

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS
PUBLIC UTILITIES COMMISSION

IN RE: REVIEW OF AMENDED POWER :
PURCHASE AGREEMENT BETWEEN :
NARRAGANSETT ELECTRIC COMPANY : Docket No. 4185
d/b/a NATIONAL GRID AND :
DEEPWATER WIND BLOCK ISLAND, LLC :
PURSUANT TO R.I.G.L. § 39-26.1-7 :

**OBJECTION OF TORAY PLASTICS (AMERICA), INC. TO REQUESTS SET FORTH
IN SEPTEMBER 29, 2011 LETTER REGARDING PURPORTED WAIVER WITH
RESPECT TO JUNE 30, 2010 POWER PURCHASE AGREEMENT**

Introduction

On June 30, 2010, Deepwater Wind Block Island, LLC (Deepwater) and National Grid (NGrid) executed and filed with the Public Utilities Commission (Commission) a Power Purchase Agreement (PPA). They sought approval of the PPA pursuant to R.I.G.L. § 39-26.1-7 entitled “Town of New Shoreham Project.”

On August 15, 2010, this Commission, in a 2 to 1 decision, approved the PPA. The majority approved the PPA despite the huge above-market costs that the PPA would impose on Rhode Island electric ratepayers. Those costs would fall most heavily upon commercial and industrial ratepayers such as Toray Plastics (America), Inc. (Toray). According to calculations submitted by NGrid in PUC Docket No. 4227 in response to a data request from the Commission, as of April 19, 2011, the estimated PPA cost to Rhode Island ratepayers would be in excess of \$700 million over its 20-year term. More importantly, the estimated above-market cost that would be charged to Rhode Island ratepayers would be in excess of \$415 million. A copy of NGrid’s analysis in this regard is attached hereto as Exhibit 1.

Toray sought appellate review of the Commission majority approval of the PPA. On July 1, 2011, the Rhode Island Supreme Court affirmed this Commission's 2 to 1 decision. Under Rule 26 of the Supreme Court Rules, a petition for reargument of the matter could have been filed within 10 days after the July 1, 2011 decision, (i.e., by July 11, 2011), but no petition for reargument was filed.

The PPA has a clear and unambiguous automatic termination provision set forth in Section 8.3. This provision states as follows:

8.3 Failure to Satisfy Conditions. If Buyer [NGrid] has not received the PPA Regulatory Approval on or before the date falling one year after Buyer has filed for the PPA Regulatory Approval, this Agreement shall terminate as of that date, with no further liability hereunder for either Party except for any obligations arising under Sections 6.1, 12 and 13. (Emphasis added).

Because the Buyer filed for PPA Regulatory Approval on June 30, 2010, the PPA automatically terminated on June 30, 2011 because "PPA Regulatory Approval" had not yet been obtained by that date (and was not obtained until July 11, 2011).

On September 29, 2011, a letter was submitted to the Commission from legal counsel for NGrid. The letter enclosed a purported waiver of the provisions of Section 8.3 of the PPA signed by NGrid and Deepwater. The signatures were not dated, but the top of each signature page had a date of September 29, 2011 typed on it.

The purported waiver states that it "shall not become effective unless and until the Buyer has received the approval of this Waiver by the Rhode Island Public Utilities Commission, which approval must be final and not subject to appeal or rehearing and must be acceptable to Buyer and Seller in their sole discretion." The accompanying transmittal letter asks the Commission to (1) affirm[] . . . the action . . . to waive the one-year condition set forth of Section 8.3 of the PPA"

and pronounce it to be “prudent and reasonable,” and (2) rule that “the PPA remains in full force and effect and the Company is authorized to proceed under the PPA.”

Toray objects to these requests and respectfully submits that this Commission should decline to issue the requested rulings because:

(1) Deepwater’s authority to transact business in the State of Rhode Island was revoked by the Rhode Island Secretary of State on June 27, 2011.¹ Under R.I.G.L. § 7-16-42(b), “Upon the issuance of the certificate of revocation, the authority of the limited liability company to transact business in this state ceases.” Therefore, Deepwater had no authority to execute the purported waiver or to join in the request for rulings set forth in the September 29, 2011 letter.

(2) The letter request was filed in Docket 4185, which is a closed docket under Rule 1.20 of this Commission’s Rules. No request to reopen the docket was made, nor could any such request be granted under the plain language of this Commission’s Rules. Accordingly, the Commission has no authority to grant any requests in this closed docket.

(3) No legal authority has been cited in the letter that would authorize the Commission to take the actions requested in the September 29, 2011 letter. The Commission’s authority to act regarding the PPA is strictly circumscribed by R.I.G.L. § 39-26.1-7. The Commission has concluded its statutory duties and responsibilities in that regard and the Commission has no further authority to act on the PPA as requested.

