State of Rhode Island and Providence Plantations

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Patrick C. Lynch, Attorney General

March 23, 2010

VIA HAND DELIVERY & ELECTRONIC MAIL

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

Re: Docket 4111 – Review of Proposed Town of New Shoreham Project
Pursuant to RI General Laws § 39-26.1-7
Post-Hearing Memorandum

Dear Ms. Massaro:

Enclosed please find ten (10) copies of the Division of Public Utilities and Carriers Post-Hearing Memorandum in the above-captioned proceeding.

Thank you for your attention to this transmittal. If you have any questions, please feel free to contact me.

Very truly yours,

Jon G. Hagopian
Special Assistant Attorney General

JGH

Enclosure
cc:Docket 4111 Service List

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS
BEFORE THE PUBLIC UTILITIES COMMISSION

IN RE:	**REVIEW OF PROPOSED TOWN OF NEW SHOREHAM PROJECT PURSUANT TO R.I.G.L. § 39-26.1-7**	)))	**DOCKET NO. 4111**

DIVISION OF PUBLIC UTILITIES AND CARRIERS' POST-HEARING MEMORANDUM

I. INTRODUCTION

On December 9, 2009, Deepwater Wind Block Island, LLC ("Deepwater") and The Narragansett Electric Company, d/b/a National Grid ("National Grid") filed a duly executed Power Purchase Agreement ("PPA") with the Commission. The PPA identifies the terms and conditions (among others) pursuant to which Deepwater will sell and National Grid will purchase power generated by eight wind turbines to be constructed by Deepwater off the coast of the Town of New Shoreham, Rhode Island (referred to hereinafter as the "New Shoreham Project"). After a four-month review in which the parties to the proceeding exchanged numerous rounds of discovery, and the Public Utilities Commission ("Commission") itself propounded extensive discovery, the Commission conducted four days of hearings from March 9, 2010 through March 12, 2010.

In this memorandum, the Division primarily discusses the legal framework and certain key facts contained in the Record that the Division believes will govern the Commission's review of the PPA. The Division then provides a brief summary of its principal conclusions.

The Division wishes to point out that in its opening remarks on the first day of hearing it clearly stated to the Commission that it had retained the services of Richard Hahn, an experienced power market analyst who would proffer testimony as to price and non-price terms of the PPA in aid of the Commission's review of this matter. See, March 9, 2010 Hearing, Tr. p. 64. The pre-filed direct testimony, pre-filed surrebuttal testimony, numerous exhibits and testimony of Mr. Hahn was clearly cogent, detailed and of a substantial nature. It is therefore now the Commission's duty to make the final determination of the instant PPA.

II. APPLICABLE LAW

Turning to the applicable law, G.L. § 39-26.1-7 entitled "Town of New Shoreham Project" requires "the electric distribution company to solicit proposals for one newly developed renewable energy resources project of ten (10) megawatts or less that includes a proposal to enhance the electric reliability and environmental quality of the Town of New Shoreham." Negotiations leading to the consummation of a contract "shall proceed in good faith to achieve a commercially reasonable contract," conditioned upon approval by the Commission. Upon consummation of the contract, the contract is to be filed with the Commission for the agency's approval. The Commission then must issue an order "approving or disapproving" the contract within the time-period specified in the statute.

G.L. § 39-26.1-2(1) defines the term "commercially reasonable" as, "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" (emphasis added). The term "commercially reasonable" includes "having a credible project operation date, as determined by the commission, but a project need not

have completed the requisite permitting process to be considered commercially reasonable. If there is a dispute about whether any terms or pricing are commercially reasonable, then "the commission shall make the final determination after evidentiary hearings."

G.L. § 39-26.1-2(6), in pertinent part, provides that the term "[n]ewly developed renewable energy resources" means "electrical generation units that use exclusively an eligible renewable energy resource, and that have neither begun operation, nor have the developers of the units implemented investment or lending agreements necessary to finance the construction of the unit; provided, however, that any projects using eligible renewable energy resources and located within the state of Rhode Island which obtain project financing on or after January 1, 2009, shall qualify as newly developed renewable energy resources for purposes of the first solicitation under this chapter" (emphasis added).

