STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS
DIVISION OF PUBLIC UTILITIES AND CARRIERS
89 JEFFERSON BOULEVARD
WARWICK, RHODE ISLAND 02883

IN RE:	Complaint by Benjamin Riggs related to Net Metering at the Town of Portsmouth Wind Generator Facility and National Grid-Electric	: : : :	Docket No. D-10-126

MEMORANDUM OF LAW OF
THE TOWNS OF CHARLESTOWN AND JAMESTOWN

Now comes the Town of Charlestown, Rhode Island ("Charlestown") and the Town of Jamestown, Rhode Island ("Jamestown") (collectively the "Towns"), by and through their Town Solicitor, and hereby submits this memorandum of law for the above-captioned matter. In accordance with the Hearing Officer's Order and Procedural Schedule, this memorandum will address two chief questions: (1) whether the Town of Portsmouth is receiving an excessive rate for the output it sells back to National Grid; and (2) whether the Town of Portsmouth's Wind Facility is a net metering configuration or a wholesale generator according to federal law. As will be shown, the Town of Portsmouth is NOT receiving an excessive rate and the Town of Portsmouth's Wind Facility is a net-metering configuration.

Background

In the last decade, many municipalities, including the Towns, have sought to manage their rising energy costs and reduce the negative environmental impact of their current energy use. As such, many municipalities, again including the Towns, began to explore wind energy projects to accomplish both goals. Portsmouth was the first municipality in Rhode Island to accomplish the stated goals. Indeed, in designing and implementing its Wind Power-Generating Facility, Portsmouth relied upon Rhode Island's so-called Net-Metering Statute (R.I.G.L. 1956 § 39-26-6(g)) and RIPUC Tariff No. 2035 (hereinafter, the "Tariff"). See Agreed Statement of

Facts dated May 5, 2011 (hereinafter, "ASF") ¶ 2. The Towns and other municipalities have similarly relied upon the Net-Metering Statute and Tariff in designing and discussing their potential wind power-generating facilities. The General Assembly, in enacting the legislative scheme, specifically incorporated legislative findings:

> "The General Assembly finds that:
>
> (a) The people and energy users of Rhode Island have an interest in having electricity supplied in the state come from a diversity of energy sources including renewable resources;
>
> (b) Increased use of renewable energy may have the potential to lower and stabilize future energy costs;
>
> (c) Increased use of renewable energy can reduce air pollutants, including carbon dioxide emissions, that adversely affect public health and contribute to global warming;
>
> (d) Massachusetts, Connecticut, and other states have established renewable energy standard programs to encourage the development of renewable energy sources;
>
> (e) It is in the interest of the people, in order to protect public health and the environment and to promote the general welfare, to establish a renewable energy standard program to increase levels of electric energy supplied in the state from renewable resources." § 39-26-1.

Rhode Island created this legislative scheme in coordination with two federal laws: (1) the Public Utility Regulatory Policies Act ("PURPA"); and (2) the Federal Power Act ("FPA").

In engineering Portsmouth's Wind Power-Generating Facility, both Narragansett Electric d/b/a National Grid ("National Grid") and Portsmouth agreed that the best and most cost-efficient method to integrate it into the existing power network was a single-line, side-tap configuration. See ASF ¶¶ 12-18. Under this design, Portsmouth and National Grid signed an interconnection agreement acknowledging that Portsmouth would be "export[ing] power under the net metering provisions set forth in the Rhode Island General Law (R.I.G.L. Title 39, Chapter

26)." See ASF ¶¶ 19 – 20. Over the course of its function, Portsmouth consumed more power than Portsmouth's Wind Power-Generating Facility produced in that time period. See ASF ¶¶ 30-31.

Both Portsmouth and National Grid enjoyed this legal arrangement until this proceeding was initiated following a consumer complaint to the PUC. After the complaint was filed, National Grid decided to use the complaint as an opportunity to try to change the current legislative and regulatory scheme, especially with regard to future municipal projects. See National Grid Response to Mr. Riggs Complaint dated Sept. 3, 2010 at 2. The Advocacy Section has decided to adopt this new view. See Advocacy Section Memorandum of Law dated 2/2/11 at 12-14. In order to protect their interests, the Towns moved to intervene into this matter on March 21, 2011. The motion to intervene was granted by the Hearing Officer on April 12, 2011.

