

STATE OF RHODE ISLAND
PUBLIC UTILITIES COMMISSION

IN RE: REVIEW OF PROPOSED
TOWN OF NEW SHOREHAM PROJECT
PURSUANT TO R.I. GEN.
LAWS § 39-26.1-7

Docket No. 4111

PRINCIPAL POST-HEARING MEMORANDUM OF LAW
OF CONSERVATION LAW FOUNDATION

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March 23, 2010

I. Introduction

Conservation Law Foundation (CLF) respectfully submits its Principal Memorandum of Law in this proceeding.

CLF believes that the Power Purchase Agreement (PPA) between Deepwater Wind Block Island LLC (Deepwater) and National Grid (Grid), filed with the Commission on December 10, 2010, is commercially reasonable and should be approved by the Commission. The PPA contemplates the construction of a proposed Block Island Wind Farm (the Project) that has the potential of being the first offshore wind project ever brought to completion in the United States.¹

The Public Utilities Commission (PUC or the Commission) respectfully must, pursuant to the Long Term Contracting Statute, R. I. Gen. Laws § 39-26.1-1, et seq. (LTC Statute), factor in the true environmental costs of fossil-fuel generation of electricity in assessing the commercial reasonableness of the PPA. When this is done, and the benefits of price predictability, job creation, and economic development are also considered, the terms of the PPA are commercially reasonable as that term is defined in the LTC Statute.

CLF further believes that information obtained through discovery has helped to clarify Deepwater's view of the required permitting process for the Project. See

¹ The sole legal issue before the Public Utilities Commission in this Docket is the commercial reasonableness of the PPA, as "commercial reasonableness" is defined in the applicable statute. See infra. As was frequently acknowledged during the hearing in this Docket, the Project cannot go forward until and unless it is fully permitted, including all environmental permits. CLF expressly reserves the right to comment on and/or intervene in environmental permitting proceedings related to the Project, as allowed by applicable law. In urging PUC approval of the PPA as commercially reasonable, CLF expresses no opinion on any environmental issue(s) related to the Project.

Deepwater's November 11, 2009 Response to CLF's Third Set of Data Requests. Clarity about permitting serves to reduce uncertainty for the developer, Deepwater, and serves the public interest by ensuring all Rhode Islanders that important environmental interests are not being ignored in this process.

For a major renewable-energy docket, this proceeding has brought forth unprecedented unanimity of opinion.

CLF and Grid, which have disagreed in this Commission on many issues -- most recently in Docket 4069, the Commission's rule-making proceeding pursuant to the LTC Statute -- both urge approval of the PPA as commercially reasonable.

There is no party to this Docket that urges rejection of the PPA, and there is no evidence in the record that the PPA is not commercially reasonable.

The political branches of Rhode Island government acted boldly in 2008 and 2009 in enacting the LTC Statute. The LTC Statute passed both houses of the General Assembly by near-unanimous votes. In June 2009, it was signed into law by the Governor. As discussed more fully below, there can be no doubt about the broad purpose of the LTC Statute. Now the action moves an administrative agency, the PUC. Respectfully, CLF urges the PUC to continue on the path started by the General Assembly and the Governor -- for the benefit of Rhode Island, the nation, and a world threatened by climate change.

II. The Background To This Docket

In this proceeding, the Commission does not write on a clean slate. Instead, the Commission is implementing public-policy goals regarding renewable energy that have been announced by the General Assembly and considered repeatedly in the past by this Commission.

In 2004, Rhode Island joined a national trend by enacting a law creating a renewable energy standard (the RES). R. I. Gen. Laws § 39-26-1, et seq. The RES obligates Rhode Island utilities to procure a gradually increasing percentage of electricity load from specified eligible renewable-energy resources, up to a level of 16% by 2019. The public-policy purpose of the RES is to serve the public interest by fostering development of renewable energy. R. I. Gen. Laws § 39-26-1(a).

In 2009, the General Assembly enacted the LTC Statute, some of the provisions of which govern this proceeding. R. I. Gen. Laws § 39-26.1-1, et seq. The public-policy purpose of the LTC Statute is clearly set out in the very first sentence of the Statute: “The purpose of this chapter is to encourage and facilitate the creation of commercially reasonable long-term contracts between electric distribution companies and developers or sponsors of newly developed renewable energy resources” Id.

