massaro:

I have enclosed for filing five (5) copies of National Grid's responses to the Division's Second Set of Data Requests in the above-referenced matter.

This filing also contains a Motion for Protective Treatment in accordance with Rule 3(d) of the Division's Rules of Practice and Procedure and R.I.G.L. § 38-2-2. The Company seeks protection from public disclosure for customer billing records that are provided as attachments to a number of these data requests. To that end, the Company has provided the Division with one (1) copy of the confidential materials for its review, and has included redacted copies of these attachments in the filing.

Thank you for your attention to this transmittal. If you have any questions, please feel free to contact me at (401) 784-7667.

Very truly yours,

Thomas R. Teehan

Enclosure

cc: Jon Hagopian, Esq.
Steve Scialabba, Division

Certificate of Service

I hereby certify that a copy of the cover letter and / or any materials accompanying this certificate has been electronically transmitted, sent via U.S. mail or hand-delivered to the individuals listed below.

Joanne M. Scanlon

December 20, 2010
Date

Complaint Relating to the Town of Porstmouth Generator Facility – NetMetering
Docket No. D-10-126 **Updated 11/16/10**

Parties/Address	E-mail Distribution	Phone
Thomas R. Teehan, Esq. National Grid. 280 Melrose St. Providence, RI 02907	Thomas.teehan@us.ngrid.com Joanne.scanlon@us.ngrid.com	401-784-7667 401-784-4321
Jon Hagopian, Esq. (Division Advocacy) Dept. of Attorney General 150 South Main St. Providence, RI 02903	jhagopian@riag.ri.gov Mtobin@riag.ri.gov Dmacrae@riag.ri.gov	401-222-2424
Benjamin C. Riggs, Jr. 15D Harrington St. Newport, RI 02840	rmcriggs@earthlink.net	401-846-2540
File original and four (4) copies w/: Luly E. Massaro, Clerk Division of Public Utilities & Carriers 89 Jefferson Blvd. Warwick, RI 02888	lmassaro@puc.state.ri.us jspirito@ripuc.state.ri.us sscialabba@ripuc.state.ri.us dstearns@ripuc.state.ri.us acontente@ripuc.state.ri.us	401-780-2107
John McColloch	jkm927@cox.net	
Miles Bidwell	mbidwell@attglobal.net	
Nick Ucci, PUC	nucci@puc.state.ri.us	
Amy D'Alessandro, PUC	Adalessandro@puc.state.ri.us	
Courtney Feeley Karp, MA DOER	Courtney.karp@state.ma.us	617-626-7382
Bob Chew, Alteris Renewables	bobchew@alterisinc.com	401-447-7835

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

RHODE ISLAND DIVISION OF PUBLIC UTILITIES AND CARRIERS

In RE: Complaint of Benjamin Riggs

Docket No. D-10-126

NATIONAL GRID'S REQUEST FOR PROTECTIVE TREATMENT OF CONFIDENTIAL INFORMATION

National Grid [1] hereby requests that the Rhode Island Division of Public Utilities and Carriers ("Division") provide confidential treatment and grant protection from public disclosure of certain confidential, competitively sensitive, and proprietary information submitted in this proceeding, as permitted by Division Rule 3(d) and R.I.G.L. § 38-2-2(4)(i)(B).

I. BACKGROUND

On December 20, 2010, National Grid filed with the Division responses to the Division's Second Set of Data Requests in the above-referenced matter. Attachments to Responses 2-1, 2-2, 2-3, and 2-7 to National Grid's responses contain confidential customer billing information for which National Grid is requesting confidential treatment.

II. LEGAL STANDARD

The Division's Rule 3(d) provides that access to public records shall be granted in accordance with the Access to Public Records Act ("APRA"), R.I.G.L. §38-2-1, *et seq.* Under APRA, all documents and materials submitted in connection with the transaction of official business by an agency is deemed to be a "public record," unless the information contained in such documents and materials falls within one of the exceptions specifically identified in R.I.G.L. §38-2-2(4). Therefore, to the extent that information provided to the Commission falls within one of the designated exceptions to the public records law, the Commission has the authority under the terms of APRA to deem such information to be confidential and to protect that information from public disclosure.

In that regard, R.I.G.L. §38-2-2(4)(i)(B) provides that the following types of records shall not be deemed public:

> Trade secrets and commercial or financial information obtained from a person, firm, or corporation which is of a privileged or confidential nature.

The Company has redacted and seeks protective treatment relative to the attachments that contain customer billing information records. This information is confidential to the customers in questions and could have negative commercial impacts for those customers if it became public.

[1] The Narragansett Electric Company d/b/a National Grid ("National Grid or "the Company").

III. CONCLUSION

Accordingly, the Company requests that the Commission grant protective treatment to those previously identified attachments to it s responses to data requests.

Respectfully submitted,

NATIONAL GRID

By its attorney,

Thomas R. Teehan, Esq. (RI Bar #4698)
National Grid
280 Melrose Street
Providence, RI 02907
(401) 784-7667

Dated: December 20, 2010

The Narragansett Electric Company
d/b/a National Grid
Docket No. D-10-126
In Re: Complaint of Benjamin Riggs
Relating to Town of Portsmouth Generator Facility – Net Metering
Division Data Requests – Set 2
Issued on November 30, 2010

Division 2-1

Request:

Are the meters used to measure electricity consumption at Portsmouth High School ("PHS"), Portsmouth Middle School ("PMS"), the Hathaway School ("HS"), and the two accounts at Portsmouth Town Hall ("PTH") read at the same time as the meter that measures the output of the PWT? If not, provide the meter reading schedules used.

Response:

No, the meters for the at Portsmouth High School ("PHS"), Portsmouth Middle School ("PMS"), the Hathaway School ("HS"), and the two accounts at Portsmouth Town Hall ("PTH") are not read at the same time as the PWT. The reading dates can be found in the following attachments: Attachment 1, DIV 2-1 and Attachment 2, DIV 2-1.

