

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS
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 :

REPORT AND ORDER

I.	Background.....	1
II.	Amended PPA.....	3
III.	Public Notice and Interventions.....	7
	A. Toray and Polytop.....	8
	B. Citizen Intervenors.....	9
	C. TCPM.....	10
	D. OSPRI	11
	E. July 8, 2010 Open Meeting.....	12
IV.	Motion to Stay Proceedings	16
	A. Written Submissions	16
	B. Commission Findings	18
V.	Motions to Dismiss	19
	A. CLF's Motion to Dismiss.....	19
	B. Attorney General's Motion to Dismiss	22
	C. Ocean State Policy Research Institute's Motion to Dismiss.....	24
	D. Deepwater Wind and National Grids' Opposition to Dismiss.....	24
	F. TransCanada's Motion to Dismiss.....	27
	G. Deepwater/Grid's Opposition to TransCanada's Motion to Dismiss	29
	H. The Attorney General's Memorandum with Respect to Motion to Dismiss of TransCanada and Response of Deepwater Wind and National Grid	32
	I. Intervening Parties	34
	J. Oral Argument	35
	K. Commission Decision Regarding all Motions to Dismiss	38
VI.	National Grid's Pre-Filed Testimony.....	39
VII.	Deepwater Wind's Pre-Filed Testimony	41
VIII.	Town of New Shoreham's Pre-Filed Testimony	49
IX.	EDC's Pre-Filed Testimony.....	50
X.	RIBCTC's Pre-Filed Testimony	57
XI.	Division's Pre-Filed Testimony	58
XII.	Toray	59
XIII.	Polytop	67
XIV.	Citizen Intervenors.....	68
XV.	OSPRI	72
XVI.	Attorney General.....	73

XVII. EDC’s Advisory Opinion.....	75
XVIII. DEM’s Advisory Opinion.....	78
XIX. Rebuttal Hearings.....	78
XX. Cross-Examination Hearings	94
XXI. Briefs.....	117
XXII. Commission Findings	129
Concurring Opinion of Chairman Germani.	143
Concurring Opinion of Commissioner Roberti.....	145
Dissenting Opinion of Commissioner Bray.....	147

I. Background

The instant matter before the Public Utilities Commission (“Commission”) represents the second attempt by the signatories of a long-term renewable energy contract for approval. The first review was conducted by the Commission in Docket No. 4111 (In re: Review of Proposed Town of New Shoreham Project Pursuant to R.I. Gen. Laws § 39-26.1-7).¹ The following presents a brief history.

On June 26, 2009, Governor Carcieri signed a bill creating a Long-Term Contracting Standard for Renewable Energy (“Act”), codified at R.I. Gen. Laws § 39-26.1-1 to 8. Section seven of the Act, entitled the Town of New Shoreham Project, required Narragansett Electric Company d/b/a National Grid (“Grid”) to “solicit proposals for one newly developed renewable energy resources project of ten (10) megawatts or less that includes a proposal to enhance the electric reliability and environmental quality of the Town of New Shoreham.” (“Project”).² The solicitation was to “require that each proposal include provisions for a transmission cable between the Town of New Shoreham and the mainland of the state [of Rhode Island].”³

Once Grid selected a Project, Grid and the selected party were required to enter into negotiations with the goal of “achieving a commercially reasonable contract.”⁴ If a contract was agreed to by October 15, 2009, it was required to be filed with the Rhode

¹ Order No. 19941(issued April 2, 2010).

² R.I. Gen. Laws § 39-26.1-7(a).

³ R.I. Gen. Laws § 39-26.1-7(b).

⁴ Commercially reasonable is defined in R.I. Gen. Laws § 39-26.1-2 as follows: “Commercially reasonable” means terms and pricing that are reasonably consistent with what an experienced power market analyst would expect to see in transactions involving newly developed renewable energy resources. Commercially reasonable shall include having a credible project operation date, as determined by the commission, but a project need not have completed the requisite permitting process to be considered commercially reasonable. If there is a dispute about whether any terms or pricing are commercially reasonable, the commission shall make the final determination after evidentiary hearings.

Island Public Utilities Commission (“Commission”) for its review and approval or disapproval.⁵ On December 10, 2009, Grid and Deepwater Wind Block Island, LLC (“Deepwater”) filed a signed Purchase Power Agreement (“2009 PPA”) for Commission review. The 2009 PPA included a fixed price of 24.4 cents per kWh in 2013, the first full year of operation with an annual 3.5% escalator. The cost estimate of the capital cost of the Project was projected at \$219,311,142.⁶

The PPA dated December 9, 2009 and filed with the Commission on December 10, 2009 was the subject of Commission review in Docket No. 4111 (In re: Review of Proposed Town of New Shoreham Project Pursuant to R.I. Gen. Laws § 39-26.1-7).⁷ The Commission reviewed the 2009 PPA over the course of just under four months, issuing multiple sets of data requests, reviewing thousands of pages of pre-filed testimony and discovery, hearing four days of live testimony proffered under oath, and reviewing post-hearing memoranda. At the conclusion of its proceeding, the Commission found:

The fundamental question of this case is whether the PPA between Deepwater Wind and Grid is commercially reasonable, and if so, does this Project provide other direct economic benefits to Rhode Island such as job creation. Based on the evidence, upon which this Commission is legally bound to render all its decisions, the Commission must unanimously, but regrettably, respond in the negative based on the pricing contained in the PPA.⁸

In reaching its decision, the Commission adopted a two-prong analysis in which it compared the pricing of the proposed Project to other renewable energy projects and compared the internal rate of return (“IRR”) to what an investor would expect to see for

⁵ Grid filed had previously filed two unsigned versions of a Purchase Power Agreement (“PPA”) with a letter explaining why it did not sign the PPA before submitting a final signed PPA between itself and Deepwater Wind Block Island, LLC. Grid explained in its filing letters that the main point of disagreement between the two parties was related to pricing.

⁶ Division Exhibit 3 (Deepwater’s Response to Division DR 1-1); Docket No. 4111, Division Exhibit 3 (Deepwater’s Response to Division DR 1-13).

⁷ Order No. 19941(issued April 2, 2010).

⁸ Order No. 19941(issued April 2, 2010) at 67.

other newly developed energy resources. The Commission found that Deepwater's pricing failed to meet either prong of the analysis.⁹ Furthermore, the Commission found that the Project would not lead to other economic benefits such as net job creation.¹⁰ No Petition for Writ of Certiorari was filed in the Rhode Island Supreme Court pursuant to R.I. Gen. Laws § 39-5-1.

Instead, apparently dissatisfied with the Commission's findings, on June 10, 2010, both chambers of the General Assembly passed amendments to R.I. Gen. Laws § 39-26.1-7 and on June 15, 2010, the amendments were signed into law by the Governor.¹¹ The 2010 R.I. Pub. Laws 31 and 32 authorized Grid to enter into a new PPA with Deepwater "changing dates and deadlines" and amending pricing terms such that the PPA price in 2013 could still be the 24.4 cents per kWh contained in the 2009 PPA with a 3.5% annual escalator intact, but that would contain a provision that would allow the first year price to be reduced if Deepwater realizes certain cost savings in the development and construction of the Project. The amendments also included a change in the definition of "commercially reasonable" for purposes of the Commission's review of the new PPA.¹²

II. Amended PPA

On June 30, 2010, Grid filed an Amended PPA with the Commission for its review. In its filing letter, Grid noted that while "the starting price remains at 24.4 cents per kilowatt-hour in 2013 (or 23.57 in 2012), the new pricing provisions contemplate the

⁹ *Id.* at 71.

¹⁰ *Id.* at 78-82.

¹¹ 2010 R.I. Pub. Laws 31 and 32. Portions relevant to the Commission's review in this case are set forth in Appendix A, attached.

¹² R.I. Gen. Laws § 39-26.1-7(a) and (e) as amended by 2010 R.I. Pub. Laws 31 and 32.

potential for this price to be lowered.”¹³ The letter also noted that the Amended PPA addresses a concern the Commission had regarding the assignment provisions in the 2009 PPA.¹⁴ Grid requested approval of the Amended PPA, indicating that it believed the Amended PPA met the statutory definition of “commercially reasonable” as set forth in R.I. Gen. Laws § 39-26.1-7(c)(iv) (as amended) “even though there may be other energy alternatives in the region that could produce electricity at lower cost.”¹⁵ Together with its filing letter and the Amended PPA, Grid filed a “Summary of Principal Differences between December 2009 Power Purchase Agreement and June 2010 Power Purchase Agreement,” setting forth sixteen differences between the two PPAs. Eight of the changes related to changes in deadlines, dates, and regulatory provisions. Another change was to move pricing terms from one place to another in the Amended PPA. Yet another was to update the schedule of permitting requirements. In response to a Commission concern when reviewing the 2009 PPA, the Amended PPA is not assignable by Deepwater without Grid’s prior written consent, which consent may not be unreasonably withheld, conditioned or delayed.¹⁶

Grid noted that the Amended PPA included verification provisions for the review of Deepwater’s “Total Facility Costs” for purposes of setting the first year price. If the “Total Facility Costs” are less than “a current projection of \$205,403,512,” savings would be used to reduce the first year price under the Amended PPA.”¹⁷ Grid noted that the Amended PPA allows Deepwater to elect to own the transmission cable “within three

¹³ Grid’s filing letter dated 6/30/10 at 1.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ Grid’s June 30, 2010 Filing (Summary of Principal Differences between December 2009 Power Purchase Agreement and June 2010 Power Purchase Agreement), at 2-3.

¹⁷ *Id.* at 1.

years after National Grid and/or Deepwater file for approval of an amendment to the Amended PPA because the Transmission Cable Conditions have not been satisfied.” In the alternative, under the Amended PPA, Grid can elect to construct or cause the construction of the Transmission Cable without Deepwater’s involvement as long as Deepwater agrees.¹⁸

With regard to pricing of Energy, Capacity and Renewable Energy Certificates (“RECs”), unlike the 2009 PPA which calculated the REC pricing based on Alternative Compliance Payments (“ACPs”),¹⁹ under the Amended PPA, the REC pricing would be based on the Chicago Climate Futures Exchange. Also, with Commission approval, the Energy, Capacity and RECs may now be used by Grid to supply its own customers, rather than only sold into the market.²⁰

On July 1, 2010, Deepwater submitted a Notice of Intervention that set forth its initial rationale for Commission approval of the Amended PPA. Deepwater submitted that the Amended PPA “is commercially reasonable and satisfies the requirements of the provisions of the Rhode Island General Laws § 39-26.1-7, as amended....”²¹ Deepwater stated that the Amended PPA is consistent with the 2009 PPA with the following three exceptions: (1) the pricing provisions were revised to reflect the statutory provision to pass savings on to ratepayers; (2) the Assignment Clause was amended to require Grid’s assent; and (3) certain changes were made at Grid’s request to clarify rights or benefit ratepayers.²²

¹⁸ *Id.* at 3.

¹⁹ *See* R.I. Gen. Laws §§ 39-26-1, 39-26-7.

²⁰ *Id.* at 1-2, 3. 2010 R.I. Pub. Laws 31 and 32 clarify the allocation of costs of the transmission cable between customers of Grid and Block Island Power Company. R.I. Gen. Laws § 39-26.1-7(f).

²¹ Deepwater Intervention Letter dated July 1, 2010 at 1.

²² *Id.* at 2.

Deepwater stated that the standard of review the Commission should follow has been clarified by changing the definition of “commercially reasonable” and by “mandating a transparent and open pricing mechanism.” According to Deepwater, this second provision addresses the Commission’s concerns regarding Deepwater’s rate of return.²³ Deepwater noted that the 2010 amendments to R.I. Gen. Laws § 39-26.1-7 set forth four criteria that need to be met in order for the Commission to approve the Amended PPA.²⁴

Pointing to the new definition of “commercially reasonable” for the purposes of this particular Project, Deepwater stated that this standard “clarifies the types of projects that should be referenced in determining the commercial reasonableness of the New PPA by limiting those projects to small offshore wind farms.”²⁵ Deepwater indicated that the pricing in the Amended PPA is “materially different” because it contains provisions to reduce the first year price if Deepwater realizes certain cost savings.²⁶ Deepwater also stated that the internal rate of return (“IRR”) “is not a factor that is to be explicitly considered in determining the commercial reasonableness of the New PPA” and that the 2010 amendments to the R.I. Gen. Laws § 39-26.1-7 address any concerns regarding the “unlevered rate of return” through the pricing adjustment provisions which can only benefit ratepayers.²⁷ According to Deepwater, the pricing adjustment would protect ratepayers because the requirement of fixed pricing forced Deepwater to include large

²³ *Id.* at 2.

²⁴ *Id.* at 3.

²⁵ *Id.*

²⁶ *Id.* at 3-4.

²⁷ *Id.* at 4.

contingencies where “large gaps in the offshore wind supply chain...leave a fixed-price bidder no choice but to include large cost contingencies in their pricing formula.”²⁸

Finally, noting that the Commission would receive Advisory Opinions from the Rhode Island Economic Development Corporation (“EDC”) and Rhode Island Department of Environmental Management (“DEM”), Deepwater argued that the State has already benefited from the possibility of a Block Island wind farm in the form of federal grants and interest from offshore wind manufacturers in the Quonset Industrial Park.²⁹ Further, Deepwater argued that the Project would allow the displacement of the diesel generators on Block Island and “the least efficient, and most costly to operate, conventional generating units operating on the margin in the regional generating system.”³⁰

III. Public Notice and Interventions

In light of the extremely compressed timeframe mandated by R.I. Gen. Laws § 39-26.1-7 requiring the Commission to issue a written decision within forty-five (45) days from the date of filing the Amended PPA, on June 24, 2010, in anticipation of Grid’s June 30, 2010 filing, the Commission caused to be published in the Providence Journal, a Notice of Filing, Intervention Deadline, Preliminary Procedural Schedule, Administrative Notice, and Standards for Filings. This Notice stated that in accordance with Commission Rule of Practice and Procedure 1.22(c), the Commission would take Administrative Notice of all documents and testimony in Docket No. 4111. Any objections were to be filed by July 6, 2010.³¹ No such objections were filed.

²⁸ *Id.* at 5.

²⁹ *Id.* at 5-6.

³⁰ *Id.* at 6.

³¹ Commission Exhibit 1.

The June 24, 2010 Notice also set a deadline of July 6, 2010 for filing Motions to Intervene with objections to those Motions due on July 8, 2010.³² Six Motions to Intervene were filed with the Commission from the following: Attorney General Patrick Lynch (“RIAG”), Toray Plastics (America), Inc. (“Toray”), Polytop Corporation (“Polytop”), Thomas Doyle et al. (“Citizen Intervenors”), TransCanada Power Marketing (“TCPM”), and Ocean State Policy Research Institute (“OSPRI”).³³ On July 8, 2010, Deepwater filed objections to all Motions to Intervene with the exception of the RIAG. Under the Commission’s Procedural Rules, the RIAG’s Motion was allowed in the absence of any objection. On July 8, 2010, at an Open Meeting, the Commission allowed all parties to intervene. However, OSPRI’s intervention was conditional upon its having a Rhode Island attorney enter an appearance on its behalf no later than Monday, July 12, 2010 pursuant to Rule 1.4 of the Commission’s Rules of Practice and Procedure.

A. Toray and Polytop

In its Petition for Intervention, Toray noted that it is a manufacturer employing 600 people in Rhode Island with a \$79 million annual payroll. As a user of 160 million kWh per year, it would be affected by an expected distribution related rate increase of \$287,000 in the first year. Toray maintained that based on usage, its situation is indicative of other large users of electricity. Toray further maintained that the Amended PPA will not provide the economic benefits anticipated by the statute. Finally, Toray indicated that it would be sponsoring a witness.³⁴

³² Commission Exhibit 1. The 2010 amendments to R.I. Gen. Laws § 39-26.1-7(b) allowed all parties to Docket No. 4111 automatic intervention in the instant docket. 2010 Pub. Laws Chapters 31 and 32.

³³ OSPRI’s Motion to Intervene also included a request for a waiver from the requirement that it have an attorney representing it.

³⁴ Petition of Toray Plastics (America), Inc. to Intervene.

Polytop noted that it is a manufacturer employing 200 people in Rhode Island with a \$10 million annual payroll. As a user of 17 million kWh per year, it would be affected by an expected distribution related rate increase of \$42,000 in the first year. Polytop maintained that based on usage, its situation is indicative of other large users of electricity. Polytop further maintained that the Amended PPA will not provide the economic benefits anticipated by the statute. Finally, Polytop indicated that it would be sponsoring a witness.³⁵

On July 8, 2010, Deepwater objected to the interventions of Toray and Polytop on the basis that the Petitions did not set forth the reasons why the Division and RIAG cannot adequately represent the entities respective interests and further, that the Commission should not allow individual customers to intervene in matters before it because such action could create unmanageable cases in the future.³⁶ Also on July 8, 2010, Grid filed a letter in support of Deepwater's objections.³⁷

B. Citizen Intervenors

The Citizen Intervenors indicated that they are residential electric customers owning property on Block Island or in North Kingstown. Their interest was in the rate increase that would occur as a result of approval of an Amended PPA. They stated that they may engage certain experts including, but not limited to, an economist.³⁸

Deepwater objected to the interventions of Citizen Intervenors on the basis that the Petitions did not set forth the reasons why the Division and RIAG cannot adequately represent the entities respective interests and further, that the Commission should not

³⁵ Petition of Polytop Corporation to Intervene.

³⁶ Objection of Deepwater Wind Block Island, LLC to Petition to Intervene of Toray Plastics (America), Inc.

³⁷ Letter from Jennifer Brooks Hutchinson, Esq. to Luly E. Massaro, 7/8/10.

³⁸ Motion of Thomas Doyle, et al. to Intervene.

allow individual customers to intervene in matters before it because such action could create unmanageable cases in the future.³⁹ Also on July 8, 2010, Grid filed a letter in support of Deepwater's objections.⁴⁰

C. TCPM

TCPM stated that it is the developer of a renewable wind project in Maine that is eligible under the Long-Term Contracting Statute (R.I. Gen. Laws § 39-26.1-1 et seq.) and is interested in entering into long-term renewable contracts with Grid. TCPM maintained that its rights have been affected by passage of the 2010 amendments to R.I. Gen. Laws § 39-26.1-7 and will be affected by the Commission's decision in the instant docket. As a developer of renewable energy, TCPM asserted that it could assist the Commission in its review and assessment of the costs of renewable energy projects.⁴¹

Deepwater objected on the basis that in the past, the Commission has denied intervention to competitors in an industry. The Commission has, in the past, drawn a distinction between an interested party and a party in interest and has previously found that a competitor may not be a party in interest. Deepwater argued that while TCPM may be an interested party, its "interests as a potential supplier of renewable energy through other long-term contract opportunities in Rhode Island will not be determined by the Commission in this docket." Additionally, Deepwater argued that expert assistance is not a basis for allowing intervention and that TCPM did not set forth reasons why the

³⁹ Objection of Deepwater Wind Block Island, LLC to Petition to Intervene of Thomas Doyle, et al.

⁴⁰ Letter from Jennifer Brooks Hutchinson, Esq. to Luly E. Massaro, 7/8/10.

⁴¹ Motion to Intervene of TransCanada Power Marketing, Ltd.

Division and RIAG cannot adequately represent its interests.⁴² On July 8, 2010, Grid filed a letter supporting Deepwater's objections.⁴³

D. OSPRI

Two members⁴⁴ of OSPRI filed a Motion to Intervene questioning the economic benefits that may result from approval of the Amended PPA. OSPRI suggested that the Amended PPA was not the result of an arms-length negotiation between Grid and Deepwater. Additionally, OSPRI questioned whether the RIAG and Division could or would represent the public interest. Secondly, OSPRI requested a waiver from the requirement set forth in Commission Rule 1.4, that it be represented by an attorney and if not, requested that the Motion for Intervention be transformed into a Motion to Intervene by Brian Bishop, one of its members.⁴⁵

Deepwater objected on the basis that OSPRI did not set forth sufficient factual and legal basis to support its intervention request. Deepwater argued that OSPRI failed to identify any specific interest that would be directly affected by the Commission's decision. Further, Deepwater argued that OSPRI did not indicate why the Division or RIAG could not adequately represent its interests. Finally, Deepwater noted that OSPRI is a Rhode Island corporation which must be represented by legal counsel pursuant to the Supreme Court's ruling in *Plantations Legal Defense Services, Inc. v. Grande*, 403 A.2d 1084 (R.I. 1979). Deepwater noted that only the Supreme Court can determine who may practice law in Rhode Island and that the Commission cannot grant a waiver from such

⁴² Objection of Deepwater Wind Block Island, LLC to Petition to Intervene of TransCanada Power Marketing, Ltd.

⁴³ Letter from Jennifer Brooks Hutchinson, Esq. to Luly E. Massaro, 7/8/10.

⁴⁴ The Motion to Intervene of Ocean State Policy Research Institute was signed by William Felkner and Brian Bishop.

⁴⁵ Motion to Intervene of Ocean State Policy Research Institute.

Supreme Court requirements; such action would be tantamount to allowing the unauthorized practice of law.⁴⁶

E. July 8, 2010 Open Meeting

On July 8, 2010, pursuant to public notice, the Commission ruled on the Motions to Intervene at an open meeting. R.I. Gen. Laws § 39-26.1-7 requires potential intervenors to meet the Commission's procedural requirements. However, the Commission notes at the outset that the extremely expedited nature of this proceeding only allowed potential intervenors three business days from the filing of the Amended PPA to file for intervention. Therefore, the Commission's review of the Motions to Intervene is largely focused on whether the potential intervenor can show "any other interest of such nature that movant's participation may be in the public interest."⁴⁷

Toray and Polytop, as two of the State's largest users of electricity and as employers of approximately 800 workers in the State of Rhode Island are within a unique class of customers. In fact, each is a member of The Energy Council of Rhode Island ("TEC-RI"), an organization comprised of the largest users of electricity in Rhode Island, often a participant through intervention in Commission dockets. However, TEC-RI is without an executive director, a fact that was made known to the public in the Providence Business News.⁴⁸ The Commission finds that Toray and Polytop have direct knowledge of how electric prices affect business decisions and economic development among some

⁴⁶ Objection of Deepwater Wind Block Island, LLC to Petition to Intervene of Ocean State Policy Research Institute.

⁴⁷ Commission Rule of Practice and Procedure 1.13(b)(3). In order to protect the record against participation designed only to introduce clearly irrelevant evidence, the Commission's procedural schedule, developed on July 8, 2010, requires each intervenor who was not a party to Docket No. 4111 to provide, by July 16, 2010, the identity of each of its witnesses, together with a curriculum vitae and a statement of the scope and subject of the witness' testimony, referring to the portion of the law to which the testimony applies.

⁴⁸ Chris Barrett, *Farley to leave TEC-RI for Fla. pastor job*, PROVIDENCE BUSINESS NEWS, May 24, 2010.

of Rhode Island's largest users of electricity and larger employers. Therefore, the Commission finds that their involvement would be in the public interest and could provide evidence which could be used in the Commission's analysis and review of the economic development benefits set forth in R.I. Gen. Laws § 39-26.1-7(c)(iii).

It is unclear from the RIAG's Motion to Intervene whether the focus will be on economic development benefits and as such, the Commission does not want to assume that the interests of Toray and Polytop will be represented by the RIAG. Furthermore, the Division, in Docket No. 4111, provided an experienced power market analyst as its witness. This witness did not address economic development benefits. As of July 8, 2010, the Division had not indicated if it would sponsor a witness or the subject of any witness testimony. Therefore, the Commission cannot assume that the interests of Toray and Polytop will be represented by the Division.

The Citizen Intervenors represent a group of ratepayers whose communities would be uniquely affected by the Project. While it is unusual for the Commission to allow the intervention of residential ratepayers, leaving those interests to be represented by the Division or RIAG, in this case, the Citizen Intervenors have indicated they may proffer expert testimony by an economist. Again, as the Commission noted in reviewing the Toray and Polytop interventions, it is unclear whether economic benefits will be the subject of the Division and/or RIAG testimony. The Commission believes it may be helpful to its analysis to have the testimony of an expert economist. The Commission notes that the legislation requires EDC to proffer the expert testimony of an experienced power market analyst. While EDC is also to provide the Commission with an advisory opinion regarding the economic benefits, there is no requirement in the law that EDC

must utilize an expert witness in developing its advisory opinion. Where little time has passed since the Commission reviewed EDC's testimony in Docket No. 4111, which was devoid of any real analytical analysis or studies, the Commission cannot assume the advisory opinion will be based on the findings of an economist and believes such testimony could be useful in its analysis. Therefore, the Commission finds that the participation of the Citizen Intervenors may be in the public interest.

Regarding TCPM's Motion to Intervene, while the Commission has, in the past, both allowed and rejected Motions to Intervene from competitors, the decision has been largely dependent upon the circumstances of the matter before the Commission. For example, in the case cited by Deepwater, the Commission was reviewing the adequacy of a public utility's water treatment plant under its authority to order repairs or maintenance under R.I. Gen. Laws § 39-4-2. In that case, the Commission did not require the assistance of a company that had unsuccessfully bid on a contract to design, build and operate a treatment plant. The record was sufficiently developed through testimony from the utility and the Division. In that case, an unsuccessful bidder was found not to be a party in interest.⁴⁹

In another case, after being questioned by the Supreme Court regarding the decision to allow a competitor to a ferry company to intervene in a rate case, the Commission, in a later rate case, rejected intervention by the competitor. The Commission found that the competitor's interest was indirect at best and that the Order in that docket would not affect the interests of the competitor.⁵⁰

⁴⁹ Order No. 17515 (issued July 23, 2003).

⁵⁰ Order No. 14572 (issued May 9, 2003).

