November 8, 2005

Luly E. Massaro, Commission Clerk
Public Utilities Commission
89 Jefferson Blvd.
Warwick, RI 02888

RE: Docket 3659

Dear Ms. Massaro,

With an understanding that the comment period on the above referenced docket has ended, we are seeking permission to comment out of time in response to a letter that the Commission received on the final day of the comment period from Nova Recovery Group, LLC ("Nova"). Despite the fact that the collaborative rulemaking process and the public hearing held on the proposed regulations afforded ample opportunity to raise concerns, Nova chose not to elucidate its objections until the last possible moment making it impossible to issue a rebuttal before the deadline. The accusations put forth in their letter as to the legality of the proposed regulations are baseless and warrant a response.

In its letter, Nova asserts that the Commission's proposed regulations invade the province of the legislature by seeking to promulgate regulations that modify an act of the general assembly. Specifically, they state that section 3.6 and 5.2 constitute impermissible attempts to alter statutory definitions and terms.

As an initial matter, it is settled law that great deference will be accorded to agencies in interpreting a statute it has been entrusted to administer and enforce. Whitehouse v. Davis, 774 A. 2d 816, 818 (R.I. 2001). In addition, where statutory provisions are subject to reasonable interpretation, the construction of the responsible agency is entitled to deference. Id. at 818-819. Therefore, the Commission plainly enjoys discretion to clarify statutory language as part of the process of developing implementing regulations. This is what the Commission has done.

In any event, a close examination of these particular sections proves that the assertions advanced by Nova are not accurate.

Section 3.6 of the proposed regulations provides a definition for "eligible biomass fuel". The definition is taken nearly verbatim from the statute with regulatory language added merely to remove ambiguity and/or ensure equitable and transparent enforcement mechanisms. To illustrate this, the definition for "eligible biomass fuel" from the proposed regulations is provided below, with clarifying regulatory language provided in bold italics:

> "3.6 Eligible Biomass Fuel: means fuel sources including brush, stumps, lumber ends and trimmings, wood pallets, bark, wood chips, shavings, slash, ***yard***

trimmings, site clearing waste, wood packaging, and other clean wood that is not mixed with other unsorted solid wastes; agricultural waste, food and vegetative material; energy crops; landfill methane or biogas; ***provided that such gas is collected and conveyed directly to the Generation Unit without use of facilities used as common carriers of natural gas;*** or neat bio-diesel and other neat liquid fuels that are derived from such fuel sources.

Generators using wood sources other than those listed above may make application, as part of the required fuel source plan described in Section 6.9, for the Commission to approve a particular wood source as "clean wood". The burden will be on the applicant to demonstrate that the wood source is at least as clean as those listed in the legislation. Wood sources containing resins, glues, laminates, paints, preservatives, or other treatments that would combust or off-gas, or mixed with any other material that would burn, melt, or create other residue aside from wood ash, will not be approved as clean wood."

The first clarification in the regulations relates to the term "and other clean wood", which is used in the statute. As "other clean wood" is an ambiguous term, it was subject to administrative interpretation and appropriately clarified by the Commission. "Other clean wood" is not a term of art nor has any other commonly accepted meaning. The law, in fact, gives no explicit definition of "clean wood", but rather provides examples of what the General Assembly considers to be "clean wood".

Therefore, it was clearly within the authority of the Commission to provide clarification as to the interpretation of the phrase "and other clean wood", using the examples provided in the statute for guidance, in order to ensure equitable application of the law. Those subject to these regulations have a right to a clear, unambiguous, and before-the-fact definition of "clean wood". The Commission accomplished this in two ways.

First, additional materials are listed that the Commission findsto also be "clean wood", based on the examples provided by the statute. For example, if "slash" is by statute "clean wood", then "site clearing waste" is therefore taken to be "other clean wood" and therefore also an eligible biomass fuel. Another example is that if "wood pallets" is by statute "clean wood", than "wood packaging" is therefore taken to be "other clean wood", and therefore also an eligible biomass fuel. By listing additional materials that the Commission accepts, prima facie, as also being "other clean wood" per the statute, the Commission clarifies the law, but in no way steps beyond the definition given in the statute.