Prepared by or under the supervision of: Timothy Roughan

The Narragansett Electric Company
d/b/a National Grid
Docket No. D-10-126
In Re: Complaint of Benjamin Riggs
Relating to Town of Portsmouth Generator Facility – Net Metering
Division Data Requests – Set 2
Issued on November 30, 2010

Attachment 1, DIV 2-1

REDACTED

The Narragansett Electric Company
d/b/a National Grid
Docket No. D-10-126
In Re: Complaint of Benjamin Riggs
Relating to Town of Portsmouth Generator Facility – Net Metering
Division Data Requests – Set 2
Issued on November 30, 2010

Attachment 2, DIV 2-1

REDACTED

Division 2-2

Request:

Provide the meter reading data for the PWT since March 2009. Provide the read date, meter reading in KWH, and KWH used since last read.

Response:

Meter reading data for the PWT since March of 2009 can be found on the bills on Attachment 1, DIV 2-2 and a summary of the data is included as Attachment 2, DIV 2-2.

Prepared by or under the supervision of: Timothy Roughan

The Narragansett Electric Company
d/b/a National Grid
Docket No. D-10-126
In Re: Complaint of Benjamin Riggs
Relating to Town of Portsmouth Generator Facility – Net Metering
Division Data Requests – Set 2
Issued on November 30, 2010

Attachment 1, DIV 2-2

REDACTED

The Narragansett Electric Company
d/b/a National Grid
Docket No. D-10-126
In Re: Complaint of Benjamin Riggs
Relating to Town of Portsmouth Generator Facility – Net Metering
Division Data Requests – Set 2
Issued on November 30, 2010

Attachment 2, DIV 2-2
REDACTED

Division 2-3

Request:

Provide copies of the electric bills for PHS, PMS, HS, and the two accounts at PTH from March 2009 to the present? Include meter reading dates, meter reading in KWH, KWH used since last read, and the calculations of the month bill. Also show how these bills include any reductions from net metering and any credits.

Response:

Meter reading dates, meter readings in kWh, kWh used since last read, and bill calculations are all found on the bills in the following attachments: Attachment 1, DIV 2-3 (PHS), Attachment 2, DIV 2-3 (HS), Attachment 3, DIV 2-3 (PMS), Attachment 4, DIV 2-3 (PTH), and Attachment 5, DIV 2-3 (PTH-Light).

The bills from March of 2009 through December of 2009 have credits allocated to them which appear on the last page of the bill as a "transferred credit" or "net metering credit". After December of 2009 the net metering credits do not appear on the attached bills because the Town of Portsmouth began to receive net metering credits through a monthly check.

Attached is a summary of billing, identified as Attachment 6, DIV 2-3.

Prepared by or under the supervision of: Timothy Roughan

The Narragansett Electric Company
d/b/a National Grid
Docket No. D-10-126
In Re: Complaint of Benjamin Riggs
Relating to Town of Portsmouth Generator Facility – Net Metering
Division Data Requests – Set 2
Issued on November 30, 2010

Attachment 1, DIV 2-3

REDACTED

The Narragansett Electric Company
d/b/a National Grid
Docket No. D-10-126
In Re: Complaint of Benjamin Riggs
Relating to Town of Portsmouth Generator Facility – Net Metering
Division Data Requests – Set 2
Issued on November 30, 2010

Attachment 2, DIV 2-3

REDACTED

The Narragansett Electric Company
d/b/a National Grid
Docket No. D-10-126
In Re: Complaint of Benjamin Riggs
Relating to Town of Portsmouth Generator Facility – Net Metering
Division Data Requests – Set 2
Issued on November 30, 2010

Attachment 3, DIV 2-3

REDACTED

The Narragansett Electric Company
d/b/a National Grid
Docket No. D-10-126
In Re: Complaint of Benjamin Riggs
Relating to Town of Portsmouth Generator Facility – Net Metering
Division Data Requests – Set 2
Issued on November 30, 2010

Attachment 4, DIV 2-3

REDACTED

The Narragansett Electric Company
d/b/a National Grid
Docket No. D-10-126
In Re: Complaint of Benjamin Riggs
Relating to Town of Portsmouth Generator Facility – Net Metering
Division Data Requests – Set 2
Issued on November 30, 2010

Attachment 5, DIV 2-3

REDACTED

The Narragansett Electric Company
d/b/a National Grid
Docket No. D-10-126
In Re: Complaint of Benjamin Riggs
Relating to Town of Portsmouth Generator Facility – Net Metering
Division Data Requests – Set 2
Issued on November 30, 2010

Attachment 6, DIV 2-3

REDACTED

Division 2-4

Request:

To the extent not provided above, provide the calculation of any net metering credits, including all work papers and assumptions.

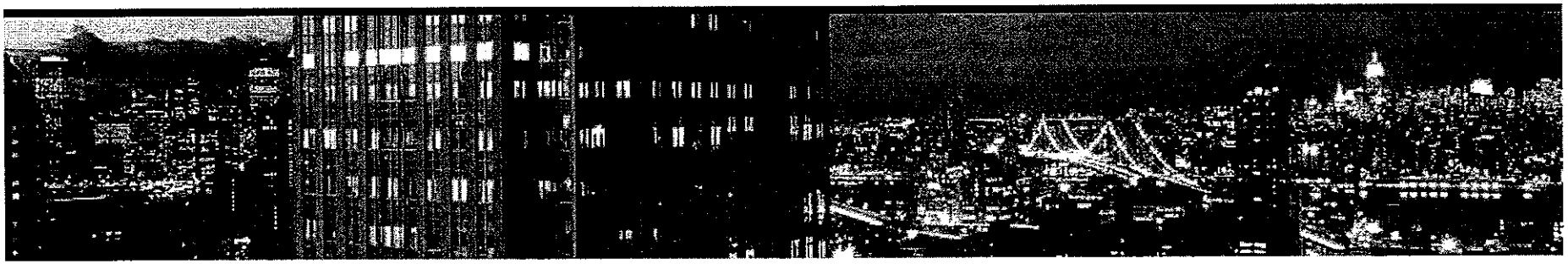
Response:

The net metering calculation is included on the bills provided in Attachment 1, DIV 2-2 (PWT). The net metering credit amount is the sum of the distribution charge, transmission charge, transition charge, and standard offer multiplied by the kWh exported over the billing period. Attachment 1, DIV 2-4 provides data from our website that provides the delivery service rates. Attachment 2, DIV 2-4 provides data from our website that provides the monthly standard offer rate.

