STATE OF RHODE ISLAND PUBLIC UTILITIES COMMISSION

IN RE: THE NARRAGANSETT ELECTRIC COMPANY D/B/A RHODE ISLAND ENERGY TARIFF ADVICE TO AMEND THE NET METERING PROVISION – PROPOSAL FOR ADMINISTRATION OF EXCESS NET METERING CREDITS	Docket No. 23-05-EL

REVITY ENERGY LLC'S REPLY MEMORANDUM TO THE DIVISION OF PUBLIC UTILITIES & CARRIERS' SEPTEMBER 26, 2023 MEMORANDUM AND SEPTEMBER 22, 2023 RESPONSE OF THE NARRAGANSETT ELECTRIC COMPANY D/B/A RHODE ISLAND ENERGY TO THE MEMORANDA OF LAW ADDRESSING TARIFF ADVICE FILING

NOW COMES, Revity Energy, LLC ("Revity"), by and through undersigned counsel, and hereby files its Reply Memorandum to the Division of Public Utilities & Carriers' September 26, 2023 Memorandum ("DPUC Memorandum") and September 22, 2023 Response of the Narragansett Electric Company d/b/a Rhode Island Energy to the Memoranda of Law Addressing Tariff Advice Filing ("RIE Memoranda").

As an initial matter, the DPUC Memorandum states that "[t]o the extent that there have been problems in how the net metering credits have been accumulated in the past, correcting them going forward with clarifying tariff changes is absolutely within the Commission's authority and is in the best interest of ratepayers, as well as the net metering customers." DPUC Memorandum at pp. 4-5. Make no mistake, the Company's proposal is *not* in the best interest of net metering customers.[1]

[1] After reviewing the DPUC's Memorandum and Pre-Filed Testimony, it is increasingly clear that the behind-the-meter residential net-metering customers have no advocate in these proceedings even though they are likely the customers who will be most affected by the Company's proposals (including, but not limited to, the manner in which the Company proposes to estimate their generation and consumption).

Revity's primary argument is that the excess renewable net-metering regime established under R.I. Gen. Laws § 39-26.4-2(8) only applies to the renewable self-generator's "own consumption at the eligible net-metering system site" and, given that there is no consumption at the remote stand-alone configuration, the excess renewable net-metering regime does not apply to stand-alone configurations. The DPUC apparently "struggles to understand Revity's arguments on this topic and its attempted distinction between consumption and usage – as it pertains to electricity." DPUC Memorandum at p. 5. Despite that struggle, the DPUC nevertheless disagrees with Revity's arguments. The DPUC Memorandum and the RIE Memoranda both rest on the argument that there is no meaningful difference between the term "usage" as employed by the General Assembly when defining the "Renewable Net-Metering Credit" and the term "consumption" as employed by the General Assembly when defining the "Excess Renewable Net-Metering Credit."

"It is a well-established canon of statutory interpretation that the use of different words or terms within a statute demonstrates that Congress intended to convey a different meaning for those words." *SEC v. McCarthy*, 322 F.3d 650, 656 (9th Cir. 2003) (*citing Russello v. United States*, 464 U.S. 16, 23 (1983)).[2] "[W]hen the legislature uses certain language in one part of the statute and different language in another, the court assumes different meanings were intended." *Sosa v. Alverez-Machain*, 542 U.S. 692, 711 n.9 (2004) (*citing* 2A N. Singer, STATUTES AND STATUTORY CONSTRUCTION § 46.06, p. 194 (6th rev. ed. 2000)); *see also Henson v. Santander Consumer USA*

[2] *Also citing Persinger v. Islamic Republic of Iran*, 729 F.2d 835, 843 (D.C. Cir. 1984); *Nat'l Insulation Transp. Comm. v. ICC*, 683 F.2d 533, 537 (D.C. Cir. 1982); *Russell v. Law Enforcement Assistance Admin.*, 637 F.2d 354, 356 (5th Cir. 1981) (the "well settled rule of statutory construction that where different language is used in the same connection in different parts of a statute it is presumed that the Legislature intended a different meaning and effect"); *Cent. States, Southeast and Southwest Areas Pension Fund v. Reimer Express World Corp.*, 230 F.3d 934, 941 (7th Cir. 2000) ("Different words in a statute . . . should be given different meanings unless the context indicates otherwise.").

