

**STATE OF RHODE ISLAND  
PUBLIC UTILITIES COMMISSION**

**IN RE: PETITION FOR DISPUTE RESOLUTION FILED :  
BY ECOGY, ENERGY, INC UNDER PROGRAM YEAR :  
2022 RENEWABLE ENERGY GROWTH PROGRAM : DOCKET NO. 22-14-REG  
TARIFF AND ENROLLMENT RULES :**

**REPORT AND ORDER**

**I. Introduction**

On July 15, 2022, Ecogy Energy, Inc. (Ecogy) submitted to the Public Utilities Commission (Commission) a Petition for Dispute Resolution under Section 10 of The Narragansett Electric Company d/b/a Rhode Island Energy’s (RI Energy or Company) Renewable Energy Growth Program (REGrowth Program) for Non-Residential Customers (Tariff).<sup>1,2</sup> In its Petition, Ecogy sought a Commission Order directing RI Energy to award Certificates of Eligibility to Ecogy’s six projects at issue in this case at the bid prices submitted in the first open enrollment of 2022.<sup>3</sup> On October 11, 2022, after reviewing the filings, relevant law, and considering the oral argument, the Commission denied Ecogy’s requested ruling, finding it to be inconsistent with the Tariff and law.<sup>4</sup>

The RE Growth Program is a statutorily created feed-in tariff program designed to encourage the installation of new renewable energy distributed generation projects in RI Energy’s

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<sup>1</sup> Pet. (July 15, 2022); [https://ripuc.ri.gov/sites/g/files/xkgbur841/files/2022-07/22-14-REG-Ecogy-Petition\\_7-15-22.pdf](https://ripuc.ri.gov/sites/g/files/xkgbur841/files/2022-07/22-14-REG-Ecogy-Petition_7-15-22.pdf). The Petition also referenced the Dispute Resolution section of the Standards for Interconnecting Distributed Generation. Because the nature of the dispute is not about interconnection of renewable energy to the electric distribution system, that tariff is not applicable to this dispute.

<sup>2</sup> Tariff RIPUC NO. 2152-1; <https://ripuc.ri.gov/sites/g/files/xkgbur841/files/eventsactions/docket/5202-NGrid-Compliance-Tariff-and-Rules-%28PUC-3-31-2022%29..pdf>. Section 10 (Dispute Resolution) of the Tariff provides: “If any dispute arises between the Company and either the Applicant or the Customer, the dispute shall be brought before the Commission for resolution. Such disputes may include but are not limited to those concerning the Rules, terms, conditions, rights, responsibilities, the termination of the Tariff or Tariff supplement, or the performance of the Applicant, the Customer, or the Company.” Tariff at Sheet 18 of 18.

<sup>3</sup> Pet. at 9.

<sup>4</sup> Minutes (Oct. 11, 2022).

service area.<sup>5</sup> A feed-in tariff is a Commission-approved and legally enforceable transactional commitment which “guarantees that customers who own a [feed-in]-eligible renewable electricity generation facility, such as a roof-top solar photovoltaic system, will receive a set price from their utility for all of the electricity they generate and provide to the [distribution system]” over the term of the tariff.<sup>6</sup> Under the Program in Rhode Island, each year the Commission is required to approve: (1) the classes of renewable energy projects that can participate in the Program; (2) the target amount of renewable generation capacity that the utility will procure in each class through selection and bidding processes referred to as “enrollments”;<sup>7</sup> and (3) the ceiling prices under which the projects seek to bid into the RE Growth Program in order to participate.<sup>8</sup> The eligible participants, including those who have been selected based on competitive bidding, obtain a “Certificate of Eligibility” (also referred to as a “COE”) which defines the obligations of the utility and the participant being awarded and accepting the certificate. Each bidding period is referred to as an “Enrollment,” implemented under a set of “Solicitation and Enrollment Rules” which also include conditions of eligibility that define who can bid for a Certificate of Eligibility.

The Commission also approves the Solicitation and Enrollment Rules that are referenced as Tariff conditions.<sup>9</sup> There are typically three open enrollments during which medium and large scale projects can bid into the program.<sup>10</sup> Project bids are reviewed for compliance with the

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<sup>5</sup> R.I. Gen. Laws § 39-26.6-2.

<sup>6</sup> R.I. Gen. Laws § 39-26.6-6 (Permanence of tariffs once set).

<sup>7</sup> The class of very small eligible generation units do not bid, but simply receive the specified price on a first come first serve basis until the capacity allocation is filled. The medium and larger projects participate through competitive bidding.

<sup>8</sup> R.I. Gen. Laws § 39-26.6-5; Small scale projects are guaranteed the ceiling prices through a rolling enrollment process while medium-scale, commercial-scale, and large-scale projects are required to bid into the RE Growth during certain open enrollment periods. R.I. Gen. Laws § 39-26.6-15; § 39-26.6-16; Tariff at Sheet 10 of 18.

<sup>9</sup> Tariff at Sheet 1 of 18.

<sup>10</sup> R.I. Gen. Laws § 39-26.6-12(a); *See* National Grid, now known as RI Energy’s, Open Enrollment Reports Pursuant to R.I. Gen. Laws § 39-26.6-20; <https://ripuc.ri.gov/eventsactions/docket/NGrid-REG-EnrollmentRepts.html>.

eligibility requirements and ranked according to bid price, which must be at or below the ceiling price.<sup>11</sup> Qualified projects are accepted in order from least expensive to most expensive until the capacity cap is satisfied.<sup>12</sup>

## **II. Ecogy's Petition**

In its Petition, Ecogy alleged that RI Energy improperly rejected six of its renewable energy projects from the first enrollment in 2022 of the RE Growth Program. Ecogy asserted that its projects were qualified to enroll and were unjustifiably rejected from enrollment. According to Ecogy, RI Energy had stated that it rejected the projects from the first open enrollment in 2022, despite being bid below the then-effective ceiling prices, because each project already had a Certificate of Eligibility from prior Program Years' enrollments. Ecogy indicated that holding a Certificate of Eligibility from a prior year's enrollment is not listed in the Tariff as a disqualification to enrollment in a subsequent Program Year and further, that RI Energy's predecessor, National Grid, had previously allowed Ecogy to bid projects that already held Certificates of Eligibility and therefore, RI Energy was changing the rules without notice.<sup>13</sup> According to Ecogy, the projects either would not meet the statutory output deadline or would likely not be financially viable and therefore, Ecogy should be entitled to seek enrollment in a subsequent REGrowth Program Year Tariff without first terminating its current Certificates of Eligibility.<sup>14</sup>

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<sup>11</sup> The eligibility requirements are set forth in the Commission-approved Solicitation and Enrollment Rules for Solar (Greater than 25 kW), Wind, Hydro, and Anaerobic Digester Projects (RIPUC Docket No. 5202, Schedule NG-2) at Section I; <https://ripuc.ri.gov/sites/g/files/xkgbur841/files/eventsactions/docket/5202-NGrid-Compliance-Tariff-and-Rules-%28PUC-3-31-2022%29..pdf>.

