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July 13, 2010

Luly E. Massaro, Commission Clerk
Rhode Island Public Utilities Commission
89 Jefferson Boulevard
Warwick, Rhode Island 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 is an original and 12 copies of the Opposition of National Grid and Deepwater Wind Block Island, LLC to Intervenor Conservation Law Foundation's Motion to Stay.

Very truly yours,

Gerald J. Petros

GJP:cl

Enclosure

cc: Service List (w/enclosure)

1063994v1 (57972/144485)

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**

OPPOSITION OF NATIONAL GRID AND DEEPWATER WIND BLOCK ISLAND, LLC TO INTERVENOR CONSERVATION LAW FOUNDATION'S MOTION TO STAY

National Grid[1] and Deepwater Wind Block Island, LLC (hereinafter "Applicants") file this Opposition to the Conservation Law Foundation's (CLF's) Motion for a Stay (hereinafter "Motion to Stay") pending resolution of its Motion to Dismiss.[2] The Commission should deny CLF's motion because the Commission lacks the authority to grant a stay in light of the General Assembly's statutorily imposed expedited schedule for these proceedings. Moreover, even if there was no statutory deadline to decide this case, the Commission would be required to deny CLF's motion because CLF fails to satisfy the standard of review otherwise applicable to motions to stay. CLF cannot show irreparable harm, or even good reason for the delay it seeks. In addition, it is unlikely to succeed on the merits because, among other reasons, the Commission lacks jurisdiction to decide the constitutional issues that form the basis for much of CLF's motion. Furthermore, the equities tip decidedly against CLF, and denying CLF's motion will not threaten the status quo.

For all of these reasons, the Commission should proceed in accordance with the statutorily mandated schedule and deny CLF's motion to delay.

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[1] The Narragansett Electric Company d/b/a National Grid.
[2] CLF styled its motion "Motion to Dismiss and Motion for a Stay." This memorandum responds to the "Motion for a Stay" component of that filing.

BACKGROUND

On April 2, 2010, in Docket No. 4111, the Commission declined to approve the Applicants' Power Purchase Agreement (PPA) regarding a renewable energy resources project including wind turbines off the coast of Block Island (the "Project"). The Commission did so based on its conclusion that the PPA was not "commercially reasonable" as that term was defined at that time in Rhode Island's Long-Term Contracting Statute ("LTC"), which governed the administrative review, and content of, the PPA at issue in Docket No. 4111.

On June 16, 2010, Governor Donald L. Carcieri signed into law amendments to the LTC (the "Amended LTC"). The Amended LTC significantly altered the "Original" LTC in numerous respects. (Attached hereto as Exhibit A is a copy of the black-lined Amended LTC reflecting the additions and amendments to the Original LTC.)

First and foremost, the Amended LTC redefines the "commercially reasonable" standard embedded in the Commission's review criteria for purposes of reviewing the PPA at issue in this docket. Commercially reasonable now means "terms and pricing that are reasonably consistent with what an experienced power market analyst would expect to see for a project of a similar size, technology and location, and meeting the policy goals in subsection (a) of this section." Id. § 39-26.1-7(c)(IV); 2010 R.I. Pub. Laws 32. In reviewing the Application in this docket the Commission will apply the amended "commercially reasonable" standard in the context of the specific characteristics of the proposed project.

Second, the Amended LTC now requires the Rhode Island Economic Development Corporation ("EDC") and the Rhode Island Department of Environmental Management ("DEM") to file advisory opinions on the findings of economic and environmental benefit, respectively. Id. § 39-26.1-7(c)(IV). The Commission is obligated to "give substantial

deference to the factual and policy conclusions set forth in the advisory opinions." Id. The Commission did not have the benefit of these advisory opinions in the earlier proceeding. In fact, in its decision the Commission commented on the need for more information regarding the economic benefits associated with the Project. The Commission will have that information in this proceeding in the form of an EDC formal advisory opinion on the economic benefits flowing from the project – both short-term and long-term. See R.I. Gen. Laws § 39-26.1-7(c). The Amended LTC also requires the Developer to fund EDC's efforts to obtain and present expert testimony on the terms and conditions of the Amended PPA. See R.I. Gen. Laws § 39-26.1-7(b).

Third, the Amended LTC also establishes a new standard of review. The Amended LTC now requires the Commission to review the Amended PPA while taking into account Rhode Island's policies of facilitating offshore windpower development and interconnecting Block Island to the mainland. R.I. Gen. Laws § 39-26.1-7(c). In addition, the Amended LTC requires the Commission to consider each of the following newly specified factors and to approve the Amended PPA if these conditions are satisfied:

(1) "The Amended Agreement contains terms and conditions that are commercially reasonable," (as redefined by the Amended LTC),

(2) "The Amended Agreement contains provisions that provide for a decrease in pricing if savings can be achieved in the actual cost of the project pursuant to subsection 39-26.1-7(e),"

(3) "The Amended Agreement is likely to provide economic development benefits, including: facilitating new and existing business expansion and the creation of new renewable energy jobs; the further development of Quonset Business Park; and, increasing the training and preparedness of the Rhode Island workforce to support renewable energy projects," and

(4) "The Amended Agreement is likely to provide environmental benefits, including the reduction of carbon emissions."

R.I. Gen. Laws § 39-26.1-7(c).

Fourth, the Amended LTC requires the Commission to ensure that there are new terms that cap the price of the produced energy and contemplate that any savings resulting from lower-than-expected project costs will be passed on to ratepayers. An independent third-party must verify the project costs, the expense of which the offshore wind developer must bear. R.I. Gen. Laws § 39-26.1-7(e).

Fifth, the Amended LTC expands the statement of policy, stating explicitly that

> it is in the public interest for the state to facilitate the construction of a small-scale offshore wind demonstration project off the coast of Block Island, including an undersea transmission cable that connects Block Island to the mainland in order to: position the state to take advantage of the economic development benefits of the emerging offshore wind industry; promote the development of renewable energy sources that increase the nation's energy independence from foreign sources of fossil fuels; reduce the adverse environmental and health impacts of traditional fossil fuel energy sources; and provide the Town of New Shoreham with an electrical connection to the mainland.

R.I. Gen. Laws § 39-26.1-7(a) (2010), 2010 R.I. Pub. Laws 32.

The final major difference, explored below (see infra, Part I), is the expedited timeframe for the Commission/EDC/DEM review process established by the Amended LTC.

In short, the Amended LTC dramatically alters the administrative review process by changing the relevant legal standard of review, establishing new criteria and priorities, and expanding the process structurally to enfold other departments with pertinent expertise that supplements the Commission's strengths.

ARGUMENT

I. The review schedule established under the Amended LTC precludes the delay requested by CLF.

The Amended LTC establishes a strictly cabined timeframe for Commission review of the Amended PPA. Upon filing of the Amended PPA with the Commission, parties may file testimony within fifteen (15) days; the EDC shall file a formal advisory opinion on the Project's

economic benefits, as well as expert testimony on the terms and conditions of the Amended PPA, within twenty (20) days[3]; the DEM shall file a formal advisory opinion on the Project's environmental benefits within twenty (20) days; and the Commission shall commence evidentiary hearings within thirty (30) days. See R.I. Gen. Laws § 39-26.1-7(b)-(c). In addition, the Commission must hold one public comment hearing within five (5) days after the EDC files its expert's testimony.[4] See id. After conclusion of the evidentiary hearings, the Commission must issue a written decision to accept or reject the Amended PPA, without conditions, no later than forty-five (45) days from the filing of the Amended PPA. See R.I. Gen. Laws § 39-26.1-7(d). No delays or extensions are allowed. See id. Should the Commission's decision be appealed, the statute instructs the Supreme Court to expedite the matter so that it is afforded precedence on the Court's calendar and heard and determined "with as little delay as possible." See id. Thus, the General Assembly and the Governor have determined that the Commission must proceed in accordance with the statutorily mandated time-frame in completing its review of the Application.

