STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS
PUBLIC UTILITIES COMMISSION

REVITY ENERGY, LLC PETITION FOR DECLARATORY JUDGMENT	Docket No. 5235

GREEN DEVELOPMENT'S MEMORANDUM OF LAW

By its attorneys, Green Development, LLC ("Green") provides this memorandum of law in support of the Commission's denial of the declaratory judgments requested in this docket. The first request is inconsistent with the governing statute which plainly requires cost sharing for any upgrades funded by one interconnecting customer that subsequently benefit another. The second request omits reference to the commonly understood fact that Narragansett Electric is only obliged to interconnect a renewable energy customer upon compliance with the requirements of the interconnection law and tariff, which include the obligation for cost sharing.

The Petition seeks two declaratory judgments:

A. Pursuant to R.I. Gen. Laws § 39-26.3-4.1 and the Interconnection Tariff, as well as past practice, National Grid is not authorized to participate in or otherwise enforce the allocation, collection or socialization of costs incurred by a private developer in the self-performance of the civil work for the interconnection required for newly installed PSES projects; and,

B. All civil interconnection work and related equipment (including all rights, title and interests in and to same) self-performed by a private developer, once completed, is presumed to be automatically donated, assigned, and conveyed by the developer (or its affiliate, as the case may be) to National Grid and, thereafter, National Grid has a legal obligation to interconnect any subsequent facility as necessary to accomplish the purchase and sale of electricity generated therefrom.

The parties filed agreed facts with the Commission on May 23, 2022.

LEGAL ARGUMENT

A. R.I. Gen. Laws § 39-26.3-4.1(c) Requires Cost Sharing.

Revity's first request must be denied. The statute cited to support the petition clearly requires cost sharing when any interconnecting customer funds upgrades that are relied on by another customer, whether the upgrades are performed by Narragansett Electric or the interconnecting customer. Narragansett Electric's past practice has no bearing on the Commission's resolution of the legal question presented for declaratory judgment. Nor does Narragansett Electric's administration of cost allocation.

i. R.I. Gen. Laws § 39-26.3-4.1 is Clear and Unambiguous in Requiring Cost Sharing.

Contrary to the first request, R.I. Gen. Laws § 39-26.3-4.1(c) very clearly requires cost sharing when one renewable energy customer makes any investment in system upgrades that are relied on by another project. The statute's provision on cost sharing, RI Gen. Laws Section 39-26.3-4.1(c), says:

> (c) If an interconnecting, renewable energy customer is required to pay for system modifications and a subsequent renewable energy or commercial customer relies on those modifications to connect to the distribution system within ten (10) years of the earlier interconnecting, renewable energy customer's payment, the subsequent customer will make a prorated contribution toward the cost of the system modifications that will be credited to the earlier interconnecting, renewable energy customer as determined by the public utilities commission.

As long as Green funded upgrades that are needed to interconnect Revity's project, Green is entitled to cost sharing from Revity. The statute not only authorizes Narragansett Electric to administer such cost sharing, *it requires* cost sharing and does not allow Narragansett Electric any discretion as to its administration. The statute does not allow Narraganset to determine or decide whether it ought to "participate in or otherwise enforce the allocation, collection or socialization of costs incurred by a private developer;" it simply requires cost sharing.

Contrary to Revity's first request, the statute makes no distinction between upgrades constructed by Narragansett Electric or those self-constructed by the interconnecting customer. In the absence of any such distinction, the statutory cost sharing obligation is not discretionary – it must be administered consistently for all customers. No rule of statutory construction allows the reading of an unexpressed exclusion into a rule of general applicability. Olamuyiwa v. Zebra Atlantek, Inc., 45 A.3d 527, 536 (R.I. 2012) (Court will not contort language of unambiguous statute to include within its reach a situation which it plainly does not encompass).[1] Any customer that funds upgrades relied on by another customer is absolutely entitled to cost sharing under Rhode Island law.[2] Revity does not contest the interconnecting customer's right to self-construct interconnection upgrades. All parties agree that self-performance of civil work is permitted under Section 2.0 of the Tariff. (Agreed Facts "AF" at 5) Narragansett Electric has been implementing "self-performance" or "self-build" for civil work (underground duct bank and manhole systems) required for distributed generation projects for the past five years, allowing interconnecting customers to self-perform limited civil work for subsequent donation to Narragansett Electric, such as duct bank construction, on Narragansett Electric's distribution system to alleviate construction resource constraints, and in recognition that certain interconnecting customers or their contractors have adequate expertise to complete civil work and may be able to do so at reduced costs and on a faster timeline compared to Narragansett Electric. (Id.) Since there is no dispute that self-build for civil work is allowed by the Tariff, there can be no dispute that cost sharing is required for self-built upgrades.