<sup>12</sup> Ecogy Mem. at 3, ¶ 6 (Sept. 13, 2022); Solicitation and Enrollment Rules for Solar (Greater than 25 kW), Wind, Hydro, and Anaerobic Digester Projects at Section II.

<sup>13</sup> Pet. at 1-2; 5-9.

<sup>14</sup> Despite Ecogy's assertions, evidence in the record shows that Ecogy refused to terminate its current Certificates of Eligibility prior to know it was enrolled in the 2022 REGrowth Program Year at the higher bid price. Therefore, the Commission finds there is dubious credible evidence that the projects are not financially viable and disregards this information as irrelevant to the Commission's decision in this matter based on its interpretation of the Tariff.

### III. RI Energy's Response

On August 10, 2022, RI Energy submitted a Response to the Petition supporting its denial of the enrollment of Ecogy's six projects in the first open enrollment of the 2022 REGrowth Program Year.<sup>15</sup> RI Energy asserted that Ecogy's request to be awarded new Certificates of Eligibility at a higher price than it had originally been awarded without first terminating the original Certificates of Eligibility was inconsistent with the purposes of the REGrowth Program. The Company opined that if the projects were no longer viable, Ecogy would not condition termination on a guaranteed higher price but would terminate them under the terms of the REGrowth Tariff even without the guaranteed higher price.

RI Energy explained that while Ecogy had been allowed such treatment in 2021, the circumstances surrounding the decision by the Company to allow such termination were different than this year. According to RI Energy, where Program Year 2022 was the first year that ceiling prices has increased significantly, the Company needed to review requested terminations more closely to ensure they were administering the program "in a manner consistent with the Program's objectives and the best interest of customers who bear the incremental costs associated with the REGrowth Program."<sup>16</sup> An Applicant willing to terminate a project even without the guarantee of a higher tariff price would be evidence that the projects truly were unviable. RI Energy stated that, "[t]he practical implications of ruling in Ecogy's favor would be to compel issuance of new [Certificates of Eligibility], with delayed Output Certification Deadlines, for still viable projects already slated to receive incentives only so the developers could maximize returns through

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<sup>15</sup> Response (Aug. 10, 2022); <https://ripuc.ri.gov/sites/g/files/xkgbur841/files/2022-08/22-14-REG-RIE-Reply-Ecogy%208-10-22.pdf>.

<sup>16</sup> Response at 6.

increased ceiling prices.”<sup>17</sup> This, according to RI Energy would be contrary to the policies of the Program and the purpose of the increased ceiling prices.<sup>18</sup>

Responding to Ecogy’s claim that RI Energy changed the rules in the middle of the game, the Company suggested Ecogy was making a claim of estoppel which was not supported by its petition. According to RI Energy, Ecogy failed to meet either element; it neither relied on the Company’s prior practice nor shown that it was harmed by any such reliance. Further, RI Energy stated that even if Ecogy could show it relied on the prior practice, because Ecogy still had the opportunity to terminate a non-viable project and still bid into the next open enrollment after such termination, it could show no harm.<sup>19</sup>

#### **IV. Procedural Schedule**

On August 12, 2022, Commission legal counsel conducted a pre-hearing conference with the parties. The parties, Ecogy, RI Energy, and the Division of Public Utilities and Carriers (Division), agreed to a schedule that included the filing of an Agreed Upon Statement of Facts, a discovery period, legal memoranda, and oral argument. While the Tariff allows for Applicants or Customers to bring disputes to the Commission for resolution, there is no set process in the Tariff, likely because some disputes are more factual in nature and some more interpretive of the tariff such as a declaratory ruling might be. In this instance, the issues before the Commission appear to raise tariff interpretation relative to the REGrowth statutes and are more akin to a declaratory ruling.

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<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Id.* at 6-7.

## V. Agreed Upon Statement of Facts

On September 13, 2022, the parties submitted the following Agreed Upon Statement of Facts, copied verbatim. Ecogy Energy, Inc. (“Ecogy”) and The Narragansett Electric Company d/b/a Rhode Island Energy (“RI Energy”) have agreed on the following statement of facts:

1. Ecogy is a solar developer that operates in Rhode Island.
2. The Narragansett Electric Company d/b/a Rhode Island Energy is a gas and electric distribution company in Rhode Island. Rhode Island Energy’s parent company, PPL Rhode Island Holdings, LLC, acquired 100 percent of the outstanding shares of common stock of The Narragansett Electric Company from National Grid USA on May 25, 2022.
3. The policy objectives of the Renewable Energy Growth Program are intended to be effectuated through implementation of the statutes establishing and governing the Program and the rules and tariffs promulgated in accordance with such statutes.
4. Ecogy’s RI Projects are described accurately in paragraph 12 of the Petition.<sup>20</sup>
5. In 2021 the Company offered potential COEs to Ecogy projects with the condition that the projects relinquish existing COEs.
6. The Company notified Ecogy that it was not eligible to participate in the 2022 First Open Enrollment because the Ecogy RI Projects had been awarded COEs in a prior enrollment round.<sup>21</sup>

In addition to the Agreed Statement of Facts, there also was a limited set of discovery responses submitted by Ecogy that were admitted into the record.