This case is different because while TCPM may be a competitor to Deepwater in regard to the Long-Term Contracting statute, it was not a competitor to the earlier bid process for the Town of New Shoreham Project under the 2009 version of R.I. Gen. Laws § 39-26.1-7. Rather, TCPM is a developer of renewable energy projects who could provide the Commission with evidence regarding the development of renewable energy projects from a perspective different from that of an experienced power market analyst working for a consulting firm. This makes TCPM's position potentially unique from that of the Division and/or RIAG. Finally, where this is only the second case where the Commission has been asked to review a long-term contract for commercial reasonableness, and the only one that will be reviewed under a separate standard from the general standard set out in R.I. Gen. Laws § 39-26.1, the Commission does not find it to be in the public interest to limit the record at the outset of the case.

With regard to OSPRI, at the outset, the Commission finds that it has no jurisdiction to grant a waiver from the requirement that OSPRI be represented by legal counsel licensed to practice law in Rhode Island.⁵¹ The Supreme Court has held that only the Supreme Court can determine who may practice law in the State of Rhode Island.⁵² Furthermore, the Supreme Court has specifically held that the representation of a client before administrative agencies does constitute the practice of law under Rule 9 of Article

⁵¹ Commission Rule of Practice and Procedure 1.4 states: Each party to and participant in a proceeding, other than individuals who appear pro se, shall be represented by an attorney, who shall enter an appearance in writing with the Clerk.

(i) Members of the Bar of the State of Rhode Island are eligible to practice before the Commission.

(ii) Members of the Bar of a Federal Court or of the highest court of any State or Territory of the United States are eligible to practice before the Commission subject to the provisions of Rhode Island Supreme Court Rule Article II, Rule 9, or any successor rule.

⁵² *In re: Steven E. Ferrey*, 774 A.2d 62 (R.I. 2001) (stating, "This Supreme Court alone possesses sole authority to determine who may, and who may not, engage in the practice of law in this state. No municipal or state board, agency or commission shares in that authority, and none has ever been delegated by this Court to any municipal or state board, agency or commission.") *In re: Steven E. Ferry*, 774 A.2d at 64-65.

II of the Rhode Island Supreme Court Rules.⁵³ Therefore, the Commission will not grant a waiver from Commission Rule of Practice and Procedure 1.4. However, the Commission decided to allow OSPRI to intervene if an attorney licensed to practice law in Rhode Island filed an Entry of Appearance before 4:00 p.m. on July 12, 2010.⁵⁴

With regard to the basis of OSPRI's Motion to Intervene, the Commission notes that OSPRI has focused on the economic benefits associated with the Amended PPA and presumably will offer expert testimony on that matter. Therefore, similar to the review of the Motion to Intervene of the Citizen Intervenors, the Commission believes the assistance of expert testimony regarding economic impact will be helpful to its analysis under R.I. Gen. Laws 39-26.1-7(c)(iii). Again, it is unclear whether the Division and/or RIAG will present testimony regarding the economic impact of the Amended PPA. As such, the Commission finds that the intervention of OSPRI may be in the public interest.

IV. Motion to Stay Proceedings

A. Written Submissions

On July 6, 2010, CLF filed a Motion to Dismiss and Motion for a Stay. CLF was seeking a Stay while its Motion to Dismiss was being considered. Citing a federal court case, CLF argued that convenience of the parties and judicial economy are sufficient reasons for the Commission to order a Stay pending its decision on the Motion to Dismiss.⁵⁵ CLF maintained that because of the short time frame of review allowed in this matter, with all of the parties and anticipated experts, considerable time and expense will

⁵³ *Id.*

⁵⁴ On July 12, 2010, the Commission received an Entry of Appearance by legal counsel on behalf of OSPRI.

⁵⁵ CLF's Motion to Dismiss and Motion for a Stay, at 22.

be incurred while the parties await the Commission's decision on the Motion to Dismiss.⁵⁶

On July 12, 2010, Citizen Intervenors joined in CLF's Motion to Stay and on July 13, 2010, Grid and Deepwater filed a joint Opposition to the Motion for Stay with a later filing from RIBCTC joining in the Opposition. The joint Opposition to the Motion for Stay argued that CLF failed to satisfy the standard of review otherwise applicable to motions to stay. However, at the outset, the Opposition argues that the language of R.I. Gen. Laws § 39-26.1-7 is mandatory, not directory and that a decision to waive the 45-day statutory deadline would be akin to amending the statute. In attempting to distinguish the cases cited by CLF, the Opposition pointed to the language of the statute that states the Commission cannot extend the 45-day period. Regardless of whether the language is mandatory or directory, the Opposition submits that even if the deadline is not mandatory, the Commission still needs to comply with it.

Turning to the standards for a Motion to Stay, the joint Opposition relied on standards for a preliminary injunction, as cited by the Division in a prior decision. The standards are that "a party requesting a stay must satisfy the Commission that (1) the requesting party has a reasonable likelihood of success on the merits; (2) the requesting party will suffer irreparable harm if a stay is not granted; (3) the balance of equities, including the possible hardships to other parties and to the public interest, tip in the requesting party's favor; and (4) the stay is needed to preserve the status quo."⁵⁷ The joint

⁵⁶ *Id.*

⁵⁷ In re: Joint Petition for Purchase and Sale of Assets by the Narragansett Electric Company and they Southern Union Company (D-06-13) citing, *Iggy's Doughboys, Inc. v. Giroux*, 729 A.2d 701, 705 (R.I. 1999).

Opposition argued that CLF fails to show that it will suffer irreparable harm if the stay is not granted.

The joint Opposition further argued that CLF fails to show it is likely to succeed on the merits because the Commission does not have jurisdiction to rule on constitutional issues and the doctrine of *res judicata* and Administrative finality do not apply in light of the statutory changes. Addressing *res judicata* and Administrative finality, the Opposition submitted that “the Amended [statute] dramatically alters the administrative review process by changing the relevant legal standard of review, establishing new criteria and priorities, and expanding the process structurally to enfold other departments with pertinent expertise that supplements the Commission’s strengths.”⁵⁸ Therefore, according to the Opposition, the issues or claims in this case were not and could not have been raised in Docket No. 4111 because the intervening legislative change altered the review process and issues. Next, the joint Opposition maintained that CLF fails to show that the balance of equities falls in CLF’s favor. In fact, Deepwater argued it will suffer harm from delay. Finally, the joint Opposition stated that CLF fails to show a stay is necessary to maintain the status quo. The Opposition argues that the status quo is an unapproved PPA which will remain unapproved until the Commission issues a decision with or without the Stay.

B. Commission Findings

Following oral argument which was held on July 15, 2010, during which, counsel to the parties reiterated their arguments, the Commission unanimously denied CLF’s Motion to Stay Proceedings, finding that CLF failed to meet the standards. The Commission reviewed each parties’ arguments and applied them to the standards set forth

⁵⁸ Joint Opposition to Motion for Stay at

by the Rhode Island Supreme Court in *Narragansett Electric Company v. Harsch*, 367 A.2d 195, 197 (R.I. 1976). In this case, the Court appeared to adopt the federal standard and found that a motion to stay will not be granted unless the party seeking the stay makes a “strong showing” that “(1) it will prevail on the merits of its appeal; (2) it will suffer irreparable harm if the stay is not granted; (3) no substantial harm will come to other interested parties; *and* (4) a stay will not harm the public interest.”⁵⁹

In applying these factors, the Commission found that based on CLF’s own admission at the hearing, it would not suffer irreparable harm if the stay were not granted.⁶⁰ The Commission found that a delay in the proceedings may cause harm to Deepwater’s financing and construction deadlines if the Amended PPA is ultimately approved. Similarly, the Commission could not say with absolute certainty that a stay would not harm the public interest. Finally, in light of the fact that CLF had failed to meet three of the standards, the Commission declined to rule on whether it believed CLF would prevail on the merits of its Motion to Dismiss at this time because the briefing and oral arguments are scheduled for a later date.

V. Motions to Dismiss

A. CLF’s Motion to Dismiss

In its Motion to Dismiss, CLF set forth the history of the Commission’s review of the 2009 PPA between Grid and Deepwater from the passage of the 2009 version of R.I. Gen. Laws § 39-26.1-7 through the passage of the 2010 amendments to R.I. Gen. Laws § 39-26.1-7. CLF noted that the Commission’s role in Docket No. 4111 was to determine

⁵⁹ *Narragansett Electric Company v. Harsch*, 367 A.2d 195, 197 (R.I. 1976) (emphasis added).

⁶⁰ Tr. 7/15/10 at 7.

whether the 2009 PPA was commercially reasonable as used in R.I. Gen. Laws § 39-26.1-2.

In its recitation, CLF noted that three PPA's were filed with the Commission in 2009. The first unsigned PPA, filed on October 15, 2009, was accompanied by a letter from Grid indicating that the price of power was too high and the upside risk of the open-book pricing was improper. However, both Grid and Deepwater represented to the Commission that negotiations were still ongoing. The second unsigned PPA, filed on November 18, 2009, included a fixed price contract at 25.3 cents per kWh in the first full year of operation plus an annual price escalator and allocated cost overruns to Deepwater. Again, Deepwater indicated the parties were still engaged in negotiations. On December 10, 2009, Grid filed a signed PPA for Commission review ("2009 PPA"). The 2009 PPA included a fixed price of 24.4 cents per kWh in the first full year of operation with an annual escalator and allocated cost overruns to Deepwater.

CLF argued that the 2010 amendments to R.I. Gen. Laws § 39-26.1-7 ("2010 Law") violate the doctrine of separation of powers and Article I of the Rhode Island Constitution. CLF also argued that review of the Amended PPA is barred by the doctrine of *res judicata*. Finally, CLF argued that if the Commission found that *res judicata* did not apply, the related doctrine of Administrative Finality should apply.

CLF argued the amended statute is unconstitutional on two separate grounds. First it argues the amended statute is a violation of Art. 5 of the RI Constitution, the Separation of Powers clause. According to CLF, the amended statute is an unlawful attempt by the legislature to control the execution of its enactments. Although the amended long term contracting (LTC) statute does not specifically refer to docket 4111, it

requires the Commission to review a contract that is virtually the same as the contract reviewed and rejected in docket 4111 and this, CLF argued, is “tantamount to a legislative reopening of docket 4111”⁶¹ in violation of the Separation of Powers Clause. CLF stated that decisions of a court or the PUC can only be corrected by appeal to a higher court. They cannot be reversed by the legislature.

CLF’s next constitutional argument was based on Art. 1, Section 2 of the R.I. Constitution, the ‘Good of the Whole’ clause. This section of the Constitution states that “All laws...should be made for the good of the whole.” CLF argued the amended LTC statute violates this constitutional provision insofar as it is designed solely for the benefit of one company and one project. CLF contended, however, that the Commission need not rule on these constitutional issues, because the present docket should be dismissed on the basis of the common law doctrines of res judicata and administrative finality.

Res judicata serves as an absolute bar to a second cause of action where there exists identity of parties, identity of issues and finality of judgment in an earlier action.⁶² CLF argues that the issues and parties to the present docket are identical to Docket No. 4111, that a final decision was already rendered in Docket No. 4111, and therefore, res judicata is an absolute bar to the present docket. An abundance of case law supporting this doctrine was duly referenced in CLF’s memorandum which for brevity purposes has been omitted here. CLF also pointed to the similar doctrine of administrative finality which states that an administrative agency must deny an application for the same relief requested in a previous application, unless the applicant shows a change in material circumstances since the denial of the first application. According to CLF, the present

⁶¹ CLF Memo p. 10. (citations omitted)

⁶² CLF Memo p. 17-18. (citations omitted)

docket should be dismissed even though R.I. Gen. Laws § 39-26.1-7 was amended after the final decision was rendered in Docket No. 4111 since “the rule of administrative finality applies in all situations where the outcome sought in each application is substantially similar.”⁶³ Thus, CLF argued that whether the doctrine of res judicata or administrative finality is applied to the present docket, in either case it should be dismissed.⁶⁴ Finally, despite the relatively simple explanation of the law thus far, distinctions in the courts’ interpretation of these doctrines have formed some of the bases for the Attorney General’s memorandum and the opposition memorandum of Deepwater Wind and National Grid.

B. Attorney General’s Motion to Dismiss

The Attorney General’s (RIAG’s) arguments in support of his motion to dismiss were based on the same grounds as that of CLF, namely he proposes that R.I. Gen. Laws § 39-26.1-7 is unconstitutional because it violates Art. 5 (Separation of Powers) and Art. 1, Sec. 2 (the Good of the Whole) of the R.I. Constitution. The RIAG cited the doctrines of res judicata and administrative finality in his memorandum as well; however unlike CLF, his argument rests solely on res judicata. Rather than repeat the RIAG’s constitutional arguments which parallel those of CLF, the Commission has summarized only his argument for res judicata.⁶⁵

The RIAG emphasized a distinction noted in *Johnston Ambulatory Surgical Assoc. v. Nolan*⁶⁶ between executive departments and quasi judicial tribunals, which

⁶³ CLF Memo P. 21-22, citing *Bluff Head Corp. v. Zoning Bd. Of Review*, 2001 WL 1558776 and *May-Day Realty Corp. v. Bd. Of Appeals*, 167 A.2d 400.

⁶⁴ In this vein, CLF points out that the doctrine of res judicata was applied to a local zoning board in the case of *Town of Richmond v. Wawaloam Reservation*, 850 A.2d 924. CLF Memo, P. 20.

⁶⁵ Due to their breadth and similarity to CLF’s memoranda, the RIAG’s constitutional arguments are omitted here for brevity purposes.

⁶⁶ 755 A.2d 799 (R.I. 2000)

determines the application of res judicata or administrative finality on a case by case basis. The Supreme Court in *Johnston Ambulatory* held that the second application for a certificate of need was barred where the same application had previously been rejected by the director of the Department of Health. In explaining at length the reasoning and purpose behind administrative finality, the *Johnston Ambulatory* court emphasized the appropriateness of res judicata to decisions rendered by an agency which has acted in a quasi-judicial capacity.⁶⁷ These types of departments are distinguished from other administrative agencies which operate merely in an advisory capacity with ancillary adjudicatory functions.⁶⁸ Relying on the *Johnston Ambulatory* and *Tucker* holdings, the RIAG argued that since the PUC is a quasi-judicial tribunal⁶⁹, its decisions are not subject to the weaker standard of administrative finality but have full res judicata effect. Thus he argued that the Commission's prior decision to reject the PPA in docket 4111 has full res judicata effect on the present docket, barring review of the amended PPA. He stated that "res judicata prohibits the relitigation of all issues that were tried or might have been tried" in docket 4111,⁷⁰ and review of the present PPA would entail such relitigation of the same issues. The RIAG maintained the amended PPA is for all purposes the same agreement that was proposed in docket 4111, the only difference being the open book pricing provision.⁷¹ Allowing yet another review of this provision, after it has already been submitted for review three times, would be a clear violation res judicata.⁷²

⁶⁷ *Johnston Ambulatory*, citing *Dept. of Corrections v. Tucker*, 755 A.2d at 810, RIAG Memo, p. 4-9.

⁶⁸ Citing *Dept. of Corrections v. Tucker*. 657 A.2d 546. RIAG Memo, p. 5-7.

⁶⁹ The point is made that the PUC is a quasi judicial tribunal by way of reference to various Title 39 statutes including the PUC's enabling statute, the Utility Restructuring Act of 1996 and comparisons to other courts. RIAG Memo, p. 10-13.

⁷⁰ RIAG Memo, p. 5, citing *Bossian v. Anderson*, 991 A.2d 1025.

⁷¹ RIAG Memo, p. 19.

⁷² RIAG Memo, p. 19.

C. Ocean State Policy Research Institute's Motion to Dismiss

The arguments of CLF and the RIAG are reiterated in OSPRI's memorandum emphasizing that the *Tucker* ruling is controlling since the Commission is a quasi judicial tribunal whose decisions are entitled the preclusive effect of res judicata.⁷³ OSPRI appeared to point out that although past decisions of the Commission do not reveal a preference for application of either res judicata over administrative finality, it is appropriate in this instance to apply the doctrine of res judicata to bar the present review of the amended PPA. OSPRI opined that the amendments to R.I. Gen. Laws § 39-26.1-7 are "illusory" to the extent that the definition of "commercially reasonable" was in fact applied by the Commission in their review of the PPA in Docket 4111, as were the economic and environmental policy considerations enunciated in the amended statute. OSPRI therefore contends, contrary to Deepwater and Grids' assertion, that the present docket contemplates neither a new PPA nor a new standard of review, and is therefore barred by res judicata.

D. Deepwater Wind and National Grids' Opposition to Dismiss

Deepwater and Grid oppose the CLF's and the RIAG's motions to dismiss on the following grounds⁷⁴: (a) The Commission lacks jurisdiction to decide constitutional issues; (b) The amended R.I. Gen. Laws § 39-26.1-7 does not violate Separation of Powers because it does not attempt to reverse or re-open 4111. "It gives the Commission an entirely new assignment".⁷⁵ It directs the Commission to apply a different standard of

⁷³ OSPRI Memo, P. 2.

⁷⁴ The Deepwater/ Grid Memo does not specifically address OSPRI's Memorandum in Support of Motions to Dismiss which incorporates for the most part the motions and arguments of CLF and the RIAG. The R.I. Building and Construction Trades Council's Objection to Motions to Dismiss is not summarized here because the arguments asserted in RIBTC's Memo are identical to those of Deepwater and National Grid.

⁷⁵ Deepwater/National Grid Memo, P. 2.

review to a new PPA in consultation with DEM and EDC; (c) The RIAG and CLF both lack standing to challenge the constitutionality of the amended R.I. Gen. Laws § 39-26.1-7.⁷⁶; (d) The amended R.I. Gen. Laws § 39-26.1-7 is legitimately related to multiple state purposes announced in the statute; and (e) Neither res judicata nor administrative finality apply since the current version of R.I. Gen. Laws § 39-26.1-7 was enacted after the decision in 4111, and the new PPA contains new issues and new claims, and because the current version R.I. Gen. Laws § 39-26.1-7 was enacted after the decision in 4111.

The great weight of Deepwater/Grid's argument pertained to the recently amended R.I. Gen. Laws § 39-26.1-7 which, according to Deepwater and Grid, "dramatically alters" the review process to the extent that it achieves the following: (a) modifies the definition of commercially reasonable; (b) changes the standard of review; (c) elicits advisory opinions of DEM and EDC; (d) incorporates price cap and savings to customer; and (e) establishes an expedited timeframe for review.

Ultimately Deepwater/Grid argued that the foregoing changes result in a new PPA and a new process of review which should not be barred by the doctrines of res judicata and administrative finality. They contended the issues in the present document could not have been litigated in the prior docket because neither the present PPA nor the present review process, as currently enacted, existed during the pendency of Docket No. 4111.⁷⁷ They further maintained that the intent of the General Assembly to repeal common law

⁷⁶ Deepwater/Grid construe a procedural notice statute, R.I.G.L. 9-30-11, to mean that the Attorney General lacks authority to challenge the constitutionality of a statute. Deepwater/National Grid contends that CLF lacks standing to challenge the constitutionality of the amended LTC because it fails to allege an injury in fact. Deepwater/Grid Memo, p. 2.

⁷⁷ Deepwater/National Grid cite a plethora of cases in support of this argument, Deepwater/Grid Memo, p. 18-22.

principles such as *res judicata* and administrative finality must be read “impliedly” into the statute because any other reading “would render the [statute] meaningless.”⁷⁸

Addressing the constitutional arguments, Deepwater/Grid initially argued the well settled rule of statutory construction that laws must be presumed to be constitutional. Secondly, in countering the Separation of Powers arguments proposed thus far, Deepwater/Grid opines that the legislature has neither “interfered impermissibly in a constitutional assigned function”, as proscribed by *INS v. Chadha*,⁷⁹ nor “assumed a function more properly entrusted to another” as denounced in *City of Pawtucket v. Sundlun*.⁸⁰ They further contended that the case law cited in CLF and the RIAGs’ memoranda is factually distinct from the present circumstances, emphasizing that none of the cases cited therein involve “amended administrative processes governing future reviews of future contracts or claims.”⁸¹

In response to the Good of the Whole argument, Deepwater/Grid first asserted that the constitutional clause has no bearing on the present docket since it is merely advisory in nature and not a directive or mandate upon the legislature. Second, they asserted that contrary to the representations of CLF and the RIAG, the amended LTC statute *is* specifically designed to benefit the general public as is evident from the legislative findings and declarations written in the statute concerning the purported overall economic, environmental benefits of a renewable energy industry to the state.

⁷⁸ Deepwater/Grid Memo, p. 18, citations omitted.

⁷⁹ *Immigration & Naturalization Serv. v. Chadha*, 462 U.S. 919 (1983).

⁸⁰ *City of Pawtucket v. Sundlun*, 662 A.2d 40 (R.I. 1995).

⁸¹ Deepwater/Grid Memo, p. 12.

F. TransCanada's Motion to Dismiss

On July 12, 2010, TransCanada filed a motion to dismiss the within matter on grounds that the amended long term contracting statute⁸² (for purposes of this section of the Order, “the Statute”) which precipitated the opening of this docket violates the U.S. Commerce Clause⁸³. TransCanada argued that R.I.G.L. 39-26.1-7, as amended by the General Assembly on June 15, 2010, discriminated against TransCanada and other out of state power producers by “purporting to mandate a contract with one particular in-state project”⁸⁴ in violation of the U.S. Commerce Clause.⁸⁵ Citing a number of cases interpreting the Commerce Clause as a prohibition against economic protectionism⁸⁶, TransCanada contended that the Statute discriminates on its face against out of state power producers of renewable energy. Several portions of the Statute’s text were highlighted in TransCanada’s memorandum in effort to demonstrate a legislative intent to discriminate against out of state producers. It cited for example the General Assembly’s declared purpose of “facilitating the financing of renewable energy generation within the jurisdictional boundaries of the state or adjacent state or federal waters”⁸⁷. The General Assembly’s declared public policy supporting “the construction of a small-scale offshore

⁸² R.I.G.L. 39-26.1-1 through 39-26.1-8.

⁸³ Article I, Section 8, U.S. Constitution.

⁸⁴ Memorandum of Law in Support of TransCanada’s Motion to Dismiss, p. 1.

⁸⁵ The Memorandum in Support of TransCanada’s Motion to Dismiss contained an introductory statement that it supported the motions to dismiss previously filed by the Attorney General and Conservation Law Foundation (CLF) on other grounds. (Memorandum, p.1) No further argument was provided in support of the other parties’ motions to dismiss.

⁸⁶ *Family Winemakers of Calif. V. Jenkins*, 592 F.3d 1 (1st Cir. 2010); *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564 (1997); *C & A Carbone v. Town of Clarkstown*, 511 U.S. 383 (1994). TransCanada Memo, p. 2.

⁸⁷ Memorandum of Law in Support of TransCanada’s Motion to Dismiss, p. 4.

wind demonstration project off the coast of Block Island”⁸⁸ was another example cited by TransCanada of the General Assembly’s discriminatory intent.⁸⁹

TransCanada asserted that the practical effect of the Statute, specifically the portion of the Statute allowing the amended PPA to count toward the long term contract capacity requirement, discriminated against the sale of renewable energy to Rhode Island from out of state sources.⁹⁰ TransCanada argued that by allowing this amended PPA to satisfy a portion of the long term contract capacity requirement, the General Assembly was effectively limiting the ability of other renewable energy producers to supply power under the long term contracting standard.⁹¹ Citing *Wyoming v. Oklahoma*⁹², TransCanada further claimed that the discrimination in the Statute could not be justified by a legitimate non discriminatory purpose.⁹³ Noting that the majority of renewable energy programs enacted nationwide do not discriminate in favor of in-state producers, TransCanada impliedly suggested that the General Assembly could have established a non-discriminatory program to promote renewable energy from the most efficient sources without favoritism for any one particular source.⁹⁴ TransCanada concluded with a public

⁸⁸ See R.I.G.L. 39-26.1-7(a).

⁸⁹ Memorandum of Law in Support of TransCanada’s Motion to Dismiss, p. 4.

⁹⁰ Memorandum of Law in Support of TransCanada’s Motion to Dismiss, p. 4.

⁹¹ Memorandum of Law in Support of TransCanada’s Motion to Dismiss, p. 4.

⁹² 502 U.S. 437 (1992). In p. 5 of its memo, counsel for TransCanada states the holding in *Wyoming v. Oklahoma*, and then points out the lack of non-discriminatory purpose of the Statute. He does not, however, delineate a clear nexus from the *Wyoming v. Oklahoma* holding to the facts of this case. See TransCanada Memo, p. 5. The nexus was made during oral argument. See p. 14 of Transcript, Mr. Buchanan: “The argument was made there (referring to *Wyoming*), much like the argument here, well you out-of staters can still compete for the rest, so that’s good enough. The Supreme Court rejected that argument. The Supreme Court ruled that if you mandate that ten percent of your purchases must be in-state, that’s discriminatory and it’s invalid.” In *Wyoming v. Oklahoma* it was also held that a small extent of discrimination exacted by a statute was insufficient to save it from constitutional challenge. *Id.* at 455-456, citing *Bacchus Imports, Ltd. v. Dias*, 468 U.S. at 268-269 et. Seq. and *New Energy Co. of Indiana v. Limbach*, 486 U.S. at 276-277.

⁹³ Memorandum of Law in Support of TransCanada’s Motion to Dismiss, p. 5: “There is no non-discriminatory purpose that supports the discrimination built into the LTC Statute.”

