**STATE OF RHODE ISLAND PUBLIC UTILITIES COMMISSION**

| **IN RE: REVITY ENERGY LLC'S REQUEST FOR INTERPRETATION OF SECTION 5.3 OF R.I.P.U.C. NO. 2244 AND R.I. GEN. LAWS § 39-26.3-4.1 REGARDING THE NARRAGANSETT ELECTRIC COMPANY D/B/A NATIONAL GRID'S AUTHORITY (IF ANY) TO ALLOCATE, IMPOSE, AND COLLECT COSTS FOR THIRD-PARTY DEVELOPER SELF-PERFORMED INTERCONNECTION WORK** | Docket No. 5235 |
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**REVITY ENERGY LLC'S PRE-HEARING LEGAL MEMORANDUM**

Revity Energy LLC ("Revity"), by and through its undersigned counsel, hereby submits this Pre-Hearing Legal Memorandum pursuant to the Procedural Schedule issued in this Docket on April 5, 2022 and in furtherance of Revity's Petition for Declaratory Judgment (the "Petition"), filed on February 18, 2022 pursuant to R.I. Gen. Laws § 42-35-8 and Section 1.11(C) of the Commission's Rules of Practice and Procedure. The Petition seeks a declaratory judgment interpreting Section 5.3 of R.I.P.U.C. No. 2244 (the "Interconnection Tariff") and applicable law as barring The Narragansett Electric Company ("Narragansett" or the "Company") from requiring, as a condition to authorizing interconnection, an interconnecting customer to pay a portion of the costs incurred by an unrelated interconnection customer for work that was self-performed by that unrelated developer.[1] Through its March 10, 2022 Response ("Narragansett Response to Petition"), Narragansett agrees that the Interconnection Tariff "is silent as to cost sharing for self-constructed and donated facilities" and, through its Responses to Data Requests, Narragansett has stated that it has never had any policy as to cost-sharing for self-performed interconnection work.

[1] As this Commission is well-aware, on May 25, 2022, PPL Corporation completed its acquisition of Narragansett and will now be operating the State's primary electric and gas utility as "Rhode Island Energy." For sake of consistency with all of the pleadings that have been filed in this Docket, this Memorandum will continue to refer to the utility as "Narragansett" or the "Company."

Thus, the legal question presented in this Petition on the Interconnection Tariff seems to be largely conceded by Narragansett: The Interconnection Tariff does not vest authority in the utility to require cost sharing for self-performed work as a condition to authorizing interconnection.

Conceding that it has no stated authority nor any written policy, Narragansett has nevertheless taken an *ad hoc*, case-by-case approach to cost-sharing for self-performed work. While Revity understands Narragansett's sincere efforts to find a workable approach, this case-by-case regime has, to date, resulted in Revity "holding the bag" regardless of which side of the interconnection process Revity finds itself. To the extent that the principles of equity will guide the Commission's review of this Petition, the Commission must agree that it is patently inequitable for Revity to consistently find itself on the losing end of the utility's cost-sharing approach to self-performed work—an inequitable result that presents a substantial risk of "discrimination in respect to any service in, affecting, or relating to . . . the distribution of electricity" in violation of R.I. Gen. Laws § 39-2-4. Ultimately, if the Commission believes that the utility should be prospectively involved in the collection and allocation of costs for self-performed interconnection work, the Commission should direct Narragansett to make a Tariff Advice filing to amend its Interconnection Tariff on this issue, and a docket should be opened so that this new policy can be publicly (and prospectively) established, after stakeholder input, and developers can know the rules of the game *before* they decide whether to play.

## STATEMENT OF FACTS

Narragansett 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. Agreed Facts at ¶ 5. "Narragansett allows Interconnecting Customers to self-perform limited civil work (<u>but not electrical work</u>), such as duct bank construction, on the

Company EDS to alleviate construction resource constraints, and in recognition that certain Interconnecting Customers or their contractors have the adequate expertise to complete civil work and may be able to do so at reduced costs." Narragansett Response to Petition at ¶ 10. Narragansett has permitted self-performance of interconnection civil work on five projects: (1) Green Development's ("Green") Nooseneck Hill Road project in West Greenwich (Case No. 27825278); (2) Green's Coventry Wind project in Coventry (Case No. 176434); (3) Green's Ten Rod Road projects in Exeter (Case Nos. 171877, 178178, 178197, 178206, 178207, 178208, 178209, 178210 & 178211); (4) Green's Iron Mine project in North Smithfield (Case Nos. 186401, 186403, 186406 & 186409); and (5) Revity's Lippitt Avenue project in Cranston (Case Nos. 177298 & 177300). Agreed Facts at ¶ 6.

Narragansett has never had a cost-sharing policy regarding its treatment of self-performed interconnection work. Narragansett "does not have a formal process whereby an Interconnecting Customer executes a formal agreement that would commit the Interconnecting Customer to either cost share proposed or existing infrastructure that had been donated to [National Grid]", nor does Narragansett "have in place a formal process to provide policy and guidelines around DG developers' self-performance of civil work." Narragansett April 19, 2022 Responses to First Set of Data Requests issued by the Division of Public Utilities and Carriers (the "Division") (at Div. 1-4 & 1-17) ("Narragansett Responses to Data Requests").

