STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS
DIVISION OF PUBLIC UTILITIES AND CARRIERS
89 JEFFERSON BOULEVARD
WARWICK, RHODE ISLAND 02888

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

REPORT AND ORDER

1. Introduction

On May 24, 2010[1], the Rhode Island Division of Public Utilities and Carriers ("Division") received a written complaint (the "Complaint") from Mr. Benjamin C. Riggs, Jr., 15D Harrington Street, Newport, Rhode Island (the "Complainant" or "Mr. Riggs") wherein Mr. Riggs questioned the propriety of the net-metering arrangement between the Town of Portsmouth ("Town" or "Portsmouth") and the Narragansett Electric Company, d/b/a/ National Grid ("National Grid") relating to a wind-powered generating facility owned by, and located within, the Town, constructed at the Portsmouth High School (the "Facility"). The Complaint, in pertinent part, is reproduced below:

> 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 [sic].
>
> 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),

[1] The complaint, dated May 19, 2010 was received by the Division on May 24, 2010.

> 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.

After receiving the Complaint, the Division forwarded a copy to National Grid and requested that National Grid submit a written reply to the Division that addresses the concerns raised by Mr. Riggs. National Grid submitted a written reply to the Complaint on September 3, 2010.

Following National Grid's submission, on September 17, 2010, the Division contacted National Grid and informed the Company that the Division had completed a review of the Complaint, pursuant to R.I.G.L. §39-4-13, and had found "sufficient facts to warrant a formal investigation of what it deems are unresolved issues associated with the Complaint, and also with respect to National Grid's interpretation of the statutes which address net metering."[2] The Division thereupon notified National Grid that the Division had established a formal docket (D-10-126) in the matter.

Subsequently, on February 2, 2011, the Division's Advocacy Section ("Advocacy Section"), an indispensable party during this formal investigation, submitted a formal Memorandum of Law to the Administrator of the Division, wherein the Advocacy Section offered a legal opinion regarding the propriety of the net-metering arrangement in issue. In its memorandum, in which the Advocacy Section cites reliance on facts elicited from National Grid through

[2] See September 17, 2010 letter from Jon G. Hagopian, Esq., counsel for the Advocacy Section, to Thomas R. Teehan, Esq., counsel for National Grid.

discovery and from its independent review of federal and State laws, the Advocacy Section outlined the following conclusions:

> • 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.... 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.
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> • 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-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.[3]

The Division provided National Grid with a copy of the aforesaid Memorandum of Law and directed the Company to submit a reply to the Advocacy Section's legal conclusions by February 23, 2011. National Grid complied with the Division's directive and offered the following observations and comments:

> The purpose of the Company's reply comments is not to take issue with the Division's analysis, but to offer a reasonable solution to allow the ... [Town] to realize a continuing, reasonable revenue stream from its generation facility while avoiding running afoul of applicable federal law and regulations.
>
> [T]he current pricing does not comply with the federal avoided-costs cap.
>
> [T]he Company suggests a curative approach under which it would purchase the output of the Portsmouth facility for use as Standard Offer supply at a rate that approximates the average wholesale cost of power that it pays to service its Standard Offer customers. In

[3] Advocacy Section's February 2, 2011 Legal Memorandum, pp. 13-14.

> turn, the Town could still sell its renewable energy certificates in the market for additional revenue.
>
> Because of its voluntary nature, this procurement would not be a transaction that is subject to the...federal provisions, and the resulting pricing would eliminate concerns about ratepayer subsidization. The Company believes that this would be a fair and reasonable approach that would remove concerns about the facility's compliance with applicable federal provisions and at the same time allow the Town ... to benefit from its generating facility. Of course, this arrangement also would need PUC approval.[4]

2. Interventions

During the time between the filing of the Complaint and the Division's decision to establish a formal docket in this matter, the Division received a number of requests from individuals, companies and municipalities seeking information related to the travel of this investigation. Many requested that they be added to the official service list in order that they be allowed to follow the developments in this case.

In view of the abundant outpouring of interest in the Complaint, the Division issued a notification to the service list on February 28, 2011 stating that the Division would entertain motions to intervene in this docket, if such motions were received by the Division no later than March 23, 2011. In response to this notice, the Division received formal intervention requests from the following eleven (11) entities and municipalities:

- Town of Portsmouth – filed motion to intervene on March 7, 2011;

[4] See February 23, 2011 letter from Thomas R. Teehan, counsel for National Grid, to the Division's Clerk, Luly Massaro.

- The Washington County Regional Planning Council ("WCRP Council") – filed motion to intervene on March 7, 2011;
- Town of Charlestown – filed motion to intervene on March 22, 2011;
- Town of Jamestown – filed motion to intervene on March 22, 2011;
- Town of Westerly – filed motion to intervene on March 22, 2011;
- Nexamp Inc. ("Nexamp") – filed motion to intervene on March 23, 2011;
- Church Community Housing Corporation ("CCHC") – filed motion to intervene on March 23, 2011;
- Energy Consumers Alliance of New England, d/b/a/ People's Power and Light (People's Power and Light") – filed motion to intervene on March 23, 2011;
- Rhode Island Office of Energy Resources ("OER") – filed motion to intervene on March 23, 2011;
- The Conservation Law Foundation ("CLF") – filed motion to intervene on March 23, 2011; and
- CME Energy LLC ("CME Energy") – filed motion to intervene on April 8, 2011

The Division's Advocacy Section filed objections to several of these intervention requests based upon the Advocacy Section's opinion that many of these expectant intervenors failed to set forth sufficient justification, in accordance with the Division's Rules, explaining why the Advocacy Section could not adequately represent their interests. The Advocacy Section alternatively

argued that many of the motions were vague, factually unparticularized or lacking in legal support for the contention that their intervention would be in the public interest.[5]

3. Procedural Conference

The Division conducted a procedural conference in this docket on April 12, 2011. The conference was held for the purpose addressing the intervention motions pending before the Division, to identify the precise issues for consideration in this docket, and also to establish a procedural schedule for adjudicating the instant complaint matter.

At this conference, the Division announced that it believed that a hearing in this docket was unnecessary and that the adjudication could proceed, in the opinion of the Hearing Officer, through the filing of an "agreed-upon statement of facts" and the subsequent submittal of legal memoranda by the parties. The Hearing Officer also framed the issues for consideration as follows:

(1) Whether the Town of Portsmouth is receiving an excessive rate for the output its 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?[6]

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[5] The Advocacy Section objected to the motions filed by the Town's of Westerly and Charlestown, CCHC, People's Power and Light and Nexamp, Inc.

[6] On May 27, 2011, in response to a motion for summary disposition that was jointly filed by several of the parties, the Hearing Officer issued the following clarification regarding the two issues that were framed by the Hearing Officer during the April 12, 2011 procedural conference: "...during the Scheduling Conference, I offered two issues for the parties to address (brief) in this complaint matter. I explained that I thought these two issues generally summed up the nature of Mr. Riggs' complaint in this matter (I referenced the Division's Advocacy Section's February 2, 2011 Memorandum of Law as the genesis for the two issues presented). I also stated that the parties would be afforded some latitude to expand their arguments beyond these two issues so long as the focus of their arguments remained consistent with the crux of the two issues that I

The Hearing Officer thereupon suggested that National Grid, the Town, and the Advocacy Section jointly work on a statement of facts that could be relied upon by all the parties participating in this docket. The Hearing Officer thereafter related that if the parties were all in agreement with this proposed procedural path, all of the motions to intervene that had been filed in this docket would be granted. This method of adjudicating the Complaint was unanimously supported by the parties.

In accordance with the adopted schedule, the parties were required to submit their initial legal memoranda by June 10, 2011. Reply memoranda were due by July 22, 2011.

Of note, on May 23, 2011, Nexamp's attorney, Zachary Gerson, Esq., filed a withdrawal of appearance from the case. Nexamp neither contacted the Division after Attorney Gerson's withdrawal nor submitted a legal memorandum or position statement in this docket. Accordingly, the Division finds that Nexamp's status as an Intervenor in this docket has been voluntarily withdrawn.

4. Statement of Facts

National Grid, the Town and the Advocacy Section filed an Agreed-Upon Statement of Facts ("Statement of Facts") in this docket on May 6, 2011. This Statement of Facts identified thirty-seven (37) agreed-upon facts on which the parties could focus their legal analysis. The thirty-seven (37) facts are listed below:

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presented and the concerns raised in the Riggs complaint. Broadly speaking, I believe the focus of this investigation is to examine whether the rate the Town of Portsmouth is receiving from National Grid is in harmony with the provisions of the... [Commission-approved] tariff and the State's net-metering statute."

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). [footnote: 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.]

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. General 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;
> (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 3,971,582 kWh 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.

5. Legal Positions of the Parties

a. The Complainant's Position

Mr. Benjamin Riggs, the Complainant, participating *pro se*, submitted his position in this docket on June 10, 2011. Mr. Riggs prefaced his position comments by stating that he filed the instant complaint after reading an April 1, 2010 letter authored by the Town's Wind Turbine Coordinator, Gary Crosby, wherein Mr. Crosby advises a citizen that the Town, in Mr. Riggs' words, "could financially profit at the expense of state-wide ratepayers by operating as a net power producer in the wholesale market while being reimbursed at retail rates." Mr. Riggs states that because this arrangement between the Town and National Grid appeared to be in violation of Rhode Island's net meeting law, as well as federal law, he decided to file a complaint with the Division.[7]

In the opinion of the Complainant, "the Town's actions were predicated on 'gaming' the provisions" of the State's net metering law. Mr. Riggs asserts:

> [t]hat, regardless, the net production of electrical power (defined as exceeding the producer's own monthly usage) for sale is governed by Federal law, specifically 16 U.S.C. §2621 et. seq., and that law limits reimbursement to the utilities' "avoided cost." As a qualifying Facility, the rate is required to comply with PURPA, and setting the rate should be done pursuant to a public notice and hearing.[8]

Mr. Riggs also opines that the remedy for correcting this error "should be retroactive to the beginning." Mr. Riggs argues that regardless of how this happened, "it was not the fault of the ratepayers, and the ratepayers should be

[7] Position Statement from Mr. Benjamin Riggs, dated June 10, 2011.
[8] Id.

reimbursed in full."[9] Mr. Riggs additionally argues that the cost associated with reimbursing ratepayers must be borne exclusively by National Grid and the Town. He related that the manner in which they share the cost should "be resolved between the two of them." Mr. Riggs also opined that the remedy should also "establish guidelines for other excess producers, regardless of whether before or after the meter, so that this issue does not have to be addressed repeatedly in the future."[10]

Next, referring to the Statement-of-Facts filed in this docket, Mr. Riggs took exception to the Town's claim that it constructed the wind facility "...to protect the environment" and "reduce its electrical demand." Mr. Riggs also rejects the Town's assertions that the Division lacks jurisdiction to hear this complaint and that it is "exempt from the laws and regulations that govern here" by virtue of its status as a "municipality."

Mr. Riggs also stressed that this case is not about "green energy." However, in response to an anticipated discussion concerning "green energy," Mr. Riggs declared that "[w]ind energy is not 'green.'" He opined that on a life cycle basis, wind energy is "far more environmentally damaging than natural gas, which is plentiful." Mr. Riggs argues that the production of the magnets that go into each turbine, the transportation of components, the construction of large foundations, and disposal issues all contribute to pollution of the environment.[11] Mr. Riggs also opined that because "wind is intermittent" wind power "on any scale will not replace a single conventional plant."

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[9] Id.
[10] Id.
[11] Id., p. 2.

In his concluding remarks, Mr. Riggs recommended that the Division's decision in this case ought to include findings that the Town's reimbursement rate be set at avoided cost, without regard to the method of production; that the Public Utilities Commission should set a rate, based on the daily ISO average, for all electrical power production from any source in the future that exceeds the producer's usage and results in reimbursement; that the cost adjustment be retroactive to the beginning, providing reimbursement to ratepayers; and that the regulations that apply to wholesale production be based on Federal law regardless of any changes to state "net metering" legislation.[12]

b. The Advocacy Section's Position

The Advocacy Section, represented by Jon G. Hagopian, Esq., Special Assistant Attorney General, submitted its legal memorandum on June 10, 2011. At the outset of its memorandum, the Advocacy Section provided a brief summary of the relevant facts associated with the Complaint; a recitation of the two issues raised by the Hearing Officer; and an appraisal of the law that applies to: (1) the Division's authority to address the instant complaint, (2) rules of statutory interpretation, (3) net metering in Rhode Island (and related industry standards), and (4) Qualified Facilities ("QF") Power Purchase rates.

Turning to the issue of whether the Town's Facility is a net metering configuration or a wholesale generator according to state and federal law, the Advocacy Section asserts that the "facts here demonstrate that the... [Town's] Facility is a self standing unit with no meaningful use of its own output to meet the Town's load requirements and actually feeds all of its output directly into the

[12] Id., p. 3.

distribution system to be sold into the regional power market." The Advocacy Section argues that although the Town claims that its generating facility is net metering "and will take the Division...through a series of mathematical netting machinations in order to prove this position," the Advocacy Section's review of cases addressing net metering and qualifying facilities at the FERC make evident that... [the Town's] Facility "does not meet the FERC definition of a net metered facility."[13] The Advocacy Section also maintains that National Grid's data responses, as well as its written response to the Complaint, also support this conclusion.[14]

The Advocacy Section observes that the Town's position in this case is that even though its wind turbine is not a 'behind-the-meter' facility its configuration "is lawful in accordance to state statute and industry standard as they apply." However, the Advocacy Section argues that the problem with this assertion is that the Rhode Island statute, which is in clear harmony with the industry standard and cases instructive of the issue, demonstrate that there is clear contemplation of a behind the meter configuration and netting with excess output occasionally being fed back to the grid. The Advocacy Section argues that "[t]he idea that this statute was enacted to allow a municipality or other citizen of this state to construct a commercial size wind turbine, tie it directly to the utility's distribution and transmission system, sell all of its output into the market, and insist upon receiving a retail rate for the sale of the output is an unreasonable interpretation

[13] Advocacy Section's Memorandum of Law, p. 12.
[14] Id.

of the present statute."[15] The Advocacy Section maintains that if the Town "was truly net metering it would be capable of demonstrating that it is a self generator in accordance with the definition of R.I. Gen. Laws §39-26-2(25) displacing all or part of its retail consumption, as metered by the distribution utility to which it interconnects, through the use of a customer-sited generation facility (meaning a generation unit that is interconnected on the end-use customer side of the retail electricity meter in such a manner that it displaces all or part of the metered consumption of the end-use customer)."[16] The Advocacy Section asserts that the relevant facts clearly reflect that the Town's Facility is not configured in this manner.