Inc., 582 U.S. 79, 86 (2017) ("[W]hen we're engaged in the business of interpreting statutes we presume differences in language like this convey differences in meaning."); *see also U.S. v. Mason*, 692 F.3d 178, 182 (2d Cir. 2012) ("As a general matter, the use of different words within the same statutory context strongly suggests that different meanings were intended.").

"The Division submits that consumption and usage, when referencing the measurement of electricity, is one in the same." DPUC Memorandum at p. 6. In its September 8 Memorandum, Revity used a hamburger analogy to distinguish usage and consumption; however, the DPUC sees "no correlation to Revity's hamburger analogy." [3] DPUC Memorandum at p. 6. While Revity found the hamburger analogy quite apt, if DPUC missed the analogy, Revity will distinguish "usage" and "consumption" in the context of electricity. Electricity can only be *consumed* in one fashion: it powers the operation of lighting, heating, cooling, refrigeration, electronic or other machine device in a manner that completely exhausts any opportunity for future application of that electricity. Electricity can be *used* in many ways: it can be consumed, it can be sold, it can be transmitted, it can be grounded, and it can be stored. Like a hamburger, electricity can be used many times but consumed only once. The renewable net-metering credit regime applies to usage; the excess renewable net-metering credit regime applies to consumption at the site. Both the Company and the DPUC agree that, with stand-alone configurations, there is little to no on-site electricity consumption—but there is certainly on-site usage of that electricity (*i.e.*, it is transmitted, (at times) it is grounded and—hopefully more increasingly in the future—it can be stored).

[3] For reference, Revity's hamburger analogy was as follows: "A hamburger can be used many times and in many different ways: by selling it, reselling it, throwing it away, or consuming it. A hamburger can only be consumed once." Revity Memorandum at p. 6.

The Company, for its part, states that Revity's ignores "the broader context of the Net Metering Statute, and the language in the Company's Commission approved Tariff, which interprets the Net Metering Statute for application to Revity." RIE Memoranda at p. 5. More specifically, the Company notes that the Tariff changed the definition of "renewable net-metering credit" from a "credit that applies to an eligible net-metering system or a community remote net-metering system up to one hundred percent (100%) of either the renewable self-generator's usage at the eligible net-metering system site" (as defined in R.I. Gen. Laws § 39-26.4-2(22)) to a "credit that applies up to one hundred percent (100%) of a Net Metering Customer's consumption at the Eligible Net Metering System site" (as defined in the Tarff). RIE Memorandum at p. 4. "The term 'consumption' in the Tariff was reviewed and approved by the Commission, presumably because it has not distinguished a customer's 'consumption' of Net Metered Accounts from the customer's 'usage' of such accounts."[4] RIE Memorandum at p. 7. If there is no difference between "consumption" and "usage", why the change? If there is a difference between "consumption" and "usage", certainly the Tariff cannot materially change the definition of a term from how it was defined by the General Assembly. The DPUC, in responding to MAE's arguments, urges that the "Commission is required to apply statutes as written and not some alternative – even if the Commission were to agree that it was more 'equitable.'" DPUC Memorandum at p. 3. Revity agrees.

The Company further asserts that the Net-Metering Statute authorizes the Company to "issue checks to any net-metering customer in lieu of billing credits or carry-forward credits or charges to the next billing period." RIE Memorandum at p. 5. "The authority to issue checks for

[4] Here the positions of the Company and the DPUC cross because the DPUC insists that the subject of the "usage" or "consumption" is the electricity and not the credits or the accounts on which those credits reside. DPUC Memorandum at p. 6. The Company appears to suggest otherwise.

(or 'cash out') net metering credits is not limited to customers served by behind-the-meter facilities, or Community Remote Net Metering Systems." *Id*. at p. 6. Both of those statements are true. However, the statutory compensation scheme for a Renewable Net Metering Credit compared to the compensation scheme for an Excess Renewable Net Metering Credit are different, which is why the Company is wrong to say that Revity's comparison of the definitions of Excess Renewable Net Metering Credit and Renewable Net Metering Credit is "meaningless."

