RHODE ISLAND PUBLIC UTILITIES COMMISSION

IN RE: REVIEW OF AMENDED POWER PURCHASE AGREEMENT BETWEEN NARRAGANSETT ELECTRIC COMPANY D/B/A NATIONAL GRID AND DEEPWATER WIND BLOCK ISLAND, LLC PURSUANT TO R.I. GEN. LAWS § 39-26.1-7	:	DOCKET NO. 4185

MEMORANDUM OF ATTORNEY GENERAL PATRICK C. LYNCH WITH RESPECT TO MOTION TO DISMISS OF TRANSCANADA

This Memorandum, which addresses the ability of *quasi*-judicial tribunals to entertain constitutional issues, is pertinent insofar as TransCanada's motion concerns constitutional issues. *See* TransCanada Brief (addressing Dormant Commerce Clause as well as incorporating AG's and CLF's objections). The closely related issue of the Attorney General's standing to bring constitutional attacks is included.

I. *QUASI*-JUDICIAL TRIBUNALS HAVE AUTHORITY TO DETERMINE THE CONSTITUTIONALITY OF STATUTES, SUBJECT TO LIMITATIONS.

A. Deepwater and Grid's brief mischaracterizes Rhode Island law.

Grid and Deepwater's Brief (in opposition to TransCanada) cites three Rhode Island cases to help it prove its (incorrect) assertion that "agencies lack jurisdiction to decide the constitutionality of the statutes they administer." Deepwater and Grid Brief in Opposition to TransCanada at 7, 8 (*citing* Payne & Butler v. Providence Gas, 77 A. 145, 153 (R.I. 1910); Peoples Liquor Warehouse v. Dep't of Bus. Regul'n, 2007 WL 1654395 (R.I. Super. May 21, 2007) (trial order) (Clifton, J.); Advisory Opinion to the Governor, 732 A.2d 55 (R.I. 1999)). However, Grid and Deepwater misread Rhode Island law.

The first case, Payne & Butler v. Providence Gas, 77 A. 145, 153 (R.I. 1910), decided a century ago before the rise of the modern regulatory state, cannot be taken literally. If it were, even the Superior Court could not entertain constitutional questions.

The second case – the unpublished Peoples opinion – is inapposite because the cited proposition is *dictum*, it is indirect, it relates to a different type of forum, and it is based on a gross misinterpretation of Rhode Island Supreme Court precedent. In Peoples, the Superior Court, in the course of making a ruling in an administrative appeal, noted in passing that "[t]he [DBR] Hearing Officer declined to rule on the Appellants' constitutional claims [that a liquor store-naming statute was a violation of the First Amendment and the Commerce Clause], because she recognized than an administrative agency of the executive branch of government cannot determine the constitutionality of a statute at issue." Peoples at *5. The opinion then contains a reference to Easton's Point Assoc. v. Coastal Resources Mgmt. Council, 522 A.2d 199 (R.I. 1987), which, apparently, the hearing officer had cited in an attempt to prove this proposition. Whether the citation to Easton's Point emanated for the reviewing court or from the hearing officer (the opinion is unclear on this), this citation grossly mischaracterizes Easton's Point.

In Easton's Point, the issue was one of election of remedies. A party seeking agency approval could not challenge that same agency's composition upon receiving a denial. Thus, Easton's Point is distinguishable on two grounds. First, it related to waiver. Given that the constitutional challenge in Easton's Point was brought by one estopped from doing so (one who had made an election of remedies), Easton's Point is a narrow ruling on standing. Second, moreover, it related to the *composition* of the

relevant board – in that instance, the Coastal Resources Management Council (CRMC). In other words, it did not relate to the rules-of-decision that the CRMC was to apply.

The Easton's Point Court's holding was narrowly tailored: the court held that the parties, having sought a permit at an agency, lacked the standing to "attack the validity of the statute that has created the agency." Id. at 201. Since the Attorney General does not seek an approval, and, moreover, does not seek to question the constitutionality of the legislation that created the PUC itself, Easton's Point is inapposite.

Grid and Deepwater's third and final Rhode Island citation is to Advisory Opinion to the Governor, 732 A.2d 55 (R.I. 1999). At the outset, Advisory Opinion did not involve the ruling by a state agency as to a challenge to the validity of a statute. Indeed, the case did not arise in an adjudicatory context at all. Advisory Opinion involved the question of the authority of the Ethics Commission to *regulate* the legislature in a manner that prohibited certain actions. (The Ethics Commission had taken it upon itself to enforce the separation-of-powers clause of the Constitution).