⁹⁴ This argument was advanced during oral argument. See Transcript, p.25. Mr. Buchanan: “We think it’s a good thing to have long-term contracts. But when a state chooses to do something, it has to do it in a way

policy argument, noting that an open competitive market for renewable energy will allow Rhode Islanders to take advantage of the best possible electricity rates. TransCanada also noted that limiting competition in the renewable energy market drives up the cost of electricity thereby discouraging the development of renewable energy, contrary to the legislative policy in this state.⁹⁵

G. Deepwater/Grid's Opposition to TransCanada's Motion to Dismiss

On July 23, 2010, Deepwater and Grid jointly filed a memorandum in opposition to TransCanada's Motion to Dismiss. Its memorandum consisted of four arguments each of which was advanced during oral argument on July 27, 2010. Counsel for Deepwater and Grid first argued that the Commission lacked jurisdiction to decide the constitutional issues raised in its opponent's motion to dismiss. Counsel relied on three Rhode Island Cases⁹⁶, one U.S. Supreme Court Case⁹⁷ and a number of cases from outside jurisdictions holding that administrative agencies lack jurisdiction to decide the constitutionality of statutes⁹⁸. Next, in an argument that can be subdivided into three categories, counsel for Deepwater and Grid argued that R.I. Gen. Laws § 39-26.1-7 does not violate the

that doesn't discriminate against interstate commerce." See also Transcript, p. 26. Mr. Buchanan: "You need to be able to buy it on an equal footing from Maine or from Block Island and those generators need to be able to compete on the merits." See also Transcript, p. 19. Mr. Buchanan (responding to Commissioner Roberti's question whether the state has the authority to develop offshore wind): "There are other ways to do it consistent with the constitution...Direct subsidies or the state acting as a market participant. Those are ways available to do it."

⁹⁵ Memorandum of Law in Support of TransCanada's Motion to Dismiss, p. 7.

⁹⁶ Counsel relied on *Payne & Butler v. Providence Gas Co.*, 77 A. 145 (R.I. 1910); an advisory opinion holding inter alia, the Ethics Commission lacked authority to promulgate regulation prohibiting legislators to serve on public boards, *In re Advisory Opinion to the Governor*, 732 A.2d 55 (R.I. 1999); and dictum from a Superior Court opinion recognizing that "an administrative agency...cannot determine the constitutionality of a statute..." *Peoples Liquor Warehouse v. Dep't of Bus. Regulation*, 2007 R.I. Super. LEXIS 78 (May 21, 2007).

⁹⁷ *Johnson v. Robison*, 415 U.S. 361 (1974), Deepwater Wind/National Grid Memorandum, p. 8

⁹⁸ Counsel cites, inter alia, *Maher v. Justices of Quincy Div. of District Court*, 855 N.W.2d 1106 (Mass. App. Ct. 2006); *Fullerton v. Adm'r Unemployment Compensation Act*, 280 Conn. 745 (2006); *Albe v. Louisiana Workers' Compensation Corp.*, 700 So.2d 824 (La. 1997); *Metz v. Veterinary Examining Bd.*, 741 N.W. 2d 244 (Wisc. Ct. App. 2007). Deepwater/National Grid Memorandum pgs. 8-9.

Commerce Clause. According to counsel, it did not violate the Commerce Clause because it did not require Grid to enter into a purchase power agreement with Deepwater. R.I. Gen. Laws § 39-26.1-7 merely authorizes Grid to enter into the purchase power agreement and therefore does not in any way interfere with interstate commerce⁹⁹. Counsel also argued that R.I. Gen. Laws § 39-26.1-7 does not violate the Commerce Clause because it provides incentives to Grid for renewable energy contracts on a non-discriminatory basis¹⁰⁰. As additional proof that R.I. Gen. Laws § 39-26.1-7 is non-discriminatory in its treatment of renewable energy producers, counsel for Deepwater/Grid claimed that R.I. Gen. Laws § 39-26.1-7 subjects Deepwater to “procedural and substantive hurdles”¹⁰¹ which are not imposed on other developers of renewable energy. Counsel cited the “rigorous review process”¹⁰² and the requirement of the Block Island interconnect established in R.I. Gen. Laws § 39-26.1-7, and asserts that these additional requirements imposed on Deepwater reveal that R.I. Gen. Laws § 39-26.1-7 does not discriminate in favor of any one producer. Counsel further argued that these statutory “hurdles” imposed on Deepwater, “discriminate[s] in *favor* of out-of-state projects at the expense of [Deepwater]”¹⁰³.¹⁰⁴

⁹⁹ Opposition of National Grid and Deepwater Wind Block Island, LLC to Intervenor TransCanada Power Marketing LTD.’s Motion to Dismiss, pp. 12-13.

¹⁰⁰ *Id.* at 14.

¹⁰¹ *Id.* at 15-16.

¹⁰² *Id.* at 15.

¹⁰³ Deepwater/National Grid Opposition Memorandum in Opposition of TransCanada’s Motion to Dismiss (hereinafter “Deepwater/National Grid Memorandum”), p. 16.

¹⁰⁴ The Commission does not address at the moment the contradiction between Deepwater Wind’s memorandum and the oral statement of Mr. Petros with respect to the characterization of Deepwater Wind as both an in-state and out of state developer. (See Memorandum, p. 15 -16 versus Transcript, pgs. 47-48 referring to Deepwater as an out of state company. Nor does the Commission address the discrepancy within Deepwater Wind’s Memorandum, characterizing Deepwater on pages 15-16 as an in-state developer (the Statute discriminates against “*the in-state developer, Deepwater Wind*”), These additional burdens, imposed exclusively on an instate producer...) *id.* at 15, and the assertion on the following page that the Statute encourages out of state developers... “[a]nd in fact *an out-of-state developer signed the Amended*

Next, counsel argued that R.I. Gen. Laws § 39-26.1-7 does not conflict with longstanding Commerce Clause principles established by the U.S. Supreme Court because it creates a valid subsidy program designed to generate a market where there currently is none.¹⁰⁵ Relying on *Hughes v. Alexandria Scrap Corp.*¹⁰⁶, counsel argued that the Statute is distinguishable from the economic protectionist statutes invalidated by the Court in *City of Philadelphia v. New Jersey*¹⁰⁷, *West. Lynn Creamery, Inc. v. Healy*¹⁰⁸ et al, because unlike the laws struck down in those cases, the amended long term contracting statute does not serve to protect a local industry at the expense of out of state competitors. R.I. Gen. Laws § 39-26.1-7, on the contrary, attempts to advance a new industry through non-discriminatory subsidization.¹⁰⁹

Finally, counsel argued that R.I. Gen. Laws § 39-26.1-7 should survive a Commerce Clause challenge because it represents a valid exercise of the state's police power¹¹⁰. Counsel relied on federal appellate and Supreme Court decisions upholding statutes that authorized the regulation of matters of significant local concern even though such regulation interfered with interstate commerce.¹¹¹ The cases cited by counsel incorporate a balancing test to determine whether the burdens on interstate commerce are

PPA..." Opposition of National Grid and Deepwater Wind Block Island, LLC to Intervenor TransCanada Power Marketing LTD.'s Motion to Dismiss, p.17). (Emphasis added).

¹⁰⁵ Deepwater Wind/National Grid Memorandum, p. 16.

¹⁰⁶ 426 U.S. 794 (1976).

¹⁰⁷ 437 U.S. 617 (1978).

¹⁰⁸ 512 U.S. 186 (1994).

¹⁰⁹ Opposition of National Grid and Deepwater Wind Block Island, LLC to Intervenor TransCanada Power Marketing LTD.'s Motion to Dismiss, pp. 16-21.

¹¹⁰ Opposition of National Grid and Deepwater Wind Block Island, LLC to Intervenor TransCanada Power Marketing LTD.'s Motion to Dismiss, pp. 22-23.

¹¹¹ Counsel cited, inter alia, *Kunelius v. Town of Stow*, 588 F.3d 1; *Pharm. Care Mgmt. Ass'n v. Rowe*, 429 F.3d 294; and *Ark. Elec. Cooperative Corp v. Ark. Pub. Serv. Comm'n*, 461 U.S. 375 (1983). Opposition of National Grid and Deepwater Wind Block Island, LLC to Intervenor TransCanada Power Marketing LTD.'s Motion to Dismiss, pp. 22-23.

clearly excessive in relation to the putative local benefits served by the statute.¹¹² Applying the balancing test to the facts of this case, counsel argued that the Statute provides significant environmental and economic benefits to the State of Rhode Island, and to Block Island as a result of the transmission cable, and these positive benefits justify any “hypothetical incidental burden” on interstate commerce.¹¹³

H. The Attorney General’s Memorandum with Respect to Motion to Dismiss of TransCanada and Response of Deepwater Wind and National Grid

On July 27, 2010, the RIAG¹¹⁴ filed a memorandum in response to TransCanada’s Motion to Dismiss; however, the memorandum did not address the U.S. Commerce Clause. The RIAG’s memorandum was tailored specifically to address two issues raised in the opposition briefs of Deepwater and Grid to TransCanada’s motion.¹¹⁵ The two subject matters raised by the RIAG were the Commission’s jurisdiction to determine constitutional issues and the RIAG’s standing to challenge the constitutionality of a statute. On the issue of the Commission’s jurisdiction, the RIAG objected to Deepwater/Grid’s reliance on three Rhode Island cases¹¹⁶. He objected on the basis that one of the cases was decided “a century ago...and cannot be taken literally”¹¹⁷. The RIAG also objected to Deepwater/Grid’s reliance on an unpublished Superior Court opinion. The basis of the objection was that the citation did not represent the holding of

¹¹² Opposition of National Grid and Deepwater Wind Block Island, LLC to Intervenor TransCanada Power Marketing LTD.’s Motion to Dismiss, p. 23, citing *Maine v. Taylor*, 477 U.S. 131 (1986).

¹¹³ Opposition of National Grid and Deepwater Wind Block Island, LLC to Intervenor TransCanada Power Marketing LTD.’s Motion to Dismiss, p. 23-26.

¹¹⁴ Michael Rubin, Esq. appeared on behalf of the Attorney General throughout these proceedings.

¹¹⁵ Section I.B. of the Memorandum of Attorney General Patrick C. Lynch With Respect To Motion To Dismiss of TransCanada (pgs. 4-5) responds to an earlier opposition brief filed by Deepwater Wind and National Grid. The Commission does not re-visit this portion of the memorandum here as it is largely repetitive of memoranda previously filed by the parties.

¹¹⁶ Memorandum of Attorney General Patrick C. Lynch with Respect to Motion to Dismiss of TransCanada, pgs. 1-4.

¹¹⁷ Memorandum of Attorney General Patrick C. Lynch with Respect to Motion to Dismiss of TransCanada, p. 2, referring to *Payne & Butler v. Providence Gas*, 77 A.145 (R.I. 1910).

the case but rather dictum taken from yet another case.¹¹⁸ The final case objected to by the RIAG was an advisory opinion¹¹⁹ which the RIAG argued was distinguishable on its facts and bore no relevance to the jurisdictional issue presented here.¹²⁰ These arguments were refuted by Deepwater / Grid by way of a memorandum filed with the Commission on July 30, 2010¹²¹ in which counsel re-asserted the validity of the case law referenced in its first memorandum, claiming, inter alia, that the RIAG overlooked, or misunderstands Rhode Island legal history.¹²² Counsel also referred back to his prior memorandum citing cases from other jurisdictions which do not recognize an agency's authority to determine constitutional questions¹²³. The RIAG re-emphasized the nature of the Commission as a quasi-judicial tribunal and the resulting authority to decide constitutional issues. In support of this argument, the RIAG cited several cases from outside the jurisdiction and two federal cases¹²⁴, one of which was addressed in considerable detail in prior memoranda filed by the parties.¹²⁵ In response, counsel for Deepwater/Grid attempted to

¹¹⁸ Memorandum of Attorney General Patrick C. Lynch with Respect to Motion to Dismiss of TransCanada, pgs. 2-3. The unpublished Superior Court Opinion is *Peoples Liquor Warehouse v. Dept of Bus. Regulation*, 2007 LEXIS 78 (R.I. Super. May 21, 2007) citing *Easton's Point Assoc. v. Coastal Resources Mgmt. Council*, 522 /a, 2d 199 (R.I. 1987).

¹¹⁹ *Advisory Opinion to the Governor*, 732 A.2d 55 (R.I. 1999).

¹²⁰ Memorandum of Attorney General Patrick C. Lynch with Respect to Motion to Dismiss of TransCanada, pgs. 3-4.

¹²¹ Response of National Grid and Deepwater Wind Block Island, LLC to Attorney General Patrick C. Lynch's Memorandum with Respect to Motion to Dismiss of TransCanada.

¹²² Response of National Grid and Deepwater Wind Block Island, LLC to Attorney General Patrick C. Lynch's Memorandum with Respect to Motion to Dismiss of TransCanada, p. 2.

¹²³ Response of National Grid and Deepwater Wind Block Island, LLC to Attorney General Patrick C. Lynch's Memorandum with Respect to Motion to Dismiss of TransCanada, pgs. 4-5.

¹²⁴ *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200 (1994) (discussed in prior memoranda) and *Riggin v. Office of Senate Fair Employment Practices*, 61 F.3d 1563 (Fed. Cir. 1995). The Commission notes that the parties vehemently disagree over the holding in *Thunder Basin*, as is already evident from the parties' prior submissions.

¹²⁵ Memorandum of Attorney General Patrick C. Lynch With Respect To Motion to Dismiss of TransCanada, pgs. 5-7. The Attorney General did not cite Rhode Island cases in support of his argument that the Commission, as a quasi-judicial tribunal, has authority to hear constitutional issues.

distinguish one of the federal cases¹²⁶ and pointed to a North Carolina case that refused to recognize a commission's authority to determine constitutional issues.¹²⁷

On the issue of whether the RIAG has standing to question the constitutionality of a statute¹²⁸, counsel argued that the broad and open ended powers of the RIAG derived from common law necessarily include the power to question the constitutionality of a statute.¹²⁹ Since this issue was previously debated by the parties in earlier submissions, the Commission does not recount the same in vivid detail but notes that the parties' disagreement over the RIAG's standing in this area is based on differing interpretations of case law.¹³⁰

I. Intervening Parties

The Rhode Island Building and Construction Trades Council and the Town of New Shoreham each filed Objections to TransCanada's Motion to Dismiss, adopting and incorporating the grounds set forth in the joint opposition memorandum of Deepwater Wind and National Grid. Toray Plastics, Inc. and Polytop Corporation filed a motion supporting and adopting TransCanada's motion.

¹²⁶ *Riggin v. Office of Senate Fair Employment Practices*, 61 F.3d 1563 (Fed. Cir. 1995).

¹²⁷ Response of Grid and Deepwater to AG's Memorandum with Respect to Motion to Dismiss, p. 4, citing *State ex rel Utilities Commission v. Carolina Utilities Customers Assoc.*, 446 SE.2d 332 (N.C. 1994).

¹²⁸ Counsel for the Attorney General was responding to earlier submissions of Deepwater Wind/National Grid. See Memorandum of Attorney General Patrick C. Lynch with Respect to Motion to Dismiss of TransCanada, p.8 referring to "Grid and Deepwater['s]...earlier Brief".

¹²⁹ Memorandum of Attorney General Patrick C. Lynch With Respect To Motion to Dismiss of TransCanada, pgs. 9-11.

¹³⁰ Counsel for the Attorney General cites three Rhode Island cases and one Colorado case. Memorandum of Attorney General Patrick C. Lynch With Respect to Motion to Dismiss of TransCanada, pgs. 10-11. Counsel for Deepwater/National Grid rejects the Rhode Island cases cited by the Attorney General as "insufficient" for not addressing the Attorney General's authority to challenge a statute. See Response of National Grid and Deepwater Wind Block Island, LLC to Attorney General Patrick C. Lynch's Memorandum with Respect to Motion to Dismiss of TransCanada, p. 10.

J. Oral Argument

On July 27, 2010, counsel for TransCanada and Deepwater/Grid presented oral arguments on the Commerce Clause issue raised in TransCanada's Motion to Dismiss¹³¹. At oral argument, counsel for TransCanada addressed the jurisdictional issue of whether the Commission has authority to question the constitutionality of a statute.¹³² Counsel's argument appeared to rest more on equitable as opposed to legal principle, urging that the Commission "should not shut its eyes to constitutional issues".¹³³ In reliance on a law treatise¹³⁴, counsel suggested that a determination by the Commission of the Commerce Clause issue will ultimately benefit the court in the event of an appeal.¹³⁵ Counsel then notified the Commission of the Massachusetts Department of Public Utilities emergency order of June 9, 2010 to suspend the operation of its renewable energy statute after a Commerce Clause challenge brought by TransCanada. Counsel stopped short of urging the Commission to adopt the Massachusetts approach, pointing out that the Massachusetts DPU order was specifically authorized by statute whereas Rhode Island

¹³¹ Gerald Petros represented Deepwater Wind at oral argument and at various stages of the proceedings. The memorandum that Mr. Petros filed with the Commission on July 23, 2010 and argued on July 27, 2010 was entitled, "Opposition of National Grid and Deepwater Wind Block Island, LLC to Intervenor TransCanada Power Marketing Ltd.'s Motion to Dismiss." Counsel for National Grid was present at oral argument, but did not participate. None of the intervening parties participated in oral argument.

¹³² In his memorandum, Counsel for TransCanada did not address the issue of whether the Commission has jurisdiction to decide the constitutionality of the amended long term contracting statute, nor did he cite any judicial precedent for his position that the Commission can or should entertain the constitutional issue presented here.

¹³³ See Transcript, p. 10, "...there's no a priori rule that says an agency...must shut its eyes to constitutional issues." and Transcript, p. 24: "You...have an obligation, just like a court, to consider can the statute be applied in such a manner that it would be consistent with the constitution, and of course, in order to do that you can't shut your eyes on the constitutional principles, you have to look straight at them."

¹³⁴ Transcript, p. 5-6, Mr. Buchanan: (citing the Wright and Miller treatise) "Often the agency...must confront constitutional questions. In such cases, administrative authorities must make preliminary constitutional decisions in order to proceed. An agency must consider these constitutional questions in the first instance in order to make its own decisions. Such constitutional decisions not only do not interfere with judicial review, but also have beneficial consequences."

¹³⁵ Transcript, p. 6, "...when the case goes on appeal, which I imagine it will, it will be helpful to the court if this Commission has engaged with the constitutional issues."

law would not authorize such action by the Commission.¹³⁶ Finally, Counsel for TransCanada argued that the Commission should exercise its “implied and incidental power”¹³⁷ pursuant to R.I.G.L. 39-1-38 as interpreted in *Town of East Greenwich v. O’Neil*¹³⁸ to address the constitutional issue before it.¹³⁹ Mr. Petros was highly critical of the so called “incidental power rule”¹⁴⁰ advanced by TransCanada counsel and retorted, “There might as well be no restrictions on the Commission’s authority if incidental powers is going to be distorted in such a fashion as to bring constitutional questions before the Commission.”¹⁴¹ In arguing that the Commission lacked authority to decide constitutional issues, Mr. Petros relied most heavily on the Commission’s enabling legislation. He contended that as a creature of statute, the Commission possesses only those powers and duties specifically granted by the General Assembly and codified in the Commission’s enabling act.¹⁴² Since the General Assembly did not grant to the Commission the power to determine the constitutionality of a statute, the Commission does not have that authority. Mr. Petros asserted that the overwhelming majority of case law, albeit from other jurisdictions, refuses to recognize an administrative agency’s authority to decide constitutional issues¹⁴³. He then turned to the importance of the rationale behind these decisions, urging that an agency having such authority would lead to the absurd theoretic result of agencies exerting unfettered power to arbitrarily overturn

¹³⁶ Transcript of Oral Argument on TransCanada’s Motion to Dismiss Proceedings pgs. 7-10. Referring to the Massachusetts DPU’s June 9 emergency order to suspend the renewable energy statute, TransCanada said, “Now I’ll grant you that the Massachusetts statute specifically provides that if there’s a challenge, the agency may do such a thing. You’re enabling act here, as far as I know, does not have that kind of language...” (Id., p. 8.)

¹³⁷ Transcript, p. 22-23.

¹³⁸ 617 A.2d 104.

¹³⁹ The R.I. Supreme Court in *Town of East Greenwich* held that the R.I. Constitution does not prohibit the PUC from reviewing a town ordinance, *Id.*

¹⁴⁰ Transcript, p.32.

¹⁴¹ Transcript, p.33.

¹⁴² Transcript, p. 31-32.

¹⁴³ Transcript. p. 35.

legislative enactments on a whim.¹⁴⁴ Finally, Mr. Petros characterized TransCanada's plea that the Commission not "shut its eyes" to the constitutional issue presented here as prejudicial, urging the Commission to apply the law and refrain from overstepping its jurisdictional powers.¹⁴⁵

During oral argument, counsel for TransCanada expounded upon his Commerce Clause argument by explaining that the Statute when read as whole, in the context of the entire Long Term Contracting Standard for Renewable Energy (R.I.G.L. 39-26.1), taking into consideration the events which precipitated the passage of the Statute, including the Commission's rejection of the original PPA on April 2010, and the provisions of the law that were repealed by the newly amended statute (i.e. the RFP requirement), cannot be squared with the constitution as it stands.¹⁴⁶ Addressing his opponent's rebuttal in brief that the Statute is not unconstitutional because it does not require National Grid to enter into a contract with an off-shore wind developer, counsel for TransCanada said, "It seems pretty clear that this project is going forward because it's propelled by legislation."¹⁴⁷ He added that if the amended PPA is truly not mandatory upon National Grid, and if the New Shoreham project is indeed open to all renewable energy producers then there would have been a competitive bidding process for the selection of the developer.¹⁴⁸

In response to questioning from the Bench regarding prior Supreme Court decisions interpreting the U.S. Commerce Clause, TransCanada's counsel repeatedly contended that these decisions, when applied to the facts of this case, reveal that while the public policy underlying the amended long term contracting statute is entirely

¹⁴⁴ Transcript. p. 36-37.

¹⁴⁵ Transcript, p.37-38.

¹⁴⁶ Transcript. pp.11-13.

¹⁴⁷ Transcript. p.18.

¹⁴⁸ Transcript. p.18.

legitimate, the General Assembly's *means* of promoting this policy was discriminatory in violation of the U.S. Commerce Clause.¹⁴⁹ Mr. Petros, on the other hand, urged the Commission to follow *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794 (1976), which held that the Commerce Clause does not prohibit a state from establishing a subsidy in favor of its own citizens as a means of furthering the legitimate purpose of protecting the state's environment.¹⁵⁰ Mr. Petros drew an analogy between the New Shoreham project and an industrial state park asserting that both are examples of the state's use of subsidies in furtherance of legitimate public policies.¹⁵¹

K. Commission Decision Regarding all Motions to Dismiss

The Commission did not rule on the Motions to Dismiss until August 11, 2010 at an Open meeting. After ruling on the underlying issues raised in the case, the Commission denied each of the Motions to Dismiss on the basis that it had ruled on the underlying issues.¹⁵² The Commission's ruling implicitly included a finding that the case was not barred by the doctrines of res judicata or Administrative Finality. Because the law was changed after the Commission's decision in Docket No. 4111 and includes a new definition of "commercially reasonable", the Commission assumes res judicata is not applicable. With regard to whether R.I. Gen. Laws § 39-26.1-7 is constitutional, the Commission presumed it is.¹⁵³ Furthermore, without commenting on whether or not the Commission believes it has subject matter jurisdiction to rule on the constitutional issues

¹⁴⁹ Transcript, p.14, 17, 19, 20, 25, 27.

¹⁵⁰ Transcript, p.49-52.

¹⁵¹ Transcript, pgs. 46-47, 52, 57-58.

¹⁵² Tr. 8/11/10 at 35.

¹⁵³ "[E]very statute enacted by the Legislature is presumed constitutional and will not be invalidated by [the Supreme Court] unless the party challenging the statute proves *beyond a reasonable doubt* that the legislative enactment is unconstitutional." *Parella v. Montalbano*, 899 A.2d 1226, 1232-33 (R.I. 2006) (emphasis in the original).

raised, the Commission defers to the expertise of the Rhode Island Supreme Court which clearly has jurisdiction over these matters.

VI. National Grid's Pre-Filed Testimony

On July 15, 2010, Grid submitted the Pre-Filed Direct Testimony of Madison N. Milhous, Jr., Director of Wholesale Market Relations for the Energy Portfolio Management organization at Grid. Mr. Milhous was involved in the negotiation of the 2009 PPA and the Amended PPA. Mr. Milhous confirmed that Grid believed the terms and conditions of the Amended PPA are “commercially reasonable within the meaning of the standard set forth in the new law recently passed by the General Assembly.”¹⁵⁴ Noting that this law authorized Grid to negotiate a new PPA, Mr. Milhous testified that he believed Grid had done so in conformance with the statutory provisions.¹⁵⁵ He noted that under the 2010 amendments to R.I. Gen. Laws § 39-26.1-7, the starting point for pricing “was not to compare Deepwater against other pricing proposals or other alternative renewable projects. Rather, it was to make pricing adjustments specified in the law, along with any other revisions that were appropriate....”¹⁵⁶ Noting that the price is still higher than other renewable energy projects available in the market, Mr. Milhous maintained that the Project is still worth doing because it will not cause rate shock to the typical residential customer and “the General Assembly has made a determination that the project is in the public interest, despite the cost....”¹⁵⁷

Turning to the pricing contained in the Amended PPA, Mr. Milhous noted that the price in the 2009 PPA was used as the initial maximum price, with any savings realized

¹⁵⁴ Grid Exhibit 2 (Pre-Filed Testimony of Madison N. Milhous, Jr.) at 5, 5-6.

¹⁵⁵ *Id.* at 6.

¹⁵⁶ *Id.* at 7.