With respect to the issue of whether the Town is receiving a proper rate for its output from its wind generator facility, the Advocacy Section points out that "the Facility has self-certified as a QF by virtue of its submission of Form No. 556 to the FERC in 2008." The Advocacy Section observes, however, that although the Facility has been certified, the Town has not executed National Grid's standard QF contract. Instead, the Town "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." The Advocacy Section observes that 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-NE administered markets for the hours in which the QF's facility generated electricity in excess of its requirements. However, in the Town's case, the Advocacy Section argues that National Grid "incorrectly

[15] Id., p. 13.
[16] Id.

treated the ... [Town's] 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." The Advocacy Section insists that this payment is contrary to National Grid's approved tariff.[17]

c. National Grid's Position

On June 10, 2011, National Grid submitted a one-page letter with the Division wherein it observed that "[t]he Rhode Island General Assembly is currently in the process of considering substantial changes to the existing net metering statute, and this legislation seems likely to be enacted into law during the current legislative session." National Grid went on to state that "[i]n light of the pending legislation, the Company believes that briefing the proper interpretation of the existing statutory provisions, which will likely be replaced, would not lead to any useful insights or conclusions regarding the proper treatment of the Portsmouth generating facility..." National Grid additionally declared that "in the unlikely event that the bill currently before the legislature is not enacted into law," the Company "reserves its opportunity to file a memorandum analyzing the issues relating to the Portsmouth generating facility during the second round of briefing under the procedural schedule in this matter."

The Division, however, rejected National Grid's decision to condition the submittal of its legal memorandum in this matter on the anticipated travel of draft legislation before the General Assembly. All of the parties to the instant docket were aware that there were bills pending before the General Assembly that

[17] Id., pp. 13-14.

may have, if passed, significantly affected the disposition of this docket. Nevertheless, all the other parties hereto respected the regulatory process and professionally fulfilled their commitment to adhere to the memorandum filing schedule. In response to National Grid's failure to submit a memorandum by June 10, the Division issued the following ruling:

> National Grid was required to submit a legal memorandum in this docket by June 10, 2011. The Company was not granted approval by the Division to unilaterally decide whether, and when, it would comply with the prescribed filing deadline. Accordingly, please be advised that the Division has interpreted your decision not to file a legal memorandum in this docket as a deliberate waiver of your right to submit such legal memorandum. Your declaration that the Company is "reserving comment on the issues presented in this matter..." is therefore not acceptable to or approved by the Division.[18]

National Grid offered no response to the Division's ruling.

d. CLF's Position

CLF, represented by Jerry Elmer, Esq., also submitted a timely legal memorandum. CLF began its analysis with an examination of the definition of "net metering" under the federal law. Relying on the definition used by the Advocacy Section in its February 2, 2011 memorandum of law, supra, which derives from the leading case of Sun-Edison LLC, 129 FERC ¶61,146, 61,620 (2009), CLF agrees that the proper definition of net metering is as follows:

> Net meeting 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

[18] This decision was sent via electronic mail to National Grid's attorney, Thomas Teehan, Esq. on June 16, 2011. A copy of this communication was simultaneously circulated to the Service List.

> 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.[19]

CLF also notes that the above definition is consistent with the definition of net metering found in Section 1251 of the 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.[20]

CLF next observes that under the federal law, net metering is governed and controlled by state law, not by federal law. Relying on the case of MidAmerican Energy Co., 94 FERC ¶61,340 (2001), CLF advises that Rhode Island's net metering policies are not preempted by federal law. CLF argues that the basis for this control at the state level is due to the jurisdictional limitations of the Federal Energy Regulatory Commission ("FERC"), whose authority is limited to "the sale of electricity at wholesale." CLF also points out that the word "wholesale," in this context, has been defined as "a sale of electric energy to any person for resale."[21]

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[19] CLF Memorandum of Law, pp. 1-2.
[20] Id., p. 2, citing: 16 U.S.C. §2621(d)(11).
[21] Id., p. 3, citing: 16 U.S.C. §824(b)(1) and (d).

CLF states that FERC reiterated the reasoning it used in MidAmerican Energy Co. eight years later when it issued its Sun Edison decision, supra. CLF relates that in Sun Edison, FERC held:

> 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.[22]

CLF argues that FERC law is "admirably clear and unequivocal on these points." According to CLF, the reason that net metering is governed by state 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. CLF accepts, however, that under Sun Edison, state law only controls in cases where "the net metering self-generator produces less electricity in the applicable billing period than it consumes."

In such cases where the net metering self-generator produces more electricity in the applicable billing period than it consumes, CLF argues that a "two-tiered structure controls the amount that the utility must pay the net metering self generator." In the first tier, CLF asserts that the state net-metering law sets the applicable rate up to the level of the self-generator's own consumption. CLF observes that in Rhode Island that rate is set at the full retail

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[22] Id., p. 3.

rate. CLF asserts that in the second tier, which relates to only 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. CLF relates that this second tier rate "is the familiar 'avoided cost' rate set forth in Section 210 of the Public Utilities Regulatory Act of 1978 (PURPA)."[23] Under this second tier rate structure, CLF avers that FERC has expressly held that state law can define avoided cost, and the state can set different avoided cost rates for different technologies. However, in closing, CLF argues that the public policy underpinning of PURPA was to encourage small energy facilities like the Portsmouth wind turbine.[24]

In applying the federal law to the instant case, CLF observes that from April 2009 through February 2011, the Town's Facility produced less electricity than the Town consumed. Based on this agreed-upon fact, CLF postulates that addressing the issues presented in this docket would be simple if the Town merely used the power generated by its wind turbine to offset its own electricity accounts. However, CLF agrees that the fact that the Town receives a check from National Grid for its power complicates the matter. CLF recognizes that this fact raises the question as to whether this transaction constitutes a wholesale sale of electricity for resale that triggers federal preemption.

Concerning this query, CLF argues that it has been unable to locate "any agency, court or jurisdiction that addresses the precise question of whether the fact that the Town receives payment from Grid by check does or does not make

[23] Id., pp. 4-5.
[24] Id., pp. 5-6.

the transaction at issue a wholesale sale of electricity for resale that triggers federal preemption." Counsel for CLF also relates that he has discussed the matter with FERC attorneys and staff, who indicated that they too were unaware of any cases that address this precise question.[25] Consequently, due to this lack available precedent, CLF has opted to not take a position on this "narrow question." Alternatively, CLF "respectfully suggests" that the Division similarly not address this issue in its decision, but, instead, base its decision on the fact "that Portsmouth could elect to offset meters; and that, in that event, Portsmouth's net metering arrangement would be governed by state law..."[26] In which case, CLF contends that the answers to the two questions posed by the Division in this case 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.[27]

In its final comments, CLF noted that "the General Assembly is in the process of completely rewriting the state's net metering law." CLF contends that the "new bill is carefully drafted to make it pellucid that Rhode Island's net metering law melds seamlessly with applicable federal law." CLF also contends

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[25] Id., pp. 7-8.
[26] Id., pp. 8-9.
[27] Id., pp. 7-9.

that "[w]hen 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."[28]

e. The Town of Portsmouth's, the Town of Westerly's, the WCRP Council's, CCHC's and People's Power and Light's Position

Portsmouth, the Town of Westerly, the WCRP Council, CCHC, and People's Power and Light (collectively, "the Portsmouth Group") were represented by Seth H. Handy, Esq. The Portsmouth Group submitted a "motion for summary disposition" on May 9, 2011; and its required legal memorandum on June 10, 2011.

- The Portsmouth Group's motion for summary disposition

The Portsmouth Group urged summary disposition of the instant proceeding on May 9, 2011, and further requested that the Division entertain its motion prior to full briefing of the issues presented in this case. In reply to the motion, this Hearing Officer informed the Portsmouth Group on May 27, 2011, in writing (copy to the Service List), that he would not consider the arguments presented in its motion until after all of the legal memoranda had been submitted in this docket; and that the Division's decision thereon would be incorporated into the final order issued in the instant docket.

In summary, the Portsmouth Group's motion covers three grounds in support of dismissing the Complaint. First, the Portsmouth Group asserts that even if federal law were implicated in this case, the Division does not have

[28] Id., pp. 9-10.

jurisdiction to decide the constitutional questions raised for resolution. As a second ground, the Portsmouth Group asserts that the Town "is a municipality that is exempt from the federal rate restrictions at issue here." The Portsmouth Group additionally contends that this proceeding should be 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 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."[29]

The legal arguments making up the bases for these grounds were repeated in the Portsmouth Group's legal memorandum, which was subsequently submitted on June 10, 2011. The details related to these arguments are provided below.

- The Portsmouth Group's legal memorandum

The Portsmouth Group argues that the Facility is a net metering facility, not a wholesale generator.[30] In support of this position, the Portsmouth Group asserts that under Rhode Island's net metering law, the Town is expressly authorized to receive renewable generation credits pursuant to the rates specified in subdivisions 39-26-2(19) and 39-26-2(22), without any on-site consumption limitation.[31] The Portsmouth Group argues that the law "very clearly allows" Portsmouth to credit its generation toward one account or to choose whether to distribute the credits to up to ten accounts or receive a check for the value of the

[29] Motion for Summary Disposition, p. 1.
[30] Portsmouth Group Memorandum of Law, p. 2.
[31] Id., citing: §39-26-6(g)(ii).

credits.[32] Additionally, the Portsmouth Group argues that both the net metering law and the Public Utilities Commission's ("PUC") applicable tariff allow the Town "to apply renewable generation credits to any account owned by the town in any location, or receive a check for the value of those credits."[33]

The Portsmouth Group adds that even National Grid has acknowledged that the Town is net metering. The Portsmouth Group relates that the Facility was initially designed to send energy directly to its own facilities and then receive renewable generation credits for any excess sent to the grid; under the initial design contained in its interconnection application to National Grid on June 6, 2008, the Town had proposed to locate the primary metering pole at the property line. However, after Rhode Island's net metering law was amended effective January 1, 2009, and the Tariff was updated accordingly, National Grid informed the Town that the Town "need not distribute the energy it produced to one or more of its facilities first, but could simplify the design to feed energy directly to the grid in exchange for the application of renewable generation credits against its energy consumption." Under the new design, which was approved by National Grid, the new primary metering point was eliminated and instead, "the service to the new wind turbine would be via a side-tap from existing National Grid overhead distribution facilities on school property."[34] Under the new design, the new side tap to the wind turbine was to have its own meter and be a separate electric account. The Portsmouth Group stressed that under the revised configuration National Grid would be able to maintain ownership and control of

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[32] Id.
[33] Id., pp. 2-3.
[34] Id., p. 4.

its distribution assets.[35] The Portsmouth Group points out to the Division that the interconnection agreement that was subsequently signed by the Town and National Grid reflects that the "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)."[36]

The Portsmouth Group next discusses the propriety of the check the Town receives from National Grid for its renewable generation credits. The Portsmouth Group asserts that "Rhode Island law permits the issuance of a check for administrative convenience, and there is no legal justification to override state law and deny a utility and a town such an administrative convenience." The Portsmouth Group argues that the net metering law and the Tariff authorize the issuance of a check for credits "by stating 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.'"[37]

The Portsmouth Group additionally argues that given the clarity regarding the fact that the Town is net metering under Rhode Island law, "PURPA rates do not apply to its project." The Portsmouth Group criticizes National Grid and the Advocacy Section for invoking PURPA, which it describes as "a law designed to encourage development of renewable energy, in an effort to obstruct ... [the Town's] ability to self-supply renewable energy through netting." Relying also on MidAmerican Energy Co, supra, the Portsmouth Group argues that FERC precedent is clear that federal law does not preempt state net metering

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[35] Id.
[36] Id.
[37] Id., p. 5; citing: R.I.G.L. §39-26-6(g)(ii)(C) and Tariff at Sheet 6.

programs.[38] The Portsmouth Group maintains that "it is up to Rhode Island to administer its net metering program and it has decided to do so in a way that permits entities like ... [the Town] to receive a check for renewable generation credits that would otherwise be applied against consumption at its own accounts."[39]

The Portsmouth Group also argues that the Town is not a wholesale generator by federal definition. The Portsmouth Group asserts that under federal law FERC jurisdiction is limited to wholesale generators who sell power to utilities for resale[40]; but that 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.[41] The Portsmouth Group contends that there can be no dispute that the Town "is a net consumer of electricity."[42] The Portsmouth Group opines that the Town is not a wholesale generator but is self-supplying or 'netting' by federal definition.[43]

In further support of its position, the Portsmouth Group argues that FERC precedent also makes it clear that a net metering customer need not consume all of the energy it generates on the site of the generating facility. On this point, the Portsmouth Group relies on a 2001 FERC decision wherein FERC held that a self-

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[38] Id., p. 6.
[39] Id.
[40] Id., p. 6, citing: 16 U.S.C. §§824, 824d, 824e (2006) and Mississippi Power & Light Co. v. Mississippi ex rel. Moore, 487 US 354 (1988).
[41] Id., citing: MidAmerica Energy Co., supra.
[42] Id., pp. 6-7. In support of this assertion, the Portsmouth Group relates that from April 2009 through March 2010, and from March 2010 through February 2011, Portsmouth's generating facility had a total output of 3,712,800 kWhs and 2,699,179 kWhs, respectively; and that during the same periods Portsmouth consumed approximately 3,972,170 kWhs and 3,971,582 kWhs, respectively, at more than forty accounts for Portsmouth, including Portsmouth School Department accounts.
[43] Id., p. 7.

supplying generator that used off-site generating facilities to self-supply its power needs was not a wholesale generator subject to federal law.[44] Based on this case, the Portsmouth Group concluded that the "location of the generating facility and the place of consumption are irrelevant as long as ... [the Town] consumes more energy than it generates."[45]