The second means by which the proposed regulations provide further clarification as to what is meant by "other clean wood" is to accept any wood material as "other clean wood", unless there is evidence that the material has some feature which would make it not akin to the examples of "clean wood" provided in the statute. By making explicit what these features are, the Commission can provide a fair and objective test by which to determine if a material is "other clean wood". In examining the list of examples provided in the statute, it is evident that all the materials listed are free of any substances one might

associate with or attach to wood in a built environment such as paint, glues, and the like. Therefore, the proposed rules provide as a test for "clean wood" in that any wood must be devoid of all of such substances in order to be considered "other clean wood". This approach provides a plain and transparent test, the foundation of which is the examples provided in the statute, and by which the Commission can evaluate future petitions for a material being "other clean wood".

The second regulatory clarification in Section 3.6 is that eligible biomass fuels must be "collected and conveyed directly to the Generation Unit without use of facilities used as common carriers of natural gas;". This restriction does not in anyway modify the definition of eligible biomass fuel, but rather limits the means by which it can be transported in order to ensure transparent oversight and equitable enforcement. There simply is no practical or technologically feasible way for the Commission to ascertain that a particular fuel is indeed an eligible biomass fuel, and therefore in keeping with the statute, if it has been conveyed over a common carrier of natural gas. In other words, far from modifying the definition of eligible biomass fuel, the regulations are limiting the means by which such fuels can be transported in order to ensure strict compliance with the statute.

In Section 5.2, Nova argues that the Commission expands and restricts the statutory terms "eligible biomass fuel" and "eligible renewable energy resource". It is abundantly clear that the General Assembly did not intend waste-to-energy technologies to be an eligible renewable energy resource not only because the statute does not include such technologies in what is listed as being eligible but also because it explicitly states in R.I. General Law 39-26-5(viii) that "waste-to-energy combustion of any sort or manner shall in no instance be considered eligible except for fuels identified in subsection 39-26-2(6)." Nothing in Section 5.2 of the regulations contradicts, expands, or restricts the statute. The only exception in Section 39-26-5(viii) is for those fuels that are both explicitly allowed in another section, but could also be considered "waste" by a casual reader, for example lumber ends or wood pallets. This exception language was plainly an attempt to make clear that the items in subsection 39-26-2(6) are eligible renewable fuels and not to be considered otherwise because of Section 39-26-5(viii). In other words, the exception language does not in anyway undermine the clear language in the first part of the section reading "waste-to-energy combustion of any sort or manner shall in no instance be considered eligible…".

Section 5.2 therefore specifies how the Commission will implement the statute's language reading "waste-to-energy combustion of any sort or manner shall in no instance be considered eligible…". Namely, the regulations simply makes abundantly clear what the Commission takes to be "…any sort or manner shall in no instance…" by listing possible instances in which a regulated entity might seek clarification from the Commission. The regulations are simply being very clear so as to reduce uncertainty for regulated entities and to minimize administrative burden, but do not expand or restrict the language of the statute. We further note that the various combustion technologies the Commission lists as examples of what would be ineligible if using waste as a fuel are themselves not deemed ineligible. But rather, per the statute, waste is not an eligible

renewable resource if used as a fuel, regardless of which technologies is being used. In other words, the combustion technologies themselves are not deemed eligible or ineligible, but rather the fuel used with the technology is.

It is accepted practice to look to the intention of the legislature when determining the meaning of any particular statute. See, Brennan v. Kirby, 529 A. 2d 633, 637 (R.I. 1987). In this instance, the Commission's regulations simply help to ensure compliance with the intention of the General Assembly in enacting the statutory provisions relating to the terms "eligible biomass fuel" and "eligible renewable energy resources."

We believe that the proposed regulations are a strict, judicious, and valid implementation of the statute. They serve only to reduce ambiguity, provide clarity, and allow for the equitable and efficient oversight by the Commission for the purposes of ensuring compliance. The regulations will reduce administrative burdens for regulated entities and the Commission, and guarantee the success of the overall policy promulgated by the General Assembly through this statute. We respectfully urge the Commission to leave unchanged the proposed regulations in these sections. Thank you for your time and consideration.

Sincerely,

(signed)

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