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Patrick C. Lynch, Attorney General

July 6, 2010

Luly Massaro, Clerk
Rhode Island Public Utilities Commission
89 Jefferson Blvd.
Warwick, RI 02888

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**

Dear Ms. Massaro,

Enclosed for filing with the Commission are an original and twelve (12) copies of Attorney General Patrick C. Lynch's Motion to Dismiss and supporting Memorandum, Motion to Intervene and Supporting Memorandum and an Entry of Appearance for Michael Rubin and Gregory Schultz in the above matter.

Thank you for your attention to this matter.

Very truly yours,

Michael Rubin
Assistant Attorney General

cc: Service List (e-mail only)

RHODE ISLAND PUBLIC UTILITIES COMMISSION

IN RE: REVIEW OF AMENDED POWER :
PURCHASE AGREEMENT BETWEEN : DOCKET NO. 4185
NARRAGANSETT ELECTRIC COMPANY :
D/B/A NATIONAL GRID AND DEEPWATER :
WIND BLOCK ISLAND, LLC PURSUANT TO :
R.I. GEN. LAWS § 39-26.1-7 :

INTERVENOR, PATRICK C. LYNCH ATTORNEY GENERAL'S,
MOTION TO DISMISS

Now comes the Intervenor Patrick C. Lynch Attorney General of the State of Rhode Island, respectfully filing his Motion to Dismiss in the above-captioned matter. In support of the Motion to Dismiss, the Attorney General relies on three contentions: (1) that the Public Utilities Commission's ("PUC") decision of April 2, 2010 has full *res judicata* effect, which is determinative of a disapproval of the amended power purchase agreement; (2) that even if the new legislation (2010 R.I. Pub. L. ch. 31 & 32) was to be construed so as to retroactively alter *res judicata*, there is a violation of separation-of-powers, and; (3) that the new legislation violates the Rhode Island Constitution's "Good-of-the-Whole" Clause.

As grounds for his motion, the Attorney General relies on the accompanying memorandum of law in support thereof.

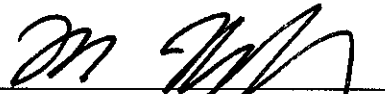
Pursuant to the PUC's Rules of Practice and Procedure, Rule 1.15(b), the Attorney General hereby certifies that no request for concurrence by counsel was made, as the nature of this Motion to Dismiss is such that it is non-resolvable by the parties.

WHEREFORE, the Attorney General respectfully requests an order of the PUC granting its Motion to Dismiss the Docket 4185 in its entirety, and further granting such other relief as the PUC deems just and equitable.

RESPECTFULLY SUBMITTED
INTERVENOR,

PATRICK C. LYNCH
ATTORNEY GENERAL

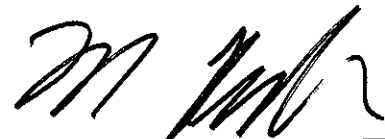
By his Attorney,



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CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that, pursuant to PUC Rules, an original and 12 copies of the within Motion were hand-delivered to the PUC Clerk, Public Utilities Commission, 99 Jefferson Blvd., Warwick, RI, 02888. In addition, electronic copies were transmitted via e-mail to all the persons on the PUC's Service List for this Docket, which list was transmitted by PUC Staff Attorney Cynthia Wilson-Frias on Wednesday, June 30, 2010. I hereby certify that all of the foregoing was done on the 6th day of July 2010.



RHODE ISLAND 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. GEN. LAWS § 39-26.1-7 :

MEMORANDUM IN SUPPORT OF MOTION TO DISMISS

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INTRODUCTION

Attorney General Patrick C. Lynch seeks to have the recent Deepwater Wind Block Island, LLC (Deepwater) special legislation construed so that this proceeding is governed by the result of the prior proceeding – the PUC Decision of April 2, 2010 (which became unreviewable as of April 9). In the alternative, the Attorney General contests the constitutionality of that Deepwater Wind special legislation. Insofar as the latter contention, the Attorney General’s participation in the instant proceedings (established by such legislation) is undertaken under protest and in order to preserve such constitutional argument for further review.¹

¹ Section 39-5-1 of the R.I.G.L. specifically provides that all PUC matters are subject to review by the Rhode Island Supreme Court within seven days of a final decision by writ of *certiorari*. This is repeated in Commission Rule 1.30.

FACTS & TRAVEL

The background is well-stated in the Commission's recent 85 page decision (Order, 4/2/10 (rejecting Deepwater PPA)). Therefore, only a brief summary is presented.

The purpose of the *quasi*-judicial PUC proceeding (Docket 4111) was to review whether the Power Purchase Agreement between National Grid and Deepwater was "commercially reasonable" as that term is defined in the Long-Term Contract statute. Over the course of seven months, many groups and organizations – environmental, labor, business and governmental – participated. Lawyers from the Attorney General's, representing the DPUC, presented evidence, as did the applicants. The PUC took sworn testimony backed by its subpoena power. This testimony was subjected to the crucible of cross-examination.

Finally, on March 30, 2010, a unanimous decision resulted that was formalized as an 85-page written order a few days later (April 2). The PUC decided to disapprove of the contract between Deepwater Wind and National Grid, finding that it was *not* commercially reasonable. The upshot, in practical terms, was to prevent the installation of the small-scale pilot project – an 8-turbine wind farm – off of Block Island.

At this point, Deepwater had the option of an appeal (technically, a petition for writ of *certiorari*). Deepwater chose to let the appeal period lapse. This choice was made despite Deepwater's asserted position that the PUC decision did not conform to statute.

It is unnecessary to recount the travails of the ensuing legislative process here. Suffice it to refer to the following: Notice Of Filing, Intervention Deadline, Preliminary Procedural Schedule, Administrative Notice, And Standards For Filings, issued by Luly E. Massaro, Commission Clerk, June 24, 2010. As that PUC-issued document encapsulates:

Pursuant to the provisions of the Rhode Island General Laws §§ 39-1 et seq., 39-3 et seq., and 39-26.1-7, as amended by 2010 R.I.

Pub. Laws 31 and 32 (Senate Bill 2819 Sub A as amended and House Bill 8083 Sub A as amended), the Public Utilities Commission (“Commission”) hereby gives notice that it expects an amended Power Purchase Agreement entered into between Narragansett Electric Company d/b/a National Grid (“National Grid”) and Deepwater Wind Block Island, LLC (“Deepwater”) to be filed **on or about June 30, 2010** (“Amended PPA”).

In this docket, the Commission will examine the Amended PPA pursuant to R.I. Gen. Laws § 39-26.1-7. In this filing, the Commission is required to review the Amended PPA and issue an order approving or rejecting it within forty-five (45) days of filing. If approved, various costs under the contract will be recovered from ratepayers of National Grid and Block Island Power Company in accordance with future Commission decisions under R.I. Gen. Laws § 39-26.1 et seq. and R.I. Gen. Laws § 39-3-11.

Id. at 1. The new Docket is 4185, as indicated in the caption at the beginning of this document.

DISCUSSION

PART ONE – AS A MATTER OF STATUTORY CONSTRUCTION, THE RECENT LEGISLATION DOES NOT ALTER *RES JUDICATA* BECAUSE IT DOES NOT EXPRESSLY APPLY RETROACTIVELY

As shown immediately below, the April 2 decision has full *res judicata* effect. Moreover, the recent legislation does not overcome *res judicata* as the legislation does not purport to retroactively undo legal consequences that arose on that date, over two months before enactment in mid-June.

I. THE STRICT DOCTRINE OF *QUASI-JUDICIAL RES JUDICATA* (SEE TUCKER) IS DISTINCT FROM THE RELAXED DOCTRINE OF ADMINISTRATIVE FINALITY (SEE JOHNSTON AMBULATORY).

