

**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

**MEMORANDUM OF THE DIVISION OF PUBLIC UTILITIES
AND CARRIERS TO REQUESTED BRIEFING ISSUES
OF THE PUBLIC UTILITIES COMMISSION**

Now comes the Division of Public Utilities and Carriers (the “Division”) and hereby responds to the requested briefing issues of the Public Utilities Commission (the “Commission”).

I. ISSUES PRESENTED

1. WHETHER THE AMENDED AGREEMENT CONTAINS PROVISIONS FOR A DECREASE IN PRICING IF SAVINGS CAN BE ACHIEVED IN THE ACTUAL COST OF THE PROJECT PURSUANT TO R.I. GEN. LAWS § 39-26.1-7(e)(i)-(ii)¹

II. APPLICABLE LAW

With respect to the first issue presented, R.I. Gen. Laws § 39-26.1-7 (e) provides *inter alia* as follows:

¹ With respect to the second briefing issue of whether the statute requires the Commission to take into account the above market cost and its effect on existing businesses, the Division did not brief this issue. It was not addressed by its expert, was beyond the scope of the Division’s review and will be addressed by the other parties to this docket.

Cap on price. (i) The amended power purchase agreement subject to subsection 39-26.1-7(a) shall provide for terms that shall decrease the pricing if savings can be achieved in the actual cost of the project with all realized savings allocated to the benefit of ratepayers. (ii) The initial power purchase agreement shall also provide that the initial fixed price contained in the signed power purchase agreement submitted in docket 4111 shall be the maximum initial price, and any realized savings shall reduce such price. After making any such reduction to the initial price based on any realized savings, the price for each year of the amended power purchase agreement shall be fixed by the terms of said agreement.

In its review of the statutory section, the Commission should be guided by the very well established rules of statutory construction set-forth in a long line of cases handed down from the Rhode Island Supreme Court. The following fundamental principles of statutory construction are dispositive of the issues presented here. The Rhode Island Supreme Court has held in construing a statute that the Court's "ultimate goal" is to give effect to the General Assembly's intent. State v. Menard, 888 A.2d 57, 60 (R.I. 2005). The primary indicia of the Legislature's intent "can be found in the plain language used in the statute." Martone v. Johnston School Committee, 824 A.2d 426, 431 (R.I. 2003). The language of a statute must be given its "plain and ordinary meaning[]." Accent Store Design, Inc. v. Marathon House, Inc., 674 A.2d 1223, 1226 (R.I. 1996). The Supreme Court of Rhode Island has cautioned however, under no circumstance will the Court construe a statute to produce a meaningless or absurd result. Tidewater Realty, LLC v. State of Rhode Island, 942 A.2d 986, 992 (R.I. 2008). Finally, the Rhode Island Supreme Court has held that in the event that the plain and ordinary meaning of a statute produces a meaningless or absurd result, it is "...not only the right but the duty..." of the Court to construe the statute so that "the purpose of the act may be effectively carried out." Kaya v. Partington, 681 A.2d 256, 262 (R.I. 1996). *See also* Town of North

Kingstown v. North Kingstown Teachers Assoc., 297 A.2d 342, 346 (R.I. 1972) (Joslin, J.); Capobianco v. United Wire & Supply Corp., 77 A.2d 534, 538 (R.I. 1950).

III. DISCUSSION

The Commission has asked whether the amended power purchase agreement contains pricing provisions that are consistent with 39-26.1-7(e)(i) and (ii). The amended Power Purchase Agreement does contain a provision whereby if the cost of the project, according to the PPA, is lower than a stated estimate, then a price reduction occurs. It appears however to the Division that the mechanism falls short of 1) allocating all savings to the benefit of ratepayers, and 2) providing for any realized savings reducing the docket 4111 capped price, as provided by the statute. Based upon the Division's interpretation of the statute both of these PPA attributes appear to be specifically required.

The more salient facts from both Dockets 4111 and here in 4185 are straightforward, indisputable, and they are as follows: The original power purchase agreement filed in Docket 4111, provided that the Bundled Price of Energy commencing in 2012 shall be \$235.75 per MWh. *See, Power Purchase Agreement, December 9, 2009*, at Exhibit E, Appendix X. The amended power purchase agreement in Docket 4185 has the same Bundled Price of Energy which shall not exceed \$235.70² per MWh beginning in 2012. *See, Amended Power Purchase Agreement, June 30, 2010*, at Exhibit E, Appendix X.

² There is a difference between the original PPA's price of \$235.75 and the amended PPA's price of \$235.70 but the difference is so small as to be deemed immaterial to the discussion.

The corresponding estimate of capital costs including contingencies is \$219,311,412 associated with the power price in the PPA in Docket 4111. *See, Deepwater Response to Division Data Requests 1-12, 1-13*, and Deepwater's financial analysis in Docket 4111. Deepwater Response to Division Data Request 1-13 specifically included a very detailed list of capital costs in the \$219 million estimate. *Id.*

In Docket 4185, Deepwater stated that the \$219 million dollar capital cost estimate was inclusive of contingencies and was the basis for the fixed price in the power purchase agreement that was the subject of Docket 4111. *See, Deepwater Response to Division Data Request 1-1 and 1-7*, Docket 4185.