¹⁵⁷ *Id.* at 8.

by Deepwater reducing that price. He explained that the base price of \$205,403,512 was provided by Deepwater as “the total project cost, net of contingencies, as contained in confidential financial information filed in Docket 4111, and increased to reflect the fact that Deepwater was rejected for a Department of Energy loan guarantee, resulting in higher financing costs.”¹⁵⁸ The pricing will be adjusted after construction is complete based on the total facility cost, any savings from the base amount, and the determination of the bundled price that is calculated from any savings as provided by Deepwater and verified by a Division consultant.¹⁵⁹

Addressing other changes in the Amended PPA, Mr. Milhous noted that the REC price will be based on the Massachusetts REC price as reported on the Chicago Climate Futures Exchange because the Rhode Island RECs are not reported. Previously, the REC price was based on the Alternative Compliance Payment pricing. According to Mr. Milhous, while the pricing of RECs has no impact on the bundled price in the Amended PPA, it allows National Grid to avoid certain adverse impacts to its financial statements if the Company were required to use mark-to-market accounting for the RECs in the future.¹⁶⁰

Mr. Milhous also explained that based on the Commission’s finding in Docket No. 4111 that the non-pricing terms of the 2009 PPA appeared commercially reasonable with the exception of the assignment clause, the assignment clause was changed to require Grid’s consent, not to be unreasonably withheld.¹⁶¹ Mr. Milhous also addressed other changes to the provisions regarding PPA Regulatory Approval, the use of the

¹⁵⁸ *Id.* at 9-10.

¹⁵⁹ *Id.* at 10-11.

¹⁶⁰ *Id.* at 11-12.

¹⁶¹ *Id.* at 13.

Energy, Capacity and RECs in the event there could be a benefit to standard offer customers, governmental approvals, and location of pricing provisions.¹⁶²

VII. Deepwater Wind's Pre-Filed Testimony

A. Pre-Filed Testimony of William M. Moore

On July 20, 2010, Deepwater submitted the Pre-Filed Testimony of William M. Moore, Chief Executive Officer of Deepwater Wind Holdings, LLC, the parent entity of Deepwater Wind Block Island, LLC. Mr. Moore argued that in supporting the 2010 amendments to R.I. Gen. Laws § 39-26.1-7, the Rhode Island General Assembly was fully aware that the proposed Project will produce higher priced energy but that it supports the proposed Project “as long as its total costs to build are deemed reasonable for an offshore wind energy project of similar scale and location.”¹⁶³ Mr. Moore stated that the amended statute mandates Deepwater to disclose the “expected costs to build this project, to have its actual costs to build verified, and to pass along any capital cost savings in the form of lower contract-specified energy prices” which will address concerns raised in Docket No. 4111 regarding Deepwater’s rate of return.¹⁶⁴ Mr. Moore also indicated that Deepwater is disclosing its expected return on investment.¹⁶⁵ He maintained that this approach will allow the proposed Project to meet the policy objectives of the General Assembly including the creation of a supply chain, creating new jobs, and supplying Block Island with cleaner power.¹⁶⁶ According to Mr. Moore,

¹⁶² *Id.* at 13-15.

¹⁶³ Deepwater Exhibit 2 (Pre-Filed Testimony of William M. Moore) at 2-3.

¹⁶⁴ *Id.* at 4.

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

Deepwater has been approached by manufacturers who have expressed interest in locating in Rhode Island.¹⁶⁷

Conceding that construction of the proposed Project by itself “is no guarantee that these companies will locate new facilities in Rhode Island,” Mr. Moore stated that it will “pave the way for larger projects that will have significant economic development benefits for the region.”¹⁶⁸ According to Mr. Moore, a smaller scale project will be built faster than a utility scale project and with less risk to all parties which will help achieve the first-in-the nation goal. Furthermore, he stated that starting small will improve the local technology, experience and other capital needed in order to achieve the essential components of the larger utility scale project at a reasonable cost, thus reducing the costs associated with the “learning curve” in future projects.¹⁶⁹ Mr. Moore further argued in support of a small project stating that, “neither [Cape Wind or Bluewater] is at the finish line, and both face significant financial and logistical hurdles to be completed by 2012 or 2013- if ever.”¹⁷⁰ Mr. Moore maintained that if the Block Island Wind Farm were canceled, construction of the Rhode Island Sound project would not begin until approximately 2020 under existing federal rules.¹⁷¹

Discussing how the new PPA is different from the PPA considered in Docket 4111, Mr. Moore stated that the new PPA requires Deepwater to disclose its expected constructions costs, to verify actual construction costs and to pass along any cost savings to the ratepayer. He noted that the first year price cap is \$235.70 (2012 pricing), but could not project what the actual price will be until the proposed Project is built and the

¹⁶⁷ *Id.*

¹⁶⁸ *Id.* at 5.

¹⁶⁹ *Id.* at 5-7.

¹⁷⁰ *Id.* at 7.

¹⁷¹ *Id.* at 8.

construction costs verified. He stated that while Deepwater “expects that savings can be achieved in designing and building this generating facility, it’s simply too early to know where these savings will be realized, and how many dollars will be saved, net of possible cost overruns in other areas.”¹⁷²

He stated that the projected unlevered rate of return was 10.5%, but argued that “the ultimate levered rate of return cannot be known today for a number of reasons.”¹⁷³ Mr. Moore explained that the price reduction mechanism “translates all capital cost savings below the level necessary to meet Deepwater Wind’s target unlevered return into specific reductions in the contract-specified price while leaving Deepwater Wind’s unlevered return unchanged.”¹⁷⁴ Under the current risk structure, according to Mr. Moore’s testimony, there are many ways for Deepwater’s rate of return to dip below the target 10.5%, but there are only two ways to increase the return above 10.5%, i.e., achieving cost savings and exceeding wind performance projections.¹⁷⁵

Mr. Moore explained that under the prior PPA, the higher project cost estimate of \$219,311,412 was based on Deepwater assuming all risk and retaining all of the benefit. According to Mr. Moore, Deepwater always believed that it would be able to construct the proposed Project at a cost below the \$219,311,412 and thus, would be able to increase its calculated rate of return above the 9.7% which was projected by Deepwater under the 2009 PPA.¹⁷⁶ The Amended PPA’s Base Amount is lower (\$205,403,512) because it is based on a higher target unlevered return (10.5%) and because of the cost savings provision requiring savings to be passed on to the ratepayer. Mr. Moore averred that

¹⁷² *Id.* at 13.

¹⁷³ *Id.* at 9-10.

¹⁷⁴ *Id.* at 10.

¹⁷⁵ *Id.* at 12.

¹⁷⁶ *Id.* at 13.

there still exists the possibility for further cost savings (e.g. in project design and engineering). In fact, according to Mr. Moore, it is this very risk structure, combined with the obvious impact of this project on the utility scale project in terms of public perception that provides an incentive for Deepwater to drive costs down.¹⁷⁷

In discussing the sharing of project risks between Deepwater and ratepayers, Mr. Moore explained the reasoning for accepting a below market rate of return is “to get this project done right and to drive down the costs of offshore wind power in the northeast, expanding our range of opportunities for additional projects.”¹⁷⁸ Mr. Moore further claimed that the Amended PPA does not guarantee any revenue level or equity return level to Deepwater. Rather, Deepwater will be paid only for energy that it actually produces which means that if the proposed Project never becomes operational, ratepayers pay nothing.¹⁷⁹

Addressing the fact that the Department of Energy loan was rejected on April 21, 2010, Mr. Moore maintained that it was due to the lack of approval of the 2009 PPA.¹⁸⁰ Next, he addressed the concern raised in Docket No. 4111 that Deepwater would not be legally bound by its financing assumptions. Mr. Moore unequivocally rejected this claim, pointing out that it has no control over lenders’ terms and conditions and therefore could not unilaterally alter financing terms that might impact its return on investment. He stated that it is this unpredictability and lack of control over future financing terms

¹⁷⁷ *Id.* at 15-16.

¹⁷⁸ *Id.* at 17.

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

that is the basis for using the unlevered return on investment in financing not only of this project, but all independent power projects.¹⁸¹

Mr. Moore concluded his testimony by citing the environmental and economic benefits that would be derived from the proposed Project. First, the power produced from the wind farm, representing approximately 1.5% of the State's total consumption, would improve air quality through displacement of existing inefficient generation facilities.¹⁸² Second, Mr. Moore claimed the project will create jobs and produce "indirect benefits from the multiplier effects of employment and local purchases related to [Deepwater's] development and construction activities".¹⁸³ Finally, referring to his testimony in Docket No. 4111, Mr. Moore stated that the proposed wind farm would produce "wholesale electric price suppression effects".¹⁸⁴ Mr. Moore concluded his testimony by characterizing the proposed wind farm as an "opportunity for the Commission to secure a place for Rhode Island in the fastest growing sector of the world's most vibrant energy industry, commercial wind power."¹⁸⁵

B. Pre-Filed Testimony of David P. Nickerson

On July 15, 2010, Deepwater submitted the Pre-Filed Direct Testimony of David P. Nickerson, Managing Member of Mystic River Energy Group, LLC, a consulting firm. In concluding that the Amended PPA is commercially reasonable as defined in the 2010 amendments to R.I. Gen. Laws § 39-26.1-7, Mr. Nickerson testified that he attempted to compare the proposed Project to recent projects that are in operation, under construction, or financed which have a similar size, technology and location. He defined similar size

¹⁸¹ *Id.* at 18-19.

¹⁸² *Id.* at 19-20.

¹⁸³ *Id.* at 20.

¹⁸⁴ *Id.* at 20.

¹⁸⁵ *Id.* at 22.

as not more than 30 MW, similar technology as offshore wind on foundations capable of supporting the turbines in 30 meters of water and similar location as at least 30 meters of water.¹⁸⁶ Because there were no exact matches, Mr. Nickerson reviewed recent European offshore wind projects up to 200 MW in size for which “relevant cost information is available” since 2009.¹⁸⁷

The most comparable project Mr. Nickerson identified was the Alpha Ventus wind project in Germany, a 60 MW project that reached full commercial operation in April 2010. He indicated Alpha Ventus met the technological and locational requirements. After adjusting for size, Mr. Nickerson maintained that the Alpha Ventus project had a similar installed cost as the proposed Project.¹⁸⁸ With regard to the other projects he had identified, Mr. Nickerson then performed adjustments to the data to more accurately compare the European projects to the proposed Project. He noted that “for offshore wind, the key cost elements are installed costs, ongoing operations and maintenance costs, and cost of capital (rate of return). If each of these underlying elements is reasonable, then it is consistent to conclude that the PPA pricing and associated payment stream over time is reasonable....”¹⁸⁹

Using publicly available data, Mr. Nickerson explained that he adjusted each project for technology, location and size. Additionally, in some cases, Mr. Nickerson needed to add in cable costs to transport the power from the project to shore. Mr. Nickerson indicated that for this calculation he used the distance from the wind farm to

¹⁸⁶ Deepwater Exhibit 3 (Pre-Filed Testimony of David P. Nickerson) at 2-4.

¹⁸⁷ *Id.* at 4-5.

¹⁸⁸ *Id.* at 5-6.

¹⁸⁹ *Id.* at 6. Mr. Nickerson argued that prices expressed in dollars per MWH is not particularly useful in this comparison because of the different financing, tax and policy mechanisms that subsidize renewable projects in the various European countries. *Id.* at 7-8.

Block Island. He explained that adjustments for water depth were based on data contained in a recent report from the European Environmental Agency.¹⁹⁰ Finally, Mr. Nickerson adjusted the larger projects “to estimate what their installed cost would be if they had been built as smaller 30 MW projects, instead of their actual sizes.”¹⁹¹ His conclusion, after making all of these adjustments, was that the installed cost for the proposed Project, calculated at \$7,132/kW falls in the middle of all of the European projects reviewed.¹⁹²

Noting that the average adjusted installed cost of the European projects was \$6,922/kW, Mr. Nickerson opined that the \$210/kW difference in the proposed Project’s installed cost “could be a proxy for part of the cost impact of other factors that are not readily quantifiable, like lack of an existing U.S. supply chain.”¹⁹³ Mr. Nickerson concluded that the installed cost of the proposed Project “is reasonably consistent with what an experienced power market analyst would expect to see for a project of similar size, technology and location” and that the estimated operations and maintenance costs and return on investment are reasonable.¹⁹⁴

C. Direct Testimony of Martin J. Pasqualini

On July 15, 2010, Deepwater submitted the Pre-Filed Direct Testimony of Martin J. Pasqualini, a financial advisor who provides advisory services in connection with the development, financing, disposition and acquisition of electric generation facilities.¹⁹⁵

Mr. Pasqualini stated that his evaluation of a renewable project is based on the

¹⁹⁰ *Id.* at 8-11.

¹⁹¹ *Id.* at 11.

¹⁹² *Id.* at 12, 16.

¹⁹³ *Id.* at 16.

¹⁹⁴ *Id.* at 16-17. Addressing other reasons to approve the Amended PPA, Mr. Nickerson distinguished the Amended PPA provisions from those of the Cape Wind project in Massachusetts and the Bluewater Wind Delaware, LLC project. *Id.* at 17-19.

¹⁹⁵ Deepwater Exhibit 4 (Pre-Filed Testimony of Martin J. Pasqualini) at 1.

unleveraged return for a project over a twenty year period. He explained that the unleveraged return “defines the total amount of cash and tax benefits that can be allocated between project participants and against which leverage can be applied” and is widely accepted as the best measure of the “relative economic robustness of a project.” Although a simplification, Mr. Pasqualini stated that it is the standard in the renewable sector.¹⁹⁶ He noted that over the past six years, on-shore projects have typically had unleveraged returns after tax in the range of eight to eleven percent. He estimated a return for the proposed Project to be comparable to the higher end returns for an on-shore project due to higher risk associated with off-shore projects.¹⁹⁷

The risks associated with off-shore wind farms in the United States include, according to Mr. Pasqualini, higher construction costs due to a lack of supporting infrastructure, substantial differences in operating performance and project availability, and substantial differences in maintenance vessel availability and cost.¹⁹⁸ Clarifying that he relied on Deepwater’s projections rather than engaging in a “quantitative review” of the assumptions reflected in Deepwater’s project model, Mr. Pasqualini created leveraged return models based on the unlevered information provided by Deepwater. He assumed that the project will elect to take a cash grant in lieu of an investment tax credit (“ITC”) and used his own debt parameters. Based on a debt to equity ratio of four to one, he calculated the after tax leveraged return as high as 17.8%. This leveraged return was reduced to a range of 13.5% to 16.0% without a federal loan guarantee, in the private finance market, and with a post-ITC leverage of 50% to 75%.¹⁹⁹

¹⁹⁶ *Id.* at 3.

¹⁹⁷ *Id.* at 4.

¹⁹⁸ *Id.* at 5.

¹⁹⁹ *Id.* at 5-6.

Mr. Pasqualini stated it would be theoretically possible to monetize the tax benefits of depreciation and interest expense by working with a tax equity investor; however, he explained that it is not likely that tax equity investors would be interested in the project. The construction period for this project is relatively long compared to the construction period of an on-shore wind project. Also, since it is a first of its kind project, even the largest and most active tax equity investors have yet to develop underwriting parameters for a project of this type.²⁰⁰

Mr. Pasqualini explained that lenders would review Deepwater's projections as "sponsor projections" and would "immediately build in contingency, reduce volume projections, and increase expense projections as a way of sizing the debt" making their projections more conservative than Deepwater's.²⁰¹ In addition, he indicated that the asymmetrical risk profile of the Project in that the price can be reduced, but not increased above a certain level would have a negative impact on the availability of Project financing.²⁰² Therefore, Mr. Pasqualini opined that the leveraged rates he had calculated would most likely represent the best case scenario for Deepwater given all of the risks he described.²⁰³

VIII. Town of New Shoreham's Pre-Filed Testimony

On July 15, 2010, the Town of New Shoreham ("Town") submitted the Pre-Filed Direct Testimony of Richard La Capra, a consultant on energy and regulatory issues. In his testimony, Mr. La Capra indicated that the Town recommended approval of the PPA because it would provide economic and environmental benefits to Block Island. With a

²⁰⁰ *Id.* at 7.

²⁰¹ *Id.* at 7-8.

²⁰² *Id.* at 8.

²⁰³ *Id.*

new transmission line between Block Island and the mainland, Mr. La Capra explained that Block Island Power Company (“BIPCo”) would be able to purchase power from the mainland, allowing the utility to reduce its fuel related costs of operating diesel generators. BIPCo would also be able to reduce its emissions by reducing its use of the diesel generators when the Project is producing power.²⁰⁴ Mr. La Capra clarified that he had not reviewed the Amended PPA for commercial reasonableness regarding pricing and terms.²⁰⁵ Finally, questioning whether BIPCo could construct facilities needed to interconnect the Project in a timely manner, the Town urged the Commission to recognize that “New Shoreham-specific economic and environmental benefits contemplated by the General Assembly depend upon timely and reliable interconnection of the BIPCo system to the Project.”²⁰⁶

IX. EDC’s Pre-Filed Testimony

On July 20, 2010, EDC submitted the Pre-Filed Testimony of Seth G. Parker, Vice President and a Principal of Levitan & Associates, Inc., a management consulting firm in the power and fuels markets. The purpose of his testimony was to review the Amended PPA for commercial reasonableness, to evaluate risk factors, estimate price suppression benefits, and evaluate other power market impacts associated with the proposed Project.²⁰⁷

²⁰⁴ Town Exhibit 1 (Pre-Filed Testimony of Richard La Capra) at 3-6.

²⁰⁵ *Id.* at 6.

²⁰⁶ *Id.* at 10, 11.

²⁰⁷ EDC Exhibit 1 (Pre-Filed Testimony of Seth G. Parker), at 3-4. In developing his opinion, Mr. Parker stated that he relied on the Commission’s Order in Docket No. 4111, the PPA between Cape Wind Associates, LLC and Grid, PPA between Bluewater Wind Delaware LLC and Delmarva Power & Light Co., ISO-NE “2010-2019 Forecast Report of Capacity, Energy, Loads, and Transmission (“CELT”), Electric Resource Planning Study dated February 1, 2008, “Eastern Wind Integration and Transmission Study” of January 2010 (“EWIT Study”), “Analysis of the Impact of Southern New England Offshore Wind and Block Island Wind on New England Energy Prices” prepared by Charles River Associates (“CRA Analysis”), and Pre-Filed Testimony of Mr. LaCapra in this docket. *Id.* at 4-5.

Mr. Parker discussed the offshore wind industry in Europe with approximately 39 operating offshore wind projects totaling approximately 2,000 MW of installed capacity with another 3,000 MW under construction. In addition, China has completed an offshore wind project with a 102 MW rating. He presented statistics that showed that most of the wind farms in Europe were closer to shore and in shallower water than the proposed Project. He stated that the capital costs for offshore wind tends to be twice that of the capital costs for on-shore wind on a unitized basis. He indicated that these costs are sensitive to the depth of the water.²⁰⁸

Next, Mr. Parker provided an overview of the ISO-NE power market, particularly dispatch and pricing.²⁰⁹ He then addressed the fact that the proposed Project is planned to be comprised of a 28.8 MW nameplate capacity wind farm with an estimated capacity factor of 40%, the power will be delivered to Block Island at a new substation, will be used by BIPCo's distribution system, and the excess will flow to Grid's mainland distribution system over an undersea transmission line whose ownership is yet to be determined.²¹⁰ Mr. Parker estimated that BIPCo would utilize approximately 13% of the output of the proposed Project in the early years and up to 21% in the later years due to expected load growth on Block Island.²¹¹ However, under the Amended PPA, Grid will pay for 100% of the output from the proposed Project as measured before the power enters the BIPCo distribution system. "Because the Amended PPA is for 100% of [the

²⁰⁸ *Id.* at 6-7.

²⁰⁹ *Id.* at 8-11.

²¹⁰ *Id.* at 11-12.

²¹¹ *Id.* at 12.

proposed Project's] output, this means [Grid] must accept and pay for all of [the proposed Project's] energy, capacity, and RECs.”²¹²

Mr. Parker noted that, like the 2009 PPA, the 2013 price per MWH is \$244 with an annual 3.5% escalator. Mr. Parker discussed that the Amended PPA, like the 2009 PPA, includes a Wind Outperformance credit. Under the Wind Outperformance credit, Deepwater shares in the surplus of energy delivered in excess of the 40% capacity target, but does not charge more for underperformance. Also like the 2009 PPA, Deepwater may not adjust the per MWH price if operating expenses are higher or lower than expected. Unlike the 2009 PPA, the Amended PPA provides for a reduction in the first year price if the Total Facility Cost (actual total capitalized cost) of constructing the proposed Project is less than \$205,403,512.²¹³ He stated, “the price adjustment in the Amended PPA schedule is essentially a discount of about \$4.60 per MWH for each \$5 million of Total Facility Cost Savings.”²¹⁴ There is no provision for increasing the first year price for increased construction costs.²¹⁵ The Total Facility Cost includes the following: (1) all development costs, including designing, engineering, permitting, and interconnection studies; (2) all Engineering, Procurement, and Construction costs, including the cost to re-perform any defective work or for warranty work; (3) all taxes and other fees; (4) insurance; (5) costs to interconnect to the Delivery Point; (6) financing and all legal fees, and (7) any other capitalized costs. All of this is to be calculated by Deepwater and verified by a Verification Agent.²¹⁶

²¹² *Id.* at 13.

²¹³ *Id.* at 13-17.

²¹⁴ *Id.* at 13-14.

²¹⁵ *Id.* at 14.

²¹⁶ *Id.* at 15.

Another price adjustment provision allows Deepwater to adjust the Amended PPA price to recover costs of the transmission cable between Block Island and the mainland in the event Grid chooses not to own and/or construct the cable.²¹⁷ Like the 2009 PPA, Deepwater may terminate the Amended PPA without further obligation in the event the United States Congress does not extend the in-service date to qualify for either the Production Tax Credit or the Investment Tax Credit. In the case of the Amended PPA, the date must be extended to December 31, 2015.²¹⁸ According to Mr. Parker, “Deepwater has confirmed that the Amended PPA prices assume that [the proposed Project] will qualify for the [Investment Tax Credit].”²¹⁹

Addressing his power market analysis, Mr. Parker indicated that he reviewed the Cape Wind PPA and the Bluewater Wind PPA, noting that each is larger than the proposed Project. His review of the Cape Wind PPA showed that Cape Wind is allowed to adjust the pricing under certain circumstances if that project does not qualify for the Investment Tax Credit. Similar to the Amended PPA, the Cape Wind PPA includes a wind outperformance credit.²²⁰ However, the Cape Wind PPA includes no provision for a change in price if the capital costs are higher or lower than expected, meaning, “Grid and its ratepayers are insulated from any variances in total capital costs.”²²¹ Finally, unlike Deepwater, Cape Wind is responsible for any costs associated with upgrades to the Pool Transmission Facilities allowing the transmission system to reliably accept Cape Wind’s energy.²²²

²¹⁷ *Id.* at 18.

²¹⁸ *Id.*

²¹⁹ *Id.* at 19.

²²⁰ *Id.* at 19-21.

²²¹ *Id.* at 22.

²²² *Id.*

Discussing the Bluewater Wind PPA, Mr. Parker explained that the pricing is not a bundled price like Deepwater and Cape Wind because the energy, RECs and capacity are priced separately with a 2.5% annual escalator. The Bluewater Wind PPA contains a “penalty” adjustment if production falls below a minimum level. Additionally, Bluewater Wind is allowed to retain a portion of their RECs to sell into the market as a separate revenue stream outside of the Bluewater Wind PPA.²²³

Mr. Parker then made adjustments to the Cape Wind and Bluewater Wind pricing to account for the escalators and timing of recovery costs. He then opined that the differences in pricing between the three projects could be the result of water depth, project size, and REC price, but could not quantify these differences. Addressing Canadian and European costs, Mr. Parker indicated that there was insufficient information to make the determination whether the Ontario feed-in tariff or European feed-in tariff make good benchmarks.²²⁴

Addressing price suppression effects of the proposed Project, Mr. Parker stated that the power produced by the proposed Project would displace energy from generators “that would otherwise be dispatched by ISO-NE....” He continued, “since ISO-NE dispatches generators under least cost economic principles, [the proposed Project] should allow ISO-NE to reduce purchases of high priced energy, and as a result, energy prices should decline in RI.”²²⁵ Mr. Parker used a program called MarketSym, assuming the most recent load and generation data, continuation of the current load zones, certain market imports, forecasted pricing, sufficient renewable generation to meet most states’

²²³ *Id.* at 23-24.

²²⁴ *Id.* at 25-32.

²²⁵ *Id.* at 33. According to Mr. Parker, this price suppression may not extend to New England because of assumptions made in his analysis. *Id.*

RES requirements, operation of the proposed Project and Cape Wind, and a 40% capacity factor for the proposed Project.²²⁶ The inputs also included certain assumptions about Block Island's load, load growth, daily and monthly load profiles.²²⁷

Under this methodology, Mr. Parker calculated that the proposed Project would allow Grid ratepayers to save an average of \$370,000 per year equal to \$7.4 million over the life of the Amended PPA.²²⁸ Noting that this result is significantly lower than one performed by Charles River Associates on behalf of Deepwater earlier in 2010 showing an average of \$59 million on a net present value in 2013 dollars with updated figures of \$5 million in savings to BIPCo ratepayers annually for a total of \$95 million and \$1.6 million annually to Grid ratepayers equal to \$32 million over the term of the Amended PPA, Mr. Parker stated that he could not account for the difference.²²⁹ Mr. Parker noted that there will be a short term price suppression impact on capacity prices but it may not have a lasting impact as a result of the various states' RES requirements.²³⁰

Addressing price suppression on natural gas prices, Mr. Parker indicated that his analysis assumed the combined effects of the proposed Project and Cape Wind. He stated that output from the proposed Project would reduce the impact of constraints on the natural gas pipeline during the winter, reducing costs to power plants and Commercial and Industrial natural gas customers who do not purchase their supply from the local natural gas distribution company. The gas savings would be \$1,035 annually with a total of \$46,873 over the term of the Amended PPA.²³¹

²²⁶ *Id.* at 33-35.

²²⁷ *Id.* at 35-36.

²²⁸ *Id.* at 37.

²²⁹ *Id.* at 37-38.

²³⁰ *Id.* at 39.

²³¹ *Id.* at 40-41.