[1] The policy objective of Rhode Island's interconnection law is to "assure that the application process assists in the development of renewable generation resources in a timely manner" and the statute is to be construed liberally in aid of its policy objective. R.I. Gen. Laws § 39-26.3-1, 5. Revity is clear that the self-build option lowers cost and speeds up the work. The cost sharing requirement is clear on the face of the statute and the denial of cost sharing for the shared benefit of self-constructed projects will not aid the development of renewable generation resources in a timely manner.

[2] The Commission need not refer to Narragansett Electric's Distribution System Interconnection Tariff ("Tariff") to resolve the issue presented, because the statute expressly answers it. However, section 5.3 of the Tariff incorporated the statutory provision, effective September 6, 2018. The Commission has thus endorsed the requirement for cost sharing as contemplated in the statute.

Moreover, when read in the context of §39-26.3-4.1 in its entirety, it is even more clear that one interconnecting customer may not be charged the cost of any system upgrades that benefit other customers. R.I. Gen. Laws §39-26.3-4.1(a) provides that "[t]he electric distribution company may only charge an interconnecting, renewable energy customer for any system modifications to its electric power system specifically necessary for and directly related to the interconnection." Further, R.I. Gen. Laws §39-26.3-4.1(b) requires that "[a]ny system modifications benefiting other customers shall be included in rates as determined by the public utilities commission." Accordingly, Rhode Island law is clear that an interconnecting renewable energy customer can only be charged for system upgrades that are necessary to interconnect that customer, and may not be charged for system modifications that benefit other customers. These provisions further clarify that cost sharing must be mandated when any interconnecting customer pays for system upgrades or system modifications that benefit any other customers. The statute makes no distinction between upgrades performed by Narragansett Electric or upgrades performed by the interconnecting customer, nor is there any legal basis to draw any such distinction.

Ignoring the plain language and meaning of the statute and its context, Revity constructs a strained and distorted interpretation of one phrase in § 39-26.3-4.1(c). It posits that the words "credited to the earlier interconnecting customer" must be read to mean that Narragansett Electric must be paid to perform the upgrade work itself and then credit that earlier interconnecting customer payment received from the subsequent interconnecting customer. (Petition at ¶¶ 46-47). Revity attempts to read its position into a statute that plainly does not support it. The statute plainly states that a subsequent interconnecting customer must credit the earlier interconnecting customer. It does

not say what Revity claims and wishes it did – that Narragansett Electric must first perform the upgrades to then issue such a credit.[3]

ii. Narragansett's Past Practice in Administering the Requirement for Cost Sharing has no Bearing on the Resolution of the Legal Question Presented.

Revity's first request for declaratory judgment suggests that the Commission should also consider Narragansett Electric's past practice of administering the cost sharing obligation to resolve whether cost sharing is allowed for customer-constructed upgrades. It cites New York law for the proposition that "regulatory and statutory interpretation must be consistent with and informed by past practices." (Petition at ¶ 5). However, even if this were Rhode Island law, the review of Narragansett's past practice on the administration of the cost sharing obligation does not help inform whether the law requires cost sharing. The law is plain and clear on its face; it requires cost sharing. Whether or not Narragansett Electric has administered that cost sharing requirement properly and consistently is not the question put to the Commission in this proceeding. Revity presents its petition as a request for declaratory judgment but then argues factual issues and disputes that simply are not relevant to the resolution of the *legal declarations* that it requests. If Revity means to dispute that Narragansett Electric has not applied the cost sharing obligation consistently or equitably between its customers, Revity must address such inequitable administration through dispute resolution in a separate proceeding, not in this action for declaratory judgment on a pure question of law.