Grid and Deepwater quote the Court as follows: "it has been our long-standing and consistent opinion that questions concerning the governmental structure of this state are constitutional issues that may be determined only by the judiciary." Advisory Opinion, 732 A.2d at 69. The Court was referring to the inability of the Ethics Commission, an administrative agency that was *not* acting in a *quasi*-judicial capacity, to prohibit, by *regulation*, the legislature from taking certain actions. In the Court's estimation, separation-of-powers issues that touched upon "governmental structure" – that is, issues that involved one branch specifically prohibiting a separate branch from taking enumerated actions – were issues that only the "judiciary" could decide. The

Court left "judiciary" undefined. The Court was speaking in contra-distinction from the legislative functions that the Ethics Commission was attempting to exercise in that instance. There was certainly no express displacement of the authority of *quasi*-judicial tribunals such as the PUC.

The constitutional issues presented to the PUC are different in two crucial respects. *First*, the separation-of-powers at issue in this proceeding is analytically distinct from the sort of separation-of-powers issue in Advisory Opinion. Were the PUC to adjudicate this separation-of-powers issue, it would not prohibit another branch of government from taking an action, as the Ethics Commission did in Advisory Opinion. *Second,* in this proceeding, constitutional issues arise in the context of a *quasi*-adjudicatory function.

B. Deepwater And Grid's Brief Mischaracterizes Federal Law On This Issue.

In their earlier submission, Grid and Deepwater quoted from Thunder Basin Coal Co. v. Reich, 510 U.S. 200 (1994), to illustrate their point. Grid and Deepwater Opposition to CLF and AG at 7. In the latest submission, however, they have beaten a hasty retreat from citation to that case. This is because, as pointed out by the undersigned at oral argument on the Stay, *the very next sentence* in Thunder Basin (omitted by Grid and Deepwater) is as follows: "This rule is not mandatory, however, and is perhaps of less consequence where, as here, the reviewing body is not the agency itself but an independent commission established exclusively to adjudicate Mine Act disputes." Id. at 215.

The fact that "[t]his rule is not mandatory" belies Grid's contention. Thunder Basin, 510 U.S. at 215; Grid and Deepwater Brief Grid and Deepwater Opposition to

CLF and AG at 7. Furthermore, since the PUC is an "impartial, independent body," R.I. Gen. Laws § 39-1-11, with exclusive jurisdiction over the PPA, *see* R.I. Gen. Laws § 39-26.1-7 (as amended), the PUC meets the Thunder Basin criteria.

C. Independent *Quasi*-Judicial Bodies With Clearly Circumscribed Delegations Of Legislative Power Have The Authority To Make Constitutional Adjudications When Judicial Review Is Available.

There is conflicting state-level authority as to whether *quasi*-judicial tribunals in administrative agencies can adjudicate constitutional issues. *Compare* Grid and Deepwater Brief in opposition to TransCanada at 8-9 (citing cases) *with* Nutbrown v. Mutt, 811 P.2d 131, 141 (Or. 1991) ("Although it is an authority to be exercised infrequently, and always with care, Oregon administrative agencies have the power to declare statutes and rules unconstitutional"). *See also* Prince George's County v. Ray's Used Cars, 922 A.2d 495, 506 (Md. 2007) ("administrative agencies are fully competent to resolve issues of constitutionality and the validity of statutes"); Desilets v. Clearview Regional Bd. of Educ., 647 A.2d 150, 155 (N.J. 1994) (same); Colonial Pipeline v. Morgan, 263 S.W.3d 827, 843 (Tenn. 2008) (agencies can adjudicate as-applied constitutional challenges to statutes, but not facial challenges); Alexander v. Town of Barton, 565 A.2d 1294, 1296 (Vt. 1989) (same); Com. *ex rel.* State Water Control Bd. v. Appalachian Power, 386 S.E.2d 633, 635-36 (Va.App. 1989) (acknowledging that agencies can consider constitutional issues); Questar Pipeline Co. v. Utah State Tax Com'n, 817 P.2d 316, 317-18 (same).

At the federal level there is likewise authority that independent *quasi*-judicial tribunals, with clearly-delineated power, have authority to decide constitutional issues. The first prerequisite in order to decide constitutional issues is that the *quasi*-judicial

tribunal must be independent and more judicial than administrative. As Thunder Basin mandates, it is of crucial importance that "the reviewing body is not the agency itself but an independent commission . . .." Thunder Basin, 510 U.S. at 215; *see also* Oestereich v. Selective Service System, 393 U.S. 233, 242 (1968) (no authority to hear constitutional claim when Board had part-time, uncompensated members, registrants were not represented by counsel, and proceedings were clearly "nonjudicial").

Second, the authority of the *quasi*-judicial tribunal must be clear and it must be delineated. For instance, in Riggin v. Office of Senate Fair Employment Practices, 61 F.3d 1563 (Fed. Cir. 1995), the key factor in determining whether an agency could adjudicate constitutional issues was "Congress's allocation of adjudicative responsibility." Id. at 1569. Similarly, in Thunder Basin, the commission was "established **exclusively** to adjudicate Mine Act disputes." Thunder Basin, 510 U.S. at 215 (emphasis added).