At the outset, the Public Utilities Commission (PUC) is a purely *quasi-judicial* tribunal and not an ordinary administrative department. Other examples include the Personnel Appeal Board (*see* R.I. Gen. Laws § 36-3-6), and, at the Federal level, the Tax Court (*see* 26 U.S.C. § 7441), the Board of Patent Appeals & Interferences (*see* 35 U.S.C. § 6), the Bankruptcy Court (*see* 28 U.S.C. § 151), the Commodity Futures Trading Commission (*see* 7 U.S.C. § 2(a)(2)), and the old Court of Claims before it became an Article III court (*see* Williams v. U.S., 289 U.S. 553 (1933) (explaining status)).

By sharp contrast, other agencies function as administrative offices with ANCILLARY adjudicatory functions. Examples at the state level include the Department of Health (*see* R.I. Gen. Laws § 5-37-1.1), the Department of Environmental Management (*see* R.I. Gen. Laws § 42-17.7-1), and the Division of Public Utilities & Carriers (*see* R.I. Gen. Laws § 39-1-3).

Upon this distinction turns the applicability of the doctrine of *res judicata* and the corresponding inapplicability of the alternative doctrine of administrative finality. And upon that distinction, in turn, hangs the fate of the Amended Deepwater Wind Power Purchase Agreement.

Under the strict doctrine of *res judicata*, ever since April 2, 2010, when Deepwater lost an approval request for this very project in this very forum (*see* Decision in Docket 4111), that developer-applicant has been precluded from litigating for such approval at the PUC again.

As documented below, whether an agency decision (a) is entitled to strict *res judicata* effect or, rather, (b) is susceptible to the less forceful standard of administrative finality depends on the following test. The question is whether the agency (a) is an independent *quasi-judicial* tribunal, primarily charged with formally adjudicating disputes, or, rather, (b) is an executive cabinet department that incidentally holds hearings in the course of performing primarily administrative functions. The PUC is in the former category.

- A. Decisions of independent tribunals that primarily adjudicate contested cases fall under the strict doctrine of *quasi-judicial res judicata* (*see Department of Corrections v. Tucker*), which does not make exceptions for changed prayers-for-relief or changed circumstances.**

Generally, the doctrine of *res judicata* “makes prior judgments conclusive in regard to any issues that were raised or that could have been raised before the first tribunal.” Department of Corrections v. Tucker, 657 A.2d 546, 549 (R.I. 1995) (“Tucker”); *see also* Bossian v. Anderson, 991 A.2d 1025, 1027 (R.I. 2010) (“*Res judicata* . . . prohibits the relitigation of all issues that were tried *or might have been tried* . . .”) (internal quotation marks omitted); DeCosta v. Viacom Int’l, Inc., 758 F. Supp. 807, 811 (D.R.I. 1991) (*res judicata* and the related doctrine of collateral estoppel “are expressions of a fundamental public policy favoring repose for both society and litigants,” and are not “mere technical rules of convenience”) *rev’d on other grounds*, 981 F.2d 602 (1st Cir. 1992). Following the suggestion of the Restatement (2d) of Judgments, § 83 (1982) (“adjudicative determination by an administrative tribunal has the same effects under . . . *res judicata* . . . as a judgment of a court”), Rhode Island courts apply *quasi-judicial res*

judicata “as long as the administrative tribunal grants to the parties substantially the same rights that they would have if the matter were presented to a court.” Tucker, 657 A.2d at 549.

In Tucker, a fired state worker filed an appeal with the Personnel Appeal Board, where he contended, pursuant to personnel rules, that his discharge was improper. Id. at 546. Tucker then filed a similar complaint, pursuant to the state equal opportunity statute, before the Commission for Human Rights. Id. at 547. The Board dismissed Tucker’s claim and Tucker did not appeal that decision to the Superior Court. Id. Two years later, however, the Commission found in favor of Tucker and ordered that he be reinstated. Id. at 548. The Department of Corrections appealed the latter ruling to the Supreme Court, which reversed and held that the claim in front of the Commission was barred by *quasi-judicial res judicata*. Id. at 548-50.

The Court began by noting that the board is an “independent” *quasi-judicial* agency whose members are “appointed by the Governor with the advice and consent of the Senate.” Id. at 549; *see* R.I. Gen. Laws § 36-3-6. The Court further noted that the board “make[s] provision[] for the presentation of evidence and legal argument similar to that which would be presented in a judicial tribunal.” Tucker, 657 A.2d at 549. Consequently, the Court found that the board had granted to the parties rights that were “substantially” the same as in court. Id. at 549-50. This made “the decision of the board . . . conclusive” and provided a bar to litigation of any issues that could have been raised. Id. at 550. Crucially, *quasi-judicial res judicata* applied even though the Commission had been granted jurisdiction to hear this class of issues by the legislature. *See id.* at 548-50. Because “Tucker [first] chose to appeal to the board and . . . [t]he board had complete jurisdiction to consider all Tucker’s claims[,] . . . [i]ts decision would be final.” Id. at 549. In other words, *res judicata* attached to the original decision and traveled with the litigants to subsequent proceedings even when the subsequent proceedings operated under a specific express

legislative grant of jurisdiction. Tucker also demonstrates that the decision of a *quasi-judicial* administrative tribunal need not be appealed to a court in order to have a *quasi-judicial res judicata* effect. Id. at 549-50.

With Tucker in mind, we turn now to the highly distinguishable facts of Danzer v. Board of Medical Licensure, 745 A.2d 733 (R.I. 2000) (*per curiam*) and Johnston Ambulatory Surgical Assoc. v. Nolan, 755 A.2d 799 (R.I. 2000). The reasoning in these cases reinforces the criteria of Tucker.

- B. By contrast, decisions of executive cabinet departments that hold hearings, as an incidental or subsidiary part of administrative functions, fall under the flexible doctrine of administrative finality (see Johnston Ambulatory v. Nolan).**

Apart from the doctrine of *quasi-judicial res judicata* articulated in Tucker, Rhode Island also recognizes the more flexible doctrine of administrative finality as expounded by Johnston Ambulatory, 755 A.2d 799 (R.I. 2000). That less forceful cousin of *res judicata* applies to certain agencies.

The Court first set the stage for Johnston Ambulatory by deciding Danzer, 745 A.2d 733, earlier in the same term. Danzer further explained the Tucker criteria in the course of ruling on a situation that did not meet that test. Danzer held that the decision of the particular board that the Court was reviewing had no *quasi-judicial res judicata* effect and that, consequently, the board's second hearing on the same issue was not barred by *quasi-judicial res judicata*. See id. at 735. Since the board's first decision was rendered without the opportunity to present formal evidence and judicial review was unavailable, the decision was not a "final adjudication." Id. The Court's reasoning was also based on the board's structural position within the Department of Health. In that instance, the board did not hold its own hearing, but instead acted upon the recommendation of an "investigating committee." Id. Additionally, the board did not issue final orders on its

own; the final order was, instead, issued by the Director of Health upon review of the board's action. *See id.* at 734.

The *per curiam* decision in Danzer logically led to the signed decision in Johnston Ambulatory Surgical Assoc. v. Nolan, 755 A.2d 799, 808 (R.I. 2000), in which the Court expounded the doctrine of administrative finality. "Under this doctrine, when an administrative agency receives an application for relief and denies it, a subsequent application for the same relief may not be granted absent a showing of a change in material circumstances during the time between the two applications." *Id.* (citing Audette v. Coletti, 539 A.2d 520, 521-22 (R.I. 1988) (zoning board's ability to grant new relief limited by earlier grant)). Although the doctrine had been traditionally limited to cases involving municipal land-use regulation, Johnston Ambulatory invoked it in the context of certain other decision-making. *See Johnston Ambulatory*, 755 A.2d at 810.

In Johnston Ambulatory, an ambulance service had filed an application for a certificate-of-need from the Department of Health. A departmental committee, the Health Services Council, recommended that the application be approved, but the director rejected the council's recommendation and denied the application. The next year, following a change in administration, Johnston Ambulatory reapplied with a substantially similar application, and the council once again voted to recommend a certificate. The new director approved. In a consolidated review of both applications, the Court applied the doctrine of administrative finality and held that Johnston Ambulatory's second application should have been denied, as its application had failed to highlight any material change in circumstances. *See id.* at 810.

