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July 30, 2010

Via electronic mail and hand delivery

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

Re: In re Review of Proposed Town of New Shoreham Project Pursuant to R.I. Gen. Laws § 39-26.1-7 – Docket No. 4185

Dear Ms. Massaro:

Enclosed for filing on behalf of The Narragansett Electric Company d/b/a National Grid and Deepwater Wind Bock Island, LLC is an original and twelve copies of Response to Attorney General Patrick C. Lynch's Memorandum With Respect to Motion to Dismiss of TransCanada.

Very truly yours,

Gerald J. Petros

Enclosures

cc: Docket No. 4185 Service List (electronically only)

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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. 4185**

RESPONSE OF NATIONAL GRID AND DEEPWATER WIND BLOCK ISLAND, LLC TO ATTORNEY GENERAL PATRICK C. LYNCH'S MEMORANDUM WITH RESPECT TO MOTION TO DISMISS OF TRANSCANADA

The Narragansett Electric Company d/b/a National Grid ("National Grid") and Deepwater Wind Block Island, LLC ("Deepwater Wind") (collectively, "Applicants") hereby file this memorandum in response to the Memorandum of Attorney General Patrick C. Lynch ("Attorney General") With Respect to Motion to Dismiss of TransCanada. Contrary to the Attorney General's contentions, the Commission may not constitutionally invalidate the statutes that it administers and the Attorney General lacks authority to attack the constitutionality of a state statute.

I. The Commission does not have jurisdiction to invalidate the Amended LTC.

A. The Rhode Island case law supports the Applicants' position that the Commission lacks jurisdiction to invalidate the Amended LTC.

The Attorney General alleges that Applicants "mischaracterize" Rhode Island case law. A.G. Memo. at 1. In fact, Rhode Island case law firmly demonstrates that the Commission lacks jurisdiction to strike down the Amended LTC.

The Attorney General quickly dismisses *Payne & Butler v. Providence Gas*, 77 A. 145, 153 (R.I. 1910), the most important Rhode Island case, in which the Supreme Court explained that:

> There is only one body that is authorized to interpret the statutes of this State with the view of determining their constitutionality. Under article XII of the amendments to the constitution of the State, adopted in November, 1903, section 1: "The supreme court shall have final revisory and appellate jurisdiction upon all questions of law and equity." Furthermore, a statute is constitutional or not, as the case may be, without reference to the interpretation of any board or boards of commissioners. *It is deemed to be constitutional until this court shall have decided that it is not.*

Id. (emphasis added);

The Attorney General discounts the case for two reasons. Importantly, neither reason has any persuasive force. First, the Attorney General points out that the case was "decided a century ago." A.G. Memo. at 2. But the vintage of the case makes no difference. *Payne* is published authority from the highest court in the land that has never been overruled or even reconsidered. As such, it represents valid Rhode Island law.

Second, the Attorney General argues that the Commission should disregard *Payne* as incoherent because, "taken literally," "even the Superior Court could not entertain constitutional challenges" under the Court's expressed view. A.G. Memo. at 2. Put another way, the Court did not mean what it said or, worse yet, like an embarrassing uncle, should be politely ignored.

The Attorney General overlooks, or misunderstands, Rhode Island legal history. In fact, prior to 1940, when the General Assembly extended such jurisdiction by statute (P. L. 1940, chap. 941), "the superior court lacked jurisdiction to pass on the constitutionality of an act of the legislature." *State v. Lemme*, 104 R.I. 416, 421 (1968) (citing *Allen v. State Bd. of Veterinarians*, 72 R.I. 372, 377 (R.I. 1947)); *see also* R.I. Const. art. X, sec. 2 ("The inferior courts shall have such jurisdiction as may, from time to time, be prescribed by law."). Therefore, *Payne* was correct in stating that, at that time, only the Supreme Court could decide the constitutionality of state statutes. Though the General Assembly has subsequently extended that authority to the

judges of the Superior Courts, *see id.*, it has not extended it to the Commission. Thus, a complete and current statement of Rhode Island law on this topic is that Rhode Island's courts – the Supreme Court and the Superior Court, as well as perhaps the District Courts[1] – are the only bodies "authorized to interpret the statutes of this State with the view of determining their constitutionality." *Payne*, 77 A. at 153. The Commission, which is not authorized to do so, must "deem" the Amended LTC constitutional "until" the judiciary rules otherwise. *Id.*

