

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PUBLIC UTILITIES COMMISSION

IN RE: AMENDED POWER PURCHASE :
AGREEMENT BETWEEN NARRAGANSETT :
ELECTRIC COMPANY D/B/A NATIONAL : DOCKET NO. 4185-A
GRID AND DEEPWATER WIND BLOCK ISLAND, LLC :
– REQUEST FOR APPROVAL OF WAIVER :

ORDER

I. Travel

On September 29, 2011, Narragansett Electric Company d/b/a National Grid (“National Grid” or “Company”) filed a letter to “inform” the Public Utilities Commission (“Commission”) that a Waiver of Section 8.3 of the Amended Power Purchase Agreement (“Amended PPA”) approved by the Commission on August 11, 2010 had been executed between National Grid and Deepwater Wind Block Island, LLC (“Deepwater”). According to National Grid, the Waiver addressed the fact that “Section 8.3 of the [Amended] PPA contains a provision whereby the [Amended] PPA” would “automatically terminate” one year after it was filed with the Commission if National Grid had not received Commission approval, including the resolution of any appeals. The Amended PPA had been filed on June 30, 2010 and the Rhode Island Supreme Court did not issue its Opinion affirming the Commission’s decision until July 1, 2011.

National Grid characterized the issue as immaterial and de minimus, stating that because the parties to the Amended PPA had always intended to proceed under the Amended PPA, they “have executed a Waiver of the one-year deadline pursuant to Section 18 of the [Amended] PPA.” Section 18 of the Amended PPA allows for written waivers of contract provisions. National Grid requested the Commission rule at an Open Meeting to “(1) affirm that the action taken by the Company to waive the one-year condition set forth in Section 8.3 of the PPA was

prudent and reasonable; and (2) the [Amended] PPA remains in full force and effect and the Company is authorized to proceed under the [Amended] PPA.”¹

On October 11, 2011, Toray Plastics (America), Inc. filed an Objection to Requests Set Forth in September 29, 2011 Letter Regarding Purported Waiver With Respect to June 30, 2010 Power Purchase Agreement (“Toray’s Objection”). Also on October 11, 2011, Citizen Intervenors filed an Objection to National Grid’s Letter affirming and adopting Toray’s Objection and rationale. Both objectors requested the Commission conduct a hearing on the matter. Toray’s Objection was in the form of a legal memorandum and cited four bases: (1) that Deepwater had no authority to execute the Waiver because its authority to transact business in Rhode Island had been rescinded by the Rhode Island Secretary of State on June 27, 2011 meaning, according to Toray, Deepwater could not have legally executed the Waiver; (2) that no Motion to Reopen the docket had been made and even if one had been made, the Commission could not grant such request under its Procedural Rules; (3) that the Commission has concluded its statutory duties and responsibilities in regard to the approval of the Amended PPA and as such, lacks the jurisdiction to grant the request of National Grid and Deepwater; (4) that the Amended PPA automatically terminated on June 30, 2011 terminating the waiver provision in Section 8.3 of the Amended PPA so that it cannot be used to resurrect the Amended PPA; and (5) that to the extent the parties were requesting a Commission ruling that the decision to approve the Waiver could not be appealed, such request would violate state law.²

Toray argued that because the Commission had fulfilled its statutory duties to review and rule on the Amended PPA under R.I. Gen. Laws § 39-26.1-7, the Commission is precluded from taking any further action under both its Procedural Rules and R.I. Gen. Laws § 39-26.1-7. Toray

¹ Grid Letter dated September 29, 2011.

² Toray’s Objection at 3-4, 8.

argued that Docket No. 4185 was closed after the submission of briefs pursuant to Commission Rule of Practice and Procedure 1.20(m). Toray recognized that there may be other methods by which the Commission could undertake the review requested by National Grid, but argued that none would apply to the current situation. Toray maintained that proceedings may only be reopened prior to the issuance of its written order and that the rule governing relief from a Commission Order would not apply, even if the letter had requested relief.³

Furthermore, argued Toray, because R.I. Gen. Laws § 39-26.1-7 set forth a very specific timeframe and process to be followed by the Commission in undertaking a review of the Amended PPA, “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.”⁴ According to Toray, because the Commission completed its task, “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).”⁵

Next, Toray argued that the Amended PPA automatically terminated on June 30, 2011 and with it, the waiver provision upon which National Grid and Deepwater rely. According to Toray, the parties were using the expired waiver provision “in a belated attempt to resurrect the automatically terminated [Amended] PPA.”⁶ Toray argued that the automatic termination provision is clear and that the Amended PPA included provisions that would survive termination of the Amended PPA but that Section 18, allowing for execution of a waiver, was not one of them. Therefore, according to Toray, “the Section 18 waiver provision cannot be used in [an]

³ *Id.* at 4-5

⁴ *Id.* at 5-6.