(4) The PPA automatically terminated on June 30, 2011 because the Supreme Court did not issue a final decision that was not subject to a rehearing request by June 30, 2011. The waiver provision in Section 8.3 of the PPA therefore also automatically terminated on June 30, 2011 and it cannot be utilized to resurrect the PPA.

¹ See attached Exhibit 2.

(5) To the extent (if any) a request is being made that the Commission's rulings in this matter cannot be appealed, such a request is in violation of R.I.G.L. § 39-5-1, which authorizes any aggrieved person to seek Supreme Court review of any decision or order of the Commission.

ARGUMENT

1. Deepwater's authority to transact business in Rhode Island was revoked on June 27, 2011. Accordingly, its execution of the purported waiver is legally ineffective.

Exhibit 2 is a Certificate of Revocation of Certificate of Organization/Registration of Deepwater Wind Block Island, LLC. On June 27, 2011, the Secretary of State of Rhode Island revoked the Certificate of Organization/Registration of Deepwater to transact business in this state. Pursuant to R.I.G.L. § 7-16-42(b): "Upon the issuance of the certificate of revocation, the authority of the limited liability company to transact business in this state ceases." Therefore, effective on June 27, 2011, Deepwater could not transact business of any kind in the State of Rhode Island. Accordingly, Deepwater could not legally execute the purported waiver submitted to the PUC, nor could it join in the September 29 letter request to the Commission seeking approval of the waiver and resurrection of the automatically terminated PPA. The letter requests should therefore be summarily denied and dismissed.

2. Docket 4185 is closed and this Commission cannot take any action in that docket.

The letter request was filed in Docket 4185, which was opened by the Commission to deal exclusively with the Commission's responsibility to review the PPA under R.I.G.L. § 39-26.1-7. This docket is now closed. The Commission's duties and responsibilities are completed. No further action can be taken by the Commission in this docket. Commission Rule 1.20(m) explains how Commission dockets close:

(m) Close of Record. The record in a proceeding shall close after the briefs, if any, have been filed, or otherwise after the dispositive open meeting, and

thereafter there shall not be received in evidence or considered as part of the record any document, letter or other evidence submitted except as provided in Rule 1.20(i), changes in the transcript as provided in Rule 1.23(b), or as otherwise stipulated by the parties with the agreement of the Commission. (Emphasis added).

Neither Rule 1.20(i), which is limited to the Commission calling for further evidence “at any stage of the hearing,” nor Rule 1.23(b), which deals solely with changes in the transcript, apply to the pending letter requests.

Although the Commission’s Rules do allow for reopening proceedings under Rule 1.26 in certain limited circumstances, none of those circumstances apply here. Under Rule 1.26(a), parties can petition to reopen a proceeding, but only “before the issuance of the written order,” which has already occurred. Under Rule 1.26(b), the Commission can reopen proceedings “at any time prior to the issuance of its written order,” which has already occurred. Therefore, Rule 1.26 cannot be used to reopen this docket. There is also a provision in Commission Rule 1.28 that deals with “Relief from Order.” It provides certain defined circumstances under which the Commission may grant relief from an Order. However, these letter requests do not seek relief from any provision of a Commission Order. Therefore, Rule 1.28, which by its terms deals exclusively with “relief from order” cannot be used to consider the letter requests.

Moreover, no request has even been made by Deepwater or NGrid to reopen Docket 4185.

3. The Commission cannot act on this letter under R.I.G.L. § 39-26.1-7.

The Commission is a creature of the Legislature and has only the express authority given to it by the Legislature. The Commission’s review of the PPA is a strictly circumscribed process set forth in exacting detail by R.I.G.L. § 39-26.1-7. All of the Commission’s duties and responsibilities regarding PPA approval or rejection pursuant to R.I.G.L. § 39-26.1-7 were

concluded when the Commission issued its majority decision in this matter. Nothing in R.I.G.L. § 39-26.1-7 gives the Commission any authority to take the actions requested in the September 29, 2011 letter.

A review of the requirements of R.I.G.L. § 39-26.1-7 makes it clear that the Commission's authority to act is limited to review of the PPA that was submitted for Commission approval or rejection on June 30, 2010. R.I.G.L. § 39-26.1-7(b) provides that upon the PPA filing, which occurred on June 30, 2010, the Commission "shall open a new docket," which was done. The Commission was then required to commence evidentiary hearings no later than 30 days from the filing of the PPA. This was done. Under R.I.G.L. § 39-26.1-7(c), the Commission was required to review the PPA to determine whether or not to approve it, and under R.I.G.L. § 39-26.1-7(d), the Commission was required to issue a written decision accepting or rejecting the PPA "without conditions, no later than forty-five (45) days from the filing of the amended power purchase agreement, without delay or extension or the timeframes contained in this section." (Emphasis added). This was done. Accordingly, the Commission's statutory authority to act regarding the PPA ended when it issued its written majority decision pursuant to R.I.G.L. § 39-26.1-7(d). The Commission has no further statutory authority to act as requested in the September 29, 2011 letter.

