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PUBLIC UTILITIES COMMISSION

October 25, 2007

VIA HAND DELIVERY and ELECTRONIC MAIL

Ms. Luly Massaro, Clerk
Rhode Island Public Utilities Commission
89 Jefferson Boulevard
Warwick, RI 02888

Re: Rhode Island Resource Recovery Corporation - DKT. 3565

Dear Luly:

Enclosed please find an original and nine copies of The Narragansett Electric Company d/b/a National Grid's Response to Memorandum of the Division of Public Utilities and Carriers in the above-referenced matter.

Sincerely,

Peter V. Lacouture

PVL/lgo
Enclosure

cc: Cynthia Wilson-Frias, Esq.
Paul J. Roberti, Esq.
W. Mark Russo, Esq.
Alan M. Shoer, Esq.
Leo J. Wold, Esq.

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS
PUBLIC UTILITIES COMMISSION

IN RE: RHODE ISLAND RESOURCE	:	
RECOVERY CORPORATION PETITION	:	DOCKET NO. 3565
FOR DECLARATORY JUDGMENT	:	

THE NARRAGANSETT ELECTRIC COMPANY D/B/A NATIONAL GRID'S RESPONSE TO MEMORANDUM OF THE DIVISION OF PUBLIC UTILITIES AND CARRIERS

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October 25, 2007

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I. INTRODUCTION

The history of this proceeding was presented in detail in the initial brief of The Narragansett Electric Company ("Narragansett Brief") which was filed on October 15, 2004. Since then, the Public Utilities Commission ("PUC" or "Commission") has conducted an evidentiary hearing (November 22, 2004) and the parties have engaged in extensive settlement negotiations. These negotiations resulted in the filing of a Settlement Agreement between Narragansett and Rhode Island Resource Recovery Corporation ("RIRRC") in August 2006 ("Settlement"), which was rejected by the Commission at an open meeting on September 27, 2007 where the Commission "reasoned that it appears that RIRRC would be acting as a public utility." Minutes of September 27, 2007 PUC Open Meeting, p. 2. Following the rejection of the Settlement, the PUC requested briefs of the parties regarding the original RIRRC Petition for Declaratory Judgment.[1]

On October 10, 2007, the Division of Public Utilities ("Division") filed its memorandum ("Division Memorandum") alleging that RIRRC would not be an electric distribution company because it would not be public utility. In fact, the Division has it backward – under the law, if an entity is an electric distribution company, by definition it is a public utility.

In the Narragansett Brief, Narragansett set forth the legal reasons it opposed RIRRC's petition for declaratory judgment, including (i) RIRRC would be an "Electric Distribution Company" and a "Public Utility" if it distributes electricity or owns, operates or controls electric distribution facilities, (ii) R.I.G.L. §39-3-1 prevents RIRRC from distributing electricity in the industrial park, and (iii) industrial park tenants are subject to transition charges. These arguments

[1] RIRRC has filed a motion for reconsideration of the PUC's rejection of the Settlement. Narragansett supports RIRRC's effort to obtain PUC approval of the Settlement.

will not be repeated here. The purpose of this memorandum is to respond to certain arguments contained in the Division Memorandum.

II. ARGUMENT

The Division Memorandum incorrectly claims that RIRRC would not be an electric distribution company because it would not be a public utility. It claims that in order to be a public utility, it must distribute electricity "to or for the public." Having made this erroneous claim, the Division makes three alternative arguments to support its position that RIRRC's distribution of electricity[2] would not be "to or for the public:" (i) the landlord-tenant exception to the definition of public utility would exempt industrial park tenants of RIRRC (Division Memorandum, p. 17), (ii) RIRRC's number of customers in the industrial park would be de minimus (Division Memorandum, p. 19), or (iii) RIRRC would be a non-regulated power producer ("NPP") under state law as an entity engaged in the purchase of electricity for retail sale to end users. (Division Memorandum, p. 27.) All of the Division's arguments must be rejected for the reasons discussed below.

A. The Division completely misreads the definition of "Electric Distribution Company" in R.I.G.L. §39-1-2(12).

With the fundamental restructuring of the electric industry in Rhode Island in 1996, the General Assembly made a finding that greater competition in the electric industry would stimulate economic growth. R.I.G.L. §39-1-1(d)(2). The Restructuring Act required electric utilities to file restructuring plans setting forth how they would structure their generation, transmission, and distribution facilities. Following the implementation of their restructuring

[2] There appears to be no question that RIRRC proposes to distribute electricity. In its Petition for Declaratory Judgment (October 21, 2003) [hereinafter "Petition"], RIRRC acknowledges that it proposes to "deliver electricity to end-users within the Industrial Park…" Petition, ¶ 8.

plans, electric distribution companies were to be prohibited from selling electricity at retail (other than standard offer and last resort service) and from owning, operating, or controlling generating facilities. The Restructuring Act created new players in the electric marketplace in Rhode Island and established new terms of art as well. Rather than all entities being deemed "public utilities" under the statute, there were new entities such as "non-regulated power producer" and new definitions for "electric distribution companies."