Law & Analysis

The paramount goal in statutory interpretation is to ascertain the intent behind the enactment of the statute and effectuate that intent when lawful. See In re Kent County Water Authority Change Rate Schedules, 996 A.2d 123, 130 (R.I. 2010). The best evidence of such intent can be found in the plain language used in the statute. Steinhof v. Murphy, 991 A.2d 1028, 1036 (R.I., 2010) (citing State v. Germane, 971 A.2d 555, 574 (R.I. 2009)). It is generally presumed that the General Assembly "intended every word of a statute to have a useful purpose and to have some force and effect." LaPlante v. Honda North America, Inc., 697 A.2d 625, 629 (R.I. 1997). If the language of a statute is clear and unambiguous, the Court must interpret the statute literally and must give the words their plain and ordinary meaning. Waterman v. Caprio, 983 A.2d 841, 844 (R.I. 2009). When confronted with an unambiguous statute, "there is no room for statutory construction and [the Court] must apply the statute as written." Id. Thus, if

the Court finds the statute unambiguous, it will not look elsewhere to discern the legislative intent. See State v. Greenberg, 951 A.2d 481, 489 (R.I. 2008).

"[I]t is axiomatic that [a] Court will not broaden statutory provisions by judicial interpretation unless such interpretation is necessary and appropriate in carrying out the clear intent of defining the terms of the statute." State v. Santos, 870 A.2d 1029, 1032 (R.I. 2005). However, "when a statute is susceptible of more than one meaning, [the court must] employ [its] well-established maxims of statutory construction in an effort to glean the intent of the Legislature." Town of Burriville v. Pascoag Apt. Assocs. LLC, 950 A.2d 435, 445 (R.I. 2008) (citing Unistrut Corp. v. State Dep't of Labor & Training, 922 A.2d 93, 98 (R.I. 2007)). A court's "interpretation of an ambiguous statute is grounded in policy considerations and [it] will not apply a statute in a manner that will defeat its underlying purpose." Id. Furthermore, it has been stated "repeatedly that in construing a statute, [a court's] task is to establish and effectuate the intent of the Legislature by examining the language, nature and object of the statute. . . . Furthermore, th[e] court will not adopt a construction that effects an absurd result." Chambers v. Ormiston, 935 A.2d 956, 967 (R.I. 2008) (citing Rhode Island State Labor Relations Bd. v. Valley Falls Fire District, 505 A.2d 1170, 1171 (R.I. 1986)).

Here, the Net-Metering Statute states, in pertinent part:

> "If the electricity generated by the renewable generation facility owned by a Rhode Island city or town, educational institution, nonprofit affordable housing, farm, the state or the Narragansett Bay Commission, during a billing period exceeds the customer's kilowatt-hour usage during the billing period, the customer shall be billed for zero-kilowatt-hour usage, and:
>
> (A) Upon request of the customer, the excess renewable generation credits shall be credited to the customer's account for the following billing period; or

(B) Upon request of the customer, the excess renewable generation credits shall be applied to no more than ten (10) other accounts owned by the customer during the billing period; or

(C) Unless otherwise requested by the customer, the customer shall be compensated monthly by a check from the distribution company for the excess renewable generation credits pursuant to the rates specified in subdivisions 39-26-2(19) and 39-26-2(22)." § 39-26-6(g)(3)(ii).

Likewise, § 39-26-2(22) states:

"'Renewable generation credit' means 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. This does not include any charges relating to conservation and load management, demand side management, and renewable energy."

And, as stated in the ASF:

"26. National Grid proposed 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 from net metering facilities or qualifying facilities as defined in the Tariff (QF).

27. The Tariff provides that for QFs employing wind technology which 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 customer's account. Unless the customer requests otherwise, the customer will be compensated monthly by check for the RGC.
>
> 28. The tariff provides that the NMF 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." ASF ¶¶ 26-28.

Thus, in order to answer the questions posed by the Hearing Officer, these statutes and regulations must be interpreted. As previously mentioned, if a statute is not ambiguous, then the words and terms must be given their plain and ordinary meaning in order to carryout their clear legislative intent. See, e.g., In re Kent County Water Authority Change Rate Schedules and Steinhof, supra. The Rhode Island Net-Metering Statute and the Tariff cannot be more clear and unambiguous: If a city or a town owns a renewable energy facility that produces excess electricity—whether considered a QF or not—it must be credited in a manner specified by § 39-26-2(22) and the Tariff (i.e. excess Kwhs 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.). Here, therefore, if Portsmouth, as a town owning a renewable energy facility, produces excess electricity and is credited in the manner described in § 39-26-2(22) and the Tariff, then as a matter of law, Portsmouth CANNOT be "receiving an excessive rate for the output it sells back to National Grid." To put it another way, a rate cannot be "excessive" if it is the rate prescribed

by law and regulation, much the same way as one cannot be traveling at an excessive rate of speed if traveling at the speed limit under normal conditions.