Addressing price stability and reliability benefits, Mr. Parker stated that Grid “ratepayers would have more stable prices if the fixed price [proposed Project] energy displaced volatile market energy, but I do not expect those benefits to be significant given the [proposed] Project’s small size.”²³² Additionally, while the proposed Project would have a slight impact on energy price volatility, “it would also likely increase ratepayer’s total cost, except in the event of extremely high market prices, because it is priced higher than market prices are expected to be.”²³³

Relying on the Eastern Wind Integration and Transmission Study (“EWIT”) Study which estimated a possibility that 3,000 MW of offshore wind could be developed off of the coasts of Rhode Island and Southeastern Massachusetts, Mr. Parker indicated that 3,000 MW would be a sufficient incentive for wind turbine manufacturers to locate in Rhode Island.²³⁴ Mr. Parker noted that his full economic analysis was addressed in the advisory opinion he had submitted in this docket.²³⁵

Addressing other factors he was asked to review, Mr. Parker indicated that if the proposed Project is built with a transmission cable between Block Island and the mainland, “BIPCo’s annual energy costs were projected to decline by \$2.0 million in 2013, and by as much as \$5.1 million by 2032.” With regard to the construction of the transmission cable, Mr. Parker stated that if Grid owns it, assuming a cost of \$43 million and a 30 year recovery period, Grid “ratepayers will pay approximately \$6.9 million in 2013...and successively lower amounts in succeeding years.”²³⁶

²³² *Id.* at 42.

²³³ *Id.*

²³⁴ *Id.* at 43-44.

²³⁵ *Id.* at 44, n.30.

²³⁶ *Id.* at 47-48.

Finally, Mr. Parker concluded that the Amended PPA is commercially reasonable when compared to the Cape Wind and Bluewater Wind PPAs because there would be a decrease in pricing if the capital cost is less than \$205.4 million or if the proposed Project achieves output in excess of the anticipated 40% capacity factor.²³⁷

X. RIBCTC's Pre-Filed Testimony

On January 20, 2010, the Rhode Island Building and Construction Trades Council ("RIBCTC") submitted the Pre-Filed Direct Testimony of Michael F. Sabitoni, its President, in Docket No. 4111.²³⁸ Mr. Sabitoni stated that the RIBCTC supports the approval of the PPA between Deepwater and Grid. Noting that one of the goals of the Act is to create jobs in the renewable energy sector, he stated, "the labor of workers represented by RIBCTC's member unions is essential to the construction of this project, while this project is in turn crucial to the creation of jobs and livelihood of those workers."²³⁹

Mr. Sabitoni elaborated that Rhode Island could gain a competitive advantage by being the first state to enter the renewable energy market for offshore wind development. He maintained that the first state would be the first to develop a uniquely qualified workforce, to locate assembly and manufacturing sites, and to become a hub for the assembly and manufacture in the national offshore wind industry.²⁴⁰ This he opined,

²³⁷ *Id.* at 48.

²³⁸ RIBCTC provided notice that it would not be filing any new testimony, but would rely on the testimony and data responses filed in Docket No. 4111, of which the Commission has taken Administrative Notice. However, for ease of review, the Commission is including a summary of that testimony herein as RIBCTC's witness will be available for rebuttal and cross-examination.

²³⁹ RIBCTC Exhibit 1 (Pre-Filed Direct Testimony of Michael F. Sabitoni), pp. 1-2.

²⁴⁰ *Id.* at 4.

would lead to even more jobs than projected by Deepwater Wind for the construction of the instant project and the utility scale project.²⁴¹

XI. Division's Pre-Filed Testimony

On July 15, 2010, the Division of Public Utilities and Carriers ("Division") submitted the Pre-Filed Direct Testimony of Richard S. Hahn, its consultant, regarding the Division's review of the Amended PPA. Mr. Hahn adopted his testimony from Docket No. 4111 as part of his testimony in the instant docket. Mr. Hahn summarized the pricing mechanism in the Amended PPA and stated:

Under the amended PPA, if the [Total Facility Cost] falls below \$205,403,512 the initial price begins to be reduced. However, based on the information provided in Docket 4111 it appears that the original estimate of the total project cost that was associated with the original 2012 starting price of \$235.70 per MWH was \$219,311,412. Therefore, the pricing mechanism in the amended PPA should be revised such that the 2012 starting price per MWH decreases if the TFC is less than \$219,311,412.²⁴²

Mr. Hahn reasoned that based on Deepwater's discovery responses in this case and in Docket No. 4111, the initial 2012 pricing of \$235.70 per MWH was linked to the cost of the Project, estimated to be \$219,311,412. He noted that Deepwater's Response to Division Data Request 1-17 (Confidential) included "pro forma financial statements for the project showing revenues, expenses, net income and after-tax cash flows" and capital outlays and cash flows based upon a capital cost of \$219,311,412.²⁴³ Thus, Mr. Hahn concluded, "it is clear from Deepwater's response to Div. 1-17 in Docket 4111 that the capital cost of \$219,311,412 was linked to the initial 2012 price of \$235.70 per MWH."²⁴⁴ Additionally, citing to Deepwater's response to Division Data Request 1-4 in

²⁴¹ *Id.* at 4-5.

²⁴² Division Exhibit 1 (Pre-Filed Testimony of Richard S. Hahn) at 5-6.

²⁴³ *Id.* at 7.

²⁴⁴ *Id.*

the instant docket, Mr. Hahn noted that “this response specifically states that the Docket 4111 price (i.e. \$237.70 per MWH in 2012, escalated by 3.5% to \$244 per MWH in 2013) and the Docket 4111 cost estimate (i.e. \$219,311,412) yielded an unlevered Internal Rate of Return (“IRR”) of 9.7%.”²⁴⁵

Acknowledging that Deepwater maintained that use of the \$205,403,512 will produce an unlevered IRR of 10.5%, “necessary to attract financing due to the changed risk/reward profile of the cost savings mechanism”, Mr. Hahn deduced that this pricing mechanism will allow Deepwater “to retain the first \$13.9 million in capital cost savings from the Docket 4111 estimate of \$219,311,412 to generate a higher IRR.” Mr. Hahn opined that such a change appears to be inconsistent with the 2010 amendments to R.I. Gen. Laws § 39-26.1-7.²⁴⁶ He took the position that Deepwater is required by the 2010 amendments to R.I. Gen. Laws § 39-26.1-7 to allocate all savings below \$219,311,312 to ratepayers, not retain the first \$13.9 million in savings.²⁴⁷

Mr. Hahn explained that an unlevered IRR is based upon 100% equity financing. He stated that “virtually all large projects such as the Deepwater offshore wind project secure a significant portion of their financing via debt. Adding a debt component to the financing will generally increase a project’s IRR.”²⁴⁸

XII. Toray

A. Pre-Filed Testimony of Shigeru Osada

On July 19, 2010, Toray submitted the Pre-Filed Direct Testimony of Shigeru Osada, Senior Vice President of Engineering and Maintenance and Member of the Board

²⁴⁵ *Id.* at 8.

²⁴⁶ *Id.*

²⁴⁷ *Id.* at 8.

²⁴⁸ *Id.* at 8, n.1.

of Toray. Mr. Osada is responsible for expansion projects, maintenance improvements, cost savings projects and utility management, including the purchase of long term electricity and natural gas from the market. He indicated that Toray has approximately 600 Rhode Island employees.²⁴⁹ He also indicated that Toray is considering expansion and additions to its workforce, but will not move forward if electric rates are increased to the extent required under the Amended PPA.²⁵⁰ He maintained that the Amended PPA is detrimental to businesses in Rhode Island and would negatively impact Rhode Island's economic recovery. He argued that "[i]n a free market competitive economy laws should not attempt to specifically guarantee one company's revenue and profits for 20 years."²⁵¹

With regard to specifics of the Amended PPA, Mr. Osada argued that the pricing in the Amended PPA is "extremely high" and should be compared to the ISO-NE market prices for electricity and not Standard Offer Service. He stated that even with the addition of REC prices, the Amended PPA is still much higher than the market prices. Furthermore, citing a 2006 report from the US Department of Energy, the pricing is significantly higher than expected pricing for offshore wind. Finally, comparing the pricing for this proposed Project to Bluewater Wind and relying on a Grid witness from Docket No. 4111, Mr. Osada maintained that the pricing could not be found to be commercially reasonable.²⁵²

Turning to State policy of deregulation in the electricity energy market, Mr. Osada believed that this type of contract is contradictory to that policy of encouraging a

²⁴⁹ Toray Exhibit 1 (Pre-Filed Testimony of Shigeru Osada), at 1, 3.

²⁵⁰ *Id.* at 5.

²⁵¹ *Id.*

²⁵² *Id.* at 6-8.

competitive electric energy market.²⁵³ Noting that the Amended PPA subsidizes one company by passing the high electricity costs onto all ratepayers, he stated:

This PPA is giving a monopoly situation to Deepwater Wind to sell the power exclusively to National Grid, which has the monopoly for distribution, and can force the above market cost to be transferred to all ratepayers through distribution rates, which I believe is totally against the concept of deregulation. The concept was to encourage free competition for power generation.²⁵⁴

Addressing the effect on the carbon footprint and the associated cost, Mr. Osada suggested that while the environmental benefit is positive, one should compare the cost associated with the Amended PPA to the clearing price from the Regional Greenhouse Gas Initiative (“RGGI”) which is similar to a cap and trade program. He noted that the cost per ton was \$1.88 for the first three year period and \$1.88 for the second three year period while he calculated the cost per ton under the Amended PPA to be between \$328 per ton and \$501 per ton depending on whether construction costs are included. He maintained that this makes the Amended PPA commercially unreasonable.²⁵⁵

Addressing the economic impact of the Amended PPA on a company such as Toray, Mr. Osada conceded that creation of jobs is positive, but the cost of those jobs under the Amended PPA is unjustifiable. Noting the disparity between the investment of \$205 million for six jobs subsidized by ratepayers versus Toray’s investment over time of \$750 million for 600 Rhode Island jobs, Mr. Osada suggested that the ratepayer expense was a financial burden. He also noted that during the construction phases of the \$750 million investment, many union construction jobs were created.²⁵⁶

²⁵³ *Id.* at 8-9.

²⁵⁴ *Id.* at 9.

²⁵⁵ *Id.* at 10-11, Exhibit 11 (RGGI Press Release June 11, 2010).

²⁵⁶ *Id.* at 11.

Noting that the additional cost to Toray in the first year alone is expected to be approximately \$287,000 and estimated to be approximately \$7 million to \$8 million over the life of the contract, Mr. Osada indicated that such increased expense would “undermine [Toray’s] ability to expand and create more jobs in Rhode Island.” He explained that when faced with huge cost increases, companies often have to implement cost cutting measures such as hiring freezes, expense cuts which reduce consumer spending among the company’s workforce, and possibly cease operations.²⁵⁷ Referring specifically to Toray, Mr. Osada stated that:

If [Toray] is faced with the high price impact of this PPA, [Toray] will make a decision not to execute a major expansion like an additional film manufacturing plant in this State even if the overall economic situation improves and the opportunity arises. [Toray does] not feel [it has] utility price sustainability in this State. This reduces [Toray’s] confidence in expanding business in this State.²⁵⁸

Expressing concern that the utility scale project would cause economic detriment rather than economic opportunity, using Cape Wind’s pricing, Mr. Osada calculated that the cost to Toray in the first year could be an additional \$1.9 million per year. Finally, Mr. Osada pointed to a recent CNBC survey that ranked Rhode Island as the 49th state with Forbes ranking Rhode Island last with regard to business friendliness.²⁵⁹

B. Pre-Filed Testimony of Edward M. Mazze, Ph.D.

On July 19, 2010, Toray and Polytop submitted the Pre-Filed Direct Testimony of Edward M. Mazze, Ph.D., Distinguished University Professor of Business Administration at the University of Rhode Island and current Member of the Ocean State Business Development Authority. Dr. Mazze is a consultant to businesses and government

²⁵⁷ *Id.* at 12-13.

²⁵⁸ *Id.* at 13.

²⁵⁹ *Id.* at 14.

agencies in the areas of economic development and business site selection.²⁶⁰ He concluded that the proposed Project “is not likely to provide economic development benefits, including: facilitating new and existing business expansion and the creation of new renewable energy jobs, the further development of Quonset Business Park; and increasing the training and preparedness of the Rhode Island workforce to support renewable energy projects.”²⁶¹

In support of his conclusion, Dr. Mazze stated that above-market costs for electricity will place businesses that use large amounts of electricity at a disadvantage to their competitors who operate in states with lower energy costs. Such increases could “cause a company to increase its prices to customers or cut expenses such as personnel.”²⁶² Noting that in the competition among states for industrial activity, “low electric rates are an important factor in attracting and retaining manufacturing facilities.” He indicated that Rhode Island has had a poor reputation for being business friendly and needs to reduce costs for businesses. Above-market energy pricing has a negative effect on the attraction and retention of businesses.²⁶³

Dr. Mazze opined that Deepwater’s business plan is too speculative in its financing to result in a utility scale project that will create up to 800 jobs noting that too many of the financial considerations are dependent upon internal and external factors outside of Deepwater’s control such as the identity of its major investors and potential financing terms. Dr. Mazze noted that “debt and equity costs and terms are generally more restrictive and costly for projects financed by wind farm developers than utilities

²⁶⁰ Joint Exhibit 1 of Toray and Polytop (Pre-Filed Direct Testimony of Edward M. Mazze, Ph.D.) at 2.

²⁶¹ *Id.* at 4.

²⁶² *Id.* at 6.

²⁶³ *Id.* at 7.

since there are significant market risks in wind power development.”²⁶⁴ Furthermore, Dr. Mazze cited the Joint Development Agreement (“JDA”) between the State and Deepwater as evidence that Deepwater has no obligation to utilize Rhode Island workers in the event “such supply of manufacturing, assembly or other product is not reasonably available in Rhode Island.”²⁶⁵ According to Dr. Mazze, where Deepwater has an obligation to maximize profit to its investors, it is likely to utilize vendors outside of Rhode Island in such a new market.²⁶⁶

Addressing the “first mover advantage” associated with the construction of a demonstration project, Dr. Mazze argued that based on the higher electricity costs associated with the proposed Project, there is little real advantage “particularly if heavy users [of electricity] have to cut back their operations or consider relocating to another state with low electricity rates.”²⁶⁷

Referencing EDC’s testimony from Docket No. 4111, wherein its witness noted that while there was no guarantee a small off-shore wind project would lead to a utility scale wind project, “there are reliable indications that investment capital, boosted by public investment, is an important first step in the development of any new industry, including the renewable energy industry,” Dr. Mazze responded that “[t]his industry requires substantial federal dollars and investment capital from the private sector. Rhode Island, with its own serious economic problems, is not well positioned to support or invest in this industry sector.”²⁶⁸

²⁶⁴ *Id.* at 8.

²⁶⁵ *Id.* at 9, citing, JDA, Section VIII.

²⁶⁶ *Id.* at 9.

²⁶⁷ *Id.* at 10.

²⁶⁸ *Id.* at 10, citing Docket No. 4111, EDC Exhibit 1 (Direct Testimony of Fred Hashway) at 7.

Conceding that any project like the proposed Project will create some jobs, having direct and indirect benefits for the State, Dr. Mazze noted that such benefits are speculative. He stated that while there are economic input-output models that can be used to measure employment, income, revenue and tax which measure the multiplier effects of certain spending models, these have limitations.²⁶⁹ For example, he noted that multipliers:

do not consider jobs that are lost in the energy industry due to the introduction of a new type of renewable energy, and as a result of an increase in the cost of energy that forces a company to reduce its workforce or leave the State. The most common means of measuring the economic impact of this type of project is the multiplier effect from expenditures.²⁷⁰

Because of the assumptions often made in using the models,²⁷¹ Dr. Mazze maintained that

A multiplier will not capture the true, total effect of Deepwater's direct dollar and employment impact on Rhode Island because the model does not take into consideration the negative consequences of high energy costs such as job losses in industrial and commercial businesses and those that may result in other energy sectors as a result of the new technology.²⁷²

Dr. Mazze opined that the proposed Project will result in higher electricity costs to businesses which will cause those companies to postpone expansion and would negatively impact the State's ability to attract and retain businesses. He proffered that

²⁶⁹ *Id.* at 12-13. Dr. Mazze provided examples of such models: those created by the Bureau of Economic Analysis of the United States Department of Commerce (RIMSII – Regional Input/Output Modeling System), MIG, Inc. (IMPLAN) and Regional Economic Models, Inc. (REMI). *Id.* at 12.

²⁷⁰ *Id.* at 13.

²⁷¹ *Id.* at 13. The assumptions cited were: (1) all firms in a given industry segment employ the same technology and produce similar products or services; (2) the model is linear, i.e., if you double one input it doubles another; (3) the model only represents activity for one year at a time; (4) the computation for induced impacts assumes that jobs created by additional spending are new jobs that will result in new households in the area, and there is a linear change in household spending with changes in income; (5) the job measure does not identify the number of hours worked in each job or the proportion of jobs that are full-time, part-time, or seasonal; and (6) the earnings spent by households will be less than the wages paid because earnings will also be used for household expenditures such as rent, mortgage payments and taxes.

Id.

²⁷² *Id.* at 14.

“Rhode Island could realize greater economic benefits by investing in energy efficiency which could support lower cost renewable energy at a reasonable price.”²⁷³

Referring to a study CNBC conducted and reported on July 13, 2010, Dr. Mazze noted that “Rhode Island ranked as the second worst state in the nation for business. In virtually every survey in the last four years, Rhode Island was near the bottom of the list when comparing factors needed to retain and attract business.”²⁷⁴ These factors include the cost of energy, workforce availability, quality of life, affordability of housing, the state’s economy, business friendliness, access to capital, cost of living, technology and innovation, taxes and education.²⁷⁵ Referencing energy costs, Dr. Mazze indicated that such costs influence a business decision regarding site selection. He noted that existing businesses can plan and budget for energy costs if there is certainty in rates. Uncertainty in rates could cause a different business decision, such as relocation to a lower cost area. Businesses considering moving to a new location review the reliability of existing infrastructure and the energy rates seeking future cost savings. Higher costs result in hesitancy by businesses to move to that location.²⁷⁶ He concluded that for businesses with heavy electric demands, “rate differentials will result in significant annual cost impacts on their operations and affect the company’s growth and hiring of additional employees.”²⁷⁷ Higher energy costs which cause a company to increase costs to customers can present difficulties to the company in a competitive business environment. This impact on Toray and Polytop from the proposed Project will cause the companies to

²⁷³ *Id.* at 14.

²⁷⁴ *Id.* at 15.

²⁷⁵ *Id.*

²⁷⁶ *Id.* at 15-16.

²⁷⁷ *Id.* at 16.

seek savings in other areas of their businesses such as personnel or expansion and could ultimately cause them to seek other states to locate operations.²⁷⁸

XIII. Polytop

On July 19, 2010, Polytop submitted the Pre-Filed Direct Testimony of Thomas A. D'Amato, Manager of Manufacturing Systems at Polytop. His duties include reviewing energy invoices, negotiating new energy contracts, and demand side energy maintenance programs. He noted that Polytop has been a Rhode Island business since 1959, has recently expanded, and employs approximately 200 employees at any given time. He stated that Polytop would like to continue to expand. However, the business is competitive because work is won by Polytop based on participation in a bidding process that often includes a review of three to four bids. Polytop operates on a thin profit margin and additional energy costs make it difficult to compete with large competitors in the Midwest who pay approximately half of the electricity costs of Polytop.²⁷⁹ He believed that higher energy costs resulting from the Amended PPA would “discourage new and existing businesses in Rhode Island.”²⁸⁰

Mr. D'Amato stated that Polytop's perception is that it will not benefit from the additional costs associated with the Amended PPA. Such additional costs, he stated, will require Polytop to increase its costs “which would eventually price [Polytop] out of the market.” Furthermore, he stated that Polytop purchases products from Rhode Island businesses in Cranston, Warwick and North Smithfield. Additionally, Polytop employs automation engineering people working on machinery; a function which could be outsourced if power costs continue to rise. Therefore, a reduction of work at Polytop

²⁷⁸ *Id.* at 16-17.

²⁷⁹ Polytop Exhibit 1 (Pre-Filed Direct Testimony of Polytop Corporation) at 1-4.

²⁸⁰ *Id.* at 4.

would not only affect this company, but other companies in Rhode Island.²⁸¹ He concluded that Polytop believes that the increase in electricity costs could “jeopardize already existing jobs in Rhode Island as well as be a deterrent to others looking to come to Rhode Island to establish a new business.”²⁸² Referencing Polytop specifically, he stated that “the probability of expansion at [Polytop’s] current Rhode Island location would become very unlikely.”²⁸³

XIV. Citizen Intervenors

On July 20, 2010, the Citizen Intervenors submitted the Pre-Filed Direct Testimony of Robert McCullough, a consultant with a Masters in Economics to testify regarding whether or not the Amended PPA is commercially reasonable.²⁸⁴ Mr. McCullough questioned whether Grid had performed adequate due diligence, and concluded that the pricing is higher than similar projects in Europe, the cost figures appear to be based on a desired rate of return rather than on engineering estimates, the rate of return seems high, and there are problems with the contract provisions.²⁸⁵

With regard to pricing, Mr. McCullough maintained that it failed to meet any of the typical standards for evaluating resource acquisitions for electric utilities: fully allocated cost, avoided cost, and competitive market pricing.²⁸⁶ Addressing fully allocated costs, Mr. McCullough affirmed the approach taken by the Division in reviewing the IRR in Docket No. 4111, noting that with the limited financing information

²⁸¹ *Id.* at 5-6.

²⁸² *Id.* at 6.

²⁸³ *Id.*

²⁸⁴ On July 26, 2010, the Chairman granted Deepwater/Grid’s Joint Motion to Strike Certain portions of Mr. McCullough’s Testimony, specifically with regard to his discussion of avoided cost on pages 8-10 of his Pre-Filed Testimony. Tr. 7/26/10 at 12.

²⁸⁵ Citizen Intervenors Exhibit 1 (Pre-Filed Testimony of Robert McCullough) at 3.

²⁸⁶ *Id.*

provided by Deepwater, this was a difficult task.²⁸⁷ He noted that the debt/equity ratio affects the IRR because “if the unleveraged return is higher than the cost of debt, which it is in this case...the financial benefits for the developer are very significant.”²⁸⁸ For example, he explained that if a project has an unlevered return on equity of 10.5% and a cost of debt of 6.5%, the levered return on equity would be 26.5%.²⁸⁹

Addressing whether the proper reference point is the levered or unlevered rate of return, Mr. McCullough noted that Deepwater’s reliance on the unlevered rate of return based on uncertainty regarding certain tax credits was “ironic since it is the timing of the Section 48 Investment Tax Credit grant which is apparently dictating the schedule for this project.”²⁹⁰ Mr. McCullough indicated that a review of a variety of financing plans a developer could use shows that the timing of construction does not appear to be a factor but noted that Deepwater has not really provided any detail regarding their anticipated financing plan.²⁹¹

Turning to comparable market pricing, Mr. McCullough criticized Deepwater Wind’s witness, Mr. Nickerson, for focusing on the cost of projects rather than the pricing of the project output. He specifically noted that the pricing for the main comparable, the Alpha Ventus project was “considerably lower” than the Deepwater pricing. Addressing the manner in which the rates are set for many European projects, Mr. McCullough discussed feed-in tariffs which are tariffs which set the initial rates for offshore wind energy for a period of time.²⁹² It appears from a chart provided by Mr.

²⁸⁷ *Id.* at 6. Mr. McCullough also indicated that ownership of Deepwater Wind Block Island, LLC by a larger company would affect its ability to structure its financing in a beneficial tax manner. *Id.*

²⁸⁸ *Id.* at 7.

²⁸⁹ *Id.*

²⁹⁰ *Id.* citing, Docket 4111, Deepwater Exhibit 3 (Pre-Filed Testimony of William Moore) at 1, 10.

²⁹¹ *Id.* at 7-8.

²⁹² *Id.* at 12-13.

McCullough that the maximum price under an off-shore wind project feed-in tariff is less than 20 cents per kWh.²⁹³

Furthermore, Mr. McCullough conducted his own survey of 158 off-shore wind projects with the criteria that they are either in service or under development. Five such projects had a nameplate rating between 20 MW and 60 MW. He indicated that he chose the 60 MW maximum to include the Alpha Ventus project and the 20 MW minimum to be slightly lower than Deepwater's nameplate rating.²⁹⁴ Mr. McCullough stated that even when making adjustments for various differences in the design of the feed-in tariffs, each of the five projects has pricing "considerably less" than the proposed Project.²⁹⁵

Addressing the appropriate level of due diligence that should have been conducted by Grid, Mr. McCullough stated that a utility conducting a solicitation would be expected "to know the exact technology, equipment, and operation characteristics" as well as ownership and creditworthiness. Finally, he stated, "[c]ontrary to assertions that financial structure should not be considered," a Report prepared for the Great Lakes Energy Development Task Force included "an extensive set of calculations showing the impact of leverage on economic feasibility."²⁹⁶ Mr. McCullough noted that Grid had not undertaken a full review of the project costs and had a limited description of the facility.²⁹⁷ Furthermore, he expressed little confidence in the various cost estimates provided by Deepwater based on changes made to the operations and maintenance ("O&M") costs assumed in Deepwater's estimates. Without further explanation, Mr. McCullough simply stated that "this undocumented increase in O&M would add .5% to

²⁹³ *Id.* at 14-16.

²⁹⁴ *Id.* at 15.

²⁹⁵ *Id.* at 16.

²⁹⁶ *Id.* at 18.