⁵ *Id.* at 6.

⁶ *Id.*

attempt to resurrect the automatically terminated [Amended] PPA.”⁷ Finally, Toray argued that because of the wording of the executed Waiver Provision, National Grid and Deepwater were admitting that the Amended PPA was not in effect and that without Commission approval, could not be in effect. Toray reiterated its position that the Commission was precluded from granting such approval.⁸

On October 17, 2011, National Grid responded to Toray’s Objection stating that the purpose of the waiver is to waive an “immaterial provision of the PPA”, namely, the automatic termination clause. In its letter, National Grid stated:

As a matter of contract law, contracting parties always have the right to mutually waive termination provisions such as the provision in the PPA, which is common in this type of agreement. In this case, the Company and Deepwater agreed to a waiver of the termination effective June 30, 2011, and, subject to Commission approval, the [Amended] PPA remains in full force and effect.⁹

National Grid characterized the waiver as an easy method to avoid a technical termination of the Amended PPA in order to avoid an unintended result. National Grid noted that approval of the waiver is “crucial in order to assure that the project can be financed without any contractual or other legal questions pending that could delay the project.”¹⁰ National Grid maintained that the fact that Docket No. 4185 was closed is irrelevant because the Commission is not prohibited from simply opening a new docket and considering the request therein.¹¹

Regarding jurisdiction, National Grid posited that the Commission’s jurisdiction lay with R.I.G.L. § 39-26.1-7 in that because the Commission approved the Amended PPA under R.I.G.L. § 39-26.1-7 in which Section 18 of the Amended PPA “expressly leaves to the Company’s discretion whether or not any amendment or waiver of the provisions of the [Amended] PPA

⁷ *Id.* at 8.

⁸ *Id.*

⁹ Grid Letter, 10/17/11 at 1.

¹⁰ Grid Letter, 10/17/11 at 2.

¹¹ Grid Letter, 10/17/11 at 2.

requires the approval of, or a filing with, the Commission,” the Commission’s authority necessary flows from the initial approval under the statute.¹² National Grid requested the Commission deny Toray’s request for a hearing.¹³

Also on October 17, 2011, Deepwater filed a Memorandum in support of National Grid’s request, arguing that (1) the Waiver is reasonable and prudent; (2) whether Deepwater is licensed to do business in Rhode Island is irrelevant; (3) the Commission has the authority to approve the Waiver; and (4) the Commission should deny Toray’s request for a hearing. Deepwater maintained that “the issues raised by Toray relate to a private contract between National Grid and Deepwater” and that the parties to a private contract can waive a condition of performance as long as they continue to respect the four specific statutory requirements set forth in R.I. Gen. Laws § 39-26.1-7.¹⁴ Deepwater argued that it and National Grid “properly exercised their respective contractual right to waive the timing provision; an eminently reasonable decision that advances the goals of [R.I. Gen. Laws § 39-26.1-7] by ensuring that the Project will move forward in a manner consistent with the Commission’s approval.”¹⁵ Therefore, Deepwater argued, National Grid’s decision to execute the Waiver rather than “walk away” from the Project was reasonable and prudent.¹⁶

Next, Deepwater argued that because it is a foreign limited liability company, under Rhode Island law, failure to register in Rhode Island does not affect its authority to transact business in Rhode Island. Regardless, Deepwater stated, on October 11, 2011, Deepwater’s

¹² Grid Letter, 10/17/11 at 1-2. Grid also cited R.I.G.L. § 39-1-38 which states that the provisions of Title 39 of the Rhode Island General Laws “shall be interpreted and construed liberally in aid of its declared purpose. The Commission...shall have, in addition to powers specified in this chapter, all additional, implied, and incidental power which may be proper or necessary to effectuate their purposes....”

¹³ Grid Letter 10/17/11 at 2.

¹⁴ Deepwater Response, 10/17/11 at 2-3 (citations omitted).

¹⁵ *Id.* at 4.