In its final comments on "wholesale" generation, the Portsmouth Group criticized the Advocacy Section for its reliance on the FERC cases of California Public Utilities Commission, 132 FERC ¶61,047 (2010) and Connecticut Power and Light, 71 FERC ¶61,153 (1995) to support the Advocacy Section's argument that the Town cannot receive more than the avoided cost rate for the energy it sells to National Grid. The Portsmouth Group argues that these cases related to 'wholesale rates' for power that is sold for resale, which according to the Portsmouth Group, would be "inappropriate" for use in the case of the Town.[46]

The Portsmouth Group next reiterated two of the arguments that it made in its motion for summary disposition, to wit, that the Division does not have jurisdiction over the constitutional questions raised in this case; and that the Town is exempt from the Federal Power Act and the avoided cost restriction under PURPA. Starting with the constitutionally question, the Portsmouth Group cites several cases that speak to the inappropriateness of administrative agencies determining the constitutionality of statutes (citations omitted). The Portsmouth Group argues that in the instant case, the Division is asked to take jurisdiction over the constitutional question of whether Rhode Island's net metering statute

[44] Id., citing: PJM Interconnection, LLC, 94 FERC ¶61,251.
[45] Id.
[46] Id., p. 8.

violates the Supremacy Clause and preemption powers of our federal government. The Portsmouth Group contends that "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."[47] The Portsmouth Group argues that if the Division were to address the constitutional preemption issue raised here, it would be "bound to read the Rhode Island net metering statute in such a way as to be consistent with the constitution unless there was no way of doing so."[48]

The Portsmouth Group argued next that even if the Town 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."[49] The Portsmouth Group bases this assertion on Section 201(f) of the Federal Power Act, which provides: "No provision of this subchapter shall apply to, or be deemed to include, the United States, a State or any political subdivision of a State..."[50] The Portsmouth Group avers that FERC decisions are clear that rates for sales from states or their subdivisions are not within its authority and not subject to its regulation because they are not rates for Qualified Facility sales at wholesale under PURPA.[51]

The Portsmouth Group next insisted that the Town's rate does not exceed avoided cost. On this issue, the Portsmouth Group maintains, simply, that the

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[47] Id., pp. 8-9.
[48] Id., p. 9.
[49] Id., p. 10.
[50] Id.
[51] Id., citing: Connecticut Light and Power, 70 FERC ¶61,012 at 19 (1995); Midwest Power Systems, Inc. 78 FERC ¶61,067 at 5 (1997); California Public Utilities Commission, 132 FERC ¶61,047 at 71 (2010).

Town "is not subject to avoided cost rates as long as it is net metering; generating less energy than it consumes." The Portsmouth Group claims that neither the Advocacy Section nor National Grid has presented any evidence that supports their conclusions that the Town's rate exceeds avoided cost. The Portsmouth Group contends that FERC has recently made it clear that, in these circumstances, avoided cost must be defined according to the characteristics of the generating source.[52] According to the Portsmouth Group "[n]either the Advocacy Section nor National Grid have presented any evidence that would support a finding that the rate established by Rhode Island's net metering law and endorsed by the Tariff exceeds rates paid for power from generators with similar characteristics."[53]

Finally, the Portsmouth Group argues that National Grid has no authority to develop and impose new policies requiring on-site consumption of any portion of the power generated from an eligible net metering facility without legislative change and PUC approval. The Portsmouth Group asserts that any ruling against Portsmouth would violate the "filed rate doctrine," which 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 more reasonable one.'[54] The Portsmouth Group argues that if National Grid and the Advocacy Section want to propose a revised rate they must seek and

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[52] Id., p. 11; citing: California Public Utilities Commission, 133 FERC ¶61,059 at 13-14 (2010).
[53] Id., pp. 11-12.
[54] Id., p. 13; citing Nantahala Power & Light v. Thornberg, 476 U.S. 953, 963 (1986); and Narragansett Electric Co. v. Burke, 381 A.2d 1358 (R.I. 1977).

achieve legislative reform and then rate reform at the PUC, applying any resulting rate adjustments prospectively.[55] The Portsmouth Group also emphasizes that "[i]t would be particularly egregious to penalize Portsmouth for good faith reliance on the law, the Tariff and National Grid guidance."[56]

f. The Town of Charlestown's and the Town of Jamestown's Position

The Towns of Charlestown and Jamestown ("Charlestown and Jamestown"), represented by Peter D. Ruggiero, Esq., Town Solicitor, submitted their jointly prepared legal memorandum on June 10, 2011. Charlestown and Jamestown began their legal analysis of the instant complaint case by stressing that the "paramount goal in statutory interpretation is to ascertain the intent behind the enactment of the statute and effectuate that intent when lawful."[57]

In furtherance of satisfying this goal, Charlestown and Jamestown identified two Rhode Island statutory provisions that the towns deemed to be the controlling law in this matter. The following provisions were underscored in Charlestown's and Jamestown's legal memorandum:

§39-26-6(g)(3)(ii):

> 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:

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[55] Id.
[56] Id., p. 14.
[57] Charlestown and Jamestown Memorandum of Law, p. 3, citing: In re Kent County Water Authority Change Rate Schedules, 996 A.2d 123, 130 (R.I. 2010).

(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 form 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)."

§39-26-2(22):

'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.

Charlestown and Jamestown also added the following items from the Statement of Facts that was filed in this docket to their analysis:

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. General 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;
> (iv) Transition kWh charge.

Charlestown and Jamestown contend that in order to answer the questions posed by the Hearing Officer, "these statutes and regulations must be interpreted." Concerning this interpretation, Charlestown and Jamestown proffer the following opinion:

> 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; 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.[58]

Charlestown and Jamestown argue that in the regulatory context, this concept "is commonly known as the "filed rate doctrine;" a doctrine which 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.'[59] Under this doctrine, Charlestown and Jamestown assert that since the Town "has been compensated at the rate prescribed by the Tariff and the Net-Metering Statute..., [the Town] cannot be deemed to be receiving an excessive rate for the output it sells back to National Grid."[60]

With respect to the question of whether the Facility is a "net-metering configuration" or a "wholesale generator" according to federal law, Charlestown and Jamestown echo the assertions made by the Portsmouth Group. Like the Portsmouth Group, Charlestown and Jamestown maintain that addressing this question is outside the Division's jurisdiction and not relevant to Mr. Riggs' complaint. Charlestown and Jamestown also maintain that even if the Division could interpret federal law, the Town like any other municipality, is exempt from the Federal Power Act and PURPA's definition of "wholesale generator" and their

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[58] Id., pp. 6-7.
[59] Id., p. 7, citing: Valdez v. New Mexico, 54 P. 3d 71, 74-75 (N.M. 2002).
[60] Id., pp. 7-8.

associated restriction to "avoided cost" credits.[61] Charlestown and Jamestown argue that because neither the Federal Power Act nor PURPA apply to municipalities such as the Town, these federal laws cannot "preempt Rhode Island law, such as §39-26-2(22) and §39-26-6(g)."[62]

g. CME Energy's Position

CME Energy, represented by Alan M. Shoer, Esq., submitted a position statement on June 10, 2011. In lieu of providing a legal analysis on the issues presented in this docket, CME Energy observed:

> [S]ince the time that the parties raised the initial questions for decision by the Hearing Examiner there has been substantial progress at the General Assembly to enact a new net metering statute, as well as a long term distributed energy contract statute that will, if enacted into law, govern projects prospectively, including the East Providence Solar project involving CME.[63]

CME Energy related that given that it is anticipated that the foregoing legislation will address the appropriate price for a net metered facility, as well as the dimensions of the availability of net metering to municipalities and their development partners, CME Energy "will defer further legal memoranda or comment until such time as the reply comments are due in this proceeding."[64]

h. OER's Position

OER, represented by John A. Langlois, Sr., Esq., submitted its legal memorandum on June 10, 2011. In its legal memorandum, OER submits that

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[61] Id., p. 8, citing: Easton's Point Assoc. v. Coastal Resources Management Council, 522 A.2d 199, 202 (R.I. 1987) and 16 U.S.C. §824(f).
[62] Id., p. 9.
[63] CME Energy Position Statement, p. 1.
[64] Id., p. 2.

the Facility "is a net metering facility as defined by the applicable State statutes," and therefore opines that, the rate the Town is receiving "is not excessive because the rate is consistent with the net metering laws."[65]

OER related that to fully comprehend its position on this issue, "one must understand the statutory structure and history of renewable energy in Rhode Island." Thereupon, OER provided a very useful summary of this statutory history, going all the way back to the 1970's.[66] OER contends that the legislative history of renewable energy in Rhode Island "demonstrates without any doubt that the General Assembly and the Governor support renewable energy." OER then argued that "[u]nless there are unequivocal prohibitions to the contrary, this broad statutory public policy should be respected in this case."[67]

OER next addressed the Complainant's concerns relative to the "engineering configuration" of the Facility, specifically its location "in front of the meter." On this point, OER argues that the question of whether the turbine is 'behind the meter' or 'in front of the meter' "is not critical to the net metering issue."[68] OER asserts that the "Renewable Energy Standard" statute defines "net metering" as "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."[69] According to OER, net metering in Rhode Island "is simply offsetting electricity that is produced from electricity that is consumed." OER also opines

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[65] OER Memorandum of Law, p. 2.
[66] Id., pp. 2-7.
[67] Id., p. 7.
[68] Id.
[69] Id., citing: R.I.G.L. §39-26-2(17).

that the statute "does not require that the facility generate more electricity than it consumes to be a net metering facility." OER adds that "[t]he 'net' in net metering may be a negative net." In its concluding comments on this issue, OER argues that the only critical factor for determination "is the ***difference*** between the electricity delivered to the customer and the electricity generated at the net metering facility by the customer." OER ultimately concludes that "no particular 'net metering configuration' is necessary."[70]

OER also offered a legal opinion on the question of whether the Town is receiving an excessive rate for its generated energy. Regarding this issue, OER observes that the Renewable Energy Standard statute defines which facilities are 'eligible net metering facilities' by examining ownership of the facility and the generation capacity of the facility.[71] OER contends that a renewable energy facility owned by a municipality with a generation capacity of less than 3.5 Megawatts is eligible for the net-metering facility rates set forth in the statute.[72] OER next argues that because the Facility satisfies all the statutory eligibility requirements, it qualifies for the net metering facility rate under the Tariff; and therefore, the rate paid to the Town "is not excessive but in accordance with the governing Rhode Island law."[73]

Lastly, OER emphasizes that the purpose of the Renewable Energy Standard statute is to 'facilitate development of new renewable energy

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[70] Id., p. 8.
[71] Id., citing: R.I.G.L. §39-26-6(g)(3)(1).
[72] Id.
[73] Id., pp. 8-9.

resources...[74] OER asserts that the statute is to be "liberally construed to give effect to that purpose."[75] Predicated on these provisions, OER asserts that "it is the statutory obligation of the Division...to interpret the applicable statutes in such a way as to facilitate renewable energy in general and the ... [Facility] in particular." OER thereafter warned that "[i]f the Division discourages renewable energy by narrowly construing the definition of 'net metering' in this instance, the Division would be violating its statutory obligations;" OER concludes that the "Division is ***required*** to maximize the renewable energy program in Rhode Island."[76]

6. New Net Metering Law

On June 29, 2011, the Governor signed into law a new statute governing net metering in Rhode Island (the "New Net Metering Law"). The New Net Metering Law, contained R.I.G.L. Chapter 39-26.2, establishes a new comprehensive set of statutes governing net metering in Rhode Island. The House version of the legislation that created the New Net Metering Law (House Bill H-5939, Substitute A) is attached to this Report and Order, and incorporated by reference.[77] The parties who submitted reply memoranda in this docket discuss the New Net Metering Law at great length, infra.

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[74] Id., p. 9, citing: R.I.G.L. §39-26-3.
[75] Id., pp. 9-10, citing: R.I.G.L. §39-26-10.
[76] Id., citing: R.I.G.L. §39-26-8(a).
[77] The Senate version is contained in Senate Bill S-457 Substitute A.

7. Reply Positions of the Parties

The adopted procedural schedule in this docket permitted the filing of reply memoranda by July 22, 2011. Six of the parties filed such reply memoranda with the Division.

a. The Advocacy Section's Reply Memorandum

The Advocacy Section's reply memorandum focused on the legal position filed by the Portsmouth Group; and particularly on the five grounds on which the Portsmouth Group seeks dismissal of the instant investigation.

The Advocacy Section first addressed the Portsmouth Group's claim that the Facility is a net metering facility and not a wholesale generator. The Advocacy Section vigorously reiterated that "the Facility is not a net metering facility as defined by the seminal case, Sun Edison LLC..." The Advocacy Section argues that because the output from the Facility has been transferred directly into the transmission grid for delivery to the market, and, further because the Facility is a standalone generating unit with no appreciable load, "the Facility will never fit the definition of a net metering facility according to Sun Edison."[78] In further support of this legal opinion, the Advocacy Section observes that one intervenor, CLF, "recognizes the fact that 'common sense suggests' the transaction between the Town and National Grid is the sale of power at wholesale...."[79] Although it concludes that the Facility is clearly not a net metering configuration, the Advocacy Section suggests that the Portsmouth Group "could have argued that the configuration of the Facility is what is more accurately described as 'virtual

[78] Advocacy Section's Reply Memorandum, p. 2.
[79] Id.

net metering,'" a configuration that the Advocacy Section acknowledges has been allowed pursuant to the recent legislative enactment of R.I.G.L. §39-26.2-1, *et seq.*[80]

The Advocacy Section next addressed the Portsmouth Group's assertion that the Division lacks the requisite jurisdiction to adjudicate the instant complaint. The Advocacy Section urges that the Division "not find credibility in any jurisdictional arguments...where there is a failure to recognize the distinct nature of the Division and the PUC." The Advocacy Section argues that the Division derives its jurisdiction in this case from the authority conferred by R.I.G.L. §39-4-10, which empowers the Division to "review the reasonableness of a utility's practice." The Advocacy Section argues that "National Grid subjects itself as a public utility to the investigatory powers of the Division as to the conduct of its business including compliance with Tariff R.I.P.U.C. No. 2035 (the "Tariff")."