²⁹⁷ *Id.* at 17-18.

the unleveraged return and over 1% to the leveraged return if eliminated from the calculations.”²⁹⁸ Mr. McCullough noted that the depreciation schedules had changed since the submissions contained in Docket No. 4111 with no explanation, thus making it “impossible” to determine whether the changes are legitimate.²⁹⁹

Addressing the discrepancy in the cost of the proposed Project as presented by Deepwater in Docket No. 4111 versus the instant docket, Mr. McCullough echoed the Division’s concern that the price adjustment provision is based on a different cost than what was initially proposed and expressed concern that “approximately 10% of the total cost of the project has been reserved to increase profits from the project and may not represent costs at all.”³⁰⁰ He asserted that Deepwater “should provide a solid cost of the project and then justify a rate of return that would make it viable.”³⁰¹

Addressing the contract language, Mr. McCullough found several provisions to be ambiguous and questioned whether there were drafting errors in others. He believed that the billing language in Section 3 of the Amended PPA was open to multiple interpretations.³⁰² He questioned whether there was a drafting error in the credit support language which would have the effect of reducing the seller’s credit support to zero after commercial operation.³⁰³ He also criticized the manner in which the capacity was calculated for purposes of the credit support provision.³⁰⁴ Next, he believed that the provision related to termination payments in Section 9.3(b)(ii) and (v) omitted calculating the present value of the future stream of payments in the event of a default by the Seller,

²⁹⁸ *Id.* at 19.

²⁹⁹ *Id.* at 20.

³⁰⁰ *Id.* at 21.

³⁰¹ *Id.*

³⁰² *Id.* at 22-23.

³⁰³ *Id.* at 23-25.

³⁰⁴ *Id.* at 25-27.

a common provision designed to make the non-terminating party whole without conferring a windfall or loss. He believed it could create an incentive to one party to default and noted that the recent contract between Cape Wind and Massachusetts Electric Company d/b/a National Grid includes such language.³⁰⁵ Addressing the Outperformance Adjustment Credit described in Exhibit Y to the Amended PPA, Mr. McCullough described a mathematical error resulting from a failure to include the extra day during leap years and suggested that because the language was somewhat confusing, the interpretation of the Exhibit by Deepwater's witness in Docket No. 4111 should be included as an example.³⁰⁶

XV. OSPRI

On July 21, 2010, OSPRI submitted the Pre-Filed Direct Testimony of Mark B. Lively, an electrical engineer with a Masters of Science in Management who has worked on utility rate cases and analyzed purchase power agreements.³⁰⁷ Mr. Lively stated that after reviewing the Amended PPA he "found that the contract would have a long term deleterious effect on economic development in Rhode Island."³⁰⁸ He maintained that the high cost of power in the Amended PPA would result in overall job loss which would offset the benefits that would result from the proposed Project.³⁰⁹ Mr. Lively based his analysis on his professional experience in the utility industry and as a consultant involved in utility rate cases. He noted that "when the customer input prices went up, such as for

³⁰⁵ *Id.* at 27-28.

³⁰⁶ *Id.* at 29-30.

³⁰⁷ OSPRI Exhibit 1 (Pre-Filed Testimony of Mark B. Lively) at 4-5.

³⁰⁸ *Id.* at 1.

³⁰⁹ *Id.* at 2-3. Mr. Lively did not quantify the number of jobs that may be lost as a result of the Amended PPA. However, based on a comparison of Toray's and Polytop's payroll to employee ratio, Mr. Lively estimated that the effect on these two companies combined could be 28 people per million dollar rate increase. He maintained that the eight permanent jobs that would be created is far offset by the number that could be lost. *Id.* at 12-13.

electricity, the customers were less able to produce competitively priced goods.”³¹⁰ He opined that based on his experience with other industries, the high electric prices contained in the Amended PPA could cause businesses to leave Rhode Island for states with lower energy costs.³¹¹

Finally, Mr. Lively criticized the manner in which the Amended PPA defined the role of the Verification Agent in undertaking his/her review of the Project costs as being too narrow. He suggested that the lack of a standard for prudence was not the intent of the legislation.³¹²

XVI. Attorney General

On July 20, 2010, the RIAG submitted the Pre-Filed Direct Testimony of William P. Short, III, an independent consultant in the field of renewable energy.³¹³ Mr. Short stated that the terms and conditions of the Amended PPA are not commercially reasonable, that the provisions allowing for a price decrease only become effective after substantial savings are achieved which only benefit Deepwater, that environmental benefits will be achieved through the Amended PPA, and that there will be no net economic benefit resulting from the Amended PPA.³¹⁴

Mr. Short indicated that by comparing the proposed Project to the construction, pricing, and O&M expenses to other projects of a similar size, one can conclude that the pricing in the Amended PPA is overstated. Additionally, he believed the annual escalator

³¹⁰ *Id.* at 7.

³¹¹ *Id.* at 11.

³¹² *Id.* at 15-16.

³¹³ On July 26, 2010, the Chairman granted Deepwater/Grid’s Joint Motion to Strike Certain portions of Mr. Short’s Testimony, specifically with regard to his discussion of the lack of bid solicitations and rate effects on pages 5-6 of his Pre-Filed Testimony. Tr. 7/26/10 at 12. On August 5, 2010, the Chairman granted Deepwater/Grid’s Joint Motion to Strike Certain portions of Mr. Short’s Testimony, specifically with regard to his discussion of cost of capital, rate of return, and job creation on pages 9-10 and 12-17 of his Pre-Filed Testimony. Tr. 7/26/10 at 12.

³¹⁴ Attorney General Exhibit 1 (Pre-Filed Testimony of William P. Short, III) at 6-7.

was higher than expected. Additionally, he maintained that the return on the proposed Project is “generous to the developer” and will result in unreasonable returns. Based on comparisons of project costs and PPA pricing for other projects, he calculated a reasonable contract price of \$171.18/MWh in 2013.³¹⁵

Mr. Short recognized that the Amended PPA included a provision for a decrease in pricing if Deepwater realizes certain savings in construction costs.³¹⁶ However, he criticized the provision because “the first \$15 million in cost reductions is solely for the benefit of the Project owners. Obviously, these construction savings will be the first to be realized, the ‘low hanging fruit.’”³¹⁷ He noted that the result is that the price reduction ratepayers may realize will be less than the cost reduction realized by the developers.³¹⁸

Addressing the environmental impact, Mr. Short noted that wind is an intermittent resource which is not required to bid into the day-ahead ISO-NE market, but rather is absorbed into the electric grid with no adjustment to the order of generation dispatch. Additionally, relying on various studies, Mr. Short noted that there have been findings that emissions are not reduced at a one to one ratio (1 MW of reduction in emissions for every 1 MW of wind power produced). In fact, in two cases, it was found that emissions of sulfur dioxide, nitrogen oxides, and carbon dioxide increased because of the need for backup generation units to ramp up quickly.³¹⁹ Mr. Short opined that “[i]n the case of ISO-NE, a project of this size will most likely back-off (substitute for) combined cycle natural gas to correct for the excess generation conditions and then call on oil-fired,

³¹⁵ *Id.* at 9-10.

³¹⁶ *Id.* at 10-11.

³¹⁷ *Id.* at 11.

³¹⁸ *Id.*

³¹⁹ *Id.* at 18-20.

simple cycle combustion turbines to fill the void when the wind disappears.”³²⁰ He noted that this latter type of unit is inefficient and creates significantly more greenhouse gases than a combined cycle unit.³²¹ Finally, Mr. Short questioned whether a project of this size would have any effect on reducing Rhode Island’s dependence on foreign oil because of the small amount of oil used in New England for generation (only 5.3%). Of this amount a majority is used “in generating facilities used primarily for reliability or voltage stability purposes while the balance, 1.6%, is burned in oil-fired steam plants.”³²² According to Mr. Short, in 2009 oil fired plants were used less than 2% of the time for marginal power supply.³²³

XVII. EDC’s Advisory Opinion

On July 20, 2010, EDC submitted an “Advisory Opinion on the Economic Development Benefits of the Proposed Block Island Wind Farm” prepared for the Rhode Island Economic Development Corporation by Seth Parker (“Opinion”).³²⁴ In his Opinion, Mr. Parker indicated that Levitan & Associates, Inc. (“LAI”) had utilized the IMPLAN model, “a standardized regional input-output model that allowed us to quantify the ‘multiplier effects’ associated with [the proposed Project’s] construction and operating activities.”³²⁵ The Opinion concluded that “the overall economic benefits

³²⁰ *Id.* at 20.

³²¹ *Id.*

³²² *Id.* at 21-22.

³²³ *Id.* at 22.

³²⁴ EDC Exhibit 2 (Advisory Opinion of Mr. Parker). The Advisory Opinion was accompanied by a letter from Executive Director, Keith Stokes. However, it was deemed by the Chairman to be public comment rather than evidence. Tr. 8/4/10 at 239. In addition, as part of this same ruling, the Chairman struck all parties’ testimony and the portions of the Advisory Opinion that discuss a potential utility scale wind project that may be constructed by Deepwater. Tr. 8/4/10 at 239.

³²⁵ *Id.* (Advisory Opinion of Mr. Parker), at 2.

attributable to [the proposed Project] are estimated to be [\$129] million in constant 2010 dollars....”³²⁶

The IMPLAN model utilized by LAI measures the benefits that accrue as a result of certain expenditures. The user inputs expenditure data and the model “captures all monetary transactions for expenditures and consumption to estimate the effects of a change in one or several economic activities on a regional activity.”³²⁷ The activities are divided into Labor Income, Total Value Added and Output.³²⁸

Under the heading “Facilitating new and existing business expansion and the creation of renewable energy jobs,” the Opinion indicates that the direct benefits include hiring of staff by Deepwater, leasing space and hiring labor related to the project construction. The Opinion indicated that indirect benefits would include tax payments made by these employees. The induced effects include the changes in household spending as income or population increases or decreases. The Opinion described “qualitative impacts” as the benefit of being first in developing an offshore wind industry in the New York and southern New England area.³²⁹

Based on the raw data provided by Deepwater categorized as engineering, fabrication and supply, installation and owner costs of project management insurance, development and financing, Deepwater’s \$205.4 million expenditures would be split by \$42.4 million in Rhode Island and \$163 million in other states. The Opinion stated that “relatively small amounts of engineering and fabrication costs, 10% and 8%, respectively, would be in RI. Relatively high amounts of installation and owner costs,

³²⁶ *Id.* at 3; EDC Exhibit 3 at 1.

³²⁷ EDC Exhibit 2 at 4.

³²⁸ *Id.*

³²⁹ *Id.*

50%, would be in RI.”³³⁰ The employment data was also broken out between RI and other states, but not included in the Opinion.³³¹ Referring back to the estimated \$129 million in benefit to Rhode Island, the Opinion indicated that the direct effects equal \$63 million, the indirect effects equal \$24 million and the “induced effects” equal \$43 million.³³²

Under the heading “Further Development of Quonset Business Park,” the Advisory Opinion referenced the JDA between Deepwater and the State of Rhode Island that includes certain economic development activities that Deepwater may implement and an Option to Lease entered into between Deepwater and Quonset Development Corporation (“QDC”) for 117 acres of land.³³³ Under the heading “Increasing the Training and Preparedness of the Rhode Island Workforce,” the Advisory Opinion discussed the award of a Transportation Investment Generating Economic Recovery (“TIGER”) Grant to QDC for infrastructure improvements, the investment by the State of \$10 million in the SAMP process, and a \$3,720,000 investment in workforce training in the areas of energy efficient construction and retrofit and renewable power.³³⁴

Finally under the heading Energy Independence, the Opinion suggested that based on US Department of Energy estimates, the proposed Project could save almost 750 million cubic feet of gas in New England each year.³³⁵

³³⁰ *Id.* at 5.

³³¹ *Id.*

³³² *Id.* at 5-6; EDC Exhibit 3 at 1.

³³³ EDC Exhibit 2 at 6-7.

³³⁴ *Id.* at 7.

³³⁵ *Id.* at 11.

XVIII. DEM's Advisory Opinion

On July 20, 2010, the Rhode Island Department of Environmental Management (“DEM”) Submitted an Advisory Opinion to the Commission authored by Director W. Michael Sullivan, Ph.D. DEM’s Advisory Opinion “focused on what potential benefits this demonstration project will have on air quality from termination of generating activities at BIPCo.”³³⁶ The Advisory Opinion did not focus on other environmental issues that will be addressed in the Rhode Island Coastal Resources Management Council’s (“CRMC”) Ocean Special Area Management Plan (“SAMP”).³³⁷ Based on DEM’s review of BIPCo’s operations and information related to the proposed Project, DEM concluded that “the approval of the PPA will provide Block Island and the region with measurable environmental benefits” through the reduction of diesel emissions and other pollutants.³³⁸ Therefore, DEM concluded that “there are substantive environmental benefits concerning this project with respect to reducing air pollution emissions both on Block Island and other fossil-fuel based electrical generating facilities in the region.”³³⁹

XIX. Rebuttal Hearings

Following notice, public evidentiary hearings for purposes of hearing rebuttal testimony from the witnesses were conducted on July 26-27, 2010 at the Commission’s offices, 89 Jefferson Boulevard, Warwick, Rhode Island. The following appearances were entered:

FOR NATIONAL GRID:

Ronald T. Gerwadowski, Esq.
Jennifer Brooks Hutchinson, Esq.

FOR DEEPWATER WIND:

Joseph A. Keough, Jr., Esq.

³³⁶ DEM’s Advisory Opinion at 1.

³³⁷ *Id.* at 1.

³³⁸ *Id.* at 3.

³³⁹ *Id.*

FOR NEW SHOREHAM:	Alan Mandl, Esq.
FOR CLF:	Jerry Elmer, Esq.
FOR TORAY & POLYTOP:	Michael R. McElroy, Esq.
FOR CITIZEN INTERVENORS:	Joseph McGair, Esq.
FOR ATTORNEY GENERAL:	Michael Rubin, Esq.
FOR DIVISION:	Jon Hagopian, Esq. Special Assistant Attorney General
FOR COMMISSION:	Cynthia G. Wilson-Frias, Esq. Senior Legal Counsel
	Amy D'Alessandro, Esq. Staff Attorney

On July 26, 2010, Deepwater presented Mr. Nickerson, Mr. Moore and Mr. Stahle for the purpose of providing rebuttal testimony in response to other parties' pre-filed direct testimony. In response to Toray's witness, Mr. Osada's assertion that the Commission should compare the pricing in the Amended PPA to the energy market rather than the standard offer service price, Mr. Nickerson stated that while this would be a common methodology, it is not consistent with the current law.³⁴⁰ Addressing Mr. Osada's reference to a report by the United States Department of Energy, Mr. Nickerson stated that it was an interesting report, but because it was published in 2007 and based on older data, in an industry that is changing rapidly, he believed the report was out of date.³⁴¹ With regard to Mr. Osada's reliance on the RI Winds Stakeholder Report from 2007, Mr. Nickerson stated that it, too, was dated and was a feasibility study which is simply an estimate of whether or not an idea is possible. He described it as a "basic

³⁴⁰ Tr. 7/26/10 at 18.

³⁴¹ *Id.* at 18-19.

screening of whether the project could possibly make sense.”³⁴² It does not reflect a real project with a developer putting development dollars and investment dollars at risk.³⁴³

Addressing the Attorney General witness, Mr. Short’s comparison of the proposed Project to a Cleveland project, similar to the RI Winds study, Mr. Nickerson testified that it was a feasibility study. Additionally, he distinguished the Cleveland project on the basis that it utilizes a less expensive monopile technology, is in 13-17 meters of fresh water as opposed to deeper salt water, and is smaller. Therefore, he maintained it does not meet the criteria of the current law.³⁴⁴ Addressing Mr. Short’s reliance on the Bluewater Wind project as a comparable, Mr. Nickerson reiterated his testimony from Docket No. 4111 with regard to the differences in size, location, and technology.³⁴⁵

Turning to Mr. Short’s assertion that the proposed Project as an intermittent resource will have a limited ability to reduce or back down fossil generation, Mr. Nickerson pointed to his direct and rebuttal testimony in Docket No. 4111, referring specifically to an ISO-NE chart that showed an expected correlation of off-shore wind production to the highest 20 load hours. Additionally, because ISO-NE’s annual market reports for 2008 and 2009 show that the majority of energy is generated by natural gas fired units while approximately four percent on the margin was coal fired units and approximately six percent was pumped storage, he disagreed with Mr. Short’s opinion that hydro units or pumped storage would be primarily displaced.³⁴⁶

³⁴² *Id.* at 19.

³⁴³ *Id.* at 20.

³⁴⁴ *Id.* at 21-22.

³⁴⁵ *Id.* at 22. Mr. Nickerson disagreed with Mr. Short’s comparison of the proposed Project to the Great Lakes’ project for the same reasons of location, technology and size. *Id.* at 25.

³⁴⁶ *Id.* at 23-25.

With regard to the Citizen Intervenors' witness, Mr. McCullough's comparisons to the proposed Project, Mr. Nickerson again argued that they were not of a similar size, location or technology. Additionally, Mr. Nickerson testified that Mr. McCullough had not taken into account the various subsidies provided to the comparables he had identified nor had he taken into account the effect of the various European feed-in tariffs.³⁴⁷ With regard to comparables identified by Mr. McCullough for projects that were operating, Mr. Nickerson stated that these were old projects with different technology and location whose costs do not include taxes, depreciation, or risk. In other words, they were not priced as if a private investor were constructing and operating them.³⁴⁸ Addressing Mr. McCullough's specific reference to the Alpha Ventus' receipt of a lower price, Mr. Nickerson testified, as he did in direct, that the Alpha Ventus project is twice as large and the utility purchasing the power has to design, permit, and construct the transmission line to connect the project to the shore.³⁴⁹

Mr. Moore testified that he did not agree that the savings to flow to ratepayers should be based on a base amount of \$219,403,512 because he did not agree with Mr. Hahn's assertion that the starting price in Docket No. 4111 was based on costs of \$219,403,512.³⁵⁰ According to Mr. Moore, "nothing in the statute...compels the transfer of a one-time snapshot view of our cost to build that...was submitted to the Commission...in response to a data request in 4111, nothing compels the use of that as

³⁴⁷ *Id.* at 26-35. Identifying certain of the comparables that appeared to be in the right size range, Mr. Nickerson stated that those projects were part of larger projects to be constructed in the future. *Id.* at 34.

³⁴⁸ *Id.* at 36-37.

³⁴⁹ *Id.* at 26-27.

³⁵⁰ *Id.* at 41-42, 44.

the base amount for the new contract.”³⁵¹ He maintained that because the 2009 PPA was based on a fixed price, it did not contain a base amount.³⁵²

He further stated that when Deepwater initially proposed an open book pricing methodology which was rejected by Grid, it utilized \$204 million as the target.³⁵³ He explained that the \$219 million provided to the Commission was based on its best estimate at the time and represented a “P-50 case”, or having a fifty percent chance of achieving the outcome.³⁵⁴ He indicated that the \$219 million contained substantial contingencies based on recommendations of Deepwater’s consultants in February 2010.³⁵⁵ This amount allowed Deepwater the opportunity to benefit by increasing its return if it realized cost savings in the construction costs.³⁵⁶

In response to questioning from the Bench, Mr. Moore responded that the price in the Amended PPA did not reflect the reduced construction cost estimate because Deepwater always believed it could build the project for less.³⁵⁷ He disagreed that the fixed price was based on a cost of \$219 million and stated that he “described the prices in the 4111 PPA as basically so aggressive as to make the project difficult to finance, and so we looked at that pricing in the context of the \$219 million estimate we got a substandard return, and so all along we assumed we had to get closer to 205 to make this a viable project.”³⁵⁸ He stated, “we never thought of [\$219] as a reasonable estimate of the cost to

³⁵¹ *Id.* at 41-42.

³⁵² *Id.* at 44.

³⁵³ *Id.* at 43-44. The difference between the original \$204 million and current \$205 million is due to an increased financing cost as a result of the Department of Energy’s rejection of Deepwater’s application for a loan guarantee. *Id.* at 51.

³⁵⁴ *Id.* at 44-45.

³⁵⁵ *Id.* at 45-46.

³⁵⁶ *Id.* at 46-48.

³⁵⁷ *Id.* at 48-49.

³⁵⁸ *Id.* 49.

build. That was not the number we expected to build at, the 219.”³⁵⁹ He stated that the \$205 million was not presented in Docket No. 4111 because the cost was based on Deepwater’s information six months ago and represented the P-50 understanding.³⁶⁰

Mr. Moore testified that Deepwater would not proceed with construction of the proposed Project if the expected cost was \$219 million because the expected unlevered return of 9.7% would be substandard for purposes of financing. Construction costs of \$205 million would yield a return of 10.5%, a return at which he hoped Deepwater “can get a project financed on this basis but it’s far from clear.”³⁶¹ Mr. Moore indicated that the Amended PPA contains a different level of risk for the developer than the 2009 PPA in that under the Amended PPA, there is no benefit flowing to the developer if there are cost savings whereas under the 2009 PPA, the developer could have realized a higher return.³⁶² He reiterated from his direct testimony that even at a base level of \$205 million, there is potential for further savings, although Mr. Moore noted that Deepwater had not yet signed any procurement contracts or construction services agreements as a result of not having an approved PPA in place.³⁶³

Mr. Moore characterized the \$219 million in Docket No. 4111 as an estimate and the \$205 base amount in this docket as a target. He stated that the \$219 million was not meant as a target for purposes of sharing savings with ratepayers, but rather, “a snapshot of our cost estimate at the time.”³⁶⁴ He stated that under the 2009 PPA, “it was our

³⁵⁹ *Id.*

³⁶⁰ *Id.* at 49-50.

³⁶¹ *Id.* at 52-53.

³⁶² *Id.* at 53.

³⁶³ *Id.* at 53-54. Mr. Moore stated that Deepwater had done some of the early negotiating, but had not “gotten into the meat of it because it’s really difficult to get the attention of vendors to engage in serious negotiation until you have a viable project, and without revenue certainty, it’s difficult to have those kind of conversation so they’ve yet to be had.” *Id.* at 54.

³⁶⁴ *Id.* at 59.

expectation that...the only way to make the \$219 million facility viable was to achieve savings that got the actual cost to complete well below 219 so that our 9.7 percent IRR would be much higher in the end.”³⁶⁵ He stated that Deepwater’s cap is an IRR of 10.5% and “any savings achieved during construction go to the ratepayer...”³⁶⁶

Addressing Deepwater’s motivation to realize further savings from the \$205, Mr. Moore reiterated his direct testimony that there are reputation and strategic reasons. He stated that:

In the first case this is not a one-off project. This project has so much risk and such a limited net present value for the equity investor that no company in their right mind would do this project as a one-off. This only makes sense in the context of the opportunity to do larger projects in the area.³⁶⁷

Therefore, according to Mr. Moore, Deepwater has “every incentive” to produce low cost energy in order to support the development of a larger industry “which is really the whole purpose of this demonstration project.”³⁶⁸ Additionally, Mr. Moore indicated that until there are actual negotiations with vendors, and even when they are in the process, a developer needs to attempt to get the lowest price in every area because many negotiations run parallel to each other and the developer does not know where costs will end up higher or lower than budgeted.³⁶⁹

Finally, addressing decommissioning, Mr. Moore clarified that Deepwater will assume responsibility for such costs and that the source of funding would be from sales under the Amended PPA. There would not be an additional source of revenues such as an adder to the PPA. Decommissioning has never been done or included in an offshore

³⁶⁵ *Id.* at 60.

³⁶⁶ *Id.*

³⁶⁷ *Id.*, at 54.

³⁶⁸ *Id.* at 54-55.

³⁶⁹ *Id.* at 55.

wind project permit. Therefore, he stated that Deepwater had some general idea of what might occur based on land-based projects. He testified that taking the turbines apart is fairly easy and that the big question is what will happen with the jacket foundations. He stated that they could be lifted off the sea floor, left in the ocean, or picked up and laid back down sideways as an artificial reef, depending on the preference of the permitting agencies.³⁷⁰

On July 27, 2010, Deepwater presented James Stahle for the purpose of providing rebuttal testimony in response to other parties' pre-filed direct testimony. Mr. Stahle adopted Mr. Pasqualini's direct pre-filed testimony in full and has been allowed as a substitute witness given Mr. Pasqualini's unavailability for cross-examination. Mr. Stahle first addressed Citizen Intervenors' witness, Mr. McCullough's statements regarding the ownership structure of Deepwater and the effect on the proposed Project financing. Mr. Stahle testified that the actual ownership of Deepwater "causes a lot more complexity in the transaction and makes it more problematic" because:

Historically, private equity funds and hedge funds are largely comprised of investors that are pension funds, that are foundations that are considered tax exempt for purposes of utilizing tax benefits, and it actually is very difficult to structure around those types of investors when considering renewable projects which are largely tax driven, particularly with respect to things like the grant proceeds as well as things like depreciation which are very valuable components of the capital structure. So I would say it's actually – it actually creates more complexity and much more difficulty given the nature of the benefactor of Deepwater.³⁷¹

With regard to Mr. McCullough's other assumptions regarding the financing of the proposed Project, Mr. Stahle suggested that Mr. McCullough was assuming a readily available source of capital at all levels of the transactional structure. He stated that this is

³⁷⁰ *Id.* at 56-59.

³⁷¹ Tr. 7/27/10 at 90.

not the reality in renewables. According to Mr. Stahle, mainstream investors are not attracted to these types of projects and therefore, one cannot assume that competitive financing is readily available.³⁷² Therefore, Mr. Stahle reiterated from Mr. Pasqualini's direct testimony that "when at the outset investors [are] looking to develop these projects," they analyze the unlevered rate of return because it allows them to determine the viability of a project without a distortion of variable parts of the capital structure which include debt and tax equity.³⁷³

Addressing RIAG witness, Mr. Short's testimony that the proposed Project should be compared to utility rates of return, Mr. Stahle maintained that such a comparison is irrelevant and not appropriate in this instance. He characterized Deepwater as an independent power producer who has to bear unexpected risks different from a utility. He stated that the unlevered return of the proposed Project at 9.7% would be very low for even onshore wind without the challenges of offshore projects. He referred back to earlier rebuttal where he opined that even 10.5% is lower than he would expect to see for projects such as that proposed by Deepwater.³⁷⁴

On July 26, 2010, Grid presented Mr. Milhous for the purpose of providing rebuttal testimony in response to other parties' pre-filed direct testimony. Addressing the Citizen Intervenors' witness, Mr. McCullough's testimony that the lack of a full cost review of the proposed Project by Grid renders the Amended PPA commercially unreasonable, Mr. Milhous disagreed because a comprehensive cost review of all elements of the proposed Project is unnecessary where this "is not a cost of service type endeavor" but rather, based on a negotiation process "to get the most reasonable price

³⁷² *Id.* at 91-93.