Even if the question of proper administration of the cost sharing obligation were properly put before the Commission, it is not in dispute. The agreed facts indicate that Narragansett Electric denied Revity cost sharing on its Lippitt Avenue project in Cranston before changing its position on

[3] Revity's petition also dwells on the significance of the work "refund" as used in section 5.3 of the Tariff. The Commission need not refer to the Tariff to resolve the question before it, where the statute so clearly answers it. But, here again, Revity tries to read its position into the Tariff which clearly and plainly addresses the statutory obligation that a subsequent interconnecting customer must "refund" the earlier interconnecting customers expense of upgrades that benefit both customers.

cost sharing for customer-constructed upgrades. (AF 8, 18). Narragansett Electric evidently admits it erred in disallowing cost sharing for the Lippitt Avenue project and has now offered to correct that error. (AF 8). Despite that history, there is no current disputed legal question regarding the proper administration of cost sharing.

The Agreed Facts also make it clear that Green appropriately relied on Narragansett Electric's proper administration of the cost sharing obligation when it entered its agreement to construct the Third Party Duct Bank. On May 18, 2020, Green requested and was granted permission by Narragansett Electric to self-perform the civil work for the Third Party Duct Bank as was then reflected in Green's final impact study. (AF 16). At a meeting on June 3, 2020, Narragansett Electric informed Green that Narragansett Electric would facilitate cost-sharing for Green's self-performed interconnection work as well as for the increase in cable size from 500kcmil to 1000kcmil for the EDP and Revity projects on Weaver Hill Road. (AF 17). On September 3, 2020, Narragansett Electric provided Green with a civil engineering and design specification for Green to self-perform the design and construction for the Third Party Duct Bank. (AF 22). This specification estimated the Third Party Duct Bank to be approximately 28,000 linear feet and contained design accommodations including conduit sections of 2-way, 4-way, and 9-way duct sizes for interconnection of the Green, Revity and EDP projects, as well as future expansion of Narragansett Electric's distribution system. Id. Green's projects are located furthest from the point of interconnection with Narragansett Electric's distribution system and Green agreed to construct the entire length of the Third Party Duct Bank, including the common portion that would be utilized by the projects proposed by Green, EDP and Revity, on the condition of a commitment to implement cost sharing. (AF 23) If administration of the cost sharing obligation were a question properly put before the Commission in this docket,

Green was and is entitled to rely on the proper administration of that requirement as it has been applied to the Third Party Duct Bank.

iii. Neither is the Question of Equitable Administration of Cost Allocation Before the Commission.

Revity has not asked for any declaratory judgment regarding whether Narragansett has properly allocated the costs of the Third Party Duct Bank. That is also not a legal question properly addressed through declaratory judgment. Administration of cost allocation also is not pertinent to the legal questions presented in this docket. If Revity disputes how the costs of the Third Party Duct Bank are allocated, it may present that as a fact-based dispute and inquiry for dispute resolution.[4] Until then, the issue of whether Narragansett Electric's procedure of allocating these costs is authorized or proper is not before the Commission.

The Commission need not address cost allocation issues in this proceeding or refer to the Tariff in doing so. However, section 5.3 of the Tariff does make it clear that the Commission has authorized Narragansett Electric to administer the cost allocation requirement. It states that "the Company may assess a portion of the costs to such subsequent Interconnecting Customers, which will be refunded to the earlier Interconnecting Customer if collected." While the Tariff's suggestion that Narragansett Electric has any discretion to assess cost sharing to subsequent interconnecting customers is inconsistent with the statutory mandate (and therefore, cannot be considered controlling law), the Commission has clearly authorized Narragansett Electric's administration of cost sharing.

Revity makes much of the fact that Narragansett Electric admits that it has no policy on the administration of cost sharing for self-constructed upgrades. If administration were relevant to this declaratory judgment action (which it is not), the Tariff is Narragansett Electric's "policy" and it

[4] Both § 39-26.3-4.1(c) and section 9 of the Tariff clearly give the Commission jurisdiction over disputes regarding whether Narragansett's proposed cost sharing allocation is equitable.

clearly and definitively requires Narragansett Electric to administer this cost sharing obligation without discrimination as to any of its customers.[5]

If the Commission decides that equitable and proper administration of cost allocation is relevant to the requests for declaratory judgment, then Narragansett Electric's obligations for cost sharing would also be relevant to equitable resolution. Rhode Island Gen. Laws § 39-1-27.7.1(d) requires the electric distribution company to file annual spending plans, including the electric ISR plan to cover, among other things, "(3) [f]or electric-distribution companies, operation and maintenance expenses on system inspection, including expenses from expected resulting repairs, and (4) [a]ny other costs relating to maintaining safety and reliability that are mutually agreed upon by the division and the company." As the agreed facts indicate in paragraph 36, Narragansett Electric identified the Weaver Hill Road extension and upgrades as necessary infrastructure upgrades necessary to maintain Narragansett's current level of service.