CLF's request for a stay is in effect a motion to amend the legislation and alter the statutorily mandated timeframe. The Commission is without authority to amend legislation. As a creature of statute, the Commission must comply with these statutory requirements. See Bristol County Water Co. v. PUC, 117 R.I. 89, 97, 363 A.2d 444, 449 (1976) ("The Public Utilities Commission is a creature of statute and, as such, it possesses only those powers, duties, responsibilities and jurisdiction conferred upon it by the General Assembly."). Therefore, the

[3] The Amended LTC requires the offshore wind developer to provide funding to the EDC to hire a qualified expert to provide testimony regarding the terms and conditions of the Amended PPA. See R.I. Gen. Laws § 39-26.1-7(b).
[4] Here, the Amended Agreement was filed on June 30, 2010, requiring that the parties submit testimony and the Commission commence evidentiary hearings before the end of July.

Commission must deny the stay requested by CLF because the Amended LTC requires the Commission to adhere to the statutorily mandated schedule.

CLF contends that the Commission should disregard the explicit 45-day time limit in the Amended LTC, characterizing it as "directory" rather than "mandatory." CLF is wrong. The time limit is mandatory, not directory, and the cases upon which CLF relies are readily distinguishable, as discussed below.

A. The Commission should deny CLF's motion for a stay because the Amended LTC imposes mandatory, not directory, timelines.

While the Rhode Island case law holds that "statutes imposing apparently mandatory time restrictions on public officials often are directory in nature," New England Dev., LLC v. Berg, 913 A.2d 363, 372 (R.I. 2007) (emphasis added), the critical judicial inquiry is determining the intent of the General Assembly: Did the General Assembly intend to impose mandatory time restrictions? Here, it is clear for several reasons that the General Assembly intended to impose mandatory time frames for each aspect of the Project.

First, it is absurd to suggest that the General Assembly did not "intend" to impose mandatory timeframes. First, and most obviously, the Amended LTC deals with a specific application in the context of a recent Commission decision and a revised standard of review. The legislation expressly identifies the critical need to move swiftly in the renewable energy area, and indeed "speed" is one of the legislation's objectives. The General Assembly laid down a specific schedule, not just for the decision but for each aspect of the process following the filing of the Application. Each aspect of that tightly framed schedule becomes meaningless under CLF's proposal to gut the legislation, and bedrock principles of statutory construction preclude such an interpretation. See In re Harrison, 992 A.2d 990, 994 (R.I. 2010) ("[N]o construction of a statute should be adopted that would demote any significant phrase or clause to

mere surplusage." (quoting State v. Clark, 974 A.2d 558, 572 (R.I. 2009))); Steihnof v. Murphy, 991 A.2d 1028, 1036 (R.I. 2010) ("'When interpreting a statute, our ultimate goal is to give effect to the General Assembly's intent." (quoting State v. Germane, 971 A.2d 555, 574 (R.I. 2009))); Raso v. Wall, 884 A.2d 391, 395 (2005) (Rhode Island courts "will not construe a statute to reach an absurd result."). And what possible purpose would the General Assembly have in directing the Supreme Court to expedite any appeal if it "intended" to permit the Commission to disregard the time frames established in the Amended LTC? For these reasons, CLF's suggestion that the General Assembly did not intend to impose mandatory timeframes begs credulity and ignores the obvious language and intent of the General Assembly expressed in the Amended LTC.

Second, it is well established that a statute's deadlines are mandatory if they are accompanied by "negative language" suggesting non-compliance will vitiate the agency's action, strip it of jurisdiction and/or require a particular outcome as a "sanction." See id. at 372 (explaining that in Washington Highway Dev. v. Bendick, 576 A.2d 115 (R.I. 1990), the Court held the statute was directory because it "contained no negative language in the event the director failed to act within the statutorily described period" and did not purport to strip the director of jurisdiction in the event of non-compliance); Providence Teachers Union v. McGovern, 113 R.I. 169, 178 (1974) ("Provisions . . . designed to secure order, system and dispatch are generally held directory unless accompanied by negative words."). In all of the cases upon which CLF relies there was no "negative language" or "negative words" suggesting that the General Assembly intended to limit the agency's jurisdiction to a particular timeframe. Rather, the relevant statutes simply referenced a deadline or timeframe without further comment

of any kind.[5] Here, in stark contrast, the General Assembly has not merely imposed a 45-day timeline on the Commission. It ordered that the Commission make its decision "without delay or extension of timeframes." R.I. Gen. Laws § 39-26.1-7(d) (emphasis added). The General Assembly further restricted the Commission's jurisdiction, while also promoting the efficiency of this expedited process, by prohibiting the Commission from imposing "conditions" on any rejection or approval issued within the 45-day window. See id. Further reflecting the General Assembly's intent that the Commission's jurisdiction would be limited to this timeframe – and that the Commission would proceed with all dispatch – the General Assembly also applied strict timelines on other governmental agencies, EDC and DEM, for the filing of their advisory opinions, R.I. Gen. Laws § 39-26.1-7(c)(iv), and required the judiciary to expedite any review it may undertake, R.I. Gen. Laws § 39-26.1-7(d). Unlike the statutes in the "directory" cases, therefore, the Amended LTC's statutory timeframes are part of "the essence of" this statute, clearly aimed at expedited review of a particular project, not merely "incidental" to a general "regulatory scheme." Bendick, 576 A.2d at 117.

Finally, this case is also distinguishable from the directory cases in another sense. In each of those cases, the party seeking to exploit the agency's violation of a timeline did so on a post facto basis, seeking to undo the agency's work, or obtain a particular outcome by default, after the agency had failed to comply with the statutory timelines. For example, in Bendick a highway department sought to secure a court order that the DEM must issue a wetlands permit "as a sole result of the failure of the director to render a decision within six weeks of a public

[5] See, e.g., Berg, 913 A.2d at 370 ("Planning Board shall, within one hundred and twenty (120) days of certification of completeness" approve, approve with changes, or deny approval of the master plan (citing R.I. Gen. Laws § 45-23-40(f)); Bendick, 576 A.2d at 115 ("director shall make his decision on the application and shall notify the applicant by registered mail . . . within a period of six (6) weeks" (citing R.I. Gen. Laws § 2-1-22(c)); Providence Teachers Union v. McGovern, 113 R.I. 169, 177 (1974) (collective bargaining agreement specified that "The arbitrators shall call a hearing to be held within ten (10) days after their appointment . . . ").

hearing." See, e.g., Bendick, 576 A.2d 115. In rejecting such arguments, these cases took proper account of the public interest in preventing parties from exploiting governmental delays to evade public oversight. Here, in contrast, the proceedings are just commencing. As a result, disregarding the statutory deadlines would delay agency review, not secure it.

B. Even if the Amended LTC's deadlines were directory, the Commission must comply with them.

The deadlines established by the Amended LTC clearly express the legislature's intent that these proceedings move quickly to conclusion, and the Commission, as a "creature of statute" with "only those powers, duties, responsibilities and jurisdiction conferred upon it by the General Assembly," Bristol, 117 R.I. at 97, must respect the legislature's express intent in this regard.

