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

IN RE: COMPLAINT OF BENJAMIN RIGGS RELATING TO PORTSMOUTH GENERATING FACILITY

Docket No. D-10-126

PRINCIPAL MEMORANDUM OF LAW OF CONSERVATION LAW FOUNDATION

Conservation Law Foundation (CLF) respectfully submits its principal memorandum of law.

In order to answer the specific questions posed to the parties in this case by the Hearing Officer, CLF must first review the contours of applicable law regarding net metering. After the legal fundamentals are understood it will be a relatively simple matter to address the specific questions at issue in this case and show exactly how the Portsmouth facility is to be treated under controlling law.

Applicable Law

The definition of net metering provided to the Division by the Advocacy Section is accurate:

> 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.

Advocacy Division February 2, 2011 Memorandum, at 6 (quoting Sun Edison LLC, 129 FERC ¶ 61,146, 61,620 (2009)). Sun Edison is a leading case on net metering that CLF discusses further below.

The above definition comports with the definition of net metering found in Section 1251 of Energy Policy Act of 2005:

> 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.

16 U.S.C. § 2621(d)(11).

The Federal Energy Regulatory Commission (FERC), in MidAmerican Energy Co., 94 FERC ¶ 61,340 (2001), expressly held that net metering is governed and controlled by state law, not by federal law. As FERC explained in MidAmerican, there are net metering and net billing policies in place in at least 20 states. The net metering policies of no two states are identical; but in all cases, net metering policies are governed by state law. In MidAmerican, FERC expressly held that Iowa's net metering policies "are not preempted by Federal law." MidAmerican, 94 FERC at ¶ 61,340.

Interestingly, the very first sentence of the block quotation from the Sun Edison LLC case cited by the Advocacy Section makes exactly the same point: "Net metering allows a retail electric customer to produce and sell power onto the Transmission System

without being subject to the Commissions' jurisdiction." Advocacy Division February 2, 2011 Memorandum, at 6 (emphasis supplied). That is, net metering allows a retail customer to sell power without being subject to Federal jurisdiction – because net metering is governed by state law.

In MidAmerican, FERC also explained the exact reason that net metering is governed and controlled by state law and not by federal law. In order for federal law to be implicated, there must be, pursuant to the Federal Power Act, a wholesale sale of electricity for resale. 16 U.S.C. § 824(b)(1) (FERC only has jurisdiction over "the sale of electricity at wholesale[;]" and "wholesale" is defined as "a sale of electric energy to any person for resale." 16 U.S.C. § 824(d). Normally, a net-metering self-generator is "merely" offsetting its own electricity use; thus, according to FERC, there is no wholesale sale of electricity for resale; thus, there is no federal jurisdiction, and net metering is governed solely by state law.

Eight years after the MidAmerican decision, FERC reiterated this same reasoning in Sun Edison:

> The Commission has explained that net metering is a method of measuring sales of electric energy. Where there is no net sale over the billing period, the Commission does not view its jurisdiction as being implicated; that is, the Commission does not assert jurisdiction when the end-use customer that is also the owner of the generator receives a credit against its retail power purchases from the selling utility.

Sun Edison, 129 FERC at ¶ 61,620 (footnotes citing MidAmerican omitted; emphasis supplied).

FERC law is admirably clear and unequivocal on these points. Net metering is governed by state law, not federal law. The reason that net metering is governed by state law and not federal law is that when a self-generator uses net metering to offset its own consumption of electricity – even where the self-generator sometimes feeds electricity back to the utility – FERC deems that there is no wholesale sale of electricity for resale such that would trigger federal law. This is true as long as, as FERC stated in Sun Edison, the net metering self-generator remains "a net consumer of electricity." That is, as long as the net metering self-generator produces less electricity in the applicable billing period than it consumes, state law (not federal law) controls the transaction. In Rhode Island, state law sets the net metering rate at the full retail rate. In other words, the meter at the net metering site spins at exactly the same speed in both directions.

There is no case from any administrative agency or court of competent jurisdiction anywhere in the country that contradicts the basic points set forth in the preceding paragraph.