The Company also argues that with respect to the distinction between "usage" and "consumption", "[f]or purposes of easing the administrative burden of administering net metering credits, . . . no distinction between the terms needs to be made." RIE Memorandum at p. 6. The express purpose of the Net Metering Statute is to "facilitate and promote installation of customer-sited, grid-connected generation of renewable energy; to support and encourage customer development of renewable generation systems; to reduce environmental impacts; to reduce carbon emissions that contribute to climate change by encouraging local siting of renewable energy projects; to diversify the state's energy generation sources; to stimulate economic development; to improve distribution system resilience and reliability; and to reduce distribution system costs." R.I. Gen. Laws § 39-26.4-1. The General Assembly made no mention of seeking to ease the administrative burden as a goal of the program and administrative ease is no justification for ignoring the express language of the Statute.

The Company concludes its statutory riposte by urging that "[i]f Revity's argument that the definition of excess renewable net-metering credit does not apply to them because it uses the term 'consumption,' it raises the question of whether they are entitled to any renewable net-metering credits since the tariff definitions for excess renewable net-metering credit and renewable net-metering credits use the same terminology." RIE Memoranda at p. 7. The Net-Metering Tariff

does use the term "consumption" in defining both Renewable Net-Metering Credit and Excess Renewable Net-Metering Credit—but the Net Metering *Statute* does not. The Statute defines a Renewable Net-Metering Credit as "[a] credit that applies to an eligible net-metering system . . . up to one hundred percent (100%) of either the renewable self-generator's usage at the eligible net-metering system site" whereas the Statute defines an Excess Renewable Net-Metering Credit as "a credit that applies to an eligible net-metering system . . . for that portion of the production of electrical energy beyond one hundred percent (100%) and no greater than one hundred twenty-five percent (125%) of the renewable self-generator's own consumption at the eligible net-metering system site . . . ." Revity is only interested in the Statute's definitions because the Tariff cannot, as a matter of law, change the definition of statutory terms from how the General Assembly defined them. The Statute makes a terminological distinction between the Renewable Net-Metering Credit and the Excess Renewable Net-Metering Credit and that distinction must be given meaning in these proceedings.

The Company chastises Revity's distinction as "strain[ing] credulity" and even "more so because the purpose of the Company's proposal is merely to provide a check to an eligible net metering customer in lieu of a credit in order to ease the administrative burden of implementing net metering." RIE Memoranda at p. 7. First, the magnitude of the proposed change is irrelevant in determining the proper statutory definition of the Excess Renewable Net-Metering Credit. Second, the DPUC has interpreted the Company's materials as proposing something far more pernicious. The DPUC's September 13, 2023 Pre-Filed Direct Testimony of Michael W. Brennan ("Brennan Testimony") states as follows:

Q. HOW WILL THE COMPANY APPLY ANY BILLING CHARGES RESULTING FROM THE RECONCILIATION PROCESS TO STAND-ALONE SYSTEMS?

A. The Company is proposing that any billing charges resulting from the annual reconciliation calculations for stand-alone systems will be charged to the net metering host account. The host account will then be responsible for any true-up transactions with offtake accounts based on contractual agreements among the parties with no involvement from the Company.

Brennan Testimony at p. 7:20-8:2. The Brennan Testimony provides no citation to the Company's materials in support of this interpretation and the Company should clearly state whether Mr. Brennan has read its materials properly.

If Mr. Brennan has read the Company's materials properly, this proposal creates significant financial legacy risk for host accounts but placing that risk at the foot of the host account is patently inequitable. The host account bears no responsibility for the fact that an off-taker consumed less electricity in a given billing cycle than originally anticipated—perhaps due to a generational pandemic resulting in the lengthy closure of public buildings or the implementation of energy efficiency protocols—and has thus accumulated unused credits. Not only does a host account lack any control over the off-taker's actual electricity consumption, the host account also lacks control over whether an off-taker decides to purchase additional credits from other hosts. Yet and still, the DPUC suggests that the host accounts should be held financially responsible for the problem while offering the cold comfort that the host account could seek to "true-up" the charges with the off-takers pursuant to contractual agreements (assuming those agreements predicted and provided for the proposals in this Tariff Advice).

