STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS PUBLIC UTILITIES COMMISSION

IN RE: REVIEW OF AMENDED POWER PURCHASE AGREEMENT BETWEEN NARRAGANSETT ELECTRIC COMPANY D/B/A NATIONAL GRID AND DEEPWATER WIND BLOCK ISLAND, LLC PURSUANT TO R.I. GEN.LAWS § 39-26.1-7

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OCEAN STATE POLICY RESEARCH INSTITUTE'S MEMORANDUM ON WHETHER §39-26.1-7 c (iii) REQUIRES [or ALLOWS] THE COMMISSION TO TAKE INTO ACCOUNT ABOVE MARKET COSTS

(I) The internal structure of §39-26.1-7 reveals that subsection c (iii) is a net standard

(a) only §39-26.1-7 c (i) contemplates any modification to the consideration of avoided costs

Proponents of Commission approval of the amended power purchase agreement have throughout these proceedings relied upon the theory that the specific governs the general, for a recent restatement by the RI Supreme Court see *Foster Glocester Regional School Building Committee et al. v. Steven A Sette et al*, 08-162, p. 8 (RI Supreme Court, June 4, 2010). Thus they have sought to focus solely on Section 7 and avoid contemplation of the general structure of review for renewables contracts under Chapter 26.1, or for that matter the overarching structure of Commission's review of any Docket with a background of ratepayer protection that suffuses Title 39.

But suddenly the rest of the Section 26.1 matters. The notion is advanced that the legislature's inclusion of a command at §39-26.1-8 that the "commission shall

consider. . . [*inter alia*] (i) The economic impact and potential risks, if any, of the proposal on rates to be charged by the electric distribution company" is advanced as a structural prohibition to their consideration of the rate effects of the amended power purchase agreement contemplated in Section 7.

This is certainly a respected species of statutory interpretation flowing from the canonical font of *inclusio unius est exclusio alterious*, for a literal recognition of the canon in Rhode Island see *City of Central Falls v. Central Falls Fire Fighters,* 02-1179, p. 8, for the background proposition in the context of statutory interpretation credit *Russello v US*, 464 US 16, 23 (1983) ("[W]here congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion", quoting *United States v. Wong Kim Bo*, 472 F.2d 720, 722 (CA5 1972)); but, in the present case, it is a theory that tells too much for proponents. If one first applies this interpretive rule to the sacred tablets of Section 7, one can see that the General Assembly required 4 separate findings to support approval of the amended power purchase agreement, Subsections c (i)-(iv). Yet explicit exception from the Commission's precedential undertakings as to Chapter 26.1 is provided only with regard to Subsection c (i) by the adoption of an altered contextual definition of "commercially reasonable".

So, it is clear that the legislature knew how to circumscribe the Commission's general approach to renewables contract analysis through specific language and did so with regard to the finding required by Subsection c (i), but acted intentionally not to

disturb the Commission's general discretion and charge when reviewing economic factors under Subsection c (iii).

(b) Structural difference between §39-26.1-7 and §39-26.1-8 demonstrates no prohibitory effect on cost consideration in the former, and indeed indicates why such consideration is mandatory.

Proponents will argue that the legislature could have more explicitly required such consideration of costs when drafting Subsection 7 c (iii) as it did when drafting Subsection 8 b (i), quoted *supra*. This proposition fails as a prohibitory matter, *i.e.*, it clearly fails to prohibit the discretion of the Commission to consider rates as a detriment to economic development, even if it does not require it.

But the different language of what is actually under review in Section 7 versus Section 8 suggests that the language of Subsection 8 c (iii) should actually be read to require a net economic development benefit finding.

Subsection 8 (b) does not ask the Commission to consider a "power purchase agreement", but an earlier stage "proposal" for an "offshore wind project". As Attorney Rubin pointed out skillfully in crossexamination of EDC witness Seth Parker on August 4th, a proposal or project, *e.g.*, the Block Island Wind Farm, does not inherently allocate costs or subsume possible detrimental reverberations of the proposal or project in the larger economy.