Green's Nooseneck Hill Road project in West Greenwich is the first and only project (to date) involving self-performed civil work wherein Narragansett has required cost-sharing between interconnecting developers. Agreed Facts at ¶ 7. According to Narragansett, "[p]rior to the Green Development Nooseneck Hill Solar project the Company did not broker cost sharing arrangements with developers that self-build the Company's infrastructure because the costs to be shared would

be very difficult to determine given that work was performed by others without the Company's involvement." Narragansett Response to First Request at Div. 1-15. For example, on Revity's Lippitt Avenue project in Cranston in 2019 (Case Nos. 177298 & 177300), "Narragansett informed Revity of its position to not facilitate cost sharing of civil work associated with the project and subsequent interconnecting customers." *Id.* at ¶ 8. After the interconnection work was completed by Revity for the Lippitt Avenue project and Narragansett took ownership over the facility, Hope Road Solar/Enerparc was granted access to the interconnection facility but refused to contribute its *pro rata* share of the costs thereof when Revity requested payment for the same. Revity Petition at ¶ 10. In the current Docket matter, Narragansett has stated that it "is willing to discuss compensating Revity for the pro rata share of the duct bank work attributable to Enerparc's project." Narragansett Response to Petition at p. 13.

In 2019, multiple photovoltaic solar energy system ("PSES") projects being separately developed by Green, Revity, and Energy Development Partners ("EDP") all entered Narragansett's interconnection queue in the same vicinity (*i.e., utilizing a common interconnection on* Nooseneck Hill Road and Division Road in West Greenwich). Agreed Facts at ¶¶ 10-12. The aggregate nameplate capacity for all of the Green, Revity and EDP projects was 70.7 MW, with the following split: the Green projects constitute 20 MW (28.3%); the Revity projects constitute 40.7 MW (57.6%); and the EDP projects constitute 10 MW (14.1%). *Id.* at ¶ 19. On May 18, 2020, Green requested and was granted permission by Narragansett to self-perform the civil work for the 4- and 6-way duct bank necessary to facilitate the interconnection of these projects. *Id.* at ¶ 16. "Green provided Narragansett with a cost estimate for the entire duct bank of $14,231,676, representing a roughly $2 million cost savings as compared to Narragansett's estimate." Narragansett Response to Petition at ¶ 12. During a meeting on June 3, 2020, Narragansett informed Green that

Narragansett would facilitate cost-sharing for Green's self-performed interconnection work on the duct bank. *Id.* at ¶ 17. Narragansett did not consult with Revity before its decision to allow Green to construct the duct back, or to facilitate cost-sharing for that duct bank. *Id.* at ¶ 18.

On January 25, 2021, there was a conference call which included representatives from Narragansett, Revity, LIG Consultants and Seal Rock Energy, during which Narragansett informed the other participants that civil construction expenses performed by developers would be cost-shared by Narragansett amongst the developers benefitting from that work and that the first developer in line has the unilateral right to perform this work, without input of other developers. Revity's April 18, 2022 Responses to First Set of Data Requests (at Div. 1-6) ("Revity's Responses to First Data Request"). **"Throughout 2021, Revity objected to Narragansett's ability to cost-share for the Weaver Hill common path interconnection work."** Agreed Facts at ¶ 34 (emphasis supplied). Green commenced the common duct bank work in September of 2021. Narragansett Responses at Div. 1-16.

On October 1, 2021, Revity transmitted correspondence to Green inviting a discussion regarding Green's estimated costs of the civil interconnection work for the West Greenwich projects, and to share bid proposals from qualified duct bank installation contractors. *Id.* at ¶ 31. That correspondence concluded as follows:

> Revity Energy is ready, willing and able to self-perform the Nooseneck Hill/ Division Road common path at the same cost of $175(+/-) per foot. At 15,900 feet, that leg would cost Revity Energy $2,782,500 to self-perform. If Green Development intends on performing the work for the Nooseneck Hill/Division Road common path, Revity Energy would pay its *pro rata* share of $2,782,500 (or less, if Green Development can secure a better bid) to Green Development in exchange for a complete release of all responsibility and liability for any and all costs and expenses beyond that figure. Conversely, if Green Development prefers,

> Revity Energy will self-perform the work for the Nooseneck Hill/Division Road leg and Green Development can pay its share in exchange for a complete release.[2]

Revity's Responses to First Data Request at Div. 1-1. Green did not respond to Revity; instead, "Green made repeated requests to Narragansett for a cost-sharing mechanism and, on October 20, Narragansett committed that cost-sharing would apply and that the pro-rata share of costs allocated to Green would be 28.3%." *Id.* at ¶ 32.

On November 4, 2021, Revity transmitted correspondence to Narragansett expressing Revity's position that "[n]either the Interconnection Tariff nor state law provides [Narragansett] any authority to collect or distribute pro rata cost-sharing contributions where a private developer voluntarily elects to perform the civil interconnection work for its own benefit."[3] *Id.* at ¶ 33. On January 18, 2022, Green provided Narragansett with a cost estimate of $14,231,676. Agreed Facts at ¶ 38. On February 22, Green provided Narragansett with a revised cost estimate of $14,690,427.03. *Id.* at ¶ 41. On April 12, Green provided Narragansett with a further revised cost estimate of $14,926,045.16. *Id.* at ¶ 43. On February 25, Revity made a payment in the amount of $806,400 to Narragansett to secure an order for the larger 1000 kcmil cable that would be required for the interconnection of the Green, Revity and EDP projects combined. *Id.* at ¶ 42.