## VI. Ecogy’s Memorandum

On September 13, 2022, Ecogy filed its Pre-Hearing Legal Memorandum framing the issue as RI Energy requesting “the Commission to somehow create for [RI Energy] a previously non-existent ‘discretion’ to ‘grant or deny [Certificates of Eligibility] for projects that already have outstanding obligations under existing [Certificates of Eligibility] when reviewing its bids during open enrollment for the REGrowth Program in light of the facts and circumstances attendant to

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<sup>20</sup> Pet. at 12; “The five medium-scale solar projects are Ecogy Energy RI I LLC (250 kW in Tiverton, R.I.), Ecogy Energy RI V LLC (184 kW in Pawtucket, R. I.), Ecogy Energy RI XIV LLC (250 kW in Cranston, R.I.), Ecogy Energy RI XX LLC (250 kW in Richmond, R. I.) and Ecogy Energy RI XXIII LLC (250 kW in Pawtucket, R.I.). The sixth project, Ecogy Energy RI VII LLC, is a 1,000 kW small wind project in Tiverton, R.I.”

<sup>21</sup> Agreed Upon Statement of Facts at 1 (Sept. 13, 2022); <https://ripuc.ri.gov/sites/g/files/xkgbur841/files/2022-09/2214-RIE-%20AgreedStatement%209-13-22.pdf>.

those bids.”” Ecogy argued that such discretion would be akin to an impermissible delegation of Commission authority to the utility.<sup>22</sup>

Noting that a Commission-approved tariff sets forth the rights and obligations between a regulated public utility and its customers, Ecogy also referenced the Commission’s jurisdiction to interpret tariffs. Interpretation of tariffs, according to Ecogy, should follow the standard of statutory construction whereby the Commission should apply the plain and ordinary meaning of words. Further, when an ambiguity exists, the resulting interpretation should be consistent with the meaning most consistent with legislative intent. An agency should not, however, seek an ambiguity where none exists. Finally, when the Commission interprets a tariff, the interpretation must be reasonable and should be interpreted in accordance with equity regardless of the specific language used.<sup>23</sup>

Ecogy explained that in early 2022, it had submitted applications for Certificates of Eligibility for the Six Projects that are the subject of this case at prices higher than those in the previously issued Certificates of Eligibility, but lower than the 2022 ceiling prices.<sup>24</sup> Ecogy intended to relinquish rights under the previously awarded Certificates of Eligibility if they received the new ones. Ecogy stated that this was the same procedure used in Program Year 2021.<sup>25</sup>

According to Ecogy, it met all the prerequisites listed in the Tariff for eligibility. However, RI Energy advised that the reason Ecogy could not be awarded 2022 Certificates of Eligibility was because it held Certificates of Eligibility from the 2020 or 2021 program years. RI Energy had advised that Ecogy must terminate the projects before they could become eligible for new

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<sup>22</sup> Ecogy Mem. at 1.

<sup>23</sup> Ecogy Mem. at 8-10 (citations omitted).

<sup>24</sup> *Id.* at 7.

<sup>25</sup> *Id.*

Certificates of Eligibility. Ecogy stated that this was a departure from past practice and not contemplated as a disqualifying factor in the Tariff.<sup>26</sup> Ecogy argued that RI Energy was adding a new requirement to the Tariff that the drafters omitted, namely that a project's Certificate of Eligibility must be terminated prior to applying in a new enrollment.<sup>27</sup> Because the termination provision allows RI Energy discretion over granting of termination, Ecogy argued that taken together, was an illegal delegation of Commission rulemaking authority to the Company.<sup>28</sup>

## **VII. RI Energy's Memorandum**

RI Energy filed its Memorandum on September 13, 2022, arguing that the relief sought by Ecogy was inconsistent with the purposes of the REGrowth Program. RI Energy asserted that its denial of 2022 Certificates of Eligibility to projects that have already been issued Certificates of Eligibility is consistent with the terms of the Tariff and associated Solicitation and Enrollment Rules. RI Energy also explained its review of the termination section of the Tariff.

RI Energy asserted that because the Six Projects at issue in this case have existing Certificates of Eligibility, they have current obligations under the REGrowth Tariff. Thus, RI Energy concluded that because Ecogy has such outstanding obligations to the utility, it is not eligible under the Solicitation and Enrollment Rules to bid these projects into other REGrowth open enrollments until it sought and received the Company's consent to terminate its existing Certificates of Eligibility and associated obligations.<sup>29</sup>

Noting that Ecogy never sought termination of the Six Projects' Certificates of Eligibility, RI Energy suggested that Ecogy could not show that the projects were financially unviable.<sup>30</sup>

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<sup>26</sup> *Id.* at 8, 10-12.

<sup>27</sup> *Id.* at 10, 12.

<sup>28</sup> *Id.* at 12.

<sup>29</sup> RI Energy Mem. at 10-11 (Sept. 13, 2022); <https://ripuc.ri.gov/sites/g/files/xkgbur841/files/2022-09/2214-RIE-Memorandum%209-13-22.pdf>.

<sup>30</sup> *Id.* at 5-6, 9.



Accordingly, the Company maintained that all Ecogy was trying to do was obtain higher payments from ratepayers than necessary to encourage the development of renewable energy under the REGrowth Program.<sup>31</sup> RI Energy submitted that this was not the intent of the program and that a Commission ruling approving Ecogy's request would increase the cost of the REGrowth Program unnecessarily.<sup>32</sup> Further, RI Energy maintained that Commission approval, if taken advantage of by other developers with existing Certificates of Eligibility could slow the progress toward meeting the goals set forth in the REGrowth statute; projects would not advance while they were seeking higher tariff payments.<sup>33</sup>

### **VIII. Division's Memorandum**

On September 23, 2022, the Division, serving in its capacity as a party before the Commission, filed its Memorandum.<sup>34</sup> The Division first summarized the positions and primary arguments of the other parties.<sup>35</sup> The Division next identified the sections of the Tariff and Solicitation and Enrollment Rules that it identified as relevant.<sup>36</sup> Based on its review of the parties' papers, the Tariff, and Solicitation and Enrollment Rules, the Division recommended the Commission deny and dismiss Ecogy's petition.<sup>37</sup>

The Division reviewed the Solicitation and Enrollment Rules and concluded that they neither prohibited nor allowed a developer with existing Certificates of Eligibility to bid into future open enrollments.<sup>38</sup> As a practical matter, according to the Division, a project cannot hold two

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<sup>31</sup> *Id.* at 8-9.

<sup>32</sup> *Id.* at 13.

