

**STATE OF RHODE ISLAND
PUBLIC UTILITIES COMMISSION**

In re Review of Proposed Town of) **Docket No. 4185**
New Shoreham Project Pursuant to)
R.I. Gen. Laws § 39-26.1-7)

**DEEPWATER WIND BLOCK ISLAND, LLC'S
POST HEARING BRIEF**

“[T]he general assembly finds it is in the public interest for the state to facilitate the construction of [the Block Island Wind Farm (the “BIWF”).]”¹ The Rhode Island Public Utilities Commission (“Commission”) must consider the Amended PPA in Docket 4185 against the backdrop of this clear, unambiguous and express legislative purpose. Furthermore, the two briefing questions issued by the Commission must be answered so that this statutory directive is not frustrated. These questions are:

- 1) 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 R.I.G.L. § 39-26.1-7(e)².
- 2) 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.

I. QUESTION 1

A. The Initial Fixed Price undisputedly meets the statutory requirements

The language, meaning and intent of Section 7(e) is clear on its face. When construing a statute, the Commission³ must “look to the plain and ordinary meaning of the statutory language.”⁴ Section 7 (e) provides:

¹ R.I.G.L. § 39-26.1-7(a).

² Hereinafter, R.I.G.L. § 39-26.1-7 shall be referred to as “Section 7.”

³ The Commission is bound by the basic rules of statutory construction. *See, e.g., In re National Grid*, 2009 R.I. PUC LEXIS 16, *8 (Mar. 18, 2009); *In re New England Gas Co.*, 2003 R.I. PUC LEXIS 21, **102-03 (Aug. 1, 2003).

(e) Cap and lower 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 amended 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.

The Amended PPA clearly and unambiguously provides that the price in the initial year of the Amended PPA is equal to “the initial fixed price contained in the signed power purchase agreement submitted in docket 4111.”⁵ This fact is undisputed.⁶

B. The Amended PPA Clearly Provides for Savings to Reduce the Price

Likewise, the Amended PPA clearly and unambiguously provides that any realized savings reduce the Amended PPA price.⁷ If savings can be achieved in the actual cost of the project, then the price is reduced by the amount of all realized savings.⁸ Savings are calculated by taking the actual costs of construction (which are verified at the completion of construction by an independent third party) and subtracting that amount from the “Base Amount” (defined as \$205,403,512 (“\$205”)). If the actual cost of the project is lower than the Base Amount, then the price is reduced, and the ratepayers benefit from the full amount of the savings. If the actual cost of the project is higher than the Base Amount, then the price does not change, and Deepwater Wind’s returns are negatively impacted.

⁴ *Henderson v. Henderson*, 818 A.2d 669, 673 (R.I. 2003) (citing *Fleet National Bank v. Clark*, 714 A.2d 1172, 1177 (R.I. 1998)). “If the language is clear on its face, then the plain meaning of the statute must be given effect.” *Fleet National Bank v. Clark*, 714 A.2d 1172, 1177 (R.I. 1998) (citing *Gilbane Co. v. Poulas* 576 A.2d 1195, 1196 (R.I. 1990)); *see also State v. DiCicco*, 707 A.2d 251, 253 (R.I. 1998) (“[W]hen we examine an unambiguous statute, ‘there is no room for statutory construction and we must apply the statute as written.’”) (quoting *In re Denisevich*, 643 A.2d 1194, 1197 (R.I. 1994)).

⁵ R.I.G.L. § 39-26.1-7(e)(ii); Amended PPA Ex. E, Appendix X. In addition to complying with the requirements of R.I.G.L. § 39-26.1-7(e)(ii), the pricing provisions also conform to the requirements of R.I.G.L. § 39-26.1-7(a).

⁶ *See, eg*, Docket 4185, Testimony of Richard Hahn, p 3, lines 16-17.

⁷ Amended PPA, Ex. E, Appendix X.

⁸ *Id.*

C. The Base Amount is Consistent with the Statute

It has been suggested that the contractually agreed Base Amount should be equal to \$219,311,412 (“\$219”) – a budgetary estimate of construction costs provided in response to a Docket 4111 data request – and that Deepwater Wind has “retained the first \$13.9 million in capital costs savings from the Docket 4111 estimate ... to generate a higher IRR.”⁹ Such characterization is blatantly misleading and is a gross mischaracterization of the requirements of Section 7.

Section 7 does not link the price reduction mechanism in the Amended PPA to Docket 4111, including the \$219 estimate referenced in a Docket 4111 data response, or to any other estimate.¹⁰ Contrasting the first two subparts of Section 7(e) makes this abundantly clear. Section 7(e)(ii) explicitly references Docket 4111 in setting the maximum price of the initial year of the Amended PPA. In contrast, Section 7(e)(i) - which sets forth the price reduction mechanism - makes no reference to Docket 4111 whatsoever.