Third, the *quasi*-judicial tribunal's authority to make a constitutional determination is buttressed when the core, underlying issue is in fact statutory and within the *quasi*-judicial tribunal's expertise. As the Supreme Court wrote just this term:

> In Thunder Basin, the petitioner's primary claims were statutory; "at root . . . [they] ar[o]se under the Mine Act and f[e]ll squarely within the [agency's] expertise," given that the agency had "extensive experience" on the issue and had "recently addressed the precise . . . claims presented." Likewise, in United States v. Ruzicka, on which the Government relies, we reserved for the agency fact-bound inquiries that, even if "formulated in constitutional terms," rested ultimately on "factors that call for [an] understanding of the milk industry," to which the Court made no pretensions.

Free Enterprise Fund v. Public Accounting Oversight Bd., 2010 WL 2555191 (U.S. 2010) (citations omitted) (alterations in original).

Finally, it is crucial that judicial review be available. This is because the final say on constitutional issues must be reserved for Article III courts. *See* Singh v. Reno, 182 F.3d 504, 510 (7th Cir. 1999) (agencies may consider constitutional claims, but "the final say on constitutional matters rests with the courts").

In sum, under certain circumstances, *quasi*-judicial tribunals can consider constitutional issues. This is necessary because, as one state court noted, "[c]onstitutional issues arise not infrequently in administrative adjudication," and a *quasi*-judicial tribunal "cannot shut its eyes to constitutional issues that arise in the course of administrative proceedings it conducts." Communications Workers of America v. Gainesville, 697 So.2d 167, 169 (Fla.App. 1st. Dist. 1997).

This implication is buttressed by the General Assembly's allocation of adjudicative responsibility in this case: the commission has an express grant of "all additional, implied, and incidental power which may be proper or necessary effectuate" the rest of Title 39. *See* R.I. Gen. Laws. § 39-1-38.

D. Even Deepwater and Grid Admit That The Doctrine Of Constitutional Avoidance Provides An Applicable Rule Of Construction.

In any event, regardless of the ability to rule in favor of constitutional challenges, a certain fact remains true. As even Grid and Deepwater appear to concede (at oral argument on the stay motion), in Rhode Island, as in federal courts, there is an obligation to construe statutes so as to avoid implicating constitutional issues. *See* Irons v. Rhode Island Ethics Com'n, 973 A.2d 1124, 1135 (R.I. 2009) (*citing* Ashwander v. TVA, 297

U.S. 288, 346-47 (1936) (Brandeis, J., concurring)). In construing laws, a tribunal should avoid an interpretation that results in the statute being a special law.

The PUC has been asked to construe R.I. Gen. Laws § 39-26.1-7 (as amended). Since the PUC is an "independent commission", *see* R.I. Gen. Laws § 39-1-11 (PUC is an "impartial, independent body"), and since the PUC has exclusive jurisdiction over this issue, *see* R.I. Gen. Laws § 39-26.1-7, the PUC certainly enjoys authority to make an interpretation that would save the constitutionality of § 39-26.1-7. Such an interpretation would be that it the statute is open to Deepwater's potential competitors, but that *res judicata* applies to Deepwater itself.

II. CONTRARY TO THE ASSERTION BY GRID AND DEEPWATER, THE ATTORNEY GENERAL HAS STANDING TO ATTACK THE CONSTITUTIONALITY OF A STATUTE.

Since TransCanada has incorporated the Attorney General's papers directed at the constitutionality of the statute ("TransCanada supports [CLF's and AG's] Motions, and concurs . . .;" *see* TransCanada Brief at 1), the ensuing discussion is germane. This is needed because the submissions of Grid and Deepwater essentially seek to strike the Attorney General's submission.

In doing so, Grid and Deepwater cite only a single decision, which is from a mid-western state. Their earlier Brief declares (ungrammatically) that "neither statutory nor constitutional nor common law empowered [*sic*] the Attorney General 'to attack the constitutionality' of the state statute at issue." Grid and Deepwater Opposition to CLF and AG at 2 n.4 (*quoting* State v. City of Oak Creek, 605 N.W.2d 526, 528 (Wis. 2000)).

A. The Attorney General Possesses Both Statutory and Common Law Powers.

The Rhode Island Constitution reflects that the Attorney General possesses both statutory and common-law authority: *See* R.I. Const., Art. IX, sec. 12. Thus, Suitor v. Nugent, 199 A.2d 722 (R.I. 1964), states, "The office of Attorney General is an ancient one. It came into being as a necessary adjunct in the administration of the common law of England and was transported to America in the early days of the establishment of government in the colonies as part of their English derived common law. . . . [Consequently,] the attorney general may exercise validly such powers as were possessed by the occupant of that office at the time of the adoption of the constitution." Id. at 723 (*quoting* Commonwealth *ex rel.* Minerd v. Margiotti, 325 Pa. 17, 21, 188 A. 524 (1936)).

