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May 6, 2011

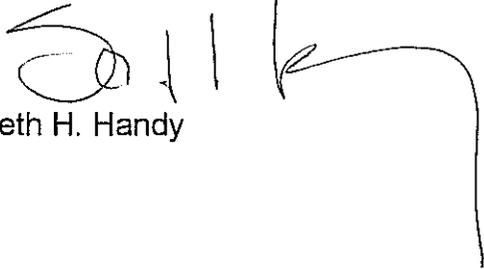
Luly E. Massaro, Division Clerk
Rhode Island Division of Public Utilities and Carriers
89 Jefferson Boulevard
Warwick, RI 02888

Re: Docket No. 10-126 – Motion for Summary Disposition

Dear Ms. Massaro:

Enclosed please find an original, signed Motion for Summary Disposition by the Town of Portsmouth, Washington County Regional Planning Council, Church Community Housing Corporation, People's Power & Light and the Town of Westerly for filing, as well as four (4) photocopies.

Sincerely,


Seth H. Handy

SHH/dlr
Enclosure

CR & F

**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
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MOTION FOR SUMMARY DISPOSITION
BY
THE TOWN OF PORTSMOUTH,
WASHINGTON COUNTY REGIONAL PLANNING COUNCIL,
CHURCH COMMUNITY HOUSING CORPORATION,
PEOPLE’S POWER & LIGHT, and
THE TOWN OF WESTERLY

By its attorneys, the Town of Portsmouth (Portsmouth), the Washington County Regional Planning Council (WCRPC), Church Community Housing Corporation (CCHC), People’s Power & Light (PP&L) and the Town of Westerly hereby move for summary disposition of this proceeding pursuant to Rule 19(e) of the Rhode Island Division of Public Utilities and Carrier’s (“Division”) Rules of Practice and Procedure. This motion is warranted prior to full briefing for three reasons. First, even if federal law were implicated in this case, the Division does not have jurisdiction to decide the constitutional questions raised for resolution. Second, Portsmouth is a municipality that is exempt from the federal rate restrictions at issue here. Finally, this proceeding should be summarily dismissed because Portsmouth relied in good faith on Rhode Island’s net metering law and the net metering tariff proposed by National Grid and approved by the Rhode Island Public Utilities Commission (PUC) and it relied on National Grid guidance in planning and executing its project, and any modifications to the net metering law that could result from this proceeding must not impact Portsmouth. For these reasons, the movants request dismissal of this complaint.

STANDARD

Rule 19(e) states that any party may file a motion for summary disposition which shall be granted if the Hearing Officer determines that there is no genuine issue of fact material to the decision.

BACKGROUND & FACTS

Congress enacted the Public Utility Regulatory Policies Act (PURPA) to encourage the development of renewable energy and reduce our nation's dependence on traditional fossil fuels. FERC v. Mississippi, 456 U.S. 742, 750 (1982). Section 210 of PURPA directed FERC to create rules requiring utilities to buy renewable energy in order to eliminate one of the greatest hindrances to the development of renewable energy: the fact that traditional electric utilities were reluctant to buy power from such producers. Id. at 750 and n. 12.

Rhode Island's State Energy Plan states that "Rhode Island of both necessity and choice embraces the purposes of ARRA DOE stimulus: increasing jobs, decreasing energy costs, reducing dependence on imported energy, reducing environmental impacts of energy production and use, and transforming markets." The Plan commits to investment in renewable energy development and deployment including wind generation in coastal communities. It considers development of the "green economy" sector a priority for the state and its economic development agency.

Rhode Island's renewable energy standard requires that our utilities purchase energy from renewable resources, mandating that utilities must obtain a set percentage of electricity sold at retail from renewable resources. R.I. Gen. Laws §§39-26-4. Rhode Island has also adopted a long term contracting law that requires utilities to enter long-term contracts for the purchase of renewable energy. Id. at §39-26.1-3.

Rhode Island's net metering law was passed in 2007 and expanded in 2008 to facilitate community scale renewable energy development and help meet our state's energy goals. Id. at §39-

26-6(g); State Energy Plan. On September 14, 2009, National Grid's proposed tariff for the implementation of the amended net metering law was approved by the PUC. *The Narragansett Electric Company Qualifying Facilities Power Purchase Rate*, RIPUC No. 2035 (Tariff). Rhode Island's net metering law defines "net metering" as the process of measuring the difference between electricity delivered by the utility and electricity generated by a net metering facility. R.I. Gen. Laws §39-26-2(17). It allows for municipal net metering customers to either apply renewable generation credits against consumption at up to ten meters or to receive a check reflecting the value of those credits pursuant to a rate set by the statute. *Id.* at §39-26-6(g)(i)(C). The Tariff further clarifies that:

The customer's usage and generation will be netted for a twelve-month period beginning on [stet] 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 shall be applied to the customer's account. . . Unless otherwise requested by the customer, the customer shall be compensated monthly by a check from the Company for the Renewable Generation Credits.

