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

DOCKET NO. 4185

OCEAN STATE POLICY RESEARCH INSTITUTE'S MEMORANDUM IN SUPPORT OF MOTIONS TO DISMISS

It is with a degree of trepidation that Ocean State Policy Research Institute joins the motion to dismiss. A major concern of the Founders Project, the legal arm of Ocean State Policy and its independent predecessor, Rhode Island Wiseuse, has been the "delegation run riot" that was once defended against by Justice Cardozo in the renown, if much disregarded, case of *Schechter Poultry Co. v US*. Thus, if the legislature chose to delegate a decision making function to the Public Utilities Commission (PUC) and then chose to take it back, this should please us, and we ought to support the result.

But that is not what happened, instead the legislature has, if §39-26.1-7 is to be given its full facial effect, reopened a case that has been finally adjudged in a *quasi*-judicial setting. A mature contemplation requires that form be given its due as well as function. Our Brothers Rubin and Elmer have convinced us that form is persuasive as to the application of *res judicata* to PUC decisions, and that it binds the legislature to respect the judicial character of the forum it has created.

The General Assembly could have legislated directly to create, or consigned to departments of more executory character, the creation of a wind farm in the waters off Block Island. It did not, in the first or the second instance. Rather it sought to place its actions in the context of a measure of adjudicative oversight. Having chosen that sword, the project contemplated must live or die by it.

While it is uncontested that the PUC is a creature of legislature, see, *e.g.*, Opposition of National Grid and Deepwater Wind Block Island, LLC to Intervenor Conservation Law Foundation's Motion To Stay (7/13/10) (Opposition), p. 13 citing *First Bank v. Conrad*, 350 N.W.2d 580, 584-585, that is not dispositive of the question of the dignity to be awarded its final judgments by the legislature. The legislature can create judicial and,

relevantly, *quasi*-judicial tribunals. And, as the Attorney General noted in his Memorandum In Support of Motion To Dismiss (07/06/10) (Support) p.8, the unmistakable formulation of the Supreme Court voiced in *DOC v Tucker*, 657 A.2d 546, 549 and cited approvingly in *Johnston Ambulatory Surgical Assoc. v. Nolan*, 755 A.2d 799, 810 is that "the preclusive effect of *res adjudicata* should apply to those decisions rendered when an administrative agency has acted in a quasi-judicial capacity". Thus it seems clear that when an agency is solely a *quasi*-judicial body, its decisions are always cloaked with such preclusive effect.

The PUC itself has not seemed convinced on this point, applying in varying cases "administrative finality" and "*res judicata*", or occasionally considering them together. While the PUC[1] and the Rhode Island Supreme Court[2] have recognized the Commission's ability to change methods, i.e. disregard precedents, as part of an orderly process to "develop and follow consistent regulatory approaches" and to "provide an explanation for [] departures", the precedent for the application of *res judicata* comes not from its own body of policies but from a careful body of law spelled out by the Rhode Island Supreme Court.

Despite an effort for consistency, the Commission has seesawed on the legal doctrine that applies to its final judgments. In *In Re: United States Department of the Navy Petition for Declaratory Judgment*, Docket No. 3132, Order 16437 (10/30/2000), the Commission applied the doctrine of *res judicata* dismissing a declaratory judgment action for failure of the petitioner to object to or appeal earlier ratesetting of which it was timely aware; in *In Re: Rhode Island Resource Recovery Corporation Petition for Declaratory Judgment* Docket #3565, Order 19273 (4/21/2008), p. 38, the Commission applied, without distinguishing, both *Res Judicata* and "administrative finality", to a decision of the Energy Facilities Siting Board (EFSB) holding that direct connection of electricity of an industrial park to a generating facility in Johnston was bound by the condition of a change in law contemplated in the EFSB decision and the lack of such law change allowed a different outcome at the PUC; in *In Re: City of Newport Water Division Application to Change Rate Schedules*, Docket No. 4025, Order 19940 (3/29/2010) the Commission requested briefing on "administrative finality", but recognized a new argument or issue at hearing and did not assert "administrative finality"; and in *In Re: Verizon-RI's Request For Partial Relief From The Alternative Regulation Plan Approved In Order No. 17417*, Docket No. 3445 the Commission found conformity of its procedural rule 1.28 (c) with administrative finality.

[1] *In Re: Petitions To Place The Newport Naval Station On The G-62 Rate*, Docket No. 3551, Order 17644, p. 22

[2] *New England Telephone & Telegraph Co. v. PUC*, 446 A.2d 1376, 1389 (R.I. 1982)

Whether welcome or not in such a complicated, contentious and temporally constrained environment, it seems proper to urge that the Commission unequivocally recognize the application of *res judicata* to its decisions as distinct from "administrative finality".