<sup>33</sup> *Id.* at 11-13.

<sup>34</sup> The Rhode Island Supreme Court has explained that “[i]t is the function of the division to serve the commission in bringing to it all relevant evidence, facts, and arguments that will lead the commission in its quasi-judicial capacity to reach a just result.” *Providence Gas Co. v. Burke*, 419 A.2d 263 (R.I. 1980).

<sup>35</sup> Division Mem. at 1-4 (Sept. 23, 2022); <https://ripuc.ri.gov/sites/g/files/xkgbur841/files/2022-10/2214-DPUC-Memo%209-23-22.pdf>.

<sup>36</sup> *Id.* at 4-5.

<sup>37</sup> *Id.* at 9.

<sup>38</sup> *Id.* at 5-6, referencing Solicitation and Enrollment Rule 1.2.2.3. Rule 1.2.2.3 states,

Certificates of Eligibility and would have to terminate one before being eligible for another. The Division thus concluded that the dispute was a timing issue over when termination would need to occur.<sup>39</sup> After a review of the Tariff, the Division argued that the Tariff is clear that “an Applicant’s obligations under an existing Certificate of Eligibility may not be terminated unless and until [RI Energy] consents.”<sup>40</sup> One of the obligations is to provide updated costs of the project. The Division asserted that Ecogy had not met this obligation to support termination of the project.<sup>41</sup>

With respect to Ecogy’s allegation that RI Energy changed its practice without notice, the Division suggested that the prior allowance of re-bidding in 2021 was not precedential. The Division noted that based on its review of the documents presented in this case, RI Energy had reviewed the prior project in the context of the Covid-19 pandemic effects and resulting supply chain issues. The Division noted that whether RI Energy’s decision in 2021 was permissible under the Tariff has not been challenged in this case. Regardless, the Division opined that allowing a “conditional” termination would be consistent with the termination provision in Section 11 of the Tariff.<sup>42</sup>

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To be eligible for an enrollment, a Project must: (1) be an eligible renewable energy resource under the RE Growth Program, as determined by the Board and approved by the Commission; (2) have a nameplate capacity equal to or less than five megawatts (5 MW); (3) interconnect with the distribution system of The Narragansett Electric Company; and (4) be located in The Narragansett Electric Company ISO-NE load zone. ...

To apply, a distributed generation project must not be: (1) already operating; (2) under construction, except for preparatory site work that is less than twenty-five percent (25%) of the estimated total project cost; or (3) fully financed for construction, except to the extent that financing agreements are conditioned upon the selection of the project in this program. A preexisting hydroelectric generating facility that is already operating may be eligible for the RE Growth Program if it can demonstrate with reasonable evidence its need for a material investment to restore or maintain reliable and efficient operation and meet all regulatory, environmental or operational requirements, in addition to meeting the other criteria of the RE Growth Program. (RIPUC Docket No. 5202, Schedule NG-2).

<sup>39</sup> Division Mem. at 6.

<sup>40</sup> *Id.* at 6.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.* at 7.

Finally, the Division contended that a petition for dispute resolution is not an available avenue for a developer to seek higher ceiling prices for projects with an existing Certificate of Eligibility.<sup>43</sup> The Division maintained that whether or not the projects can be built economically is not an issue properly before the Commission in this case. Rather, Ecogy has the ability to seek termination from RI Energy if it cannot fulfill the obligations because of an event or circumstance beyond its reasonable control and for which Ecogy could not prevent or provide against by using commercially reasonable efforts. If Ecogy can make such a showing, RI Energy may not unreasonably withhold consent.<sup>44</sup>

The Division submitted that this Tariff provisions, providing an evaluation process, implements a beneficial protective public policy by advancing the goals of the statute which were to facilitate and promote new installations of renewable energy through a competitive bid process. The purpose, according to the Division, is not to afford developers the right to continuously rebid existing projects for any reason. Allowing unfettered rebids would “invite chaos in a rising-cost environment” and significantly increase costs to ratepayers. As such, according to the Division, RI Energy must have the rights afforded to it under the Tariff to evaluate requests for termination to ensure they meet the stated conditions. The first step, however, is for an Applicant, such as Ecogy, to request termination.<sup>45</sup>

## **IX. Hearing**

On September 29, 2022, the Commission conducted a hearing for oral argument. At the start of the hearing, the Commission granted RI Energy’s amended motion for confidential treatment of prior bid prices for the six projects in order to protect the competitive solicitation

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<sup>43</sup> *Id.* at 8.

<sup>44</sup> *Id.*

<sup>45</sup> *Id.* at 9. The Division noted that through its papers and discovery responses, Ecogy had made broad statements of economics but had not provided project-specific evidence supporting its claims. *Id.* at 6.

process and Ecogy. RI Energy had previously requested additional information about Ecogy's projects to be kept confidential, but Ecogy had included the information about its projects in unredacted form, thus obviating the need for confidentiality. As explained by RI Energy's counsel, because there was an upcoming open enrollment, release of the bid prices could affect the pricing in the upcoming auction. In addition, it would, in the event Ecogy was successful, harm the six projects' competitive standing. And, even if Ecogy were to be unsuccessful, in the event the Certificates of Eligibility were terminated, other project developers would have insight into Ecogy's bids, again, allowing them a potential competitive advantage.<sup>46</sup> Ecogy and the Division supported the amended motion.

Ecogy reiterated its arguments that the Tariff includes qualifications projects must meet in order to be considered in the open enrollments, but that the list does not include the requirement that the project cannot hold a current Certificate of Eligibility. Thus, according to Ecogy, because it is not stated, it is not a prohibition. Therefore, according to Ecogy, the Company was unilaterally revising the Tariff imposing an unwritten and unknown set of rules.<sup>47</sup> Ecogy suggested that it could walk away from the project at any time without the consent of the Company.<sup>48</sup>

Ecogy asserted that because there was not an effective date on the Certificate of Eligibility until the project achieved commercial operation, Ecogy had no obligations under the Certificate of Eligibility.<sup>49</sup> Ecogy agreed that RI Energy has the obligation to commit to purchasing the entire output of the facility, thus preserving Ecogy's capacity in the program at the price it offered and cannot take the capacity awarded to Ecogy to then re-award it.<sup>50</sup> Ecogy, however, asserted that

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<sup>46</sup> R.I. Gen. Laws § 38-2-2(B) exempts trade secrets and commercial or financial information obtained from a person, firm, or corporation that is of a privileged or confidential nature from disclosure under the Access to Public Records Act.