¹⁶ *Id.* at 6.

authority was reinstated and it provided a copy of its Certificate of Good Standing from the Rhode Island Secretary of State. Therefore, according to Deepwater, the issue was moot.¹⁷

Next, Deepwater argued that Docket No. 4185 was not closed because the Commission has previously held that an existing docket may be utilized to entertain “a new independent request for relief” that “pertains” to a previous docket.¹⁸ Deepwater stated that in the past, the Commission has held separate proceedings under a single docket where the issues are related. Furthermore, Deepwater noted that the Commission and the United States Supreme Court have determined that its procedural rules may be relaxed or modified in the interest of justice.¹⁹

Deepwater also argued that the Commission’s jurisdiction to rule on National Grid’s request arises from R.I. Gen. Laws § 39-26.1-7, requiring Commission approval of the Amended PPA if the Amended PPA met four statutory criteria.²⁰ According to Deepwater, because the Commission found that the Amended PPA met the four statutory criteria, “[t]he Commission necessarily retains jurisdiction at this juncture to determine whether any waivers to the PPA provisions cause it to fall out of compliance with the four statutory purposes.”²¹ Additionally, like National Grid, Deepwater relied on the Commission’s general regulatory powers granted to it under R.I. Gen. Laws § 39-1-1(c) as source of jurisdiction over National Grid’s request.²²

Finally, Deepwater requested the Commission deny Toray’s request for an evidentiary hearing on the basis that the waiver did not affect the substantive terms of the Amended PPA, that “the underlying facts are simple and self-evident,” and that there are no issues of fact in

¹⁷ *Id.* at 7-8 (citations omitted).

¹⁸ *Id.* at 8, citing, Order No. 17417 (issued April 6, 2005).

¹⁹ *Id.* at 8-9 (citations omitted).

²⁰ *Id.* at 9-10.

²¹ *Id.* at 10.

²² *Id.*

dispute. Therefore, according to Deepwater, under Commission Procedural Rule 1.15, the Commission has the discretion to rule on the request without conducting a hearing.²³

On October 20, 2011, the Division filed a letter with the Commission stating that it “views the issue presented here as strictly a contract issue between National Grid and the other contracting party, Deepwater, and therefore, takes no position as to the requests before the Commission. The legal issues appear to have been fully briefed by the interested parties in this matter.”²⁴

II. Hearing

On October 25, 2011, Commission Staff conducted a Pre-Hearing Conference to schedule oral argument in this matter and on November 1, 2011, the Commission conducted a hearing at its Offices at 89 Jefferson Boulevard, Warwick, Rhode Island, for the purpose of hearing oral argument. The following appearances were entered:

NATIONAL GRID:	Jennifer Brooks Hutchinson, Esq.
DEEPWATER WIND:	Joseph A. Keough, Jr., Esq.
TORAY PLASTICS:	Michael R. McElroy, Esq.
CITIZEN INTERVENORS:	Joseph J. McGair, Esq.
COMMISSION:	Cynthia G. Wilson-Frias, Esq. Senior Legal Counsel

Prior to the commencement of oral argument, Counsel for National Grid stated that National Grid was not seeking a Commission ruling regarding the reasonableness and prudence of the execution of the Waiver. Rather, National Grid was simply seeking “approval of the

²³ *Id.* at 10-11.

²⁴ Letter from Jon Hagopian, Special Assistant Attorney General, to Luly Massaro, Commission Clerk, 10/20/11.

Waiver in order to remove a legal technicality by nature of the timing provision in the [Amended] PPA.”²⁵

Counsel for Toray opened with a request that the Commission take no action on National Grid’s request.²⁶ He stated that National Grid’s letter request contained no reference to statutory or other authority upon which the Commission could act on its request, even if its request was treated as a Petition under Commission Rule of Practice 1.10. Counsel asserted that no such authority exists and therefore, the Commission lacks jurisdiction to grant the request of National Grid for approval of the Waiver.²⁷ Counsel argued that jurisdiction does not arise under the Section 18 Waiver provision of the Amended PPA because that provision did not survive the termination of the Amended PPA and as such, could not be used by the parties after the termination date to extend the Amended PPA.²⁸

Counsel’s next argument was that the Commission’s jurisdiction does not arise from R.I. Gen. Laws § 39-26.1-7 because under the statute, the Commission only charge was to “accept or reject the amended power purchase agreement without conditions” which was done in August 2011. According to Mr. McElroy, because the Commission could only accept or reject the Amended PPA and not impose conditions or changes, it could not now approve a change in the PPA to eliminate Section 8.3. He suggested that because of the narrow charge to the Commission under R.I. Gen. Laws § 39-26.1-7, National Grid and/or Deepwater should seek an amendment to the law to grant the Commission additional authority.²⁹ During Rebuttal, responding to a question from the Commission, he stated that the Commission only has the

²⁵ Tr. 11/1/11 at 4.

²⁶ Tr. 11/1/11 at 5

²⁷ Tr. 11/1/11 at 7.

²⁸ Tr. 11/1/11 at 8-10, 14.