Initially, Johnston Ambulatory considered the Tucker criteria: "the preclusive effect of *res adjudicata* should apply to those decisions rendered when an administrative agency has acted

in a quasi-judicial capacity.” Id. at 810 (citing Tucker, 657 A.2d at 549). The Court found that *quasi-judicial res judicata* did not apply to the situation before it and *only then* applied the less weighty doctrine of administrative finality. See Johnston Ambulatory, 755 A.2d at 810. In other words, the Court did not view administrative finality as an *alternative* to *quasi-judicial res judicata* in any given context but, rather, as a situationally distinct doctrine that would apply only in instances where *quasi-judicial res judicata* did not apply. See id. at 808-10.

The Court’s holding, that the determination was not made by a *quasi-judicial* administrative tribunal, was rooted in the text of the Department’s enabling statute. The Court noted that the council served as an “advisory body” whose role was “solely ‘to consult and advise’ the department,” as the director made the final determination. Id. at 806. Furthermore, as with the board in Danzer, the council did not conduct the hearings and was not required to be present at the hearings; nor was the director, who relied on the same “cold record.” Johnston Ambulatory, 755 A.2d at 807; cf. Environmental Scientific Corp. v. Durfee, 621 A.2d 200, 203 (R.I. 1993) (discussing another statutory scheme where the final decision-maker is not the hearing officer).

In sum, as in Danzer, the parties in Johnston Ambulatory were not afforded “substantially the same rights that they would have if the matter were presented to a court,” see Tucker, 657 A.2d at 549. This contrasts with the PUC, which, as shown next, fits squarely within the Tucker model.²

²A hypothetical example provides a useful illustration of the type of administrative proceeding that is not adjudicatory and, therefore, is outside of realm of *res judicata*. Suppose the National Highway Traffic Safety Administration (NHTSA) reviews the safety of manufactured vehicles. Let us suppose an auto-maker – say, for convenience, Volkswagen – tried to bring its model into the United States market but was administratively rejected by NHTSA because it did not meet the safety standards then applicable. Assume, for illustration,

II. THE DECISIONS OF THE PUC ARE ENTITLED TO *RES JUDICATA* EFFECT.

A. The PUC's Powers Are Entirely Those Of A *Quasi-Judicial* Body.

- 1. The 1969 reform legislation split off the administrative functions that are now embodied in the DPUC from the purely *quasi-judicial* functions that are now embodied in the PUC.**

Turning to the PUC, the Rhode Island Supreme Court has examined the statutory genesis in detail, most recently in *In re Kent County Water Auth.*, 2010 WL 2431084, *1-10 (R.I. June 17, 2010). The Court interpreted the 1969 statutory enactments that created the PUC, as well as the DPUC, in its modern form. The Court wrote, “the General Assembly intended by its enactment to segregate the judicial and administrative attributes of ratemaking and utilities regulation and to vest them separately and respectively in the [PUC] and the [DPUC].” *Kent County*, *1 (quoting *Narragansett Elec. Co. v. Harsch*, 117 R.I. 395, 402, 368 A.2d 1194, 1199-1200 (1977)). The Court has distinguished the “judicial powers” of the PUC from the “administrative powers” of the DPUC, *Harsch*, 117 R.I. at 403, 368 A.2d at 1200, and added, “this marks a departure from the historical view of rate fixing and utility regulation as [an] administrative or legislative, rather than a judicial[,] function . . .” *Id.* at 405 n.7, 368 A.2d at 1201 n.7.

that this rejection is a unilateral decision by agency staff affirmed by the agency director but without any formal neutral adjudication. That would be final as to that model at that time.

Even if the underlying decision were accompanied by judicial review, such judicial review would not convert the administrative decision into an adjudicatory determination. Such judicial review, once finalized, would preclude further appeals from that particular decision, but it would not alter the non-adjudicatory nature of that proceeding.

If, in the next year, Congress passed new, more lenient, safety standards for small cars, Volkswagen could try to meet that standard. This is because the prior proceeding was not fully adjudicatory.

The hypothetical stands in contrast to the Deepwater situation. Deepwater had the benefit of a full adjudication.

The legislature's intentions for the PUC can be seen by the choice of words it used: the PUC is defined as a "quasi-judicial tribunal," R.I. Gen. Laws § 39-1-3, and the PUC is an "impartial, independent body." R.I. Gen. Laws § 39-1-11. It has "the powers of a **court** of record. . . . It may make orders and render **judgments** and enforce the same by any suitable process issuable by the superior court." R.I. Gen. Laws § 39-1-7 (emphasis added). These are not empty words; the PUC meets or exceeds the attributes of the Personnel Appeal Board that led the Court in Tucker to declare that the Board's decisions have *res judicata* effect.

2. The 1996 reform legislation reinforced the split.

The culmination of the separation came when the chairperson of the PUC lost the authority to direct the DPUC by the Utility Restructuring Act of 1996, P.L.1996, c. 316, § 1. In that enactment, the General Assembly – completing the work it had begun in 1969 – created the position of the public utilities administrator; the public utilities administrator assumed the PUC chairperson's former duties that pertained to the direction of the DPUC. *Id.* See generally Malachowski v. State, 877 A.2d 649, 651 (R.I. 2005). This reinforced the intention to *entirely* separate the administrative functions of the DPUC from the PUC, further underscoring the *quasi-judicial* nature of the latter.

B. The PUC, Although A Mere "Creature Of Statute," Possesses Judicial Power.

It is acknowledged that "[t]he Public Utilities Commission is a creature of statute and, as such, it possesses only those powers, duties, responsibilities and jurisdiction conferred upon it by the General Assembly." Bristol County Water Co. v. PUC, 117 R.I. 89, 97, 363 A.2d 444, 449 (1976). However, the PUC is still a *quasi-judicial* body. A comparative example is instructive: although the Superior Court is a creature of statute, *compare* R.I. Gen. Laws § 8-2-1 *with* R.I. Const. Art. 10, § 2, it is nonetheless a judicial body.

Indeed, the Rhode Island Supreme Court has long acknowledged that judicial power may lie in agencies that are mere creatures of statute. *See, e.g., In re Request for Advisory Opinion*, 961 A.2d 930, 940 (R.I. 2008) (stating that Executive Branch administrative agencies may exercise *quasi*-judicial powers); *Weeks v. Personnel Bd.*, 118 R.I. 243, 246-47, 373 A.2d 176, 177-78 (1977) (noting “the judicial nature of the proceedings” before a local board).

C. As A *Quasi*-Judicial Body, The PUC’s Decisions Are Final And May Not Be Reversed By The Legislature.

The PUC is a paradigmatic *quasi*-judicial tribunal and it satisfies the Tucker criteria: “the parties [have] substantially the same rights that they would have if the matter were presented to a court.” Tucker, 657 A.2d at 549. For example, parties at the PUC have an opportunity to present evidence. R.I. Gen. Laws § 39-1-11 (“upon the evidence presented before it . . . by the parties”). Indeed, there is provision for depositions, “to be taken in the manner and used for the purposes prescribed by law for taking depositions in civil actions in the superior court,” R.I. Gen. Laws § 39-1-16; the PUC has subpoena power, R.I. Gen. Laws § 39-1-13; and, although the Commission is not required to follow the rules of evidence, R.I. Gen. Laws § 39-1-11, there is opportunity for cross-examination. *See Valley Gas Co. v. Burke*, 446 A.2d 1024, 1033 (R.I. 1982). Finally, the PUC is structurally dissimilar to the arrangements in Johnston Ambulatory and Danzer (in which, as we have seen, the Court determined that decisions from certain agencies would *not* lead to *quasi*-judicial *res judicata* effect). The PUC’s decisions are not advisory or preliminary opinions that must be approved by an administrator, as in Johnston Ambulatory. *See id.* at 803-04. Additionally, due to the 1969 and 1996 reforms discussed above, no administrator is party to the issuance of its orders, as in Danzer.