> On December 21, 2021, Narragansett filed the FY 2023 Electric Infrastructure, Safety, and Reliability (ISR) Plan. In it, Narragansett identifies required upgrades in the Central RI West Area to extend portions of the 35kV system and install a new substation at Weaver Hill Road to relieve existing distribution circuit concerns on the 54F1 and 63F6.

Narragansett Electric has admitted that "asset condition concerns" require replacement or upgrades in the Central RI West region. Narragansett Electric proposes to extend the 35kV system and install a new modular substation at Weaver Hill Road to relieve pressure on the 54F1 and 63F6 circuits.[6] Rhode Island Gen. Laws § 39-26.3-4.1(a) and its implementing tariff provide that "[t]he electric

[5] If the Commission were to require total transparency and clarity on cost allocation methodology in the Tariff before allowing any allocation of upgrade costs, as Revity urges, then the Tariff would be transparent and clear on the cost allocation methodology for transmission system upgrade expenses, which it is not and never has been despite the history of allocating transmission system upgrade costs to these projects and despite a history of customer advocacy for transparency and clarity.

[6] 2023 Electric Infrastructure, Safety, and Reliability Plan Annual Filing (December 20, 2021), p. 36 (see http://www.ripuc.ri.gov/eventsactions/docket/5209-NGrid-Book1-Electric%20ISR%20FY2023%20Plan%20(PUC%2012-20-21).bates.pdf)

distribution company may only charge an interconnecting, renewable energy customer for any system modifications to its electric power system specifically necessary for and directly related to the interconnection." R.I. Gen. Laws §39-26.3-4.1(b) requires that "[a]ny system modifications benefiting other customers shall be included in rates as determined by the public utilities commission." The Tariff incorporates the statutory language and adds:

> 5.4 Separation of Costs
>
> a. The Company may combine the installation of System Modifications with System Improvements to the Company's EDS to serve the Interconnecting Customer or other customers, but shall not include the costs of such System Improvements in the amounts billed to the Interconnecting Customer for the System Modifications required pursuant to this Interconnection Tariff. . . .

If equitable cost allocation is an issue to be addressed in the context of this docket, then it is only equitable that Narragansett Electric withdraw any charges for any system improvements required for existing service requirements, as proposed to be addressed in Narragansett Electric's 2023 ISR.

B. <u>The Third Party Duct Bank is Donated to Narragansett Upon Completion and Narragansett's Approval, but Revity has no Right to Interconnect Unless and Until it Pays its Cost of Interconnection.</u>

Green does not dispute much of the first clause of Revity's second request for declaratory judgment. That clause states

> all civil interconnection work and related equipment (including all rights, title and interests in and to same) self-performed by a private developer, once completed, is presumed to be automatically donated, assigned, and conveyed by the developer (or its affiliate, as the case may be) to National Grid.

Green agrees that it donates its customer-performed interconnection work to Narragansett Electric upon completion. However, Green does not "donate, assign or convey" any of its rights to the upgrades, including, for example, its statutory right to cost sharing with a subsequently interconnecting customer relying on the upgrades, as established in section A above.

The second clause of Revity's second request for declaratory judgment is incomplete and, therefore, inaccurate relative to the relief Revity seeks. That clause states "thereafter, National Grid has a legal obligation to interconnect any subsequent facility as necessary to accomplish the purchase and sale of electricity generated therefrom." While Green does not dispute that Narragansett is obliged to interconnect renewable energy customers, such obligation is conditioned on compliance with prerequisite requirements outlined in Rhode Island law and the Tariff. Those include the obligation to fund any and all upgrades required for the interconnection. There can be no dispute that R.I. Gen. Laws §39-26.3-4.1(a) authorizes Narragansett Electric to charge interconnecting, renewable energy customers for system modifications to its electric power system specifically necessary for and directly related to the interconnection. Nor can there be any dispute that the cost of such upgrades must include the cost sharing contemplated by §39-26.3-4.1(a), (b) and most clearly (c), as argued in section A above.