Prepared by or under the supervision of: Timothy Roughan

Bilskc

Address https://www.nationalgridus.com/narragansett/business/rates/4_g32.asp



200 KW Demand (G-32)

This service is primarily available for large commercial and industrial customers with a 12-month average demand of 200 kW or greater.

Rates for Delivery Service

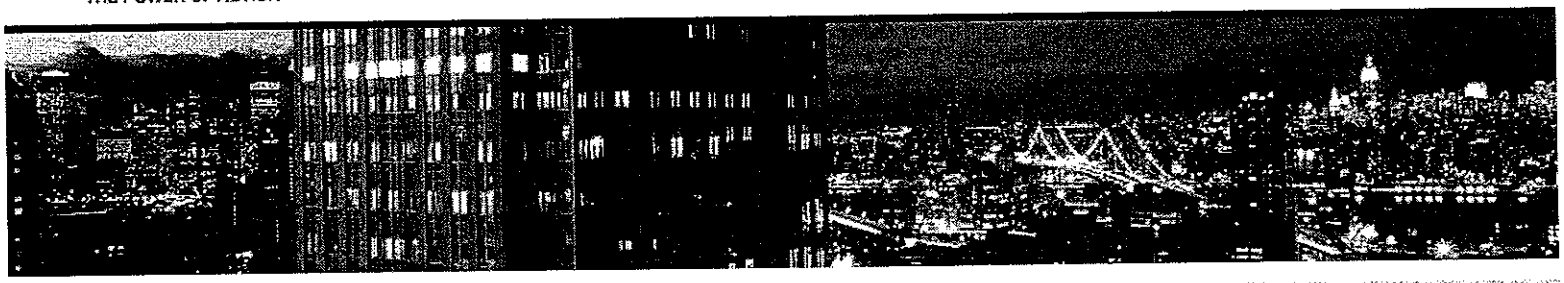
Customer Charge	$750.00/month
Distribution Charge	
Demand in excess of 200 kW	$2.00/kW
Energy	0.873¢/kWh
Transmission Charge	
Demand	$2.28/kW
Transmission Charge	0.575¢/kWh
Transition Charge	0.068¢/kWh
Conservation Charge	0.350¢/kWh

Related Information

Rate Tariff (pdf)

Bilskc

Address https://www.nationalgridus.com/narragansett/business/rates/4_standard.asp



Standard Offer Service
Last Resort Service
Capacity Update

Standard Offer Service

This service is available to all customers who have not chosen an alternate energy supplier.

Current Rate:

Small Customer Class (A-16, A-60, C-06, S-06, S-10, S-14):

March 1, 2010 through September 30, 2010 -- 9.532¢/kWh*
October 1, 2010 through March 31, 2011 -- 9.366¢/kWh*

Large Customer Class (G-02, B-32, G-32, B-62, G-62 and X-01):

January 1, 2010 through January 31, 2010 -- 7.891¢/kWh
February 1, 2010 through February 28, 2010 -- 8.138¢/kWh
March 1, 2010 through March 31, 2010 -- 8.344¢/kWh **
April 1, 2010 through April 30, 2010 -- 7.939¢/kWh **
May 1, 2010 through May 31, 2010 -- 7.796¢/kWh **
June 1, 2010 through June 30, 2010 -- 7.750¢/kWh **
July 1, 2010 through July 31, 2010 -- 7.019¢/kWh **
August 1, 2010 through August 31, 2010 -- 7.372¢/kWh **
September 1, 2010 through September 30, 2010 -- 6.830¢/kWh **
October 1, 2010 through October 31, 2010 -- 6.901¢/kWh **
November 1, 2010 through November 31, 2010 -- 7.148¢/kWh **
December 1, 2010 through December 31, 2010 -- 7.571¢/kWh **

* includes Standard Offer Adjustment Factor of 0.134¢/kWh and Standard Offer Service Administrative Cost Factor of 0.117¢/kWh

** includes Standard Offer Adjustment Factor of 0.144¢/kWh and Standard Offer Service Administrative Cost Factor of 0.102¢/kWh

Related Information

Rate Tariff (pdf)
The Disclosure Label (pdf)

12/01/2010 10:48:28 AM

Division 2-5

Request:

Does NGRID have QF rates for the purchase of power from QFs? If so, please provide these rates that were in effect from March 2009 to the present, and the basis for them.

Response:

In accordance with Section III.A of the Company's Qualifying Facilities Power Purchase Rate, R.I.P.U.C. No. 2035, effective September 14, 2009 (and its predecessor tariff, R.I.P.U.C. No. 2010-A, effective January 1, 2009), the Company pays QFs not eligible for net metering at rates equal to the payments received by the Company for the sale of the QF's output into the ISO-NE administered markets for the hours in which the qualifying facility generated electricity in excess of its requirements.

The QF credits are calculated for each customer for each hour of the month. The formula used to calculate the credit is as follows:

Monthly credit = (hourly wholesale price + congestion + Losses)* QF energy.

This credit is calculated for each hour of the entire month and totaled. The hourly wholesale price is the same for each customer, however, the congestion and loss values differ by ISO-NE reliability zone and node and may be different for each customer depending on each customer's location. These values are provided by ISO-NE. The ISO-NE also provides us with a forward capacity credit, if any, by facility, and that credit is added to the total amount paid to the generator as well.

Prepared by or under the supervision of: Jeanne A. Lloyd

Division 2-6

Request:

Does NGRID charge QFs for the delivery of their output across the NGRID distribution system. For example, assume that a QF located within the NGRID service territory interconnects at a distribution voltage (i.e., 14KV or 4Kv) and wishes to sell its output into the ISO-NE energy markets. Does NGRID charge the QF to wheel power across its distribution system to the nearest transmission node (i.e., 115 KV bus)? If so, provide the rates charged and the basis for them.