Section 39-26.1-2(4), in pertinent part, provides that an eligible renewable energy resource "means resources as defined in § 39-26-5 and any references therein." Section 39-26-5(a), in turn, provides that "an eligible renewable energy resource" is generation units in the NEPOOL control area using:

(1) Direct solar radiation;

(2) The wind;

(3) Movement or the latent heat of the ocean;

(4) The heat of the earth;

(5) Small hydro facilities;

(6) Biomass facilities using eligible biomass fuels[1] and maintaining compliance with current air permits; eligible biomass fuels may be co-fired with fossil fuels, provided that only the renewable energy fraction of production from multi-fuel facilities shall be considered eligible;

(7) Fuel cells using the renewable resources referenced above in this section;

(8) Waste-to-energy combustion of any sort or manner shall in no instance be considered eligible except for fuels identified in § 39-26-2(6) (emphasis added).[2]

The Rhode Island Supreme Court has held in construing a statute that the Court's "ultimate goal" is to give effect to the General Assembly's intent. State v. Menard, 888 A.2d 57, 60 (R.I. 2005). The best evidence of the Legislature's intent "can be found in the plain language used in the statute." Martone v. Johnston School Committee, 824 A.2d 426, 431 (R.I. 2003). A statute's language must be given its "plain and ordinary meaning[ ];" Accent Store Design, Inc. v. Marathon House, Inc., 674 A.2d 1223, 1226

[1] "Eligible biomass fuel" means "fuel sources including brush, stumps, lumber ends and trimmings, wood pallets, bark, wood chips, shavings, slash and other clean wood that is not mixed with other solid wastes; agricultural waste, food and vegetative material; energy crops; landfill methane; biogas; or neat bio-diesel and other neat liquid fuels that are derived from such fuel sources."

[2] G.L. § 39-26-5(b) & (c) proceed to provide, in pertinent part, as follows: "(b) A generation unit located in an adjacent control area outside of the NEPOOL may qualify as an eligible renewable energy resource, but the associated generation attributes shall be applied to the renewable energy standard only to the extent that the energy produced by the generation unit is actually delivered into NEPOOL for consumption by New England customers. The delivery of such energy from the generation unit into NEPOOL must be generated by:

(1) A unit-specific bilateral contract for the sale and delivery of such energy into NEPOOL; and

(2) Confirmation from ISO-New England that the renewable energy was actually settled in the NEPOOL system; and

(3) Confirmation through the North American Reliability Council tagging system that the import of the energy into NEPOOL actually occurred; or

(4) Any such other requirements as the commission deems appropriate.

(c) NE-GIS certificates associated with energy production from off-grid generation and customer-sited generation facilities certified by the commission as eligible renewable energy resources may also be used to demonstrate compliance, provided that the facilities are physically located in Rhode Island."

(R.I. 1996), however, under no circumstance will the Court construe a statute to produce a meaningless or absurd result. Tidewater Realty, LLC v. State of Rhode Island, 942 A.2d 986, 992 (R.I. 2008).

III. DISCUSSION

The plain language of G.L. § 39-26.1-7 expressly contemplates the contracting parties' "good faith" efforts to consummate a "commercially reasonable" contract. The plain language of § 7 also directs the Commission to review the filed contract, and issue an order "approving or disapproving" the contract. Pursuant § 39-26.1-2(1), the General Assembly vested the Commission with the authority to make the "final determination" after evidentiary hearings "about whether any terms or pricing are commercially reasonable." Since § 2(1) expressly applies to Ch. 26.1 as a whole (including § 7), it follows that the General Assembly vested the Commission with the authority under § 7 to determine whether or not the filed contract is "commercially reasonable." This authority includes the lesser-included powers to approve contracts on such terms and conditions as are within the discretion of the Commission, or, to approve contracts expressly found not to be "commercially reasonable" upon such terms and conditions as will render them "commercially reasonable." See Southern Pac. Co. v. Olympian Dredging Co., 260 U.S. 205, 208 (1922) ("The power to approve implies the power to disapprove and power to disapprove necessarily includes the lesser power to condition an approval"); Leach v. State Fire Marshal, 278 Mass. 159, 166 (1932) (the same); Eljen Corp. v. Washington State Dept. of Health, 2003 WL 21500747 *3 (Wash. App. Ct. 2003) (the same). See also Frye Regional Medical Center, Inc. v. Hunt, 510 S.E.2d 159, 164 (N.C. 1999) (power to approve includes the power to amend); Bd. Of Public Education and

Orphanage for Bibb County v. Zimmerman, 203 S.E.2d 178, 183 (Ga. 1974) (power to approve includes the power to approve any part thereof less than the whole).