In its responses to the Commission's request in Docket No. 5206, Narragansett identified the following issues with respect to Green's work on the Nooseneck Hill interconnection:

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[2] Revity is aware that supply chain costs have been volatile since its October 1 correspondence and, certainly, Revity's cost-sharing proposal would reflect the actual labor and material costs incurred by the developer which are directly applicable to self-performing the common path of the interconnection route.

[3] In its June 15, 2022 Memorandum, the Division of Public Utilities and Carriers ("DPUC") raised certain "Agreed Facts Clarifications" which largely seem to suggest that Revity had intermittent contact with the utility and Green throughout 2021. It should be noted that Revity has weekly communications with representatives of Narragansett regarding general and project-specific interconnection issues. See Agreed Facts at ¶ 34 ("Throughout 2021, Revity objected to Narragansett's ability to cost-share for the Weaver Hill common path interconnection work."). Revity can certainly produce records documenting these communications if the Commission believes those records relevant to the legal inquiry.

When looking at the work methods, [Green's] work schedule was based on five days per week, 24 hours of construction per day with restoration on the sixth day. They ran back-to-back 12-hour shifts from September 2021 to April 2022. This is a very aggressive schedule that comes with a cost premium ranging from 25 percent to 30 percent. The Company informed Green Development, via e-mail dated September 3, 2021, the incremental cost that solely benefit Green Development should not be passed on to other developers.

Planned utility projects generally do not have long duration (many months) of 24-hour construction. Permit restrictions may require night/off hours work but do not typically stipulate around-the-clock construction. There are unique situations that result in short duration 24-hour construction, emergency repairs, cable splicing and curing, directional drills, pull back, micro tunnel drilling, etc. The Company is not aware of permit conditions or unique situations that required around-the-clock construction and does not believe the cost premium of such work should be passed on to other developers, unless Green can justify why this approach was appropriate.

The Company uses a competitive bid process to award work to vendors' work is awarded to a Contractor of Choice ("COC") or through project-specific bids. The COC contract is units-based that was established with competitive bids. Some projects, generally larger complex ones, get awarded through project-specific bids. Either way, the competitive bid process eliminates vendors who propose suboptimal means and methods that increase costs, such as 24-hour construction without providing value.

Additionally, the data provided by Green Development does not separate costs associated with rework. On this project, a representative of Green Development chose to install manholes and vaults, against the advice of the Company's Construction Supervisor, and not in accordance with the Rhode Island Department of Transportation's ("RIDOT") or the Company's standards. This resulted in the replacement of the vaults. If a Company contractor willfully installed vaults incorrectly, the Company would enforce the terms and conditions of the contract and require the contractor to correctly replace the vaults at the sole cost of the contractor. The Company does not believe it is appropriate for this type of rework costs, associated with willful neglect, to be passed onto other developers.

May 24, 2022, National Grid Responses to Request 3-3 of RIPUC's Third Set of Data Requests in Docket No. 5206.

As of the date of the Petition, Revity has 21 interconnection applications under review by Narragansett, totaling 130 MWs, that face the uncertainty depending on which side of Narragansett's *ad hoc*, case-by-case policy such applications may fall.

## LEGAL STANDARD

A decision by the Commission must be "fairly and substantially supported by legal evidence specific enough to enable [a court] to ascertain if the facts upon which the [PUC's] decision is premised afford a reasonable basis for the result reached." *ACP Land, LLC v. Rhode Island Public Utilities Commission*, 228 A.3d 328, 334 (R.I. 2020) (quoting *Portsmouth Water & Fire District v. Rhode Island Public Utilities Commission*, 150 A.3d 596, 602 (R.I. 2016)). "Once the PUC adopts a tariff, it becomes the standard for determining the duties and obligations between a regulated public utility and its customers." *Laprocina v. Lourie*, 250 A.3d 1281, 1282 (R.I. 2021). "[W]here an agency interprets a tariff or rate contract, its interpretation must be reasonable." *Verizon New England, Inc. v. Maine Public Utilities Commission*, 509 F.3d 1, 8 (1st Cir. 2007). The interpretation must give words "their plain and ordinary meaning." *Powers v. Warwick Public Schools*, 204 A.3d 1078, 1086 (R.I. 2019).

## ARGUMENT

1. ***Neither the Interconnection Tariff nor R.I. Gen. Laws § 39-26.3-4.1 vests the utility with authority to participate and/or enforce cost-sharing between private developers where one developer has voluntarily elected to self-perform interconnection work.***

The question before the Commission in this dispute is whether the Interconnection Tariff or R.I. Gen. Laws § 39-26.3-4.1 vests Narragansett with the authority to impose cost-sharing on an interconnecting customer for projects self-performed by another interconnecting customer. Section 5.3 of the Interconnection Tariff provides as follows:

> The Interconnecting Customer shall only pay that portion of the interconnection costs resulting from the System Modifications required to allow for safe, reliable parallel operation of the Facility with the Company EDS; provided, however the Company may only charge an Interconnecting Customer for System Modifications specifically necessary for and directly related to the interconnection, excluding modifications required on the Transmission infrastructure. The Interconnecting Customer shall also be responsible for all costs reasonably incurred by the Company attributable to:

a) The proposed interconnection project in designing, constructing, operating and maintaining the System Modifications required to allow for safe, reliable parallel operation of the Facility with the Company EDS; or
b) Resulting from the Facility operating in conjunction with any existing Facilities; or
c) Other proposed Facilities that precede the Facility in the interconnection queue.