The Advocacy Section also condemned the Portsmouth Group's assertion that the instant complaint must be dismissed because the Town is exempt from the rate caps under PURPA. The Advocacy Section argues that the Division's investigation is not a rate setting review, but rather the investigation "centers on whether the Town is receiving the proper rate under the Tariff which contains two separate rate categories." The Advocacy Section argues that while the "exemption" issue "may have some merit in a rate setting forum" (before the PUC), in the context of the avoided cost rate caps under PURPA, the Advocacy Section

[80] Id., p. 4.

argues that such discussion would not be relevant in the instant "review and analysis of the Tariff issue" now before the Division.[81]

The Advocacy Section similarly criticized the Portsmouth Group's reliance on the filed rate doctrine as a bar preventing the Division from ordering National Grid to pay the Town the QF rate as opposed to the net metering rate under the Tariff. The Advocacy Section asserts that the Portsmouth Group's argument "is obviously flawed because there has never been a general rate filing by National Grid or the Town relating specifically to this transaction." The Advocacy Section emphasizes that the only question in this matter is "whether the appropriate purchase rate was applied, based on the facts associated with the generator configuration."[82]

Finally, the Advocacy Section criticized, what it described as the Portsmouth Group's "strongest argument," the "equity" argument. The Advocacy Section characterized equity arguments as arguments "of last resort where the petitioner throws itself at the hands of the court." The Advocacy Section observes that in this case, the Town is essentially arguing "that it is a victim of the goliath National Grid, who it asserts guided it through this transaction, including the configuration of the Facility."[83] The Advocacy Section also turned its ire to National Grid, who it describes as an "industry giant in this region" and the "gatekeeper" to its tariffs. The Advocacy Section argues that National Grid "should be the primary party responsible for ensuring that the tariffs are being appropriately applied to its customers and regulations are conformed with."

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[81] Id., pp. 3-4.
[82] Id., p. 5.
[83] Id., p. 5.

Speaking further to the issue of National Grid's responsibility in this matter, the Advocacy Section pointed to the following initial written response from National Grid to the Complaint:

> '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"[84] 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).*[85]

The Advocacy Section also observed, that in its response to Advocacy Section data request 1-5, National Grid concluded that the Facility "fails to comport with National Grid's and the industry's understanding of what constitutes a net metering generation configuration;" and that "[r]eading the (RI) 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."[86] The Advocacy Section adds that National Grid "never explains why, in light of its statements regarding its

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[84] *As noted by the Advocacy Section in our February 2, 2011 Memorandum, Portsmouth in fact filed with the FERC a Certification Of Qualifying Status For An Existing Or A Proposed Small Power Production Or Cogeneration Facility. See Tab 2 to the Attachments to the Memorandum, 2/2/11.*

[85] *See Thomas Teehan letter to John Spirito, 9/3/10.*

[86] Advocacy Section's Reply Memorandum, pp. 6-7.

understanding of net metering, it allowed the Town to configure its wind facility in such a manner that it is essentially a wholesale generator." The Advocacy Section contends that the "only insight provided is found in its 9/3/10 letter to the hearing officer that the Company provided an 'accommodation' to save the Town money." The Advocacy Section expressed consternation over this decision by National Grid due to "the fact that payments to the wind generator that exceed the revenues that the ISO pays to National Grid for the Portsmouth power are additional costs placed on National Grid's standard offer customers, along with certain additional costs placed on transmission and distribution customers as well." The Advocacy Section described this "subsidization of the Town as the primary foundation of the Riggs complaint."[87]

The Advocacy Section also focused on National Grid's February 23, 2011 "rather concise response" to the Advocacy Section's February 2, 2011 "*Memorandum Relating To The Complaint of Benjamin Riggs.*" The Advocacy Section emphasizes that National Grid "did not rebut or take issue with any of the Advocacy Section's analysis or findings." The Advocacy Section notes that in its response, National Grid concluded that 'the current pricing does not comply with the federal avoided-costs cap,' and 'suggests a curative approach under which it would purchase the output of the ... [Facility] for use as Standard Offer supply at a rate that approximates the average wholesale cost of power that it pays to service its Standard Offer customers.'[88]

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[87] Id., p. 7.
[88] Id., p. 8.

The Advocacy Section argues that it "is important to point out that National Grid did not take the opportunity to retract, modify, or clarify any of the contradictions between its actions in entering into the arrangement with Portsmouth between late 2008 and early 2009 and National Grid's statements in its submissions in this docket regarding its understanding of net metering under federal law and its interpretation of the Rhode Island net metering law in place at the time the Portsmouth arrangement was entered into."[89]

In its final reply discussion, the Advocacy Section addressed the issue of whether the New Net Metering Law "shall have retroactive or prospective effect." The Advocacy Section conveyed that on June 29, 2011, Rhode Island enacted a new net metering law, R.I.G.L., Chapter 26.2, which "permits a Town-owned generating facility to 'virtually net meter,' i.e. tie directly into the distribution system and receive a credit for the output at a rate that comprises the generation, distribution, and transmission [sic] [and transition] components, for all kWhs sold into the grid, up to the amount of consumption for all the Town's accounts." However, the new law is silent on whether it has retroactive application.

In addressing this issue, the Advocacy Section argues that the Rhode Island Supreme Court has held that the "Court presumes that statutes and their amendments operate prospectively unless there is clear, strong language or a necessary implication that the General Assembly intended to give the statute retroactive effect."[90] The Advocacy Section further argues that where a statute contains a statement that the act 'shall take effect upon passage,' which is the

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[89] Id., pp. 8-9.
[90] Id., p. 9, citing: Direct Action for Rights and Equality v. Gannon, 819 A.2d 651, 658 (R.I. 2003) *citing* Pion v. Bess Eaton Donut Flour Co., 637 A.2d 367, 371 (R.I. 1994).

case here, the Court has held that the statute applies prospectively.[91] However, despite the apparent conflict between the Town's need for retroactive application in this matter and the stated effective date of the new law, the Advocacy Section proffered the following alternative analysis:

> The legislature presumably passed the most recent net metering statute to clarify the purpose and strategy it has to encourage the development of projects of the type in the Town of Portsmouth. For this reason it is not unreasonable to conclude that the General Assembly implied retroactive application of Chapter 26.2. To conclude otherwise based upon the timing of the passage of the amended Net Metering statute here might thwart the intent of the legislature.[92]

In its closing, the Advocacy Section argued that based on the totality of the circumstances it believes the Division's order in this docket must "require recognition of National Grid's role in inappropriately applying its tariff, in violation of federal and state laws and regulations, resulting in excess payments made to ... [the Town] at the expense of National Grid's other customers."[93] The Advocacy Section also argues that if the Division finds that the former statutory section on net metering was clear and this configuration was nothing more than a standalone generator as National Grid has stated and not eligible for net metering, and further finds that the new legislation regarding net metering applies only prospectively, "then the Division is constrained to find National Grid's practices in the transaction here were unreasonable."[94] In the event such findings are made by the Division, the Advocacy Section contends that the

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[91] Id., citing: Kaveny v. Town of Cumberland Zoning Board of Review, 875 A.2d 1, 5 (R.I. 2005).
[92] Id., p. 10.
[93] Id.
[94] Id., pp. 10-11.

Division has the authority, under R.I.G.L. §39-4-10, to make a specific finding that National Grid acted in an unreasonable manner in administering its Qualifying Facilities Power Purchase Rate, both RIPUC No 2035 and its predecessor tariff, RIPUC No. 2010-A, as it related to the Facility, up until the effective date of the revised net metering statute signed into law on June 29, 2011. If the Division agrees with the Advocacy Section that the evidence in this investigation leads to a finding of unreasonable practices on National Grid's part, the Advocacy Section urges the Division to "order a refund under its authority under R.I.G.L. §39-3-13.1, to all customers of payments made to ... [the Town] in excess of the Qualifying Facilities rate in the aforementioned tariffs." The Advocacy Section opines that the refund could reasonably be accomplished by crediting the Standard Offer reconciliation account for net supply costs that have been added to Standard Offer service as a result of the transaction. The Advocacy Section adds that similar credits could be applied to the transmission adjustment reconciliation and to the distribution surcharge associated with the renewable generation credits paid to the Town. The Advocacy Section also asserts that National Grid should be directed to submit to the Division a calculation of the amounts of excess payments made through June 28, 2011 and direct National Grid to effectuate these refunds via the next standard offer and annual tariff rate filings made with the PUC.[95]

[95] Id., p. 11.

b. National Grid's Reply Memorandum

National Grid observes that before the enactment of the New Net Metering Law, the statutory provisions that governed net metering were contained within R.I.G.L. 39-26-6 (the "Renewable Energy Standard"), provisions which National Grid notes were amended in 2008 and again in 2009. National Grid argues that after these changes took place 2008 and 2009, the State's net metering laws became "a confusing and, in certain respects, conflicting patchwork of net metering provisions that did not clearly address the proper sizing of net metering generating facilities to offset consumption and did not identify the accounts against which the output of a facility would be netted."[96] As an example, National Grid observes that the Renewable Energy Standard defined net metering in very general terms as '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.'[97] National Grid contends that this "definition provides no detail as to which accounts are available to be offset by the output of a net metering facility, and allows for various approaches to that determination." National Grid observes that after the 2009 amendments to the Renewable Energy Standard went into effect, it became possible for a city or town to be compensated for excess renewable generation credits by a check from the utility. National Grid argues that after this amendment became law, the excess generation credits no

[96] National Grid's Reply Memorandum, p. 1.
[97] Id., p. 2, citing: R.I.G.L. §39-26-2(17).

longer had to be applied to another town account or rolled forward from month to month.

In further support of its claim of confusion, National Grid next noted that Section III.B of its Qualifying Facility (QF) Rate, R.I.P.U.C. 2035, which has been in effect since September 2009, contains a provision that allows certain eligible QF's to deliver power to the Company through net metering. National Grid argues that those net metering portions of the QF Rate were designed to reflect the legislative provisions relating to net metering that were, until recently, found in R.I.G.L. 39-26-6 (the "Renewable Energy Standard").

However, National Grid now maintains that with the enactment of the New Net Metering Law, "the legislature has addressed and cured the lack of clarity that surrounded the former statutory net metering provisions." According to National Grid, the New Net Metering Law "makes it clear that the Town...is an eligible net metering facility and is receiving the proper rate for... [its] output..."[98]

In support of this conclusion, National Grid maintains that under the New Net Metering Law, the maximum allowable capacity for "Eligible Net Metering Systems," based on nameplate capacity, is 5 megawatts. National Grid asserts that the Facility is a 1.5 megawatt facility, and, therefore, clearly meets the eligibility requirement. National Grid also points out that the New Net Metering Law establishes that an Eligible Net Metering System must be reasonably designed and sized to annually produce electricity in an amount that is equal to or less than the renewable self-generator's usage at the Eligible Net Metering Site. However, in the case of a municipally-owned Net Metering System, such as the

[98] Id., p. 2.

Facility, National Grid argues that the new law provides that generation at the municipally-owned facility may be applied to offset the consumption on all of the municipality's accounts, including consumption at offsite accounts.[99]

National Grid argues that under the new statute, the issue of whether the Facility is a legitimate net metering facility that is properly sized for the rate it is receiving has been "resolved." National Grid argues that it is no longer important to consider whether the facility's output is offset by the consumption taking place where the facility is located. National Grid asserts that the new law "makes it clear that the Town...is allowed to net the output of its municipally-owned generating facility against the consumption represented by all of its municipal accounts."[100]

National Grid argues next that because the Town's output is less than its consumption by all of its municipal accounts, it may receive renewable net metering credits for all of its output, as it currently does. National Grid observes that the rate for Renewable Net Metering Credits under the New Net Metering Law is calculated as the sum of (i) the standard offer service kilowatt hour charge for the rate class applicable to the net metering customer; (ii) distribution kilowatt hour charge; (iii) transmission kilowatt hour charge; and (iv) transition kilowatt hour charge. National Grid concludes: "that the rate that... [the Town] is receiving for its output is and continues to be the appropriate rate under Rhode Island law."

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[99] Id., pp. 4-5.
[100] Id., p. 5, citing: R.I.G.L. §39-26.2-2(2).

c. CLF's Reply Memorandum

CLF began its reply by asserting that the New Net Metering Law "was specifically designed to, and does, comprehensively address all the issues before the Division in this proceeding."[101] CLF thereafter focused its attention on four areas: federal net metering law; Rhode Island's New Net Metering Law; rules of statutory interpretation; and answers to the two questions posed by the Hearing Officer.

