RHODE ISLAND PUBLIC UTILITIES COMMISSION

IN RE: AMENDED POWER PURCHASE AGREEMENT BETWEEN NARRAGANSETT ELECTRIC CO. AND DEEPWATER WIND B.I.	:	DOCKET NO. 4185

ATTORNEY GENERAL'S MEMORANDUM ON (1) THE RELEVANCE OF NEGATIVE ECONOMIC IMPACT AND (2) THE INSUFFICIENCY OF THE PRICE DECREASE PROVISION.[1]

PART ONE – "ECONOMIC DEVELOPMENT BENEFITS" NECESSARILY SUBSUMES A COST-BENEFIT TEST UNDER THE RECENT ENTERGY CASE

This Part will fully brief the cost-benefit issue (the net benefits issue) along three lines of argument: (1) there is a United States Supreme Court decision of about a year ago that holds that it is preferable to read cost-benefit analysis into a statute even if the text of the enactment merely speaks to benefits; (2) a different reading would render the decision-making function of the Commission a nullity; (3) the co-applicants themselves, in a parallel context, admit that extrinsic matters must be weighed.

---

[1] In addressing these matters, this Memorandum reverses the order of the Commission's sequence in assigning these issues for briefing.

As background, the first step in the Commission's establishment of a two-pronged briefing requirement came on Monday July 26, when the Commission requested briefing on: "Whether the amended agreement contains provisions that provide for a decrease in pricing if savings can be achieved in the actual cost of the project pursuant to subsection 39-26.1-7(e)." (*See* Memo from Ms. Wilson-Frias *re* Briefing Question). This first prong (which is *not* featured in the first part of this Memorandum) concerns whether the Amended PPA conforms to the price decrease provisions of the relevant legislation.

On Tuesday, July 27, the Chairman requested that the parties also brief the issue "of the proper interpretation of R.I.G.L. 39-26.1-7(c)(iii), particularly with respect to whether the section requires the Commission to take into account the above-market costs and whether there is any negative effect on existing businesses." (*See* Email from Ms. Wilson-Frias *re* Exhibit List & Briefing, Wed. 7/28/2010 approx. 9:22 AM). This second prong (which *is* featured in the first part) concerns whether extrinsic economic impacts can be weighed against the intrinsic economic benefits of the project.

I. THE RECENT ENTERGY CASE HELD THAT WHEN A STATUTE IS "SILENT" WITH RESPECT TO OVERALL COSTS, IT IS NONETHELESS REASONABLE TO TAKE SUCH MATTERS INTO ACCOUNT.

A. Entergy Allows Cost-Benefit Analysis In The Face Of Statutory Silence.

A serious issue arose last Tuesday (July 27) at these hearings. Grid argued that the negative impact of over-market costs cannot be considered when undertaking a consideration of the economic development benefits of the project. Thus, Grid objected to all testimony that invokes losses as an offset against the benefits set forth in the EDC advisory opinion. Grid's argument is that only benefits can be considered, not costs or detriments. Although this Commission allowed testimony from Dr. Mazze, Mr. Osada and others on the off-setting costs that were ignored by EDC, all of this testimony is theoretically subject to being stricken when this Commission renders its final decision. Because of the pending objection, the Commission asked the parties to prepare legal memoranda on the issue of whether R.I. Gen. Laws § 39-26.1-7 allows for the consideration of costs in determining whether the PPA is likely to provide economic development benefits.[2]

Entergy Corp. v. Riverkeeper, 129 S.Ct. 1498 (U.S. 2009), ruled upon an analogous situation. The High Court favored an approach by which costs are to offset benefits, even where the applicable scheme expressly focuses on only benefits.

---

[2] The relevant subsection ensues:

> (c)(iii) The amended agreement is likely to provide economic development benefits, including: facilitating new and existing business expansion and the creation of new renewable energy jobs; the further development of Quonset Business Park; and, increasing the training and preparedness of the Rhode Island workforce to support renewable energy projects;

That case, like the matter at bar, involved a statute that, on its terms, sought to maximize certain benefits – in that instance, environmental benefits. There, a statute stated that industry must use "the best technology available for minimizing adverse environmental impact." But, the agency promulgated regulations that expressly declined to mandate the state-of-the-art technology. The pertinent agency reasoned that use of the highest-performing pollution controls must be measured against cost, a factor not mentioned in the legislation. Despite the text's neglect to mention the cost factor, the agency deemed that the expense of mandating that facilities comply with the optimum-performing system was often too high.

Upon review, the Second Circuit reversed the agency by interpreting the phrase "best technology available for minimizing adverse environmental impact" to mean "technology that achieves the greatest reduction in adverse environmental impacts," even if the costs out weighed the benefits. Riverkeeper v. EPA, 475 F.3d 83, 88-100 (2nd Cir. 2007). Notably, even the Second Circuit would have allowed considered costs that would have been unfeasible for industry. Thus, no court or party took the position that Deepwater takes here: that costs are completely irrelevant.