In fact, the relationship between the PUC and the administrator is the direct *reverse* of these arrangements. The administrator appears as a “part[y] in interest” in front of the PUC. *See*

R.I. Gen. Laws § 39-5-2. Thus, the administrator plays a role that is subordinate to that of the PUC. Stated bluntly, this system takes the structure featured in Johnston Ambulatory and stands it on its head.

It should come as no surprise that Rhode Island courts have consistently found decisions of the PUC to have a *quasi-judicial res judicata* effect. See New Shoreham v. Burke, 519 A.2d 1127, 1130 (R.I. 1987); In re Narragansett Elec. Co., 1989 WL 1110237 at *1 (R.I.Super. Feb. 21, 1989); Verizon New England v. John Rocchio Corp., 2007 WL 3236723 (R.I.Super.Oct. 12, 2007) (trial order) (Gibney, J.) (*res judicata* “extends to the decisions of . . . the PUC”).

* * *

In sum, the April 2 decision of the PUC in Docket 4111 is to be given preclusive effect with respect to all matters that might have been raised in that proceeding.

III. RES JUDICATA EFFECT ATTACHES TO A DECISION FROM THE MOMENT OF RENDERING OR, AT THE LATEST, FROM THE TIME THE APPEAL PERIOD HAS RUN.

Typically, if a decision is entitled to *res judicata* effect, it has that effect “as soon as it is issued.” Washington v. State Street Bank, 14 Fed.Appx. 12, 16 (1st Cir. July 19, 2001) (a judgment has *res judicata* effect notwithstanding the possibility or even pendency of an appeal); Cruz v. Melecio, 204 F.3d 14, 20-21 (1st Cir. 2000) (same) (*citing* Restatement (2d) of Judgments § 13 cmt. f).

Even if one were to allow for the delay related to the possibility of appeal, in this instance it would make no difference. As background, R.I. Gen. Laws § 39-5-1 specifically provides that all PUC matters are subject to review by the Rhode Island Supreme Court within seven days of a final decision by writ of *certiorari*. This is repeated in Commission Rule 1.30. Here, Deepwater did not seek such review. In effect, the result of allowing for appeals would be that *res judicata*

attached on April 9, instead of April 2. The lapse of the time period for appeal (or petition), like the decision itself, occurred before the legislation was enacted. In either event, the legislation came later. In short, this possible difference in date is a matter of insignificance.

IV. IN ORDER FOR THE *RES JUDICATA* EFFECT OF THE APRIL 2 DECISION TO BE REMOVED, THERE WOULD HAVE TO BE RETROACTIVE LEGISLATION.

In other words, as of April 9, at the very latest, finality attached to the outcome of Docket 4111 and any subsequent enactment that would strip away that character would have to be retroactive. The question then becomes whether the recent legislation – which never directly addresses the outcome of the prior proceeding (April 2 decision in Docket No. 4111) – achieves the character of retroactivity. If not, the result is that *res judicata* prevails and the current Docket must be dismissed.

V. THREE RULES OF STATUTORY CONSTRUCTION COMBINE TO YIELD AN INTERPRETATION THAT RESPECTS THE *QUASI-JUDICIAL RES JUDICATA* FORCE OF THE APRIL 2 ORDER

A. There Is A Strong Presumption That Legislation Applies Only Prospectively.

At the outset, “[r]etroactivity is not favored in the law. Thus, congressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result.” Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 208 (1988). *Accord* Hydro-Manufacturing, Inc. v. Kayser-Roth Corp., 640 A.2d 950, 954 (R.I. 1994) (“It is well established, however, that statutes and their amendments are presumed to apply prospectively”); Maturi v. McLaughlin Research Corp., 326 F.Supp.2d 313, 321 (D.R.I. 2004) (applying Rhode Island law) (“The text of the [statute] is silent The presumption, therefore, is against retroactivity”).

Therefore, Deepwater cannot surmount the presumption against retroactivity in regard to the Deepwater legislation – the legislation should *not* be construed to reverse the past outcome of April 2, which, as established above, is binding. As a matter of statutory construction, the legislature did not effectively allow for a re-determination of a past outcome. Such an interference with the usual operation of *res judicata* would constitute retroactive legislation, a conclusion not to be presumed. *Cf. Wilkinson v. State Crime Lab. Comm’n*, 788 A.2d 1129 (2002) (where legislature passed a statute easing the way for the Crime Lab to fire an employee, the Supreme Court ruled it would be interpreted to be prospective and could not apply to the employee who was then in place). This legislation can and should be characterized as prospective in that it does not purport to undo the past decision of the PUC.

Under this prudent interpretation, the recent special legislation, which does not even refer to the outcome reached by the PUC (Order of April 2, 2010), cannot be said to undo the *res judicata* effect that attended such outcome. It should not be presumed that the legislature violated principles of non-retroactivity. This is because the General Assembly never explicitly reversed the earlier denial.

B. Additionally, There Is A Presumption That Legislation Does Not Limit The Doctrine Of *Res Judicata*.

As a general principle of statutory construction, in the absence of statutory direction to the contrary, courts will apply *res judicata* and collateral estoppel to agency adjudicatory decisions that resolve disputed issues of fact properly before the agency “which the parties have had an adequate opportunity to litigate.” *United States v. Utah Constr. & Mining Co.*, 384 U.S. 394, 422 (1966). This principle applies to state agencies as well as to federal agencies, *University of Tenn. v. Elliott*, 478 U.S. 788, 798 (1986). Of course, the pertinent legislature can modify or contradict this principle by statute, *see Astoria Fed. Sav. & Loan Ass’n v. Solimino*,

501 U.S. 104, 108-09 (1991), but, in this instance, the recent legislation does not even mention the topic.

C. Additionally, There Is A Strong Presumption That Legislation Does Not Implicate Constitutional Issues.

The “long-recognized principle of constitutional scrutiny,” Hometown Properties, Inc. v. Fleming, 680 A.2d 56, 60 (R.I. 1996), is that, when “confronted with a challenge to the constitutionality of a legislative enactment,” courts must interpret the statute narrowly to “avoid a finding of unconstitutionality.” State ex rel. Westerly v. Bradley, 877 A.2d 601, 606 (R.I. 2005) (internal quotation marks omitted). The famous Brandeis concurrence in Ashwander v. TVA, 297 U.S. 288, 346-47 (1936) – relied upon by our state Supreme Court in Irons v. Ethics Comm’n, 973 A.2d 1124, 1135 (R.I. 2009) (citing, Ashwander) – bears quotation: “[I]f a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.” Ashwander, 297 U.S. at 348 (Brandeis, J., concurring).

Serious concerns are established in the ensuing parts of this Memorandum regarding the constitutional infirmities of this legislation if it were to be construed in a manner contrary to the present argument. A construction that preserves *res judicata* should be employed in order to avoid those constitutional dimensions.

VI. THE PUC, AS THE LEGISLATIVELY-DELEGATED AGENCY OF EXPERTISE, IS RESPONSIBLE FOR THE INTERPRETATION OF THE NEW LEGISLATION IN THE FIRST INSTANCE.

Of course, the judiciary has “final authority” on statutory construction. Chevron v. Natural Resources Defense Council, 467 U.S. 837, 843 n.9 (1984). Nonetheless, when agencies are called upon to interpret statutes, these interpretations are entitled to judicial deference. *See id.* at 844. If the construction is permissible, then the court may not substitute its judgment for

that of the agency, even if it is “not necessarily the only possible interpretation, nor even the interpretation deemed *most* reasonable by the courts.” Entergy Corp. v. Riverkeeper, 556 U.S. -- -, 129 S.Ct. 1498, 1505 (2009) (citing Chevron, 467 U.S. at 843-44) (emphasis in original).³

Similar rules apply in this state. A mere month ago, the Court reiterated this in the course of reversing the Superior Court, stating that such deference applies “even when the agency’s interpretation is not the only permissible interpretation that could be applied.” Auto Body Ass’n v. Department of Business Regulation, 2010 WL 2223998 at *5 (R.I. June 4, 2010) (quoting Pawtucket Power Assocs., 622 A.2d at 456-57). See, e.g., Unistrut Corp. v. Department of Labor & Training, 922 A.2d 93, 99 (R.I. 2007) (“[w]hen the administration of a statute has been entrusted to a governmental agency, deference is due to that agency’s interpretation of an ambiguous statute . . .”); State v. Swindell, 895 A.2d 100, 104 (R.I. 2006) (quoting State v. Cluley, 808 A.2d 1098, 1103 (R.I. 2002) (agency’s interpretation of a statute “is entitled to great weight”)).