The circumstances that led to enactment of the LTC Statute bear recounting, for that history sheds important light on a central issue presented in this Docket. The simple fact is that events and dockets in this Commission between 2005 and 2008 led directly to the enactment of the LTC Statute and, consequently, to this current Docket.

On January 18, 2005, the Commission opened Docket No. 3659 for the adoption of rules governing implementation of Rhode Island's RES. In that Docket, the main controversy concerned whether or not the RES Rules would require long-term contracting for renewable energy. Docket No. 3659 took almost a year to litigate and, on December 28, 2005, the PUC resolved the controversy when the Commission issued its Order and final RES Rules. The RES Rules required long-term contracts. The Order explained the Commission's reasoning:

The General Assembly has set forth a policy to encourage investment in renewable energy supply. According to developers, commitments to purchase the energy are important for the financing of renewable energy supply development. The Commission agrees with [Cape Wind] that the legislature anticipated long term RES commitments from obligated entities providing standard offer service, last resort service, and their successor services. Furthermore, the General Assembly set forth the policy that the goals of RES are to stabilize long-term energy prices and to create Rhode Island employment in the renewable energy sector. These are not short-term goals. Finally, the Commission finds that the policy statement . . . cited by [Cape Wind] is persuasive, particularly the concern that the absence of long term contracts hinders the development of renewable energy supplies.

The General Assembly expects the Commission to implement the policy objectives of the legislature in a way that will encourage [renewable energy] development.

PUC Order, at 9-10.

Nevertheless, despite the clarity of the PUC's Order, the issue of long-term contracts remained controversial, and the matter was debated in the Commission in Dockets Nos. 3765, 3901, and 4012. In Order 19108 in Docket No. 3765, the Commission created a Working Group to meet regularly in an effort to resolve the long-standing, recurring, and increasingly acrimonious debate over long-term contracts. The Working

Group included a wide range of governmental, quasi-governmental, and non-governmental stakeholders including the Attorney General's office, the Division, the Office of Energy Resources, many private renewable energy developers, several environmental organizations, and Grid. In Order 19239 in Docket No. 3901, the Commission instructed the Working Group to continue meeting and to make regular reports of its progress to the Commission.

In last year's Standard Offer Service (SOS) Docket No. 4012, in Order 19602, in a truly extraordinary move, the Commission dismissed Grid's entire SOS filing because the filing failed to provide for long-term contracts, as contemplated by the RES Statute and required by repeated decisions of the Commission.

All of these Orders were a reflection of the importance the Commission attaches to long-term contracting for renewable energy. Further, these Orders reflect the Commission's understanding that long-term contracting is necessary to implement the statutory mechanisms put into place by the General Assembly.

In 2008, many of the Working Group participants arrived at what they believed was a fair and workable solution to the long-vexing problem of long-term contracts. Although not all members of the Working Group agreed to the compromise reached, there was strong agreement among three key segments of stakeholders: the utility, private renewable-energy developers, and environmental organizations. Those Working Group stakeholders reduced their compromise solution to writing, and that writing eventually

became the core provisions of the LTC Statute, which passed the General Assembly almost unanimously, and was signed into law by the Governor on June 26, 2009.

This history is worth recounting because it provides crucially important context to the current Docket.

First, this history demonstrates that long-term contracts for renewable energy reflect the strong public policy of the State of Rhode Island as legislatively announced by the General Assembly. The public-policy purpose of the original (2004) RES is to promote renewable energy, and the public-policy purpose of the (2009) LTC Statute -- which grew out of the Working Group created by this Commission -- is to encourage and facilitate long-term contracts for renewable energy.

Second, the history demonstrates that long-term contracts for renewable energy reflect the long-standing policy of this Commission. "The Commission has stated repeatedly 'that long term contracts will be necessary for the success of the renewable energy supply.'" Commission Order No. 19602, at 7 (citing Order No. 19801 (issued October 17, 2007), p. 32; Order No. 19239 (issued March 7, 2008), p. 19; Order No. 19580 (issued February 25, 2009), p. 11)).