The Attorney General also challenges the relevance of *Advisory Opinion to the Governor*, 732 A.2d 55 (R.I. 1999). That case, if anything, supports a broader rule than one prohibiting state agencies from invalidating state statutes. *Advisory Opinion* states that whenever "questions concerning the governmental structure of this state" are involved, "only . . . the judiciary" may determine them. *Id.* at 69. This suggests that, at least where "governmental structure" is concerned, even constitutional issues that do not implicate the validity of state statutes should go only to the judiciary. This is significant because, in this case, both of the Attorney General's constitutional claims involve "questions concerning the governmental structure of the state." That the Attorney General's separation of powers argument plainly relates to the proper allocation of governmental responsibility and, thus, the structure of state government is beyond contest. Furthermore, the Attorney General's "good-of-the-whole" challenge also relates to governmental structure. Assuming that the Attorney General's claim has merit, it raises the

[1] The Supreme Court has interpreted the General Assembly's statutes delegating tax disputes to the exclusive jurisdiction of the District Courts as having vested those courts with jurisdiction to determine the constitutional validity of the state's tax statutes. *See Owner-Operators Independent Drivers Ass'n v. State*, 541 A.2d 69, 74 (R.I. 1988). In addition, the District Courts' more general authority to assess the constitutionality of state statutes seems to be implicit in R.I. Gen. Laws § 9-24-27 (the current codification of what was once P. L. 1940, chap. 941), which requires both the Superior Courts and the District Courts to certify to the Supreme Court for its review only *highly important* constitutional challenges to the validity of state statutes. This certification requirement is also significant because it puts a point on how, even when granting such authority to the courts, the General Assembly has taken care in limiting its distribution of the power of judicial review.

structural question of whether the legislature may pass "special laws" that address the case or situation of particular individuals or companies, or whether such case-by-case lawmaking is reserved solely for the judiciary.[2] TransCanada's Commerce Clause challenge also implicates issues of state governmental structure because it pertains to the alleged limits of state legislative power in the context of our federal system. In any event, the *Advisory Opinion* is supportive of the Supreme Court's opinion in *Payne* which requires the Commission to "deem" the Amended LTC constitutionally valid until a court holds otherwise.

Finally, the Attorney General also attacks *Peoples* as inapposite *dictum*, but the point is that the opinion reinforces the other Rhode Island case law precluding administrative agencies from addressing challenges to the constitutionality of state statutes. In acknowledging, favorably, that the DBR Hearing Officer "declined to rule on the Appellants' constitutional claims, because she recognized that an administrative agency of the executive branch of government cannot determine the constitutionality of a statute at issue," the Superior Court reflected, accurately, Rhode Island law as articulated in *Payne*. *Peoples Liquor Warehouse v. Dep't of Bus. Regulation*, 2007 R.I. Super. LEXIS 78, *5 (R.I. Super. May 21, 2007).

B. The great weight of case law from other jurisdictions supports the Rhode Island rule that administrative agencies may not constitutionally invalidate statutes.

In the face of this adverse Rhode Island law, the Attorney General relies on very limited dissenting authority from a small minority of jurisdictions (discussed *infra,* n. 4), but the fact remains that "the great majority of state courts have held that administrative agencies have no power to determine the constitutional validity of statutes." *Westover v. Barton Elect. Dep't*, 543

[2] Historically, legislatures in America's early colonies adjudicated individual cases and engaged, as a matter of course, in case-by-case lawmaking. Hence, the residual judicial terminology applied to the legislative branch of neighboring Massachusetts, a "General Court" currently in its 186th session. *See* http://www.mass.gov/legis/.