²⁹ Tr. 11/1/11 at 10-11, 12-13.

ability to fulfill the legislature's vision if the Commission has subject matter to do so.³⁰ He stated that R.I. Gen. Laws § 39-26.1.7 "was very careful about the subject matter jurisdiction it granted to this Commission. Every single thing that it asked [the Commission] to do [the Commission] did. Nothing is left. There is no continuing jurisdiction granted at all."³¹ For all of these reasons, Toray requested that the Commission decline to act on the basis that it has no jurisdiction, but to the extent the Commission finds it has jurisdiction, Toray requested the Commission reject National Grid's request for approval of the Waiver.³²

Toray's Counsel suggested that National Grid and Deepwater had mischaracterized the effect of Section 8.3 regarding PPA Regulatory Approval. He noted that each party indicated in their papers that the provision "allows for termination" or allows for a "decision not to terminate the PPA." However, he argued that "they have it backwards." Noting that the provision states "this agreement shall terminate as of that date," Toray's Counsel asserted that this is mandatory language and therefore, the Amended PPA has terminated and had terminated prior to the execution of the Waiver.³³ Therefore, he argued, rather than waiving a provision, "National Grid and Deepwater are trying to resurrect [the Amended PPA], and they admit they can only do so if the Commission approves the waiver, a waiver that was executed pursuant to an expired Section 18 of an expired PPA which is terminated."³⁴ He stated that the parties could have executed the Waiver prior to the expiration of the Amended PPA but failed to. He stated, "having failed to protect their own interest, they now ask this Commission to exercise authority it does not have to correct their mistake."³⁵ In Rebuttal, he reiterated that because the waiver is not effective until

³⁰ Tr. 11/1/11 at 102-03.

³¹ Tr. 11/1/11 at 103.

³² Tr. 11/1/11 at 11-12.

³³ Tr. 11/1/11 at 13-15.

³⁴ Tr. 11/1/11 at 15.

³⁵ Tr. 11/1/11 at 16.

such time as National Grid has received Commission approval, it was still not effective and therefore, there was still no contract.³⁶

Finally, Counsel for Toray referred the Commission to National Grid's Response to Commission Record Request 9(b) in Docket No. 4185. The question was "What is the Commission's jurisdiction, if any, over the PPA after it has been approved?" Mr. McElroy read the response into the Record: "Once the Commission approves the power purchase agreement in these proceedings, the Commission does not have jurisdiction over the power purchase agreement or the contractual relationship between the parties."³⁷ Additionally, in response to a question in Docket No. 4185 from the Bench regarding Section 18 of the Amended PPA, National Grid's legal counsel, Mr. Gerwatowski, responded that "Typically, we wouldn't normally be expecting to come before the Commission for another round of approval on that."³⁸ And in response to a comment from the Bench that issues may arise that have not been discussed in the Docket No. 4185 Record, Mr. Gerwatowski stated, "The Commission doesn't have jurisdiction over that. That's the difficulty with a contract like this which is basically not regulated once the approval is over."³⁹ Toray's Counsel stated that Toray agreed that the Amended PPA is no longer regulated by the Commission and therefore, there is no jurisdiction under which the Commission could act.⁴⁰

In response to a question from the Bench, Mr. McElroy agreed that assuming the Town of New Shoreham Project is built and National Grid begins paying for power under the Amended PPA, at that point, the Commission would have to make a determination whether or not there is a contract. He stated that at that time, the Commission would have to rule whether it would be just

³⁶ Tr. 11/1/11 at 98.

³⁷ Tr. 11/1/11 at 18-19.

³⁸ Tr. 11/1/11 at 19-20.

³⁹ Tr. 11/1/11 at 20-21.

⁴⁰ Tr. 11/1/11 at 21.

and reasonable to pass the contract costs on to ratepayers. He stated that there would be a new docket with an evidentiary hearing. He agreed that it was Toray's position that that would be the only time when the Commission would be authorized to act on the issue.⁴¹

Counsel for the Citizen Intervenors concurred with the arguments of Toray's Counsel, highlighting the argument that the Amended PPA expired on June 30, 2011, something which he referred to as a drop dead date. He stated that the Commission did not retain jurisdiction over the Amended PPA after it granted approval. He questioned why the parties needed approval from the Commission if there was no dispute between them regarding the Waiver. He also suggested that the parties to the Amended PPA still had not agreed to modify the contract because they needed to obtain Commission approval before it becomes effective.⁴² During Rebuttal, he took issue with the use of the term "technicality," arguing that R.I. Gen. Laws 39-26.1-7 did not envision the Commission protecting the rights of the parties, stating, "[i]f they did what they were supposed to do, this wouldn't have happened."⁴³

Beginning her argument, Counsel for National Grid stated that "[i]n the event that the Commission were not to take any action, the company would not be in a position to go forward with the project which would essentially frustrate the purposes that have been laid out by the General Assembly for the Town of New Shoreham project."⁴⁴ She stated that National Grid was not asking the Commission to determine whether a contract exists between National Grid and Deepwater. Rather, National Grid was seeking approval of the Waiver under a provision of the approved Amended PPA which carved out continuing jurisdiction for the Commission where

⁴¹ Tr. 11/1/11 at 17-18.