In addressing the topic of federal net metering law, CLF reiterates that the FERC has "expressly held that net metering is governed and controlled by state law, not federal law."[102] CLF also reiterates that in order for federal law to be implicated in net metering, there would need to be, pursuant to the Federal Power Act, "a wholesale sale of electricity at wholesale[;]' and 'wholesale' is defined as 'a sale of electric energy to any person for resale.'"[103] As initially asserted in its previous legal memorandum, CLF again argues that because the Town is "merely" offsetting their own electricity use, there is no wholesale sale of electricity for resale; thus, there is no federal jurisdiction. CLF reiterated that in this case it is undisputed that the Facility produces less electricity than the Town consumes.[104]

In addressing Rhode Island's New Net Metering Law, CLF maintains that the new law "was carefully, [and] consciously written to comport with applicable federal law."[105] CLF observes that the New Net Metering Law comports with applicable federal law in three respects that are relevant to this proceeding. First,

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[101] CLF's Reply Memorandum, p. 1.
[102] Id., p. 2, citing: MidAmerican Energy Co., 94 FERC ¶61,340 (2001).
[103] Id.
[104] Id.
[105] Id., p. 4, citing: R.I.G.L. Chapter 39-26.2.

for all electricity that a net metering self-generator produces up to the amount of electricity that the self-generator itself consumes, the New Net Metering Law specifies that the utility credit the self-generator at the full retail rate.[106] CLF argues that there is no prohibition against this arrangement in federal law. Second, for just that increment of electricity that a self-generator produces above the amount it consumes, the New Net Metering Law specifies that the utility pay the 'avoided cost rate which is hereby declared to be the electric distribution company's standard offer service kilo-watt (kWh) charge for the rate class...'[107] CLF asserts that this also "clearly comports with federal law, because the utility is paying the avoided cost rate as 'avoided cost' is defined by state law." Third, for all situations in which the net metering self-generator produces less electricity than the self-generator itself consumes, "the utility can only offset the self-generator's meters, but cannot issue a check to the self generator."[108] Under this provision, CLF argues that "there can now be no suggestion that what... [the Town] is doing somehow constitutes a sale of electricity for resale such that federal law would be implicated."[109]

Next, in addressing the rules of statutory interpretation, CLF principally relied on the case law that was proffered by the Advocacy Section in its June 10, 2011 legal memorandum. CLF agreed that the "'ultimate goal' is to give effect to the General Assembly's intent."[110] CLF argues that "[i]n creating the New Net Metering Law in the new Chapter 26.2, the General Assembly stated exactly what

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[106] Id., p. 5, citing: R.I.G.L. §39-26.2-3(a)(4).
[107] Id., citing: R.I.G.L. §39-26.2-3(a)(5) and §39-26.2-2(4).
[108] Id., pp. 5-6, citing: R.I.G.L. §39-26.2-3(a)(4).
[109] Id., p. 6.
[110] Id., p. 6, citing: State v. Menard, 888 A2d 57, 60 (R.I. 2005).

its purpose and intent was: 'The purpose of this chapter is to facilitate and promote installation of customer-sited, grid-connected generation of renewable energy..."[111] CLF asserts that the Facility is exactly the type of renewable project that is contemplated under the New Net Metering Law. CLF also argues that because the New Net Metering Law "is clear and unambiguous" it "is dispositive of this proceeding."[112]

Finally, with respect to the two questions raised by the Hearing Officer, CLF offered brief responses. Regarding the question of whether the Town is receiving an excessive rate for its output, CLF expresses a resounding "no." CLF declares that "State law controls the rate, and... [the Town] is getting precisely the rate set by state law."[113]

With respect to the question of whether the Facility is a net metering configuration (under state law) or a wholesale generator under federal law, CLF insists that the Facility is not a wholesale generator under federal law. CLF observes that under the New Net Metering Law, the Town "is now not permitted to receive a check from Grid for electricity that it...produces." CLF argues that even in the event that, in the future, the Town should ever produce more electricity than it consumes, "that excess would be paid at the avoided cost rate as specified in federal law."[114]

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[111] Id., p. 7, citing: R.I.G.L. §39-26.2-1.
[112] Id., p. 8.
[113] Id., p. 9.
[114] Id.

d. The Portsmouth Group's Reply Memorandum

The Portsmouth Group started its reply by arguing that the Advocacy Section "mistakenly mischaracterizes" the Facility as a 'self standing unit with no meaningful use of its own output to meet the Town's load requirements.' The Portsmouth Group contends that the Facility offsets some of its own energy consumption "and that is just what net metering is designed to allow... [the Town] to do."[115] The Portsmouth Group argues that "there is no cause to malign the Town for alleged gamesmanship or for taking advantage of the system or ratepayers when it is simply crediting its own energy production against its greater consumption," which the Portsmouth Group stresses "is entirely consistent with net metering as defined and understood by both state and federal law."[116]

The Portsmouth Group next argues that the fundamental fact in this case is that the Town is a net consumer of energy. The Portsmouth Group maintains that Rhode Island law clearly authorized the Town "to credit up to ten of its meters or to receive a check for the value of its renewable generation credits as an administrative means to accomplish 'net metering' of their production against their consumption." The Portsmouth Group asserts that there is "simply nothing in the law that dictates that renewable generation credits must be applied against energy consumption at the same site as... [the Town's] energy production."[117] In support of its assertion, the Portsmouth Group observes that the earlier law "speaks of crediting to up to ten 'accounts owned by the customer' and the Tariff

[115] The Portsmouth Group's Reply Memorandum, p. 1.
[116] Id.
[117] Id., p. 2.

clearly provides for netting a customer's generation against its production [sic][consumption]."[118] The Portsmouth Group also asserts that federal law similarly "clearly contemplates customer-based netting."[119]

The Portsmouth Group also argues that even if the Division still sees any uncertainty in Rhode Island's former net metering law, the Rhode Island legislature has now amended the law, making it even clearer that the Town is net metering. As support, the Portsmouth Group observes that the New Net Metering Law expressly provides: that net metering systems must be owned by the same entity that is the customer of record on the net metered accounts; that municipal generation can be metered against all municipal accounts, without limitation and without regard to their location; that a municipality may be compensated for its renewable generation credits by check as long as the electrical distribution company consents to that administrative convenience; and that net metering customers are entitled to the designated net metering rate and that the avoided cost rate will be applied only to that increment of generation that exceeds the net metering customer's own consumption. The Portsmouth Group argues that "there can be no question that... [the Facility] fits squarely within the defined eligibility of Rhode Island's new net metering law."[120]

e. Charlestown's and Jamestown's Reply Memorandum

Charlestown's and Jamestown's reply memorandum contained only a copy of the New Net Metering Law that was signed into law by the Governor on June 29, 2011. Charlestown and Jamestown briefly argue "that this statute reaffirms

[118] Id., pp. 2-3, citing: R.I.G.L. §39-26-6(g)(ii) and Tariff at sheets 5-6.
[119] Id., p. 3, citing: Sun Edison, 129 FERC ¶61,146 at ¶18 (2009).
[120] Id., pp. 3-4.

the arguments stated in their original memorandum." Charlestown and Jamestown also request that the Division issue an order that finds that: (1) the Town does not receive an excessive rate for its sale of electricity back to National Grid and (2) that the Facility is a net-metering configuration in accordance with both federal and Rhode Island law."[121]

f. OER's Reply Memorandum

OER asserts in its reply memorandum that it "established in its June 10 Memorandum that the wind facility owned by the Town... is a net metering 'configuration' as defined by the State statutes in effect at that time." According to OER, "[n]one of the memoranda filed by the other parties in this proceeding disproved this conclusion."[122] OER reasons therefore, that the rate the Town is receiving is "consequently" not excessive because the rate is "consistent with the net metering laws."[123]

OER adds that the New Net Metering Law mirrors "in key respects the interpretation of the former statutes propounded in OER's Memorandum." OER opines that the revisions do not alter the status of the Town as a net metering facility; but rather, "the presence of the new statutes should clarify and ultimately resolve all issues regarding... [the Town's] net metering status."[124]

OER next criticized that Advocacy Section for being the only party in this proceeding asserting that the Facility does not meet the statutory definition of a net metering facility. OER faulted the Advocacy Section for urging the Hearing

[121] Towns' Reply Memorandum, p. 1.
[122] OER's Reply Memorandum, p. 2.
[123] Id.
[124] Id.

Officer to "give the language in the net metering statute its 'plain and ordinary meaning'" while at the same time illustrating the meaning of the statute by "applying the 'industry standard' of net metering." OER argues that the Advocacy Section "never explored the express language of the statute."[125]

OER also criticizes the Advocacy Section for relying exclusively on National Grid "as its sole authority" for defining the 'industry standard' of net metering. OER argues that the Advocacy Section "is urging the Hearing Officer to construe the net metering statutes in Rhode Island based solely upon National Grid's interpretation of net metering while ignoring the plain language of the statute."[126]

OER additionally takes exception to the Advocacy Section's use of federal regulatory decisions to support its explanation of net metering. OER contends that the Advocacy Section did not offer any explanation why FERC decisions "should be used to interpret a Rhode Island statute." OER argues that FERC decisions pertain only to Federal regulations and should not be used to interpret the plain language of a Rhode Island statute.[127]

OER next reiterated its previous assertion "that the statutory definition of net metering was clear and unambiguous." OER relates that the Renewable Energy Standard statute defined 'net metering' as '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.'[128] OER maintains "that the Hearing

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[125] Id., pp. 2-3.
[126] Id., p. 3.
[127] Id., pp. 3-4.
[128] Id., p. 4, citing: R.I.G.L. §39-26-2(17).

Officer needs no further 'illustration' or 'instruction' beyond this simple language." OER argues that because 'the process of measuring the difference' at the Facility is clearly established, the Facility "was net metering under the Renewable Energy Standard statute."[129]

OER next addressed the New Net Metering Law. OER observes that the new law defines net metering as 'using electricity generated by an eligible net metering system for the purpose of self-supplying power at the eligible net metering system site and thereby offsetting consumption at the eligible net metering site through the netting process established in this chapter.'[130] OER also observes that the new law defines an 'eligible net metering system' as:

> A facility generating electricity using an eligible net metering resource that is reasonably designed and sized to annually produce electricity in an amount that is equal to or less than the renewable self-generator's usage at the eligible net metering site measured by the three (3) year average annual consumption of energy over the previous three (3) years at the electric distribution account(s) located at the eligible net metering site.[131]

OER avers that the new law also provides "preferential treatment" to municipalities that own or operate a net metering system. OER relies on the following language to support this claim:

> Notwithstanding any other provisions of this chapter, any eligible net metering resource: (i) owned by a municipality or multi-municipal collaborative or (ii) owned and operated by a renewable generation developer on behalf of a municipality or multi-municipal collaborative through municipal net metering financing arrangement shall be treated as an

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[129] Id., pp. 4-5.
[130] Id., p. 5, citing: R.I.G.L. §39-26.2-2(8).
[131] Id., pp. 5-6, citing: R.I.G.L. §39-26.2-2(2).

> eligible net metering system and all municipal accounts designated by the municipality or multi-municipal collaborative for net metering shall be treated as accounts eligible for net metering within an eligible net metering system site.[132]

OER concludes that in view of the facts agreed to in this case, that there can be no dispute that the Town's wind facility is an eligible net metering system under the New Net Metering Law.[133]

Lastly, OER addressed the issue of whether the Town is receiving an excessive rate under the New Net Metering Law. On this question, OER argues that the Town was neither receiving an excessive rate under the former Renewable Energy Standard statute, nor is it receiving an excessive rate under the new law. OER explains that from April, 2009 through February, 2011, the electricity generated at the Facility never exceeded the total usage of all the electric accounts of the Town. In view of that, OER asserts that "the rate to be paid to the Town... under the new net metering statute is the retail rate. That is the rate that has been paid to the Town by National Grid."[134]

8. Discussion and Findings

a. Discussion

The Division has carefully considered the legal arguments espoused by the parties in this proceeding. Fundamentally, the Complainant and the Advocacy Section, and to a lesser degree, National Grid, maintain that the current interconnection arrangement between the Town's Facility and National Grid's distribution system, as well as the "retail" rate that National Grid pays the Town

[132] Id., p. 6, citing: R.I.G.L. §39-26.2-2(2).
[133] Id., pp. 6-7.
[134] Id., pp. 7-8.

for its production output from the Facility, are inconsistent with the prevailing Federal law, the PUC's relevant Tariff, and the State net metering law that was in effect until June 29 of this year. The Advocacy Section additionally suggests that the New Net Metering Law lacks retroactive application, and, therefore, fails to provide any remedial impact with respect to the period of time pre-dating its enactment.

In stark contrast, the Town, and all the other Intervenors, argue that Federal Law is not a bar to the interconnection arrangement between the Town's Facility and National Grid's distribution system. They also universally contend that the State's net metering law, past and present (specifically, the net metering law that was in effect at the time of the interconnection as well as the currently effective net metering law), fully support the arrangement and the retail rate that the Town receives for its output from the Facility.

In reviewing the pertinent Federal Law, the Division finds that the FERC has predictably limited the application of Federal law in its decisions to those "wholesale" cases that fall under its regulatory purview. In short, FERC jurisdiction, in the context of related national energy policy, is limited to enforcing the Federal law that applies to Qualified Facilities (QFs) under PURPA (the Public Utility Regulatory Policies Act of 1978, as amended) (16 U.S.C. § 2601 et seq.) and larger energy producers (non QFs) under the Federal Power Act ("FPA") (16 U.S.C. §§ 824-824w). In this proceeding, however, the Division must query whether either of these Federal Acts, and the FERC decisions issued thereunder, have any significance to the existing interconnection arrangement here. Before reaching

that question, however, the Division believes that a brief summary of the provisions of the FPA and PURPA would be instructive.

Pursuant to the FPA, the FERC has plenary jurisdiction over "the transmission of electric energy in interstate commerce and to the sale of electric energy at wholesale in interstate commerce."[135] The FPA also provides that "electric energy shall be held to be transmitted in interstate commerce if transmitted from a State and consumed at any point outside thereof...;"[136] and that "the term 'sale of electric energy at wholesale'... means a sale of electric energy to any person for resale."[137] Nevertheless, a careful review of the FPA reveals certain limitations with respect to the states' regulation over electric distribution companies on an intrastate basis. For example, the FPA provides that FERC "shall not have jurisdiction...over facilities used for the generation of electric energy or over facilities used in local distribution or only for the transmission of electric energy in intrastate commerce, or over facilities for the transmission of electric energy consumed wholly by the transmitter."[138] The FPA also bars Federal regulation on "those matters which are... subject to regulation by the States."[139] Also of note, the FPA provides that: "[n]o provision in this subchapter shall apply to... a State or any political subdivision of a State... or any agency, authority, or instrumentality of any one or more of the foregoing..."[140]

The FPA also requires the FERC to promulgate "and from time to time thereafter revise, such rules as it determines necessary to encourage cogeneration

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[135] 16 U.S.C. § 824b.
[136] 16 U.S.C. § 824c.
[137] 16 U.S.C. § 824d.
[138] 16 U.S.C. § 824b.
[139] 16 U.S.C. § 824a.
[140] 16 U.S.C. § 824f.

and small power production" and to establish rules which "require electric utilities to offer to... sell electric energy to qualifying cogeneration facilities and qualifying small power production facilities and ... purchase electric energy from such facilities." As a limitation, however, the FPA provides that "[n]o such rule prescribed... shall provide for a rate which exceeds the incremental cost to the electric utility of alternative electric energy."[141]

The FPA further authorizes the FERC to "...prescribe rules under which... qualifying small power production facilities are exempted in whole or part from the Federal Power Act... [and] from State laws and regulations respecting the rates, or respecting the financial or organizational regulation, of electric utilities, or from any combination of the foregoing, if the...[FERC] determines such exemption is necessary to encourage cogeneration and small power production."[142]

PURPA was enacted in 1978 for the purpose of creating a market for non-utility electric power producers to sell their generated electricity to traditional electric utility companies. Two classes of "qualifying facilities" (QFs) were established under PURPA, "small power production facilities" and "cogeneration facilities." Under PURPA, a small power production facility is defined as a generating facility of 80MW or less whose primary energy source is renewable (hydro, wind or solar), biomass, waste, or geothermal resources; a cogeneration facility is defined as a generating facility that sequentially produces electricity and

[141] 16 U.S.C. § 824a-3(a)-(d).
[142] 16 U.S.C. § 824a-3(e).

another form of useful thermal energy (such as heat or steam) in a way that is more efficient than the separate production of both forms of energy.