But a contract for the purchase of power would include those costs and their allocation and thus considering the benefits of such a contract would necessarily include consideration of the effects of the contract induced as to buyers and sellers – the actual buyers of power under the "amended power purchase agreement" being

inescapably the ratepayers, as conceded by EDC's witness Seth Parker in our crossexamination on August 5th, 2010. Thus cost to ratepayers is a required portion of the inquiry to establish "economic development benefits".

(c) §39-26.1-7 c (iv) is clearly a net benefit standard and is structured identically to c (iii) resolving doubt in favor of net benefit requirement for c (iii) under the canon of *noscitur a sociis*.

Subsection 7 c (iv) provides analogously to 7 c (iii) that to approve the "amended power purchase agreement" the Commission must making a finding that "it is likely to provide environmental benefit, including the reduction of carbon emissions." There has been no evidence offered in the previous docket or in the present docket that the Block Island Wind Farm will, in and of itself, reduce carbon emissions. Wind turbines do not consume carbon dioxide or remove it from the air. Rather, the environmental benefits attributed to the Block Island Wind Farm – without conceding that they are accurately represented – are carbon avoidance, the purported inferential result of the operation of this amended power purchase agreement in the marketplace. As the Rhode Island Supreme Court has observed recently in *State v Jeffrey Clark*, 974 A.2d 558, 585 (R.I. 2009) regarding *noscitur a sociis*, "That venerable principle counsels that when there is doubt as to the meaning of particular statutory language, "the meaning of questionable or doubtful words or phrases in a statute may be ascertained by reference to the meaning of other words or phrases associated with it." (quoting *State v. DiStefano*, 764 A.2d 1156, 1161 (R.I. 2000)). This interpretive doctrine was applied in Clark, as we propose here, to contextualize a phrase in a list of phrases by comparison to other phrases in the list.

While the list of findings required in Subsection 7 c (i) thru (iv) does not constitute 4 structurally identical commands, the similarity of c (iii) and c (iv) in structure and content is unmistakable and begs application of *noscitur a sociis* to resolve any ambiguity to the extent the Commission believes there is any ambiguity.

(II) The larger context of Title 39 favors resolution of any ambiguity in §39-26.1-7 c (iii) in favor of a cost conscious standard

While a great deal of homage has been paid to the specific over the general in this case, the general deserves its due. It can be of little doubt that the function of utilities regulation is primarily concerned with the problem of monopoly, which is to say that utilities regulation exists as a protection of ratepayers against the tendency of utilities to command "monopoly rents", see, *e.g.*, Crew, Michael and Parker, David, International handbook on economic regulation, Edward Elgar Publishing Limited, Cheltenham, UK (2006), page 5.

While it would be fair to say that this more narrow origin has been supplemented with duties to protect ratepayers *while* facilitating other legislative policies and purposes, the organic charter of utilities regulators remains always concerned with the economical cost provision of the regulated commodity or service. This can be seen to be true in the establishment of the Commission at §39-1-3:

> (a) To implement the legislative policy set forth in § 39-1-1 and to serve as the agencies of the state in effectuating the legislative purpose, there are hereby established a public utilities commission and a division of public utilities and carriers.

And following logically to the policy to be implemented in § 39-1-1 the quintessential statement of the policies to be accomplished is Subsection a (3):

> The general assembly finds and therefore declares that:
> . . .
> (3)Preservation of the state's resources, commerce, and industry requires the assurance of adequate public transportation and communication facilities, water supplies, and an abundance of energy, all supplied to the people with reliability, at economical cost, and with due regard for the preservation and enhancement of the environment, the conservation of natural resources, including scenic, historic, and recreational assets, and the strengthening of long-range, land-use planning.

Thus the balance of these purposes is to be accomplished at "economical cost". And this is emphasized as Subsection a (3) is followed by Subsection b:

> (b) It is hereby declared to be the policy of the state to provide fair regulation of public utilities and carriers in the interest of the public, to promote availability of adequate, efficient and economical energy, communication, and transportation services and water supplies to the inhabitants of the state, to provide just and reasonable rates and charges for such services and supplies, without unjust discrimination, undue preferences or advantages, or unfair or destructive competitive practices, and to co-operate with other states and agencies of the federal government in promoting and coordinating efforts to achieve realization of this policy.