³⁷³ *Id.* at 93-94.

³⁷⁴ *Id.* at 95-99.

achievable.”³⁷⁵ With regard to Mr. McCullough’s criticisms of the non-price terms of the Amended PPA, Mr. Milhous stated that “they were in general an oversimplification and an overreaching effort to find problems that really don’t exist.”³⁷⁶

Specifically referring to the billing issue relative to capacity, Mr. Milhous stated that treatment of capacity in the Amended PPA was dictated by the law and the ISO-NE forward capacity market. He indicated that while the market rules allow a direct assignment of energy and RECs from a seller to buyer, there is no way to directly assign capacity to a buyer if the buyer is not a participant in the forward capacity market. He related a conversation with the ISO-NE director of market operations who verified that the solution as set forth in the Amended PPA seemed reasonable.³⁷⁷ Next, with regard to the credit support issue, Mr. Milhous stated that he believed Mr. McCullough was confusing the term capacity during operations with the ISO-NE capacity as it relates to the amount of revenue that could be generated under the forward capacity market. He stated that in the operational phase, “the capacity is defined in the PPA which is basically the capability to generate a specific amount of electricity at any point in time, something that could clearly be determined.”³⁷⁸ According to Mr. Milhous, this is a more inclusive definition which incorporates the ISO-NE definition, but does not solely depend only on it.³⁷⁹ Next, with regard to Mr. McCullough’s criticism that the termination provision does not specifically refer to the net present value of the contract, Mr. Milhous stated that because the Amended PPA requires the valuation to be based on a commercially

³⁷⁵ Tr. 7/26/10 at 67-68.

³⁷⁶ *Id.* at 68.

³⁷⁷ *Id.* at 68-70.

³⁷⁸ *Id.* at 71.

³⁷⁹ *Id.*

reasonable manner, it can only be interpreted as having a net present value calculation.³⁸⁰ Finally, with regard to the calculation of production hours for leap years, Mr. Milhous testified that such calculations are not standard in power purchase agreements and given the complexities associated with the Amended PPA related to the intermittent nature of the resource, the complexities of the forward capacity market and the wind outperformance provision, he saw no reason to further complicate it.³⁸¹ However, he maintained that just because a contract is complicated, that does not make it commercially unreasonable.³⁸²

On July 27, 2010, Toray presented Mr. Osada for the purpose of providing rebuttal testimony in response to other parties' pre-filed direct testimony. In response to EDC's Advisory Opinion, Mr. Osada criticized Mr. Parker's use of a software program which only considers positive data, not the associated costs. Thus, the economic benefit analysis did not consider the above-market cost or the cost to other existing businesses. He stated that the calculations do not consider that it will cost \$390 million in above-market costs to reap a benefit of \$129 million. He quipped that the findings are if you give me \$3.00, I will give you \$1.00 and the conclusion is that you should ignore this economic detriment and find that there are benefits.³⁸³ He stated that the benefits itemized in EDC's Advisory Opinion would not apply to Toray and opined that because EDC's Advisory Opinion did not take the costs to existing businesses into account, this is

³⁸⁰ *Id.* at 72-73.

³⁸¹ *Id.* at 73-74.

³⁸² *Id.* at 74.

³⁸³ Tr. 7/27/10 at 19-20.

not meeting the requirement of the law that the proposed Project will produce economic benefits.³⁸⁴

Addressing the environmental impact of the proposed Project as described in EDC's Advisory Opinion, Mr. Osada suggested that the amount of energy displaced was overstated because it was calculated based on the nameplate capacity of the proposed Project rather than the projected 40% capacity of the project.³⁸⁵ With regard to EDC's witness, Mr. Parker's testimony regarding the wind outperformance credit, Mr. Osada testified that even if the capacity factor was raised to 50%, the price reduction would still not be sufficient to offset the above-market price.³⁸⁶ Addressing Mr. Parker's testimony that ratepayers would realize an average savings of \$370,000 annually from a reduction in locational market prices ("LMPs"), Mr. Osada stated that based on his experience with the ISO-NE market and Mr. Parker's calculation of the LMPs, Toray would save \$4,400 annually.³⁸⁷ Finally, with regard to Mr. Moore's testimony that based on DEM estimates, 42,000 tons of carbon dioxide would be displaced, Mr. Osada stated that this is a positive environmental benefit, but urged the Commission not to ignore the economic cost of that benefit.³⁸⁸

On July 27, 2010, Toray and Polytop presented Dr. Mazze for the purpose of providing rebuttal testimony in response to other parties' direct pre-filed testimony. Addressing Mr. Moore's testimony with regard to the economic benefits that would result from the proposed Project, Dr. Mazze stated that these findings are highly speculative because "they assume that we have enough competitive benefits for companies to locate

³⁸⁴ *Id.* at 21-22.

³⁸⁵ *Id.* at 30-31.

³⁸⁶ *Id.* at 32.

³⁸⁷ *Id.* at 32-34.

³⁸⁸ *Id.* at 37-38.

in Rhode Island.” He continued that Deepwater is assuming that companies will locate in Rhode Island “even if the labor rates are not competitive,” and even if the labor force is not trained or experienced in this type of manufacturing.³⁸⁹

Addressing Mr. Moore’s reliance on the generation of indirect benefits from the multiplier effect of employment and local purchases related to construction activities for the proposed Project, Dr. Mazze suggested that the multiplier effect can apply to benefits such as the creation of jobs in other states and the use of suppliers in other states. He stated that the proposed Project, “which is a small project at best, it may create a few jobs and it may create some small indirect benefits, but it’s not going to have any significant impact on the Rhode Island economy.”³⁹⁰

Addressing the manner in which IMPLAN operates, Dr. Mazze stated that the results of the IMPLAN model is based on the inputs provided by the proponent of a project and therefore, it is hard to verify the data. He stated that the exercise is used to “add a certain amount of informational input to these projects.” However, the data is not input in a way related to a specific state, and in this case is based on an inexperienced company and information from others based on what “they believe may happen if they get the appropriate funding.”³⁹¹ With regard to EDC’s evaluation that the proposed Project would create \$129 million of economic benefits, Dr. Mazze questioned the analysis on the basis that the creation of 56 jobs for this amount would be “ridiculous”.³⁹² He stated that because EDC relied on unverified figures provided by the proponent of the

³⁸⁹ *Id.* at 41.

³⁹⁰ *Id.* at 42.

³⁹¹ *Id.* at 43-44.

³⁹² *Id.* at 45.

proposed Project, all of those numbers are speculative and therefore, the findings are based on such speculation rather than fact.³⁹³

Stating that Mr. Parker did not address any of the limitations of the IMPLAN model, Dr. Mazze reiterated that “it is difficult to measure an economic impact because you may very well attract or create jobs in Connecticut or Massachusetts” due to the close proximity and therefore, many of the indirect or induced benefits may go to the neighboring states when compared to Rhode Island.³⁹⁴ He offered that when using the three multiplier models, one must always note the limitations in each such model as “it makes no distinction between the size of the company...the availability of capital for the company to perform what it says it’s going to perform...[nor] does it consider the unique economic aspects for the region.”³⁹⁵ Again addressing the veracity of the results of the models, he testified that he was unaware of any situation where there has been an after-the-fact review to determine the accuracy of the models’ projections.³⁹⁶

Addressing the overall result as stated by Mr. Parker, Dr. Mazze stated that the proposed Project will create a minimum number of employees which is a significant multiplier in the model. “Because it is so significant, it basically creates a shadow over the value of the entire document.”³⁹⁷ Addressing the qualitative benefits as described by Mr. Parker, Dr. Mazze stated that those benefits had not been quantified and took issue with the premise that the proposed Project would meet the economic benefit goals set forth in the statute. For example, addressing the creation of jobs in the renewable energy sector, Dr. Mazze maintained that this was the “Providence Plan” initiated by President

³⁹³ *Id.* at 46.

³⁹⁴ *Id.* at 47.

³⁹⁵ *Id.*

³⁹⁶ *Id.* at 48.

³⁹⁷ *Id.* at 49-50.

Obama where many different organizations, at least 22, in the State of Rhode Island worked together to obtain a grant to train workers, primarily in solar installations on homes. Another, the TIGER grant, was “brought in by our federal delegation with the support of lots of organizations and agencies in the state” and should not be attributed just to Deepwater.³⁹⁸ He noted that the local universities have had renewable energy training programs in place for several years.³⁹⁹ Thus, he disagreed that the proposed Project had already led to the attraction of training and development funding.⁴⁰⁰

Further addressing relocation of businesses, Dr. Mazze stated that based on his experience as a Board member for a large manufacturing company, a business would look at “the tax, labor available, where [the] competition is located, the availability of suppliers, transportation facilities, and since [it is] in manufacturing, [it] would look at energy costs.”⁴⁰¹ The decision would be made based on those factors and whether the move would benefit the shareholders. According to Dr. Mazze, the cost of energy is one factor that businesses consider when making locational decisions. He noted that if a business is going to have a high input figure, the cost either needs to be passed along to customers or saved in other areas.⁴⁰² He stated, “if these businesses have to pay more for energy, what will happen is that these organizations that are paying more are going to have to either pass along the costs to their customers or they’re going to have to make decisions that may prohibit them from expanding.” Large companies, according to Dr.

³⁹⁸ *Id.* at 51-52.

³⁹⁹ *Id.* at 52.

⁴⁰⁰ *Id.* at 57-58.

⁴⁰¹ *Id.* at 53.

⁴⁰² *Id.* at 53-54.

Mazze, may ultimately make the decision to leave Rhode Island for more areas allowing them to be more competitive.⁴⁰³

With regard to the EDC Advisory Opinion regarding the benefits of being first to build offshore wind, Dr. Mazze argued that because of other projects going on, Rhode Island is not going to be first and stated:

At the end of the day, the value of this project is going to be how competitive it is to those that are going to participate in the construction and managing of it and to those that are going to use it. So I'm not convinced that this is going to put us in any better competitive position than we were in yesterday.⁴⁰⁴

Noting that Deepwater's own documents suggest a temporary workforce between 35 and 50 temporary jobs and six permanent jobs, Dr. Mazze took issue with EDC's Advisory Opinion which projected 100 jobs over the life of the proposed Project.⁴⁰⁵

On July 27, 2010, the RIAG presented Mr. Short for the purpose of providing rebuttal testimony to other parties' direct prefiled testimony. Mr. Short criticized the DEM Advisory Opinion for overstating the environmental benefits because DEM assumed that 1MW of wind would replace 1MW of fossil generation, something which he maintained is not true given the intermittent nature of wind. He stated that the intermittent nature forces units to operate at less than optimal levels and as such, it may increase emissions as the generators need to ramp up and ramp down in response to load fluctuations. This is particularly true where New England has few quick start units. As a result, according to Mr. Short, this could cause more emissions per unit than under optimal conditions. Reiterating his direct testimony, Mr. Short referred to the Texas results showing an increase in NO_x and SO_x and a slight decrease in carbon dioxide, but

⁴⁰³ *Id.* at 58-59.

⁴⁰⁴ *Id.* at 56.

⁴⁰⁵ *Id.* at 56-57.

not at a one to one ratio. He stated that the DEM Advisory Opinion also overestimated the environmental benefits because, referring to ISO-NE studies, he stated that there has been a significant decline in the emissions over the last eighteen years.⁴⁰⁶ Finally, with regard to the DEM Advisory Opinion, Mr. Short argued that DEM's use of the average marginal emissions rate is not the same as the marginal emissions rate because it is not weighted by unit.⁴⁰⁷

With regard to EDC's Advisory Opinion, Mr. Short criticized it for not including the above-market cost of the proposed Project. He stated that if one were to take the above-market cost at net present value and subtract it from the updated economic benefits proffered by the EDC Advisory Opinion, the result would be a value to Rhode Island's consumers/taxpayers/ratepayers of negative \$83 million on a net present value basis.⁴⁰⁸

XX. Cross-Examination Hearings

Following notice, public evidentiary hearings for purposes of conducting cross-examination were held on August 2-5, 2010 at the Commission's offices, 89 Jefferson Boulevard, Warwick, Rhode Island. The following appearances were entered:

FOR NATIONAL GRID:	Ronald T. Gerwadowski, Esq. Jennifer Brooks Hutchinson, Esq.
FOR DEEPWATER WIND:	Joseph A. Keough, Jr., Esq.
FOR NEW SHOREHAM:	Alan Mandl, Esq.
FOR CLF:	Jerry Elmer, Esq.
FOR TORAY & POLYTOP:	Michael R. McElroy, Esq.
FOR CITIZEN INTERVENORS:	Joseph McGair, Esq.

⁴⁰⁶ *Id.* at 72-77, 80-82.

⁴⁰⁷ *Id.* at 84.

⁴⁰⁸ *Id.* at 86.

FOR ATTORNEY GENERAL:	Michael Rubin, Esq.
FOR EDC:	Alan Shoer, Esq.
FOR OSPRI:	John Kupa, Jr., Esq.
FOR DIVISION:	Jon Hagopian, Esq. Special Assistant Attorney General
FOR COMMISSION:	Cynthia G. Wilson-Frias, Esq. Senior Legal Counsel
	Amy D'Alessandro, Esq. Staff Attorney

Deepwater presented Mr. Nickerson, Mr. Stahle, and Mr. Moore for cross-examination on August 2, 2010. Mr. Nickerson testified that the pricing structure in the Amended PPA caps Deepwater's IRR at 10.5%, but acknowledged that wind performance in excess of the assumed 40% capacity factor could increase the IRR.⁴⁰⁹ Mr. Nickerson agreed that while Grid is obligated to pay for 100% of the output of the wind farm, Block Island customers are projected to receive approximately 13% of the electrons.⁴¹⁰

He stated that when comparing the proposed Project to the various German projects, he added in to the German numbers an equivalent cost related to the transmission line between the proposed Project and Block Island, but not the cost from Block Island to the mainland. According to Mr. Nickerson, this cost estimate was provided by Deepwater.⁴¹¹ He stated that this adjustment was to compare the cost of delivering power to the delivery point under the Amended PPA to the cost of delivering

⁴⁰⁹ Tr. 8/2/10 at 5-8.

⁴¹⁰ *Id.* at 10.

⁴¹¹ *Id.* at 23.

power from the German projects to the respective delivery points.⁴¹² While not agreeing that the cost of the transmission cable from Block Island to the mainland should be included in the cost comparisons between the European projects and the proposed Project, Mr. Nickerson agreed that simply adding in the projected \$42 million cable cost would increase the proposed Project's installed cost above that of the other projects. However, he questioned the scope of the deviation between the regression line and the ultimate cost because of the length of the transmission line between Block Island and the mainland.⁴¹³ He stated on redirect that "[a]lthough I understand that a cable to the mainland is part of this process and the legislation, it is not a component of the [Amended] PPA and I'm trying to compare things with similar technology, location, [and] size on an apples-to-apples basis at a delivery point" which in this case is Block Island.⁴¹⁴ Mr. Nickerson indicated that while the statute does not specifically state that the proposed Project needs to be compared to others in water at least 30 meters deep, he interpreted location as including that depth.⁴¹⁵

When questioned regarding the portions of the Amended PPA he reviewed, Mr. Nickerson disagreed that the statute meant "all terms and conditions of the PPA" need to be commercially reasonable.⁴¹⁶ Next, Mr. Nickerson agreed that while there have been offshore wind projects in Europe for the past ten years, they have still not mastered the technology and still have much to learn.⁴¹⁷ With regard to his criticisms of Mr. McCullough's comparable projects, Mr. Nickerson agreed that while the European Feed-

⁴¹² *Id.* at 11-12.

⁴¹³ *Id.* at 12-14.

⁴¹⁴ *Id.* at 27.

⁴¹⁵ *Id.* at 15.

⁴¹⁶ *Id.* at 19.

⁴¹⁷ *Id.* at 21.

In Tariffs guarantee a revenue stream for new projects which could result in cost sharing among related projects, there was no guarantee that the second phase of the projects would be constructed.⁴¹⁸

Mr. Stahle testified that his job is to match investors to projects which meet certain threshold requirements such as a reasonable unlevered IRR.⁴¹⁹ He stated that at that point, the potential investors would engage third party analysts to conduct a line item audit on the project before deciding whether to invest.⁴²⁰ He stated that in reviewing a project, generally, financial advisors would expect the costs of a project to be higher than a base case model such as the sponsor model provided by Deepwater.⁴²¹ He reiterated that he had not assessed the validity of Deepwater's numbers but simply assessed them to determine if they met a threshold return.⁴²² He believed the base case included contingencies but stated that each project is fairly unique and therefore, no standard level exists.⁴²³ Although he had not reviewed things such as the operating expenses which he stated could affect the IRR (higher O&M expenses would equate to a lower IRR) or the impact of government subsidies, which could affect the cost of debt, he agreed that one must review all of the variables that affect the total return. Additionally, leverage would enhance the IRR, but the question is the cost of such debt.⁴²⁴ However, because these are not currently quantified, his role is to review the base case to come up with base

⁴¹⁸ *Id.* at 24-25.

⁴¹⁹ *Id.* at 63.

⁴²⁰ *Id.* at 35, 59-60.

⁴²¹ *Id.* at 33.

⁴²² *Id.* at 32, 35. In conducting this assessment, Mr. Stahle indicated that in reaching his conclusion regarding the threshold viability based, he had taken into account onshore wind because "that is the only baseline available today in the domestic U.S." and those are the types of projects institutional investors are providing capital for. *Id.* at 51.

⁴²³ *Id.* at 69.

⁴²⁴ *Id.* at 36-37, 62.

returns.⁴²⁵ He stated that the unlevered IRR is a starting point to assess the “potential viability of the project just from a pure economic standpoint [and] not with regards to the actual project’s attributes.”⁴²⁶

With regard to Deepwater’s ability to raise financing from the market in the form of debt and equity, he stated that typically, investors “want a fully baked project which means that it’s fully permitted, it’s actually to the point of construction where they can actually begin the civil engineering of the project.”⁴²⁷ He described Deepwater’s proposed Project to be in the late stage development category.⁴²⁸

Mr. Moore testified that the pricing contained in 2009 PPA was based on a cost of approximately \$219 million, that this was the only cost data provided to the Commission and Division in the Record in Docket No. 4111.⁴²⁹ He also conceded that the only figure he had provided in an email to the General Assembly was a cost figure of \$220 million.⁴³⁰ He argued that the \$220 million was a projection for discussion and not for purposes of the PPA.⁴³¹ He conceded in response to questioning from the Chairman that a typical recipient of his email to the General Assembly, reading just his document, would believe the cost of the proposed Project was \$220 million.⁴³²

However, he reiterated on multiple occasions that such a cost would not allow the proposed Project to achieve an adequate return and thus, he maintained that Deepwater never expected the proposed Project costs to be as high as \$219 million, even when Mr. Moore testified in Docket No. 4111. He characterized his testimony in the prior docket

⁴²⁵ *Id.* at 36-37.

⁴²⁶ *Id.* at 58.

⁴²⁷ *Id.* at 57-58.

⁴²⁸ *Id.* at 57.

⁴²⁹ *Id.* at 74-75.

⁴³⁰ *Id.* at 83-84.

⁴³¹ *Id.* at 84.

⁴³² *Id.* at 88.

as standing for the proposition that the IRR was unacceptable at the time and that the proposed Project would not succeed at that level. Furthermore, he testified that because the \$219 million included contingency costs which Deepwater would be able to utilize in order to raise its return where the Amended PPA requires all cost savings to be returned to ratepayers through reduced first-year pricing, it is unreasonable to require the use of the \$219 million as the cost to trigger savings to ratepayers. Finally, he maintained that despite the fact that Deepwater has yet to enter into any procurement or construction contracts, based on new staffing and more recent discussions with potential vendors, the \$205 million is an updated cost figure which is, like the \$219 million before, a P-50 estimate (probability of 50% of achieving the result), and is more accurate, although still involving contingencies.⁴³³ Finally, he asserted that despite the fact that the current estimated cost of the proposed Project is \$14 million less than the estimation provided in Docket No. 4111, there have been no cost savings because “[u]nder the definition of the new PPA, savings can only be achieved in terms of the actual costs to build. We haven’t built anything yet. We have not achieved any savings.”⁴³⁴ He further stated that the two different estimates “are budgetary estimates. They have no relationship to the cost savings as defined in the [Amended] PPA.”⁴³⁵ On redirect, he agreed with his counsel that the term “pricing” in the statute relates to Docket 4111, but that the cost is not.⁴³⁶

With regard to the differences in the proforma provided to the Commission in this docket and Docket No. 4111, Mr. Moore stated that the one provided in this docket included lower capital costs and an increase in Deepwater’s expense assumption based on

⁴³³ *Id.* at 102, 113-14, 126-28, 162-63, 188-89, 205-06, 213-14, 226-28.

⁴³⁴ *Id.* at 101.

⁴³⁵ *Id.* at 102.

⁴³⁶ *Id.* at 235.

an updated vendor quote, a smaller Investment Tax Credit grant, and higher expected insurance expenses. He confirmed that, contrary to Deepwater's response to Division Data Request 1-4, the estimated O&M costs had increased.⁴³⁷ He also testified that increased O&M expenses, other things being equal, will reduce the IRR for a given project.⁴³⁸

Addressing questions related to the location of new businesses in Rhode Island, Mr. Moore agreed that manufacturers of cable would most likely be highly energy dependent and conceded that Rhode Island's high electric costs could "theoretically" cause concern for those manufacturers. He agreed that Rhode Island's electric costs are higher than in other areas of the country.⁴³⁹ He agreed that with the exception of Deepwater's projections in Docket No. 4111, Deepwater had done no studies regarding economic benefits, instead choosing to rely on EDC's analysis.⁴⁴⁰ He agreed that mathematically, the \$390 million of estimated above-market costs in Docket No. 4111 are approximately three times the \$129 million of estimated economic benefits to the State of Rhode Island as calculated by EDC's witness.⁴⁴¹

Addressing the denial of the Department of Energy loan guarantee, Mr. Moore read from the denial letter which stated that one of the reasons for denial was a lack of a PPA for the utility scale wind project.⁴⁴² In response to further questioning regarding the reasons for denial, he agreed that when resubmitting an application for approval of a DOE loan, it will only be for the proposed Project rather than connected to the utility

⁴³⁷ *Id.* at 181.

⁴³⁸ *Id.* at 180.

⁴³⁹ *Id.* at 98-100.

⁴⁴⁰ *Id.* at 93-94.

⁴⁴¹ *Id.* at 119-20.

⁴⁴² *Id.* at 132-33.

scale project. He conceded that Deepwater will not have completed an on-site resource assessment, will not have committed to a turbine supplier, will not have completed the permitting and leasing, and will not have financing in place. However, Mr. Moore expressed confidence that because the application would only be for the proposed Project rather than a joint application for the proposed Project tied together with the utility scale project, Deepwater would be in a better position with DOE. He indicated that Deepwater had more wind data than before, that permitting in state waters is different from federal waters in that it could be a shorter timeframe, and that it should be easier to demonstrate an ability to raise the required equity for the smaller proposed Project than the utility scale project.⁴⁴³

Agreeing that approval of the Amended PPA does not guarantee that construction of the proposed Project will occur, Mr. Moore stated that there are numerous challenges including future decisions of permitting agencies regarding the construction windows, inability to obtain the DOE loan guarantee, inability to meet the deadline to qualify for the Investment Tax Credit. Some of these, he stated cause challenges, and some, like the inability to qualify for the Investment Tax Credit or achieve cost savings below \$219 million would cause Deepwater to abandon the project. However, the loss of the DOE loan guarantee does not result in automatic abandonment of the proposed Project, but makes it more difficult to obtain financing.⁴⁴⁴ He stated:

Abandonment of the development of this project is a possibility within the next two years if any number of factors come into play, but that's typical for a development project that has any number of different kinds of tax requirements or permit milestones. It's not all that unusual. Slightly higher risk in this case.⁴⁴⁵

⁴⁴³ *Id.* at 185-89.

⁴⁴⁴ *Id.* at 168, 192-95, 209-10. The value of the DOE loan guarantee at closing is approximately \$1,075,000 but this figure does not represent the overall cost savings over the life of the loan. *Id.* at 212.

⁴⁴⁵ *Id.* at 228.

Another concern related to this topic was the compression of the permitting process in this docket compared to that provided in Docket No. 4111. Mr. Moore stated that such a timeframe will present a challenge. For example, Deepwater will most likely be in a situation “no developer ever wants to be in” where it will be required to make the choice of whether to make down payments to suppliers prior to having all permitting in place. He could not currently predict whether Deepwater would make such an investment.⁴⁴⁶

When questioned about the non-price terms raised by Mr. McCullough, Mr. Moore stated that with regard to the forward capacity, credit terms and termination provisions, he agreed with Mr. Milhous’ interpretation as provided during Mr. Milhous’ rebuttal testimony.⁴⁴⁷ Addressing specific contract terms related to Appendix X to the Amended PPA, specifically the definition of “Cost,” Mr. Moore agreed that these were all costs that are part of the Total Facility Cost against which cost savings will be measured for purposes of determining the first year pricing. He agreed that the types of warranties that would be negotiated with suppliers would commence at the commercial operation date and would cover parts and whatever labor was negotiated. Therefore, he was unable to explain why the term “Cost” would include those costs incurred to perform warranty work. He confirmed that it was not designed to include projected future warranty work. He also agreed that if work was completed under warranty during the test period prior to commercial operation that by definition, it would not have costs associated with it. Additionally, with regard to the inclusion of costs incurred to reperform defective work, most contracts would contain language requiring the vendor who performed the

⁴⁴⁶ *Id.* at 167-68.