Having so recognized, the next tier question is the competency of this *quasi*-judicial forum to contemplate the full implications of the application of *res judicata*. Judge Thompson wrote on point for agency application of "administrative finality" for the Superior Court in *Beechwood v. Charlestown Planning Commission* WC 06-0717 Slip. Op., p. 26 (Super. Ct. 2008) that if the agency did not have the capacity to decide the question as the court of first instance, it "would then be bound to go through the entire decision-making process, including the holding of public hearings and the taking of evidence, even though the ultimate outcome had been preordained". Judge Thompson found in no uncertain terms: "This would quite clearly be absurd". Drawing authority from *Jeff Anthony Props v. Zoning Bd. Of Review* 853 A. 2d 1226, 1230, to avoid interpreting a statute in a way that will create an absurd result, Judge Thompson found implicit in *Johnston Ambulatory*, 755 A.2d at 807 that the RI Supreme Court had "authorized administrative agencies to apply the doctrine . . . in the first instance", *Beechwood* WC 06-0717 at 25.

Similar authority for the application of *res judicata* by the *quasi*-judicial body is implied in *Tucker*, 657 A. 2d at 548, where the court held that the issue was saved for judicial review despite the fact that "*res judicata* [had not] been urged before the [Human Rights] commission". This preservation was not, however, as matter of the lack of competency of the Human Rights Commission to have entertained a claim of *res judicata*, but rather because the context of the case made clear that raising the issue "would have been a futile act", *id* at 549. Thus the court acknowledged the propriety of such a claim being raised in the first instance before a *quasi*-judicial body.

This comports with the reasoning in *Johnston Ambulatory*, 755 A. 2d at 810, regarding "administrative finality", that "It prevents repetitive duplicative applications for the same relief, thereby conserving the resources of the administrative agency and of interested third parties that may intervene." Certainly the same applies to *res judicata*.

This role must place a *quasi*-judicial body on the slippery slope of inspecting the firmity of statutes, that very activity thought to be forbidden by those who oppose the consideration of constitutional questions by the PUC. But, from the historic line of RI cases cited by the Attorney General from *Dorr* to *Taylor*, see Support at 26, it is clear that a legislative assault on *res judicata* must fail. And the more recent case that stands for a contemporary telling of this cautionary tale is *In Re: Sherman*, 565 A.2d 870 (RI 1989).

In one of many special acts, not unlike that approved in *Kennedy v. RI*, 654 A.2d 708 cited by the Attorney General, Support at 31, the legislature provided a waiver of cap on damages actions against the state for Paul Sherman who attempted suicide and was severely injured in the attempt while in the custody of the State at the Adult Correctional Institutions. This waiver provided that the $3 million limitation on recovery "shall

include any interests and costs". When awarding damages, the trial judge denied pre- and postjudgment interest because the statute did not explicitly subject the state to interest on the award and "the court will strictly construe statutes that award interest on judgments against the State." *Sherman*, 565 A.2d at 871 (citing numerous decisions). The judgment was entered on April 22, 1987 and became final ten days later.

The legislature, several months later on July 3, 1987, passed a new special act providing explicitly for pre- and post judgment interest. There was limited remand in the case by the RI Supreme Court for the consideration of certain postjudgement motions. After a hearing on Oct. 26, 1987 the trial justice filed a decision "providing that the State shall pay pre- and postjudgment interest pursuant to" the new statute, *Ibid*.

But the RI Supreme Court overturned the award holding:

> If the Legislature intends to allow a party to collect interest on a judgment against the State, the Legislature must act before the entry of final judgment in order to benefit the intended party. [5] If the court later reconsiders the issue of interest on the judgment, the action is invalid under the doctrine of res judicata. Res judicata serves as an "absolute bar to a second cause of action where there exists identity of parties, identity of issues, and finality of judgment in an earlier action." *Beirne v. Barone*, 529 A.2d 154, 157 (R.I.1987).

Id at 872.

By the same and obvious token, the PUC in Docket No. 4111 found the PPA to be "commercially unreasonable", just as in *Sherman*, the trial court found that no interest should be awarded with damages. A subsequent statute that did not explicitly disturb the ruling but implicitly reopened or undermined it was held to be without effect. So must be found the legislative amendments to §39-26.1-7 that undertake precisely the same assault on a *quasi*-judicial decision protected by *res judicata*.