⁴² Tr. 11/1/11 at 21-22, 25.

⁴³ Tr. 11/1/11 at 104.

⁴⁴ Tr. 11/1/11 at 26.

none would normally exist. Therefore, according to National Grid's Counsel, the Commission has jurisdiction arising from the Amended PPA itself.⁴⁵

Counsel for National Grid conceded that the Waiver was not executed until after June 30, 2011, but stated that the Waiver includes an effective date of June 30, 2011 and that neither National Grid nor Deepwater intended for the contract to terminate. In response to several questions from the Commission as to whether there is a contract in effect under which the parties can execute a Waiver, Counsel for National Grid argued that because the Waiver included an effective date of June 30, 2011, that "as of June 30, 2011 the contract was in existence. The only thing that we're asking the Commission to do is approve that waiver. The contracting parties can always elect to waive conditions."⁴⁶ In response to a question from the Bench expressing concern that the parties were really asking the Commission to resurrect a contract, Ms. Hutchinson argued that if this Amended PPA had not been part of a regulatory proceeding, the parties would be free to continue the contract as private parties to a contract. However, the only reason National Grid had returned to the Commission was because the Amended PPA was part of a regulatory process and "it does create a legal technicality, and all that National Grid is trying to do is clear up that legal technicality" to avoid a problem several years in the future.⁴⁷

Conceding that the parties could have avoided the legal technicality by executing a Waiver prior to the expiration of the Amended PPA, Counsel for National Grid argued that there was nothing that could have been waived because the Supreme Court could have issued its decision prior to June 30, 2011. She agreed that the parties could have anticipated missing the deadline prior to the expiration of the Amended PPA, but stated that they most likely still would

⁴⁵ Tr. 11/1/11 at 27-28.

⁴⁶ Tr. 11/1/11 at 34-36.

⁴⁷ Tr. 11/1/11 at 37-38.

have sought Commission approval.⁴⁸ She agreed that under Section 18 of the Amended PPA, National Grid could have simply filed a notice with the Commission with a copy of the Waiver, but that National Grid decided that it needs Commission approval because it is not in the position to take a risk that cost recovery may not be approved in the future.⁴⁹ She concluded that “[t]he parties believe that [the Amended PPA] is in existence, that by waiving the condition effective back to June 30th, that the contract never terminated.”⁵⁰

At the beginning of his argument, Deepwater’s Counsel stated that this “is a situation where two contracting parties have executed a waiver and have executed their rights under a contract that is perfectly allowable under the contract.”⁵¹ He stated that there absolutely is a contract that is still in existence between National Grid and Deepwater.⁵² However, the parties requested Commission approval at this time because “this is coming back at some point. Now, it either comes back in two years when [National Grid is] looking for rates or we deal with this now, and this will tie into the jurisdiction question, but it absolutely is a question that will come back before you.”⁵³ According to Deepwater’s Counsel, the Commission should address the matter now so that the New Shoreham Project can move forward and meet the goals of the Rhode Island General Assembly as set forth in R.I. Gen. Laws § 39-26.1-7.⁵⁴ He stated, “[t]o decline jurisdiction or to decline to approve the waiver would absolutely frustrate and defeat those goals.”⁵⁵ He posited that this would be an unreasonable determination where the contract

⁴⁸ Tr. 11/1/11 at 39.

⁴⁹ Tr. 11/1/11 at 49-50.

⁵⁰ Tr. 11/1/11 at 57.

⁵¹ Tr. 11/1/11 at 61-62.

⁵² Tr. 11/1/11 at 62.

⁵³ *Id.*

⁵⁴ Tr. 11/1/11 at 62-63.

