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July 19, 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 the Motions to Dismiss of Intervenors Conservation Law Foundation and Intervenor Attorney General Patrick C. Lynch.

Very truly yours,

Gerald J. Petros

GJP:cl

Enclosure

cc: Service List (w/enclosure)

1064920v1 (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 THE MOTIONS TO DISMISS OF INTERVENOR CONSERVATION LAW FOUNDATION AND INTERVENOR ATTORNEY GENERAL PATRICK C. LYNCH

National Grid[1] and Deepwater Wind Block Island, LLC (hereinafter "Applicants") file this Consolidated Opposition to the Motions to Dismiss filed by the Conservation Law Foundation ("CLF") and Attorney General Patrick C. Lynch ("Attorney General").[2] The Commission should deny CLF and the Attorney General's motions for several reasons.

First, as CLF conceded, the Commission lacks jurisdiction to hear constitutional arguments challenging the validity of a statute. The Commission need go no further.

Second, the Attorney General's (and CLF's)[3] constitutional arguments lack merit. The Amended Long Term Contracting Standard for Renewable Energy ("Amended LTC") does not represent a violation of Separation of Powers principles. The Amended LTC does not even

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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 Consolidated Memorandum responds to the "Motion to Dismiss" component of that filing. This Consolidated Memorandum also responds to the Attorney General's separately filed papers in support of its Motion to Dismiss. The CLF's supporting motion papers are hereinafter cited as "*CLF Mot.*"; the Attorney General's supporting memorandum is hereinafter cited as "*A.G. Memo.*" In addition, Thomas Doyle, Patricia Doyle, James E. O'Neill, Rosemarie Ives, Jonathan Ives, Michael Beauregard and Laurence Ehrhardt, as citizen intervenors, filed a motion adopting CLF's and the Attorney General's motions without filing a separate memorandum in support. This document is also filed in opposition to their motion-by-adoption, which raises no further arguments beyond those that CLF and the Attorney General raised.

[3] CLF originally challenged the statute on constitutional grounds as well. CLF has now conceded, however, that the Commission lacks subject matter jurisdiction to review the constitutionality of the statute. Nevertheless, CLF's arguments are considered herein given their heavy overlap with the Attorney General's arguments.

implicate such principles and does not purport to reverse or even direct the reopening of a prior administrative proceeding. To the contrary, the Amended LTC gives the Commission an entirely new assignment: It must apply a different set of criteria and standards to review a different contract in consultation with other administrative agencies. Nor does the Amended LTC run afoul of the purely advisory "good-of-the-whole" clause of the Rhode Island Constitution. The statute plainly relates rationally to multiple legitimate purposes, which the General Assembly has identified on the statute's face.[4]

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[4] The Commission should also deny the pending motions because the Attorney General and CLF lack standing to challenge the constitutionality of the Amended LTC. The Attorney General is an office of limited authority, with powers circumscribed by the Rhode Island Constitution to those "established" or which "from time to time may be prescribed by law." R.I. Const. Article IX, Section 12. Neither the Constitution nor other Rhode Island law authorizes the Attorney General to attack the constitutionality of a Rhode Island statute. To the contrary, Rhode Island statutory law presupposes that the Attorney General will only intervene to *defend* the constitutionality of Rhode Island statutes, requiring the Attorney General to file annually with the General Assembly a "report of *defense* of challenged legislation" cataloging the cases in which the Attorney General or members of his office defended legislation on constitutional grounds. *See* R.I. Gen. Laws § 42-9-6.1 (emphasis added). No statute requires the Attorney General to report on statutes that the Attorney General has recently *attacked* because the Attorney General is not supposed to do so. Rhode Island law requiring that parties attacking the constitutionality of state statutes provide the Attorney General with notice and an opportunity to intervene also contemplates that the Attorney General will serve as guardian and defender of the constitutionality of Rhode Island's statutes. *See* R.I. Gen. Laws § 9-30-11 (requiring a party challenging a state statute's constitutionality to provide notice to the Attorney General and an opportunity to intervene); R.I. Super Ct. R. 24(d); *State v. Bouffard*, 945 A.2d 305, 312 (R.I. 2008) ("This Court has frequently declared that no challenge to the constitutionality of a state statute or municipal ordinance may be validly presented unless the Attorney General is served with a copy of the proceeding." (internal quotations omitted)). Thus, applying a similar constitutional and statutory scheme, Wisconsin courts have held that the Attorney General's "duty" is "to defend the constitutionality of state statutes." *State v. City of Oak Creek*, 588 N.W.2d 380, 381 (Wis. Ct. App. 1998), *aff'd by* 605 N.W.2d 526, 528 (Wis. 2000) (explaining that neither statutory nor constitutional nor common law empowered the Attorney General to "attack the constitutionality" of the state statute at issue).