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> As appropriate, to the extent that subsequent Interconnecting Customers benefit from System Modifications that were paid for by an earlier Interconnection Customer, subsequent Interconnection Customers who benefit from those same System Modifications may retroactively contribute a portion of the initial costs, which may be refunded to the earlier customer. In this scenario, 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. Such assessments may occur for a period of up to five years from the Effective Date of the earlier Interconnecting Customer's Interconnection Service Agreement.

R.I. Gen. Laws § 39-26.3-4.1 provides, in relevant part, as follows:

> (a) The 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.
> (b) If the public utilities commission determines that a specific system modification benefitting other customers has been accelerated due to an interconnection request, it may order the interconnecting customer to fund the modification subject to repayment of the depreciated value of the modification as of the time the modification would have been necessary as determined by the public utilities commission. Any system modifications benefitting other customers as determined by the public utilities commission.
> (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.

R.I. Gen. Laws § 39-26.3-4.1(a)-(c). These are the provisions of Rhode Island law that currently govern the interconnection process in Rhode Island.

"Narragansett does not dispute that Section 5.3 is silent on cost sharing for self-constructed and donated facilities." Narragansett Response to Petition at p. 9. Narragansett further "acknowledges that Section 5.3 of the Interconnection Tariff, which includes certain look-back and cost sharing provisions, does not explicitly address situations in which an Interconnecting Customer self-performs civil work and donates those facilities to Narragansett." *Id.* at p. 1. Narragansett has also conceded that "[t]he terms of the interconnection tariff apply to services offered to the Company's retail customers, not to parties contracted by the Company to perform work on its distribution system." Narragansett Responses to Data Requests (at Div. 1-2). Finally, Narragansett states that it "does not (and did not) have a formal cost sharing policy." Narragansett Responses to Data Requests (at Div. 1-17).

Notwithstanding the clear admissions by Narragansett, Green nevertheless contends that "the statute and Tariff are unambiguous on the requirement of cost sharing" and the "law does not distinguish between upgrades effectuated by Narragansett Electric or self-performed by the interconnecting customer." Green Development, LLC's April 15, 2022 Response to Division's First Set of Data Requests (at Div. 1-7) ("Green's Responses to First Data Requests"). Green insists that "[t]here is no administrative discretion allowed by governing Rhode Island law." *Id.* Not surprisingly, Narragansett disagrees with Green's assertion, and instead states there is discretion as "the cost sharing provision of Section 5.3 is permissive" and "cost sharing may not always be appropriate or required." Narragansett Response to Petition at p. 13. Green's contention that Narragansett is required by Rhode Island law and the Interconnection Tariff to require cost sharing for self-performed work also runs headlong into the indisputable fact that Narragansett has never required or participated in cost-sharing for self-performed work until this West Greenwich interconnection.

The Division has now weighed in through its June 15, 2022 Memorandum concluding that "[a]llowing Revity to independently negotiate with Green on how charges should be applied for the use of National Grid's facilities would create an unacceptable precedent that conflicts with the Company's long-standing treatment of similar instances under the Narragansett Electric Company Terms and Conditions for Distribution Service." Division Memorandum at p. 4. The Division further states that "[t]here is a history in Rhode Island, consistent with industry practices and similar to other jurisdictions, which applies to the treatment of these types of facilities."[4] *Id.* at p. 3. The Division explains that "the Company's policy and practice has been and continues to be . . . one of obtaining funds from others that use donated facilities, which may include excess facilities that may be utilized by additional customers in the future, and reimbursing the original party for a portion of its cost based on the funds it receives from the other customer." *Id.* at p. 3.

The Division's conclusions run headlong into Agreed Upon Fact 7 (not mentioned in the DPUC Memorandum) which states that "Green's Nooseneck Hill Road project in West Greenwich is the only project involving self-performed civil work wherein Narragansett has actively participated in cost-sharing between interconnecting developers." Prior to this Nooseneck Hill project, the utility expressly disclaimed any ability or authority to obtain funds from subsequent customers interconnecting to self-performed donated infrastructure. The Division's conclusion is also contradicted by Narragansett's representation that it "does not (and did not) have a formal

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[4] The Division's Memorandum begins that its "analysis and recommendations address the engineering and cost recovery issues, not any legal framework." The issue presented to the Commission through Revity's Petition (to wit: whether Rhode Island law vests the utility with authority to cost-share for self-performed work) is a legal question that must first be answered before any discussion of how cost-sharing in such a circumstance could or should work. While the Division's recommendations may be helpful to the Commission as it addresses the underlying cost sharing issue on a prospective basis in the future, those recommendations have no relevance to the Commission's resolution of the legal question raised in Revity's Petition.

cost sharing policy." If the Commission is looking at past practice, there is no question there has never been cost-sharing for self-performed interconnection work facilitated by Narragansett.