VII. THERE IS ABSOLUTELY NOTHING IN THE RECENT LEGISLATION THAT EXPRESSLY REFERS TO THE APRIL 2 DECISION OR TO THE DOCTRINE OF RES JUDICATA.

As a matter of statutory construction, the recent legislation does not alter the *res judicata* effect of the April 2 disapproval decision. There is absolutely nothing in the legislation that expressly refers back that decision.

³ The Rhode Island Supreme Court has already stated that the PUC has the requisite legislative delegation of power for its statutory interpretations to qualify for Chevron deference. See R.I. Gen. Laws § 39-1-3; see also Pawtucket Power Assocs. v. City of Pawtucket, 622 A.2d 452, 456-57 (R.I. 1993) (holding that the statutory interpretations of the PUC should be accorded judicial deference).

VIII. *RES JUDICATA* IS IMPERVIOUS TO INTERVENING CHANGES IN LAW.

An additional point is warranted. This is made lest there be an attempt to assert that the very fact that the new statute states a new rule of decision is itself grounds to dispense with *res judicata*.

The finality of *res judicata* does not yield to intervening changes in law. A particular case out of Washington State, Columbia Rentals, Inc. v. State, 576 P.2d 62 (Wash. 1978), dramatically illustrates this rigidity, which is necessary for any judicial system to operate.

There, a series of adjacent shorefront parcels were respectively owned by private individuals. Over time, accretions formed new land, title to which was disputed. The owners sought to quiet title with respect to the additional beach, but the state courts denied their claims. Some appealed to the United States Supreme Court, which, announcing a new rule, reversed as to those individuals. Hughes v. Washington, 389 U.S. 290 (1967) (ruling for owners). But this left some neighboring landowners without their respective share of the disputed area (as they had not appealed). One of these, Columbia Rentals, filed in order “to modify the earlier judgment . . . and to quiet title in it to the accreted lands . . . as . . . established by Hughes.” See Columbia Rentals, 576 P.2d at 63 (referring to the intervening holding).

The trial court sympathetically ruled that “the judgments in . . . prior cases should be changed to extend landowners’ property lines” to the new shoreline despite the prior result. Id. (*quoting* trial court). But the state supreme court held that the lower court had improperly “modif[ied] [an] earlier judgment against [claimants] because of changed judicial interpretation of applicable law” and that such modification was barred by *res judicata*. Id. at 65.

Although the prior judgment was wrong, the claimants “could have appealed from the judgments entered.” *Id.* The Court was unmoved by their plight because “the objective of all judicial proceedings is rendition of a judgment.” *Id.*

IX. THE *RES JUDICATA* EFFECT OF THE APRIL 2 DECISION IS DETERMINATIVE OF A DISAPPROVAL OF THE NEW PPA.

In response to the recent special legislation, Deepwater has submitted an amended PPA based on the same project design. In fact, the physical specifications for the project are the same. The one variation relates to the terms of the PPA. This is the introduction of the element of open book pricing. But this is a factor that was submitted for review three times in the prior proceeding, thereby demonstrating that this revision is not different in kind from what was considered earlier. This is detailed in the Memorandum anticipated from Conservation Law Foundation, which, to that extent only, is incorporated here.

Applying the principles set forth earlier, the PUC should protect its prerogatives by rendering an interpretation maintaining the preclusive effect of its April 2 decision. Therefore, the new PPA must be rejected under the principles of *res judicata*.

PART TWO – ALTERNATIVELY, AS A MATTER OF CONSTITUTIONAL LAW, IF THE
STATUTE WERE TO BE CONSTRUED SO AS TO RETROACTIVELY ALTER RES
JUDICATA, THERE WOULD BE A VIOLATION OF SEPARATION-OF-POWERS
BECAUSE AGENCY DECISIONS ARE TREATED LIKE THOSE OF COURTS ONCE
FINALITY IS ACHIEVED

At the outset, it is clear that legislation that alters rights fixed by the final judgments of Article III-type courts at the state or federal level cannot be upheld against a separation-of-powers analysis. The case most often cited for this doctrine is McCullough v. Virginia, 172 U.S. 102, 123-24 (1898), in which the Virginia legislature attempted to prevent enforcement of a state court judgment by retroactively repealing the legislation that had given rise to the proceeding. The Supreme Court held that the legislature was prevented from doing so: “Legislation may act on subsequent proceedings, [and] may abate actions pending, but when these actions have passed into judgment the power of the legislature to disturb the rights created thereby ceases.” *Id.* The Court has since reiterated the principle underlying McCullough: *See e.g., Chicago & Southern Air Lines v. Waterman S.S.*, 333 U.S. 103, 113, (1948) (“[j]udgments . . . may not be . . . overturned or refused . . . by another Department of Government”); Hodges v. Snyder, 261 U.S. 600, 603 (1923) (“the judgment of a court cannot be taken away by subsequent legislation, but must be thereafter enforced by the court regardless”); Stephens v. Cherokee Nation, 174 U.S. 445, 478 (1899) (“legislatures cannot set aside the judgments of courts”).

This proposition, in turn, brings us to another question: The question is whether this tribunal’s decisions can be afforded the protections given to court rulings. The major issue is the extent of any distinction between pure judicial courts and *quasi*-judicial bodies. The fact is that there is ample authority from this and other jurisdictions for treating the latter like the former once the proceedings are final. That federal and sister-state authority will be examined first before reviewing the Rhode Island landscape.

I. DIRECT AUTHORITY SUPPORTS APPLYING SEPARATION-OF-POWERS TO *QUASI*-JUDICIAL BODIES.

A. The O’Grady, California School Boards, Jackson County and Chrysler Decisions Apply To *Quasi*-Judicial Bodies.

One particular case serves as a link between application of the doctrine to full-fledged courts, on one hand, and application of the doctrine to executive department agencies, on the other. This link is provided by U.S. v. O’Grady, 22 Wall. [89 U.S.] 641 (1874). That case invalidated an attempt by Congress to revise a final judgment entered by the Court of Claims. In O’Grady, the Justices made short work of the notion that the Court of Claims’ status (in that era) as a mere statutory court created under Article I should facilitate congressional intervention:

Should it be suggested that the judgment in question was rendered in the Court of Claims, the answer to the suggestion is that the judgment of the Court of Claims, from which no appeal is taken, is just as conclusive under existing laws as the judgment of the Supreme Court

Id. at 648. At another point, the opinion underscores that: “where no appeal is taken to [the Supreme Court], [such judgments] are, under existing laws, absolutely conclusive.” Id. at 647. This bears a striking resemblance to the prior PUC proceeding (Docket 4111), in which Deepwater failed to seek review by the Rhode Island Supreme Court.

A case that applies separation-of-powers to a typical governmental agency is California School Boards Ass’n v. California, 171 Cal. App. 4th 1183 (2009). In California School Boards, the legislature had enacted a statute that created the Commission on State Mandates, a *quasi*-judicial tribunal that implemented requirements that the state reimburse local governments for certain costs imposed on the localities by the legislature and state agencies. Id. at 1189. Specifically, the Commission was to “determine whether reimbursement was required for new

state mandates.” Id. at 1191. Local governments were to file claims, which the Commission would “adjudicate[].” Id.

The newly-established Commission found in several cases that reimbursement was due. The legislature then amended the statute to reverse those results. Not content to allow the legislation to apply prospectively, the legislature directed the Commission to “set aside” certain decisions and to “reconsider” others. Id. Specifically, the new law provided that the state did not need to reimburse local governments for costs in certain cases (instances where the costs resulted from ballot measures).