Following this mandate, Narragansett sold its electricity generation facilities and the "wires" of The Narragansett Electric Company were separated into transmission facilities ("plant or equipment used for the transmission of electricity . . ." and "distribution facilities" ("plant or equipment used for the distribution of electricity and which is not a transmission facility.") R.I.G.L. §39-1-2(25) and (10). Narragansett became an "electric distribution company" which is a company that (i) distributes electricity or (ii) owns, operates or controls distribution facilities. R.I.G.L. §39-1-2(12).

Contrary to the assertion of the Division (Division Memorandum p. 4), the definition of "electric distribution company" created by the Restructuring Act is unambiguous and does not contain a requirement that the electricity be distributed "directly or indirectly to or for the public" nor does it contain any other qualification or requirement. The final phrase in the definition of electric distribution company — "and shall be a public utility pursuant to §39-1-2(20)" — confirms the first statement in subsection 20, the definition of public utility: "'public utility' means and includes every company <u>that is an electric distribution company</u> . . ." [Emphasis supplied.]

The Supreme Court has left no doubt as to what a trial court or administrative agency must do when interpreting an unambiguous statute:

> "It is well settled that when the language of a statute is clear and unambiguous, this Court must interpret the statute literally and must give the words of the statute their plain and ordinary meanings." State v. DiCicco, 707 A.2d 251, 253 (R.I. 1998) (quoting Accent Store Design, Inc., 674 A.2d at 1226). When confronted with an unambiguous statute, we must apply the statute as written. 707 A.2d at 253.
>
> RIH Medical Foundation, Inc. v. Nolan, 723 A.2d 1123, 1126 (R.I. 1999).

The Division is asking the Commission to interpret the definition of electric distribution company by reading into it the "to or for the public" requirement contained in §39-1-2(20) for other entities to be considered public utilities. In this case, where the definition of "electric distribution company" is clear, the Commission should refuse to do this.

> The act of "reading into" statutory language is part and parcel of our function of interpreting statutes that are unclear or ambiguous. The court can do this, however, only when the statute is in fact unclear or ambiguous. When faced with statutory language that is clear and unambiguous, we may not interpret or change the express intention of the Legislature. In re Advisory Opinion to the Governor, 504 A.2d 456, 459 (R.I. 1986).
>
> Providence Journal Co. v. Kane, 577 A.2d 661, 664 (R.I. 1990).

Thus the Commission should apply the literal meaning of the definition and decline to interpret it as the Division has suggested.

In addition, to adopt the Division's reasoning, the Commission would have to read the word "shall" in the definition of "electric distribution company" as "may." The Supreme Court has held that "shall" is mandatory:

> In Brown v. Amaral, 460 A.2d 7 (R.I. 1983), this court stated that "the word 'shall' usually connotes the imperative and contemplates the imposition of a duty." Id. at 10 (quoting Carpenter v. Smith, 79 R.I. 326, 334-35, 89 A.2d 168, 172-73 (1952)).
>
> Conrad v. Rhode Island, 592 A.2d 858, 860 (R.I. 1991).

The definitions of "electric distribution company" and "public utility" are clear and unambiguous. An "electric distribution company" is a company which distributes electricity or

owns, operates or controls electric distribution facilities. Once a company is determined to be an electric distribution company, it shall be a public utility. The words of the definition are clear – an electric distribution company shall be a public utility, not that it "may" be a public utility. The Commission should reject the Division's argument.

There are two ways in which the General Assembly could have accomplished the result which the Division urges in its memorandum. First, the Legislature could have easily added "to or for the public" to the definition of electric distribution company. Alternatively, it could have made more modest changes to the definition of public utility by changing the word "electric" in the definition to "electric distribution" in the fourth line of the definition quoted in the footnote below, instead of striking the word "electric."[3] However, the General Assembly explicitly included "electric distribution company" at the beginning of the definition of public utility, clearly separating it from the "directly or indirectly to or for the public" language and requirement contained later in the definition. The Division's argument that an electric distribution company is not a public utility unless it meets other qualifications is an incorrect interpretation of the plain, unambiguous language of the statute and should be rejected by the Commission. By definition, all electric distribution companies are public utilities under Rhode Island law.