As a *quasi*-judicial body, and in order to review an assertion of *res judiciata*, it will be required in at least this limited sense that the PUC inquire into the firmity of its own statutes. This is still an area of judicial doctrine although it implicates the separation of powers and is implicitly a constitutional question. We do not think that limited statutory review for the sake of application of *res judicata* is inappropriate although the burden of time prevents us from providing other than the implicit authorities *supra*.

This is not an invitation to sail the constitutional waters of the other issues raised in motions to dismiss. We regard these motions as preservationist in character and the issues well suited to declaratory judgments in other courts of competent jurisdiction, and see no bar to the institution of such proceedings immediately should the Commission, as we expect, decline to rule on these issues, but, as we trust, preserve them for review.

In that regard we wish to reserve the prerogative to advance precedents and join the arguments of the movants at any later stage in these proceedings.

The new "commercially reasonable" standard was contained within the range of the commission's discretion in establishing the old "commercially reasonable" standard.

Finally on point and not process, in assessing whether the statute attempts to disturb the decision in Docket No. 4111 or effectively direct a different outcome in that case, Deepwater and National Grid invite us to view the new statute not as an attack on the previous decision, but an entirely new animal, Support at 18, 19. We are not so zoologically curious.

R.I. Gen. Laws § 39-26.1-7(a) as originally enacted defined "commercially reasonable" as "terms and pricing that are reasonably consistent with what an experienced power market analyst would expect to see in transactions involving newly developed renewable energy resources." As amended, the statute now defines "commercially reasonable" 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". To the extent the definition of "commercially reasonable" has been changed, the impact of the new language on the decision already rendered by the PUC is illusory.

The narrower definition as currently written was already considered, discussed and rejected by the PUC in its original decision, *In Re: Review of Proposed Town of New Shoreham Project Pursuant to R.I. Gen. Laws §39-26.1-7*, Docket No. 4111, Order 19941 (*New Shoreham I*) at 70. Specifically, it refused to accept Deepwater's proposal that the Commission limit its basis for a finding of "commercially reasonable" to looking at the Project only in comparison to other "projects or pricing that is identical to the Block Island project in nearly every facet, from its size, its location and even the benefits it would render to Block Island", *Ibid*.

The PUC voluntarily rejected this rationale "because 'if the commercially reasonable standard meant only comparing the terms and pricing of Deepwater to other projects that benefit the Town of New Shoreham, it would become a self referent standard.'" *Ibid* (quoting Division Exhibit 1 at 11). The PUC did not base its rejection on the statutory limitations provided by R.I. Gen. Laws § 39-26.1-7(a), and recognized its authority to consider the narrower standard.

The PUC went on to state that it "cannot make its interpretation of commercial reasonableness strictly dependent on project size and other project attributes because…this is the definition that will have to apply to a multitude of projects to be reviewed by the Commission in accordance with Grid's future obligation to enter into long-term contracts for 90MW of newly developed renewable energy resources over the next four years. *Therefore, the Commission needs to apply the definition consistently in reviewing all such contracts, regardless of sizing restrictions, technology, location, or novelty.*" *Id* at 69, 70 (Emphasis added.)

The doctrine of r*es judicata* "makes prior judgments conclusive in regard to any issues that were raised or that could have been raised before the first tribunal." *Tucker*, 657 A.2d at 549. Therefore, the definition of "commercially reasonable" as defined in the amended statute does not raise any new or different issues that were not previously considered by the PUC.

Another change to the definition of "commercially reasonable," was the addition of subsection (a) which provides for four policy considerations as follows: "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) (amended).

With regard to the economic benefits, the PUC rejected the theory that the contract should be ratified based on the "potential future economic benefits." *New Shoreham I* at 78. It noted that "the record cannot support such a finding that other economic benefits would either render this commercially unreasonable contract reasonable or make the $390 million above market costs " 'worth the price.' " *Ibid*. Although the PUC acknowledged evidence that there was harm to subscribers and taxpayers, "the only evidence of benefits was based on speculation." *Ibid*. Parties to this litigation had the opportunity to present evidence to the PUC on the economic benefits but did not. That the information was not presented when the opportunity was ripe does not preserve the issue for further discussion once the decision was rendered.

In sum, Deepwater and National Grid contend that there is a world of difference between the two versions of §39-26.1-7 when, in fact, the commission had the discretion to write a decision in *New Shoreham I* that fairly reflects the newly adopted statute. Thus the "new standard" is actually subsumed within the "old standard", was available to the PUC for its decision in *New Shoreham I*, and the newly enacted legislation is not a departure from the old docket but an attempt to reopen it and direct the verdict. For this reason the Commission should dismiss Docket 4185 as requested by several parties.

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