Reading the term "newly developed renewable energy resources" contained in §§ 39-26.1-2(1) & 6 literally requires the Commission to assess the commercial reasonableness of the New Shoreham Project by comparing it to benchmark projects which: (i) have not begun operation, and (ii) which do not have investment or lending agreements in place necessary to finance the construction of the units. None of the witnesses in this proceeding, however, have been able to identify any projects that satisfy these criteria. See e.g., Nickerson Rebuttal at 2-3 (it is only reasonable and appropriate to compare the New Shoreham Project to projects that "provide newly developed renewable energy to Rhode Island along with associated electric reliability and environmental enhancements to the Town of New Shoreham, and within the 30 MW maximum project size as required by statute" even though "there are no readily available alternatives other than offshore wind projects to achieve this objective'); Hamal Direct, Exhibits 3 & 4 (comparing the New Shoreham Project to offshore wind and renewables projects currently operating and financed outside of the NEPOOL control area); Hahn Direct at 20-21 (recognizing that the Bluewater project, which has not commenced construction is outside the NEPOOL control area). The record, then, overwhelmingly reflects that a comparison of the PPA price to the prices of benchmark projects fitting squarely within the statutory criteria is not possible.

Even where a project can be identified that falls within the literal definition of "commercially reasonable" (*e.g.*, the Cape Wind Project), by the nature of the extraordinarily narrow scope of the criteria contained in §§ 39-26.1-2(6) & (4), pricing information for the identified project is not available. See National Grid Response to

Division Request 3-1 (where National Grid objects to providing the Division with confidential information which is the subject of pending negotiations between an affiliate of National Grid and Cape Wind); Hahn Direct at 22 ("data on such projects are hard to come by, as most are confidential and not available to the public"). In effect, then, §§ 39-26.1-2(1), (4) & (6) require the Commission to adjudge the "commercial reasonableness" of the New Shoreham Project without reference to any credible benchmarks at all. Such a result is absurd, and renders the duty vested in the Commission by § 39-26.1-7—to determine whether the PPA is commercially reasonable—futile and meaningless.

The Rhode Island Supreme Court has held that in the event that the plain and ordinary meaning of a statute produces a meaningless or absurd result, it is "...not only the right but the duty..." of the Court to construe the statute so that "the purpose of the act may be effectively carried out." Kaya v. Partington, 681 A.2d 256, 262 (R.I. 1996). See also Town of North Kingstown v. North Kingstown Teachers Assoc., 297 A.2d 342, 346 (R.I. 1972) (Joslin, J.); Capobianco v. United Wire & Supply Corp., 77 A.2d 534, 538 (R.I. 1950). Adherence to the Court's directive in this regard then requires the Commission to assess whether the PPA price is "commercially reasonable" based on some credible method of analysis. The Division has recommended two methodologies by which the Commission can review the PPA price in order to fulfill this statutory obligation: (i) compare the PPA price to credible, available pricing of renewable energy projects of the type designated in § 39-26.1-2(4) and § 39-26.1-5(a), and/or (ii) compare the internal rate of return ("IRR") achieved at the PPA price to those which an

"experienced power market analyst" would expect from of other comparable renewable energy projects. E.g., Hahn Direct at 22-26; Hahn Surrebuttal at 11-14.