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[3] The amendment to the definition of "public utility" was as follows: "Public utility" means and includes every company **{ADD** that is an electric distribution company and every company **ADD}** operating or doing business in intrastate commerce and in this state as a railroad, street railway, common carrier, gas, liquefied natural gas, ~~electric,~~ water, telephone, telegraph, and pipeline company, and every company owning, leasing, maintaining, managing, or controlling any plant or equipment or any part of any plant or equipment within this state for ~~generating,~~ manufacturing, producing, transmitting, distributing, delivering, or furnishing natural or manufactured gas, ~~steam, electrical or nuclear energy, heat, light or power,~~ directly or indirectly to or for the public, or any cars or equipment employed on or in connection with any railroad or street railway for public or general use within this state, or any pipes, mains, poles, wires, conduits, fixtures, through, over, across, under, or along any public highways, parkways or streets, public lands, waters, or parks for the transmission, transportation, or distribution of gas ~~or electric current~~ for sale to the public for light, heat, cooling or power for providing audio or visual telephonic or telegraphic communication service within this state . . . P.L. 1996, ch. 316.

B. The three exceptions cited by the Division are not applicable to RIRRC.

As discussed above, the Division has misread the definition of electric distribution company and the "to or for the public" requirement does not apply. Even if it did, the landlord-tenant exception, the de minimus exception and the NPP exception do not apply to RIRRC: it would still be an electric distribution company if it distributed electricity or owned, operated or controlled distribution facilities.[4]

1. The landlord-tenant exception is not recognized in Rhode Island and would not apply to RIRRC.

The landlord-tenant exception is not recognized in Rhode Island. The Division cites old cases from other states in urging the Commission to create such an exception. As presented by the Division, the exception would provide that "a real estate developer who supplies utility services to its tenants is not a 'public utility.'" Division Memorandum, p. 17.

In Cottonwood Mall Shopping Center, Inc. v. Utah Power & Light Co., 440 F.2d 36 (10th Cir. 1971) the Court of Appeals for the Tenth Circuit found that a shopping mall developer who proposed to supply electricity to its tenants would be subject to the Utah public utility statutes. The statutes required an entity to obtain a certificate of public convenience before supplying electricity. Although the definition of "electrical corporation" in the Utah statute contained an exception for the distribution of electricity "through private property … solely for [the owner's] own use or the use of his tenants" Utah Code Annotated § 54-2-1(20), the court determined that by virtue of the public use of the shopping mall, the electricity would not be used by mall tenants alone. Based on this and other factors, the court held

[4] The business of distributing electricity has been found by the General Assembly to be affected with a public interest. R.I.G.L. §39-1-1(a)(1). Each of the exceptions urged by the Division would conflict with this legislative finding.

> we do not think Utah would permit this intrusion into the field of a public utility by one who would be unregulated both from the standpoint of what it could do to its customers and, more so, the damage it could do to the public good by an uneconomic duplication of facilities and a raid on Power Company's customers to the detriment of all public power users. Nor do we think Utah would be persuaded by the cases from other states which involve different statutes and much less precise policies.
>
> Cottonwood, 440 F.2d at 43 [footnote omitted.]

In a footnote to this discussion, the court lists the Drexelbrook and Sun Prairie cases, discussed in the Division's Memorandum, as cases that the Utah courts would not find persuasive. The court notes that the cited cases are "for the most part apartment-tenant situations" and deal with the "service to the public" concept rather than the language of the Utah statute. Id., n. 10.

The present case obviously does not involve an apartment-tenant situation or a commercial shopping mall but the sale of parcels in a large industrial park. The creation of the landlord-tenant exception in Rhode Island is not good public policy and would, as the court recognized in Cottonwood, create a new class of customers who would receive utility services without any regulation or supervision by the Commission or the Division.

In support of its position, the Division argues that, as a Maryland court suggested many years ago, "tenants can 'escape the burden' of an unduly onerous charge by going elsewhere." Division Memorandum, p. 19, citing Public Service Commission of Maryland v. Howard Research and Development Corp., 314 A.2d 682, 689 (Md. App. Ct. 1974). This remedy may be effective for commercial tenants of a shopping mall but is not practical for companies who have located their manufacturing or other facilities in an industrial park. The Division's reasoning does not provide a basis for good public policy and should be rejected.