This Docket represents an historic first. After years of contested dockets; after years of Working Group meetings; after repeated rule-making procedures conducted by the Commission; this Docket represents the first time the Commission has ever been asked to rule on an actual, signed PPA that reflects a long-term contract for a new renewable-energy resource for Rhode Island. This Docket can truly be said to be the culmination of years of

labor by many disparate parties -- the General Assembly, the Governor, this Commission, environmental organizations, renewable-energy developers, the utility, and others. After literally years of dispute, we have turned an important corner. Today, the PUC is not debating long-term contracts for renewable energy as a theoretical, abstract, or metaphysical matter; today, the PUC is considering a signed PPA.

III. The Legal Standard Governing This Docket

The only issue before the PUC in this Docket is a determination of whether or not the PPA is commercially reasonable. Commercial reasonableness is a defined term in the LTC Statute. “‘Commercially reasonable’ means terms and pricing that are reasonably consistent with what an experienced power market analyst would expect to see in transactions involving newly developed renewable energy resources.” R. I. Gen. Laws § 39-26.1-2(1) (emphasis supplied). Thus, this PPA is not to be compared with contracts for electricity derived from fossil-fuel sources. The definition of commercial reasonableness put into the LTC Statute by the General Assembly is an acknowledgement that, for the present, electricity from renewable sources is more expensive than electricity from fossil fuels, but that the other benefits from newly developed renewable energy make it worth the additional cost.

IV. The PPA Is Commercially Reasonable

The record evidence in this case is that the PPA is commercially reasonable. December 9, 2009 Pre-Filed Testimony of William M. Moore, at p. 18, lines 13-14 (testifying that the terms and conditions of the PPA are commercially reasonable);

December 9, 2009 Prefiled Direct Testimony of David P. Nickerson, at p. 49, line 16 to p. 50, line 14 (testifying that the PPA is commercially reasonable as that term is defined in the LTC Statute); Grid's January 5, 2010 Response to Division Data Request 2-1 ("If the Commission applies the 'commercial reasonableness' standard to this power purchase agreement to determine whether it should be approved, National Grid believes it is commercially reasonable . . ."); March 10 Transcript (testimony of Nickerson) p. 234 lines 6 - 8 ("[M]y view is that the pricing and terms of this agreement are commercially reasonable.").

There is no evidence in the record that the PPA is not commercially reasonable.

Further, there is no party to this Docket urging rejection of the PPA. December 9, 2009 Pre-Filed Direct Testimony of Madison N. Milhous, Jr., at 5, line 19 ("National Grid supports Commission approval of the PPA . . ."); December 9, 2009 Pre-Filed Testimony of Moore, at 2, lines 10-13 ("We are asking the PUC to approve a power purchase agreement we have negotiated with [Grid] for the Block Island Wind Farm."); January 19, 2010 Direct Testimony of Sabitoni, at p. 5, line 8 ("The [Rhode Island Building and Construction Trades Council] urges the expeditious review and approval of the PPA."); January 19, 2010 Pre-Filed Direct Testimony of Richard LaCapra at p. 3, line 5 ("The Town [of New Shoreham] does not object to Commission approval of the PPA.").

Credible testimony that is uncontradicted, unchallenged, and unimpeached, should be accepted by the Commission. Beaupre v. Dynachem Corp., 324 A.2d 621, 623 (R.I. 1974) (collecting cases).

In considering the commercial reasonableness of the PPA, the Commission must be guided by the controlling statute, here the LTC Statute. The LTC Statute makes clear that several factors other than just price must be factored in to the determination of commercial reasonableness. R.I. Gen. Laws §39-26.1-1. These factors include environmental benefits, long-term price stability, and job creation.