The above-described qualifying facilities receive special rate and regulatory treatment under PURPA. These benefits generally permit QFs to sell their generation to electric utilities at either the utility's "avoided cost" or at a negotiated rate. QFs also have a right to purchase certain services from utilities under PURPA, including the right to purchase supplementary power, back-up power, maintenance power, and interruptible power at rates which are just and reasonable.[143] Under PURPA, QFs also receive relief from certain regulatory burdens, including exemption from the Public Utility Holding Company Act of 2005; as well as an exemption from State laws and regulations respecting the rates and financial and organizational aspects of utilities.[144]

The benefits created under PURPA for QFs are inviolate at the state level, and may not be disturbed by state legislatures. Put another way, in the interest of encouraging conservation of electric energy, increased efficiency in the use of facilities and resources by electric utilities, and equitable retail rates for electric consumers, Congress has guaranteed QFs the right to sell their generated electricity to electric utilities at reasonable rates.

PURPA was amended by the Energy Policy Act of 2005 (§1251), in order to, *inter alia*, formally add a place for "net metering" into the Nation's energy policy. The net metering definition that was adopted provides as follows:

> Net Metering. – Each electric utility shall make available upon request net metering service to any

[143] See 18 C.F.R. § 292.305.
[144] See 18 C.F.R. § 292.602.

> electric consumer that the electric utility serves. For purposes of this paragraph, the term 'net metering service' means service to an electric consumer under which electric energy generated by that electric consumer from an eligible on-site generation 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 appropriate billing period.[145]

FERC has issued a number of decisions wherein the propriety of net-metering arrangements were analyzed from a regulatory perspective for the purpose of determining their compatibility with Federal law. Chief among these cases were MidAmerican Energy Company and Sun Edison LLC, *supra*. In MidAmerican, FERC held that states may adopt net metering policies that permit small generation facilities to utilize a single meter to measure their output and consumption "on a net basis". This arrangement consequently permits net metering customers to receive retail compensation for their output. The FERC also concluded that the practice of netting does not constitute a "sale" sufficient to invoke Federal jurisdiction. The FERC also declared that in implementing PURPA, it recognized "that net billing arrangements...would be appropriate in some situations, and left the decision of when to do so to state regulatory authorities." In MidAmerican, FERC also discussed the issue of "net sales to a utility," concluding that a net sale would require compensation at an avoided cost rate. However, in determining whether a net sale is present, FERC agreed that a small generating facility's net output could be measured over a "reasonable time period." Though no specific time frame is approved, the FERC suggested that the time frame could extend out for at least a year.

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[145] 16 U.S.C. § 2621(d).

In Sun Edison, the FERC reaffirmed the legality of net metering under the Federal law, which it described as follows:

> Net metering allows a retail electric customer to produce and sell power onto the Transmission System without being subject to... [FERC'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 is sold back to the utility. Essentially, the electric meter "runs backward" during the portion of the billing cycle when the load produces more power that [sic] it needs, and runs normally when the load takes electricity off the system.

In Sun Edison, FERC also explained:

> ...that "net metering is a method of measuring sales of electric energy. Where there is no net sale over the billing period... [FERC] has not viewed its jurisdiction as being implicated; that is... [FERC] 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. Only if the end-use customer participating in the net metering program produces more energy than it needs over the applicable billing period, and thus is considered to have made a net sale of energy to a utility over the applicable billing period, has ...[FERC] asserted jurisdiction.

Predicated on the Federal law summarized above, the Complainant and the Advocacy Section assert that the Town cannot be considered a true net metering customer because its Facility is not configured as a "behind-the-meter" facility and also because the Facility feeds all of its output directly into National Grid's distribution system. In view of this arrangement, the Advocacy Section and the

Complainant maintain that the Town cannot receive a compensatory rate for its output that would exceed National Grid's avoided (or incremental) costs.

The Complainant and the Advocacy Section also argue that the Town's arrangement with National Grid violated Rhode Island law as well - both statutory law under R.I.G.L. Chapter 39-26, and the PUC's approved Tariff, which sets "Qualifying Facilities Power Purchase Rates" for National Grid (R.I.P.U.C. No. 2035). The Complainant and the Advocacy Section contend that the violations of State law principally result from the fact that the Facility is on the distribution system side of the meter, and because the rate that the Town is receiving for its generated output exceeds National Grid's avoided costs.

b. Findings

(i.) federal law vs. state law

Some of the Intervenors in this case have either argued directly that the Federal law is not relevant in this matter, or have significantly downplayed its application and importance. Despite this effort to marginalize the implications of FERC's jurisdiction over wholesale power generators, the Division does unquestionably recognize that the Federal law applies to the "sale of electricity at wholesale" and "the sale of electric energy to any person for resale." Conversely, however, the Division also recognizes that net metering is governed and controlled by state law, not Federal law.

That said - the Division also finds that FERC has made it crystal clear that the states do not have unfettered authority over net sales to electric utilities by net metering customers. The case law on the subject unambiguously reflects that net sales that are calculated beyond the customer's "billing period" remain within

FERC's "wholesale" domain. Even though FERC has not defined a maximum length of time for an appropriate billing period, and appears to have left the issue open for future challenge and consideration, the Division acknowledges that Federal law continues to control in this area. Therefore, if the Division were to find evidence of net sales in the case of Portsmouth, the Federal law would, indeed, play a very significant part in the Division's evaluation of the propriety of the instant arrangement between the Portsmouth and National Grid.

(ii.) the behind-the-meter issue

Before addressing the issue of whether there are net sales present in this case, the Division must first take up the issue of whether the location of the meter under Portsmouth's arrangement with National Grid is a dispositive factor. The issue arises because the Complainant and the Advocacy Section argue that the Town's Facility is interconnected to National Grid's distribution system on the "wrong" side of the meter.

Initially, the Division observes that references to net metering in the Federal law make no mention of where the generating facility is to be located in relation to the meter. Industry standards notwithstanding, the Federal law does not appear to prescribe a design requirement for meter location configurations.

The Rhode Island net metering law that was in effect at the time the Facility came on line (the "Former Net Metering Law"), R.I.G.L. § 39-26-2(4), contains a definition for a "customer-sited generation facility," which is defined as a "generation unit that is interconnected on the end-use customer's side of the retail electricity meter in such a manner that it displaces all or part of the metered consumption of the end-use customer." However, the Former Net

Metering Law does not appear to mandate such a configuration. Adding to the confusion, the Former Net Metering Law defined "net metering" as simply "the process of measuring the difference between electricity delivered by an electrical distribution company and electricity generated by a... wind-net-metering facility, and fed back to the distribution company" (R.I.G.L. § 39-26-2(17)). Interestingly, there is no mention of the term "customer-sited generation facility" in the definition of "net metering."

In an effort to reconcile these somewhat conflicting definitions, and the apparent lack of a meter location mandate, the Division notices that the Former Net Metering Law carved out a special net metering arrangement for cities and towns that developed, owned, operated or maintained energy generation units utilizing eligible renewable energy resources (the New Net Metering Law similarly contains special net metering arrangements for cities and towns, *infra*).[146] Indeed, the term "customer-sited generation facility" is unused within those provisions contained in the Former Net Metering Law that speaks specifically to the net metering systems owned by municipalities; provisions, which incidentally conferred upon cities and towns a higher distributed generation capacity than for other net metering systems (3.5 MW v. 1.65 MW and 2.25 MW) and a special arrangement that permitted a municipality to have their excess renewable generation credits applied to up to ten (10) other accounts owned by the municipality.

Similarly, under the New Net metering Law, which went into effect on June 29, 2011 (R.I.G.L. Chapter 39-26.2), the Rhode Island General Assembly has

[146] See R.I.G.L. §§ 39-26-2(27), 39-26-6(g)(3)(ii), 39-26.2-2(14) and 39-26.2-2(2)and (3).

crafted a law that again confers special treatment to cities and towns that own and operate net metering systems in Rhode Island. Under the New Net Metering Law, municipalities are exempted from certain system design and site restrictions placed on other eligible net metering systems.[147] Further, though the definition of the term "customer-sited generation facility" (R.I.G.L. § 39-26-2(4)) is preserved under the New Net Metering Law, the term is not utilized in any of the Chapter's new net metering provisions. This is especially curious in that the New Net Metering Law is designed to allow all of a municipality's accounts to be "treated as accounts eligible for net metering within an eligible net metering system site."[148] This provision, tantamount to a virtual net metering arrangement, would seem to be at odds with the definition of a "customer-sited generation facility," which, appears in both the former and current net metering laws.

Relying on the rules of statutory interpretation, the Division would have to give the term "customer-sited generation facility" weight and endeavor to reconcile the term with the rest of the provisions in both the Former Net Metering Law, as well as the New Net Metering Law. In so doing, the Division finds that the dearth of "customer-sited generation facility" usage suggests that the term was provided to merely describe the perceived industry standard. In view of the absence of mention elsewhere in the State's net metering laws, it would appear that the General Assembly is not mandating a behind-the-meter configuration for net metering municipalities.

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[147] See R.I.G.L. §§ 39-26.2-2(2) and (3).
[148] See R.I.G.L. §§ 39-26.2-2(2).

The Division also considered the reasonableness of the decision by National Grid to approve a system design for the Town's Facility that allowed for an interconnection to National Grid's distribution system from a point on the distribution side of the Town's meter. Although an interconnection on the Town's side of the meter would have eliminated a major disputed issue in this case, the *de facto* location of the interconnection point seems somewhat insignificant in view of the noticeable absence of unequivocal State and Federal prescriptive law on this issue.

The Division additionally finds sufficient evidence of intent by the General Assembly to apply its New Net Metering Law retroactively to cure any concerns with respect to the interconnection configuration being used here. The timing and clarity of purpose behind the New Net Metering Law strongly suggests intent by the General Assembly to permit municipalities, such as Portsmouth, to incorporate all of their accounts into the net metering calculation, thereby negating the importance of the actual locations of their generating facilities and points of interconnection to the grid.

In the final analysis, even though industry standards suggest commonality with respect to this design issue, the Division views the matter as *de minimus* in comparison to efforts by the State (and Congress) to encourage the development of new renewable energy resources. Accordingly, the Division finds that the location of the Facility's point of interconnection to National Grid's distribution system does not warrant further regulatory attention or action.

iii. net sales

In the instant case, the record supports a finding that the Town's consumption has consistently exceeded the generation output from the Facility. Between April 2009 and March 2010 the Facility had a total output of 3,712,800 kWhs, compared to the Town's total consumption of 3,972,170 kWhs during that same period. Between March 2010 and February 2011 the Facility had a total output of 2,699,179 kWhs, compared to the Town's total consumption of 3,971,582 kWhs during that same period.[149] Furthermore, even though the Former Net Metering Law, limited the application of excess renewable energy credits "to no more than ten (10) other accounts owned by the... [Town],"[150] the record reflects that between March 2010 and February 2011, the Town consumed 3,569,399 kWhs at its ten largest accounts.[151]

As stated above, the implied retroactive effect of the New Net Metering Law would also lead the Division to conclude that all of the Town's accounts would factor into this determination of possible net sales. Whether the Division relies on the Town's total account consumption, or just consumption from its ten largest accounts, the Division is satisfied that the Town is not making excess sales to National Grid, and, therefore, cannot be considered a wholesale generator under the Federal law.

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[149] Statement of Facts, paragraphs 30-31.
[150] R.I.G.L. §39-26-6(g)(3)(ii).
[151] Statement of Facts, paragraph 33.

iv. wholesale generator vs. net metering configuration

Regarding the issue of whether the Town's Facility is a wholesale generator according to Federal law, the Division must find that it is not. Predicated upon the Federal law reviewed, the Division finds that because the Town is consuming more energy than the Facility generates it cannot be characterized as a wholesale generator within the meaning of the FPA.

Federal law contains numerous discussions of support for net metering arrangements between retail electric customers and their local electric utility companies. This report and order contains the details for how net metering is defined under the Energy Policy Act of 2005 and the seminal case of Sun Edison, LLC, *supra*. In fact, the term "net metering" has become fully cemented into our national energy policy lexicon.

In the Sun Edison and MidAmerican cases, FERC, charged with the regulatory responsibility of enforcing and interpreting PURPA and the FPA, firmly supported state-imposed net metering practices that: prescribe the use a single meter in a net-metering configuration; require net billing arrangements; and permit the small power producer to receive "retail" compensation for its generated output. As discussed above, the one unsettled issue that stands out under these cases relates to the treatment of "net sales" to electric utilities, which occurs when "the end-use customer participating in the net metering program produces more energy than it needs over the applicable billing period."[152] The uncertainty comes from a lack of clarity on the issue over "what time interval the netting

[152] Sun Edison, LLC, (cite omitted) p. 6.

process may properly take place."[153] Overall, however, it appears that FERC has left open the door to legal challenges to a state's authority to set prices on excess electricity from a net metering customer (QF) and to determine the time interval over which the netting process may take place. Nonetheless, as the Division does not find meaningful evidence of net sales in this case, the Division must find that the Facility is a net metering configuration and not a wholesale generator.

v. rates

The remaining issue for consideration relates to the question of whether the Town is receiving an excessive rate for the output its sells back to National Grid. As discussed herein, the Division finds that the Federal law provides the states with substantial deference in net metering matters. And, also for the reasons stated above, the Division does not find that the Federal law is a bar to Rhode Island's efforts to aggressively "facilitate 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."[154] With respect to the rates that National Grid is paying the Town for its output from the Facility, the Division finds that the rate is consistent with the Former Net Metering Law, the New Net Metering Law, and National Grid's approved Tariff.