In any case, any newly created landlord-tenant exception would not apply to RIRRC. The facts presented have not established that the relationship between RIRRC and the industrial

park users would be a landlord-tenant relationship. The evidence is that RIRRC was seeking to sell as many of the parcels as possible, and therefore would not be a "landlord." While there was testimony about the possibility of RIRRC renting some parcels to tenants, it is clear that RIRRC intends to sell parcels in the industrial park. Tr. 11/22/04, pp. 49-50, 79.

2. The de minimus exception does not apply to electric distribution companies and would not apply to RIRRC.

In order to claim that the de minimus exception applies to the facts in this case, the Division analyzes the two Rhode Island Supreme Court cases where the Court determined, prior to the 1996 deregulation of the electric industry in Rhode Island, that electric generation facilities owned by independent power producers were not public utilities.[5] The first case involved the Newbay coal-fired power plant that was proposed for East Providence. In its opinion, after acknowledging that the PUC had authority only over companies that provided, inter alia, energy to the public, the Court held that "Newbay cannot be considered an electric utility until operations actually commence." City of East Providence v. Public Utilities Commission, 566 A.2d 1305, 1308 (R.I. 1989) [hereinafter "Newbay."]

In a case decided a few years later, the Court found that the Pawtucket Power cogeneration facility was not a public utility and thus qualified for an exemption from city property tax pursuant to R.I.G.L. §44-3-3(22). In that case, the steam produced at the power plant would be sold exclusively to Colfax, Inc. and the electricity would be sold exclusively at wholesale to the New England Power Company. The Court focused on the "directly or indirectly to or for the public" requirement in the definition of "public utility" and, applying the de minimus principle, determined that, as the Commission had previously held in a declaratory judgment, Pawtucket Power's ownership and operation of the facility would not cause it to

[5] Prior to deregulation, a company owning plant or equipment for generating electricity was a public utility.

become a public utility under Rhode Island law. Pawtucket Power Associates Limited Partnership v. The City of Pawtucket, 622 A.2d 452, 455 (R.I. 1993). Both of these cases involved electric generators and turned on the definition of public utility in the law at that time. As stated earlier, however, the definitions in the law all changed with the deregulation of the electric utility industry in Rhode Island in 1996.[6] Because the "to or for the public" requirement does not apply to electric distribution companies, the de minimus principle is not applicable to the present case[7]. Thus, the Newbay and Pawtucket Power cases have no applicability to the issue at hand – whether an entity that engages in the distribution of electricity, or owns, operates or controls distribution facilities is an electric distribution company and consequently a public utility. The Commission should reject application of the de minimus exception to RIRRC.

3. The Division's assertion that RIRRC is an NPP and not an electric distribution company is not supported by the evidence before the PUC.

If RIRRC were planning merely to purchase and sell electricity which would be delivered over Narragansett's distribution facilities to occupants of the industrial park, Narragansett agrees that RIRRC would be a NPP. However, the evidence indicates that RIRRC intends to deliver electricity to end-users, and/or own, provide, and maintain the electrical infrastructure used to provide electricity from the FPL plant to end users in the industrial park. See, e.g., Petition, ¶8; RIRRC Response to Commission Data Request 1-1; RIRRC Response to Narragansett Data

[6] Under the current law post-restructuring, Newbay and Pawtucket Power would not be considered public utilities. They would, however, fall under the new definition of non-regulated power producer ("NPP") which is defined as a company "engaged in the business of producing, manufacturing and generating, buying, aggregating, marketing or brokering electricity for sale at wholesale or for retail to the public . . ." R.I.G.L. §39-1-2(19). The definition specifically provides that a "non-regulated power producer shall not be subject to regulation as a public utility except as specifically provided in the general laws." Id.

[7] Even if the de minimus principle were applicable, the present case is significantly different from the facts of Newbay and Pawtucket Power. In each of those cases, there was one wholesale purchaser of electricity and one purchaser of steam. In this case, RIRRC owns 185 developable acres in the industrial park which are platted into 22 lots, suggesting the possibility of 22 electrical customers. Tr. 11/22/04, pp. 48-49, 52-53, 95. If this number of customers were considered de minimus, the Commission may have a difficult time determining a number that is too large to be de minimus.

Request 1-7, discussed below. As a result, RIRRC clearly meets the definition of an electric distribution company, and would not be considered an NPP.

Surprisingly, the Division Memorandum asserts that RIRRC should be considered an NPP, assuming that RIRRC's function would merely be buying electricity for retail sale to end users and that it would not own distribution lines[8]. Division Memorandum, p. 27. In reaching this conclusion, the Division ignores RIRRC's statement in the Petition establishing this docket[9], ignores the response of RIRRC to Commission Data Request No. 1-1[10], ignores the response of RIRRC to Narragansett Data Request No. 1-7[11] and instead cites and relies on the contradictory testimony of RIRRC's witness.