4. The PPA and its § 8.3 provision automatically terminated on June 30, 2011.

The PPA automatically terminated by its terms on June 30, 2011. That termination included Section 8.3, the waiver provision. Accordingly, the waiver provision cannot now be used in a belated attempt to resurrect the automatically terminated PPA.

The PPA at issue was dated and filed with the Commission on June 30, 2010. The filing contained a cover document that summarized certain provisions of the Agreement. Page 2 of that summary states:

The PPA will . . . terminate if National Grid has not received the PPA Regulatory Approval on or before the date falling one year after NGrid filed for the PPA Regulatory Approval. (§§ 8.2, 8.3).

The first page of the agreement states in the second “Whereas” clause that “Buyer is authorized under R.I.G.L. § 39.26-7 to enter into a power purchase agreement with Seller . . .”

On page 7 of the PPA, in the definitions section, the phrase “PPA Regulatory Approval” is set forth as a defined term as follows:

“PPA Regulatory Approval” shall mean the PUC’s approval of this Agreement without material modification or conditions pursuant to R.I.G.L. § 39-26.1-7(b)-(d), including the recovery by Buyer of its costs incurred under this Agreement and remuneration equal to 2.75 percent (2.75%) of Buyer’s actual annual payments under this Agreement pursuant to R.I.G.L. § 39-26.1-4, which approval shall be final and not subject to appeal or rehearing and shall be acceptable to Buyer and Seller in their sole discretion. (Emphasis added).

The Supreme Court decision upholding the Commission’s majority approval of the PPA was issued on July 1, 2011. Rule 25 of the Supreme Court Rules provides that petitions for reargument “shall be filed within ten (10) days after filing of the decision.” Therefore, PPA Regulatory Approval,” as defined by the PPA, did not occur until July 11, 2011.

Section 8.3 of the PPA is clear and unambiguous and provides as follows:

8.3 Failure to Satisfy Conditions. If Buyer has not received the PPA Regulatory Approval on or before the date falling one year after Buyer has filed for the PPA Regulatory Approval, this Agreement shall terminate as of that date, with no further liability hereunder for either Party except for any obligations arising under Sections 6.1, 12 and 13. (Emphasis added).

This PPA automatic termination provision is clear. Failure to receive “PPA Regulatory Approval” on or before June 30, 2011 automatically terminates the PPA, except for the

obligations arising under Sections 6.1 (dealing with credit support), 12 (dealing with confidentiality), and 13 (dealing with indemnification). Section 18 is the waiver provision that the parties are seeking to utilize. However, Section 18 did not survive the automatic termination of the PPA on June 30, 2011. Only the obligations under Section 6.1, Section 12, and Section 13 survived. Therefore, the Section 18 waiver provision cannot be used in to attempt to resurrect the automatically terminated PPA.

It should also be noted that the waiver provision in Section 18 requires (and the purported waiver itself states) that the purported waiver “shall not become effective unless and until the Buyer [NGrid] has received approval of this Waiver by the Rhode Island Public Utilities Commission, which approval must be final and not subject to appeal or rehearing and must be acceptable to Buyer and Seller in their sole discretion.”² This is an admission that Commission approval of the purported waiver is required, that the PPA is not currently in effect, and that without Commission approval (which the Commission has no authority to give, for the reasons set forth above), the waiver cannot become effective.

Because the Commission has no authority to grant the relief being sought in the September 29, 2011 letter, even if the defects set forth above could be cured, the purported waiver cannot be approved by the Commission and it therefore cannot take effect. The PPA therefore remains terminated and unenforceable.

5. Appeal rights can not be eliminated.

It is not entirely clear what the letter and purported waiver are attempting to do when the purported waiver states that Commission approval of the purported waiver “must be final and not subject to appeal or rehearing.” If by this language the parties are stating that any Supreme

² The purported waiver also attempts to be retroactively effective to June 30, 2011. No authority is cited in support of this.

Court review must be completed and any rehearing right under Rule 25 of the Supreme Court Rules must have expired, then Toray has no problem with that interpretation.

On the other hand, if the letter request is asking the Commission to rule that the purported waiver is effective, that the PPA remains in full force and effect, and that no aggrieved persons can seek Supreme Court review of this Commission's decision, then of course, this Commission has no such authority. This Commission cannot modify R.I.G.L. § 39-5-1, which specifically provides that “any person aggrieved by a decision or order of the commission may . . . petition the supreme court for a writ of certiorari to review the legality and reasonableness of the decision or order.”