While Revity appreciates Narragansett's argument that it should be afforded discretion in cost sharing for self-performed work, the exercise of that discretion under these circumstances is extremely problematic. "[W]ithout standards to fetter [a decisionmaker's] discretion, the difficulties of proof and the case-by-case nature of 'as applied' challenges render the [decisionmaker's] action in large measure effectively unreviewable." *Apodaca v. White*, 401 F. Supp. 3d 1040, 1054 (S.D. Cal. 2019) (quoting *City of Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. 750, 755-56 (1988)). Stated differently, R.I. Gen. Laws § 39-1-27.6(c)(5) provides that "[a]ll employees of the electric distribution company must apply all tariff provisions in a fair and impartial manner that treats all customers (including those of an affiliated nonregulated power producer) in a nondiscriminatory manner." Allowing the Company to implement an unwritten cost sharing policy on a case-by-case basis, without any standards or guideposts, clearly inhibits any ability of an Interconnecting Customer to challenge (and the Commission to review) the reasons why the Company has or has not elected to require cost sharing. Indeed, for this reason, Rhode Island state law recognizes that "[t]he electric distribution company must maintain in a public place, and file with the commission, current written procedures implementing the standards of conduct in such detail as will enable customers and the commission to determine that the electric distribution company is in compliance with the requirements of this section." R.I. Gen. Laws § 39-1-27.6(e).

Green further maintains that "any upgrades self-performed by an interconnecting customer must ultimately be donated to Narragansett Electric and then made available to any customer interconnecting a renewable energy project in such a way that they must rely on the previously

funded upgrades" and "the general assembly has resolved that it is equitable that the cost of such upgrades must be allocated fairly among those that benefit from them." Green's Responses to First Data Requests (at Div. 1-7). Rhode Island General Laws do not explicitly prescribe any right for developers to self-perform interconnection work, a fact of which Green is well aware as evidenced by Green's support for HB 8028 (currently pending before the House Corporations Committee) which, among other things, would enshrine in the General Laws the developers' right to self-perform subject to utility oversight and standards.[5] If the General Laws do not currently explicitly recognize the concept of self-performance, it is entirely unclear how, as Green contends, the General Assembly has already "resolved" the question of cost-sharing of self-performed interconnection work.

As articulated at length in Revity's Petition (at ¶¶ 38-51), the language used in R.I. Gen. Laws § 39-26.3-4.1 and the Interconnection Tariff contemplate cost-sharing as a reimbursement structure for Narragansett to collect and recoup funds for work performed by the Company. These provisions exist to ensure that Narragansett's ratepayers are not burdened with costs arising from interconnection upgrades that are solely required to connect renewable energy facilities to the larger electric infrastructure. R.I. Gen. Laws § 39-26.3-4.1 and the Interconnection Tariff, when read together, allow Narragansett to collect from subsequent interconnecting customers "all costs

[5] With regard to HB 8028, and its provisions regarding self-performance, Narragansett provided written testimony to the House Corporations Committee stating that it "is committed to working with developers on self-perform or self-build processes that fully adhere to approved construction standards and requirements" and that "the Company is already in the process of formalizing self-build criteria and processes." The Commission and the Division both opposed the provisions enshrining self-performance in law because (according to Commission and the Division) those provisions would allow the developer to take "the role of the utility . . . by choosing to self-perform system improvements necessary to interconnect a distributed generator" and the "proposed legislation places these fundamental yet critical responsibilities in the hands of unregulated developers that have no accountability for performance or operational issues that may arise." While Revity respectfully disagrees with these conclusions, the underlying concerns that were raised further demonstrate why cost sharing for self-performed construction should not be allowed until a formal policy and standards are developed.

reasonably incurred **by the Company**" (emphasis supplied) and to "credit" or "refund" earlier interconnecting customers according to their *pro rata* share. As articulated in Revity's Petition, to "incur" means "[t]o suffer or bring on oneself (a liability or expense)." *Matter of Arbitration Between United Public Works, AFSCME, Local 646, AFL-CIO and Dep't Transportation*, 487 P.3d 302, 306 (Haw. 2021) (quoting BLACK'S LAW DICTIONARY (11th ed. 2019)); *see also U.S. ex. rel. Humphrey v. Franklin-Williamson Human Service, Inc.*, 189 F. Supp. 2d 862, 871 (S.D. Ill. 2002) ("Clearly, the word 'incur' connotes taking on a liability."). In allowing self-performance, Narragansett incurs no costs—the self-performing developer incurs the costs. As articulated in Revity's Petition, a "refund" is a "return of money to a person who overpaid * * *." BLACK'S LAW DICTIONARY (11th ed. 2019). In self-performance, the performing developer pays Narragansett no money for which a refund could be applied (indeed, the self-performing developer is even required to pay for the taxes levied on the improvements despite those improvements being donated to the utility). The term "refund" does not support application where one interconnecting customer would directly pay another interconnecting customer for the costs incurred by the performing customer for earlier self-performed work.

Narragansett nevertheless contends that "[i]t should not matter whether the first Interconnecting Customer paid for the work directly under a self-build authorization and later donated the property to Narragansett." Narragansett Response to Petition at p. 10. Obviously, it does matter whether it was a regulated utility or a private developer's affiliated construction company who performed the work. Both Revity's Petition and Narragansett's Response to Petition discuss the Commission's 2020 Decision in *Episcopal Diocese of Rhode Island*, in which the Commission stated that R.I. Gen. Laws § 39-26.3-4.1(a) makes "clear that the interconnecting customer may only be charged for costs it is causing" Narragansett and so, "[i]n the event the

customer seeking the extension of distribution facilities to serve a new facility causes a cost in excess of the future revenues Narragansett expects to receive from the customer, that customer is directly responsible for the excess costs." *In re: Petition of the Episcopal Diocese of Rhode Island for Declaratory Judgment on Transmission Sys. Costs & Related Affected Sys. Operator Stud.*, No. 4981, 2020 WL 2486927, *18 (Apr. 14, 2020) ("*Episcopal Diocese*").