If the legislature had intended that savings be calculated with reference to the cost estimate in Docket 4111, then the legislature would have referenced the cost estimate in Docket 4111 and not “actual costs.”¹¹ In Rhode Island, the provisions of a statute may not be interpreted to include a matter omitted unless the clear purpose of the legislation would fail without the

⁹ Docket 4185, Direct Testimony of Richard Hahn, p 8, lines 12-13.

¹⁰ The Attorney General, citing AG Exhibit 6, argues that the \$220MM figure used by Deepwater Wind in its meeting with legislators before the enactment of the amendments to Section 7 is evidence that \$219 is the appropriate Base Amount. The Attorney General is correct that the \$220MM figure was linked – to the 12% unlevered return referenced in AG Exhibit 6. If this exhibit is given any weight by the Commission, it must stand for the proposition that the legislature, with full knowledge of the \$220MM figure (and the \$219 figure), amended Section 7 without specific reference to a Base Amount.

¹¹ “Actual” is defined as follows: “...2 a: existing in act and not merely potentially; b: existing in fact or reality <~ and imagined conditions> c: not false or apparent <~ costs>...” *Webster's New Collegiate Dictionary* (1979). Springfield, MA: G & C Merriam Company.

implication.¹² Therefore, words or language may not be inserted into a statute where it is plainly evident that the legislature intended that the statute not contain such provisions.¹³

Indeed, Section 7(e)(i) does not include *any* specific numerical cost point for measuring savings. But because the purpose of the LTC Act is to “facilitate the construction” of the BIWF, \$219 cannot be the Base Amount. The evidence in the record is that setting the Base Amount at \$219 would mean that the BIWF would not be constructed.¹⁴ The Commission must avoid reaching a result that frustrates the entire Long Term Contracting Act (R.I.G.L. § 39-26.1-1, et seq., hereinafter the “LTC Act”).

The Base Amount set forth in the Amended PPA (\$205) is appropriate and consistent with the statute. The Base Amount is, in essence, the target construction budget for the BIWF. Deepwater Wind does not intend to issue a notice to proceed with construction until it has reached this target through further engineering, better project definition and design, and cost refinement. Construction estimates will change during the development of the project. The Base Amount will not. The statute is clear: realized savings are measured against actual cost, not construction cost estimates. It is axiomatic that until a notice to proceed with construction has been issued, there can be no actual costs. Similarly, in order to realize savings, there must be actual expenditures.

D. Base Amount Calculation

Deepwater Wind’s Base Amount calculation has been completely transparent to the Commission. The cost buildup that generates the \$205 target has been disclosed to the

¹² See, *State v. Feng*, 421 A.2d 1258, 1264 (R.I. 1980) (citing *Coastal Finance Corp. v. Coastal Finance Corp. of North Providence*, 387 A.2d 1373, 1378 (1978) and *New England Die Co. v. General Products Co.*, 168 A.2d 150, 154 (1961)).

¹³ *New England Die Company v. General Products Company*, 168 A.2d 150 (1961).

¹⁴ Docket 4185, Rebuttal Testimony of William Moore, p. 52, l. 5-10.

Commission.¹⁵ The Base Amount sets Deepwater Wind's unlevered rate of return at 10.5%. Mr. Stahle testified that this return is on the low end of what is reasonable and necessary to obtain project financing.¹⁶ This testimony was not contradicted or rebutted by any other expert.

The Base Amount was determined by the parties to the Amended PPA as a reasonable target construction budget to satisfy the statutory cost savings requirements. Much has been made of the \$219 figure disclosed in response to Div 1-13 in Docket 4111. But the argument that \$219 is the proper target ignores the evidence in this Docket. That estimate was offered in connection with a contract that had a markedly different risk profile than the Amended PPA.¹⁷ Mr. Moore made clear in Docket 4111 that \$219 was Deepwater Wind's best estimate at the time. He has also made clear that prior to proceeding with the construction of the BIWF, Deepwater Wind's estimates would change and that the challenge that Deepwater Wind accepted was to reduce this estimate. This was commercially reasonable given the risk profile in the original contract, which provided Deepwater Wind with the opportunity to improve its return profile to a level that it considered reasonable.¹⁸ Taking this data response out of context is inconsistent with the express language and purpose of LTC Act.

Following the passage of the amendments to Section 7, Deepwater Wind and National Grid negotiated, at arm's length, the terms of the Amended PPA. The Base Amount was agreed to by the parties because it reflects not only a target that Deepwater Wind is prepared to "lock-in" but is also Deepwater Wind's best current estimate of the Total Facility Cost. The Amended

¹⁵ Deepwater Wind Response to Rhode Island Public Utilities Commission Data Request 1-7.