But, having granted *certiorari*, the Supreme Court reinstated the agency rule. The Court determined that the statute afforded the regulators "discretion" to determine the overall "circumstances," id., and that the phrase "best technology available" does not preclude cost-benefit analysis. Id.

Concluding that weighing countervailing costs is a logical outgrowth of the statutorily-required determination, the Entergy Court validated the agency's approach – the statute implicitly authorized cost-benefit analysis in setting the standards. In other

words, that case affirmatively answered the question of whether an agency may engage in cost-benefit analysis under a particular provision of an Act where such provision says nothing of such method. Acknowledging that the section "is silent . . . with respect to cost-benefit analysis," the Justices stated that a multi-factor approach was nonetheless implicit. 129 S.Ct. at 1508.

Here, we face just this kind of statutory silence. Although logic dictates that this Commission should take into account factors in addition to the direct jobs produced, the statutes wording says nothing about such considerations. Nonetheless, like the agency whose approach was endorsed in Entergy, the Commission should reject the claim that the statute forecloses cost-benefit analysis. There may be a down-side to the benefit that Deepwater Wind promises, and this off-set should be considered.

B. Entergy Infers Cost-Benefit Analysis Even Where Other Statutory Sections are Explicit.

Here, the applicant (Grid) adverts to the fact that other sections explicitly permit the Commission to engage in a balancing analysis. *Cf.* R.I. Gen. Laws § 39-26.1-8 (b) ("the economic impact and potential risks"). Grid will cite this evidence to draw a negative inference. The argument goes that the General Assembly knew how to authorize a flexible cost-benefit approach when it so intended.

But the Supreme Court rejected just this argument in Entergy. While other sections expressly authorized cost-benefit analysis, 129 S.Ct. at 1508, the provision at hand was silent. The Court was untroubled by the seeming contrast: The majority rejected the argument that because the section "does not expressly authorize cost-benefit analysis . . . thought [the statute] does for two other tests, displays an intent to forbid its use." The court found that this argument was extreme ("proves too much") since it

would preclude all consideration of costs whatsoever, even prohibitive and unfeasible costs. In other words, in the Court's view, while a legislature might reject a strict cost-benefit balancing, it would be absurd to reject all consideration of cost. Likewise, Grid's position here "proves too much." Id. at 1508.

C. Even Though Entergy's Cost-Benefit Holding Was Permissive, Some Degree of Countervailing Cost Analysis Is Required.

To be sure, the Entergy concept of a straight cost-benefit approach was not compulsory on any federal agency, much less a state forum such as the PUC. Rather, the court endorsed the particular agency's (The EPA's) choice. But, this fact does not mean that an agency faced with a statute like the one at issue in Entergy (or the one at issue here) is free to disregard cost altogether. Rather, as even the dissent acknowledged, at a minimum, some consideration of cost-feasability must be allowed. Thus, Entergy at least stands for the proposition that in the face of literal silence, some assessment of cost is still mandated. The PUC is required to consider extrinsic economic development net-benefits even if a full 1-for-1 cost-benefit analysis is not its chosen metrology. In other words, the PUC *can* apply a straight cost-benefit analysis and *must*, at least, consider cost.

II. A STATUORY DELEGATION OF AUTHORITY TO A *QUASI*-JUDICIAL TRIBUNAL SHOULD NOT BE CONSTRUED SO AS TO NULLIFY MEANINGFUL DECISION-MAKING.

There is an additional relevant dimension to the Entergy case. The Court rejected a restrictive reading by inferring a Congressional "refusal to tie the agency's hands." Id. at 1508.

This judicial reluctance to "tie the agency's hands" has importance here. The logic of the Entergy decision overcomes Grid's incorrect suggestion of a legislative attempt to hobble this Commission. In actuality, the legislature left the PUC with the

discretion to weigh and decide. Indeed, the legislation does not say that over-market costs should *not* be considered. A review of the consequences on other existing and potential economic development cannot be ruled out.

Any reading of the Amended LTC statute that would obstruct the Commission's consideration of the externalized costs of the Amended PPA would render the scheme largely meaningless. To paraphrase Grid's own papers on another issue, this would violate bedrock principles of statutory construction. "[N]o construction of a statute should be adopted that would demote any significant phrase or clause to mere surplusage." *In re* Harrison, 992 A.2d 990, 994 (R.I. 2010) (*quoting* State v. Clark, 974 A.2d 558, 572 (R.I. 2009)). Foreclosing an inquiry would render this proceeding superfluous; the provisions calling for hearings would be turned into a nullity. Thus, the Amended LTC statute's language establishing a meaningful PUC proceeding should not yield to a perfunctory or rubber-stamp approach.