⁵⁵ Tr. 11/1/11 at 64.

terms had not been changed and where the Waiver represented a meeting of the minds to continue the Amended PPA.⁵⁶

Finally, responding to National Grid's argument, Counsel for Toray stated that if National Grid believes that it can walk away from the Amended PPA without approval of the Waiver, such Waiver which is contingent upon approval from the Commission, there is no contract in effect at this time.⁵⁷ In response, Ms. Hutchinson stated that "As a matter of contract law, nothing has changed or altered by the timing of that waiver. But if the Commission...doesn't approve it or the Commission doesn't take any action, then the company would treat the agreement as terminated and the project wouldn't be able to go forward."⁵⁸ She argued that this is a simple administrative contract matter between the parties and the Waiver advances the goals of the General Assembly and the decision of the Supreme Court issued after its review of the Commission's decision in Docket No. 4185.⁵⁹

During the hearing, the Commission issued a Record Request to National Grid seeking the date on which the Waiver was executed. On November 3, 2011, National Grid filed a Response indicating that the Waiver was signed on July 18, 2011 with an intended effective date of June 30, 2011.⁶⁰ National Grid also stated, "[u]nder settled law, the non-occurrence of a condition does not terminate the underlying contract, even if the conditions provides for an 'automatic termination.'"⁶¹ Therefore, National Grid reiterated its argument that [i]f the contracting parties intend to move forward, as National Grid and Deepwater intend to do here,

⁵⁶ Tr. 11/1/11 at 64-66.

⁵⁷ Tr. 11/1/11 at 108.

⁵⁸ Tr. 11/1/11 at 110.

⁵⁹ Tr. 11/1/11 at 110, 112.

⁶⁰ National Grid's Response to Commission Record Request 11/3/11.

⁶¹ *Id.* (citations omitted).

subject to Commission approval, the contract remains in full force and effect, and the condition is waived.”⁶²

On November 7, 2011, in response to National Grid’s additional citations and arguments provided in addition to its Record Response, Toray filed a letter with the Commission in response to the position that the contract continues in full force and effect. Toray’s letter reiterated its position that if National Grid believed it could walk away from the Amended PPA if the Commission did not approve the Waiver, National Grid had conceded there is currently no contract in effect.⁶³ Toray stated:

If the PPA was still in effect then (1) National Grid would not need the conditional Waiver, (2) National Grid would not need PUC approval of the Waiver, and (3) National Grid would not expose itself and its stockholders to a breach of contract suit from Deepwater Wind by not going forward with the project if the Commission does not approve the conditional Waiver.⁶⁴

According to Toray, if National Grid believes they can walk away, the Company must be certain it currently has no obligation to perform under the Amended PPA at this time.⁶⁵

III. Commission Findings

On November 29, 2011, the Commission conducted an Open Meeting for the purpose of considering all of the arguments before it and to consider National Grid’s Waiver request. At the outset, the Commission repeats that the “arguments have not made [the Commission’s] job more easy. They’ve been effective on both respects....”⁶⁶ The Commission believes that none of the arguments before it could be considered frivolous, either under the Rule 11 definition or the non-legal common sense definition. From the passage of R.I. Gen. Laws § 39-26.1-7 in 2009, the

⁶² *Id.* (citations omitted).

⁶³ Toray’s Letter 11/7/11 at 1.

⁶⁴ *Id.*

⁶⁵ *Id.* at 2.

⁶⁶ Tr. 11/1/11 at 112.

amendments of 2010, and through this filing, the facts and issues presented have been unique to this Commission.

A. Jurisdiction

What is not unique to this Commission is the fact that this Commission is a creature of statute. An administrative agency is “a governmental body charged with administering and implementing particular legislation.”⁶⁷ Its authority is drawn from its enabling legislation, in the Commission’s case, Title 39 of the Rhode Island General Laws. The Commission has been created to implement the legislative policy set forth in R.I. Gen. Laws § 39-1-1, including “preservation of the state’s resources...with due regard for the preservation and enhancement of the environment [and] the conservation of natural resources.”⁶⁸ The General Assembly has given the Commission broad authority to “supervise, regulate, and make orders governing the conduct of companies offering to the public in intrastate commerce energy...by providing full, fair and adequate administrative procedures and remedies....”⁶⁹ Throughout Title 39 of the Rhode Island General Laws, the General Assembly has granted to the Commission specific authority or mandate to carry out the goals of the General Assembly which are included in the various chapters of Title 39. The General Assembly has also provided the Commission with tools necessary to effectuate the underlying policy where specific authority may not be clearly set forth. R.I. Gen. Laws § 39-1-38 states: “The provisions of this title shall be interpreted and construed liberally in aid of its declared purpose. The commission...shall have, in addition to powers specified in this chapter, all additional, implied, and incidental power which may be proper or necessary to effectuate their purposes.”⁷⁰

⁶⁷ BLACK’S LAW DICTIONARY 45 (6th ed. 1990).

⁶⁸ R.I. Gen. Laws §§ 39-1-1(a)(3), 39-1-3.

⁶⁹ R.I. Gen. Laws § 39-1-1(c).