Tariff at Sheet 6.

Movants incorporate and rely on the Agreed Statement of Facts in support of this motion, attached as **Exhibit A**.

At a scheduling conference held on April 12, 2011, the Division ruled that its investigation would be limited to the issues presented by the Riggs Complaint as they relate only to the Portsmouth wind facility. The Division presented those issues as follows:

- 1) Whether the Town of Portsmouth is receiving an excessive rate for the output it sells back to Narragansett?
- 2) Whether the Town of Portsmouth's Wind Facility is a net metering configuration or a wholesale generator according to federal law?

The Division resolved that a hearing will not be necessary but the case will be resolved based on briefing from the agreed statement of facts.

ARGUMENT

Federal law is not properly put in question here because Portsmouth clearly is not a wholesale generator pursuant to federal definition. As long as a customer is a net consumer of electricity over a defined billing period it is net metering and not engaged in wholesale sales subject to federal law. SunEdison, 129 FERC ¶61,146 at ¶18 (2009)(“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”). Portsmouth generates less power than it consumes so it clearly is not a wholesale generator according to federal definition. Moreover, it is just and appropriate that Portsmouth should receive the full value of its renewable generation credits for its self-supply of power that simply offsets some of its own energy consumption. However, this is not the issue raised in this motion; it will be the subject of full briefing if the Division deems briefing necessary.

These movants submit herein that full briefing is not necessary or warranted for three reasons. First, even if federal law were properly raised in this proceeding, the Division lacks jurisdiction to decide the issue that has been framed for its resolution. Second, given the Division’s decision to restrict the scope of this investigation to the Portsmouth wind turbine, even if federal law applied, Portsmouth is a municipality and is exempt from the federal laws invoked against it. Finally, given the Division’s decision to restrict the scope of this investigation to the Portsmouth wind turbine, it is clear that there is no justification to apply any results of this proceeding retroactively so as to impact Portsmouth’s already developed project.

I. **The Division Does Not Have Jurisdiction Over Constitutional Questions Raised in This Investigation.**

Even if federal law were properly put in question in this proceeding, the Division would not have jurisdiction to decide the constitutional question presented by National Grid and the Advocacy Section. Administrative agencies do not have jurisdiction to determine the constitutionality of statutes. Peoples Liquor Warehouse v. Dept. of Business Regulation, 2007 Super LEXIS 78, *5 (R.I.Super. May 21, 2007) (“the Hearing Officer declined to rule on the Appellants constitutional claims because she recognized that an administrative agency of the executive branch of government cannot determine the constitutionality of a statute at issue”). Rhode Island law is consistent with federal law and other jurisdictions on this point. See e.g., Thunder Basin Coal Co. v. Reich, 510 U.S. 200, 215 (1994) (adjudication of constitutional enactments generally thought to be beyond the jurisdiction of administrative agencies); Fullerton v. Adm’r Unemployment Compensation Act, 280 Conn. 745, 759 (2006) (well established that claims regarding the constitutionality of legislative enactments are beyond the jurisdiction of administrative agencies); Westover v. Village of Barton Elec. Dept., 543 A.2d 698, 699 (VT. 1988). The Division would be overreaching the bounds of its jurisdiction if it ruled on the constitutional questions it is asked to answer in this docket.

Here the Division is asked to take jurisdiction over the constitutional question of whether Rhode Island’s net metering statute violates the Supremacy Clause and preemption powers of our federal government. In National Grid’s response to the Division’s data request number 1-5(c), they allege that:

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.

In its findings, the Advocacy Section of the Division of Public Utilities and Carriers repeats National Grid's fundamental conclusion that "the Rhode Island statute should be interpreted more narrowly to avoid constitutional issues." Advocacy Section Memorandum at p. 13. The Division does not have jurisdiction to determine whether a plain reading of Rhode Island's net metering statute, that allows net metering generators like Portsmouth to receive a check for the renewable generation credits generated from its wind turbine and applied against their consumption of energy regardless of whether that consumption is at the site of the turbine, violates the Supremacy Clause of the United States Constitution. Net metering is a state-created, legislatively mandated program and the Division may only act in accordance with the law as enacted, enforcing its administrative procedure for netting.