<sup>47</sup> Hr'g. Tr. at 11, 15, 61, 65.

<sup>48</sup> *Id.* at 56.

<sup>49</sup> *Id.* at 17-19.

<sup>50</sup> *Id.* at 18-19.

there is no corresponding obligation on the project until the project achieves operation. According to Ecogy, “there is no obligation to do anything just because you get a [Certificate of Eligibility].” Rather, the Certificate of Eligibility gives a project the right to a future stream of payments in the event that the project is completed and operational.<sup>51</sup> Ecogy denied there was any bilateral obligation upon the issuance of a Certificate of Eligibility, thus positing that the law and Tariff only contemplate a one-sided obligation on the part of RI Energy with no commensurate obligations on the part of the winning bidder until the project begins operation.<sup>52</sup> However, Ecogy did agree that it could not, during the two-year period between the issuance of the Certificate of Eligibility and operation, sell the same power to someone else.<sup>53</sup>

Next, not conceding that the termination provision applied, Ecogy asserted that it would be burdensome for a developer to provide the Company with project-specific information supporting an Applicant’s request to terminate a Certificate of Eligibility and opined that no project would be allowed to terminate. This, according to Ecogy would lead to many disputes that would strain the resources of the Commission.<sup>54</sup> Additionally, Ecogy again claimed that the tariff does not explain under what circumstances the Company would grant termination of a Certificate of Authority and therefore, giving the Company discretion over terminations is an over-delegation of the Commission’s authority.<sup>55</sup>

RI Energy first explained the design of the open enrollment auctions. It is a buyer’s auction with a ceiling price above which a bid cannot qualify. The Company seeks the lowest cost bids first. RI Energy suggested that to change the bid price after the auction would corrupt the process

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<sup>51</sup> *Id.* at 57.

<sup>52</sup> *Id.* at 52-53.

<sup>53</sup> *Id.* at 54.

<sup>54</sup> *Id.* at 22-23, 56, 75.

<sup>55</sup> *Id.* at 20-21.

and harm the integrity of the auction process. This, according to RI Energy is what Ecogy has requested.<sup>56</sup> Ecogy is seeking to either get a higher price for the projects it already enrolled in the program or keep its existing price in place, depending on the results.<sup>57</sup> Because Ecogy bid lower than other bidders in 2021, keeping those projects out of the program, it would corrupt the competitive bid process to allow Ecogy to now seek higher prices for the very same projects without first terminating those Certificates of Eligibility.<sup>58</sup>

RI Energy provided an explanation that the 2021 decision to allow Ecogy to rebid was based on specific facts and should be distinguished from the situation here.<sup>59</sup> As to Ecogy's broad statements of financial viability without project specific information, RI Energy suggested that it was really complaining about the ceiling prices that were set. That is not something before the Commission in this case.<sup>60</sup>

RI Energy asserted that the standard for terminations in the Tariff are specific. The Company cannot unreasonably withhold consent to a termination "if the applicant cannot fulfill the obligations because of an event or circumstance that is beyond the applicant's reasonable control and for which the applicant could not prevent or provide against by using commercially reasonable efforts."<sup>61</sup> Responding to Ecogy's concerns that it would be burdensome to provide information to the Company, RI Energy claimed that that is exactly what the Tariff requires the Company to seek. "We're not going to excuse bidders from their commitment to put this power online without understanding whether or not it is, in fact, infeasible to proceed and construct this."<sup>62</sup> In response to Ecogy's concern that nobody would be able to terminate a Certificate of

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<sup>56</sup> *Id.* at 27, 29-31.

<sup>57</sup> *Id.* at 33.

<sup>58</sup> *Id.* at 30-32.

<sup>59</sup> *Id.* at 34.

<sup>60</sup> *Id.* at 35.

<sup>61</sup> *Id.* at 28-29 (quoting Section 11 of the Tariff).

<sup>62</sup> *Id.* at 29.

Eligibility, RI Energy reiterated that it cannot unreasonably withhold termination if the standard in the Tariff is met – something RI Energy needs to determine under the Tariff.<sup>63</sup>

The Division commented that it was surprising that Ecogy was ignoring the clear language of the Section 11 termination provisions of the Tariff as a precursor step to bidding. The projects were already enrolled in the REGrowth Program and, therefore, a specific statement that such projects were ineligible to bid was unnecessary because it was “common sense.”<sup>64</sup> There could be no reason, according to the Division, to need language that says if you already have a project in the REGrowth Program, you cannot rebid the same thing.<sup>65</sup>

The Division expressed concern that allowing Ecogy the relief it sought would, in fact, harm the competitive bid process and other bidders. The Division opined that if Ecogy knows it cannot get a price any lower than that which it already has, it could manipulate the bid process and push out other viable projects entitled to new capacity in the program. There would be a detrimental impact on the program if the bids were rolling from year-to-year rather than fixed in each year.<sup>66</sup> The Division opined that the one year’s ceiling prices are irrelevant to another’s due to the annual nature of the setting of ceiling prices.<sup>67</sup>

## **X. Petition Treated as Seeking Declaratory Judgment**

The Commission notes that the Renewable Energy Growth statute gives exclusive jurisdiction to the Commission in interpreting the applicable tariffs and rules of the program, stating in pertinent part:

The commission shall have the authority to determine the final terms and conditions in the tariff and rules. Once approved, the commission shall retain exclusive jurisdiction over the performance-based incentive payments, terms, conditions, rights, enforcement, and

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<sup>63</sup> *Id.* at 76.

<sup>64</sup> *Id.* at 39-40.

<sup>65</sup> *Id.* at 40.

<sup>66</sup> *Id.* at 41-42.