Response:

No, Narragansett Electric does not charge QFs to wheel power across its distribution system to the nearest transmission node.

Prepared by or under the supervision of: Jeanne A. Lloyd

Division 2-7

Request:

Provide a list of all QFs that interconnect to NGRID and indicate the voltage at which they interconnect.

Response:

Please see attachment DIV 2-7.

Prepared by or under the supervision of: Timothy Roughan

The Narragansett Electric Company
d/b/a National Grid
Docket No. D-10-126
In Re: Complaint of Benjamin Riggs
Relating to Town of Portsmouth Generator Facility – Net Metering
Division Data Requests – Set 2
Issued on November 30, 2010

Attachment DIV 2-7

REDACTED

Attachment 6

THE NARRAGANSETT ELECTRIC COMPANY
QUALIFYING FACILITIES POWER PURCHASE RATE

I. Applicability

The Company will purchase the electrical output from any qualifying facility as defined under the Public Utility Regulatory Policies Act of 1978 and constructed after November 9, 1978, under the following terms and conditions. Qualifying facilities include the following:

a. Small power production facilities of 20 megawatts or less which use biomass, waste, renewable resources, or any combination thereof for at least 75 percent of their total energy input in the aggregate during any calendar year period.

b. Cogeneration facilities of 20 megawatts or less which first generate electricity and then use at least five percent of the total energy output for thermal production, provided that the useful power output of the facility plus one-half the useful thermal energy output must be:

   1) no less than 42.5 percent of the total energy input of natural gas and oil to the facility in any calendar year; or

   2) if the useful thermal energy output is less than 15 percent of the total energy output of the facility, no less than 45 percent of the total energy input of natural gas and oil to the facility in any calendar year.

c. Cogeneration facilities of 20 megawatts or less which first provide useful thermal energy and then use reject heat to generate electricity, provided that the useful power output must be no less than 45 percent of the total energy input of natural gas and oil during any calendar year period.

II. Terms and Conditions

1. Any qualifying facility that desires to sell electricity to the Company must provide the Company with sufficient prior written notice. At the time of notification, the qualifying facility shall provide the Company with the following information:

   a. The name and address of the applicant and location of the qualifying facility.
   b. A brief description of the qualifying facility, including a statement indicating whether such facility is a small power production facility or a cogeneration facility.
   c. The primary energy source used or to be used by the qualifying facility.
   d. The power production capacity of the qualifying facility and the maximum net energy to be delivered to the Company's facilities at any clock hour.
   e. The owners of the qualifying facility including the percentage of ownership by any electric utility or by any public utility holding company, or by any entity owned by either.
   f. The expected date of installation and the anticipated on-line date.
   g. The anticipated method of delivering power to the Company.
   h. A copy of the qualifying facility's Federal Energy Regulatory Commission certification as a qualifying facility.

   Such notice shall be sent to:

   Director, Regulated Load and Distributed Generation
   Energy Portfolio Management Group
   National Grid USA Service Company, Inc.
   100 East Old Country Rd.
   Hicksville, NY 11801

   Following such notification, the qualifying facility and the Company shall execute the standard purchase power agreement setting forth the terms of the sale, a form of which is attached in Schedule A, which shall be executed no later than thirty (30) days prior to the desired commencement date of the sale. The actual commencement date of the sale shall be the first day of the calendar month following the acceptance by ISO-New England, Inc. ("ISO-NE") of the

registration of the qualifying facility in the ISO-NE settlement system.

2. The qualifying facility shall furnish and install the necessary meter socket and wiring in accordance with the Company's Standards for Connecting Distributed Generation.

3. The qualifying facility shall install equipment approved by the Company which prevents the flow of electricity into the Company's system when the Company's supply is out of service, unless the qualifying facility's generation equipment can be controlled by the Company's supply.

4. The qualifying facility's equipment must be compatible with the character of service supplied by the Company at the qualifying facility's location.

5. The qualifying facility shall be required to install metering pursuant to the requirements contained in the Company's Standards for Connecting Distributed Generation.

6. The qualifying facility shall enter into an interconnection agreement and follow all other procedures outlined in the Company's Standards for Connecting Distributed Generation, as amended and superseded from time to time.

7. The qualifying facility shall reimburse the Company for any equipment and the estimated total cost of construction (excluding costs which are required for system improvements or for sales to the qualifying facility, such as the cost of a standard metering installation, in accordance with the Company's Terms and Conditions) which are necessary to meter purchases under this rate and to interconnect the qualifying facility to the Company's distribution or transmission

system in accordance with the Company's Standards for Connecting Distributed Generation. The Company will install, own, and maintain the equipment.

8. The qualifying facility shall save and hold harmless the Company from all claims for damage to the qualifying facility's equipment or injury to any person arising out of the qualifying facility's use of generating equipment in parallel with the Company's system; provided that nothing in this paragraph shall relieve the Company from liability for damage or injury caused by its own fault or neglect.

9. As a condition to receiving any payments required by this rate, the qualifying facility must comply with any and all applicable New England Power Pool ("NEPOOL") and ISO-NE rules, requirements, or information requests that are necessary for the qualifying facilities' output to be sold into the ISO-NE administered markets (whether the Company or the qualifying facility is actually submitting information to ISO-NE). If the Company must provide to NEPOOL or ISO-NE any information regarding the operation, output, or any other data in order to sell the output of the qualifying facility into the ISO-NE administered markets, the qualifying facility must provide such information to the Company in a timely manner. The Company will not be liable to pay the qualifying facility for the output of the qualifying facility if the Company is unable to sell the output into the ISO-NE administered markets because of a failure of the qualifying facility to provide to the Company, NEPOOL or ISO-NE any information on a timely basis that was required for sale of the facility output into the ISO-NE administered markets. For any perceived errors or omissions in the data reported

to NEPOOL or ISO-NE or the transactions from ISO-NE to the Company or qualifying facility, the qualifying facility must notify the Company within 30 days of such error or omission occurring.