More to the point, in suggesting that the 45-day time limit is "no bar" to delaying this matter indefinitely, CLF mischaracterizes the legal meaning, and implications, of the term "directory." "Directory" does not mean "advisory" or "suggested," and a "directory" obligation is no mere "guideline" or "recommendation." Even so-called "directory" deadlines are "mandatory, in that a party could seek to compel" the governmental agency "to comply with the time provisions," even if the same statute is "not mandatory in the sense that failure to comply entirely voids the action taken."[6] Beauchesne v. David London & Co., 118 R.I. 651, 660-61 (R.I. 1977). Put another way, even if the legislature did not specify a jurisdictional restriction or some self-executing sanction for non-compliance in the relevant statute, the judiciary may order compliance with the statute's directory deadlines, and a state agency should adhere to such deadlines.

[6] The occasion for seeking a court order requiring compliance has rarely arisen because, as noted above, the distinction between directory and mandatory orders usually becomes relevant only after the fact, when a party seeks to exploit a lapsed deadline to private advantage.

II. The Commission also should deny CLF's motion for a stay because CLF fails to meet the elements required to obtain a stay.

The Commission should also deny CLF's motion because CLF has failed to meet its burden in establishing the elements required to support a stay.

A. Standard of Review

A party requesting a stay must satisfy the Commission that (1) the requesting party has a reasonable likelihood of success on the merits; (2) the requesting party will suffer irreparable harm if a stay is not granted; (3) the balance of equities, including the possible hardships to other parties and to the public interest, tip in the requesting party's favor; and (4) the stay is needed to preserve the status quo. See, e.g., In re Eastern Telephone, Inc., 2002 R.I. PUC LEXIS 17, *4 (June 21, 2002); see also In re Narragansett Electric Company and Southern Union Company, 2006 R.I. PUC LEXIS 25, *5 (Jun. 1, 2006) (citing Iggy's Doughboys, Inc. v. Giroux, 729 A.2d 701, 705 (R.I. 1999)).

B. CLF failed to establish irreparable harm.

Irreparable harm is a rare and carefully defined element under Rhode Island law. See, e.g., Nye v. Brousseau, 992 A.2d 1002, 1010 (R.I. 2010) (explaining that to establish "irreparable harm" a party seeking an injunction must show that the injury is "presently threatened or imminent" and one "for which no adequate legal remedy exists"). The burden is plainly on CLF to establish irreparable harm to support its motion. See, e.g., Narragansett Elec. Co. v. Harsch, 367 A.2d 195, 197 (R.I. 1976).

CLF fails to establish irreparable harm, or really any harm at all, if the Commission proceeds according to the mandated review schedule. In fact, CLF does not even allege irreparable harm. Allowing this matter to proceed will, at most, delay resolution of CLF's

motion to dismiss with no other identifiable "harm" to CLF. Delaying this matter will, on the other hand, irreparably injure the public interest as discussed below.

C. CLF will not succeed on the merits.

1. The Commission lacks jurisdiction to consider CLF's constitutional challenges to the Amended LTC.

As the moving party, CLF has the burden of establishing a probability of success on the merits. It fails to meet this element procedurally – the claims were filed and made in a venue that lacks jurisdiction over its arguments – and substantively, because its legal arguments do not establish a probability of success.

CLF dedicates much of its motion to constitutionally challenging the Amended LTC. The Commission's jurisdiction and authority are determined by its enabling legislation. That legislation does not authorize the Commission to determine the constitutionality of state statutes.[7]

Indeed, under Rhode Island law administrative agencies lack jurisdiction to decide the constitutionality of the statutes that they administer. See, e.g., Peoples Liquor Warehouse v. Dep't of Bus. Regulation, 2007 R.I. Super. LEXIS 78, *5 (R.I. Super. May 21, 2007) (observing that "[t]he 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."). Furthermore, with respect to the specific kinds of constitutional challenges that CLF brings, the Rhode Island Supreme Court has explained that "it has been our long-standing and consistent opinion that questions concerning

[7] In the zoning context, the enabling statute for the Commission does give the Commission some limited authority to review local ordinances and regulations. See R.I. Gen. Laws § 39-1-30 (respecting Commission review of certain "town" or "city" ordinances and regulations); East Greenwich v. O'Neil, 617 A.2d 104 (R.I. 2004). But there is no indication in the enabling statute or the case law that the Commission may review even local legislation for constitutionality.

the governmental structure of this state are constitutional issues that may be determined only by the judiciary." In re Advisory Opinion to the Governor, 732 A.2d 55, 69 (R.I. 1999) (citing G & D Taylor & Co. v. Place, 4 R.I. 324, 361 (1856)) (emphasis added).

In this respect, Rhode Island law is consistent with the overwhelming case law from other jurisdictions. It is black letter law that administrative agencies lack the authority to rule on the constitutionality of legislative enactments. See Thunder Basin Coal Co. v. Reich, 510 U.S. 200, 215 (1994) ("agree[ing]" that "adjudication of the constitutionality of congressional enactments has generally been thought beyond the jurisdiction of administrative agencies" (internal quotations and citations omitted)); Fullerton v. Adm'r, Unemployment Compensation Act, 280 Conn. 745, 759 (2006) ("[I]t is well established that claims regarding the constitutionality of legislative enactments are beyond the jurisdiction of administrative agencies."); Albe v. Louisiana Workers' Compensation Corp., 700 So.2d 824, 827 (La. 1997) (collecting "overwhelming" state and federal authority supporting the rule); States ex rel. Utilities Comm'n v. Carolina Utilities Customers Ass'n, 336 N.C. 657, 674 (1994) ("As an administrative agency created by the legislature, the Commission has not been given jurisdiction to determine the constitutionality of legislative enactments."); Lincoln v. Arkansas Pub. Serv. Comm'n, 854 S.W.2d 330, 332 (Ark. 1993) ("no administrative tribunal has authority to declare unconstitutional the act which it is called on to administer"); Arapahoe Roofing & Sheet Metal, Inc. v. Denver, 831 P.2d 451, 454 (Colo. 1992); Westover v. Barton Elec. Dep't, 543 A.2d 698, 699 (Vt. 1988); First Bank v. Conrad, 350 N.W.2d 580, 585 (N.D. 1984); Bare v. Gorton, 526 P.2d 379 (Wash. 1974) ("An administrative body does not have authority to determine the constitutionality of the law it administers; only courts have that power."); Metz v. Veterinary Examining Bd., 741 N.W.2d 244, 254 (Wisc. Ct. App. 2007); Montez v. J&B Radiator, Inc., 779

P.2d 129 (N.M. App. 1989); Duncan v. Missouri Bd. for Architects, Professional Engineers & Land Surveyors, 744 S.W.2d 524, 531 (Mo. Ct. App. 1988); Metropolitan Government v. State Bd. of Equalization, 1988 Tenn. App. LEXIS 409, **10-11 (Tenn. Ct. App. July 8, 1988).

This rule flows naturally from the fact that a legislature creates administrative agencies such as the Commission to effectuate its "statutory purposes," and, thus, "the legislature could not have intended" agencies to "be able to question the very validity of [the legislature's] enactments." Westover, 543 A.2d at 699; see Conrad, 350 N.W.2d at 584-585 ("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.").

Accordingly, CLF cannot prevail on its constitutional arguments.