⁷⁰ R.I. Gen. Laws § 39-1-38.

Rhode Island General Laws § 39-26.1-7(a) states: “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 and undersea transmission cable that interconnects Block Island to the mainland....”⁷¹ To that end, with regard to the Amended PPA, the General Assembly initially granted authority to the Commission to review the Amended PPA and approve it if it met four criteria. Additionally, R.I. Gen. Laws § 39-26.1-7(i) allows for changes to the pricing in the Amended PPA in the event National Grid chooses not to own the transmission cable and this possibility has been memorialized in the Amended PPA as requiring Commission approval of such amendment. Therefore, there are certainly instances where the Amended PPA may be brought before the Commission for subsequent review. Furthermore, there is nothing in R.I. Gen. Laws § 39-26.1-7 which prohibits the parties from seeking Commission review of something like the Waiver provision which is necessary to effectuate the stated purposes of R.I. Gen. Laws § 39-26.1-7, namely “to facilitate the construction of a small-scale offshore wind project off the coast of Block Island....”

In this case, the parties have requested Commission review of a Waiver of a deadline to allow the parties to continue performing under the Amended PPA. Approval of the Waiver will facilitate the construction of the New Shoreham Project. The purpose of the deadline was to avoid undue delay in the procurement of renewable energy by National Grid. The Amended PPA counts toward National Grid’s long term contracting requirements under which National Grid needs to contract for a certain capacity by a certain date.⁷² The timing of the Supreme Court’s decision was not such as to cause undue delay in the progress of the Town of New Shoreham Project. Finally, a finding of no jurisdiction by this Commission would result in the

⁷¹ R.I. Gen. Laws § 39-26.1-7(a).

⁷² R.I. Gen. Laws § 39-26.1-7(h).

termination of the Town of New Shoreham Project which is contrary to the intent of the General Assembly in R.I. Gen. Laws § 39-26.1-7. Therefore, because of the lack of prohibition against reviewing the Amended PPA, the Commission finds that it can rely upon R.I. Gen. Laws § 39-1-38 so to interpret R.I. Gen. Laws § 39-26.1-7(a) as allowing for continuing jurisdiction over the Amended PPA where necessary to aid in the intended purpose of facilitating the construction of the Town of New Shoreham Project through the review of provisions which do not alter the key terms of the contract like the pricing terms. Having found jurisdiction, the Commission will treat National Grid's letter as a Petition under Commission Rule of Practice and Procedure 1.10 and assigns it Docket No. 4185-A.⁷³

B. Ripeness

The Commission finds that this issue is ripe for review. The United States Supreme Court has stated that in evaluating ripeness, “[t]he problem is best seen in a two-fold aspect, requiring us to evaluate both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration.”⁷⁴ To apply such a standard to this administrative proceeding, the Commission finds that the issues are properly before the Commission for determination. As National Grid and Deepwater correctly noted and Toray agreed, the issue of cost recovery will be presented to the Commission after the commencement of sales under the Amended PPA. Once the New Shoreham Project is constructed and operational, National Grid will be seeking recovery of the cost of the sales through a Commission-approved tariff.⁷⁵

⁷³ The Commission cautions National Grid to follow the appropriate filing requirements in the future.

⁷⁴ *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967).

⁷⁵ R.I. Gen. Laws § 39-26.1-7(a) states in part: “...the provisions of subsections (b), (c), (d), and (f) of § 39-26.1-5 shall apply....” R.I. Gen. Laws § 39-26.1-5(f) states: The electric distribution company shall file tariffs with the commission for commission review and approval that net the cost of payments made to projects under the long-term contracts against the proceeds obtained from the sale energy, capacity, RECs or other attributes. The difference shall be credited or charged to all distribution customers through a uniform fully reconciling annual factor in distribution rates, subject to review and approval of the commission. The reconciliation shall be designed so that customers are credited with any net savings resulting from the long-term contracts and the electric distribution

Deepwater and National Grid are seeking approval of the Waiver to avoid facing Toray's arguments at the time of cost recovery. At the hearing, Toray agreed that it is reasonable for a regulated utility to seek approval of something like the Waiver in order to remove a certain level of uncertainty of rate recovery in the future. Furthermore, regulatory certainty is important not just to regulated utilities seeking rate recovery, but to investors in important projects, such as the Town of New Shoreham Project. The United States Supreme Court has recognized that regulatory certainty is imperative to the ability to attract capital in a competitive power market.⁷⁶ Thus, the issue is a timely one which should be decided by the Commission now. Therefore, the first prong of the test is met.