<sup>67</sup> *Id.* at 42.

implementation of the tariffs and rules, subject to appeals pursuant to chapter 5 of this title.<sup>68</sup>

While there were many factual assertions made in the legal memoranda filed by counsel for the parties, as well as factual representations made by counsel during oral argument, the Commission has relied solely on the facts contained in the Agreed Statement of Facts, as well as information included in Ecogy's discovery responses which were entered as full exhibits in the record. As noted by Counsel for Ecogy during oral argument, the facts or information provided by legal counsel at oral argument about past history that was not otherwise in the record is not what drives the decision in this case,<sup>69</sup> and Counsel for Ecogy further stated that he would object to the Commission relying upon factual assertions made by the lawyers in this case that were not supported by testimony.<sup>70</sup> Consistent with those statements, Counsel for Ecogy also asserted that the Petition was more in the nature of a declaratory judgment action.<sup>71</sup>

No evidentiary hearings were held or requested by any party. Rather, the hearings consisted solely of oral argument by counsel for all parties. Accordingly, as a procedural matter, the Commission has addressed this Petition as one for a declaratory judgment that requests this Commission to interpret the applicable law and tariff language consistent with its jurisdiction.

## **XI. Commission Decision**

On October 11, 2022, after conducting the hearing, and reviewing the law, tariffs, and filings, the Commission denied Ecogy's petition finding that its Six Projects at issue in this case were ineligible to bid into the REGrowth Program Year open enrollments. Specifically, after reviewing R.I. Gen. Laws § 36-26.6-20 and the relevant Tariff provisions, the plain language

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<sup>68</sup> R.I. Gen. Laws §39-26.6-5(e).

<sup>69</sup> See Hr'g. Tr. at 60, 68.

<sup>70</sup> *Id.* at 60.

<sup>71</sup> *Id.* at 59-60.



supports a finding that because Ecology held valid Certificates of Eligibility from prior enrollments which had not been terminated, it had already committed all of its products and had nothing left to bid into the 2022 REGrowth Program. Thus, the fact that the language in the Tariff did not expressly list the existence of an accepted Certificate of Eligibility as a disqualifying factor that would prevent a project from bidding for another Certificate of Eligibility for the same project was irrelevant.

To find otherwise would corrupt the purpose of the REGrowth Program design as anticipated by the General Assembly when it enacted the program. It would be patently unfair to other bidders for a developer to bid projects into an open enrollment, possibly foreclose other bidders from entering, and then rebid a potentially viable project into a future enrollment to receive a higher price than it had previously committed. The General Assembly intended for projects to be selected by the lowest cost bid first.<sup>72</sup> This would undermine the competitive nature of a program designed to result in the construction of renewable energy in Rhode Island at competitive pricing and would likely serve only to increase the price of renewable energy while delaying the development of those projects.<sup>73</sup>

To be clear, this is a case of fairness to all renewable energy developers to ensure a logical, level playing field to all developers to avoid gaming of a competitive solicitation. Even though Ecology's Petition alleged that the utility "changed the rules," based on a past transaction when the utility offered potential COEs to Ecology projects with the condition the projects relinquish existing

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<sup>72</sup> See R.I. Gen. Laws § 39-26.6-15 (d) If after the first program year, the applications for the medium-scale solar projects are significantly over-subscribed, then the board and the electric distribution company, in consultation with the office, may propose to the commission a bidding process for medium-scale projects or a subset of the medium-scale projects under which *project selections would be made based on the lowest bids, rather than first-come, first-served* or such other method previously approved by the commission. (emphasis added).

<sup>73</sup> See R.I. Gen. Laws § 39-26.6-2 which states, in part, "The program shall be designed to finance the development, construction, and operation of renewable energy distributed-generation projects over five (5) years through a performance-based incentive system that is designed to achieve specified megawatt targets at reasonable cost through competitive processes."

COEs, the pertinent facts associated with how and why the past transaction occurred as it did were never put into evidence. Moreover, the facts were in dispute, as indicated by the disagreement between Counsel for both Ecogy and the utility in memoranda and oral argument. Thus, whether National Grid’s prior decision on a different project was consistent with the tariff and law is not currently before the Commission. The short agreed-upon statement that “[i]n 2021 the Company offered potential COEs to Ecogy projects with the condition that the projects relinquish existing COEs” was not enough.<sup>74</sup> Any decision on whether that history is relevant to RI Energy’s subsequent decision to deny a COE in this case is very fact-specific and facts that would support such an argument were not before the Commission. There is no evidence, therefore, that RI Energy violated the tariff in 2022 because National Grid had reviewed a prior project and exercised its discretion to make a different decision in 2021.

Should Ecogy seek termination of its projects and be denied, it has another avenue of seeking redress under the Tariff to challenge whether the request was being unreasonably withheld by the utility. However, where Ecogy has not sought and been denied termination of its projects, the Commission has insufficient information to address any potential claims of discrimination under Title 39. It is simply not a matter that is properly before the Commission.

Given the narrow set of facts before the Commission in this case, the Commission is faced solely with the question whether – under the REGrowth Program Solicitation and Enrollment Rules – projects who have already been awarded and accepted Certificates of Eligibility (which remain in effect and have not been terminated) are legally entitled to bid for and receive a new Certificate of Eligibility in a subsequent enrollment without the consent of the utility. For the reasons stated herein, the answer is “no.”

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<sup>74</sup> Agreed Statement of Facts, ¶ 5.

**A. Ecogy’s Six Projects were ineligible to bid into the 2022 Open Enrollment because they had no products available to bid into the enrollment**

A project with an existing Certificate of Eligibility is not eligible to bid into a future open enrollment because there are no products the project has available to offer in the bid; the entirety of the projects had already been committed. Projects subject to the competitive bid process are required to bid a price per kWh for the entire output of the facility at a price that cannot exceed the Commission-approved ceiling price for that class of customers.<sup>75</sup> Once accepted, the project is either awarded a distribution company-awarded Certificate Eligibility or a Commission-awarded Certificate of Eligibility.<sup>76</sup> It is then that the rights and obligations of the winning bidder and RI Energy commence. As Rhode Island General Laws § 39-26.6-20(c) states:

Upon receipt of a PUC-awarded certificate or a distribution-company certificate, a distributed-generation project shall be entitled to receive, and the electric distribution company shall pay and/or credit (as applicable), the performance-based incentives for the specified term, and under the terms and conditions of the applicable tariff ...