2. CLF's constitutional arguments are without merit.

CLF's constitutional challenges also must fail because they lack substantive merit.

a. The Amended LTC does not violate Separation of Powers principles.

The Amended LTC does not implicate, let alone violate, Separation of Powers principles. As expressed in a recent advisory opinion from the Rhode Island Supreme Court,

> [t]he doctrine of separation of powers, which is now expressly established in the Rhode Island Constitution, declares that governmental powers at the state level are divided among 'three separate and distinct departments.' In practice, this doctrine operates to confine legislative powers to the legislature, executive powers to the executive department, and judicial powers to the judiciary, precluding one branch of the government from usurping the powers of another.

In re Request for Advisory Op. (CRMC), 961 A.2d 930, 933 (R.I. 2008) (quoting R.I. Const. art. 5).

"'Functionally, the doctrine [of Separation of Powers] may be violated in two ways. One branch may interfere impermissibly with the other's performance of its constitutionally assigned function.'" City of Pawtucket v. Sundlun, 662 A.2d 40, 58 (R.I. 1995) (quoting I.N.S. v. Chadha, 462 U.S. 919, 963, 103 S. Ct. 2764, 77 L. Ed. 2d 317 (1983) (Powell, J., concurring)). A representative example of this first kind of violation, cited by CLF in its memorandum, is Schisler v. State, 394Md. 519, 907 A.2d 175 (2006), in which the legislature adopted a statute designed to usurp and disrupt the executive's exclusive power to remove executive agency officials. "'Alternatively, the [Separation of Powers] doctrine may be violated when one branch assumes a function that more properly is entrusted to another.'" Sundlun, supra. An example of this kind of violation, also supplied by CLF, is McInnish v. Riley, 925 So.2d 174 (Ala. 2005), in which the legislature attempted to execute an appropriations law by directly distributing funds. Closer to home, members of the Supreme Court recently issued an advisory opinion on this latter form of violation, advising that a statute allowing members of the General Assembly to sit on the Coastal Resources Management Council, an executive body, was probably unconstitutional. CRMC, 961 A.2d at 932.

The Amended LTC does not fit into either category of Separation of Powers violations and thus does not implicate Separation of Powers principles. The Amended LTC does not, for example, purport to appoint, or remove, members of the Commission. Nor does it involve the General Assembly in executive functions, such as distributing appropriated funds or appointing the members of executive boards. The General Assembly has done nothing more and nothing less than establish an administrative review procedure and standard of review for the Amended

PPA, just as it earlier established an administrative review procedure and standard of review for the Original PPA, an action that no party, including CLF, objected to on Separation of Powers or any other grounds. Indeed, the General Assembly exercises this legislative power as a matter of course, the paradigmatic example being the enactment of the Administrative Procedures Act. Separation of Powers principles simply have no bearing on the Amended LTC.

Nevertheless, CLF contends that the Amended LTC violates Separation of Powers principles because decisions of the Commission are not "reversible" by legislative fiat and because the General Assembly is attempting to "control directly" the execution of its enactments. CLF Mot. at 9. However, the General Assembly did not "reverse" the Commission decision or even order a new hearing on the same issues. To the contrary, in a rapidly evolving area of the law (renewable energy projects), the General Assembly significantly revised the applicable administrative review process, bringing into the decision-making fold agencies with economic (EDC) and environmental (DEM) expertise that the Commission lacks. It has also changed the relevant legal standard to be applied to a future Commission review, both indirectly (by requiring the inter-agency opinions) and directly (by, inter alia, imposing additional substantive requirements on the pricing provisions of the Amended PPA and changing the definition of what constitutes a "commercially reasonable" project).[8]

Thus, Docket No. 4185 is not a reopening of Docket No. 4111. Nor does it represent any General Assembly mandate that the Commission reverse its decision in docket No. 4111. Insofar as it goes, the Commission's order in Docket No. 4111 stands. The issues now, however, are different. They are whether the Commission, in conjunction with other specialized agencies, EDC and DEM, will approve a different PPA applying a different legal standard and a

[8] See infra, Part II(B)(3), discussing res judicata and detailing further some of the new issues that the Amended LTC raises in this docket.

structurally different administrative procedure. Moreover, the Amended LTC plainly does not arrogate to the General Assembly the authority to "control directly" the Commission's decision. The Amended LTC established a more diffuse administrative review process, involving the Commission, EDC, and DEM.

b. The Amended LTC does not violate the advisory principle of Rhode Island constitutional law that laws must be made for the "good of the whole."

CLF also argues that the Commission should nullify the Amended LTC because it was not enacted for the "good of the whole" but, rather, for the "benefit" of "one specific developer, Deepwater." CLF Mot. at 15. As CLF acknowledges, however, in case after case the Rhode Island Supreme Court has opined that this language is merely "advisory and not [a] constitutional restraint upon the legislative powers of the General Assembly." See CLF Mot. at 16 (and cases cited therein).[9] Furthermore, the Amended LTC is not "so outrageously subversive of all rules of fairness" as to run afoul of this advisory constitutional language. In the Matter of Dorrance Street, 4 R.I. 230, 249 (1856) (explaining also that "evidently a wide discretion with regard to the distribution of the burdens of state amongst the citizens was intended to be reposed in the general assembly by the will of the people, as signified in this clause of the constitution" which speaks in

[9] In its separately filed Memorandum of Law in Support of Motion to Dismiss (hereinafter "AG Memo."), the Attorney General for the State of Rhode Island argues that this language is no longer dicta in light of the recently passed Separation of Powers Amendments ("SOP Amendments"). See AG Memo. at pp. 31-34. No case law supports that novel contention. The Attorney General argues that the "entire edifice" of the Rhode Island Supreme Court case law finding the "good-of-the-whole" language to be merely advisory was built upon the Continuing Powers clause, which the SOP Amendments removed. Kennedy v. Rhode Island, 654 A.2d 708 (R.I. 1994), the case upon which the Attorney General relies, however, did not mention or cite the "good-of-the-whole" clause in relation to the Continuing Powers clause. Rather, Kennedy, applying law pre-dating formal adoption of a more explicit "equal protection" clause, used the good-of-the-whole clause as the source for Rhode Island equal protection law, importing established (and deferential) Equal Protection principles from federal case law to uphold the constitutionality of the statute in question. As cited above, In the Matter of Dorrance, the leading case regarding the construction of Article 1, § 2, which contains the good-of-the-whole clause, emphasized the language of § 2 itself in finding that section to be advisory. This language remains untouched. See R.I. Cons. Art. I, § 2 ("All laws . . . should be made for the good of the whole; and the burdens of the state ought to be fairly distributed among the citizens."). In any event, the Attorney General's argument raises precisely the kind of constitutional nicety that is reserved for the Courts and not properly decided by the Commission.

terms of what "ought to be" done to "fairly" legislate). Though the Amended LTC may benefit the interests of Deepwater and its partners, the statute is by no means designed solely to benefit Deepwater. Advancing prospects for an important Rhode Island renewable energy project, the Amended LTC makes the public's economic, environmental, and other interests and concerns the General Assembly's overriding goals.