Second, if the Commission were to take no action, National Grid and Deepwater would suffer harm. If the Commission does not take action on the Waiver, National Grid will be in the position of having to make a decision whether to move forward based on a good faith belief that it has a valid contract or take the risk of millions of dollars of expenses that might be found unrecoverable in the future.⁷⁷ National Grid has stated that it is not in the position to take on the regulatory risk that it perceives absent an approved Waiver. Therefore, the second prong of the test is met.

company recovers all costs incurred under such contracts as well as, recovery of the financial remuneration and incentives specified in § 39-26.1-4.

⁷⁶ See *NRG Power Marketing, LLC v. Maine Public Utilities Comm'n*, 130 S.Ct. 693, 700 (2010) quoting, *Nevada Power Co. v. Duke Energy Trading & Marketing, L.L.C.*, 99 FERC ¶ 61,047, pp. 61,184, 61,190 (2002), stating (“Competitive power markets simply cannot attract the capital needed to build adequate generating infrastructure without regulatory certainty....”).

⁷⁷ See *Abbott Laboratories v. Gardner*, 387 U.S. 136, 152-53 (finding an issue ripe where companies were faced the dilemma of continuing to use material which they believe in good faith meets statutory requirements, but which did not meet regulations, which could prove more costly.); See e.g. *Jennings v. Exeter-West Greenwich Regional School District Cmte.*, 352 A.2d 634 (R.I. 1976) (finding that an issue was ripe where a parent “was forced to choose whether to transfer his child to the public schools or risk being forced to pay in the future for the transportation costs that will continue to accrue.”).

C. Ruling on Waiver

Having found that the Waiver is properly before the Commission and is ripe for review, the Commission approves the Waiver without further hearing.⁷⁸ The Commission finds that there are no facts in dispute regarding the language of the Amended PPA, the Waiver, or the timing. Therefore, the Commission denies Toray's request for an evidentiary hearing. The Commission notes that the parties to the Amended PPA wish to continue performing under the Amended PPA and finds no public policy reason to interfere with that intention. The key terms of the Amended PPA have not been altered since Commission approval in August 2010. Therefore, approval of the Waiver is appropriate in order to effectuate the intent of the General Assembly as set forth in R.I. Gen. Laws § 39-26.1-7(a).

D. Appellate Rights

Toray expressed concern that National Grid and Deepwater attempted to eliminate appellate rights through the Waiver language that states "...this Waiver 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 and rehearing..." The Commission finds this concern to be overstated. The Commission interprets this language to simply mean that the Waiver will not become effective until either the appeal period runs without appeal or the Rhode Island Supreme Court rules on an appeal and the time for rehearing passes. Therefore, the Commission finds that the parties have not attempted to

⁷⁸ The Commission finds that because Deepwater's authority to transact business was reinstated prior to the Commission's decision, where the Waiver did not become effective until such time as National Grid receives certain approvals from the Commission, the prior revocation of authority is moot and irrelevant to the Commission's decision in this matter.

avoid application of R.I. Gen. Laws § 39-5-1 which governs judicial review of the Commission's Orders.

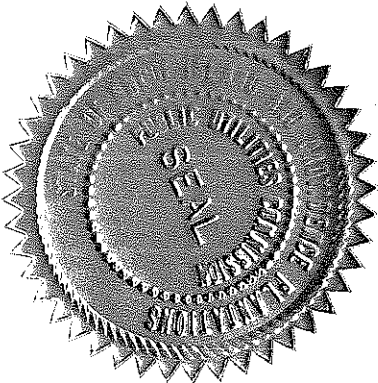
Accordingly, it is hereby

(20629) ORDERED:

1. The Narragansett Electric Company d/b/a National Grid's request for Approval of Waiver filed on September 29, 2011 is hereby approved.

EFFECTIVE AT WARWICK, RHODE ISLAND PURSUANT TO AN OPEN MEETING ON NOVEMBER 29, 2011. WRITTEN DECISION ISSUED JANUARY 24, 2012.

PUBLIC UTILITIES COMMISSION





Elia Germani, Chairman



Mary E. Bray, Commissioner



Paul J. Roberti, Commissioner

NOTICE OF RIGHT OF APPEAL PURSUANT TO R.I.G.L. SECTION 39-26.1-7(d) REFERENCING SECTION 39-5-1, ANY PERSON AGGRIEVED BY A DECISION OR ORDER OF THE COMMISSION MAY, WITHIN SEVEN DAYS (7) DAYS FROM THE DATE OF THE ORDER, PETITION THE SUPREME COURT FOR A WRIT OF CERTIORARI TO REVIEW THE LEGALITY AND REASONABLENESS OF THE DECISION OR ORDER.