In its Response, Narragansett emphasizes (accurately) that this language was conditioned by the Commission as follows:

> The policy behind allocating to customers the costs they cause to the electric system is to send price signals to customers. The absence of such price signals would result in the development of renewable energy that may not be cost-effective. As previously discussed, projects that will not provide investors with a return on their investment are not likely to be built. Allowing renewable energy developers to escape the cost of transmission system modifications resulting from connecting their project to the distribution system by simply passing those costs on to all other customers would provide no incentive to only develop projects that are cost effective for both the investor and the general body of ratepayers. Such a decision would increase the cost of renewable energy to Narragansett's ratepayers without a record supporting such a cost shift.

Narragansett's Response to Petition at p. 11 (quoting *Episcopal Diocese* at p. 9, n.41). Surely, that logic makes sense in a case, like *Episcopal Diocese*, where the cost-shifting was between Narragansett and the developer. This is not such a case. Indeed, Narragansett expressed no concern for the ratepayer in 2019 when it allowed Enerparc to interconnect for free to facilities constructed by Revity in Cranston. That is because, in the case of self-performance, the cost-shifting that occurs is between the developers, the costs are never borne by Narragansett and, therefore, there is no threat of ratepayer burden. As such, unless and until there is revision of the Interconnection Tariff, cost socialization for self-performed work should remain a private market matter.

Narragansett also cited the Commission's Decision in *Wind Energy Development, LLC*, Docket No. 4483, Order 22957 (2017) in its Response arguing that the Commission has found that

"the proposed tariff revision to Section 5.3 achieves [a] balance by providing a fair and equitable allocation of system upgrade costs associated DG interconnection costs." Narragansett Response to Petition at p. 11. That case is materially different from the matter presently before the Commission. Again, in *Wind Energy Development*, the Commission was being asked to evaluate the argument "that other customers should be required to subsidize the renewable energy industry's interconnection" and ultimately rejected "this approach [a]s contrary to basic cost causation principles and Rhode Island law." *Wind Energy Development, LLC*, Docket No. 4483, Order 22957 at p. 31. The legal issue presented here involves cost sharing between private developers—not between private developers and ratepayers.

With regard to the question of whether the Interconnection Tariff or Rhode Island state law provides Narragansett cost-sharing authority for self-performed interconnection work, Narragansett concedes that the law is silent. Unless the Commission is to conclude that the utility has the authority to do anything not expressly prohibited by the Interconnection Tariff, the ineluctable conclusion of the Tariff's silence is that Narragansett does not have cost-sharing authority. Perhaps there should be a regime to address these circumstances in the future, but that regime cannot be imposed retrospectively, based on an unwritten, ad hoc, case-by-case internal policy of the utility. Instead, that regime must be established prospectively through a public process that obtains input from all interested stakeholders.

2. ***Recognition that the utility currently lacks authority to participate in or enforce cost-sharing between private developers would not detract from the market efficiencies of self-performance nor would it result in market inequities such as "free-riding."***

Given that Narragansett agrees that Section 5.3 of the Interconnection Tariff "does not explicitly address situations in which an Interconnecting Customer self-performs civil work and donates those facilities to Narragansett," the Company instead has argued that "cost sharing in

these circumstances is equitable and consistent with the intent of the Interconnection Tariff." Narragansett Response to Petition at p. 1. Narragansett continues that "[i]f Revity were not required to make any contribution for the costs of the duct bank, as Revity argues, Revity would [be] escaping these costs and would become a free rider on Green Development's construction." *Id.* at p. 12.

Far from attempting to "free ride", throughout its project development process Revity has remained willing to pay its fair share of the costs associated with interconnecting its projects. In the case of the current interconnection, Revity has been in constant contact with Narragansett and Green, has supported interconnection reform legislation (HB 8028), and has initiated this Petition—all with the express purpose of trying to resolve this issue in a transparent (and, with respect to the latter two actions, public) manner.

Nevertheless, Revity acknowledges that, despite *its* good faith approach to this dispute, there is concern that adoption of Revity's interpretation would open the door for others to ride for free. It is for that reason that Revity fully supports efforts by the Rhode Island legislature to address this issue on a prospective basis. As Revity explained in its Responses to the Division's First Set of Data Requests, a self-performing developer whose work is subject to uncompensated third-party interconnection has legal recourse through Section 9.2 of the Interconnection Tariff to elevate compensation disputes to the Commission. Revity's Responses to First Data Request (at Div. 1-3). To the extent that a private party has performed work for which another party knowingly and inequitably benefits without just compensation, the performing party may also have legal recourse through common law and statutory claims. *Id.*