CLF also lacks standing to challenge the Amended LTC. As the Supreme Court held in *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (quotations and internal citations omitted), the "irreducible constitutional minimum" of standing includes a requirement that "the plaintiff must have suffered an 'injury in fact' – an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical." CLF lacks standing because it has failed to allege *any* injury resulting from the alleged constitutional violation embodied in the Amended LTC, let alone one that is "concrete" or "imminent," as opposed to "conjectural" or "hypothetical." Note, also, that CLF has intervened in this proceeding presumably based on its specialty in environmental issues. The constitutional challenge that it brings has nothing to do with environmental issues and CLF nowhere in its papers argues such issues as a basis for invalidating the Amended LTC.

Finally, the doctrines of *res judicata* and administrative finality do not apply. In enacting the Amended LTC, the General Assembly cleared any such obstructions to administrative approval. Furthermore, neither doctrine applies because different claims and issues are at stake in this proceeding and because the Amended LTC was enacted, and the Amended Power Purchase Agreement ("Amended PPA") agreed upon, only *after* the Commission's decision in the prior docket.

BACKGROUND

On April 2, 2010, in Docket No. 4111, the Commission declined to approve the Applicants' Power Purchase Agreement (Original PPA) regarding a renewable energy resources project including eight (8) wind turbines off the coast of Block Island (the "Project"). The Commission did so based on its conclusion that the Original 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 Original PPA at issue in Docket No. 4111.

On June 16, 2010, Governor Donald L. Carcieri signed into law amendments to the original 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 Amended PPA at issue in this docket. Commercially reasonable is defined as "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 new "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 for 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 actual project costs will be passed on to ratepayers. An independent third-party must verify the actual project costs, the reasonable 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).

The final major difference is the expedited timeframe for the Commission/EDC/DEM review process established by the Amended LTC. *See* R.I. Gen. Laws § 39-26.1-7.

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 Commission lacks jurisdiction to consider constitutional challenges to the Amended LTC.

CLF now concedes that the Commission lacks subject matter jurisdiction over its constitutional arguments. *See* CLF's *Supplemental Memo. of Law in Supp. of CLF's Mot. to Dismiss* (July 12, 2010) at 1. At the oral argument on the motion to stay, the Attorney General's office acknowledged that indeed the Commission may lack subject matter jurisdiction to invalidate a statute. Nevertheless, the Attorney General and CLF dedicated much of their memoranda to constitutionally challenging the Amended LTC. This legal strategy needlessly diverted the resources and attention of both the Commission and the Applicants and lacks a reasonable basis. The Commission plainly lacks the jurisdiction and authority to determine the constitutionality of duly enacted legislation. Consequently, the Commission must reject the Attorney General's remaining constitutional challenges to the Amended LTC.

Under Rhode Island law, administrative agencies lack jurisdiction to decide the constitutionality of the statutes that they administer.[5] *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

[5] 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*.

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 the Attorney General brings, the Rhode Island Supreme Court has explained that "it has been our long-standing and consistent opinion that questions concerning the governmental structure of this state are constitutional issues *that may be determined only by the judiciary.*" *In re Advisory Opinion to the Governor*, 732 A.2d 55, 69 (R.I. 1999) (emphasis added) (citing *G & D Taylor & Co. v. Place*, 4 R.I. 324, 361 (1856)).

Rhode Island law is consistent with the overwhelming case law from other jurisdictions holding 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); *State ex rel. Utilities Comm'n v. Carolina Util. 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."); *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, 381 (Wash. 1974) ("An administrative body does not have authority to determine the constitutionality of the law it administers; only the 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, 131 (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.").[6]

Accordingly, the Attorney General's challenges to the constitutionality of the Amended LTC must be rejected.