The state maintained that it was simply empowering the Commission to prospectively reconsider a decision with new rules-of-decision. Since the legislature controlled the Commission’s jurisdiction as well as the laws that the Commission was compelled to apply, the state argued that this was a permissible alteration of jurisdiction and rules-of-decision. But the court disagreed with this characterization and found a violation of separation-of-powers. The holding rested on two propositions. *First*, “[o]nce the Commission’s decisions are final, whether after judicial review or without judicial review, they are binding, just as are judicial decisions.” Id. at 1201. *Second*, “like a judicial decision, a quasi-judicial decision of the Commission is not subject to the whim of the Legislature. . . . The State is bound by those decisions.” Id. at 1201-02.

Another recent case, also with analogous facts, reached an identical conclusion. In Citizens For Constitutional Fairness v. Jackson Cty., 2008 WL 4890585 (D.Or. November 12, 2008), a statute authorized certain commissions, functioning as *quasi*-judicial bodies, to either waive zoning restrictions or compensate real property holders for the reduction in value thereby

caused. After such a body reached a waiver agreement with the plaintiffs, a new statute repealed the pertinent power.

In the first part of its opinion, the court ruled against the validity of the application of the new statute on Contract Clause grounds. Next, the opinion turned to the alternative grounds of separation-of-powers. The federal district court concluded that the waivers are “final quasi-judicial orders” that cannot be rescinded by legislation without violating the doctrine. *See Jackson County* at *4. The court reasoned that this statute invalidated preexisting rulings that were due the same weight as a judicial decision. *Id.*

Another case deserves mention even though the court did not explicitly use the phrase “separation-of-powers.” The application of a statute to certain commission-ordered relief that “had become final and unalterable” at the time of enactment was held to be unconstitutional in *Chrysler Properties, Inc. v. Morris*, 245 N.E.2d 395, 396 (N.Y. 1969). Significantly, the highest court of New York explicitly rejected “the distinction . . . between binding orders . . . made by administrative tribunals and final judgments of courts.” *Id.* at 399. This was an “artificial distinction” and “should be avoided.” *Id.*

Correspondingly, cases upholding legislative interference do so only where the administrative proceedings are still pending at some level. *See Saco River Cellular, Inc. v. FCC*, 133 F.3d 25, 31 (D.C.Cir. 1998) (holding that statute which required FCC to reinstate application did not lead to a violation of separation-of-powers since the FCC’s original proceeding had not yet “terminat[ed]”); *Apache Survival Coalition v. U.S.*, 21 F.3d 895 (9th Cir. 1994) (Congress validly enacted a statute that chose from among competing alternatives in a *pending* adjudication before the Forest Service); *Florida Birth-Related Neurological Injury Compensation Ass’n v. DeMarko*, 640 So.2d 181, 182 (Fla.App. 1994) (“[a] statute transferring jurisdiction from one

quasi-judicial tribunal to another is procedural in nature” as applied to a pending case); Ohio Public Interest Action Group v. Public Utils. Comm’n, 331 N.E.2d 730, 734 (Ohio 1975) (“the proceedings . . . were not concluded and no final order affecting substantive rights had been entered”).

Thus, although a legislature may withdraw jurisdiction or alter the mandate of a *quasi*-judicial tribunal while a decision is pending, it may not, by legislative enactment, force the tribunal to either reconsider or to reverse a final decision.

B. The Chadha Concurrence Applies To *Quasi*-Judicial Bodies.

In Immigration & Naturalization Serv. v. Chadha, 462 U.S. 919 (1983), an alien facing deportation was granted a stay by the INS. The House of Representatives subsequently “vetoed” this adjudication *via* an act that was not passed by the Senate and, consequently, did not constitute an Article I legislative act. The majority opinion found this reversal of an adjudication to be a violation of the Constitution, but only on formalistic grounds not relevant here (the holding was based on the failure of Congress to pass a statute in a bicameral manner with presentment to the President).

In a concurrence, however, Justice Powell bypassed the formalistic approach and, instead, found a violation of the separation-of-powers doctrine. Powell found that the Congress had “assumed a judicial function” by adjudicating a specific dispute. Chadha, 462 U.S. at 960 (Powell, J., concurring in the judgment). Powell stated that “[e]ven if the House did not make a *de novo* determination, but simply reviewed the Immigration and Naturalization Service’s findings, it still assumed a function ordinarily entrusted to the federal courts.” Id. at 965. “[T]he legislative branch [had] in effect acted as an appellate court . . .” Id. at 966. Justice Powell’s concurrence continued: “Unlike the judiciary or an administrative agency, Congress is not

bound by established substantive rules. Nor is it subject to the procedural safeguards[] . . . that are present when a court or an agency adjudicates individual rights. It is the peculiar province of the legislature to prescribe general rules for the government of society; the application of those rules would seem to be the duty of other departments.” *Id.* at 967 (*quoting Fletcher v. Peck*, 6 Cranch [10 U.S.] 87, 136 (1810) (Marshall, C.J.) (footnote omitted)).

Concededly, the Chadha concurrence does not definitively control this present controversy in Rhode Island for two reasons. *First*, Powell’s opinion was a mere concurrence. Indeed, Justice Powell wrote only for himself in that case. *Second*, the separation-of-powers doctrine in Rhode Island is, of course, a matter of state law and all federal constitutional holdings are non-binding.

Even with those limitations stated, the concurrence in Chadha does provide a persuasive basis for decision. The facts of the case were that the alien was seeking to be free of a harsh deportation. In the same vein, in the matter at hand, the rate-payers are seeking to vindicate their interest in low rates and free competitive bidding. In both instances, the boundary between legislative and judicial functions was, or is, being breached.

II. THE SEPARATION-OF-POWERS DOCTRINE IN RHODE ISLAND BROADLY PROHIBITS LEGISLATIVE INTERFERENCE WITH JUDICIAL DECISIONS.

The Rhode Island judiciary has jealously guarded its own prerogatives against legislative attacks by invoking the doctrine of separation-of-powers. Thus, there are a number of court decisions in which the judiciary has resisted legislative encroachment on the function of case-by-case adjudication. Although these cases involve courts – not administrative agencies – there is no indication that the Rhode Island Supreme Court would be less aggressive in invoking the doctrine with respect to the PUC.

The leading Rhode Island case upholding the separation-of-powers in the judicial context is Opinion upon the Act to Reverse the Judgment against Dorr, 3 R.I. 299 (1854) (“Dorr”), which emerged from the crucible of the Dorr Rebellion. Ironically, the doctrine was invoked against the reformer Thomas Wilson Dorr, who, among other causes, had championed the separation-of-powers doctrine. *See generally* Patrick T. Conley, Democracy in Decline (1977). Dorr’s leadership of a popular movement had ended with his conviction for treason against the State. The Dorr case cited here arose ten years later and concerned an 1854 piece of legislation descriptively entitled “An act to reverse and annul the judgment of the Supreme Court of Rhode-Island for treason, rendered against Thomas W. Dorr, June 25th, A. D. 1844.” The Supreme Court elaborated:

The act in question is an exercise by the General Assembly of supreme judicial power. It purports to repeal, annul and reverse a judgment of the highest Court known to the Constitution, and to declare it to be in all respects as if it had never been rendered.

Id. Then, the Court concluded:

The exercise, by the General Assembly, of the power to reverse the judgments of the Courts, is inconsistent with this distribution of powers, and with the existence of a distinct judicial department.

Id.

Dorr was extended to retroactive legislative re-determination of criminal sentences in State v. Garnetto, 75 R.I. 86, 63 A.2d 777 (1949) (intervening retroactive reform legislation held to be unconstitutional when relied upon by an inmate to seek post-conviction relief). Although not explicitly noted by the Court, the relief afforded by the new statute in Garnetto was, on its face, general. It did not specify a particular inmate or proceeding. Thus, the court, *sub silentio*, extended and enhanced the Dorr precedent. *Accord* G. & D. Taylor & Co. v. Place, 4 R.I. 324, 1856 WL 2338 at *6 (1856) (“to open judgments . . . is an exercise of judicial power”); Lemoine

v. Martineau, 115 R.I. 233, 240, 342 A.2d 616, 621 (R.I. 1975) (statute attempting to limit the judiciary’s subpoena power “is an unauthorized legislative encroachment on the judiciary's right and obligation to run its affairs”).