¹⁶ Docket 4185, Rebuttal Testimony of James Stahle, p. 94, line 3 to p. 95, line 4. Deepwater Wind notes that Toray Plastics, an intervener opposed to the Amended PPA, utilizes a 15% IRR.

¹⁷ The evidence presented in this Docket has established that at \$219, Deepwater Wind's unlevered return was approximately 9.7%, a return that Deepwater Wind was not prepared to accept. However, the Docket 4111 PPA also provided that Deepwater Wind would receive the benefit of any actual cost savings in the construction of the facility, thereby enabling Deepwater Wind to improve its return to its desired minimum threshold.

¹⁸ As recently as this past May, Deepwater Wind has maintained that it was striving to achieve a 12% IRR. See, Attorney General Exhibit 6.

PPA provides unprecedented benefits to the ratepayers by establishing an asymmetric risk profile that directs all of the savings benefits to the ratepayer, and places all of the risk of cost overruns on Deepwater Wind.¹⁹ Unlike a traditional ratemaking procedure, which would allow a regulated utility to recover costs prudently incurred in excess of its approved budget, Deepwater Wind has assumed the entire risk of cost overruns.

Deepwater Wind can only earn a commercially reasonable rate of return (10.5%) at the pricing set forth in the Amended PPA if it builds the facility for an amount equal to or less than the Base Amount. If the actual costs of construction are greater than the Base Amount, the price does not increase - rather, Deepwater Wind's returns suffer. And unlike the original contract, Deepwater Wind's returns do not increase if it achieves savings. Deepwater Wind accepted this asymmetric risk profile not only to satisfy the requirements of Section 7, but also in recognition that as the developer selected by the State of Rhode Island to build these pioneering energy projects, Deepwater Wind has an obligation to be reasonable in its return expectations.

Even assuming, *arguendo*, a reasonable rationale to use the \$219 estimate as the Base Amount in the Amended PPA, this would fail to satisfy the legislature's obvious intent of supporting the BIWF by locking the sponsor's returns in a below-market range, rendering the project unfinanceable. This result would ignore the policy goals of developing the off-shore industry in Rhode Island and the policy determinations of the legislature that were made in full recognition of the price in the Amended PPA. The Amended PPA, with a Base Amount of \$205, meets this obligation, provides Deepwater Wind with the opportunity to create savings that

¹⁹ Deepwater Wind is only aware of one other contract that will contain a similar provision. The recently announced settlement respecting the Cape Wind contract expressly references the Amended PPA and will include a price reduction provision. But the Cape Wind price reduction provision differs from the Amended PPA because it provides for Cape Wind to share in any realized savings.

benefit the ratepayer and enables Deepwater Wind to earn a return that allows the project to move forward.

II. QUESTION 2

The second briefing question asks whether Section 7(c)(iii) “requires the Commission to take into account the above-market costs and whether there is any negative effect on existing businesses. A review of the statute reveals that there is no reference whatsoever to the language in the Commission’s question. The statute makes no mention of “above-market costs” or “negative effect on existing businesses.” To read either “above-market costs” or “negative effect on existing businesses” into “economic development benefits” is inappropriate. As noted above, words or language may not be inserted into a statute where it is plainly evident that the legislature intended that the statute not contain such provisions.”^{20, 21}

It is clear that a central purpose of Section 7 is to “position the state to take advantage of the *economic development benefits* of the emerging offshore wind industry.”²² As such, the Commission must find that “[t]he amended agreement is likely to provide economic development benefits. In making its determination, the Commission is required, by the LTC Act, to give substantial deference to the factual and policy conclusions set forth in the advisory opinion of the Rhode Island Economic Development Corporation (the “EDC”).”²³ The

²⁰ *Infra*, note 13.

²¹ The Attorney General would lead the Commission to believe that Entergy Corp. v. Riverkeeper, 129 S.Ct. 1498 (U.S. 2009) permits (or even requires) the Commission to perform a cost-benefit analysis. Respectfully, Deepwater Wind suggests that the Entergy decision does not stand for the proposition cited. The legal debate in Entergy focused on the statutory meaning of the term “best technology available” and whether “available” could require a cost benefit analysis in setting a permit for a particular power plant. In a 5-4 decision, the Court concluded that the statute gave the EPA discretion to consider costs. In the Entergy case, the majority states that “If silence here implies prohibition, then the EPA could not consider any factors in implementing §1326(b) - an obvious logical impossibility. It is eminently reasonable to conclude that §1326(b)’s silence is meant to convey nothing more than a refusal to tie the agency’s hands as to whether cost-benefit analysis should be used, and if so to what degree.” Entergy at 1508. The case is easily distinguishable for many reasons, but only one bears noting - in the case of Section 7, the General Assembly was not silent.

²² *Infra*, note 1.

²³ R.I.G.L. § 39-26.1-7(c)(iv).