First and foremost among environmental benefits, the Commission should consider the fact that wind-generated electricity emits no greenhouse gasses. When avoided carbon dioxide emissions are valued at \$80 per ton, the value widely regarded by climate scientists as necessary for achieving the reduction in carbon emissions necessary to halt catastrophic climate change,² this value accounts for approximately one third of the price differential between the market value of the products delivered under the PPA and the contract price. Deepwater's March 8, 2010 Response to CLF's Fourth Data Request (Question 25); Deepwater's March 10, 2010 Supplemental Response to CLF's Fifth Data Request (Questions 26, 27, 28). For example, in 2013, projected to be the first full year of operation of the Project, the market value of the products delivered under the PPA is 12¢ per KWh, and the effective PPA rate is 24.4¢ KWh, yielding a differential of 12.4¢ per

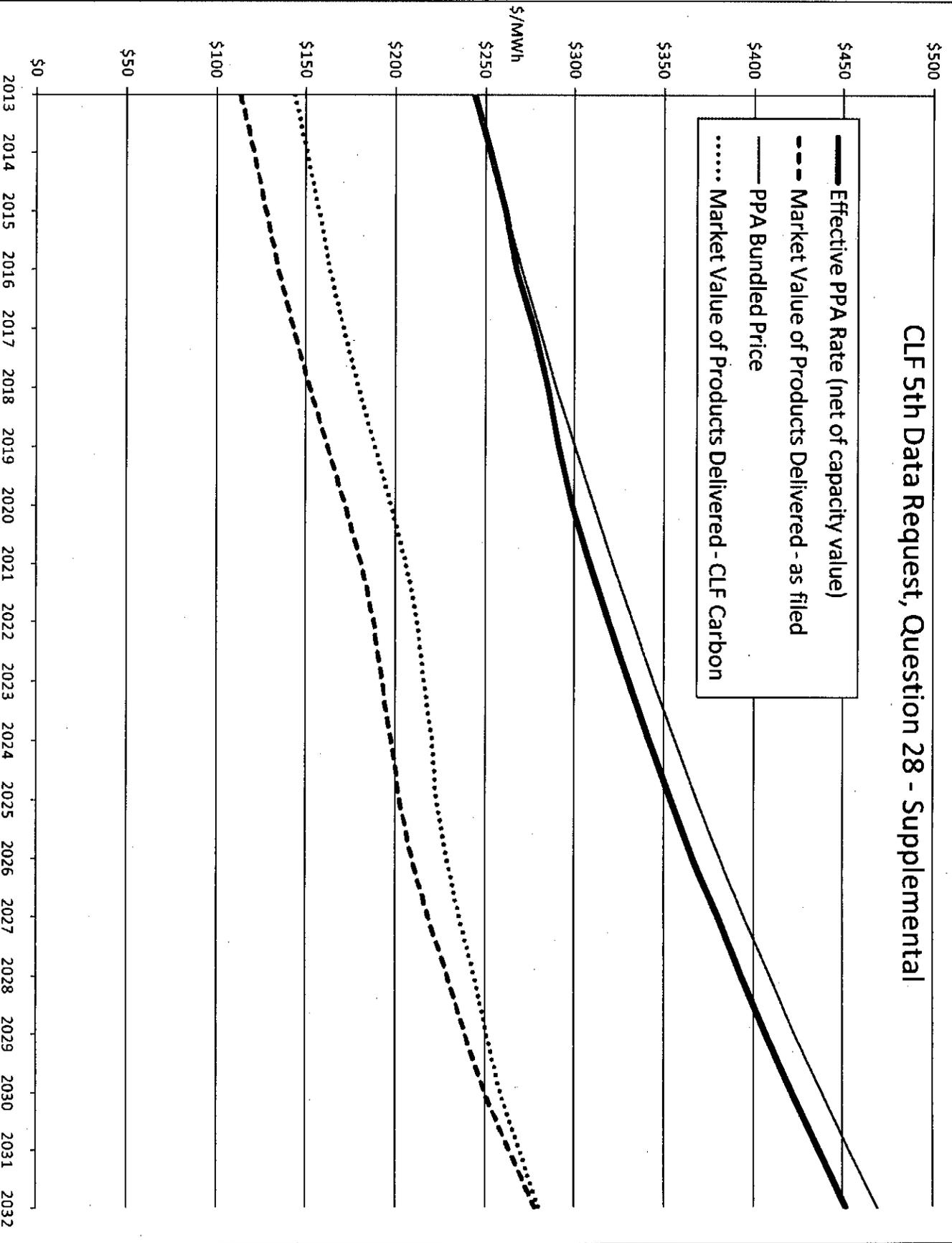
² See, e.g., Stern Review Report on the Economics of Climate Change, available at: http://webarchive.nationalarchives.gov.uk/+http://www.hm-treasury.gov.uk/independent_reviews/stern_review_economics_climate_change/stern_review_report.cfm The PUC can take administrative notice of this fact. PUC Rule of Practice and Procedure 1.22(c).