Further, subparagraph (i) of the same section explicitly states that “[a]ll distributed-generation projects accepting certificates shall be obligated to abide by all the terms and conditions of the approved, applicable tariff.”<sup>77</sup>

This means that at the moment a project is awarded a Certificate of Eligibility, the Applicant/developer is immediately entitled to rely on that certificate as evidence of a guaranteed stream of revenue for the entire expected output of the facility from the date of operation through the end of the tariff term. In turn, the Applicant/developer has committed the output of the project at the winning bid price to the utility and its ratepayers funding the projects through electric rates. Once these bilateral commitments are effectuated under the statutory scheme and accompanying

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<sup>75</sup> R.I. Gen. Laws § 39-26.6-15(a)

<sup>76</sup> R.I. Gen. Laws § 39-26.6-20(a)-(c).

<sup>77</sup> R.I. Gen. Laws § 39-26.6-20(i).

tariff provisions, the targeted annual capacity procurement amount available to competitors in future bidding rounds is reduced because it is already committed to the winning bidder. RI Energy and ratepayers have an immediate expectation that they will receive output at the agreed price within 24 months unless the project is terminated or expires by the expiration of time. During oral argument, Ecology conceded that it could not commit the output of the project to another buyer during the 24-month period between the issuance of the Certificate of Eligibility and the output (or operation) deadline.<sup>78</sup> If Ecology cannot commit the output to another buyer during the 24-month period, then it cannot reasonably expect to provide the same output to the same buyer at a higher price while still holding a Certificate of Eligibility for that same output at a lower price.<sup>79</sup>

The Tariff and Enrollment Rules also make it clear that there are obligations that attach to the Applicant immediately upon issuance of a Certificate of Eligibility. Tariff Section 8.a sets forth the eligibility requirements such that an Applicant will be entitled to a Performance-Based Incentive Payment as follows: “Eligibility Upon receipt of a Certificate of Eligibility, the Applicant is entitled to the Performance-Based Incentive Payment for the term specified in the applicable Tariff supplement, provided that the Applicant has complied with all other requirements of this Tariff and the Solicitation and Enrollment Process Rules.”<sup>80</sup> Likewise, Section 2.3 of the Enrollment Rules setting forth the Requirements to Initiate Payment for Output make clear that “if awarded a Certificate of Eligibility, a Project is required to meet specific requirements to maintain its status in the RE Growth Program prior to and during construction, and to initiate the start of the payments for its output.”<sup>81</sup> This means that at the moment a Certificate of Eligibility is provided

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<sup>78</sup> Hr’g. Tr. at 52.

<sup>79</sup> The statutory requirement that mandates the tariff commitments substitute for a power purchase agreement, avoiding the need for a contract to be executed, but nevertheless mirroring the legal effects of such an agreement. See R.I. Gen. Laws § 39-26.6-11.

<sup>80</sup> Tariff at Sheet 9 of 18.

<sup>81</sup> Solicitation and Enrollment Rules at Section 2.3.

to the Applicant, the applicant must comply with the requirements of the Tariff and Solicitation and Enrollment rules in order to remain in the REGrowth Program. This is an immediate obligation of the Applicant, and it is effective both prior to and following construction.

In the bid processes for program years 2020 and 2021, Ecogy bid prices for each of the Six Projects at issue in this case at a price below the ceiling prices in effect at the time of the bids. The price offer was for the entire output of the facility. The price offers were accepted by National Grid, the predecessor to RI Energy. Certificates of Eligibility were then issued memorializing that offer and acceptance and agreed-upon price for the entire output of the energy and renewable energy certificates (RECs) of the project.<sup>82</sup> At that moment, Ecogy had a right to a share of the capacity allocation for the given enrollment and an expectation of future revenue upon which it could rely to seek financing for the projects. Similarly, at that moment, the utility and its ratepayers had an expectation that Ecogy would advance the projects to deliver the output of the facility to allow RI Energy to meet a portion of its renewable energy obligations under the law within twenty-four months at the price offered.<sup>83</sup> Simply put, because Ecogy had already committed to sell the entire output of its projects, there was nothing more to offer. Ecogy would have had to seek termination of its existing Certificates of Eligibility first. It did not do so, and in fact, during discovery, indicated that it may not terminate the projects, even if unsuccessful in this matter.<sup>84</sup>

Because Ecogy has nothing from these projects left to offer, it is irrelevant that the Tariff is silent on this issue. In other words, the Tariff does not need to specifically state that a holder of

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<sup>82</sup> While the law does not require power purchase agreements to be entered into, the design of the competitive bid process, the successor to the DG Standard Contracts (R.I. Gen. Laws § 39-26.2) is consistent with the elements of contract.

<sup>83</sup> Because of this existing commitment, what the Company and its ratepayers did not expect was that Ecogy would come back to seek additional money for the same projects already enrolled in the program.

<sup>84</sup> As RI Energy's attorney analogized, this is like a draw poker game where Ecogy is asking to see RI Energy's cards before deciding whether to take additional cards and discard others. Hr'g. Tr. at

an existing Certificate of Eligibility, issued in a prior auction, that has not been terminated, is ineligible to bid the same project again. As the Division's attorney suggested, it is common sense.

While Ecogy suggests that because there is no effective date on the Certificate of Eligibility until the project achieves commercial operation, Ecogy confuses the timing of its commitment under the Certificate of Eligibility with the timing of payments made under the Tariff. As Ecogy correctly noted, the effective date unlocks the stream of payments to an operational project. An enrolled project is entitled to projected future payments for a period of 15 or 20 years from the date it is operational. Thus, the now blank effective date in the Certificate of Eligibility applies not to whether the project has entered the program and committed the output of the entirety of the project at a price certain, but rather, the start of the time period when the money flows to the Applicant. The commencement of the stream of payments cannot be known until the project achieves commercial operation and meets all of the requirements of the Tariff to receive those payments. Thus, Ecogy's assertion that the blank effective date on the Certificate of Eligibility is controlling on this decision is unpersuasive.