10. NEPOOL and ISO-NE have the authority to impose fines, penalties, and/or sanctions on participants if it is determined that a participant is violating established rules in certain instances. Accordingly, to the extent that a fine, penalty, or sanction is levied by NEPOOL or the ISO-NE as a result of the qualifying facility's failure to comply with a NEPOOL or ISO-NE rule or information request, the qualifying facility will be responsible for the costs incurred by the Company, if any, associated with such fine, penalty or sanction.

III. Rates for Purchases

A. Rates for Qualifying Facilities

For qualifying facilities not exempted by the net metering provisions in section B below, the Company will pay rates equal to the payments received by the Company for the sale of such qualifying facilities' output into the ISO-NE administered markets for the hours in which the qualifying facility generated electricity in excess of its requirements.

B. Net Metering Exemption for Certain Qualifying Facilities

For qualifying facilities which utilize solar or wind technology and (i) are 1.65 megawatt (MW) or less , or (ii) are 2.25 MW or less and are developed but not owned by cities or towns, but are located on city or town owned land and provide power solely to the city or town that the project is located in, or (iii) are 3.5 MW or less and are entirely owned by cities and towns of

Rhode Island, state agencies and the Narragansett Bay Commission, the Company will permit the Net-Metering Facility (NMF) to deliver electricity to the Company through net metering as specified below:

(1) The customer's usage and generation will be netted for a twelve-month period beginning on January of each year[1]. If the electricity generated by the NMF during a billing period exceeds the customer's kWh usage during the billing period, the customer shall be billed for zero kilowatt-hour usage and a renewable generation credit shall be applied to the customer's account. Renewable generation credit shall be defined as the credit equal to the excess kilo-watthours generated multiplied by the sum of 1) the Standard Offer or Last Resort Service charge, if applicable; 2) the distribution kWh charge for the applicable rate class; 3) the transmission kWh charges for the applicable rate class; and 4) the transition charge. Unless otherwise requested by the customer, the customer shall be compensated monthly by a check from the Company for the Renewable Generation Credits. Upon request by the customer, the renewable generation credit may be credited to the customer's bill in the following billing period and carried forward to subsequent billing periods through the end of the netting period. Any unused credits remaining on the customer account at the end of the netting period shall used to offset recoverable Company costs. Any Rhode Island city or town, state agency, educational institution, non-profit affordable housing, farm, or the Narragansett Bay Commission, whose account is not currently in arrears, may elect to apply any such credits earned to other accounts, up to a

[1] The initial netting period will be from the date of the first meter read after the commencement of operation of the qualifying facility through December following the first January occurring subsequent to the commencement of operation.

maximum of ten, owned by it. Non-profit affordable housing as defined by Rhode Island General Law subsection 39-26-2(19) shall use the Renewable Generation Credits to benefit the residents of the eligible affordable housing development. All Customers eligible under the provisions of this section will be required to complete Schedule B.

(2) A maximum of two percent (2%) of peak load of aggregate installed capacity shall be allowed to be net metered provided, however, at least one (1) megawatt is reserved for projects less than twenty-five (25) kilowatts (kW). Upon reaching this maximum, the Company shall notify the Public Utilities Commission.

(3) Net metering shall be limited to charges assessed on a per kilowatt-hour basis as defined in Section III.B(1). Customers with demand meters will continue to pay charges billed on a kilowatt and/or kVA basis.

(4) Customers who install generation eligible for net metering under the provisions of this section must follow the Company's Standards for Connecting Distributed Generation.

(5) Pursuant to Rhode Island General Laws §39-26-6(h), any prudent and reasonable costs incurred by the Company pursuant to achieving compliance with Rhode Island General Laws §39-26-6(g) and the annual amount of the distribution portion of any Renewable Generation Credits provided to NMFs shall be aggregated on an annual basis by the Company and recovered from all customers through a uniform per kWh-hour surcharge embedded in the distribution component of the rates reflected on customer bills.

IV. Rates for Distribution Service to Qualifying Facilities

Retail distribution delivery service by the Company to the qualifying facility shall be governed by the tariffs, rates, terms, conditions, and policies for retail delivery service which are on file with the Public Utilities Commission. The selection of the appropriate retail rate will be determined as follows:

1) for qualifying facilities with generating capacity of less than 10kW, the appropriate residential or small general service rate will apply unless the customer's load necessitates use of G-02, G-32, or G-62 rate;
2) for qualifying facilities serving non-profit affordable housing, Residential Rate A-16 will apply;
3) for qualifying facilities with generating capacity of at least 10kW but not more than 200 kW, Rate G-02 will apply, unless the customer's load necessitates the use of the G-32 or G-62 rate;
4) for qualifying facilities with generating capacity of at least 200kW but not more than 3,000 kW, Rate G-32 will apply unless the customer's load necessitate the use of the G-62 rate;
5) for qualifying facilities with generating capacity of 3,000 kW or more, Rate G-62 will apply.

Schedule A

THE NARRAGANSETT ELECTRIC COMPANY
QUALIFYING FACILITY POWER PURCHASE AGREEMENT

The Agreement is between _____, a Qualifying Facility ("QF") and The Narragansett Electric Company (the "Company") for energy purchases by the Company from the QF's facility located at _____, Rhode Island.

Agreement to Purchase under the Qualifying Facilities Power Purchase Rate Tariff

Effective as of _____, the Company agrees to purchase electricity from the QF and QF agrees to sell electricity to the Company under the terms and conditions of the Company's Qualifying Facilities Power Purchase Rate Tariff as currently in effect or amended by the Company in the Company's sole discretion. The QF agrees to comply with the terms and conditions of the Qualifying Facilities Power Purchase Rate Tariff and associated policies of the Company that are on file with the Rhode Island Public Utilities Commission as currently in effect or as modified, amended, or revised by the Company, and to pay any metering and interconnection costs required under such tariff and policies.