KWh. Of this 24.4¢-differential, the value of carbon (at \$80 per ton) is 3.8¢ per KWh, or fully 30.64% of the difference.³

These facts are clearly illustrated on the line-graph chart Deepwater produced as its Supplemental Response to CLF's Data Request 28, served by Deepwater on March 10, 2010, which chart is reproduced on the following page. See also Deepwater's March 8, 2010 Response to CLF's Fourth Data Request; Deepwater's March 8, 2010 Response to CLF's Fifth Data Request.

³ At \$80 per ton, the value of avoided carbon dioxide emissions is \$38.56 per MWh, or 3.856¢ per KWh (because $\$80/\text{ton} \div 2000 \text{ lbs./ton} \times 964 \text{ lbs./MWh} = \$38.56/\text{MWh}$) where 964 lbs./MWh is the 2008 New England marginal CO₂ emission rate. See Deepwater's March 8, 2010 Response to CLF's Data Request 25.

CLF 5th Data Request, Question 28 - Supplemental



CLF joins Grid in urging the Commission to approve the PPA as a down payment on longer-term solutions to addressing the problem of climate change. See, e.g., March 9, 2010 Hearing Transcript at p. 64 lines 1 - 3 (“Grid supports approval of this agreement as a first step in making offshore wind a part of the environmental solution to climate change.”) CLF recognizes, as we must, that the Project at issue in this Docket is but a first step in addressing climate change. As the 2007 report of the Intergovernmental Panel on Climate Change (IPCC) makes clear, climate change is a global problem of unprecedented dimensions.⁴

Additional environmental benefits are obtained because wind projects, unlike fossil-fuel generation, do not emit nitrogen oxides (NOx) or sulfur oxides (SOx). NOx are an ozone precursor, and avoided NOx emissions may be an especially important benefit from the Project because the evidence in the Record is that there is high correlation between offshore wind generation and periods of peak demand on the hottest days. March 10 Transcript (testimony of Nickerson), at p. 224 line 24 to p. 225 line 17.

Other parties to this Docket have testified about the environmental benefits of the Project and have cited those benefits as a reason for the PUC to approve the PPA. December 9, 2009 Pre-Filed Testimony of Milhous, at p. 6, lines 1-5 (“If the State of Rhode Island desires to meet climate change objectives through the development of offshore wind, this small demonstration project is a reasonable place to start. This policy

⁴ See http://www.ipcc.ch/publications_and_data/ar4/syr/en/contents.html
CLF put the 2007 IPCC Report into evidence in Docket # 4065, and the Commission can take administrative notice of it in this Docket.

goal underlies Section 39-26.1-7 [the LTC Statute] of Rhode Island law . . .”); December 9, 2009 Pre-Filed Testimony of Moore, at p. 12, lines 19-21 ([I]n terms of environmental quality . . . the Block Island Wind Farm will be a zero-emission renewable energy facility, and will enhance local air quality by displacing fossil fuel power.”); See, especially, December 9, 2009 Pre-Filed Testimony of Nickerson, at p. 8 (citing avoided emissions of NO_x, SO_x, and CO₂ both per annum and over the 20-year life of the PPA as a result of the Project).

No party to this proceeding has challenged or disputed that there will be substantial environmental benefits from the Project.

As the LTC Statute makes clear, the Commission must consider these environmental factors in determining the commercial reasonableness of the PPA.

The LTC Statute also directs the Commission to consider the benefits of price predictability in determining the commercial reasonableness of the PPA. Under the PPA, the exact price of the electricity is known for every minute of the 20-year life of the contract. In contrast, the Commission is well aware of price volatility of fossil fuels and of electricity produced by fossil-fuel combustion. In 2008 when the LTC Statute was first introduced into the General Assembly, oil was valued at \$150 per barrel. In 2009 when the LTC Statute was signed into law, oil had dropped to \$45 per barrel. In 2010 when the hearing in this Docket commenced, oil was trading at around \$80 per gallon. It was, in part, just this type of volatility that the General Assembly sought to mitigate by enacting

the LTC Statute -- and by directing the PUC to consider price predictability in ruling on commercial reasonableness.