A.2d 698, 699 (Vt. 1988) (collecting cases); *see* Opp. of [Applicants] to Intervenor [TransCanada's] Mot. to Dismiss, at 8-9 (collecting cases).

Moreover, the case law directly contradicts the Attorney General's proposed rule that quasi-judicial agencies should be treated any differently. As detailed in the Applicants' memoranda in response to TransCanada's motion to dismiss, at 9-11, courts have applied the restriction on the jurisdiction of administrative agencies specifically to quasi-judicial entities including utility commissions. *See, e.g., State ex rel. Utilities Comm'n v. Carolina Utilities Customers Ass'n*, 446 S.E.2d 332, 342 (N.C. 1994) ("As an administrative agency created by the legislature, the Commission has not been given jurisdiction to determine the constitutionality of legislative enactments."). Thus, there is no merit to the Attorney General's contention that the Commission's alleged "quasi-judicial" character as a utilities regulator entitles it to review the General Assembly's enactments.

Furthermore, the Attorney General mischaracterizes the Supreme Court's opinion in *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 215 (1994) and the state case law referencing that opinion. In *Thunder Basin*, the Supreme Court reaffirmed its commitment to the principle that "'adjudication of the constitutionality of congressional enactments has generally been thought beyond the jurisdiction of administrative agencies.'" *Id.* (quoting *Johnson v. Robison*, 415 U.S. 361, 368 (1974)). The Attorney General, however, latches onto and misapplies the next sentence in the Supreme Court's opinion, where the Court stated that "[t]his 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.*

First of all, the *Thunder Basin dicta* does not even apply by its own terms. The Court was referencing solely the situation where a party raises a constitutional challenge that does not implicate the authority of the "agency itself." *Id.* The Attorney General and TransCanada, in contrast, ask the "reviewing body," the "agency itself," to invalidate its own statutory charge and disregard the General Assembly's instructions. *Id.* Secondly, contrary to the Attorney General's characterization, *Thunder Basin* did not endorse the propriety of agencies ruling on the constitutionality of statutes, and it did not, as the Attorney General would have it, establish any "criteria," A.G. Memo. at 5, for determining when an agency may do so. In the sentence the Attorney General quotes, the Court merely mused in *dicta* that the rule was "perhaps" of "less consequence" in certain other contexts. Thus, as a Florida court subsequently explained: "[T]he *Thunder Basin* decision *was not based upon the authority of the administrative agency to decide constitutional issues*. Rather, the Court's ruling was based upon the fact that the United States Court of Appeals could provide judicial review of the constitutional claims." *Communications Workers, Local 3170 v. City of Gainesville*, 697 So.2d 167, 173-74 (Fla. 1st D.C.A. 1997) (emphasis added).[3]

Notably, the Attorney General mischaracterizes *Communication Workers*, the very case that explained so clearly the limited character of *Thunder Basin*'s holding. Specifically, the Attorney General claims that *Communications Workers* supports the Attorney General's rule that "under certain circumstances, *quasi*-judicial tribunals can consider constitutional issues,"

[3] The Mine Act, the statute which the Supreme Court addressed in *Thunder Basin*, provided that all claims were to be decided by the Commission with review by the court of appeals and that the federal district court had no jurisdiction. The Court found that the Mine Act did not violate the due process clause in eliminating a federal district court venue for constitutional claims because the petitioner's "statutory and constitutional claims" could "*be meaningfully addressed in the court of appeals.*" *Thunder Basin*, 510 U.S. at 215. Thus, the Supreme Court did not hold that the Commission could invalidate the statute on constitutional grounds and did nothing to disrupt the general rule, to which the Supreme Court established no exception, that "adjudication of the constitutionality of congressional enactments" is "beyond the jurisdiction of administrative agencies." *Id.*

including the issue of the constitutionality of a statute. A.G. Memo. at 7. In fact, *Communications Workers* held that the Public Employee Relations Commission, a body which exercised "quasi-judicial power," *lacked* authority to invalidate legislative enactments, even though it was authorized to address other constitutional issues that arose in cases properly before it. *Communications Workers,* 697 So.2d at 170. In other words, *Communications Workers* followed the Rhode Island rule, applying it to a quasi-judicial entity. This further establishes that the Commission may not review or invalidate the Amended LTC.[4]

C. The Commission does not even meet the Attorney General's manufactured criteria for testing when an administrative agency may constitutionally invalidate a statute.