II. The Attorney General's constitutional arguments are without merit.

The Attorney General's constitutional challenges also must fail because they lack substantive merit.

[6] The Attorney General cites the familiar but irrelevant principle, derived from *Chevron v. Natural Resources Defense Council*, 467 U.S. 837, 843 (1984), that deference may be due to an agency's interpretation of a statute. This interpretive authority is not the same, however, as the authority to rule a statute unconstitutional. As demonstrated above, administrative agencies lack jurisdiction to do so.

A. Acts of the General Assembly are presumed to be constitutional.

Any analysis of whether a state statute is constitutional must start with the unyielding principle that all laws regularly enacted by the Rhode Island Legislature are presumed to be constitutional and valid. *See Driver v. Town of Richmond*, 570 F. Supp. 2d 269, 275 (D.R.I. 2008); *City of Pawtucket v. Sundlun*, 662 A.2d 40, 45 (R.I. 1995). Courts must give effect, if possible, to a state statute, and approach all constitutional questions with caution. *See DEPCO v. Brown*, 659 A.2d 95, 100 (R.I. 1995); *United Nuclear Corp. v. Cannon*, 553 F. Supp. 1220, 1233 (D.R.I. 1982). Every reasonable inference must be made in favor of the constitutionality of a particular legislative act. *See R. I. Med. Soc'y v. Whitehouse*, 66 F. Supp. 2d 288, 305-06 (D.R.I. 1999); *City of Pawtucket*, 662 A.2d at 45. Whether a court believes an enactment to be unwise or unnecessary is largely irrelevant, for those are judgments to be made by the Legislature. *See FCC v. Beach Comm'ns, Inc.*, 508 U.S. 307, 313-14 (1993).

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

With these principles in mind, 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." *Sundlun*, 662 A.2d 4at 58 (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 *Schiscler v. State*, 394 Md. 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. 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, the Attorney General and CLF contend 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; *see A.G.* Memo. at 25-27. 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).[7]

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 structurally *different* administrative procedure. Moreover, the Amended LTC plainly does not

[7] *See infra*, Part III, discussing *res judicata* and administrative finality doctrine and detailing further some of the new issues that the Amended LTC raises in this docket.

arrogate to the General Assembly the authority to "control directly" the Commission's decision. The Amended LTC establishes a more *diffuse* administrative review process, involving the Commission, EDC, and DEM.

This case, then, is patently distinguishable from those cases from other jurisdictions upon which the Attorney General relies, in which state legislatures ordered the reversal and/or reopening of the proceedings, or retroactively created an appeal right regarding a claim already adjudicated to a final judgment. In *Opinion upon the Act to Reverse the Judgments Against Dorr*, 3 R.I. 299, 300 (1854), for example, the Court addressed a statute which "purport[ed] to repeal, annul and reverse a judgment of the highest Court known to the Constitution, and to declare it to be in all respects as if it had never been rendered." In *State v. Garnetto*, 75 R.I. 86, 93 (1949), similarly, the Court invalidated a statute that made it "mandatory" that a court "grant a motion to quash" a prisoner's ongoing sentence. *See G. & D. Taylor & Co. v. Place*, 4 R.I. 324 (1856) (invalidating statute that purported to force reopening of judicial proceeding to allow for introduction of previously excluded evidence in support of the same claim). None of these cases involved amended administrative processes governing future reviews of future contracts or claims.[8] As explained by the United States Supreme Court in one of the cases that the Attorney General cites, *"[l]egislation may act on subsequent proceedings."* *McCullough v. Virginia*, 172 U.S. 102, 123-24 (1898) (emphasis added).

[8] The Attorney General's case law from other jurisdictions is equally distinguishable on this basis. *See, e.g., In re Matter of Chrysler Properties, Inc., v. G. Michael Morris*, 245 N.E.2d 395 (N.Y. 1969) (invalidating a statute that retroactively created an appeal right from an otherwise final decision of the New York State Tax Commission to the City of New York); *California School Boards Ass'n v. State of California*, 90 Cal. Rptr. 3d 501, 513 (Cal. Ct. App. 2009) (invalidating legislature's "direction" to "reconsider or set aside" a "final" agency decision on reimbursement claims.).