The uniform testimony in this case shows widespread understanding and appreciation of the benefits of price predictability that the PPA will bring. October 29, 2009 Letter of Governor Carcieri to Public Utilities Commission, appearing as Exhibit B to the January 19, 2010 Pre-Filed Testimony of Fred S. Hashway, p. 3 (“The State believes that such contracts can serve as a hedge against the volatile prices of fossil fuels, and therefore provide more stability to our residential, industrial, and commercial ratepayers.”); December 9, 2009 Pre-Filed Testimony of Moore, at 12 (“[T]he PPA establishes fixed prices for the next twenty (20) years. The PPA power price is not subject to the volatility of fuels used by conventional sources of electricity, such as natural gas or diesel fuel[,] and therefore contributes to price stability.”); January 19, 2010 Pre-Filed Testimony of Fred Hashway, at p. 9, lines 16-17 (the Project “offers potential for long term price stability . . .”); March 10 Transcript (testimony of Nickerson), at p. 215 line 10 to p. 217 line 3 (PPA is “a natural hedge against the underlying volatile nature of market power”).

One other factor must be mentioned in considering the benefits of price predictability: the difference (in terms of price predictability) between the unsigned PPA filed by Grid with the PUC on October 15, 2009, and the signed PPA at issue in this Docket. The October 15 unsigned PPA did not provide for predictable prices for the entire 20-year life of the contract. Instead, the risk of certain cost overruns by the developer were to be borne by ratepayers. Such a pricing structure would have undermined one of the

public-policy purposes of the LTC Statute as determined and announced by the General Assembly: assuring price predictability. In contrast, the signed PPA at issue in this Docket does provide price predictability and certainty for the 20-year life of the contract. That is because 100% of the risk of all cost overruns, regardless of the cause or the source, are to be borne by Deepwater; none of the risk is borne by ratepayers. In this way, an important public-policy objective of the LTC Statute is achieved by this PPA. See, generally, March 9 Transcript (testimony of Moore) at p. 19 line 5 to p. 21 line 19 (contrasting the absolute price certainty provided for in the current PPA with Deepwater's original proposal for open-book pricing).

A related issue concerns risk allocation. Risk under the current PPA is disproportionately allocated to the developer -- and not to ratepayers -- by the relative steepness of the annual escalation clause. All multi-year contracts that provide for a set rate of price escalation each year (as the PPA does) also have a "levelized equivalent price," the single figure equal to the net present value of the entire contract, accounting for both the annual escalation provision and discounting to present value the future stream of income. March 10 Transcript (testimony of Moore), at p. 71 lines 2 - 23. Contracts can achieve the identical levelized equivalent price by starting at a lower initial price and escalating more steeply or by starting at a higher initial price and escalating less steeply. But although the levelized equivalent prices in these two (or multiple) scenarios may be identical, the overall situations are not identical. The higher the annual escalation percentage (that is, the lower the starting price) the greater the share is of risk that is

allocated to the developer; conversely, the lower the annual escalation percentage (for the same levelized equivalent price) the greater the share is of risk that is allocated to the ratepayer.⁵ Id., at p. 72 line 9 to p. 73 line 9. The PPA at issue in this Docket has a relatively high annual escalation provision. This has the effect of allocating relatively more risk to the developer, and relatively less risk to ratepayers. See, generally, id., p. 71 line 2 to p. 74 line 9.

Finally, in assessing the commercial reasonableness of the PPA, the LTC Statute requires the PUC to consider the benefits of local job creation. The evidence in this Docket is unchallenged and undisputed that the Project will create scores of well-paying jobs in Rhode Island. December 31, 2009 Deepwater Response to Division's Data Request 1-1. This is why there is such strong support for the PPA from parties to this Docket as diverse as Governor Carcieri (October 29, 2009 Letter of Governor Carcieri to Public Utilities Commission, appearing as Exhibit B to the January 19, 2010 Pre-Filed Testimony of Fred S. Hashway) and organized labor. January 19, 2010 Pre-Filed Testimony of Michael F. Sabatoni on Behalf of Rhode Island Construction and Building Trades Council.

