



State of Rhode Island and Providence Plantations

DEPARTMENT OF ATTORNEY GENERAL

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Peter F. Kilmartin, Attorney General

May 16, 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 Opposition to Motion for Summary Disposition of the Town of Portsmouth et. al in the above captioned matter.

Very truly yours,

Jon 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 : DOCKET No. D-10-126
TOWN OF PORTSMOUTH GENERATOR :
FACILITY – NET METERING :**

**ADVOCACY SECTION OF THE DIVISION OF PUBLIC UTILITIES AND
CARRIERS OBJECTION TO THE MOTION FOR SUMMARY DISPOSITION
OF THE TOWN OF PORTSMOUTH, THE WASHINGTON COUNTY
REGIONAL PLANNING COUNCIL, CHURCH COMMUNITY HOUSING
CORPORATION, PEOPLE’S POWER AND LIGHT AND THE TOWN OF
WESTERLY**

INTRODUCTION

Now comes the Advocacy Section of the Division of Public Utilities and Carriers (the “Advocacy Section”) pursuant to Rule 19(d) of the Rules of Practice and Procedure of the Division of Public Utilities and Carries and hereby objects to the Motion for Summary Disposition of the Town of Portsmouth (“Portsmouth”), the Washington County Regional Planning Council (the “Planning Council”), the Church Community Housing Corporation (“Church”), People’s Power and Light (“People’s”) and the Town of Westerly (“Westerly”) (used collectively herein as the “Petitioners”).¹ The grounds supporting the Advocacy Section’s objection are set-forth herein.

¹ It should also be noted that only one of the Petitioners here, Portsmouth, is a full party to this case. The other Petitioner’s participation has been limited solely to filing briefs on the issues of whether the Town of Portsmouth is receiving a rate for the output it sells back to National Grid comporting with the Tariff and whether the Town of Portsmouth’s Wind Facility is a net metering configuration or a wholesale generator under state and federal law. The Advocacy Section questions the propriety and standing of petitioners other than Portsmouth to file a motion for summary disposition.

ARGUMENT

First, it appears that Petitioner's have overlooked the fact that the hearing officer limited the scope of this proceeding to the four corners of the Riggs Complaint.² The Advocacy Section however did not overlook nor misunderstand this clear and unequivocal pronouncement. The Advocacy Section therefore reiterates, as it asserted in the recent scheduling conference, this matter is not a rate setting proceeding. It is not seeking, nor does it believe the Division of Public Utilities and Carriers (the "Division") has the jurisdiction to decide whether the rate Portsmouth receives for the sale of its output to National Grid is excessive. Similarly, the Advocacy Section is not seeking in this docket for the Division to pass on the constitutionality of Rhode Island's so-called net-metering statute. The hearing officer may read the state net-metering statute to interpret whether, as the Petitioners claim, this is a mere net-metering procedure or on the other hand, a wholesale transaction requiring shifting to a different rate category for Portsmouth under National Grid's tariff. These sorts of questions are not of constitutional dimension calling for the Division to abstain from ruling contrary to Petitioners assertions.

The Advocacy Section therefore seeks that the hearing officer, enter an order here which inter alia, establishes once and for all the scope of the proceedings so there is no mistake about the jurisdiction of the Division and that of the PUC as to the matters for disposition in the instant case. Moreover, the Division need not reach the questions raised

² It should be noted that the Motion's Background & Facts section contains citations to R.I.G.L. 39-26-4 Renewable Energy Standard (RES) and 39-26.1-3 Long-Term Contract Standard. Neither of these cited sections have any relevance whatsoever with the transaction between National Grid and the Portsmouth wind turbine. The renewable energy certificates created by the facility are sold to the Energy Consumers Alliance of New England and are not available to National Grid to meet its RES compliance under 39-26-4. Regarding the Long-Term Contract Standard, National Grid has not signed a long-term contract with the Portsmouth WTF and the transaction with the Portsmouth WTF provides nothing towards National Grid's requirement to meet the minimum long-term contract capacity of 90 MW under 39-26.1 et al.

by the Petitioners in order to dispose of the instant complaint. The Division need only dispose of whether, under industry standards and within the context of National Grid's tariff, the Portsmouth/National Grid transaction, which is the subject of the complaint here, complies with National Grid's tariff. The order should also deny Petitioners request for summary disposition for the reasons set-forth herein.