After misinterpreting Rhode Island law and mischaracterizing case law from other jurisdictions, the Attorney General attempts to cobble together a set of "criteria" that, he argues, should allow the Commission to strike down the General Assembly's statute. As indicated above, the great weight of the case law has rejected the Attorney General's position that agencies, including quasi-judicial agencies, have any special authority to invalidate statutes. The Commission also cannot meet the other criteria that the Attorney General proposes.

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[4] Against this authority and the authority of the "great majority" of states, *Westover*, 543 A.2d at 699, the Attorney General most prominently cites an Oregon case that could not be more qualified in its adoption of the unpopular rule the Attorney General promotes. *See* A.G. Memo. at 5 (citing *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.")). The Attorney General also cites a Vermont case, but that case reaffirmed the Vermont Supreme Court's holding of just a year earlier that "administrative agencies have no power to determine the constitutional validity of statutes." *Alexander v. Town of Barton*, 565 A.2d 1294, 1296 (Vt. 1989) (citing *Westover v. Barton Elect. Dep't*, 543 A.2d 698, 699 (1988)). At the same time, *Alexander* held that a state board of appraisers had jurisdiction to address a constitutional challenge to the town's *implementation* of its listing procedure, under a statute that "*specifically require[d]*" the board, in reviewing such local actions, to "'take into account' the applicable provisions of the United States and Vermont constitutions." *Id.* (emphasis added). Here, there is no statute empowering, let alone specifically requiring, the Commission to "take into account" constitutional provisions. Equally important, the Attorney General and TransCanada raise facial challenges to the Amended LTC, seeking to halt its implementation based solely on the statutory language. Thus, neither *Alexander* nor any of the other "as applied" cases that the Attorney General cites provide any support for his position.

Relying in large part on the example of *Riggin v. Office of Senate Fair Employment Practices*, 61 F.3d 1563 (Fed. Cir. 1995), the Attorney General proposes, first, that the Commission's "clearly circumscribed" powers as reflected in the General Assembly's "'allocation of adjudicative responsibility'" support the Commission's authority to invalidate the Amended LTC. A.G. Memo. at 6. While *Riggin* did hold that a hearing officer could address the specific constitutional challenge raised in that case (whether a statute requiring early retirement for Capitol Hill police officers violated due process requirements), the case is most significant for the court's observation that this constitutional issue did "*not require the agency to question its own statutory authority or to disregard any instructions Congress has given it.*" *Id.* at 1570 (emphasis added). That is precisely what the Attorney General and TransCanada ask the Commission to do with respect to the Amended LTC: invalidate the statute, together with its clear grant of statutory authorization to the Commission to review the Amended PPA and its detailed instructions on how the review must proceed.

The General Assembly's "allocation of adjudicative responsibility," moreover, does not support Commission invalidation of the Amended LTC. Under Title 39, the Commission has limited adjudicative responsibility consistent with its role as a utilities and rates regulator. It has no adjudicative responsibility to review the constitutionality of Title 39 or any other Rhode Island statute. Tellingly, the Attorney General's only claimed statutory source for such authority is a residual implied powers provision, R.I. Gen. Laws § 39-1-38, which grants to the Commission "all additional, implied, and incidental power which may be proper or necessary to effectuate" Title 39. See A.G. Memo. at 7. But the power to *invalidate* a section of Title 39 is not incidental to the Commission's charge to *effectuate* Title 39 and, indeed, logically conflicts with that charge. The General Assembly "could not have intended" that the Commission would