Indeed, the General Assembly has decided as a matter of state policy to advance an offshore wind farm off the coast of Block Island, setting forth in detail the statewide benefits it concludes may flow from such a project. Clearly, the Commission is not authorized to second-guess the General Assembly's conclusion that the Amended LTC is in the public interest. The General Assembly's conclusions could not be clearer than the opening words of the statute at issue:

> The general assembly finds it is in the public interest for the state to facilitate the construction of a small-scale offshore wind demonstration project off the coast of Block Island, including an undersea transmission cable that interconnects Block Island to the mainland in order to: position the state to take advantage of the economic development benefits of the emerging offshore wind industry; promote the development of renewable energy sources that increase the nation's energy independence from foreign sources of fossil fuels; reduce the adverse environmental and health impacts of traditional fossil fuel energy sources; and provide the Town of New Shoreham with an electrical connection to the mainland.

R.I. Gen. Laws § 39-26.1-7(a). In fact, this and the other amendments that CLF challenges (requiring EDC and DEM input, Commission review for consistency with the General Assembly's public policy objectives just referenced, pricing provisions further protecting ratepayers, etc.) have bolstered the expertise that will be brought to bear in reviewing the PPA and further promoted the broad public interest.

3. CLF will not succeed on its res judicata and administrative finality arguments.

CLF argues that res judicata or, alternatively, the administrative finality doctrine, bars the

Commission from implementing the Amended LTC. Neither common law doctrine can possibly apply, however, because the General Assembly, by mandating review of the revised PPA, has cleared these and any other common law doctrinal obstructions to the Amended PPA. As the Attorney General acknowledges in its memorandum, "[o]f course, the pertinent legislature can modify or contradict this principle [of res judicata] by statute." See AG Memo. at 15 (citing Astoria Fed. Sav. & Loan Ass'n v. Solimino, 501 U.S. 104, 108-09 (1991) (holding that a court may find that a statute impliedly repeals common law preclusion principles; a "plain statement" of the legislature's intent to repeal is not required because "weighty and constant" values are not at stake)). Any reading of the Amended LTC that would not remove such common law obstacles to the Commission's consideration of the Amended PPA would render the Amended LTC entirely meaningless, again violating bedrock principles of statutory construction. Rhode Island law "will not construe a statute to reach [such] an absurd result," Raso v. Wall, 884 A.2d 391, 395 (2005), and "no construction of a statute should be adopted that would demote any significant phrase or clause to mere surplusage." In re Harrison, 992 A.2d at 994 (quoting State Clark, 974 A.2d at 572). Thus, the Amended LTC's language establishing a schedule controlling this current proceeding precludes any res judicata or administrative finality challenge.

Further, CLF's res judicata and "administrative finality" arguments fail because the issues, or claims, at stake in Docket No. 4185 are different from the issues in Docket No. 4111 and could not have been decided in that earlier proceeding. See Bossian v. Anderson, 991 A.2d 1025, 1027 (R.I. 2010) (res judicata prohibits relitigation of issues that "were tried or might have been tried in the original suit"). The new statute raises a host of specific issues that were beyond the compass of the Commission's review in Docket No. 4111. For example, the Commission has never determined whether the price under the PPA is commercially reasonable

for a demonstration project of similar size, technology and location, as now required by § 39-26.1-7(c)(IV); the Commission has never applied the policy principles newly enunciated at § 39-26.1-7(a); the EDC has not filed an opinion subject to substantial deference on the economic benefits produced by the project, as now required by § 39-26.1-7(c)(IV); the DEM has not submitted such an opinion on the environmental benefits of the project, including the reduction of carbon emissions, see § 39-26.1-7(c)(IV)); the EDC has not presented expert testimony from an expert experienced in power markets regarding the terms and conditions of the PPA, see § 39-26.1-7(b); and the Commission has not applied the enhanced pricing provisions that the new statute mandates, see § 39-26-1.7(c)(2).[10] These critical issues that the Amended LTC statute raises for the first time have, simply put, never been determined by the Commission, EDC, DEM or any other agencies.[11]

Moreover, res judicata cannot preclude the "claim" that the Applicants bring, seeking approval of the Amended PPA under the General Assembly's newly established legal standards, because the Applicants agreed upon the Amended PPA, and the General Assembly amended the LTC, only after the date of the Commission's Order in Docket No. 4111. See Frank v. United Airlines, 216 F.3d 845, 851 (9th Cir. 2000) (holding that "[a] claim arising after the date of an earlier judgment is not barred, even if it arises out of a continuing course of conduct that

[10] The PPA that National Grid newly submitted in June of 2010 itself is substantially different from the PPA reviewed in Docket No. 4111. See Summary of Principle Differences Between December 2009 [PPA] and June 2010 [PPA] (submitted to Commission with cover letter to submittal of June 2010 PPA) (cover letter and list attached hereto as Exhibit B). Thus, it is not just the law but the facts that have shifted since the closing of Docket No. 4111. For this reason as well, the "issues" are no longer the same and there has been a change in "material circumstances" such that neither res judicata nor the administrative finality doctrine can apply. See Johnston Ambulatory Surgical Assoc. v. Nolan, 755 A.2d 799 (R.I. 2000) (administrative finality doctrine does not apply where there has been a change in material circumstances); see also AG's Memo. at p. 7 (describing the administrative finality doctrine as the "less forceful cousin" of res judicata).

[11] Moreover, CLF's conclusion that of course the project produces economic benefits is misplaced. Although the Applicants agree that the project produces economic benefits, the earlier version of the statute did not require any such finding by the Commission and, moreover, with respect to the "commercial reasonableness" standard then applicable, the Commission concluded in Docket No. 4111 that it had received inadequate expert testimony and other evidence to reach such a conclusion. This – and many other – issues remain open and unanswered as this docket unfolds.

provided the basis for the earlier claim."); 47 Am. Jur. 2d Judgments § 481 ("If the cause of action in the second action arises after the rendition of the judgment in the first action, it is a different cause of action not barred by the prior judgment.").

Simply stated, the Commission has not determined whether the revised Application meets the criteria for approval established by the Amended LTC. The issues, or claims, in this docket were not litigated, and could not have been litigated, in the previous docket because that review was conducted under a different law applying different standards to a different application without advisory opinions from two other state administrative agencies. Furthermore, that review concluded before the General Assembly's amendments and before the Applicants reached agreement on the Amended PPA. In evaluating this newly-agreed-upon PPA, the Commission will make a new determination in this docket pursuant to the new standards enacted in the Amended LTC. The doctrines of res judicata and administrative finality have no application.

D. The balance of the equities tips decidedly against CLF.

The "balance of equities, including the possible hardships to other parties and to the public interest," also tips decidedly against CLF. Denying the motion to stay will not impose any identifiable hardship on CLF, an intervenor. The Commission will, in due course, address any arguments properly presented by CLF, without the need for any stay. By contrast, delaying this proceeding will not only directly violate the General Assembly's mandate in the Amended LTC, but risks scuttling the entire Project and jeopardizes the significant public benefits likely to flow from the Project, including Rhode Island's prominent position in the renewable energy industry, the creation of hundreds of jobs, more efficient energy for Block Island, and millions of dollars of investments in Rhode Island. The General Assembly and the Governor have created

an opportunity for the State to assume a leadership position in the development of renewable sources of energy, and further delay creates enormous risks to that public goal.

E. A stay is not needed to preserve the status quo.

Finally, a stay is plainly unnecessary to preserve the status quo. The status quo is that Commission has not yet approved the PPA. That will remain the status quo unless and until these proceedings close with Commission, DEM, and EDC approval of the PPA. During the course of the review, the commission will address any arguments properly raised by CLF and the other interveners and parties.

CONCLUSION

For the foregoing reasons, Applicants respectfully request that the Commission deny CLF's Motion to Stay.