II. Portsmouth is exempt from the Federal Power Act and the Avoided Cost Restriction Under PURPA.

The Division has resolved to limit the scope of this proceeding only to the Riggs complaint and the facts related to the Portsmouth wind turbine. Even if Portsmouth were a wholesale generator by federal definition, it would not be accountable to federal rate restrictions because it is a municipality that is exempt from the Federal Power Act and PURPA's rate restrictions. Section 201(f) of the Federal Power Act says that:

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. . .

16 U.S.C. §824(f) (2005). FERC decisions are clear that rates for sales from states or their subdivisions are not within its authority and not subject to its regulation. Connecticut Light and Power Co., 70 FERC ¶61,012 at 19 (1995); Midwest Power Systems, Inc., 78 FERC 61,067 at 5 (1997); CPUC 1, 132 FERC 61,047 at ¶71 (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). The Federal Power Act and PURPA cannot be invoked to nullify or reduce the credit made available to municipalities for their self supply of power pursuant to Rhode Island law.

III. Any Rate Impact Must Only be Prospective and Would Have to be Imposed Through Legislative Reform and a PUC Docket Proceeding.

Given the Division's decision to restrict the scope of this docket to Portsmouth's wind turbine, there is no longer any basis for continuing the investigation because there would be no justification for applying any result in any way that compromises the value of the renewable generation credit Portsmouth receives for its power. National Grid has no authority to develop and impose a "new policy" requiring on-site consumption of any portion of the power generated from an eligible net metering facility without legislative change and PUC approval. Rhode Island's net metering law mandates that National Grid purchase renewable generation credits from eligible net metering facilities and does not require any on-site consumption. In fact, the Tariff that National Grid proposed to RIPUC for approval makes it clear that "[i]f 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." The Tariff is also entirely clear in providing that, "[u]nless otherwise requested by the customer, the customer shall be compensated monthly by a check from the Company for the Renewable Generation Credits." National Grid has no authority to develop new policies that are inconsistent with the clear intent of the Rhode Island legislature and the Tariff. Moreover, if National Grid were to consider adopting such a new policy, it could only do so by appealing to PUC for an amendment to the Tariff.

Any ruling against Portsmouth would violate the filed rate doctrine. The filed rate doctrine recognizes "that the right to a reasonable rate is the right to the rate which the Commission files or

fixes, and that, except for review of the Commission's orders, the court can assume no right to a different one on the ground that, in its opinion, it is the only or the more reasonable one." Nantahala Power & Light v. Thornberg, 476 U.S. 953, 963 (1986) (citing Montana-Dakota Utilities Co. v. Northwestern Public Service Co., 341 U.S. 246, 251-2 (1951); Narragansett Elec. Co. v. Burke, 381 A.2d 1358 (R.I. 1977) ("It is a fundamental rule that utility rates are exclusively prospective in nature"). The filed rate doctrine prohibits the imposition of retroactive rate impact on a project that was developed in reliance on rates set by tariff. If National Grid and the Advocacy Section want to propose a revised rate they must initiate legislative reform and then rate proceedings, applying resulting rate adjustments prospectively.

FERC precedent over the last fifteen years has been entirely clear that its rate findings are to be applied prospectively and not retroactively to the impairment of existing projects. Midwest Power Systems, Inc., 78 FERC ¶61,067 at 7 (FERC not inclined to upset expectations of parties and lenders); Connecticut Light and Power, 70 FERC ¶61,012 at 16-17 (will not invalidate existing rates where the avoided cost issue could have been raised earlier). FERC follows this policy even when it determines that the rates in such contracts are beyond the state's regulatory authority or were set in violation of PURPA or FERC regulations implementing PURPA. See e.g., Midwest. There are excellent and obvious policy reasons not to apply rate decisions retroactively, including FERC's conclusion that "[t]he appropriate time to challenge a state-imposed rate is up to or at the time the contract is signed, not several years into a contract which heretofore has been satisfactory to both parties." Connecticut, 70 FERC ¶61,012 at 17; Greenwood ex rel. Estate of Greenwood v. N.H. Public Utilities Comm'n, 527 F.3d 8, 15 (1st Cir. 2008). The Division ought to follow the great weight of precedent in this proceeding.