C. 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."

1. The good-of-the-whole clause cannot serve as a basis for invalidating the Amended LTC because it presents no constitutional restraint upon the legislative power of the General Assembly.

There is no merit to the argument that the Amended LTC is constitutionally invalid 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, 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).

Moreover, the oft-stated rule that Article 1, Section 2, which contains the good-of-the-whole clause, is advisory is not, as the Attorney General contends, "sheer *dicta*." *See A.G. Memo.* at 33-34. The Rhode Island Supreme Court has applied it as binding. In *Town of Lincoln v. City of Pawtucket*, 745 A.2d 139, 146 (R.I. 2000), the Court, addressing an Article 1, Section 2 claim alleging that a statute imposed an unequal burden, held that the argument "must be rejected," explaining that "[t]his section is advisory and not mandatory" and is "addressed to the General Assembly for the purpose of advice and does not clothe the courts with the power of enforcing restraints on the lawmaking powers." More recently, members of the Court have reiterated in an advisory opinion that Article 1, Section 2, "*presents no constitutional restraint upon the legislative power of the General Assembly.*" *In re Advisory Opinion to Governor*, 510

A.2d 941, 942 (R.I. 1986) (emphasis added). For this reason alone, the challenge to the Amended PPA on the basis of the good-of-the-whole clause must fail.[9]

2. The Amended LTC satisfies the advisory standard that the good-of-the-whole clause represents.

In any event, 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 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 consider approving 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

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[9] In its memorandum, the Attorney General argues that this language now has added weight and significance in light of the recently passed Separation of Powers Amendments ("SOP Amendments"). *See A.G. Memo.* at 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. 1995), 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* 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. (See discussion of *Kennedy, infra*). As cited below, *In the Matter of Dorrance*, 4 R.I. 230, 249 (1856), the leading case regarding the construction of Article 1, Section 2, emphasized the language of that section 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.

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 the Attorney General improperly challenges in this forum (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 Amended PPA and *further promoted* the broad public interest.

In promoting a host of legitimate public interests by regulating a particular project, the Amended LTC is similar to the kinds of statutes that the Supreme Court has affirmed in previous cases against Article 1, Section 2 challenges. In *Kennedy v. State of Rhode Island*, 654 A.2d 708 (1995), for example, the Court sustained the constitutionality of a statute authorizing an individual plaintiff to bring suit for damages in excess of a general statutory cap. The Court concluded that the statute was constitutional because the "private" benefit conferred on the individual plaintiffs was not "wholly irrelevant" to the state's legitimate objective of providing adequate compensation. Id. at 713. Here, similarly, the private benefit accruing to Deepwater furthers a host of legitimate state objectives, enumerated in the statute.

As touched on *supra*, n. 9, in construing Article 1, Section 2, *Kennedy* applied the very deferential "rational basis" standard of review, imported from equal protection case law. Under that standard, a Court will sustain a statute that "entails neither a suspect classification nor a fundamental right, nor a gender-based classification" if "*any state of facts reasonably may be conceived* to justify" the discriminatory statutory classification. *Kennedy*, 654 A.2d at 713 (emphasis added). Assuming, *arguendo*, that the Amended LTC contains a "discriminatory statutory classification" that adheres to Deepwater's benefit, the Amended LTC more than meets this standard of review.[10] In the General Assembly's estimation, this particular wind project, if it meets the requirements of the Amended LTC, is worth pursuing at this juncture to promote a variety of public policy interests. *See* R.I. Gen. Laws § 39-26.1-7(a). There is simply no doubt that the project may conceivably help achieve the General Assembly's goals and that the Amended LTC, therefore, must be valid.