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 13, 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 13, 2010.

Cynthia Tomas

National Grid – Review of Proposed Town of New Shoreham Project
Docket No. 4185 – Service List Updated 7/12/10

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Exhibit
A

2010 -- H 8083 SUBSTITUTE A AS AMENDED

LC02500/SUB A/3

STATE OF RHODE ISLAND

IN GENERAL ASSEMBLY

JANUARY SESSION, A.D. 2010

AN ACT

RELATING TO PUBLIC UTILITIES AND CARRIERS -- CONTRACTING STANDARD FOR RENEWABLE ENERGY

Introduced By: Representatives JP O'Neill, Walsh, and Jackson

Date Introduced: May 05, 2010

Referred To: House Environment and Natural Resources

It is enacted by the General Assembly as follows:

SECTION 1. Section 39-26.1-7 of the General Laws in Chapter 39-26.1 entitled "Long-Term Contracting Standard for Renewable Energy" is hereby amended to read as follows:

39-26.1-7. Town of New Shoreham Project. -- (a) The general assembly finds it is in the public interest for the state to facilitate the construction of a small-scale offshore wind demonstration project off the coast of Block Island, including an undersea transmission cable that interconnects Block Island to the mainland in order to: position the state to take advantage of the economic development benefits of the emerging offshore wind industry; promote the development of renewable energy sources that increase the nation's energy independence from foreign sources of fossil fuels; reduce the adverse environmental and health impacts of traditional fossil fuel energy sources; and provide the Town of New Shoreham with an electrical connection to the mainland. To effectuate these goals, and notwithstanding any other provisions of the general or public laws to the contrary, the Town of New Shoreham project, its associated power purchase agreement, transmission arrangements, and related costs are authorized pursuant to the process and standards contained in this section. The Narragansett Electric Company is hereby authorized to enter into an amended power purchase agreement with the developer of offshore wind for the purchase of energy, capacity, and any other environmental and market attributes, on terms that are consistent with the power purchase agreement that was filed with the commission on December 9, 2009 in docket 4111, and amendments changing dates and deadlines, provided

that the pricing terms of such agreement are amended as more fully described in subsection 39-26.1-7(e), in addition to other amendments that are made to take into account the provisions of this section as amended since the filing of the agreement in docket 4111. Any amendments shall ensure that the pricing can only be lower, and never exceed, the original pricing included in the power purchase agreement that was reviewed in docket 4111. ~~On or before August 15, 2009, the electric distribution company shall 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. The electric distribution company shall select a project for negotiating a contract that shall be conditioned upon approval by the commission. Negotiations shall proceed in good faith to achieve a commercially reasonable contract. Should the distribution company and the selected party agree to a contract, the contract shall be filed with the commission no later than October 15, 2009 for commission approval. The commission shall review the contract and issue an order approving or disapproving the contract on or before January 31, 2010. If the parties are unable to reach agreement on a contract prior to October 15, 2009, an unsigned copy shall be filed by the electric distribution company prior to that same date, and the commission shall have the discretion to order the parties to arbitrate the dispute on an expedited basis. Notwithstanding anything in this section to the contrary, and notwithstanding any solicitation made pursuant to this section, the distribution company and the selected party may agree to a contract for a~~ The demonstration project subject to the amended power purchase agreement shall ~~that includes~~ include up to (but not exceeding) eight (8) wind turbines with aggregate nameplate capacity of no more than thirty (30) megawatts, ~~subject to and conditioned upon the approval of the commission.~~ even if the actual capacity factor of the project results in the project technically exceeding ten (10) megawatts.

(b) The amended power purchase agreement shall be filed with the Public Utilities Commission. Upon the filing of the amended power purchase agreement, the commission shall open a new docket. The commission shall allow the parties to docket 4111 to become parties in the new docket who may file testimony within fifteen (15) days of the filing of the amended agreement. The commission shall allow other interventions on an expedited basis, provided they comply with the commission standards for intervention. The developer shall provide funding for the economic development corporation to hire an expert experienced in power markets, renewable energy project financing, and power contracts who shall provide testimony regarding the terms and conditions of the power purchase agreement to assist the commission in its review, provided that the developer shall be precluded from influencing the choice of expert, which shall be in the sole discretion of the economic development corporation. This testimony shall be filed

within twenty (20) days after the filing of the amended power purchase agreement. The parties shall have the right to respond to the testimony of this expert through oral examination at the evidentiary hearings. The commission shall hold one public comment hearing within five (5) days after the filing of the expert testimony. Evidentiary hearings shall commence no later than thirty (30) days from the filing of the amended power purchase agreement.

(c) The commission shall review the amended power purchase agreement taking into account the state's policy intention to facilitate the development of a small offshore wind project in Rhode Island waters, while at the same time interconnecting Block Island to the mainland. The commission shall review the amended power purchase agreement and shall approve it if:

(i) The amended agreement contains terms and conditions that are commercially reasonable;

(ii) The amended agreement contains provisions that provide for a decrease in pricing if savings can be achieved in the actual cost of the project pursuant to subsection 39-26.1-7(e);

(iii) The amended agreement is likely to provide economic development benefits, including: facilitating new and existing business expansion and the creation of new renewable energy jobs; the further development of Quonset Business Park; and, increasing the training and preparedness of the Rhode Island workforce to support renewable energy projects; and

(iv) The amended power purchase agreement is likely to provide environmental benefits, including the reduction of carbon emissions. An advisory opinion on the findings of economic benefit set forth in (iii) above shall be provided by the Rhode Island economic development corporation and an advisory opinion on the environmental benefits set forth in (iv) above shall be filed by the Rhode Island department of environmental management. The advisory opinions shall be filed with the commission within twenty (20) days of filing of the amended power purchase agreement. The commission shall give substantial deference to the factual and policy conclusions set forth in the advisory opinions in making the required findings. Notwithstanding any other provisions of the general laws to the contrary, for the purposes of this section, "commercially reasonable" shall mean terms and pricing that are reasonably consistent with what an experienced power market analyst would expect to see for a project of a similar size, technology and location, and meeting the policy goals in subsection (a) of this section.

(d) The commission shall issue a written decision to accept or reject the amended power purchase agreement, without conditions, no later than forty-five (45) days from the filing of the amended power purchase agreement, without delay or extension of the timeframes contained in this section. Any review of the commission's decision shall be according to chapter 5 of title 39, and the supreme court shall advance any proceeding under this section so that the matter is

afforded precedence on the calendar and shall be heard and determined with as little delay as possible. ~~Upon approval of the contract, the~~ The provisions of section 39-26.1-4 and the provisions of ~~paragraphs (a).~~ subsections (b), (c), (d), and (f) of section 39-26.1-5 shall apply, and all costs incurred in the negotiation, administration, enforcement, transmission engineering associated with the design of the cable, and implementation of the project and agreement shall be recovered annually by the electric distribution company in electric distribution rates. ~~To the extent that there are benefits for customers of the Block Island Power Company or its successor, the commission shall determine an allocation of cost responsibility between customers of the electric distribution company and customers of Block Island Power Company or its successor after the cost estimates are filed with the commission, but the commission need not determine the final cost allocation at the time the commission considers and/or approves the contract between the electric distribution company and the project developer. The allocation of costs shall assure that individual customers in the Town of New Shoreham pay higher charges related to the project on their individual bills than any charges for the same project that may be included in individual bills of customers of the electric distribution company. The commission shall provide for an appropriate rate design and billing method between the electric distribution company and Block Island Power Company at the appropriate time.~~ The pricing under the agreement shall not have any precedential effect for purposes of determining whether other long-term contracts entered into pursuant to this chapter are commercially reasonable.