In this case, it would be particularly egregious to penalize Portsmouth for good faith reliance on the law, the Tariff, and National Grid's guidance. Portsmouth had every reason to rely on the net metering rate established by the Rhode Island legislature and endorsed by the Tariff. Portsmouth initially planned to put their wind turbines behind the meter but due to changes in the net metering law and consultations with National Grid, it was determined that it would be much easier to be compensated for renewable generation credits by check rather than distribute their energy to multiple town accounts. There is no justification for the Division to punish Portsmouth for being pioneers in responding to our legislature's call for net metered renewable energy projects and executing its projects in conformity with the existing law, Tariff, and guidance received from National Grid during project development.

Indeed, there are many renewable energy projects that are currently in planning and relying on the rate and mechanisms developed in our net metering law and tariff in following Portsmouth's example. It is unjustly prejudicial to impede those plans by seeking to cut back the credit such projects planned to receive and should expect for their generation of self-supplied power.

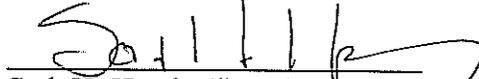
CONCLUSION

For these reasons, Movants respectfully request summary disposition of this proceeding.

Respectfully submitted,

THE TOWN OF PORTSMOUTH,
CHURCH COMMUNITY HOUSING
CORPORATION, THE WASHINGTON
COUNTY REGIONAL PLANNING COUNCIL,
PEOPLE'S POWER & LIGHT and THE TOWN
OF WESTERLY

By their attorneys,


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CERTIFICATE OF SERVICE

I hereby certify that on May 6, 2011, I delivered a true copy of the foregoing document to the parties by electronic mail.


Seth H. Handy

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

AGREED-UPON STATEMENT OF FACTS

By its attorneys, the Town of Portsmouth (Portsmouth), the Advocacy Section of the Division of Public Utilities and Carriers and National Grid submit the following statement of agreed facts.

1. In late 2005, Portsmouth planned the installation of a wind turbine in an effort to manage its energy costs while enhancing their energy independence and security and reducing the town's environmental impact.
2. Portsmouth relied on Rhode Island's net metering law and Tariff in planning its project, and designed it with the intent to offset its own energy consumption.
3. On June 6, 2008, National Grid received an interconnection application from the Town of Portsmouth for installation of a 1.5 MW wind turbine at 120 Education Lane in Portsmouth, Rhode Island and assigned the application for review on June 10, 2008.

4. The application site diagram identified that a primary metering pole was sought at the property line for the school grounds.
5. On July 11, 2008 a site meeting was held between National Grid and the Town of Portsmouth to discuss the application and potential placement of poles to accommodate the primary metering proposal.
6. On July 21, 2008 National Grid completed its initial review of the requested interconnection.
7. On September 4, 2008, a site plan was issued to National Grid by Portsmouth's engineer indicating that a new primary metering pole would be installed inside the property line, before the riser pole for main electrical service to the high school.
8. The new primary metering was to encompass three existing electric accounts, the high school, gym and tennis courts and the new wind turbine service, all of which would be behind the new primary meter.
9. Locating the metering point from the existing three services out to the property line would require the sale to the Town of Portsmouth of certain National Grid distribution assets on the customer side of the new primary metering point.
10. The assets for sale included several poles, primary and secondary overhead wires, aerial and pad-mounted transformers, and primary underground cables.
11. In preparation of the transfer, steps were taken to begin the process of estimating the residual value of those assets for sale to the Town of Portsmouth.
12. 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.
13. The new power one-line diagram changed the requested point of service.

14. The diagram eliminated the new 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 the school property.
15. The new side tap to the wind turbine was to have its own meter and be a separate electric account.
16. This configuration results in National Grid maintaining ownership and control of most distribution assets including poles, wires, transformers and cables.
17. On October 10, 2008, Arthur Larson, National Grid's coordinator on this project, responded with an email saying "In general – the concept proposed should not present any problems."
18. On October 14, 2008, the Town of Portsmouth confirmed that this new method of service was desired, and National Grid designed the service and estimated the cost of electrical construction.
19. In December 2008, Portsmouth and National Grid signed an interconnection agreement with a description of facilities, stating "Customer intends to export power under the net metering provisions set forth in Rhode Island General Law (R.I.G.L. Title 39, Chapter 26."
20. On February 13, 2009, Portsmouth and National Grid signed the form agreement provided in Schedule B of the tariff National Grid filed with the RIPUC for the implementation of Rhode Island's net metering law (RIPUC No. 2010-A), acknowledging the intent to credit the renewable generation credits from its wind turbine to five Portsmouth accounts.