The Former Net Metering Law defines "renewable generation credit" as "credit equal to the excess kWhs... multiplied by the sum of the distribution company's: (i) standard offer service kWh charge for the rate class applicable to

[153] MidAmerican Energy Company, (cite omitted), p. 7.
[154] See R.I.G.L. §39-26-3.

the net metering customer; (ii) distribution kWh charge; (iii) transmission kWh charge, and (iv) transition kWh charge.[155] The New Net Metering Law defines a "renewable net metering credit" as a "credit that applies to an Eligible Net Metering System up to... (100%) of the self generator's usage at the Eligible Net Metering System Site over the applicable billing period. This credit shall be equal to the total kilowatt hours of electricity generated and consumed on-site during the billing period multiplied by the sum of the distribution company's: (i) standard offer service kilowatt hour charge for the rate class applicable to the net metering customer; (ii) distribution kilowatt hour charge; (iii) transmission kilowatt hour charge, and (iv) transition kilowatt hour charge."[156] The Division finds that since the Facility began operation in March 2009, it has been receiving "renewable generation credits," or "renewable net metering credits" in conformance with the Rhode Island net metering laws in effect during this period. The Division similarly finds that the net billing arrangement that has existed between the Town and National Grid during this same period meets the requirements of National Grid's approved Tariff, which substantially incorporates the provisions of the State's net metering law(s).

Now, therefore, it is

(20501) ORDERED:

1. That in response to the May 24, 2010 complaint filing by Mr. Benjamin C. Riggs, Jr., 15D Harrington Street, Newport, Rhode Island, against the

[155] See R.I.G.L. §39-26-2(22).

[156] See R.I.G.L. §39-26.2-2(12).

Narragansett Electric Company – d/b/a National Grid; and the Division-initiated formal investigation that ensued; the Division hereby finds that the Town of Portsmouth has not, and is not currently, receiving an excessive rate for the output its sells back to National Grid; and that the Town of Portsmouth's Wind Facility is a net metering configuration and not a wholesale generator according to federal law. Accordingly, no further regulatory action is required in this matter.

2. That a copy of the New Net Metering Law, R.I.G.L. Chapter 39-26.2, is attached to this Report and Order and incorporated by reference.

DATED AND EFFECTIVE AT WARWICK, RHODE ISLAND ON OCTOBER 13, 2011.

John Spirito, Jr., Esq.
Hearing Officer

APPROVED:

Thomas F. Ahern
Administrator

2011 -- H 5939 SUBSTITUTE A

LC01934/SUB A/2

STATE OF RHODE ISLAND

IN GENERAL ASSEMBLY

JANUARY SESSION, A.D. 2011

AN ACT

RELATING TO PUBLIC UTILITIES AND CARRIERS -- RENEWABLE ENERGY STANDARD

Introduced By: Representatives Carnevale, Blazejewski, Tanzi, Edwards, and Trillo

Date Introduced: March 17, 2011

Referred To: House Environment and Natural Resources

It is enacted by the General Assembly as follows:

SECTION 1. Sections 39-26-2, 39-26-3, 39-26-5 and 39-26-6 of the General Laws in Chapter 39-26 entitled "Renewable Energy Standard" are hereby amended to read as follows:

39-26-2. Definitions. -- When used in this chapter:

(1) "Alternative compliance payment" means a payment to he Renewable Energy Development Fund of fifty dollars ($50.00) per megawatt-hour of renewable energy obligation, in 2003 dollars, adjusted annually up or down by the consumer price index, which may be made in lieu of standard means of compliance with this statute;

(2) "Commission" means the Rhode Island public utilities commission;

(3) "Compliance year" means a calendar year beginning January 1 and ending December 31, for which an obligated entity must demonstrate that it has met the requirements of this statute;

(4) "Customer-sited generation facility" means a generation unit that is interconnected on the end-use customer's side of the retail electricity meter in such a manner that it displaces all or part of the metered consumption of the end-use customer;

~~(5) "Educational institution" means any public school, approved private non-profit school, or institution of higher education as defined in 20 U.S.C. Chapter 28, Subchapter I, Part A section 1001 (a).~~

~~(6)~~(5) "Electrical energy product" means an electrical energy offering, including, but not limited to, last resort and standard offer service, that can be distinguished by its generation

attributes or other characteristics, and that is offered for sale by an obligated entity to end-use customers;

~~(7)~~(6) "Eligible biomass fuel" means fuel sources including brush, stumps, lumber ends and trimmings, wood pallets, bark, wood chips, shavings, slash and other clean wood that is not mixed with other solid wastes; agricultural waste, food and vegetative material; energy crops; landfill methane; biogas; or neat bio-diesel and other neat liquid fuels that are derived from such fuel sources;

~~(8)~~(7) "Eligible renewable energy resource" means resources as defined in section 39-26-5;

~~(9)~~(8) "End-use customer" means a person or entity in Rhode Island that purchases electrical energy at retail from an obligated entity;

~~(10)~~(9) "Existing renewable energy resources" means generation units using eligible renewable energy resources and first going into commercial operation before December 31, 1997;

~~(11) "Farm" shall be defined in accordance with section 44-27-2, except that all buildings associated with the farm shall be eligible for net metering credits as long as: (i) the buildings are owned by the same entity operating the farm or persons associated with operating the farm; and (ii) the buildings are on the same farmland as the renewable generation on either a tract of land contiguous with such farmland or across a public way from such farmland.~~

~~(12)~~(10) "Generation attributes" means the nonprice characteristics of the electrical energy output of a generation unit including, but not limited to, the unit's fuel type, emissions, vintage and policy eligibility;

~~(13)~~(11) "Generation unit" means a facility that converts a fuel or an energy resource into electrical energy;

~~(14)~~(12) "NE-GIS" means the generation information system operated by NEPOOL, its designee or successor entity, which includes a generation information database and certificate system, and that accounts for the generation attributes of electrical energy consumed within NEPOOL;

~~(15)~~(13) "NE-GIS certificate" means an electronic record produced by the NE-GIS that identifies the relevant generation attributes of each megawatt-hour accounted for in the NE-GIS;

~~(16)~~(14) "NEPOOL" means the New England Power Pool or its successor;

~~(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;~~

~~(18)~~(15) "New renewable energy resources" means generation units using eligible

renewable energy resources and first going into commercial operation after December 31, 1997; or the incremental output of generation units using eligible renewable energy resources that have demonstrably increased generation in excess of ten percent (10%) using eligible renewable energy resources through capital investments made after December 31, 1997; but in no case involve any new impoundment or diversion of water with an average salinity of twenty (20) parts per thousand or less;

~~(19) "Non-profit affordable housing" shall mean a housing development or housing project as defined by section 42-55-3 undertaken by a non-profit entity where the residential units taking electric service are either in the same building in close proximity to the renewable energy source or, if not within the same building, are within one-half (1/2) of a mile radius from the renewable energy source; provided, however, that the application has been filed with and reviewed by the division of public utilities and carriers and the division has certified the development or project as eligible. The division shall promulgate regulations setting forth an application process and eligibility criteria to assure that the net metering allowed will benefit the low-income affordable housing residents only. The renewable generation credit applicable for nonprofit affordable housing shall be calculated based on the rate class applicable to residential units.~~

~~(20)~~(16) "Obligated entity" means a person or entity that sells electrical energy to end-use customers in Rhode Island, including, but not limited to: nonregulated power producers and electric utility distribution companies, as defined in section 39-1-2, supplying standard offer service, last resort service, or any successor service to end-use customers; including Narragansett Electric, but not to include Block Island Power Company as described in section ~~39~~-26-7 or Pascoag Utility District;

~~(21)~~(17) "Off-grid generation facility" means a generation unit that is not connected to a utility transmission or distribution system;

~~(22) "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.~~

~~(23)~~(18) "Reserved certificate" means a NE-GIS certificate sold independent of a

transaction involving electrical energy, pursuant to Rule 3.4 or a successor rule of the operating rules of the NE-GIS;

~~(24)~~(19) "Reserved certificate account" means a specially designated account established by an obligated entity, pursuant to Rule 3.4 or a successor rule of the operating rules of the NE-GIS, for transfer and retirement of reserved certificated from the NE-GIS;

~~(25)~~(20) "Self-generator" means an end-use customer in Rhode Island that displaces all or part of its retail electricity consumption, as metered by the distribution utility to which it interconnects, through the use of a customer-sited generation facility, the ownership of any such facility shall not be considered an obligated entity as a result of any such ownership arrangement;

~~(26)~~(21) "Small hydro facility" means a facility employing one or more hydroelectric turbine generators and with an aggregate capacity not exceeding thirty (30) megawatts. For purposes of this definition, "facility" shall be defined in a manner consistent with Title 18 of the Code of Federal Regulations, section 92.201 et seq.; provided, however, that the size of the facility is limited to thirty (30) megawatts, rather than eighty (80) megawatts.

~~(27) "Towns and cities" means any Rhode Island town or city with the powers set forth in title 45 of the general laws, which may exercise all such powers, including those set forth in chapter 45-40.1, in developing, owning, operating or maintaining energy generation units utilizing eligible renewable energy resources.~~

(22) "Renewable energy resource" means any one or more of the renewable energy resources described in subsection 39-26-5(a) of this chapter.

39-26-3. Purposes. -- The ~~purpose~~ purposes of this chapter ~~is~~ are to define renewable energy resources and to facilitate 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.

39-26-5. ~~Eligible renewable energy resources.~~ Renewable energy resources. -- (a) ~~For the purposes of the regulations promulgated under this chapter, eligible renewable energy resources are generation units in the NEPOOL control area using:~~ Renewable energy resources are:

(1) Direct solar radiation;

(2) The wind;

(3) Movement or the latent heat of the ocean;

(4) The heat of the earth;

(5) Small hydro facilities;

(6) Biomass facilities using eligible biomass fuels and maintaining compliance with current air permits; eligible biomass fuels may be co-fired with fossil fuels, provided that only the renewable energy fraction of production from multi-fuel facilities shall be considered eligible;

(7) Fuel cells using the renewable resources referenced above in this section;

(8) Waste-to-energy combustion of any sort or manner shall in no instance be considered eligible except for fuels identified in section 39-26-2(6).

(b) For the purposes of the regulations promulgated under this chapter, eligible renewable energy resources are generation units in the NEPOOL control area using renewable energy resources as defined in this section.

~~(b)~~(c) A generation unit located in an adjacent control area outside of the NEPOOL may qualify as an eligible renewable energy resource, but the associated generation attributes shall be applied to the renewable energy standard only to the extent that the energy produced by the generation unit is actually delivered into NEPOOL for consumption by New England customers. The delivery of such energy from the generation unit into NEPOOL must be generated by:

(1) A unit-specific bilateral contract for the sale and delivery of such energy into NEPOOL; and

(2) Confirmation from ISO-New England that the renewable energy was actually settled in the NEPOOL system; and

(3) Confirmation through the North American Reliability Council tagging system that the import of the energy into NEPOOL actually occurred; or

(4) Any such other requirements as the commission deems appropriate.

~~(c)~~(d) NE-GIS certificates associated with energy production from off-grid generation and customer-sited generation facilities certified by the commission as eligible renewable energy resources may also be used to demonstrate compliance, provided that the facilities are physically located in Rhode Island.

39-26-6. Duties of the commission. -- The commission shall:

(a) Develop and adopt regulations on or before December 31, 2005, for implementing a renewable energy standard, which regulations shall include, but be limited to, provisions for:

(1) Verifying the eligibility of renewable energy generators and the production of energy from such generators, including requirements to notify the commission in the event of a change in a generator's eligibility status.

(2) Standards for contracts and procurement plans for renewable energy resources, to achieve the purposes of this chapter.

(3) Flexibility mechanisms for the purposes of easing compliance burdens, facilitating

bringing new renewable resources on-line, and avoiding and/or mitigating conflicts with state level source disclosure requirements and green marketing claims throughout the region; which flexibility mechanisms shall allow obligated entities to: (i) demonstrate compliance over a compliance year; (ii) bank excess compliance for two (2) subsequent compliance years, capped at thirty percent (30%) of the current year's obligation; and (iii) allow renewable energy generated during 2006 to be banked by an obligated entity as early compliance, usable towards meeting an obligated entity's 2007 requirement. Generation used for early compliance must result in the retirement of NE-GIS certificate in a reserved certificate account designated for such purposes.

(4) Annual compliance filings to be made by all obligated entities within one month after NE-GIS reports are available for the fourth (4th) quarter of each calendar year. All electric utility distribution companies shall cooperate with the commission in providing data necessary to assess the magnitude of obligation and verify the compliance of all obligated entities.

(b) Authorize rate recovery by electric utility distribution companies of all prudent incremental costs arising from the implementation of this chapter, including, without limitation, the purchase of NE-GIS certificates, the payment of alternative compliance payments, required payments to support the NE-GIS, assessments made pursuant to section 39-26-7(c) and the incremental costs of complying with energy source disclosure requirements.

(c) Certify eligible renewable energy resources by issuing statements of qualification within ninety (90) days of application. The commission shall provide prospective reviews for applicants seeking to determine whether a facility would be eligible.

(d) Determine, on or before January 1, 2010, the adequacy, or potential adequacy, of renewable energy supplies to meet the increase in the percentage requirement of energy from renewable energy resources to go into effect in 2011 and determine on or before January 1, 2014, the adequacy or potential adequacy, of renewable energy supplies to meet the increase in the percentage requirement of energy from renewable energy resources to go into effect in 2015. In making such determinations the commission shall consider among other factors the historical use of alternative compliance payments in Rhode Island and other states in the NEPOOL region. In the event that the commission determines an inadequacy or potential inadequacy of supplies for scheduled percentage increases, the commission shall delay the implementation of the scheduled percentage increase for a period of one year or recommend to the general assembly a revised schedule of percentage increases, if any, to achieve the purposes of this chapter.