Extending the free-rider argument, Narragansett contends that "[a]llowing renewable energy developers to escape the cost of transmission system modifications resulting from

connecting their project to the distribution system by simply passing those costs on to all other customers would provide no incentive to only develop projects that are cost effective for both the investor and the general body of ratepayers." Narragansett Response to Petition at p. 11 (quoting *Episcopal Diocese of Rhode Island*, Docket No. 4981, at 19, n.41 (2020). "Such a decision would increase the cost of renewable energy to Narragansett's ratepayers without a record supporting such a cost shift." *Id.* This argument is a red-herring. No party in this proceeding has proposed "allowing renewable energy developers to escape the cost of transmission system modifications resulting from connecting their project to the distribution system by simply passing those costs on to all other customers." Given that Narragansett never incurs any costs with respect to self-performed work, these costs never come anywhere near the ratepayer. When Narragansett refused to assist in cost-socialization for the Lippitt Avenue/Laten Knight Road project in Cranston and EnerParc refused to pay for its interconnection, it was Revity who bore the costs (not Narragansett and certainly not the ratepayer). Part of the reason that self-performed work has been more cost-efficient than utility-performed work is that, in the former scenario, the developer is taking the financial risk of performance and in the latter, the utility knows that others will bear the costs. Utility-enforced cost-socialization of self-performed work removes that market pressure for the benefit of a developer that does not have the same financial obligations as the regulated utility.

If the Commission determines that the utility does not *currently* have the authority to require cost-share for self-performed work, developers will still self-perform interconnection work because, **as everyone acknowledges**, developers can perform interconnection work more efficiently (both in terms of time and money). Knowing that self-performance reduces costs and timelines for interconnection work, all developers planning to connect a project to a newly developed route have a vested interest in the work being self-performed. Accordingly, the

developer in the best position to self-perform (either by virtue of its position in the interconnection queue, the location of its project(s) on the interconnection route, or its financial resources) can and should make contact with other developers in the area with projects proceeding and offer to self-perform subject to those developers contractually committing themselves to their *pro rata* contribution. Their leverage: If the other developers refuse to contract, then the offering developer withdraws its offer to self-perform and the utility performs the interconnection (at additional cost to everyone and with a longer timeline for completion). If multiple developers agree to cost-share and one developer elects to try to free-ride, the cost-sharing developers can pool resources and seek administrative and/or judicial recourse.

The Division, in its June 15, 2022 Memorandum, challenges the idea that independent developers can privately negotiate:

> I am unaware of any precedent in Rhode Island or other state in which facilities donated by a party to the utility and owned by the utility are the subject of independent negotiations for reimbursement with the party which constructed and donated those facilities to the utility. Furthermore, in this instance, Green has no ownership or interest in the facilities since they have been donated to National Grid. Additionally, Green has no negotiation position since it donated the facilities to National Grid. Private business negotiations presuppose that one party has something another party wants an interest in and thus has equal footing in the negotiations. Green has no negotiating power since it has nothing to provide or withhold. Thus, Revity would have an unfair advantage in the negotiations with nothing to be lost if it made no contribution after it already had an Interconnection Service Agreement in place with National Grid, giving Revity the right to use the duct bank at no guarantee of payment to Green. This Option provides no protection or equity for Green and allows Revity an opportunity to avoid all or most of the cost sharing, . . . .

Division's June 15, 2022 Memorandum at pp. 5-6. Since the Nooseneck Hill interconnection is largely completed, Green's only leverage to negotiate cost-sharing *on this project* is the threat of legal action. (This, of course, was the predicament in which Revity found itself when the utility disclaimed any ability to cost-share with Enerparc in 2019). Nevertheless, Revity continues to

engage with Green and the Company as to the proper cost allocation for this interconnection. On projects moving forward, as articulated above, the self-performing developer can refuse to self-perform and instead request that the utility perform the interconnection work (at increased costs and on a longer timeline to everyone). If subsequent interconnecting developers want to lower the cost and time for completion, they will negotiate with the developer offering to self-perform.

The Division proposes that the subsequent customer should "negotiate the full reimbursement cost with National Grid for the position of the system it will utilize to interconnect its facilities" and that portion of the reimbursement paid to the utility which is associated with self-performed duct bank system would be reimbursed to the self-performing developer. The Division continues on to propose the following administrative standards of this cost-sharing regime:

1. Developing a project design criterion which meets the Company's standards and provides for the least cost option for all the known factors, including potential utilization of a portion of the self-performed project by the entities.
2. Assuring that only Company approved contractors are used for self-performed projects following comparable procurement methodology that the Company uses for its own contractors and publish for access by anyone.
3. Developing and publishing a full auditing process available to all interconnecting parties.
4. Assuring that the project cost has been adequately documented and does not include unreasonable costs being added into a final cost reconciliation for the self-performed project.
5. Developing an equitable distribution of cost for the portions of a self-performed project that are shared among multiple interconnecting parties. This should consider the portion of the self-performed project each interconnecting party utilizes. It should additionally include a cost distribution model which is based on capacity utilization ratio, space utilization ratio, and a combination of these ratios as determined to be most equitable to all parties involved.
6. Requiring all parties to provide written acceptance of, at minimum, facility use, cost allocation, and commitment for payment prior to construction commencement to the extent possible and certainly prior to execution of an ISA.
7. Collecting the funds and reimbursing the developer who completed the self-performed facilities and then donated the facilities to National Grid. These funds should be reimbursed within 90 days of collecting funds from another party.
8. Repeating this multi-step process each time an additional party utilizes a portion of a self-performed project. The collections from each additional

> interconnecting party shall be reimbursed to all the parties who have made contributions to the project cost, including the original self-performer. This shall be done as an equitable ratio of cost incurred by the previous interconnecting customer.

Division Memorandum at pp. 5-6.