(e) Cap and lower price. (i) The amended power purchase agreement subject to subsection 39-26.1-7(a) shall provide for terms that shall decrease the pricing if savings can be achieved in the actual cost of the project, with all realized savings allocated to the benefit of ratepayers. (ii) The amended power purchase agreement shall also provide that the initial fixed price contained in the signed power purchase agreement submitted in docket 4111 shall be the maximum initial price, and any realized savings shall reduce such price. After making any such reduction to the initial price based on realized savings, the price for each year of the amended power purchase agreement shall be fixed by the terms of said agreement. (iii) The amended power purchase agreement shall require that the costs of the project shall be certified by the developer. An independent third-party acceptable to the division of public utilities and carriers shall within thirty (30) days of this certification by the developer, verify the accuracy of such costs at the completion of the construction of the project. All reasonable costs of this verification shall be paid for by the developer. Upon receipt of such third-party verification, the division shall notify the Narragansett Electric Company of the final costs. The public utilities commission shall reduce the expense to ratepayers consistent with a verified reduction in the project costs.

~~(b)~~(f) The ~~solicitation shall require that each proposal include provisions for~~ project shall include a transmission cable between the Town of New Shoreham and the mainland of the state. The electric distribution company, at its option, may elect ~~propose~~ to own, operate, or otherwise participate in such transmission cable project~~, subject to commission approval~~. The electric distribution company, however, has the option to decline to own, operate, or otherwise participate in the transmission cable project~~, even if the commission approves such arrangements~~. The electric distribution company may elect to purchase the transmission cable and related facilities from the developer or an affiliate of the developer, pursuant to the terms of a transmission facilities purchase agreement negotiated between the electric distribution company and the developer or its affiliate, an unexecuted copy of which shall be provided to the division of public utilities and carriers for the division's consent to execution. The division shall have twenty (20) days to review the agreement. If the division independently determines that the terms and pricing of the agreement are reasonable, taking into account the intention of the legislature to advance the project as a policy-making matter, the division shall provide its written consent to the execution of the transmission facilities purchase agreement. Once written consent is provided, the electric distribution company and its transmission affiliate are authorized to make a filing with the federal energy regulatory commission to put into effect transmission rates to recover all of the costs associated with the purchase of the transmission cable and related facilities and the annual operation and maintenance. The revenue requirement for the annual cable costs shall be calculated in the same manner that the revenue requirement is calculated for other transmission facilities in Rhode Island for local network service under the jurisdiction of the federal energy regulatory commission. The division shall be authorized to represent the State of Rhode Island in those proceedings before the federal energy regulatory commission, including the authority to enter into any settlement agreements on behalf of the state to implement the intention of this section. The division shall support transmission rates and conditions that allow for the costs related to the transmission cable and related facilities to be charged in transmission rates in a manner that socializes the costs throughout Rhode Island. Should the electric distribution company own, operate, and maintain the cable, the annual costs incurred by the electric distribution company directly or through transmission charges shall be recovered annually through a fully reconciling rate adjustment from customers of the electric distribution company and/or from the Block Island Power Company or its successor, subject to any federal approvals that may be required by law~~: provided, however, the parties shall use all reasonable efforts to obtain socialization of the costs of the cable in New England transmission rates administered by the ISO New England, to the extent permitted~~. The allocation of the costs related to the

transmission cable through transmission rates or otherwise shall be structured so that the estimated impact on the typical residential customer bill for such transmission costs for customers in the Town of New Shoreham shall be higher than the estimated impact on the typical residential customer bill for customers on the mainland of the electric distribution company. This higher charge for the customers in the Town of New Shoreham shall be developed by allocating the actual cable costs based on the annual peak demands of the Block Island Power Company and the electric distribution company, and these resultant costs recovered in the per kWh charges of each company. In any event, the difference in the individual charge per kWh or per customer/month shall not exceed the ratio of average demand to peak demand for Block Island Power Company relative to the electric distribution company, currently at 1.8 to 1.0 respectively. To the extent that any state tariffs or rates must be put into effect in order to implement the intention of this section, the public utilities commission shall accept filings of the same and shall approve them. ~~costs shall be determined by the commission and assure that individual customers in the Town of New Shoreham pay higher charges related to the cable on their individual bills, than any charges for the same project that may be included in individual bills of customers of the electric distribution company.~~

~~(c)~~(g) Any charges incurred by the Block Island Power Company or its successor pursuant to this section or other costs incurred by the Block Island Power Company in implementing this section, including the cost of participation in regulatory proceedings in the state or at the federal energy regulatory commission shall be recovered annually in rates through a fully reconciling rate adjustment, subject to approval by the commission. If the electric distribution company owns, operates, or otherwise participates in the transmission cable project, pursuant to subsection 39-26.1-7(b) the provisions of section 39-26.1-4 shall not apply to the cable cost portion of the Town of New Shoreham Project.

~~(d)~~(h) Any contract entered into pursuant to this section shall count as part of the minimum long-term contract capacity.

(i) If the electric distribution company elects not to own the transmission cable, the developer may elect to do so directly, through an affiliate, or a third-party and the power purchase agreement pricing shall be adjusted to allow the developer, an affiliate or a third-party, to recover the costs (including financing costs) of the transmission facilities, subject to complying with the terms as set forth in the power purchase agreement between the developer and the electric distribution company.

SECTION 2. This act shall take effect upon passage.

LC02500/SUB A/3

EXPLANATION

BY THE LEGISLATIVE COUNCIL

OF

A N A C T

RELATING TO PUBLIC UTILITIES AND CARRIERS -- CONTRACTING STANDARD FOR RENEWABLE ENERGY

***

This act would authorize the Narragansett Electric Company to enter into an amended agreement with the developer of offshore wind for the purchase of energy, capacity and other environmental and market attributes as long as the provisions of the general laws pertaining to the Town of New Shoreham project are complied with.

This act would take effect upon passage.

LC02500/SUB A/3

Exhibit B

nationalgrid

Ronald T. Gerwatowski
Deputy General Counsel

June 30, 2010

VIA HAND DELIVERY & ELECTRONIC MAIL

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

RE: Docket 4185 - Review of Amended Power Purchase Agreement Between The Narragansett Electric Company d/b/a National Grid and Deepwater Wind Block Island, LLC Pursuant to R.I.G.L. § 39-26.1-7

Dear Ms. Massaro:

Enclosed for filing on behalf of National Grid[1] is a new power purchase agreement (the "Amended PPA") that the Company has executed with Deepwater Wind Block Island, LLC ("Deepwater"). This filing is being made pursuant to Section 39-26.1-7 of the Rhode Island General Laws, which section was amended by the General Assembly during this past legislative session. The law authorized National Grid to enter into an amended power purchase agreement with specified pricing changes from the power purchase agreement that was filed on December 9, 2009 and considered in Docket 4111 ("2009 PPA").

As required by the new law, the Company and Deepwater incorporated a mechanism in the Amended PPA that requires the price to be reduced to the extent that the project costs are lower than originally estimated. These provisions are included in Exhibit E to the Amended PPA. As amended, the new pricing can only be lower, and never exceed, the original pricing included in the 2009 PPA. As such, while the starting price remains at 24.4 cents per kilowatt-hour in 2013 (or 23.57 cents in 2012), the new pricing provisions contemplate the potential for this price to be lowered. The Company and Deepwater also took the opportunity to address specific concerns raised by the Commission during the Docket 4111 proceeding regarding assignment language in the 2009 PPA. A short summary of the changes made to the Amended PPA is provided with this filing letter.