(e) Establish sanctions for those obligated entities that after investigation have been found to fail to reasonably comply with the commission's regulations. No sanction or penalty shall relieve or diminish an obligated entity from liability for fulfilling any shortfall in its compliance

obligation; provided, however, that no sanction shall be imposed if compliance is achieved through alternative compliance payments. The commission may suspend or revoke the certification of generation units, certified in accordance with subsection (c) above, that are found to provide false information, or that fail to notify the commission in the event of a change in eligibility status or otherwise comply with its rules. Financial penalties resulting from sanctions from obligated entities shall not be recoverable in rates.

(f) Report, by February 15, 2006, and by February 15 each year thereafter, to the governor, the speaker of the house and the president of the senate on the status of the implementation of the renewable energy standards in Rhode Island and other states, and which report shall include in 2009, and each year thereafter, the level of use of renewable energy certificates by eligible renewable energy resources and the portion of renewable energy standards met through alternative compliance payments, and the amount of rate increases authorized pursuant to subsection (b) above.

~~(g) Implement the following changes regarding distributed generation from renewable energy systems by June 1, 2009.~~

~~(1) Increase the maximum allowable distributed generation capacity for eligible net metered energy systems to 1.65 megawatts (MW); except that for eligible net metered renewable energy systems developed but not owned by cities and towns, located on city or town owned land, and providing power solely to the city or town that the project is located in, increase said maximum to 2.25 megawatts; and except that for eligible net metered renewable energy systems owned by cities and towns of Rhode Island, the Narragansett Bay Commission and state agencies, increase said maximum to 3.5 megawatts (MW).~~

~~(2) Increase the aggregate amount of net metering to a maximum of two percent (2%) of peak load, provided that at least one megawatt is reserved for projects less than twenty five (25) kW.~~

~~(3) (i) With the exception of those customers described in subsection (ii), if the electricity generated by the renewable generation facility during a billing period exceeds the customer's kilowatt hour usage during the billing period, the customer shall upon a request of the customer be billed for zero kilowatt hour usage and the excess renewable generation credits shall be credited to the customer's account for the following billing period. Unless otherwise requested by the customer, the customer shall be compensated monthly by a check from the electric distribution company for the excess renewable generation credits pursuant to the rate specified in subdivision 39-26-2(22).~~

~~(ii) 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).~~

~~(iii) Nonprofit affordable housing shall use said compensation, pursuant to paragraph (ii), to benefit the residents of the housing development.~~

~~(4) 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. Where compensation has been provided for excess renewable generation credits, no further charge may be made to the customer against said credits.~~

~~(h) 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.~~

~~(i) Report, by July 1, 2010 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.~~

~~(j)~~(g) Consistent with the public policy objective of developing renewable generation as an option in Rhode Island, and subject to the review and approval of the commission the electric distribution company is authorized to propose and implement pilot programs to own and operate no more than fifteen megawatts (15 MW) of renewable generation demonstration projects in

Rhode Island and may include the costs and benefits in rates to distribution customers. At least two (2) demonstration projects shall include renewable generation installed at or in the vicinity of nonprofit affordable housing projects where energy savings benefits are provided to reduce electric bills of the customers at the nonprofit affordable housing projects. Any renewable generation proposals shall be subject to the review and approval of the commission. The commission shall annually make an adjustment to the minimum amounts required under the renewable energy standard under chapter 39-26 in an amount equal to the kilowatt hours generated by such units owned by the electric distribution company. The electric and gas distribution company shall also be authorized to propose and implement smart metering and smart grid demonstration projects in Rhode Island, subject to the review and approval of the commission, in order to determine the effectiveness of such new technologies for reducing and managing energy consumption, and may include the costs of such demonstration projects in distribution rates to electric customers to the extent the project pertains to electricity usage and in distribution rates to gas customers to the extent the project pertains to gas usage.

SECTION 2. Title 39 of the General Laws entitled "PUBLIC UTILITIES AND CARRIERS" is hereby amended by adding thereto the following chapter:

CHAPTER 26.2

NET METERING

39-26.2-1. Purpose. -- The purpose of this chapter is to facilitate and promote installation of customer-sited, grid-connected generation of renewable energy; to support and encourage customer development of renewable generation systems; to reduce environmental impacts; to reduce carbon emissions that contribute to climate change by encouraging the local siting of renewable energy projects; to diversify the state's energy generation sources; to stimulate economic development; to improve distribution system resilience and reliability; and to reduce distribution system costs.

39-26.2-2. Definitions. -- Terms not defined in this section herein shall have the same meaning as contained in chapter 26 of title 39 of the general laws. When used in this chapter:

(1) "Eligible net metering resource" means eligible renewable energy resource as defined in section 39-26-5 including biogas created as a result of anaerobic digestion, but, specifically excluding all other listed eligible biomass fuels;

(2) "Eligible Net Metering System" means a facility generating electricity using an eligible net metering resource that is reasonably designed and sized to annually produce electricity in an amount that is equal to or less than the renewable self-generator's usage at the eligible net metering system site measured by the three (3) year average annual consumption of

energy over the previous three (3) years at the electric distribution account(s) located at the eligible net metering system site. A projected annual consumption of energy may be used until the actual three (3) year average annual consumption of energy over the previous three (3) years at the electric distribution account(s) located at the eligible net metering system site becomes available for use in determining eligibility of the generating system. The eligible net metering system must be owned by the same entity that is the customer of record on the net metered accounts. Notwithstanding any other provisions of this chapter, any eligible net metering resource: (i) owned by a municipality or multi-municipal collaborative or (ii) owned and operated by a renewable generation developer on behalf of a municipality or multi-municipal collaborative through municipal net metering financing arrangement shall be treated as an eligible net metering system and all municipal accounts designated by the municipality or multi-municipal collaborative for net metering shall be treated as accounts eligible for net metering within an eligible net metering system site.

(3) "Eligible Net Metering System Site" means the site where the eligible net metering system is located or is part of the same campus or complex of sites contiguous to one another and the site where the eligible net metering system is located or a farm in which the eligible net metering system is located. Except for an eligible net metering system owned by or operated on behalf of a municipality or multi-municipal collaborative through a municipal net metering financing arrangement, the purpose of this definition is to reasonably assure that energy generated by the eligible net metering system is consumed by net metered electric service account(s) that are actually located in the same geographical location as the eligible net metering system. Except for an eligible net metering system owned by or operated on behalf of a municipality or multi-municipal collaborative through a municipal net metering financing arrangement, all of the net metered accounts at the eligible net metering system site must be the accounts of the same customer of record and customers are not permitted to enter into agreements or arrangements to change the name on accounts for the purpose of artificially expanding the eligible net metering system site to contiguous sites in an attempt to avoid this restriction. However, a property owner may change the nature of the metered service at the accounts at the site to be master metered in the owner's name, or become the customer of record for each of the accounts, provided that the owner becoming the customer of record actually owns the property at which the account is located. As long as the net metered accounts meet the requirements set forth in this definition, there is no limit on the number of accounts that may be net metered within the eligible net metering system site.

(4) "Excess Renewable Net Metering Credit" means a credit that applies to an eligible

net metering system for that portion of the renewable self-generator's production of electricity beyond one hundred percent (100%) and no greater than one hundred twenty-five percent (125%) of the renewable self-generator's own consumption at the eligible net metering system site during the applicable billing period. Such excess renewable net metering credit shall be equal to the electric distribution company's avoided cost rate, which is hereby declared to be the electric distribution company's standard offer service kilo-watt hour (kWh) charge for the rate class and time-of-use billing period (if applicable) applicable to the distribution customer account(s) at the eligible net metering system site. Where there are accounts at the eligible net metering system site in different rate classes, the electric distribution company may calculate the excess renewable net metering credit based on the average of the standard offer service rates applicable to those on-site accounts. The electric distribution company has the option to use the energy received from such excess generation to serve the standard offer service load. The commission shall have the authority to make determinations as to the applicability of this credit to specific generation facilities to the extent there is any uncertainty or disagreement.

(5) "Farm" shall be defined in accordance with section 44-27-2, except that all buildings associated with the farm shall be eligible for net metering credits as long as: (i) The buildings are owned by the same entity operating the farm or persons associated with operating the farm; and (ii) The buildings are on the same farmland as the project on either a tract of land contiguous with or reasonably proximate to such farmland or across a public way from such farmland.

(6) "Multi-municipal collaborative" means a group of towns and/or cities that enter into an agreement for the purpose of co-owning a renewable generation facility or entering into a financing arrangement pursuant to subdivision (7).

(7) "Municipal net metering financing arrangement" means arrangements entered into by a municipality or multi-municipal collaborative with a private entity to facilitate the financing and operation of a net metering resource, in which the private entity owns and operates an eligible net metering resource on behalf of a municipality or multi-municipal collaborative, where: (i) The eligible net metering resource is located on property owned or controlled by the municipality or one of the municipalities, as applicable, and (ii) The production from the eligible net metering resource and primary compensation paid by the municipality or multi-municipal collaborative to the private entity for such production is directly tied to the consumption of electricity occurring at the designated net metered accounts.

(8) "Net metering" means using electricity generated by an eligible net metering system for the purpose of self-supplying power at the eligible net metering system site and thereby offsetting consumption at the eligible net metering system site through the netting process

established in this chapter.

(9) "Net metering customer" means a customer of the electric distribution company receiving and being billed for distribution service whose distribution account(s) are being net metered.

(10) "Person" means an individual, firm, corporation, association, partnership, farm, town or city of the State of Rhode Island, multi-municipal collaborative, or the State of Rhode Island or any department of the state government, governmental agency or public instrumentality of the state.

(11) "Project" means a distinct installation of an eligible net metering system. An installation will be considered distinct if it is installed in a different location, or at a different time, or involves a different type of renewable energy.

(12) "Renewable Net Metering Credit" means a credit that applies to an Eligible Net Metering System up to one hundred percent (100%) of the renewable self-generator's usage at the Eligible Net Metering System Site over the applicable billing period. This credit shall be equal to the total kilowatt hours of electricity generated and consumed on-site during the billing period multiplied by the sum of the distribution company's:

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

(ii) Distribution kilowatt hour charge;

(iii) Transmission kilowatt hour charge; and

(iv) Transition kilowatt hour charge.

(13) "Renewable self-generator" means an electric distribution service customer who installs or arranges for an installation of renewable generation that is primarily designed to produce electricity for consumption by that same customer at its distribution service account(s).

(14) "Municipality and towns and cities" means any Rhode Island town or city, including any agency or instrumentality thereof, with the powers set forth in title 45 of the general laws.

39-26.2-3. Net Metering. -- (a) The following policies regarding net metering of electricity from eligible net metering systems and regarding any person that is a renewable self-generator shall apply:

(1) The maximum allowable capacity for eligible net metering systems, based on nameplate capacity, shall be five megawatts (5 mw).

(2) The aggregate amount of net metering in Rhode Island shall not exceed three percent (3%) of peak load, provided that at least two megawatts (2 mw) are reserved for projects of less than fifty kilowatts (50 kw).

(3) For ease of administering net metered accounts and stabilizing net metered account bills, the electric distribution company may elect (but is not required) to estimate for any twelve (12) month period:

(i) The production from the eligible net metering system; and

(ii) Aggregate consumption of the net metered accounts at the eligible net metering system site and establish a monthly billing plan that reflects the expected credits that would be applied to the net metered accounts over twelve (12) months. The billing plan would be designed to even out monthly billings over twelve (12) months, regardless of actual production and usage. If such election is made by the electric distribution company, the electric distribution company would reconcile payments and credits under the billing plan to actual production and consumption at the end of the twelve (12) month period and apply any credits or charges to the net metered accounts for any positive or negative difference, as applicable. Should there be a material change in circumstances at the eligible net metering system site or associated accounts during the twelve (12) month period, the estimates and credits may be adjusted by the electric distribution company during the reconciliation period. The electric distribution company also may elect (but is not required) to issue checks to any net metering customer in lieu of billing credits or carry forward credits or charges to the next billing period. For residential eligible net metering systems twenty-five kilowatts (25 kw) or smaller, the electric distribution company, at its option, may administer renewable net metering credits month to month allowing unused credits to carry forward into following billing period.

(4) If the electricity generated by an eligible net metering system during a billing period is equal to or less than the net metering customer's usage during the billing period for electric distribution company customer accounts at the eligible net metering system site, the customer shall receive renewable net metering credits, which shall be applied to offset the net metering customer's usage on accounts at the eligible net metering system site.

(5) If the electricity generated by an eligible net metering system during a billing period is greater than the net metering customer's usage on accounts at the eligible net metering system site during the billing period, the customer shall be paid by excess renewable net metering credits for the excess electricity generated beyond the net metering customer's usage at the eligible net metering system site up to an additional twenty-five percent (25%) of the renewable self-generator's consumption during the billing period; unless the electric distribution company and net metering customer have agreed to a billing plan pursuant to subdivision (3).

(6) The rates applicable to any net metered account shall be the same as those that apply to the rate classification that would be applicable to such account in the absence of net metering

including customer and demand charges and no other charges may be imposed to offset net metering credits.

(b) The commission shall exempt electric distribution company customer accounts associated with an eligible net metering system from back-up or standby rates commensurate with the size of the eligible net metering system, provided that any revenue shortfall caused by any such exemption shall be fully recovered by the electric distribution company through rates.

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

(7) The billing process set out in this section shall be applicable to electric distribution companies thirty (30) days after the enactment of this chapter.

39-26.2-4. Liberal construction of chapter required. -- This chapter shall be construed liberally in aid of its declared purposes.

39-26.2-5. Severability. -- If any provision of this chapter or the application thereof to any person or circumstances is held invalid, such invalidity shall not affect other provisions or applications of the chapter, which can be given effect without the invalid provision or application, and to this and the provisions of this chapter are declared to be severable.

SECTION 3. This act shall take effect upon passage.

LC01934/SUB A/2

EXPLANATION

BY THE LEGISLATIVE COUNCIL

OF

A N A C T

RELATING TO PUBLIC UTILITIES AND CARRIERS -- RENEWABLE ENERGY STANDARD

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This act would facilitate and promote installation of a customer-sited, grid connected generation of renewable energy through net metering of electricity.

This act would take effect upon passage.

LC01934/SUB A/2