The matter can be stated another way. Grid is, essentially, trying to establish that the economic development benefit was already determined by the legislature. The notion is that the Commission must accept the *prima facie* promises of the project. But, the context makes such a one-sided approach senseless.

The legislature already had before it evidence of the benefits. There was unrefuted testimony from Docket 4111 that the project would provide 6 permanent jobs and some 35-50 temporary construction jobs and that Deepwater had a lease-option at Quonset. If these facts alone were sufficient to establish sufficient economic development benefit, then no inquiry by the PUC would be necessary. The legislature could have made the finding itself.

But the legislature did not do so, leaving to this Commission the question of whether the costs of the project would create a negative economic development impact outweighing positive contributions. The legislature asked this Commission to make a searching inquiry as to whether the project will provide net economic development benefits. The legislature cannot be said to have pre-decided the cost-benefit question. The very fact that the General Assembly called for a new docket means that a weighing of the indirect impacts of the project is mandated.

In this respect paragraph (iii), the pargraph at issue, stands in sharp contrast to paragraph (i) in which "commercially reasonable" is narrowly defined by a self-referential standard. (That standard is applicable by virtue of a cross- reference at the end of paragraph (iv).) When the legislature wanted to prescribe a restrictive standard, it certainly knew how to do so. But that particular provision is the only prohibition against a general inquiry. Otherwise, the Commission's broad organic purpose – to protect ratepayers – is unaltered. Paragraph (iii) is necessarily suffused with that purpose.

III. STATUTORY STRUCTURE SIGNIFIES THAT SECOND-ORDER AND EXTRINSIC CONSEQUENCES ARE SUBJECT TO SCRUTINY.

We can better understand paragraph (iii) by first examining paragraph (iv). *See* § 39-26.1-7(c)(iv). The latter provision is structurally identical with the provision at issue and appears in a list with it. The common structure of the two paragraphs invites a similar analysis.

Paragraph (c)(iv) sets forth the following as a factor for approval: "The amended power purchase agreement is likely to provide environmental benefits, including the reduction of carbon emissions."

Upon reflection, one realizes that the project itself provides virtually no intrinsic environmental benefits – wind turbines do not absorb carbon out of the air. Instead, one must inquire into avoided carbon (or other environmental benefits gained through avoidance). In other words, the benefits do not directly result from the operation of the project *per se*. The co-applicants' claim as to environmental benefits is entirely in the realm of extrinsic matters. It is the turbines' impact on the larger system that matters.

Let us return to the paragraph at issue. The economic development benefit standard is written identically: "The amended agreement is likely to provide economic development benefits, ..." The structure is parallel. Extrinsic matters are clearly a part of assessing the economic development benefits of a project just as extrinsic avoided carbon is a part of assessing the environmental benefits.

PART TWO – THE OPEN BOOK COST/PRICE PROVISION CALLS FOR USE OF A BASE-LINE OF ROUGHLY $220 MILLION

As for the other issue (the top-line – a.k.a. base-line – cost-savings issue), this Memorandum endeavors to be concise. The Attorney General looks to the anticipated arguments of other aligned parties. The anticipated briefs of others, will – the Attorney General believes – argue that there was no reference to $205 million in Docket # 4111 and, by contrast, that there was plenty of reference to $219 million in that proceeding. Indeed, the figure of $219 million was a major driver of (factor in establishing) the bundled price of 24-plus cents/kwh. Therefore, the decrease must be measured from $219 million not, as co-applicants attempt, from $205 million.

The $219-million-versus-$205-million issue is one of whether the PPA meets the cost savings requirements of the statute. There has been questioning from the bench on this topic, and this is certainly troubling to the interveners before the Commission.

The $220 million reference (an approximation of the $219 million figure) in Deepwater's memorandum to the Legislature (Attorney General Ex. 6) that the Attorney General found and produced deserves to be highlighted. This constitutes a definitive piece of evidence on this topic. Thus, this entire point is reinforced by the Attorney General's Ex. 6, which was the center of much discussion during the Moore cross-examination. The Commission will recall that the referenced Exhibit is a lobbying communication to the legislature that commits Deepwater Wind to a $220 million figure (approximating the figure of $219 million).

RESPECTFULLY SUBMITTED
INTERVENOR,

PATRICK C. LYNCH
ATTORNEY GENERAL

By his Attorney,

Mike Rubin, Esquire (#3656)
RI Department of Attorney General
150 South Main Street
Providence, RI 02903-2907
Tel: (401) 274-4400, x 2116
Fax: (401) 222-3016
MRUBIN@RIAG.RI.GOV

CERTIFICATE OF SERVICE

I hereby certify that on the 5th day of August, 2010, that I transmitted an electronic copy of the within document to the service list and to Luly Massaro, Commission Clerk via electronic mail.