This case is also similar to an earlier Rhode Island case, *Crafts v. Ray*, 22 R.I. 179, 185-190 (1900), in which the Court sustained the constitutionality of an ordinance and statute providing a ten-year tax exemption to two specific manufacturing companies that agreed to locate their manufacturing property in East Providence. The Court explained that whether to grant this tax exemption to the manufacturer was "a question of policy, with which the court has nothing to do, the legislature having the power to decide" and that "[t]he property of the town is benefited, both in value and income, by the introduction of business and the consequent increase of inhabitants." Id. at 189; *see also id.* at 190 ("The primary objective of this statute is not to aid

[10] Contrary to the Attorney General's contention, Rhode Island authority post-dating the enactment of the Equal Protection clause indicates that Article 1, Section 2 challenges are still to be reviewed under this same deferential standard. As the Court explained in *Town of Lincoln v. City of Pawtucket*, 745 A.2d 139, 146 (R.I. 2000), rejecting a challenge brought under the unfair burdens clause in Article 1, Section 2, "no separate analysis is required to determine that legislation meeting the standards of the Equal Protection Clause also cannot be in violation of this advisory admonition."

or benefit private persons for private ends, but its purpose is to benefit the public at large by increasing, in the end, the resources of the State and its taxable property through the establishment of new industries." (quoting *Colton v. Montpelier*, 45 A. 1039, 1040 (Vt. 1899)).[11]

In this case, the General Assembly has similarly decided that, assuming all statutory conditions are met and administrative approvals obtained, a particular project will promote the state's interests in, *inter alia*, decreasing dependence on foreign fossil fuels and reducing the adverse health and other impacts of fossil fuel energy sources. *See* R.I. Gen. Laws § 39-26.1-7(a). That the General Assembly's pursuit of this goal also benefits the developer who stands ready to take on the project is, for constitutional purposes, of no moment.[12]

III. The Attorney General's and CLF's *res judicata* and administrative finality arguments lack merit.

CLF argues that *res judicata* or, alternatively, the administrative finality doctrine, bars the Commission from implementing the Amended LTC. The Attorney General emphasizes *res judicata* over administrative finality, essentially adopting CLF's *res judicata* argument.

Neither common law doctrine can possibly apply, however, because the General Assembly, by mandating review of the Amended 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 A.G. Memo.* at 15 (citing *Astoria Fed. Sav. & Loan Ass'n v.*

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[11] *Crafts* further explained that "[w]hen . . . one erects a factory under a contract of exemption, the consideration for which is an expected public benefit, the case is quite different from that of a pure gift." 22 R.I. at 189.

[12] In another analogous case, the Rhode Island Supreme Court's members opined that the good-of-the-whole clause could not be used to challenge a statute ordering the Department of Transportation to repair a road in Little Compton because the clause is directory in nature. *In re Advisory Opinion*, 510 A.2d 941, 942 (R.I. 1986). The members also concluded, however, that the statute did not represent the expenditure of public finds for a private purpose, requiring two-thirds majority approval by both houses of the General Assembly, pursuant to R.I. Const. Art. IV, § 14. The Court's members explained that "if the principle purpose and objective in a given enactment is public in nature it *does not matter that there will be incidental benefits to private interests*." *Id.* at 942-43 (emphasis added).

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, 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 990, 994 (R.I. 2010) (quoting *State v. Clark*, 974 A.2d 558, 572 (R.I. 2009)). Furthermore, "[w]hen interpreting a statute," the "ultimate goal is to give effect to the General Assembly's intent." *Steihnof v. Murphy*, 991 A.2d 1028, 1036 (R.I. 2010) (quoting *State v. Germane*, 971 A.2d 555, 574 (R.I. 2009) (internal quotations omitted)). Thus, the Amended LTC's language establishing a schedule controlling this proceeding precludes any *res judicata* or administrative finality challenge.

Further, the *res judicata* and "administrative finality" arguments fail because the issues, or claims, at stake in Docket No. 4185 are different from the issues decided 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 Amended 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 Amended 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).[13] 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.[14]

Moreover, *res judicata* and its "less forceful cousin," *A.G. Memo.* at 7, the administrative finality doctrine, cannot preclude this new "claim" because the Applicants agreed upon the Amended PPA, and the General Assembly amended the LTC *after* the date of the Commission's Order in Docket No. 4111. Courts recognize, and logic dictates, that *res judicata* cannot apply to claims that arose *after* the decision in question. Indeed, the cases are legion and include the United States Supreme Court and the Rhode Island Supreme Court. *See Lawlor v. National Screen Service Corp.*, 349 U.S. 322, 328 (1955) ("While the 1943 judgment precludes recovery on claims arising prior to its entry, it cannot be given the effect of extinguishing claims which

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[13] 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).