III. THE SEPARATION-OF-POWERS DOCTRINE APPLIES WHETHER THE INTERFERENCE COMES AT THE EXPENSE OF INDIVIDUALS OR THE PUBLIC.

The above discussion reflects a robust separation-of-powers doctrine with respect to the Rhode Island judiciary. Moreover, these precedents reinforce that separation-of-powers relates to the institutional arrangements of government, not to individual rights. The structural nature of the concerns must be underscored:

But the doctrine of separation of powers is a *structural safeguard* rather than a remedy to be applied only when specific harm, or risk of specific harm, can be identified. In its major features (of which the conclusiveness of judicial judgments is assuredly one) it is a prophylactic device, establishing high walls and clear distinctions because low walls and vague distinctions will not be judicially defensible in the heat of interbranch conflict. . . . Separation of powers . . . profits from the advice authored by a distinctively American poet: Good fences make good neighbors.

Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 239-40 (1995) (doctrine is “categorical”).

In this context, one must resist the visceral sense that a constitutional doctrine is less likely to apply where the intervening government action is at the expense of the public rather than individual rights. Instinctively, one might guess that the doctrine of separation-of-powers is most stringently applied to restrictions on core interests in individual liberty. In reality, however, this is not so. This feature distinguishes this branch of constitutional law from the more usual issues. Analytically, it does not matter whether the alleged violation of separation-of-powers produces a result that, on one hand, adversely affects an individual or, on the other hand, adversely affects the general public.

The above-cited Dorr case here in Rhode Island supports this view. The Act in Dorr would have benefited the individual, at least intangibly (restoring him to full innocence), at the expense of the public, at least intangibly (contrary to the state's interest in seeing wrong-doers punished). A more recent example is the above-cited Garnetto case (intervening retroactive sentencing reform legislation favorable to convicts held to be unconstitutional on separation-of-powers grounds when relied upon by an inmate to seek post-conviction relief).

Likewise, federal law rejects the so-called public rights/private rights distinction in this context. This is manifested in the above-quoted passage of Plaut. *See also* Gavin v. Branstad, 122 F.3d 1081, 1088 (8th Cir. 1997) (*citing* Plaut) (“The character of the right involved has nothing to do with the separation-of-powers issue.”).

Thus, the precedents suggest the following approach to separation-of-powers. Consider two situations: (1) suppose that Deepwater had won at the PUC and then the legislature intervened to deprive it of that approval, on one hand; and (2) suppose that Deepwater had lost at the PUC and then the legislature enacted legislation to secure for Deepwater the needed approval. Both situations are on the same footing from a separation-of-powers standpoint. Due to the structural concerns animating a pure separation-of-powers analysis, the change between these two hypothetical situations does not make any difference. Separation-of-powers applies in either event. (By contrast, an analysis the Takings Clause, Equal Protection Clause, Due Process Clause or Contract Clause might yield differing results.)

PART THREE – ALTERNATIVELY, AS A MATTER OF CONSTITUTIONAL LAW, THE
STATUTE VIOLATES THE GOOD-OF-THE-WHOLE CLAUSE

According to one scholar, “All but four of the state constitutions contain express restrictions against the enactment of special legislation,” and Rhode Island’s is among those that do so. *See* Note, “Special Legislation,” 51 Yale L.J. 1358, 1358 & n.4 (1942). Specifically, Article I, § 2 of the Rhode Island Constitution provides, among other things, that:

All free governments are instituted for the protection, safety, and happiness of the people. All laws, therefore, should be made for the good of the whole; and the burdens of the state ought to be fairly distributed among its citizens.

R.I. Const. Art. I, § 2.

But, in some instances, Rhode Island has afforded its clause a much less forceful interpretation than the treatment sister states have given to their counterparts. *Compare* Kennedy v. Rhode Island, 654 A.2d 708, 712 (R.I. 1995) (upholding act granting, to one particular plaintiff, the right to seek a damage award that exceeded the general cap), *with* Wilson v. All-Steel, Inc., 428 N.E.2d 489, 491 (Ill. 1981) (statute reviving certain expired claims unfairly “creates a new . . . remedy where none previously existed” for certain sub-group); Fountain Park Co. v. Hensler, 155 N.E. 465, 469 (Ind. 1927) (act giving one organization eminent domain power “under the guise and verbiage of general laws should be checked”); Anderson v. Board of Comm’rs, 95 P. 583, 586 (Kan. 1908) (“the inherent vice of special laws is that they create” a “wilderness of special provisions, whose operation extends no further than” to one particular person); Lewis v. Webb, 3 Me. 326, 336 (1825) (“it can never be . . . legitimate legislation, to enact a special law . . . granting a privilege and indulgence to one man”); Cox v. State, 279 N.W. 482 (Neb. 1938) (“to uphold this legislation would require individuals, similarly situated, to knock at the door of the legislature”); Lucero v. Highway Dep’t, 228 P.2d 945 (N.M. 1951) (“if

the Legislature desires that compensation be paid . . . , it will have to open the door to all alike”); Reynolds v. Porter, 760 P.2d 816, 823 (Okla. 1988) (law that “carved out . . . a subclass” of actionable claims for special treatment invalid); Jack v. State, 82 P.2d 1033, 1034 (Okla. 1937) (“the abuses of granting special legislative favors to the few should not be tolerated”); Collins v. Commonwealth, 106 A. 229 (Pa. 1919) (“the Legislature cannot by a special act vest in a particular individual a right A general act is the only remedy”); Milwaukee Brewers Baseball Club v. Wisconsin, 387 N.W.2d 254, 263 (Wis. 1986) (where legislature directed a truncated administrative and judicial process for a particular project, it unfairly singled out the local objectors from those who might challenge other construction); Soo Line R. v. Department of Transp., 303 N.W.2d 626, 630 (Wis. 1981) (“the specter of favoritism”).

But this appearance of a disparity is on the verge of changing due to a number of factors. Foremost among these is the constitutional reform wrought by the 2004 Separation-of-Powers Amendment.

I. THE RECENT SEPARATION-OF-POWERS AMENDMENT REINVIGORATES THE GOOD-OF-THE-WHOLE CLAUSE.

A. The Separation-Of-Powers Amendment Extends Beyond The Topic Of Legislative Appointments.

The relatively recent break with the past is best summarized by our Supreme Court in In re Request for Advisory Opinion (CRMC), 961 A.2d 930 (R.I. 2008):

In November of 2004, the electorate of the State of Rhode Island approved the so-called separation of powers amendments. These amendments ushered in four fundamental changes to the Rhode Island Constitution and, for the first time in Rhode Island's history, clearly and explicitly established three separate and distinct departments of government.

Those fundamental changes may be summarized as follows:

(1) Article 3, section 6 was amended to preclude legislators from serving on state boards, commissions, or other state or quasi-public entities that exercise executive power;

(2) Article 5 was amended to provide that the powers of the Rhode Island government are distributed into “three separate and distinct departments”;

(3) Article 6, section 10, which had vested broad “continuing powers” in the General Assembly, was repealed; and

(4) Article 9, section 5 was amended to give the Governor appointment power with respect to members of any state or quasi-public entities exercising executive power, subject to the advice and consent of the Senate.

Id. at 933.

Notably, two of the changes (items 2 and 3, above) transcend the publicly-visible issue of appointments by the legislature. These two provisions were more fundamental and structural. And, importantly, one of these changes (the third listed above) strikes at the heart of the Kennedy case. That precedent, cited above, was, seemingly, the single most salient obstacle to an expansive reading of Good-of-the-Whole Clause. But this is no longer so.

B. Prior to 2004, The Strong Continuing Powers Clause In The Old Constitution Corresponded With A Weak Reading Of The “Good-of-the-Whole” Clause.