21. 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.
22. National Grid sent Portsmouth a letter on November 2, 2009, indicating that Portsmouth could either carry its renewable generation credits forward as a credit against their accounts for a one year billing cycle or receive a check for the renewable energy credits subject to any previous charges.
23. On November 25, 2009, National Grid and Portsmouth signed a revised Schedule B providing that Portsmouth would receive a check for its renewable generation credits.
24. The Portsmouth wind generating facility consumes energy at the turbine for station power use before sending the balance of its energy to the grid.
25. On April 1, 2010, Gary Crosby, the Portsmouth Wind Turbine Coordinator stated in a letter that "Portsmouth's wind turbine is not a 'behind-the-meter' facility. Every KWH that the turbine generates goes directly onto the grid."
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).¹
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:

¹ R.I.P.U.C. No. 2010-A was approved for effect 1/1/09 in Docket 3999. R.I.P.U.C. 2035 was approved for effect 9/14/09.

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.

29. The Tariff also provides for a non-NMF rate for QFs, this tariffed QF rate per R.I.P.U.C No. 2035, Section III, Rates For Qualifying Facilities is equal to the payments received by National Grid for the sale of such QF's output into the ISO-NE administered markets for the hours in which the QF's facility generated electricity in excess of its requirements.

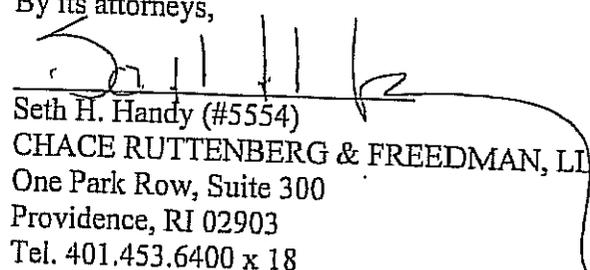
30. From April 2009 through March 2010 the Town of Portsmouth's wind generating facility had a total output of 3,712,800 kWhs. From March 2010 through February 2011 Portsmouth's wind generating facility had a total output of 2,699,179 kWh.

31. From April 2009 through March 2010, Portsmouth consumed 3,972,170 kWhs at more than forty accounts for Portsmouth, including the Portsmouth School Department accounts. From March 2010 through February 2011, Portsmouth

- consumed approximately 3,971,582kWh of electricity at more than forty accounts for Portsmouth, including the Portsmouth School Department accounts.
32. From April 2009 through March 2010, Portsmouth consumed approximately 967,120 kWhs at its site located at 120 Education Lane in Portsmouth, Rhode Island. They consumed approximately 972,240 kWhs at this site from April 2010 through March 2011.
 33. From March 2010 through February 2011, Portsmouth consumed 3,569,399 kWh at its ten largest accounts.
 34. National Grid has credited Portsmouth for the output of the Portsmouth wind generating facility at the tariff based NMF rate.
 35. Portsmouth is presently credited a varying renewable generation credit for its power, as calculated under the net metering statute and Tariff.
 36. Over the last six month period from August of 2010 through January of 2011, the credit rate has averaged \$0.082 per kWh and over the year from February of 2010 through January of 2011 it averaged \$0.0875 per kWh.
 37. Over the same periods, National Grid has been compensated on average \$0.0536 and \$0.0547 from ISO-NE for the sale of kWh's from Portsmouth's wind turbine facility. The difference between the amount paid to Portsmouth by National Grid and the amount received by National Grid from ISO-NE has been or will be added to National Grid's standard offer cost.

THE TOWN OF PORTSMOUTH

By its attorneys,


Seth H. Handy (#5554)

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Docket D-10 126-Agreed Statement of Facts re:
Complaint of Benjamin Riggs Relating to Portsmouth
Wind Generating Facility

ADVOCACY SECTION OF THE RHODE ISLAND DIVISION
OF PUBLIC UTILITIES AND CARRIERS

By its Attorney

/S/ Jon G. Hagopian

5/5/2011

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Providence, RI 02903
(401) 274-4400 x2231

Docket D-10 126-Agreed Statement of Facts re: Complaint
of Benjamin Riggs Relating to Portsmouth Wind
Generating Facility

NATIONAL GRID

By its attorney,



5/5/2011

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Docket D-10 126-Agreed Statement of Facts re:
Complaint of Benjamin Riggs Relating to Portsmouth
Wind Generating Facility