But what if the net metering self-generator produces more electricity in the applicable billing period than it consumes? In that event, a two-tiered structure controls the amount that the utility must pay the net metering self-generator. In the first tier, state net-metering law sets the applicable rate up to the level of the self-generator's own consumption. (In Rhode Island, that is the full retail rate.) In the second tier, just for the incremental additional power produced by the self-generator above and beyond the self-generator's own consumption during the applicable billing period, federal law sets the rate.

This is the familiar "avoided cost" rate set forth in Section 210 of the Public Utilities Regulatory Act of 1978 (PURPA). 16 U.S.C. § 824a-3.

Crucially, although federal law requires that this incremental portion of power above and beyond the self-generator's own consumption during the applicable billing period not exceed the avoided cost rate, FERC has expressly held that state law can define avoided cost, and the state can set different avoided cost rates for different technologies. California Public Utilities Commission, 133 FERC ¶ 61,059 (October 21, 2010). Specifically, FERC held that state law can define avoided cost rates based on the environmental attributes of a generation technology. Id. at ¶¶ 26-31.[1]

All of the foregoing law is unremarkable because it comports completely with the underlying public-policy purposes of PURPA's Section 210. Section 210 "seeks to encourage the development of . . . small power production facilities. Congress believed that increased use of these sources of energy would reduce the demand for traditional fossil fuels." FERC v. Mississippi, 456 U.S. 742, 750, 102 S. Ct. 2126, 2132, 72 L.Ed.2d 532 (1982).

That is, part of the public-policy underpinning of PURPA was to encourage small renewable energy facilities like the Portsmouth wind turbine. As the Congressional

[1] The Advocacy Section cites an earlier decision, California Public Utilities Commission, 132 FERC ¶ 61,047 (2010), without acknowledging the later Clarification, which CLF cites in the text. Advocacy Section's February 2, 2011 Memorandum, at 9-10. The earlier California PUC decision is cited by the Advocacy Section for the ordinary proposition that the portion of net metering output controlled by federal law must not exceed the avoided cost rate. In this context, FERC's Clarification, cited in the text by CLF, is all-important, because it makes clear that: (1) FERC will look to state law for the definition of "avoided cost"; and (2) states may set the avoided cost rate based on the environmental attributes of specific technologies.

Research Service put it, "The original intent of § 210 of PURPA was to encourage alternative sources of electricity beyond traditional generation facilities, without these facilities being subject to all existing federal and state utility regulations." Amy Abel & Jon Shimabukuro, Electricity Restructuring Bills: A Comparison of PURPA Provisions (Congressional Research Service, Apr. 7, 1999), available at http://ncseonline.org/nle/crsreports/energy/eng-50.cfm.

In short, the law applicable to this case can be summed up in a few pithy sentences:

1. Net metering (including setting the rate at which a utility pays a self-generator) is controlled by state law, not federal law, where a net metering self-generator is producing an amount of electricity up to the amount the self-generator is itself consuming. This is because FERC deems that in this circumstance the self-generator is merely off-setting its own consumption of electricity for the applicable billing period; thus there is no wholesale sale of electricity for resale and federal law is not implicated.

2. Where a net metering self-generator produces more electricity than it itself consumes, the payment for the incremental amount of electricity produced beyond the self-generator's own consumption cannot exceed the avoided cost rate; however, FERC looks to state law to define "avoided cost," and state law may properly consider environmental attributes of generation in setting an avoided cost rate.

Applying the Law To This Case

From April 2009 through February 2011, Portsmouth's wind turbine produced less electricity than the Town of Portsmouth consumed. Agreed Statement of Facts, ¶¶ 30, 31, 35. If Portsmouth merely used the power generated by its wind turbine to offset its own electricity accounts, the matter would be simple. In that event: (1) state law would control Portsmouth's net metering arrangement, including setting the price to be paid to

Portsmouth by Grid; (2) federal law would not be implicated by Portsmouth's net metering because FERC would deem that there is no wholesale sale of electricity for resale. In that event, the respective answers to the two questions posed by the Division would be as follows:

Question # 1: Whether the Town of Portsmouth is receiving an excessive rate for the output it sells to National Grid? Answer: No. State law controls the rate, and Portsmouth is getting precisely the rate set by state law.

Question # 2: Whether the Town of Portsmouth's Wind Facility is a net metering configuration (under state law) or a wholesale generator under federal law? Answer: Portsmouth's wind facility is a net metering facility under state law, not a wholesale generator under federal law.