The statements in the Petition and in the responses to the data requests cited above are clear: RIRRC proposes to own the electric distribution infrastructure in the industrial park and to deliver electricity to end-users within the park. While the testimony of RIRRC's witness [Tr. 11/22/04, pp. 58-61] suggests some uncertainty as to the specific details of the arrangement, he never contradicts the statements of RIRRC which are cited and quoted above. The Commission should reject as unsupported by the evidence the Division's assertion that "the evidence reflects

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[8] This is inconsistent with the acknowledgement on page 1 of the Division Memorandum that RIRRC proposes to "[deliver] electricity to end-users within the Industrial Park…" Division Memorandum, p. 1. Page 24 of the Division Memorandum also acknowledges that RIRRC will be responsible for "infrastructure maintenance".

[9] RIRRC proposes to "deliver electricity to end-users within the Industrial Park…" Petition, ¶ 8.

[10] Commission Request 1-1: Please indicate who does/will own and/or construct distribution and or transmission facilities within the industrial park?

RIRRC Response: Under current plans, Resource Recovery envisions that it will retain ownership of the industrial park infrastructure. The existing agreement between Resource Recovery and FPL, as a successor, provides Resource Recovery with contractual authority to build into FPL's switch yard at distribution or transmission level service. [Emphasis supplied.]

[11] "[RIRRC] will continue to own the infrastructure, including … the electric infrastructure that would be necessitated if [RIRRC] undertakes a direct connection to realize the benefit of that portion of the output of the [FPL] plant that was secured pursuant to the Option and Purchase and Sale Agreement …" RIRRC Response to Narragansett Data Request 1-7.

that end users, most likely, would construct and own their own 'direct connect' facilities, not RIRRC" (Division Memorandum, p. 27). The Commission should find that, based on the evidence before it, RIRRC will not be an NPP.

C. Applicability of Narragansett's Back-up Tariffs (B-32 and B-62).

Finally, the Division's Memorandum addresses the applicability of Narragansett's back-up rates to the RIRRC situation. The Division states that "in order to avoid transmission, transition, demand-side management and renewable charges, etc., RIRRC's end-use customers must possess a cognizable, legal right to Back-Up Service from Narragansett." Division Memorandum, p. 38. The Division states, and Narragansett agrees, that the back-up tariffs as drafted apply only in situations where the customer has an on-site non-emergency generation unit. Accordingly, the Division concludes that the back-up service tariffs are not available to direct connect customers, and therefore could not apply to RIRRC or the occupants of the industrial park.[12]

The PUC should affirm the Division's conclusion that Narragansett's back-up service rates would not be available to RIRRC tenants who have a direct connection to the FPL generating plant.

III. CONCLUSION

As noted in footnote 1, Narragansett supports the motion filed by RIRRC seeking reconsideration and approval of the Settlement by the PUC.

[12] Although Narragansett agrees with the Division's conclusion, the Company disagrees with the Division that the tariffs contain a substantial ambiguity. The Division Memorandum characterizes the terms of the tariff as establishing two classes of customers. Division Memorandum, p. 34. Rather, it is clear that the tariff applies to one class of customers – customers who receive electricity from non-emergency generation units where the electricity is not delivered over company-owned distribution facilities and who expect the Company to provide retail delivery service when the generation units are not supplying the customer's load.

If the Commission does not reconsider and approve the Settlement, for the reasons discussed above and in the Narragansett Brief, Narragansett respectfully requests that the Commission determine that RIRRC would be an "electric distribution company" and hence a "public utility" and subject to the restrictions of Title 39 including §§39-3-1 et seq., if it owned and operated the direct connection from the FPL plant to end use customers as it has proposed. As a result, RIRRC would be prohibited by R.I.G.L. §39-1-27(d) from selling electricity at retail. The Commission should also determine that RIRRC is subject to payment of transmission, transition, demand-side management, renewable and other charges, and that the occupants of the RIRRC industrial park are not entitled to back-up service from Narragansett under the existing B-32 and B-62 tariffs. Finally, the Commission should reject with prejudice RIRRC's request for a declaratory judgment.

Respectfully submitted,

The Narragansett Electric Company
d/b/a National Grid
By its Attorneys,

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October 25, 2007

CERTIFICATE OF SERVICE

I hereby certify that a copy of this The Narragansett Electric Company d/b/a National Grid's Response to Memorandum of The Division of Public Utilities and Carriers was mailed, postage prepaid, and e-mailed to the following this 25th day of October, 2007:

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