If these procedures and standards are advisable, there should be a Tariff Advice filed to revise the Interconnection Tariff to authorize the utility to enforce cost-sharing through the interconnection service agreement. This process would allow stakeholders and the public to comment on the proposed cost-sharing regime. That process would produce a rule guiding all developers as to their options and responsibilities vis-à-vis interconnection *before embarking on a new development*. This rule would have to be applied uniformly (or, at the very least, set forth conditions for when cost-sharing would be applied and when it would not). If Narragansett is going to be involved in cost-sharing, it must be involved in cost-sharing for every project and interconnecting developers should have advance insight into the costs being incurred for the work.[6] If, on the other hand, Narragansett is not going to be involved in cost-sharing, it must not be involved in cost-sharing for any project, in which case developers *may* be less likely to agree to self-perform because of the back-end collection risk but, again, given that self-performance is more efficient than utility-performed interconnection, the most logical way for the developers on the same interconnection route to proceed is for them to negotiate and contract for self-performance by one and cost-sharing by the others.

What is inequitable is the utility allowing Revity to self-perform the Laten Knight Road civil work, to be told afterwards there is no cost sharing and then to be told two years later that

[6] To that end, HB 8028 would require the self-performing developer to "provide an industry standard estimate-level detailed audit and line item budget account of its actual costs with every cost estimate it issues and within ninety (90) days of completion any system modifications, including any and all supporting records and documentation."

there has been a change of policy to Revity's further detriment. What is inequitable is the inconsistent application of cost-sharing policies which creates artificial leverage for one developer over another depending on how the utility decides to apply the policy on any given interconnection project. In this case, Green was promised a cost-sharing mechanism which was not offered to Revity three years ago. Revity was not consulted before Narragansett made that promise and, prior to this Petition, Revity had no contemporaneous insight or input on the interconnection costs being incurred by Green. Between January 18, 2022 and April 12, Green's cost estimate for the interconnection work increased by $649,369. Agreed Facts at ¶ 38, 42 & 43. In fact, until December of 2021, Green's estimate for the manhole and ductbank cable installation was approximately $6 million.[7]

[7] On May 24, 2022, National Grid responded to Request 3-3 of RIPUC's Third Set of Data Requests in Docket No. 5206 as follows:

1. Original estimate, provided on June 2020, from Green Development was approximately $9 million (page 1 of 62 WC Nooseneck Ductbank Estimate.pdf), it should be noted this estimate includes other costs such as the overhead bridge crossings and ductbank cable installation that are not in the current reconciliation.
    a. Using this estimate, the Company concluded the Green Development current scope manhole and ductbank civil estimate was approximately $6 million.
2. The first time the Company became aware of costs greater than approximately $6 million was when Green Development provided an approximately $13.6 million estimate, dated December 16, 2021, on December 17, 2021.
3. The January 18, 2022 cost reconciliation, provided on January 19, 2022, projects a Total Budget Cost of $14.2 million with a Total Estimate at Completion of $14.9 million.
   * * *
4. The current manhole and ductbank (civil only) cost reconciliation, provided by Green Development on May 5, 2022, shows at the same Total Budget of as the January 18 document, but Green Development stated the number did not include OH&P.
    a. Green Development stated "The original budget for the project was $14,234,991.26 without the 10% OH&P." This is the first reference, that the Company can find where the Total Budget and Total Cost at Completion did not include overheads and profits.
    b. Green Development wants to add an additional $1.18 million to the actuals.
5. The Company needs Green Development to explain all the various estimates/numbers provided, as well as clearly justifying why the totals did not include overheads and profits. In addition, Green Development needs to explain the drivers/changes that caused the cost increases.

Prior to this Petition, Green had no interest in discussing these costs with Revity because Narragansett had promised to cost share. The leverage is made manifest by the history. On October 1, Revity wrote to Green to discuss the interconnection costs, Green then made "repeated requests" to Narragansett for a "cost sharing regime," Narragansett confirmed cost sharing on October 20, and Revity's October 1 letter went ignored. At least where Narragansett is performing the interconnection work (while it is much more expensive and takes longer) the interconnecting customer knows that Narragansett, as a regulated entity, will have to justify its costs. Revity has had no such protection from Green (a competitor with its own affiliated construction division).

It is clear that Revity is not attempting to evade its financial responsibility for ***reasonable*** costs incurred by Green to serve Revity's projects on this interconnection route. To the extent that the Commission finds it prudent to establish prospective procedures to mitigate (or eliminate) the risk of bad faith free-riding, the Commission and Narragansett should do so through a public process with stakeholder input. But the prudence of establishing such prospective procedures in the future does nothing to change the legal realities of the current interconnection regime: There is no stated authority for the utility to initiate, participate in or enforce cost-sharing for self-performed interconnection work.

## CONCLUSION

For the foregoing reasons, Revity Energy LLC respectfully requests that the Commission issue a Declaratory Judgment, declaring as follows:

A. Pursuant to R.I. Gen. Laws § 39-26.3-4.1 and the Interconnection Tariff, as well as past practice, Narragansett 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 the same) self-performed by a private developer, once completed, is presumed to be automatically donated, assigned and conveyed by the developer (or its affiliates, as the case may be) to Narragansett and, thereafter, Narragansett has a legal obligation to interconnect any subsequent facility as necessary to accomplish the purchase and sale of electricity generated therefrom.

**REVITY ENERGY LLC**

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