In the leading case of Kennedy v. Rhode Island, 654 A.2d 708 (R.I. 1995), the Court reached its result (upholding a special law as against Good-of-the-Whole Clause challenge), by citing the fact that the Rhode Island Constitution, as in effect at that time, vested in the General Assembly “all of the powers inhering in sovereignty other than those which the constitution textually commits to other branches of our state government.” Id. at 710-11 (*quoting Nugent v.*

City of East Providence, 103 R.I. 518, 525-26 (1968)). The approach was that the General Assembly's powers were "plenary." Id.

This crucial passage of Kennedy cites the earlier case of In re Advisory Opinion to the House of Representatives (Legislator Reimbursement), 485 A.2d 550, 553 (R.I. 1984), three times. Further, that passage of Kennedy cites the case of Kass v. Retirement Board, 567 A.2d 358, 360 (R.I. 1989), twice. Those two precedents formed the cornerstone of Kennedy. The cited portions of these two cases, in turn, explicitly rested on the old R.I. Const. Art. 6, § 10, which stated: "The general assembly shall continue to exercise the powers it has heretofore exercised, unless prohibited in this Constitution." The entire edifice was built on that one section, the Continuing Powers Clause.

This means that Kennedy based its diminishment of the Good-of-the-Whole Clause on its exaltation of the Continuing Powers Clause. The two clauses were in tension so that the emphasis on the latter came at the expense of the former.

2. The Continuing Powers Clause Was Swept Away By The Amendment.

The Continuing Powers Clause relied upon by Kennedy constitutes the very provision that was completely deleted by the voters in their approval of the Separation-of-Powers Constitutional Amendment in 2004 (as indicated in the third item listed earlier). Indeed, it was the only provision of the former text that was discarded wholesale. This alone signifies that the Kennedy opinion is no longer good law.

Furthermore, for good measure, the voters amended Article 5 of the Constitution so that it now reads: "The powers of the government shall be distributed into three **separate and distinct** departments: the legislative, executive and judicial." R.I. Const. Art. 6 (emphasis added). The bolded words, "separate and distinct," were added. This strengthens *quasi*-judicial and judicial

tribunals against legislative encroachment and further casts Kennedy as a case that has lost its authority. Indeed, the Advisory Opinion – the most recent Rhode Island case on separation-of-powers – particularly refers to Kennedy as a case that is representative of a bygone regime. Id. at 933. In sum, the whole model of legislative hegemony that the Kennedy case relied upon to narrowly construe the Good-of-the-Whole Clause has been superseded by constitutional amendment.

II. EVEN BEFORE THE RECENT SEPARATION-OF-POWERS AMENDMENT THERE WERE GROUNDS TO REINVIGORATE THE GOOD-OF-THE-WHOLE CLAUSE.

A. The Suggestion In Some Older Decisions Limiting the Good-of-the-Whole Clause Is Sheer *Dicta*.

Prior to the Separation of Powers Amendment, the Rhode Island Supreme Court made certain broad statements to the effect that this provision was merely addressed to the General Assembly's discretion. In other words, the Court's broad language implied that this clause was not an enforceable restraint upon the law-making power. ⁶See Advisory Opinion to the Governor, 510 A.2d 941, 942 (R.I. 1986) ("addressed to the General Assembly by way of advice"); Sepe v. Daneker, 76 R.I. 160, 168, 68 A.2d 101, 105 (1949) ("advisory; not mandatory;" *quoting* Crafts v. Ray, 22 R.I. 179, 183, 46 A. 1043, 1043 (R.I. 1900)).

Upon scrutiny, such broad statements are belied by the very cases in which the language appears. In each of those cases, the Court did not rely on an approach of automatic deference to the General Assembly. Instead, in each instance, the Court undertook an examination of classifications at issue in determining that such classifications were reasonable. Indeed, in each case it would have been hard to find otherwise. State maintenance of a public street (Advisory Opinion), and liquor licensing (Sepe) are clearly not invidious distinctions. In other words, the judiciary would have upheld these legislative schemes regardless of whether the Good-of-the-

Whole Clause was weak or strong. Those precedents, closely read, really do not evidence a toothless clause.

To illustrate, the repeated *dicta* that the clause merely constitutes “advice and direction” were originally planted by the case of *In re Dorrance St.*, 1856 WL 2331, *12 (R.I. 1856). Again, the context of the language is important. The Court was being asked to invalidate a plan for straightening and coherently reconfiguring a municipal street system. It is hard to imagine a plainer example of a general public purpose. As a practical matter, the test to be used was inconsequential because the legislation would have been upheld under even the most stringent constitutional standard.

Indeed, the *Dorrance* opinion hastened to add that, in the proper case, the judiciary should apply the clause to invalidate legislation:

We do not mean to say that a law . . . may not be in its distribution of the burden, both in design and effect, so outrageously subversive of all the rules of fairness, as not to come so far within the purview of this general clause, as to enable the court to . . . declar[e] it to be void.

In re Dorrance St., 1856 WL 2331, *12 (R.I. 1856).

B. The Addition of an Equal Protection Clause in 1986 Clarified The Distinct Meaning Of The Good-Of-The-Whole Clause.

In any event, in 1986 a convention provided Rhode Island with a new constitution. The drafters supplemented the original language of Article I, § 2 by adding (without deleting the foregoing language quoted above) the specific additional guarantee that “[N]or shall any person be denied equal protection of the laws.” R.I. Const. Art. I, § 2.

The addition suggested that the earlier language regarding the “good of the whole” must mean something other than equal protection; otherwise, the new language would be redundant.

Indeed, the two types of clauses address opposite, but related, concerns.

As explained by one case, “Special legislation confers a special benefit or exclusive privilege on a person or a group of persons It . . . discriminates **in favor** of a select group. Special legislation differs from a violation of equal protection in that the latter consists of . . . discrimination **against** a person or class of persons.” Wilson v. All-Steel, Inc., 428 N.E.2d 489, 491 (Ill.1981) (emphasis added; internal quotation marks and citations omitted). Accord Fountain Park Co. v. Hensler, 155 N.E. 465, 469 (Ind. 1927) (Equal Protection Clause is the “antithesis” of “prohibiting the granting of special privileges or immunities;” “One prevents the curtailment . . . and the other prohibits the enlargement”); Jones v. State, 555 P.2d 399, 417 (Idaho 1976) (“the equal protection clause . . . and [the anti-special-laws clause], were adopted to serve distinctly different identifiable purposes. While it might be constitutional in the sense of equal protection . . . to single out persons or corporations for preferred treatment, such would nevertheless be . . . in conflict with [the anti-special-laws clause]”).

Thus, even before the separation-of-powers reform of 2004, elements of the judiciary were already chafing at the legislative log-rolling by which “a select few who had the ability to have a local legislator introduce a special bill” received special privileges. McGrath v. DiStefano, 1992 WL 813621 (R.I. Super. Oct. 1, 1992) (Needham, J.) (legislation that benefited a select handful of claimants against the state held violative of Art. I, § 2).

In any event, it is no longer crucial to define the trend towards rigorous scrutiny of special bills that was emerging prior to 2004. In November of that year, the electorate settled any doubt.

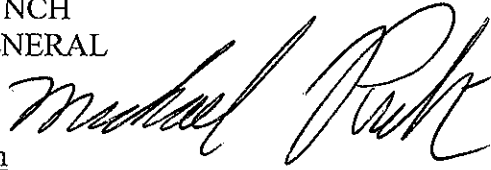
CONCLUSION

This matter stands at the intersection of three important doctrines: *res judicata*, separation-of-powers, and laws-for-the-benefit-of-the-whole. Each embodies a bulwark against

unbridled legislative power that has become the captive of a special interest. The Docket should be dismissed.

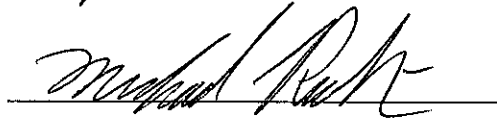
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CERTIFICATE OF SERVICE

I hereby certify that on the 6 day of July, 2010, I sent a true copy of the foregoing to the attached service list.



**National Grid – Review of Proposed Town of New Shoreham Project
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