Payments for Energy

The Company will pay the QF at the rates in effect at the time of delivery as provided for in the Qualifying Facilities Power Purchase Rate Tariff.

Notice

The Company or QF may terminate this agreement on thirty (30) days written notice which includes a statement of reasons for such termination.

Agreed and Accepted

_____ _____
Date

_____ _____
The Narragansett Electric Company Date

Schedule B

THE NARRAGANSETT ELECTRIC COMPANY
NET-METERING APPLICATION OF CREDITS

The Agreement is between _____, a Net-Metered Facility ("NMF") and The Narragansett Electric Company (the "Company") for application of credits earned through net-metering as per section III.B(1) from the NMF located at _____, Rhode Island.

The NMF agrees to comply with the provisions of the Qualifying Facilities Power Purchase Rate Tariff, the applicable retail delivery tariffs and terms and conditions for service that are on file with the Rhode Island Public Utilities Commission as currently in effect or as modified, amended, or revised by the Company, and to pay any metering and interconnection costs required under such tariff and policies.

Agreement to apply credits earned by the NMF

Effective as of _____, the customer requests and the Company agrees that the application of renewable generation credits applicable to the NMF will be as follows (choose one):

____ Renewable generation credit should be applied to account of NMF customer of record in the month following the month that the credit is earned. This credit will carry forward from month-to-month through the end of the twelve month netting period.

____ Renewable generation credit should be submitted to the NMF customer of record in the form of a monthly check from the Company and should be remitted to (Customers should consult their tax attorney on the tax implications of this option):

Name (to appear on the check):

_____

Address:

_____
_____
_____

____ Renewable Generation credit should be applied to the following account(s) designated by the NMF under the terms and conditions of the Company's Qualifying Facilities Power Purchase Rate Tariff as currently in effect or amended by the Company in the Company's sole discretion. This option is available only to accounts of Rhode Island cities or towns, state agencies,

educational institutions, non-profit affordable housing, farms, or the Narragansett Bay Commission.

Designated Account(s)

The following information must be provided for each individual designated account (up to a maximum of ten (10)):

Name: _____
Address: _____
Account number: _____
Percentage of monthly earned credit: _____

The Company will credit the NMF and its designated account(s) the rates in effect at the time of delivery as provided for in the Qualifying Facilities Power Purchase Rate Tariff.

Notice

Execution of this agreement will cancel any previous agreement for the qualified facility or net metered account under the Qualifying Facilities Power Purchase Rate Tariff.

The Company or NMF may terminate this agreement on thirty (30) days written notice which includes a statement of reasons for such termination. In addition the NMF must re-file this agreement annually.

Agreed and Accepted

_____ _____
Customer Date

_____ _____
The Narragansett Electric Company Date

Attachment 7

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PUBLIC UTILITIES COMMISSION
89 Jefferson Boulevard
Warwick Rhode Island 02888
(401) 941-4500

Chairman Elia Germani
Commissioner Mary E. Bray
Commissioner Paul J. Roberti

August 17, 2010

The Honorable Gordon D. Fox
Speaker of the House
Rhode Island State House
Providence, Rhode Island 02903

Dear Speaker Fox:

This letter is sent pursuant to Rhode Island General Law §39-26-6(i), which requires that the Rhode Island Public Utilities Commission ("Commission") report:

> *...to the governor, the speaker of the house and the president of the senate on the status of the implementation of subsection (g) and (h), including if said provisions are optimally cost-effective, reliable, prudent and environmentally responsible.*

The referenced subsections refer to the treatment of distributed generation from renewable energy systems, also known as "net metering." More specifically, subsection (g) outlines the criteria for the maximum allowable distributed generation capacity for eligible net-metered energy systems;[1] the aggregate amount of net metering across the service territory; and billing and credit criteria for net metered customers. Subsection (h) allows for the recovery of costs associated with the implementation of subsection (g) and states:

> *Any prudent and reasonable costs incurred by the electric distribution company pursuant to achieving compliance with subsection (g) and the annual amount of the distribution component of any renewable generation credits provided to net metering customers shall be aggregated by the distribution company and billed to all customers on an annual basis through a uniform per kilowatt-hour surcharge embedded in the distribution component of the rates reflected on customer bills.*

The Commission has worked with National Grid to collect the information necessary to comply with the reporting requirement under §39-26-6(i). We have summarized much of the pertinent information below, however, we are also attaching a more detailed document on these matters to this letter. The document, dated July 6, 2010, is in the form of a letter from National Grid senior counsel in response to a Commission request for this data.

[1] Net metering is limited to solar and wind facilities, as specified under §39-26-2(17).

Rhode Island General Law §39-26-6(g)(2) defines the maximum aggregate amount of net metering as two percent (2%) of peak system load, and reserves at least 1 megawatt ("MW") for projects less than twenty-five (25) kilowatts ("kW") in size. National Grid's reported historic peak load in Rhode Island is 1,932 MW, thus, the 2% cap on distributed generation is approximately 38.6 MW. Currently, National Grid has 156 customers with net metered facilities, with an aggregate capacity of 3,212 kW (or, 3.2 MW). This capacity represents 0.17% of peak load, well below the 2% cap. Of the 156 customers noted above, there were 149 customers with generator capacity of less than 25 kW. Their aggregated capacity totaled 716.5 kW (or, 0.7 MW).

The Commission also requested information on the number of net metered customers being compensated by checks versus bill credits. Under §39-26-6(g)(3), "if the electricity generated by the renewable generation facility during a billing period exceeds the customer's kilowatt-hour usage during the billing period," they are billed for zero kW usage and compensated monthly by a check from the electric distribution company for their excess renewable energy credits, unless otherwise requested. These credits are defined by the law as the excess kWhs multiplied by the sum of the standard offer service charge (per rate class), distribution charge, transmission charge, and transition charge.[2] Facilities owned by a city or town, educational institution, nonprofit affordable housing, farm, the state, or the Narragansett Bay Commission may elect to apply excess renewable generation credits to no more than ten (10) other accounts owned by that customer.[3] According to National Grid, of the current 156 customers with eligible net metered facilities, 57 customers (36.5%) were being compensated for excess renewable generation credits by check, while 99 customers (63.5%) retained bill credits.