These common law powers "were not abridged by constitutional provision," Suitor, 98 R.I. at 58, 199 A.2d at 722, since the Rhode Island Constitution "did not purport to create such an office but recognized it as existing and provided for continuance of the powers and duties exercised by its occupant prior to the adoption of the constitution." Id. Importantly, these powers are impervious to legislative interference, since the General Assembly may not "infringe [ ] upon the fundamental powers of the Attorney General." *In Re* House of Representatives, 575 A.2d 176, 180 (R.I. 1990). *See* State Attorneys General, Powers & Responsibilities, Lynne M. Ross, 1990.

B. The Attorney General Represents the Public and Defends Its Rights.

In this state it is well-settled that "[s]uits for the public should be placed in public and responsible hands." McCarthy v. McAloon, 79 R.I. 55, 62, 83 A.2d 75, 78 (1951) (*quoting* O'Brien v. Aldermen, 18 R.I. 113, 116, 25 A. 914, 915 (1892)). The public

officer vested with that authority is the Attorney General. Id.; *see also* Newport Realty v. Lynch, 878 A.2d 1021, 1032 (R.I. 2005) ("the Attorney General is vested with the authority to maintain suits seeking redress of a public wrong'") (*quoting* McCarthy 79 R.I. at 62, 83 A.2d at 78); Stearns v. Newport Hosp., 27 R.I. 309, 316, 62 A. 132, 135 (1905) ("maintaining the rights of the public is . . . exercised here, as in England, by the attorney-general.") (*quoting* Burbank v. Burbank, 152 Mass. 254, 25 N.E. 427 (1890)).

C. The Attorney General has the Common Law Power to Question the Constitutionality of a Statute.

Part of these common law powers is the right to question the constitutionality of a statute, when that statute affects the rights of the public. For instance, the Colorado Supreme Court reached this conclusion *via* a two-step process. First, the Colorado court noted that the Colorado Attorney General was "here in the interests of the people to promote the public welfare . . .." People *ex rel.* Salazar v. Davidson, 79 P.3d 1221, 1230 (Col. 2003) (*quoting* State Railroad Com'n v. People *ex rel.* Denver & R.G.R., 98 P. 7, 11 (Col. 1908)). Second, the court explicitly rejected the contention that the Attorney General could not bring suit because it was not part of his statutory grant of power, stating that it was within his common law powers, and that it was "irrelevant that no statute authorizes the Attorney General to file his petition," since the legislature was prohibited from limiting the Attorney General's powers. Davidson, 79 P.3d at 1230. *Accord* Commonwealth *ex rel.* Hancock v. Paxton, 516 S.W.2d 865, 867 (Ky. 1974) (in the course of holding that the Attorney General could question the constitutionality of a state law, court rejected the notion that his duties were limited to representing the government).

The situation in Rhode Island is analogous. The Attorney General (a) is charged with protecting the public welfare, (b) possesses common law powers, and (c) the legislature is prohibited from limiting these powers. Consequently, it follows that in Rhode Island, as in Colorado, the Attorney General has the common law power to question the constitutionality of a statute on behalf of the public. It is therefore unsurprising that courts in Rhode Island permit the Attorney General to question the constitutionality of a statute. *See, e.g.*, FUD's, Inc. v. State, 727 A.2d 692 (R.I. 1999) (silently allowing the Attorney General to question the constitutionality of lack of mutuality of jury trial right in anti-discrimination complaints); Kennedy v. State, 654 A.2d 708 (R.I. 1995) (allowing the Attorney General to question the constitutionality of special law exempting a plaintiff from cap); National Revenue Corp. v. Violet, 807 F.2d 285, 288 (1st Cir. 1986) (stating that, although Attorney General could not declare statute unconstitutional in consent decree with challenging litigant, he could ask the court for a ruling that a statute was unconstitutional after "inform[ing] the court that, in his opinion, a statute is flawed.").

RESPECTFULLY SUBMITTED
INTERVENOR,

PATRICK C. LYNCH
ATTORNEY GENERAL

By his Attorney,

Mike Rubin, Esquire (#3656)
RI Department of Attorney General
150 South Main Street
Providence, RI 02903-2907

Tel: (401) 274-4400, x 2116
Fax: (401) 222-3016
MRUBIN@RIAG.RI.GOV

CERTIFICATE OF SERVICE

I hereby certify that on the 23 day of July, 2010, that I transmitted an electronic copy of the within document to the service list and to Luly Massaro, Commission Clerk via electronic mail.