Mr. Brennan offers that the host account can avoid this outcome in the future by simply "siz[ing] the system such that the generation to consumption ratio is intentionally lower than 100%." Brennan Testimony at p. 11:6-7. Otherwise stated, a host account should subscribe less

than 100% of offtake consumption to provide a buffer to guard against unused credits in the future. However, that suggestion runs headlong into the Company's Proposal No. 2 which would require a stand-alone net metering project "to allocate net metering credits to eligible credit recipients via Schedule B to allocate as close to 100% of the credits as possible before the project receives authority to interconnect ('ATI')." The DPUC agrees with the Company on this Proposal as well: "Given the nature of many remote net metering systems in which the host account has little or no load, it is critically important that these projects secure adequate satellite accounts to receive all of the allocated credits at the outset." Brennan Testimony at p. 11:21-24.

Accordingly, the DPUC is suggesting that the host account under-subscribe its facilities to protect against future unused credits but is also advocating for a regime where the host account must allocate "as close to 100% of the credits" before the project receives ATI. The DPUC apparently recognizes the internal contradiction here and offers a tidy work-around:

> [T]he Company acknowledges that a stand-alone facility could initially be treated as a qualifying facility (QF) and receive compensation under an avoided cost rate. This facility could, once sufficient satellite accounts have been enrolled, then transition to become a remote net metering customer. Allowing a process of transition such as this provides potential flexibility for developers to proceed with construction and interconnection in a manner that is efficient in terms of obligations to providers of capital and tax equity. If a project is allowed to interconnect as a QF while continuing to enroll eligible credit recipients, this restriction on ATI would be considerably less impactful.

Brennan Testimony at p. 12:6-14. So, to avoid a problem for which the host accounts bear no responsibility of creating in the first place, host accounts should under-subscribe their future facilities and, to address the fact that under-subscription would risk delaying ATI (under the proposed new rule), the DPUC recommends the host account artificially interconnect as a Qualifying Facility and then later "transition" to the net-metering program. All this work in the spirit of *reducing* the administrative burden of the net-metering program.

Lastly, as to Proposal No. 2, Revity, in its September 8, 2023 Memorandum, asserted that "a renewable energy facility qualifies for federal income tax credits in the year that the facility is placed in service which cannot happen until the facility receives authority to interconnect" and thus "[a]dditional conditions precedent imposed on the authority to interconnect present risks that the facility will be delayed—a delay which, depending on the value of the credit in a given year, could place at risk millions of dollars." Revity Memorandum at p. 11. The DPUC criticizes this argument because "[t]here is simply no testimony on the record to support Revity's assertions that such a provision would interfere with interconnection processes or would cause tax problems." DPUC Memorandum at p. 7. Proposal No. 2 would obviously add another administrative hurdle for a host account to achieve ATI and the Internal Revenue Service Code states that the "energy credit for any taxable year is the energy percentage of the basis of each energy property *placed in service during such taxable year*." 26 U.S.C. § 48(a)(1) (emphasis supplied). The Company responds that "[t]he Memorandum should not be used by Revity to make policy arguments that, if intended to be brought to the attention of the Commission for review, should be in the form of expert testimony, with substantial evidence." RIE Memorandum at p. 9. Where is the testimony that host accounts are responsible for the problem of unused credits? Where is the evidence that a failure to subscribe 100% of credits pre-interconnection is the cause of the unused credit problem? The DPUC states that Proposal No. 2 "helps ensure that net metering credits do not bank on the host accounts and 'will help minimize the number of accounts requiring a billing charge, and/or minimize the value of the billing charge.'" Brennan Testimony at p. 11:16-19. There is no testimony that net metering credits are banking on host accounts for stand-alone configurations. Proposal No. 2 is a solution in search of a problem.

WHEREFORE, for the foregoing reasons, Revity respectfully requests that the Commission decline to allow the Company to apply its proposals regarding excess renewable net-metering credits to non-community "stand-alone" configurations. If the Commission decides to allow the Company to apply Proposal No. 3 to "stand-alone" configurations, Revity would respectfully request that a one-year grace period be adopted and off-takers be allowed to engage in a one-time transfer of unused credits to other eligible off-takers with consumption capacity. Lastly, Revity requests that the Commission reject Proposal No. 2.

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CERTIFICATE OF SERVICE

The paper copies of this filing will be hand delivered to the Rhode Island Public Utilities Commission on October 2, 2023.

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October 2, 2023

Docket No. 23-05-EL Rhode Island Energy – Net Metering Provision, RIPUC No. 2268
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