have the authority to invalidate a portion of the statute that the General Assembly directed the Commission to administer. *See Westover,* 543 A.2d at 699 (Vt. 1988) (a legislature creates an administrative agency to effectuate its "statutory purposes," and, thus, "the legislature could not have intended" an administrative agency to "be able to question the very validity of [the legislature's] enactments"); *see also First Bank* v. *Conrad,* 350 N.W.2d 580, 584-585 (N.D. 1984) ("Basically, administrative agencies are creatures of legislative action. As such, legal logic compels the conclusion that the agencies have only such authority or power as is granted to them or necessarily implied from the grant.... To make the system of administrative agencies function the agencies must assume the law to be valid until judicial determination to the contrary has been made.").

The Attorney General also proposes that an administrative agency may, under certain circumstances, invalidate a statute that is within the agency's area of "expertise." Once more, the Attorney General exaggerates the case law, relying on the *Thunder Basin dicta* while also citing to *United States v. Ruzicka*, 329 U.S. 287 (1946). But *Ruzicka* did not even involve the issue of whether an administrative agency may constitutionally invalidate a statute. The issue, rather, was whether the administrative agency, in a situation requiring milk industry expertise, could address a challenge to an *administrative agency order* issued by the Secretary of Agriculture. *Id.* at 294. The Court answered in the affirmative, holding that the petitioner could not pursue a lawsuit challenging the administrative order without first challenging the order before the Department of Agriculture. In this proceeding, the Attorney General and TransCanada do not challenge the constitutionality of a prior Commission order. They challenge the validity of a duly enacted statute. This is not allowed.

The Attorney General's "expertise" argument also fails because the issues here do not implicate the Commission's technical expertise in utilities issues. Rather, they are complex issues of constitutional law, touching on fundamental questions regarding the structure of Rhode Island government and the nature of our federal system, in which only the Courts are expert. *C.f. Free. Enterprise Fund v. Pub. Co. Accounting Oversight Bd.*, 2010 U.S. LEXIS 5524, * 25 (U.S. June 28, 2010) (holding that administrative review procedure was not an exclusive remedy because, *inter alia*, petitioners' constitutional claims challenging Sarbanes-Oxley Act as violating separation of powers principles and appointment clause was "outside the [agency's] competence and expertise" and did not require "technical considerations of agency policy"). For this reason, too, the Commission may not adjudicate these issues.

II. The Rhode Island Attorney General does not have standing to attack the constitutionality of a Rhode Island law.

For reasons already provided, the Attorney General lacks standing to challenge the constitutionality of the Amended LTC. *See* Opp. of [Applicants] to the Mot.'s to Dismiss of Intervenor [CLF] and [the Attorney General], at 2, n.4. In response, the Attorney General turns to valid but irrelevant generalities and platitudes ("the Attorney General possess both statutory and common-law authority" and he "represents the public," A.G. Memo. at 8-9). But when the Attorney General collects the common law supporting his purported authority to challenge the Amended LTC, he relies primarily on Colorado case law, citing Rhode Island law only for instances where the Attorney General challenged state statutes but where his authority to do so was not in issue. This is insufficient to establish for the Attorney General a wide-ranging authority to attack state statutes.

Respectfully submitted,

THE NARRAGANSETT ELECTRIC COMPANY d/b/a NATIONAL GRID and DEEPWATER WIND BLOCK ISLAND, LLC

By their Attorneys,

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DATED: July 30, 2010

CERTIFICATION

I hereby certify that an original and twelve copies of the within were hand-delivered to the Commission Clerk, Public Utilities Commission, 99 Jefferson Boulevard, Warwick, Rhode Island 02888. In addition, electronic copies were transmitted by e-mail to all persons on the below service list. I hereby certify that all of the foregoing was done on July 30, 2010.

Cynthia Lomas

National Grid – Review of Proposed Town of New Shoreham Project
Docket No. 4185 – Service List Updated 7/22/10

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