[14] 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.

did not even then exist and which could not possibly have been sued upon in the previous case."); *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 provided the basis for the earlier claim."); *Russo v. Baxter Healthcare Corp.*, 919 F. Supp. 565, 570 (D.R.I. 1996) ("The scope of litigation is framed by the complaint at the time it is filed. The rule that a judgment is conclusive as to every other matter that might have been litigated does not apply to new rights acquired pending the action which might have been, but which were not, required to be litigated." (internal quotations omitted)); *Zalobowski v. New England Teamsters & Trucking Industry Pension Fund*, 122 R.I. 609, 613 (1980) (holding that "[b]y definition, the doctrine of res judicata [could not] . . . apply to subsequent actions" for payments due under installment contract that "accrued since the filing date of the original action"); *Belliveau Building Corp. v. O'Coin*, 1997 R.I. Super. LEXIS 10, *14 (February 19, 1997) (holding that "*res judicata* does not bar claims that arise after the original suit is lodged"); 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."). For this reason as well, the Commission should reject the Attorney General's and CLF's *res judicata* and administrative finality arguments.

CLF contends that the new contract does not raise a new issue because Deepwater and National Grid "*could* have" presented a PPA with the Amended PPA's terms and conditions "earlier," in Docket No. 4111. *CLF Mot.* at 19 (emphasis in original). CLF misses the point entirely. Deepwater and National Grid, which are legally distinct contracting entities, did not reach agreement on the terms reflected in the Amended PPA until *after* the Commission's decision in Docket No. 4111. Therefore, they could not have filed the Amended PPA in that

docket. The situation is conceptually indistinguishable from, for example, a breach of contract claim which arose after a judgment on an earlier breach-of-contract claim regarding the same contract. The judgment in the earlier action does not preclude the second claim because the breach underlying the second claim arose *after* the judgment on the first claim. *C.f. Belliveau*, 1997 R.I. Super. LEXIS at *14 (rejecting *res judicata* argument to the extent the claim was based on alleged contractual interference occurring after first suit was lodged). Similarly, here, Deepwater and National Grid's Amended PPA came into existence only *after* the Commission's decision in Docket No. 4111 and the General Assembly's enactment of the Amended LTC. Further, the Amended LTC established a *new* standard of review for future PPAs filed with the Commission including the pending application.[15] The Commission could not have applied this new standard in the earlier proceeding – the standard did not exist then.[16]

Simply stated, the Commission has not determined whether the Amended PPA 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

[15] Note that CLF's erroneous interpretation of *res judicata* doctrine, if applied, would have extreme consequences. In this case, it would preclude National Grid and Deepwater from negotiating a long-term contract for a wind farm off of Block Island *for all time*, regardless of intervening changes to their contract, the energy or security needs of Rhode Island, or the governing law, and no matter how beneficial the General Assembly deems the contract to be for the people of Rhode Island. More generally, it would repose in the Commission an unparalleled power to constrict and freeze the General Assembly's policymaking powers on a range of issues that come before it. This in itself would violate Separation of Powers principles, for no conceivable public end.

[16] Indeed, the Amended LTC does not even *allow* the Commission to consider the PPA presented in Docket 4111: it is only an *amended* PPA, a *different* contract, that the Commission may consider in this proceeding.

Amended LTC. It will do so under a mandatory timeframe that the General Assembly established, by necessity removing any common-law preclusion obstacles to the approval process. The doctrines of *res judicata* and administrative finality have no application.

CONCLUSION

For the foregoing reasons, Applicants respectfully request that the Commission deny CLF's and the Attorney General's Motions to Dismiss.

Respectfully submitted,

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

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DATED: July 19, 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 19, 2010.

Cynthia G. Thomas

National Grid – Review of Proposed Town of New Shoreham Project
Docket No. 4185 – Service List Updated 7/16/10

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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,

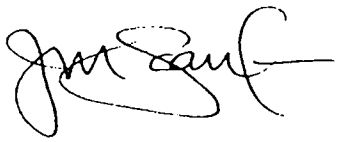
Ronald T. Gerwatowski

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)