In the regulatory context, this concept is commonly known as the "filed rate doctrine." See generally Town of Norwood v. Fed Energy Reg. Comm'n, 217 F.3d 24, 28 (1st Cir. 2000) ("The filed rate doctrine . . . is actually a set of rules that have evolved over time but revolve around the notion that under statutes like the Federal Power Act, utility filings with the regulatory agency prevail over unfiled contracts or other claims seeking different rates or terms than those reflected in the filings with the agency.") (citing AT&T v. Central Office Tel., Inc., 524 U.S. 214, 221-24 (1998); Montana-Dakota Utils. v. Northwestern Pub. Serv. Co., 341 U.S. 246, 251-52 (1951)). The "filed rate doctrine" provides that "any filed rate—that is, one approved by the governing regulatory agency—[is] per se reasonable and unassailable in judicial proceedings brought by ratepayers." See, e.g., Valdez v. New Mexico, 54 P.3d 71, 74-75 (N.M. 2002) (internal quotation marks and alterations omitted); see also Summit Props., Inc. v. Pub. Serv. Co. of N.M., 118 P.3d 716, 723-24 (N.M. Ct. App. 2005). "[T]he heart of the filed rate doctrine is not that the rate mirrors a competitive market, nor that the rate is reasonable or thoroughly researched, it is that the filed rate is the only legal rate." Valdez, 54 P.3d at 75 (emphasis in original). "The policy behind the filed rate doctrine is to prevent price discrimination[,] to preserve the role of agencies in approving rates and to keep courts out of the rate-making process." Id.

It should be noted that this matter is not a rate or tariff proceeding, nor can the PUC act beyond the scope of its purpose in attempting to change law passed by the Legislature, such as § 39-26-2(22) and § 39-26-6(g). Likewise, this is not the forum for a declaratory judgment on whether the Rhode Island Net-Metering Statute (and the Tariff based upon it) are pre-empted or

unconstitutional in light of PURPA or the FPA. The PUC, like other administrative agencies, does not have jurisdiction to determine the constitutionality of statutes. See, e.g., Easton's Point Assoc. v. Coastal Resources Mgmt. Council, 522 A.2d 199, 202 (R.I. 1987) (holding that administrative agencies are circumscribed from considering constitutional challenges during the course of a licensing or permit proceeding). Indeed, the PUC can only rule on the complaint before it and cannot issue the relief sought by National Grid, Mr. Riggs, and the Advocacy Section.

Therefore, since it is agreed by all parties that Portsmouth has been compensated at the rate prescribed by the Tariff and the Net-Metering Statute (see ASF ¶ 34), Portsmouth cannot be deemed to be receiving an excessive rate for the output it sells back to National Grid.

As to the second question posed by the Hearing Officer—whether Portsmouth's Wind Power-Generating Facility is a "net-metering configuration" or a "wholesale generator" according to federal law—the Towns first argue that such a question is beyond the scope of the PUC's authority and not relevant to Mr. Riggs' complaint for the reasons stated above. See Easton's Point Assoc., supra. Secondly, even if the PUC could interpret federal law, Portsmouth, like any other municipality, is exempt from the FPA and PURPA's definition of "wholesale generator" and their associated restriction to "avoided cost" credits. See 16 U.S.C. § 824(f). The FPA states in pertinent part, "No provision in this subchapter shall apply to, or be deemed to include, the United States, a State or any political subdivision of a State. . . ." Id. Thus, whether Portsmouth's Wind Power-Generating Facility is a "net-metering configuration" or a "wholesale generator" under federal law is not relevant because federal law does not apply to municipalities by the plain language of the federal statute. It should be noted that the cases relied upon by the Advocacy Section in its Memorandum of Law dated February 2, 2011—California Public

Utilities Commission, 132 FERC ¶ 61,047 (2010) and Connecticut Power and Light, 70 FERC ¶ 61,012 (1995)—do not involve municipality owned power-generating facilities and therefore have no precedential meaning on whether net-metering or avoided-cost should be used in this context currently before the PUC. Consequently, as the FPA and PURPA specifically do not apply to municipalities such as Portsmouth, FPA and PURPA cannot, as a matter of law, pre-empt Rhode Island law, such as § 39-26-2(22) and § 39-26-6(g). Therefore, that leaves Rhode Island free to define whether Portsmouth's configuration of its Wind Power-Generating Facility can be net-metering, which the Legislature has chosen to do.

Conclusion

For the reasons stated herein, the Towns of Charlestown and Jamestown request that the PUC order that (1) Portsmouth does not receive an excessive rate for its sale of electricity back to National Grid and (2) Portsmouth's Wind Power-Generating Facility is a net-metering configuration in accordance with both federal and Rhode Island law.

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Respectfully submitted,
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Dated: June 8, 2011

CERTIFICATION

I, the undersigned, do hereby certify that I did forward a copy of the within Motion to Intervene via e-mail to all on the following service list on the 10th day of June, 2011. Paper copies will not be sent unless requested.

_/s/ MaryAnn Leonardo_____

Complaint Relating to the Town of Portsmouth Generator Facility – NetMetering
Docket No. D-10-126 **Updated 5/23/11**

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