To the Division's knowledge, Deepwater never presented the \$205 million dollar capital cost estimate in Docket 4111 that it has presented as its capital cost estimate here in Docket 4185. In fact, Deepwater never used the \$205 million dollar capital cost estimate as a basis for its fixed power price of \$235.75 MWh in 4111 either.

Interestingly, Deepwater's Chief Executive Officer testified on cross-examination by the Division, that the \$205 million dollar capital cost estimate for the Block Island project included contingency reserves for expenses resulting from unforeseen construction circumstances. *See, Cross Examination Testimony of William M. Moore, Tr. August 2, 2010 at Pgs. 125 and 128 (emphasis added)*. National Grid's Power Market Analyst Mr. Milhous, however, provided contrasting testimony on the issue, testifying that the \$205 million capital cost estimate for the Block Island project here was not inclusive of contingencies. *See, Cross Examination Testimony of Madison N. Milhous, Jr., Tr. August 3, 2010 at Pg.134, Ln. 19-24, Pg. 135, Ln. 1-6; Pg. 102, Ln. 20-24, Pg. 103, Ln. 1-14; See also, Response of National Grid to Division Data Request 1-2*, Docket 4185

The amended PPA attempts to provide for a reduction in the price in the event that the Total Facility Cost (“TFC”) is lower than the Base Amount estimate of \$205,403,512. Appendix X of the amended PPA provides a new description of the Bundled Price per MWh. If the TFC is equal to or greater than \$205,403,512 the PPA price in the first year of the contract remains at \$235.70 per MWh. If the TFC is less than \$205,403,512 the PPA price in the first year of the contract decreases according to a fixed schedule. For example, if the TFC is \$175,403,512, or \$30 million less than \$205,403,512, then the initial PPA price becomes \$208.00 per MWh.

It is clear in the statutory language of Section 39-26.1-7(e)(i) and (ii) that the law links the PPA capped prices of Docket 4111 to the estimated project costs underlying the original PPA prices. It further seems clear that the legislature expected that price reductions capture savings for the benefit of ratepayers if the project cost comes in below that aforementioned estimate. Through Deepwater’s own statements, the \$219 million estimate was the foundation for the \$235.75 price in 2012 in Docket 4111. The Division’s reading of the plain and unambiguous terms of the statute leads it to conclude that the revised pricing formula in the amended PPA falls short of the statutory requirement by not allocating all the project cost savings off of the estimate underlying the Docket 4111 price to the benefit of ratepayers. In Docket 4111, Deepwater testified that the estimated cost of the project was approximately \$219 million. This capital cost was equated to the initial price of \$235.70 per MWh (2012). Thus, it would seem that any savings in the TFC below \$219 million must, under the law, be allocated to ratepayers. A plain reading of the statute together with the testimony, data responses and

National Grid's letter of June 30, 2010³³ accompanying the PPA confirm this interpretation that the price in bundled power is reduced, if savings occur off the original estimate. Under the revised PPA, any savings between \$219 million and \$205,403,512 will be retained by the developer. The Division asserts that in order to comport with the new law, the amended PPA should be revised such that any savings in the cost to construct the facility below \$219 million directly accrue to ratepayers, unless it can be established that the Base Amount in the revised PPA was the underlying Total Facility Cost contemplated during the Docket 4111 proceeding.

The two applicable subsections of the statute are clear on their face, the price reduction is triggered "if savings can be achieved in the actual costs of the project pursuant to subsection 39-26.1-.7 (e)," which price in the signed PPA "submitted in Docket 4111 shall be the maximum initial price, and any realized savings shall reduce such price." The cross-reference here of these provisions demonstrates a link between them. The Docket 4111 price referenced in the statute was presented as being derived by the cost estimate of \$219 million dollars. The logic is simple and the statute is unequivocal, that is the \$235.70 base price must be reduced if there are reductions in the cost that underlies this price. The energy price was supported by the cost model which had as its basis the project cost of \$219 million dollars. No other evidence has been evinced that any other cost estimate drove this price other than the \$219 million dollar estimate.

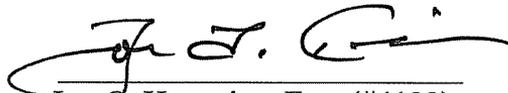
³³ "As required by the new law, the Company and Deepwater incorporated a mechanism in the Amended PPA that requires the price to be reduced to the extent that the project costs are lower than originally estimated." See Correspondence of Ronald T. Gerwatowski to the Commission Clerk dated June 30, 2010, National Grid Exhibit 1 Full Docket 4185. (*Emphasis added*).

IV. CONCLUSION

For the foregoing reasons, the facts when applied to the plain and unambiguous terms of R.I. Gen. Laws 39-26.1-7(e) result in only one conclusion, that the costs presented in Docket 4111 should be the benchmark for power price reductions in the instant Docket 4185. The Amended Power Purchase Agreement here should be based upon the project cost estimate provided in Docket 4111 which has been demonstrated to be \$219 million dollars.

Thomas Ahern, Administrator
State of Rhode Island
Division of Public Utilities and
Carriers

By his attorney,



Jon G. Hagopian, Esq. (#4123)
Special Assistant Attorney General
State of Rhode Island
Department of Attorney General
150 South Main Street
Providence, R.I. 02903
Tel.: 401-274-4400

Dated: August 6, 2010