However, the matter may be complicated by the fact that Portsmouth does not "merely" offset its own meters, but instead receives a check from Grid for its power. Agreed Statement of Facts, ¶ 23. This fact raises the question as to whether this transaction constitutes a wholesale sale of electricity for resale that triggers federal pre-emption.

Counsel has found no case from any agency, court or jurisdiction that addresses the precise question of whether the fact that Portsmouth receives payment from Grid by check does or does not make the transaction at issue a wholesale sale of electricity for resale that triggers federal pre-emption (and, thus, could possibly also change the answers to the above questions). Counsel has also conferred with FERC attorneys in FERC's Office of

General Counsel and with staff in FERC's Office of Energy Market Regulation, and has been directed to no cases that address this precise question.

On the one hand, CLF believes that Portsmouth takes the position that its receiving checks from Grid is merely an accommodation to Grid and that it (Portsmouth) could "merely" offset multiple town accounts. Thus, Portsmouth believes that the fact that it receives a check from Grid is of no legal significance and does not trigger federal pre-emption. As noted, there is no reported case that squarely holds that Portsmouth is not entirely correct in making this assertion.

On the other hand, common sense suggests that if Portsmouth sends electricity to Grid and Grid pays money for the electricity, this transaction constitutes a sale of power; and it is undisputed that Grid resells that power to end-use customers. After all, "[a] sale, in the ordinary sense of the word, is a transfer of property for a fixed price in money or its equivalent." Iowa v. McFarland, 110 U.S. 471, 479, 4 S. Ct. 210, 214, 28 L.Ed. 198 (1884).

CLF takes no position on the narrow question of whether the fact that Portsmouth receives payment from Grid by check does or does not make the transaction at issue a wholesale sale of electricity for resale that triggers federal pre-emption; and the question has not been decided by any agency or court from any jurisdiction. CLF respectfully suggests that the Division need not, in this proceeding, address this question, which has never been addressed by any agency or court. What is unequivocally clear is that Portsmouth could elect to offset meters; and that, in that event, Portsmouth's net metering

arrangement would be governed by state law and the answers to the Division's two questions in this case would be as shown on page 7.

A Change In Rhode Island Net Metering Law

One additional point must be made.

In response to the current uncertainty over net metering in Rhode Island revealed by this proceeding, the General Assembly is in the process of completely rewriting the state's net metering law. The new bill is carefully drafted to make it pellucid that Rhode Island's net metering law melds seamlessly with applicable federal law.

Under the bill now in the General Assembly, there is a two-tiered structure governing net metering rates. In the first tier, the bill sets the applicable rate up to the level of the self-generator's own consumption at the full retail rate. The bill expressly provides that there is no limit on the number of meters a self-generator may offset. The bill has no provision for self-generators like Portsmouth to be able to receive a check for this first tier of net metering -- that is, for electricity up to the amount of the self-generator's own consumption. Instead, in this first tier, self-generators will only be able to offset their own meters. In the second tier, just for the incremental additional power produced by the self-generator above the self-generator's own consumption, the bill provides for compensation at the avoided cost rate. Since federal law expressly permits state's to define avoided cost, the bill defines avoided cost as the standard offer rate for the applicable rate class of the self-generator.

When this bill becomes law, as it likely will before the end of this proceeding before the Division, it will obviate the need for proceedings like the instant one by making perfectly clear that there is no conflict between Rhode Island and federal net metering law.

Under the new law, all net metering facilities in Rhode Island – regardless of whether they produce more or less electricity than the self-generator itself consumes – will be receiving the correct and legal rate for all the power they produce, under both state and federal law. No net metering facility in the state will receive "an excessive rate" for its electricity. In short, the precise questions posed by the Hearing Officer in this case are about be definitively resolved (for future cases) by the General Assembly. By providing clarity, and conforming Rhode Island law to federal law, the General Assembly is eliminating the need for future hearings to address unsettled questions surrounding net metering.

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CERTIFICATE OF SERVICE

I certify that the original of this Memorandum, together with four photocopies, was filed in person with the Clerk of the Division of Public Utilities and Carriers, 99 Jefferson Blvd., Warwick, RI 02888. In addition, electronic copies of this Motion were served via e-mail on the the service list for this Docket. All of the foregoing was done on the 10th day of June 2011.