Mr. Hahn's Direct and Surrebuttal Testimony, as well as his testimony at hearing, details his recommendations, conclusions and supporting rationale based on this framework. The Division will not repeat the entirety of his analysis here; all of Mr. Hahn's recommendations and conclusions are restated and incorporated in this memorandum by reference. Nonetheless, based on that testimony, the Commission should factor into its decision-making process the following governing principles:

- The PPA price is at the "high end of the range of expected prices for other comparable renewable energy projects." Only projects that utilize solar photovoltaic technologies" have higher prices than the New Shoreham Project;
- The IRR of the New Shoreham Project is higher than would be expected for other comparable renewable energy projects;
- The PPA contains other non- price terms (*e.g.*, PPA, Para. 14.2) that should be amended; and
- In all events, the Division concurs with National Grid that the PPA should not set a precedent for future contracts, and the Commission must affirmatively reflect such a determination in its final decision.[3]

[3] National Grid's witness, Mr. Milhous, stated in his testimony, "It is National Grid's view, however, that the terms and pricing in this PPA by no means represent what an experienced power market analyst would expect to see in transactions involving newly developed renewable projects generally, where the complexities associated with a small-scale demonstration such as this are not present." (Nat. Grid Exh 8, Milhous Direct, P. 7, L. 8-12)

- "If you just look at price in isolation, I want to stress the word in isolation, the price that's in the Deepwater PPA is high relative to other projects, it's at the high end of the range as shown here. It's not the highest, but it's much closer to the high than the low."[4] (Hahn Testimony, Hearing March 12, 2010, Tr. at P.48 L. 6-12).

  "If you take out solar, then it is the highest. So again, if that's all you're looking at, it would appear to be a high price. But there's the promise of or potential for other economic benefits to the state that I think should be considered as well and I say so in my testimony. And to the extent that, you know, the state policy makers determined that those economic benefits are worth the price, then you may conclude that the contract is commercially reasonable. If you don't think those economic benefits are worth the price, then you may conclude that it's not." So I don't think you can just look at the price in isolation. I think you need to...look at the whole picture." (Hahn Testimony, Hearing March 12, 2010, Tr. At P.48 L. 14-24 to P.9 L. 5.)

IV. CONCLUSION

Subject to the legal framework detailed herein, as well as the aforementioned governing principles and other qualifications, all of which are more particularly detailed in the various testimonies of Mr. Hahn, the Commission could conclude that the PPA reflects a "commercially reasonable" contract, as that term appears in Title 39, Ch 26.1, §§ (2)(1), (4) & 7 of the Rhode Island General Laws if that determination is not based upon price alone, but based also on other economic benefits[5] that may accrue to the State,

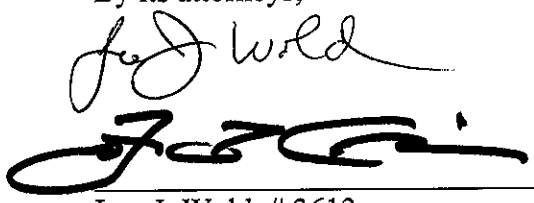
[4] The Division would point out that even Mr. Moore stated, "..we're very conscious of the fact that it's a very high-priced PPA.....(A)nd I think it's important really to emphasize at the outset that the only reason to do the Block Island project, the only reason for the Commission to approve this PPA is as a stepping stone to the larger project as a means of getting this industry kick started in Rhode Island and I think it's really important for us to, in so doing, focus on the end game which is to build larger projects." (Transcript 3/11/10, pages 7-8).

[5] The Division takes note of the potential negative economic impacts resulting from bill increases on existing business customers, as testified to by Mr. Farley on behalf of TEC-RI in his public comments of 3/9/10, as an issue for the Commission's consideration as well.

as indicated in the testimony proffered by the EDC, and the public comments of the Governor and the legislative leadership in this Docket.[6]

Respectfully submitted,

Division of Public Utilities and Carriers
By its attorneys,



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[6] See 10/29/09 letter of Governor Carcieri, public testimony of the Governor on 3/9/10, and the 3/10/10 letter to the Commission from Senate President Paiva-Weed and House Speaker Fox.

National Grid – Review of Proposed Town of New Shoreham Project
Docket No. 4111 - Service List Updated 3/17/2010

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CERTIFICATION OF SERVICE

I hereby certify that on the 23rd day of March 2010, that I transmitted an electronic copy of the within Post-Hearing Memorandum to the attached service list and to Luly Massaro, Commission Clerk via electronic mail and regular mail.

Dorothy MacRae