**B. Section 11 of the REGrowth Tariff is not an illegal delegation of Commission authority to the Company**

Contrary to Ecogy's claim that the Termination provision in the Tariff is an illegal delegation of Commission rulemaking authority to the Company, such claim is without merit. RI Energy is the administrator of the REGrowth Program subject to Commission oversight; the Commission is not the administrator.<sup>85</sup> Thus, the question is whether there is a standard governing the Company's consent to termination in the Tariff. Contrary to Ecogy's contention that there is

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<sup>85</sup> See R.I. Gen. Laws § 39-26.6-2, stating that “[t]he renewable energy growth program shall be implemented by the electric distribution company, and guided by the distributed-generation board, in consultation with the office of energy resource, subject to review and supervision of the commission.”

no standard in the Tariff governing termination, leaving it arbitrary, the Tariff contains a clear standard for Company consent. Section 11 states:

The Applicant and the Customer may not terminate their obligations under this Tariff unless and until the Company consents to such termination. The Company will not unreasonably delay or withhold its consent to an Applicant's request to terminate if the Applicant cannot fulfill the obligations because of an event or circumstance that is beyond the Applicant's reasonable control and for which the Applicant could not prevent or provide against by using commercially reasonable efforts.<sup>86</sup>

Based on this standard, it is clear that it would be unreasonable to delay or withhold consent to termination if the Applicant can show an event or circumstance that is beyond their reasonable control which could not be prevented through commercially reasonable efforts. As explained by RI Energy's Attorney, it is incumbent on the Company to conduct due diligence to ensure the standard has been met. To shirk this responsibility could open the Company up to questions of prudence in its administration of the program, affecting cost recovery. Thus, Ecogy's argument that it should not have to provide specific information to support its request is without merit. In the event any Applicant were to seek termination based on its belief that the standard was met, but was denied the request, the remedy is to file a dispute resolution petition with the Commission for its review to determine whether the denial of the termination was unreasonably withheld.<sup>87</sup> However, Ecogy never made this claim.

### **C. Whether RI Energy correctly allowed Ecogy to rebid a project in 2021 is not properly before the Commission**

Ecogy complained that RI Energy had departed from a prior practice. Ecogy provided one example of a project it was allowed to rebid prior to terminating its then-current Certificate of Eligibility. Ecogy argued that this one decision by the Company should govern all of Ecogy's bid

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<sup>86</sup> Tariff at Sheet 18 of 18 (emphasis added).

<sup>87</sup> While the Commission appreciates Ecogy's concern for the Commission's limited resources, it understands the General Assembly expects the Commission to fulfill its responsibilities in overseeing the program administration.

practices going forward. Ecogy points to National Grid's 2021 decision as support for its claim that the Tariff does not prohibit a project holding a current Certificate of Eligibility from rebidding in a future auction. National Grid's project-specific determination in 2021 is irrelevant to the Commission's consideration of the plain meaning of the statute and Tariff as explained above.

Furthermore, National Grid's single project-specific decision in 2021 may or may not have been in compliance with the Tariff. After reviewing the discovery responses submitted by Ecogy and the arguments presented, a decision on whether (1) RI Energy properly applied the Tariff in 2021 and (2) whether Ecogy had reason to rely on this decision for all of its bid practices going forward is fact-specific and outside of the scope of the decision in this proceeding.

The Company's denial of Ecogy's attempt to rebid the projects, by itself, does not support the allegation that the Company changed the terms of the Tariff in violation of R.I. Gen. Laws § 39-26.6-6. Ecogy also alleged that there has been an inconsistent application of the Tariff as to Ecogy. However, no evidence beyond the fact that termination of a Certificate of Eligibility was allowed in a past transaction was presented to support any unlawful treatment or unreasonable discrimination by the utility. While Ecogy might have some claim of discrimination under Title 39 of the RI General Laws, such a claim was never properly alleged or put before the Commission with substantial evidence in the record.

**D. Whether the 2020 and 2021 ceiling prices are now too low is irrelevant and not properly before the Commission in this matter**

Ecogy spent considerable time providing general information about current market conditions and the level of ceiling prices set under 2020 and 2021 market conditions. This is all irrelevant to the Commission's decision in this matter. Ceiling prices were set in 2020 and 2021 after extensive stakeholder processes and Commission hearings. Ecogy then assessed its projects and bid into the program. Its offers were accepted at their prices. Ecogy was issued Certificates



of Eligibility on the price terms they deemed adequate. Thus, the change in circumstances from those years to now is irrelevant to the interpretation of the Tariff. The 2022 ceiling prices will be filed in November 2022 after another stakeholder process in which Ecogy could participate. That is the appropriate forum in which to comment on ceiling prices.

## **XII. Conclusion**

The Commission, like the Division, is not unsympathetic to the risk and pressures on renewable energy developers arising from recent market conditions. With that said, however, we must ensure all participants in ratepayer funded renewable energy compensation programs are acting consistently with the law to carry out the legislative intent. The Renewable Energy Growth Program is designed as a stakeholder process to set ceiling prices designed to support the development of renewable energy. Applicants bid into that program and are chosen from lowest cost up to the ceiling price. The intent of the General Assembly in this program was to encourage the development of the most cost-effective projects first within each renewable energy class. The ceiling prices are set annually to attempt to match the then-current market conditions under which the Applicants are developing projects. Ecogy bid under those market conditions. If the current market conditions have made the projects financially unviable, Ecogy has the ability to seek termination, show its hand, and if allowed to terminate, bid the projects into the program. What Ecogy cannot expect under the current law and regulatory framework is to simply return to the Company and its ratepayers and ask for more money for the very same energy and renewable energy certificates.

Accordingly, it is hereby,

(24538 ) ORDERED:

Ecogy Energy Inc.'s requested ruling is hereby denied as inconsistent with the law and Renewable Energy Growth Program Tariff and Enrollment Rules.

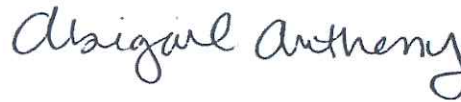
EFFECTIVE AT WARWICK, RHODE ISLAND ON OCTOBER 11, 2022, PURSUANT TO AN OPEN MEETING DECISION ON OCTOBER 11, 2022. WRITTEN ORDER ISSUED NOVEMBER 14, 2022.

PUBLIC UTILITIES COMMISSION



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Ronald T. Gerwatowski, Chairman



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Abigail Anthony, Commissioner



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John C. Revens, Jr., Commissioner



**NOTICE OF RIGHT OF APPEAL:** Pursuant to R.I. Gen. Laws § 39-5-1, any person aggrieved by a decision or order of the PUC may, within seven (7) days from the date of the order, petition the Supreme Court for a Writ of Certiorari to review the legality and reasonableness of the decision or order.