As noted, the distribution company is allowed to recover the costs it incurs to implement the laws governing net metering. These costs are reconciled on an annual basis. As of 2008, the annual amount eligible for recovery was $30,897. In 2009, the amount was $17,264. National Grid has determined that this total amount of $48,161 "is too small to produce a billable charge," and it will likely be reconciled in a subsequent year.

Finally, the Commission asked National Grid to provide an opinion as to whether or not the company believes that the net metering requirements, as specified by law, are optimally cost-effective, reliable, prudent, and environmentally responsible. Their concerns are noted at length in the attached document and we encourage you to read their response in its entirety.[4] While the Commission takes no definitive position on these matters, we would note that the implementation of the state's net metering policy does shift costs from a very small number of ratepayers with installed eligible net metered facilities to all others. While it would seem that these costs are relatively small at current levels, we are concerned by several of National Grid's observations. For example, the company has interpreted the General Assembly's net metering policy as one that was designed "to assist customers who decided to install units to cover their own average usage at their own premises." However, they state that some developers are proposing to over-size generation units as a means to profit from selling electricity at above-

[2] See §39-26-2(22).
[3] See §39-26-6(g)(3)(ii)(B).
[4] Please refer to pages 3 through 5 of National Grid's July 6, 2010 letter to the Commission; See attached.

market rates. In essence, a net metered customer may interconnect a facility with the capacity to generate substantially more electricity than they could possibly use in any given month. Under the law, that electricity would essentially be purchased by National Grid at current rates and potentially be resold in the wholesale market at a significant loss. These losses would ultimately be recovered from all other ratepayers.

To the extent that this "gaming" is allowed to occur under current law, the Commission is concerned that other Rhode Island electric ratepayers may be in the unfortunate position of subsidizing a profit-taking scheme at a time when many residents and businesses are struggling to stay afloat. Rhode Islanders are already supporting numerous electricity-related policies through their rates and various bill surcharges, including the renewable energy standard, energy efficiency and demand-side management programs, and the subsidization of the A-60 low-income rate. As the levels of distributed generation throughout the electric system increase and the costs associated with those net metered facilities rise, ratepayers will be asked to pay even more. We would encourage the state's elected officials to consider the intent of the net metering law and determine to what extent current policy can be gamed at the expense of those Ocean State residents and businesses subsidizing it.

Should you have any questions concerning this matter, please do not hesitate to contact me.

Sincerely,

Elia Germani
Chairman

cc: The Honorable Donald L. Carcieri, Governor
The Honorable M. Teresa Paiva-Weed, Senate President
Commissioners
Thomas F. Ahern, Administrator, DPUC

nationalgrid

Thomas R. Teehan
Senior Counsel

July 6, 2010

VIA HAND DELIVERY & ELECTRONIC MAIL

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

RE: R.I.G.L. § 39-26-6(i)

Dear Ms. Massaro:

On behalf of The Narragansett Electric Company ("National Grid" or "Company"), I am responding to a letter received by Senior Legal Counsel Cynthia Wilson-Frias on June 23, 2010 requesting information from National pertaining to eligible net metered customers.

The Company's original response, which was made on June 30, 2010, inadvertently neglected to respond to the fifth of the six information requests. This updated letter includes that response.

National Grid provides the following information:

Request (1): Please provide the aggregate amount of net metering as a percentage of the peak load and the range of project sizes. Please include specific reference to the amount of net metering related to projects of 25kW of less.

Request (2): Please provide the total number of net metering customers.

Company Response: The table below shows the total aggregate capacity, in total kW installed and as a percentage of the Company's historic peak load of 1,932 MW, of all net metered facilities currently installed on the Company's system.

	Number of Customers	Aggregate Capacity (kW)	Aggregate Capacity as % of Peak Load
Generators w/capacity less than 25 kW	149	716.5 kW	0.04 %
Generators w/capacity greater than 25 kW	7	2,485.6 kW	0.13 %
Total Net Metering	156	3,212 kW	0.17 %

Request (3): Please indicate the number of net metering customers choosing checks and the number choosing bill credits by customer type or rate class, if possible.

Company Response: The table below indicates the number of customers in each rate class who have chosen to receive renewable generation credit in the form of a monthly check and the number who have chosen to have the credits applied to the monthly bill:

Rate Class	Bill Credit	Check	Total
A16	65	51	116
A60	0	1	1
C06	7	3	10
G02	3	0	3
G2	11	0	11
G32	12	2	14
G62	1	0	1
Grand Total	99	57	156

Request (4): R.I.G.L. § 39-26-6(g)(4) states: "If the customer's kilowatt-hour usage exceeds the electricity generated by the renewable generation facility during the billing period, the customer shall be billed for the net kilowatt-hour usage at the applicable rate. Any excess credits may be carried forward month to month for twelve (12) month periods as established by the commission. At the end of the applicable twelve (12) month period, if there are unused excess credits on the net metering customer accounts, such credits shall be used to offset recoverable utility costs." Please indicate whether there have been any accounts with excess credits at the end of the applicable twelve (12) month credit and if so, how those credits were applied.

Company Response: Prior to January 1, 2009, the Company's Qualifying Facility Tariff, R.I.P.U.C. No. 2006 provided that "the customer's usage and generation will be netted for a twelve-month period beginning on January of each year[1]. In the event of a negative read for a given month, such amount will accumulate as a "generation credit" to the customer from month to month for a twelve-month period. Generation credits will be used to offset any positive meter reads (i.e. usage) for the subsequent monthly billing period. Any generation credits remaining at the end of the calendar year may be carried forward to the subsequent calendar year, but must be used by December 31 of such subsequent year."

[1] The initial netting period will be from the date of the first meter read after the commencement of operation of the qualifying facility through December following the first January occurring subsequent to the commencement of operation.