Subsection (b) speaks distinctly to the provision of regulation, and commands through it both the promotion of "economical energy" as well as the provision of "just and reasonable rates". While §39-26.1-7 conveys a legislative directive that the "commercial reasonability" of the amended power purchase agreement be viewed by comparison to "a project of a similar size, technology and location, and meeting the policy goals in subsection (a) of this section.", it does nothing to disturb the organic charge of the commission to promote economical energy or provide just and reasonable rates.

In this light, the recent amendments to §39-26.1-7 can be seen as a legislative bar to prevent a *prima facie* finding that cheaper renewable power was available from

causing the Commission to reject the amended power purchase agreement without considering the other factors. The amended Subsection 7 cannot, however, be read to prohibit the consideration of costs and indeed read in the context of the Commission's establishment and purpose appears to require such consideration.

Thus, while National Grid and Deepwater's 7/23/10 Motion to Strike Testimony (Grid/Water Motion) was providentially granted to the extent it that it excluded evidence on "avoided cost" ***as related to the definition of "commercially reasonable"***, it would be an overly broad and improvident interpretation of the granting of that motion as having in any way presaged the answer to the present question.

(III) Reading §39-26.1-7 c (iii) to prohibit consideration of costs, *i.e.*, the setting of a net benefit standard, would render the subsection a nullity in violation of the canon of statutory interpretation requiring that meaning be given to every provision.

Referring again to the Grid/Water Motion to Strike, counsel absurdly maintained on page 6 that "The General Assembly has *already* decided that the benefits of the Project justify its costs and the slightly higher electric rates that will result". If this were the case, the command to the Commission to make a finding that the amended power purchase agreement would "provide economic development benefits" would be less than nugatory, violating the nullity corollary to the canon requiring meaning be given to every provision, see *Int. Federation of Technical and Professional Engineers v. RI State Labor Relations Board*, 747 A.2d 1002, 1005 (R.I. 2000) "[t]his [C]ourt has long applied a canon of statutory interpretation which gives effect to all of

a statute's provisions, with no sentence, clause or word construed as unmeaning" (holding that under that canon §28-7-9(d) was not implicitly nullified).

Counsel appears to mistake the Legislature's command for the Commission to hear the matter and make such a finding as an announcement of the finding. We think it unnecessary to point to countless other laws that demonstrate that the Legislature knows how to announce a finding, and that no such finding on cost benefit was announced in this legislation.

Rather, it seems exceedingly clear that the Legislature was unconvinced that the Commission's previous decision gave the extent of weight it may have desired to the benefits it imagined to flow from the consummation of a power purchase agreement for this project. Thus, this 'remand' serves the very purpose of a cost benefit exercise of, at minim, a qualitative nature and arguably contemplates a quantitative comparison of benefits and rates, or rate effects on economic development.

The proponent parties urging approval of the amended power purchase agreement argued at length before the public and the Legislature that the benefits of the project outweighed its cost. But when it came to actually debating that question in an evidentiary setting, as provided for in the amended §39-26.1-7, those proponents, who had grandly announced the net benefits of their scheme outside this docket, simply ducked the question. This is a disservice to the Legislature, the Commission and the public.

(IV) Reading cost benefit into language that does not contain a literal command for it was approved in Entergy v Riverkeeper which recommends a similar discretion for the Commission to consider costs under §39-26.1-7, although the case is not controlling.

Time does not permit us to fully brief this point. We wish to recognize the Attorney General's apt citation of this case. Should there be any grant of extension in time or pages we would be pleased to augment our submission as to this and several other points.

Submitted for Ocean State Policy Research Institute by and through its attorney,

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I hereby certify that a true copy of the above memorandum was sent electronically to the docket list and the original was hand delivered on August 6, 2010 to the Public Utilities Commission.