6. Toray requests a public hearing on the issues raised by the September 29, 2011 letter.

Toray, a Rhode Island corporation, formally requests, pursuant to Rule 1.20 of this Commission's Rules, R.I.G.L. § 42-35-9, R.I.G.L. § 39-1-1(c), and R.I.G.L. § 39-4-3, that the Commission consider the requests set forth in the September 29, 2011, letter in a formal public hearing. This hearing should provide for appropriate public notice and a full, fair, and adequate opportunity for all parties, including the intervenors, any other interested persons, and the public, to provide testimony, argument, and comment on the requests made in the September 29, 2011 letter.

Conclusion

For the reasons set forth above, Toray respectfully requests that the September 29, 2011 letter requests be denied and that the Commission rule, after an appropriate public hearing, that it has no authority to rule as requested in the letter, but if it does believe that it has such authority, that (1) the actions taken in an attempt to waive Section 8.3 of the PPA were improper, (2) the

PPA automatically terminated on June 30, 2011, and is therefore no longer enforceable, and (3)
NGrid and Deepwater are not authorized to proceed under the PPA.

Respectfully submitted,
TORAY PLASTICS (AMERICA), INC.
By its attorney

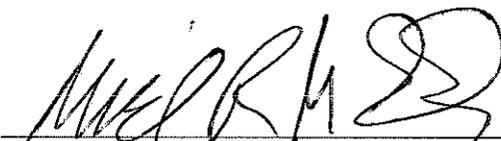
Date: October 11, 2011



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CERTIFICATE OF SERVICE

I hereby certify that on the 11th day of October, 2011, I served a true copy of the foregoing on the attached service list.



Michael R. McElroy

Estimated Above Market Cost for 20-year PPA Hypothetical Comparison with Competitive Solicitation

8 WTG 28.8 MW 06/30/2010 PPA			
Statutory Capacity 11.5 MW			
Annual Output 100915 MWh			
		Above Market Cost	
Unit Pricing	Contract Cost	ESAI 7x24 Pricing	ESAI Monthly Pricing
2009			
2010			
2011			
2012	\$ 235.70	\$ 4,162,462	\$ 2,093,886
2013	\$ 243.95	\$ 24,618,164	\$ 13,942,160
2014	\$ 252.49	\$ 25,479,800	\$ 15,341,218
2015	\$ 261.32	\$ 26,371,593	\$ 15,296,030
2016	\$ 270.47	\$ 27,294,598	\$ 15,010,270
2017	\$ 279.94	\$ 28,249,909	\$ 15,083,071
2018	\$ 289.74	\$ 29,238,656	\$ 15,375,002
2019	\$ 299.88	\$ 30,262,009	\$ 15,719,457
2020	\$ 310.37	\$ 31,321,179	\$ 16,162,939
2021	\$ 321.23	\$ 32,417,421	\$ 17,321,513
2022	\$ 332.48	\$ 33,552,030	\$ 18,345,789
2023	\$ 344.11	\$ 34,726,351	\$ 19,540,502
2024	\$ 356.16	\$ 35,941,774	\$ 21,110,833
2025	\$ 368.62	\$ 37,199,736	\$ 22,769,638
2026	\$ 381.53	\$ 38,501,726	\$ 24,245,180
2027	\$ 394.88	\$ 39,849,287	\$ 25,234,690
2028	\$ 408.70	\$ 41,244,012	\$ 26,274,283
2029	\$ 423.01	\$ 42,687,552	\$ 27,320,679
2030	\$ 437.81	\$ 44,181,617	\$ 28,441,504
2031	\$ 453.13	\$ 45,727,973	\$ 29,611,609
2032	\$ 468.99	\$ 47,328,452	\$ 30,813,060
Sum	\$ 700,356,301	\$ 415,053,311	\$ 408,773,448
NPV @ 7%	\$ 323,236,542	\$ 187,077,535	\$ 183,983,372



State of Rhode Island and Providence Plantations

A. Ralph Mollis
Secretary of State

6/27/2011

Deepwater Wind Block Island, LLC
c/o CT CORPORATION SYSTEM
10 WEYBOSSET STREET
PROVIDENCE, RI 02903

ID# 509832

CERTIFICATE OF REVOCATION OF
CERTIFICATE OF ORGANIZATION/REGISTRATION

OF

Deepwater Wind Block Island, LLC

The undersigned, as Secretary of State of the State of Rhode Island, and by virtue of the authority vested in him by § 7-16-42 of the Rhode Island General Laws, hereby revokes the Certificate of Organization/Registration of the above-named entity to transact business in this state.

Witness my hand and the seal of the
State of Rhode Island this 27th day of
June, 2011.



A. Ralph Mollis
Secretary of State

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**National Grid – PUC Review of Proposed Town of New Shoreham Project
Docket No. 4185 – Service List Update 10/6/11**

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