National Grid requests approval of the Amended PPA. The Company believes that the Amended PPA promotes the important public policy goals articulated in Rhode Island General Laws Section 39-26.1-7. It also contains terms and conditions that are "commercially reasonable" for a small-scale offshore wind demonstration project, even though there may be other energy alternatives in the region that could produce electricity at lower cost.

[1] The Narragansett Electric Company d/b/a National Grid ("National Grid" or the "Company").

Along with this cover letter and a summary of the changes made to the Amended PPA, this filing includes a bound volume containing a copy of the executed Amended PPA, as well as a copy of the same agreement that has been marked to show the changes from the 2009 PPA that was before the Commission in Docket 4111.

In accordance with the statutory schedule for these proceedings, National Grid will be filing testimony that provides more detailed information. The testimony is due July 15, but the Company will endeavor to file sooner to the extent practicable.

Very truly yours,

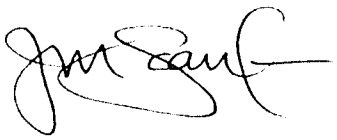
Ronald T. Gerwatowski

Enclosures

cc: Docket 4185 Service List
Leo Wold, Esq.
Steve Scialabba, Division

Certificate of Service

I hereby certify that a copy of the cover letter and/or any materials accompanying this certificate were electronically submitted, hand delivered and/or mailed to the individuals listed below.



Joanne M. Scanlon
National Grid

June 30, 2010
Date

National Grid – Review of Proposed Town of New Shoreham Project
Docket No. 4111 – Service List Updated 6/30/10

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The Narragansett Electric Company
d/b/a National Grid
Deepwater Wind Block Island, LLC
Docket No. 4185
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.G.L. § 39-26.1-7

Summary of Principal Differences between
December 2009 Power Purchase Agreement and June 2010 Power Purchase Agreement

The following is a summary of the principal differences between the new Power Purchase Agreement filed in this docket ("Amended PPA") and the Power Purchase Agreement that was filed with the Commission in Docket No. 4111 (the "2009 PPA").

Changes to Pricing

- Consistent with the revised provisions of R.I.G.L. § 39-26.1-7, the pricing was changed from a first year (2012) bundled price equal to $235.75/MWh, to a bundled price that cannot exceed $235.70/MWh in the first year (subject to annual escalations of 3.5%, as in the 2009 PPA) and is calculated based on the Total Facility Cost, with all savings flowing to National Grid and its customers if that Total Facility Cost is less than the current projection of $205,403,512 (the "Base Amount"). Pricing in the Amended PPA still includes both the adjustment for the Capacity Clearing Price and the Wind Outperformance Adjustment Credit that appeared in the 2009 PPA. (Ex. E, App. X)

- Also consistent with the revised provisions of R.I.G.L. § 39-26.1-7, verification provisions are included in the Amended PPA. Within 90 days after Commercial Operation, Deepwater will certify the Total Facility Cost, savings from the Base Amount and its determination of the Bundled Price based on a table included in Exhibit E to the Amended PPA, and will provide that certification to an independent third party acceptable to the Rhode Island Division of Public Utilities and Carriers (the "Division") for verification (the "Verification Agent"). The Verification Agent will issue a draft report confirming Deepwater's certification or disputing any cost (solely based on the cost not having been incurred by Deepwater, not being supported by documentation, or mathematical errors), savings, and determination of the Bundled Price. After resolving any disputes with Deepwater, the Verification Agent will issue a final report which will be delivered to the Division, which will then notify National Grid. National Grid will thereafter pay Deepwater the Bundled Price, and the Parties will true-up any overpayments or underpayments that occurred prior to the determination of the final pricing. (Ex. E, App. X)

- The Amended PPA also sets the portion of the Bundled Price allocated to the RECs at the price for similar RECs on the Chicago Climate Futures Exchange, rather than using the

Alternative Compliance Payment amount for those RECs. The use of a market-based rate for this purpose could permit National Grid to avoid adverse impacts to its financial statements if it were required to use mark-to-market accounting for those RECs in the future. (Ex. E, § 2)

- The language regarding the annual escalation of the Bundled Price remains largely unchanged but has been moved to Exhibit E in order consolidate the pricing terms in the Amended PPA. (Ex. E, § 4)

Changes to Dates and Deadlines

- The Term begins on the Agreement Date, which was changed from December 9, 2009 to June 30, 2010. (§ 2.1)

- The date on which National Grid filed for the PPA Regulatory Approval was changed from October 14, 2009 to June 30, 2010. The PPA will still terminate if National Grid has not received the PPA Regulatory Approval on or before the date falling one year after National Grid filed for the PPA Regulatory Approval. (§§ 8.2, 8.3)

- The date on which Deepwater will have the right to terminate the PPA without penalty if certain federal incentive programs are not extended or Deepwater is unable to, or has determined that it will be unable to, secure tax equity financing and/or permits for the Facility, was moved from December 31, 2010 to December 31, 2011. (§ 8.4)

- The deadline before which either Party may terminate the PPA if the Termination Cable Conditions are not satisfied is the second anniversary of the PPA Regulatory Approval. This deadline was December 31, 2010 in the 2009 PPA. (§ 8.5(a))

Changes to Regulatory Provisions

- National Grid is required to file the Amended PPA with the Commission and to exercise commercially reasonable efforts to obtain the PPA Regulatory Approval from the Commission. (§ 8.2)

- The PPA Regulatory Approval must be acceptable to the Parties in their sole discretion, as opposed to just National Grid in the 2009 PPA. (§ 1)

- As required by R.I.G.L. § 39-26.1-7(f), the Amended PPA recognizes that the Division must now consent to any Transmission Cable Purchase Agreement between National Grid and Deepwater or an Affiliate of Deepwater. (§ 1)

Other Changes

- In response to the Commission's decision in Docket No. 4111, Deepwater may not assign the Amended PPA without National Grid's prior written consent, which consent may not be unreasonably withheld, conditioned or delayed. (§14.2)

- Consistent with R.I.G.L. Section 39-26.1-9(d), the Amended PPA permits National Grid to retain Energy, Capacity, and RECs with the Commission's approval. (§ 4.3)

- The Amended PPA provides for Deepwater to elect to own the Transmission Cable, either directly or through an Affiliate, as contemplated by R.I.G.L. § 39-26.1-7(i), and Deepwater may make that election within three years after National Grid and/or Deepwater file for approval of an amendment to the Amended PPA because the Transmission Cable Conditions have not been satisfied. In addition, a new section has been added providing that National Grid, in its sole discretion, may elect to waive the Transmission Cable Conditions and construct, or cause the construction of, the Transmission Cable without the involvement of Deepwater or Deepwater Transmission. If National Grid elects to do so, it must do so pursuant to an agreement that is acceptable to both National Grid and Deepwater. (§ 8.5(c), (d), (e))

- The language regarding National Grid's obligation to determine, in its sole discretion, whether any amendment or waiver of the Amended PPA requires governmental approval, was modified slightly to address the possibility of required approvals from and filings with other government agencies. (§ 18)

- Exhibit B has been updated to reflect Deepwater's current understanding of its permitting requirements. (Ex. B)