⁵ This stands to reason. With a low starting price but relatively high escalator, consider what happens if a project gets built but fails 10 years in to a 20-year contract. Ratepayers will have gotten the full benefit of rates below the levelized equivalent price for the full 10 years that the project produced electricity; at the same time, the developer will have been deprived of making any return on his investment, because the developer's stream of income will have been so drastically back-end loaded. The steeper the annual escalator (for the same levelized equivalent price), the more risk there is allocated to the developer and the less risk there is allocated to the ratepayer.

V. What is NOT At Issue in This Docket

Despite the fact that this Docket presents the narrow issue of commercial reasonableness, there has been in this case -- in comments from the public and in cross-examination during the hearing -- considerable discussion about questions and issues that have no legal relevance to the proceeding and, consequently, can have no bearing on the outcome.

For example, on the first day of the hearing, there was considerable discussion by several lawyers about the 2.75% “financial remuneration and incentive” that the LTC Statute provides for Grid. R. I. Gen. Laws § 39-26.1-4. March 9 Transcript, p. 166 line 16 to p. 168 line 17; p. 199 line 15 to p. 201 line 3; p. 219 line 17 to p. 221 line 18. But the provision of this incentive to Grid is a matter of public policy that has been decided by the General Assembly. As a matter of public policy, the incentive may have been an excellent idea, or it may have been a terrible idea.⁶ But that public-policy question is not before the Commission in this Docket.

Likewise, several commenters objected to the approval of the PPA because of environmental, aesthetic, or viewshed concerns related to the Project. See, e.g., March 9, 2010 Comment of Benjamin C. Riggs, Jr., at p. 3 (“the beauty of [Rhode Island’s] bays and oceans will be harmed . . .”); January 19, 2010 Comment of Michael Delia, at p. 2 (“the proposed Block Island wind farm will change [the island’s] character, viewsheds,

⁶ CLF supported the incentive in the General Assembly.

ecology”). CLF knows that environmental, aesthetic, and viewshed concerns are important. Moreover such concerns -- including aesthetic ones -- are going to be addressed in the environmental permitting of the Project. See, e.g., Friends of Tims Ford v. Tennessee Valley Assoc., 585 F.3d 955, 968 (6th Cir. 2009) (claims of aesthetic and recreational concerns are cognizable under NEPA). But such issues are not before the PUC in this Docket. This Docket addresses the commercial reasonableness of the PPA only, not viewshed or aesthetic concerns related to the Project.

Commenters have even expressed unhappiness with the existence of the LTC Statute that gives rise to this Docket: “The June 2009 was flawed in its formulation and flawed in its passage because of serious and significant deficiencies and omissions as well as the absence of public process and public notification that is especially warranted on such a complex project.” March 7, 2010 Comment of Rosemarie Ives, at p. 3 (emphasis in original). Of course, it is too late to argue that the LTC Statute represents bad public policy; and, in any event, such objections are properly addressed to the General Assembly (which makes laws about renewable energy), not to the PUC (which is charged with carrying those laws out).

None of these issues are before the Commission in this Docket.

The only issue presented in this Docket is whether the PPA is commercially reasonable.

VI. Conclusion

WHEREFORE, for the foregoing reasons, CLF respectfully urges the PUC to approve the PPA between Deepwater and Grid at issue in this Docket. In particular, CLF urges the PUC to factor in the environmental benefits of renewable energy as a key basis for its approval, as required by the controlling LTC Statute.

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by its Attorney,



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CERTIFICATE OF SERVICE

I hereby certify that, pursuant to PUC Rules of Practice and Procedure, an original and nine copies of the within Memorandum were hand-delivered to the PUC Clerk, Public Utilities Commission, 99 Jefferson Blvd., Warwick, RI 02888. In addition, electronic copies were transmitted to all of the persons on the PUC's Service List for this Docket, transmitted by PUC Staff Attorney Cynthia Wilson-Frias on March 12, 2010. I hereby certify that all of the foregoing was done on the 23th day of March 2010.