Without expressly asking for such a declaration, Revity's petition states its expectation that it must be allowed to interconnect without sharing any upgrade costs funded by another customer that benefit Revity's project. On page 4 of the Petition, it contends

> But where a developer voluntarily decides to privately perform interconnection work there is no such legal or regulatory authority that allows National Grid to allocate to or collect those costs from other developers. Rather, the self-performing developer must do so without the added benefit of having National Grid acting as its debt collector that conditions its issuance of approval to interconnect under the Interconnection Tariff on the payment of those third-party costs.

Yet there is no dispute that Revity's project will rely on the Third Party Duct Bank for interconnection. The duct bank work being constructed by Green will span a total length of 28,169 feet, of which 14,602 feet (51.8%) is common-path facilities that are required for the Green, Revity and EDP projects, 89 feet (0.3%) is required solely for the Revity projects, and 13,478 feet (47.9%) is required solely for the benefit of the Green projects. (AF 28) On July 16, 2021, Narragansett Electric

approved the civil design and construction package for the Third Party Duct Bank by Green and authorized construction. (AF 29) The final approved design included a total Third Party Duct Bank linear length of 29,843 feet and included 6 three-way manholes and 41 two-way manholes. Id. The Third Party Duct Bank is designed and built to accommodate runs of differing capacity including 9-way, 6-way, 4-way, and 2-way duct bank. Id. The capacity of the piping drives the total linear feet and the real cost of construction (e.g., 9-way duct bank is more expensive than 4-way which is more expensive than 2-way). Id. Green's project would only require a 2-way duct bank. Id. The addition of the Revity and EDP projects require a greater capacity duct bank. Id. If Revity were not required to make any contribution for the costs of the duct bank, as Revity argues, Revity would escape costs its project causes. Revity expects to be a free rider on Green Development's construction. No laws or tariffs sanction that result.

CONCLUSION

For these reasons, Green respectfully asks the Commission to deny both requests for declaratory judgment.

Respectfully submitted,

GREEN DEVELOPMENT, LLC

By its attorneys,

/s/ Seth H. Handy
HANDY LAW, LLC
Seth H. Handy (#5554)
42 Weybosset Street
Providence, RI 02903
Tel. 401.626.4839
E-mail seth@handylawllc.com

CERTIFICATE OF SERVICE

I hereby certify that on June 17, 2022, I sent a true copy of this document by electronic mail to the Commission and the attached service list and mailed the original pleading and 6 photocopies to the Commission.

/s/ Seth H. Handy

Revity Energy LLC - Petition for Declaratory Judgment – Docket No. 5235
Service List Updated 3/7/2022

Revity Energy LLC
Nicholas L. Nybo, Esq.
Revity Energy LLC and Affiliates
117 Metro Center Blvd., Suite 1007
Warwick, RI 02886
nick@revityenergy.com
Mark C. Kalpin, Esq., Mark.Kalpin@hklaw.com
Todd J. Griset, Esq., TGriset@preti.com

The Narragansett Electric d/b/a National Grid
John K. Habib, Esq.
Keegan Werlin LLP
99 High Street, Suite 2900
Boston, MA 02110
jhabib@keeganwerlin.com
MStern@keeganwerlin.com

Celia O'Brien, Esq. CELIA.OBRIEN@nationalgrid.com
andrew.marcaccio@nationalgrid.com
raquel.webster@nationalgrid.com
joanne.scanlon@nationalgrid.com;
John Kennedy john.kennedy@nationalgrid.com

Division of Public Utilities
Leo Wold, Esq., Leo.wold@dpuc.ri.gov
Jon.hagopian@dpuc.ri.gov
Christy.hetherington@dpuc.ri.gov
Margaret.L.Hogan@dpuc.ri.gov

Public Utilities Commission
Luly E. Massaro, Commission Clerk
Public Utilities Commission
89 Jefferson Blvd.
Warwick, RI 02888
Luly.massaro@puc.ri.gov
Cynthia.WilsonFrias@puc.ri.gov
Todd.bianco@puc.ri.gov
Alan.nault@puc.ri.gov

Office of Energy Resources
Christopher.Kearns@energy.ri.gov
Nicholas.Ucci@energy.ri.gov
Albert.Vitali@doa.ri.gov
Cal Brown, cbrown@seadvantage.com
Jim Kennerly, jkennerly@seadvantage.com
Stephan Wollenburg, swollenburg@seadvantage.com
Tobin Armstrong, tarmstrong@seadvantage.com