As of December 31, 2008, eight (8) customers had generation credits remaining, totaling 7,870 kWhs. In accordance with the provisions of R.I.P.U.C. No. 2006, all credits were carried over into 2009. R.I.P.U.C. No. 2006 was superceded by R.I.P.U.C. No. 2010-A, effective January 1, 2009, and the currently effective R.I.P.U.C. No. 2035, effective September 15, 2009 which incorporates the provisions of R.I.G.L. § 39-26-6(g)(4). As of December 31, 2009, none of the 93 customers who had chosen to receive bill credits rather than a check as compensation for renewable generation credits had any generation credits remaining at that time.

Request (5): Please provide an accounting of the costs incurred by National Grid pursuant to achieving compliance with subsection (g) and the annual amount of the distribution component of any renewable generation credits provided to net metering customers for which the Company will be seeking recovery. Please break out the costs by year since National Grid has not yet sought to implement a surcharge.

Company Response: Rhode Island General Laws §39-26-6(h) and R.I.P.U.C. No. 2006, Section III.B (5)[2] allowed the Company to reconcile on an annual basis the distribution portion of any renewable credits *plus* the distribution portion of any distribution company delivery charges displaced by renewable energy systems subject to R.I.P.U.C. No. 2006, Section III. As reported in the Company's filing in Docket No. 4011, Schedule JAL-14, the total amount eligible for recovery during 2008 was $30,897. As reported in Docket No. 4140, Schedule JAL-13, the distribution portion of the renewable credits paid to eligible net metered facilities during 2009 was $17,264. The total amount for both 2008 and 2009 is $48,161. Since this amount is too small to produce a billable charge, the Company requested deferral of the amount until the subsequent year's reconciliation filing.

Request (6): In addition to the specific information requested above, the Commission has asked the Company's opinion as to whether National Grid believes the net metering requirements are optimally cost-effective, reliable, prudent and environmentally responsible.

Company Response: National Grid is becoming increasingly concerned that net metering is being used in ways in which it never was intended to be employed. The genesis of net metering was to assist customers who decided to install units to cover their own average usage at their own premises. It was understood that from time to time production would exceed usage and, thus, net metering provided an added supplemental benefit. Today, the net metering rules are being stretched beyond their original benign purposes. Many developers are now attempting or proposing to deliberately over-size generation units at customer locations, or locate units far removed from customer locations as stand alone generation projects, without regard to what actual consumption is taking place at the customer location. Thus, net metering is being turned into a means of selling electricity at above market rates, rather than a means to provide supplemental benefits when production occasionally exceeds

[2] Effective January 1, 2008

usage at the customer site. The problem is that these sales proliferate and take place in a manner that is not at all transparent. While the Commission or others may be challenged by long term contracts that reflect above market rates, net metering has precisely the same effect, but without regulatory check or oversight. Instead of power purchase contracts being considered for their cost, over-sized generation projects are created and the utility is required to essentially pay for the power generated at above market rates. In turn, all other customers pick up the difference between the market price of energy and the net metering rate in lost revenues. The new system of supplying "credits" is the same as paying for electricity generated at above market rates. The difference is that the net metering credits have no regulatory transparency.

There also is another issue relating to lack of transparency. When a customer employs net metering, the impression is left that the customer's generation is "saving money." That may be true in an economic sense for that individual customer. However, it is not true as it applies to costs of the distribution system. While there are real savings for the value of the commodity of electricity that no longer needs to be purchased, the credits that allow the net metering customer to avoid paying for delivery charges do not represent "real" savings. Rather, it is a disguised "cross subsidy" through which all other distribution customers fund the net metering customer. Thus, a significant portion of the savings is simply a shift of cost responsibility from the net metering customers to all other customers. In that way, net metering customers avoid paying for their use of the distribution system that occurs when the generating unit is not producing electricity.

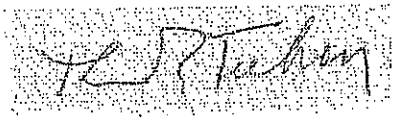
The renewable generation credits paid to net metered customers are collected from all other customers through distribution charges or through various reconciliation clause adjustment factors. In addition, customers who provide some or all of their own energy requirements are able to avoid contributions to public benefit charges, like energy efficiency and renewable energy charges and low income assistance payments and are able to reduce their contribution to fixed transmission and distribution costs which must then be recovered from other customers. National Grid most certainly supports advancing renewable generation and furthering renewable energy policy. But the Company believes that this should take place in a transparent manner, where the real cost is considered against the benefits provided. Net metering is the least transparent means of achieving the goals. When rate-shifting and cross subsidies intended to advance renewable initiatives are lacking transparency, that is when the achievement of otherwise laudable goals can have unintended economic consequences. With large amounts of net metering, rates will increase for distribution customers, but neither policy-makers nor customers will truly understand the cause. National Grid believes that there may be other more direct means of achieving the renewable energy development objectives outside of net metering, where the costs are visible and the means more efficient and economic.

Finally, the Company believes that two aspects of the current rules should be maintained. First, the current limits placed on the size of individual generating units are reasonable and should be maintained. Second, the total amount of generation eligible for net

metering should remain limited to 2% of the Company's peak. Currently, this cap results in an allowed aggregate installed capacity of approximately 40MW. Since the amount of generation currently installed is only 3.2 MW, the Company believes that the current limit is adequate, and should allow for reliable access to net metering by customers if developments are sized appropriately to only offset actual customer usage. Should large numbers of oversized or stand-alone generation units be granted net metering treatment, the cap will be more quickly reached, and the result will be unreliable access to this treatment for customers seeking to develop on-site resources for their own use in the future.

If you have any questions regarding the information provided, please do not hesitate to contact me at (401) 784-7667.

Very truly yours,



Thomas R. Teehan

cc: Leo Wold, Esq.
Steve Scialabba, Division

280 Melrose Street, Providence, RI 02907
T: 401-784-7667 F: 401-784-4321 thomas.teehan@us.ngrid.com www.nationalgrid.com