The Division has the authority to dispose of the tariff compliance issue here pursuant to R.I. Gen. Laws § 39-4-10 which provides:

If...the division of public utilities and carriers shall find that any regulation, measurement, practice, act, or service or any public utility is unjust, unreasonable, insufficient, preferential, unjustly discriminatory, or otherwise in violation of any of the provisions of chapters 1-5 of this title, or that any service of any such public utility is inadequate or that any service which can be reasonably demanded cannot be obtained, the division shall have power to substitute therefore such other regulations, measurements, practices, service, or acts, and to make such order respecting, and such changes in the regulations, measurements, practices, service, or acts, as shall be just and reasonable, and the power to order refunds as provided for in § 39-3-13.1.

The rate setting issues which Petitioners wish to pursue in this docket such as excessiveness of rates and "avoided cost" are issues within the exclusive jurisdiction of the Public Utilities Commission (the "PUC").³

The Petitioner's argue that the Town of Portsmouth enjoys a municipal exemption from PURPA and the FPA. This is not an issue that need be reached in this case. The argument as to whether Portsmouth is paid an excessive rate for its output according to standards set-forth under PURPA and applicable case law or whether it is exempt from

³ See R.I. Gen. Laws § 39-1-11(c) & 39-1-3(a); See also, In re: Island Hi-Speed Ferry, LLC, 746 A.2d 1240, 1244 (R.I. 2000).

the application of these standards is a rate setting issue.⁴ The exemption argument advanced here might more properly be made in the context of a rate setting case, and decided pursuant to the jurisdiction of the PUC, not the Division.⁵ The Rhode Island Supreme Court made it unequivocally clear when it held in In re: Island Hi-Speed Ferry, LLC, 746 A.2d 1240, 1244 (R.I. 2000) that the Commission (not the Division) pursuant to R.I.Gen. Laws §39-1-1(c) had “exclusive power and authority to supervise, regulate and make orders governing the conduct companies offering [energy, communication, and transportation services] to the public” for the purpose of protecting the public against improper and unreasonable rates. Similarly, the PUC pursuant to R.I. Gen. Laws § 39-1-3(a) possesses the “jurisdiction, powers and duties *** to hold investigations and hearings, involving the rates, tariffs, tolls and charges” of the public utility. Id. Equally as troubling is that as a factual matter it has never been demonstrated and the docket is bereft of evidence that the Town of Portsmouth is the sole owner of this wind generating facility. This fact is critical to applying the purported municipal exemption raised here by at least one of the Petitioners.

The exemption argument, the Advocacy Section asserts would of course have no effect on whether the Division and PUC could address such issues as they apply to National Grid who might well be subject to PURPA and the FPA, thus making determinations as to the application of these standards unavoidable as a practical matter.

⁴ Although referred to in the Advocacy Section’s Memorandum Relating to the Complaint of Benjamin Riggs and the Town of Portsmouth Generator Facility, it does not seek the Division to go beyond deciding whether National Grid is applying this transaction to the proper rate category under its tariff and any other tariff compliance issue deemed appropriate.

⁵ Petitioner’s citation of Narragansett Electric vs. Burke, 381 A.2d 1358 (R.I. 1977) is misplaced and only worthy of slight mention in this footnote because that case of course presumes that the PUC would hold an initial rate hearing. In this case as we know, the PUC never had the opportunity to pass on the initial rate as the parties went off on their own two years ago and apparently, in private, struck a purported agreement on a rate and configuration without the slightest review by any regulatory authority. This argument should be summarily ignored by the hearing officer.

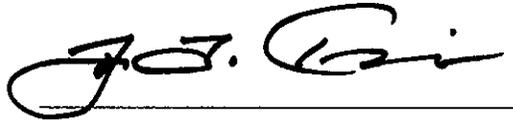
This is not to say that the Advocacy Section is conceding any arguments as to the scope and validity of the so called municipal exemption as it might apply to Portsmouth.

When the dust settles, the issue of tariff compliance and the proper rate category applicable to the transaction here under the instant tariff is what the Division must dispose of according to law and equity.

Respectfully submitted,

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

By its Attorney,

A handwritten signature in black ink, appearing to read "J.G. Hagopian", written over a horizontal line.

Jon G. Hagopian (# 4123)
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May 16, 2011

CERTIFICATE OF SERVICE

I certify that a copy of the within objection was served by electronic mail to all persons listed on the service list for Docket No. D-10-126 on the 16th day of May, 2011.

Donna MacRae-Daigle