Commission’s analysis of this section requires both an interpretation of the phrase “economic development benefits” and “substantial deference.” The Commission’s interpretation of this provision should be based on the plain meaning of the statute.²⁴ Section 7 lists three specific examples of economic development benefits to aid the Commission in its determination.²⁵

A. Economic Development Benefits

The EDC provided the Commission with an advisory opinion that concluded the Amended PPA is likely to provide economic development benefits. Only one other expert – Dr. Mazze – provided testimony on economic development benefits. However, Dr. Mazze’s testimony did not include a study on the economic development benefits of the BIWF, and his testimony was at best self-contradictory.

Section 7 requires a finding of “economic development benefits.” In contrast, the section of the LTC Act authorizing a utility-scale offshore wind farm requires a more extensive analysis of “[t]he economic impact and potential risks, if any, of the proposal on rates to be charged by the electric distribution company.” Further, the utility-scale project section also requires an “[e]conomic justification for the proposal, including projection of market prices.” There is no mention in Section 7 of “economic impact and potential risk” or of the necessity to project market prices of energy. Unlike the utility-scale project section, which contemplates a broad economic analysis, Section 7 only requires a finding that the Amended PPA provides economic development benefits.

Further, the statute’s explicit purpose of Section 7 is to “facilitate the construction of a small-scale offshore wind demonstration project.” With this language, the General Assembly

²⁴ *Infra*, notes 3 and 4.

²⁵ “[F]acilitating 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.”

has already concluded that such a project *is* in the best interests of the State. All that is left for the Commission and the EDC to do is to find that the BIWF is likely to provide economic development benefits.²⁶

This distinction between “economic development benefits” and a broader economic analysis is consistent with the fact that the BIWF is a demonstration project that is intended to serve, in part, as the impetus for the creation of a new industry in Rhode Island. The types of economic development benefits that the statute lists in modifying “economic development benefits” support a plain and ordinary reading of the statute. The three types of benefits listed²⁷ all specifically relate to renewable energy specifically. As such, the legislature specifically did not require the Commission to inquire into the impacts that the BIWF would have on rates nor did the legislature require that the Commission take into account any above-market costs or whether there would be any negative effect on existing businesses.²⁸ Rather, it required that economic development benefits be likely and cited as examples benefits that are consistent with the creation of a new industry. It would be an absurd result to conclude that the General Assembly intended a broader economic analysis of the BIWF when it has already concluded that the BIWF is in the public interest.

Assuming, *arguendo*, that Section 7 requires a broad economic analysis, such an analysis would, by necessity, need to evaluate a host of factors including, without limitation, price suppression (both electric and natural gas), environmental externalities and the potential for economic benefits from other off-shore wind projects. However, the intervening parties who

²⁶ R.I.G.L. § 39-26.1-8(c)(viii).

²⁷ R.I.G.L. § 39-26.1-7(c)(iii).

²⁸ Deepwater Wind does not dispute that there are impacts. However, it also notes that the question of above-market costs was the subject of much debate in both Docket 4111 and Docket 4185. Likewise, although there has been evidence introduced in this Docket respecting the possible existence of negative impacts on existing businesses, that fact has not been conclusively established in this Docket.

oppose the Amended PPA, and who argue for a broader economic analysis, successfully moved to exclude evidence of economic benefits. Specifically, evidence that the BIWF could lead to other off-shore wind projects and their associated economic development benefits, has been stricken from the record in this Docket.²⁹ Such an expansive interpretation of Section 7 would be inconsistent and prejudicial and would contradict the express language and purpose of Section 7.

B. Substantial Deference

The Commission is a quasi-judicial body.³⁰ When the Rhode Island Supreme Court reviews the factual findings of a trial court justice, “substantial deference” means that the Court “will not disturb those findings unless the trial justice has overlooked or misconceived material evidence or was otherwise clearly wrong.”³¹ The Commission should apply at least as deferential a standard in its review of the advisory opinion of the EDC. Although there was some expert testimony critical of the advisory opinion, that testimony was not supported by factual findings or a contrary economic development study. There is no credible evidence in the record that would justify the Commission’s rejection of the EDC’s expert advisory opinion.

III. CONCLUSION

As the developer selected by the State of Rhode Island to build these pioneering energy projects, Deepwater Wind is very conscious of its obligation to be reasonable in its rate-of-return expectations and to make sure that the ratepayer support provided to this demonstration project will actually yield benefits to the local economy. The Amended PPA meets this obligation.

²⁹ In fact, the portion of the EDC advisory opinion that was struck by the Commission made exactly that finding. (EDC Advisory Opinion, p 8).

³⁰ *Infra*, note 3.

³¹ *In re Richard A.*, 946 A.2d 204, 209 (R.I. 2008) (emphasis added) (citing *In re Jessica C.*, 690 A.2d 1357, 1362 (R.I. 1997)).

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