⁴⁴⁷ *Id.* at 181-83.

defective work to fix the problem at its own expense. Therefore, he could not explain the inclusion of that language either. He agreed that costs that would not be incurred by the developer should not be included in the definition of “Cost.”⁴⁴⁸

Grid presented Mr. Milhous for cross-examination. Mr. Milhous agreed that the Amended PPA will not provide direct financial benefits to Toray or Polytop. He also agreed that based on analysis provided by Jeanne Lloyd from the rates department at Grid, Toray will pay a little more than \$300,000 in the first year of the proposed Project’s commercial operation and approximately \$7 million over the twenty-year term of the Amended PPA under certain assumptions.⁴⁴⁹ He testified that while they will not financially benefit from the Amended PPA, typical residential ratepayers using 500 kWh per month will not experience rate shock from the 1.7% increase on their bills in the first year despite the fact that there are other less expensive renewable options available. He believed from the evidence in Docket No. 4111 that solar is more expensive than the proposed Project.⁴⁵⁰ He opined that whether Toray would experience rate shock as a result of its increase would be dependent upon Toray’s financial structure.⁴⁵¹

Updating the above-market costs associated with the Amended PPA, Mr. Milhous explained that based on data related to the South East Massachusetts (“SEMA”) load zone rather than the Rhode Island load zone, the above-market costs are now projected to be \$370 million in nominal dollars.⁴⁵² Under the Amended PPA, Mr. Milhous agreed that the pricing under the Amended PPA ties the pricing to the cost of the proposed

⁴⁴⁸ *Id.* at 169-75.

⁴⁴⁹ Tr. 8/3/10 at 26-28.

⁴⁵⁰ *Id.* at 42-43.

⁴⁵¹ *Id.* at 42, 95.

⁴⁵² *Id.* at 110-12. Mr. Milhous explained that the SEMA load zone was deemed to be a reasonable proxy because transmission congestion issues (which make costs higher) are expected to be resolved and updated Rhode Island data is still being gathered and analyzed. Additionally, he noted that the 2012 price has been reduced from \$235.75 to \$235.70 in the Amended PPA. *Id.* at 111-12.

Project. With regard to the current \$205 million cost estimate, Mr. Milhous testified that this was close to the estimate Grid was provided with during its negotiations with Deepwater in 2009.⁴⁵³ He stated that based on these costs, it was expected Deepwater would realize a 12% rate of return with pricing contained in the 2009 PPA.⁴⁵⁴ He clarified that the difference between the \$219 million and the \$203.9 million was based on the contingencies. However, in his initial calculations of the return, Mr. Milhous utilized the \$203.9 figure.⁴⁵⁵ He stated that from Grid's perspective, the reduction in the IRR related to the Amended PPA results from "the cost to construct, including construction financing cost, is now slightly up and two, the O&M costs are slightly up."⁴⁵⁶

He explained that the process by which the price would be reduced would be that the actual construction costs would be certified, they would be compared to the base amount and if the actual construction costs are lower than the base amount, they would be reduced in accordance with Schedule E attached to the Amended PPA. He estimated that a \$1,000,000 decrease in costs would result in a \$0.92/MWH reduction in price.⁴⁵⁷ At an expected annual output of approximately 100,000 MWH per year, the \$1,000,000 in cost savings would result in approximately \$93,000 of annual savings.⁴⁵⁸ He explained that

⁴⁵³ *Id.* at 57-58. He stated that it was not until negotiations for the Amended PPA that Grid was made aware that Deepwater had provided the Commission and Division with the \$219 million estimate in Docket No. 4111. *Id.* at 58, 102.

⁴⁵⁴ *Id.* at 101, 143.

⁴⁵⁵ *Id.* at 134-35.

⁴⁵⁶ *Id.* at 103.

⁴⁵⁷ *Id.* at 55. "It would basically be 1/5th of that interval that I just described if we're to do an interpolation." He agreed that this meant it would be \$4.60 divided by five. *Id.*

⁴⁵⁸ *Id.* at 49-50, 55.

any disputes regarding the final Total Facility Cost (“TFC”) Report would be resolved by the courts with Grid as a party to the proceeding.⁴⁵⁹

Addressing specific terms in Appendix X of the Amended PPA, specifically the reconciliation provision which states, “[a]ny amount owed to Seller or Buyer as a result of the reconciliation shall be paid to the other party in accordance with the billing and payment terms of the agreement together with interest on such amount accruing at the late payment rate”, Mr. Milhous confirmed that the reconciliation process of costs could not result in amounts owed to Seller. He stated that this provision was inserted so that the amounts due to Grid as a result of the reconciliation could be netted against any amounts due to Deepwater for power sales in the same month.⁴⁶⁰

Attempting to address the provisions in the definition of “Cost” contained in Appendix X, Mr. Milhous suggested that the warranty work was meant to encompass costs incurred by Deepwater for work not covered by warranty, but agreed that such work would not constitute “warranty work.”⁴⁶¹ When asked a hypothetical of whether there were any provisions in Appendix X to address a situation where Deepwater was required to perform work in order to meet the in service deadline but would then be able to submit a claim against either warranty, a vendor who performed defective work, or an insurance policy which may provide reimbursement to Deepwater after the reconciliation of costs, Mr. Milhous stated that “we’re really not at that level of detail. I think that’s something that would have to be worked out at the time the TFC report was prepared.”⁴⁶² He agreed that it would be a “cost incurred” and thought that the verification agent could include it

⁴⁵⁹ *Id.* at 109-10.

⁴⁶⁰ *Id.* at 82-83.

⁴⁶¹ *Id.* at 84-86.

⁴⁶² *Id.* at 88, 108.

in his or her report, but did not respond as to whether there would be any additional credits to ratepayers.⁴⁶³ He stated that “in theory” ratepayers should not have to pay such costs which Deepwater incurs but which it may ultimately receive payment for. While stating that this was a very specific scenario, he did not think it was an unreasonable hypothetical, characterizing it as “a possibility.”⁴⁶⁴

The Division presented Mr. Hahn for cross-examination. Mr. Hahn indicated that when he performed his IRR analysis in Docket No. 4111, it was based on the figures with which he was provided in Commission Data Request 1-17. He stated that the construction costs were above \$205 million. He indicated that if Deepwater had provided him with the same O&M estimates but lower construction costs, the IRR he had calculated would have been even higher.⁴⁶⁵ He explained that “if O&M estimates are lowered and everything else being equal, then the internal rate of return will increase, and if the O&M costs are increased, the estimate of the IRR will decrease, so they’re inversely related.”⁴⁶⁶ Mr. Hahn confirmed that his recollection of Docket No. 4111 was that the figure \$203.9 million was never provided as the cost of the proposed Project. He did not doubt that it was the figure Mr. Milhous relied on, only that it was not in the record.⁴⁶⁷ In his opinion, the difference between the costs in this docket and the costs in Docket No. 4111 was a very important point and that is why he recommended to the Division that they address it. He stated that he has not assessed economic benefits, and

⁴⁶³ *Id.* at 87-90.

⁴⁶⁴ *Id.* at 90.

⁴⁶⁵ *Id.* at 142-143.

⁴⁶⁶ *Id.* at 145.

⁴⁶⁷ *Id.* at 166.

that such assessment is not in his expertise. Therefore, he did not provide testimony on those issues.⁴⁶⁸

With regard to the IRR analysis he performed in this docket in response to a Commission Data Request, he stated that it was different from the Docket No. 4111 analysis because he used all of Mr. Stahle's assumptions. In Docket No. 4111, the largest factor affecting his IRR analysis and the difference from Deepwater's IRR analysis was the treatment of the cash grant. Mr. Hahn testified that he assumed it would be available as additional cash flow, while Deepwater assumed it would be used to pay down debt. Deepwater's assumptions remained in Mr. Stahle's analysis and Mr. Hahn's calculations were based on those assumptions in this docket. When questioned as to why his IRR results compared to Deepwater's deviate more as leverage increases, Mr. Hahn opined that it would most likely result from a difference in opinion between he and Mr. Stahle regarding the debt coverage ratios.⁴⁶⁹ With regard to the appropriateness of relying on an unlevered rate of return, Mr. Hahn indicated that he had not seen that this is the standard upon which investors judge a project outside of the initial review, but conceded that Mr. Moore may be correct. He disputed the appropriateness on the basis that in reality, large projects are financed with debt as well as equity and using the leveraged rate of return better reflects reality.⁴⁷⁰

Citizen Intervenors presented Mr. McCullough for cross-examination. Mr. McCullough testified that he was retained to review the entire Amended PPA for commercial reasonableness and not just the amended portions. He posited that it did not matter whether the Commission had found the terms to be reasonable in Docket No.

⁴⁶⁸ *Id.* at 168.

⁴⁶⁹ *Id.* at 146-53.

⁴⁷⁰ *Id.* at 163-64.

4111, because if they are not clear to an experienced power market analyst now, then the contract is not a sound document. Furthermore, the terms he criticized would render the Amended PPA commercially unreasonable. He noted that if the provisions appear clear on their face, it will not matter what the parties agreed to outside of the Amended PPA if the provisions are challenged.⁴⁷¹

With regard to Exhibits A and E to the Amended PPA setting forth the description of the facility, Mr. McCullough testified, “[m]y criticism of this was simply that for a large expenditure we don’t have a good idea of a technology, the number of turbines, the actual megawatts, and that appears to be true regardless of what version we’re in.”⁴⁷² He pointed out that “a change in the turbines will change the megawatts and the megawatts will change the operation of two other portions of the contract and change the economic balance of the contracts significantly.”⁴⁷³ He expressed concern that because it affects the relationship of the cost to the pricing components, it is important. He stated that this provision alone may not render the entire PPA commercially unreasonable but because it is a building block, the change could affect the cost and the pricing.⁴⁷⁴ He conceded that he had not reviewed the equivalent provision in the Bluewater Wind PPA regarding the description of the project as part of his review of the Amended PPA and after reviewing it on the stand, testified that the description was not as detailed as he was discussing. He later testified that he had not been asked to review it for commercial reasonableness.⁴⁷⁵

⁴⁷¹ *Id.* at 180, 184-85, 205

⁴⁷² *Id.* at 178.

⁴⁷³ *Id.* at 192-93.

⁴⁷⁴ *Id.* at 192-93.

⁴⁷⁵ *Id.* at 200, 212.

Addressing the termination provisions and the lack of language requiring a net present value analysis and the fact that it was not changed in the Amended PPA, Mr.

McCullough stated:

The question of the vintage of the language doesn't affect my opinion. This is a section that lacks the time value of money, therefore, it creates a windfall opportunity for a party in the case of termination and whether or not it was an earlier or later version, it poses a problem in terms of commercial reasonableness.⁴⁷⁶

He testified that if asked prior to execution of the contract, he would have included the language in the provision, but because there are other acceptable means to determine liquidated damages, he would not accept the proposition that it would be commercially unreasonable not to provide a net present value calculation in the absence of clear language requiring it be done. He stated that rather than relying on a sentence that required the parties to apply the provision in a "commercially reasonable manner," the provision should clearly include the language. He stated that while a good legal argument may be able to be made in litigation over the meaning of the term, it should have been "drafted with sufficient care to avoid problems down the line." He stated that "if our judgment is whether or not this is an iron-clad document for a new technology, for an LLC with unknown ownership and credit resources, for a cost basis that we have yet no clear answer in, no, I would say that is [a] very bad piece of contract language."⁴⁷⁷

With regard to Appendix X, Mr. McCullough testified that his concern here was that the \$205 million estimate appeared to be based on certain equipment which is not included in the description of the Project within the Amended PPA. Therefore, he opined

⁴⁷⁶ *Id.* at 180.

⁴⁷⁷ *Id.* at 184.

that “if Deepwater Wind chooses to change the equipment and increase the size of the project, it will be able to evade returning some of that money to ratepayers.”⁴⁷⁸

Expressing overall concern with the cost figures, Mr. McCullough agreed with the characterization of his testimony that the costs are designed to result in a desired IRR. He testified that he would prefer to rely on cost estimates based on solid engineering models, a standard construction schedule, and costs during construction, which include the actual components of the cost. He expressed concern that the cost basis upon which pricing would be reduced is based on a variety of assumptions and proformas with differing cost estimates with no real explanation of the basis for the changes.⁴⁷⁹ He stated that “the law says we’re supposed to be looking at terms and prices and we don’t know where the prices are coming from.”⁴⁸⁰

RIBCTC presented Mr. Sabitoni for cross-examination. He stated that he had not thought about the impact on a customer like Toray and had focused on the impact to residential ratepayers. He stated that any rate increase in the current economy is difficult but he believed the potential benefits from the proposed Project would make such costs worth it. He did not know whether a \$300,000 increase is a substantial amount to Toray. With regard to the TIGER grant, Mr. Sabitoni indicated that approval of the grant was not for the proposed Project alone, but that resources had been allocated to the offshore wind industry. While he did not think the State would lose the grant money if the proposed Project were not approved, Mr. Sabitoni questioned whether there were milestones within the grant award that would be hard for the State to meet without the proposed Project.⁴⁸¹

⁴⁷⁸ *Id.* at 208.

⁴⁷⁹ *Id.* at 209-212.

⁴⁸⁰ *Id.* at 210.

⁴⁸¹ *Id.* at 4-17.

Toray and Polytop presented Dr. Mazze for cross-examination. Dr. Mazze agreed that in 2008, he had conducted an analysis using an input-output model called RIMS, similar to IMPLAN for Bluewater Wind estimating the potential economic benefits to the State of Rhode Island of a large scale offshore wind project off the coast of Rhode Island.⁴⁸² In the Bluewater Wind analysis, Dr. Mazze concluded that the proposed offshore wind project would produce many economic development benefits for the State of Rhode Island.⁴⁸³ He did not include the Bluewater Wind analysis in his curriculum vitae because, he explained, he only includes such projects with the agreement of the project sponsor. Confidentiality agreements such as the one he signed when reviewing the Bluewater project did not allow him to disclose his work.⁴⁸⁴ He was unaware that the results of his analysis had been presented to the State of Rhode Island by Bluewater Wind as part of its bid to the State to become the preferred developer of offshore wind projects because Bluewater Wind never provided him with a copy of the full report that it presented to the State of Rhode Island.⁴⁸⁵

When asked about the location in his report of the limitations of RIMS, he explained that the assumptions listed in his report suggest the limitations.⁴⁸⁶ He distinguished his analysis for Bluewater from the analysis provided by EDC on the basis that the purpose of the Bluewater Analysis was to respond to a Request for Proposals rather than serve as testimony before a public utilities commission. He agreed that he would not tailor a report for a specific purpose.⁴⁸⁷ However, while the objective for the

⁴⁸² *Id.* at 37-38.

⁴⁸³ *Id.* at 63-66.

⁴⁸⁴ *Id.* at 87-88, 126-28. The company that hired him in 2008 has since gone bankrupt. Thus he never obtained a release. *Id.* at 128.

⁴⁸⁵ *Id.* at 28, 70.

⁴⁸⁶ *Id.* at 45-48.

⁴⁸⁷ *Id.* at 58.

project may have been stated in the same way for the Bluewater report and EDC's report on Deepwater, he stated that a report for an unidentified project has a different purpose than a report for a project that is before the Public Utilities Commission with costs and annual escalators.⁴⁸⁸ He stated that if he had known the projected costs and prices to consumers from the Bluewater project, he may have included them in that report; however, he was never provided with any of the power costs, nor did he ask for the costs and prices.⁴⁸⁹

When questioned about his conclusions in the Bluewater report regarding the benefits to Rhode Island from the offshore wind project, including leadership in the offshore wind industry, additional training opportunities, creation of jobs, increased tax revenues, and reduced reliance on fossil fuels and the discrepancy of these conclusions to his conclusions regarding Deepwater's proposed Project, he stated that economic circumstances have changed since 2008 and he no longer believes Rhode Island can position itself this way.⁴⁹⁰ With regard to statements in his report regarding the number of jobs that could be created compared to his statements in this docket regarding the number of jobs and his related skepticism, Dr. Mazze pointed out that the Bluewater proposal was very different from Deepwater's proposed Project.⁴⁹¹ He stated that had Bluewater Wind won the bid with the State and he was testifying for them, the first thing he would have done is update the analysis he had run, particularly where the size of the project had been reduced.⁴⁹²

⁴⁸⁸ *Id.* at 93-94, 131.

⁴⁸⁹ *Id.* at 60-62.

⁴⁹⁰ *Id.* at 50, 63-65.

⁴⁹¹ *Id.* at 74, 128-31.

⁴⁹² *Id.* at 118-19.

Dr. Mazze agreed that it is possible to perform a valid economic analysis without including rate increases.⁴⁹³ He testified that the input-output models have no way to build in above-market costs, the loss of an entire industry, or an overall change in the economy.⁴⁹⁴ He stated that they will always produce a positive number and only provide the benefit for the first year and are designed to produce the most positive outcome.⁴⁹⁵ He stated, “[y]ou cannot use the models to project out that over the next 20 years the economic benefits are going to be, you know, 20 years times whatever number you see...as the result of any one particular project.”⁴⁹⁶ He agreed that these models are designed to look at the benefit of one project while ignoring the impact on other sectors of the economy.⁴⁹⁷ He agreed that “if the money is being expended by consumers inside your state, then the argument is that you’ve just redirected discretionary income where people might have bought other products and services..., stating “you’re right, you’ll be trading \$1 for another dollar.”⁴⁹⁸ He noted that the models do not take into account the desire to attract a heavy user of electricity to Quonset Park nor do they include alternative sources of energy.⁴⁹⁹

Using the March 2010 flood in Rhode Island, he explained that there are positive economic benefits that flowed from that event, but they will not have a lasting effect.⁵⁰⁰ Explaining why the input-output models are used and generally accepted, he stated that one purpose is “when you’re developing a new project and you’re trying to win support

⁴⁹³ *Id.* at 97.

⁴⁹⁴ *Id.* at 101.

⁴⁹⁵ *Id.* at 120.

⁴⁹⁶ *Id.* at 101.

⁴⁹⁷ *Id.* at 101-03.

⁴⁹⁸ *Id.* at 149-50.

⁴⁹⁹ *Id.* at 121-22.

⁵⁰⁰ *Id.* at 103-04.

and maybe request it.” Another example is when an existing business in Rhode Island desires to expand and wishes to run the analysis using real figures.⁵⁰¹

Dr. Mazze stated that use of these models for a new project or industry should be a starting point with many other factors being part of the decision of whether to move forward.⁵⁰² He indicated that businesses would be looking at a variety of cost factors such as transportation, energy, permitting, licensing and taxes when deciding whether to locate in Rhode Island. He stated that because most businesses are seeking to maximize profits, these types of models would not be particularly valuable to them except to the extent they may be seeking something from the lawmakers such as tax breaks.⁵⁰³

Addressing Attachment 2 to Mr. Parker’s Advisory Opinion (a list of jobs purportedly created from the proposed Project), Dr. Mazze agreed that based on the figures provided therein, it appeared that of the 111 jobs Mr. Parker estimated would be created in 2010, approximately 30%-31% would be created in Rhode Island. Using the same Attachment, of the total 187 jobs that would be created, 58 would be in Rhode Island, again, approximately 31%. In 2012, of the 292 jobs that would be created, approximately 42% would be in Rhode Island, or 122.⁵⁰⁴

Toray presented Mr. Osada for cross-examination. Mr. Osada testified that Toray’s annual utility costs including gas, electricity, nitrogen, and carbon dioxide is approximately \$24 million.⁵⁰⁵ He agreed that Toray has a policy to invest in projects designed to reduce carbon dioxide in order to be a good corporate citizen. He indicated that while these projects result in an incremental cost to Toray, it is important to engage

⁵⁰¹ *Id.* at 104-05.

⁵⁰² *Id.* at 110.

⁵⁰³ *Id.* at 123-26.

⁵⁰⁴ *Id.* at 114-15.

⁵⁰⁵ *Id.* at 154-55.

in environmental cooperation.⁵⁰⁶ However, he cautioned, “you cannot ignore the cost to reduce the carbon dioxide.”⁵⁰⁷ Toray has also applied for stimulus funds to construct small on-site renewable energy projects. He explained that the decision to engage in this type of investment is multi-factored and includes starting with the construction estimate and then determining an appropriate IRR and payback period. Toray also looks at the level of reduction of its carbon footprint from the project. Toray then calculates the amount of EDC and federal stimulus dollars it would require to meet the desired IRR.⁵⁰⁸

With regard to the cost impact from the Amended PPA on Toray, Mr. Osada testified that Toray is already at a disadvantage compared to its competitors in southern states. These competitors can take advantage of lower electricity costs than Toray in Rhode Island.⁵⁰⁹ He indicated that there is a proposal for an expansion project in the planning stage. He stated that it is difficult to say whether the project would be canceled given its early stage. With regard to other potential expansion projects, Mr. Osada testified that while Toray may not make a definitive decision never to expand in Rhode Island if the Commission approves the Amended PPA, the electric costs would be a major factor in the determination. He stated that Toray’s decision to expand includes a review of its electric prices in Rhode Island compared to those in other states.⁵¹⁰

With regard to the effect of the cost impact to Toray as a result of the Amended PPA, on cross-examination, Mr. Osada testified that he had testified before the House and Senate committees when the bill was being considered. He stated that he had advised the committees that he believed the cost impact would be \$260,000 with a \$7 million impact

⁵⁰⁶ *Id.* at 157-60.

⁵⁰⁷ *Id.* at 160.

⁵⁰⁸ *Id.* at 160-61, 201-205.

⁵⁰⁹ *Id.* at 162.

⁵¹⁰ *Id.* at 167-173, 175, 181-82.

over the 20-year term of the proposed project. He stated that the situation had not changed since that testimony.⁵¹¹

EDC presented Mr. Parker for the purpose of cross-examination on the Pre-Filed Testimony and Advisory Opinion. Mr. Parker testified that the IMPLAN model “is a good standard analytic tool that, when used correctly, provides useful results, but again, my caution is that you can’t just blindly accept those results.”⁵¹² He agreed that the model is not designed to recognize the impact of external electricity prices, whether higher or lower.⁵¹³ Therefore, it did not consider the effect of higher electricity prices on Rhode Island’s municipalities.⁵¹⁴ He clarified that of the \$205 million in costs associated with construction of the proposed Project, only \$42 million was allocated to Rhode Island.⁵¹⁵ He opined that neither the TIGER grant nor the Providence Plan is contingent upon approval of the proposed Project, noting that they had already been awarded.⁵¹⁶

With regard to his analysis of various “secondary impacts”, Mr. Parker stated that all of his analyses “stands on their own.”⁵¹⁷ He did not attempt to weigh them all together with the cost of the power, stating, “I leave the unenviable task of trying to weigh them all to the Commission.”⁵¹⁸ He agreed there may be additional costs associated with balancing the generation system, including those associated with installed reserves, but could not quantify the level.⁵¹⁹ Addressing the differences between his

⁵¹¹ *Id.* at 191-93.

⁵¹² *Id.* at 286.

⁵¹³ *Id.* at 287.

⁵¹⁴ Tr. 8/5/10 at 50.

⁵¹⁵ *Id.* at 60.

⁵¹⁶ *Id.* at 82.

⁵¹⁷ Tr. 8/4/10 at 283-84, Tr. 8/5/10 at 28.

⁵¹⁸ Tr. 8/5/10 at 28.

⁵¹⁹ Tr. 8/5/10 at 36.

price suppression results and those of Charles River Associates, he could not determine the reason they were so large.⁵²⁰

OSPRI presented Mr. Lively for cross-examination. He is not an economist by training and did not conduct any studies regarding the economic impacts upon which he testified. Clarifying his concerns regarding the verification agent's role as set forth in the Amended PPA, Mr. Lively stated that there is nothing that allows the verification agent to determine with certainty that the costs being charged to the project were actually incurred as part of the project.⁵²¹

The RIAG presented Mr. Short for cross-examination. During the course of cross-examination, Grid moved to strike several portions of the Pre-Filed Testimony on the basis that Mr. Short was not qualified as an expert in those areas. The Motion to Strike was granted with regard to the discussion of cost of capital.⁵²² Another Motion to Strike was granted with regard to Mr. Short's testimony regarding the potential job loss to the State of Rhode Island as a result of the proposed Project.⁵²³

XXI. Briefs

During the course of the proceedings, it became clear to the Commission that the parties were operating under two different interpretations of two separate provisions of the 2010 amendments to R.I. Gen. Laws § 39-26.1-7(c). As a result, in order to assist the Commission with its review of these two provisions, the Commission issued the following two briefing issues:

⁵²⁰ *Id.* at 51-52.

⁵²¹ *Id.* at 106-07.

⁵²² *Id.* at 125-26.

⁵²³ *Id.* at 149.

- (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. Gen. Laws § 39-26.1-7(e); and
- (2) The proper interpretation of R.I. Gen. Laws § 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.

The positions of the parties regarding the appropriate interpretation were of no surprise to the Commission. The Briefs provided by Deepwater and Grid were in support of the proposition that the Amended PPA did comply with R.I. Gen. Laws § 39-26.1-7 using a base price of \$205,403,512 rather than the \$219,311,412 provided to the Commission as a construction estimate in Docket No. 4111. In addition these parties, together with EDC argued that there was no requirement, and in fact, that the Commission could not take into account above-market costs in determining whether the Amended PPA would result in economic development benefits to Rhode Island.

Conversely, Toray & Polytop, the RIAG, the Division and OSPRI argued that R.I. Gen. Laws § 39-26.1-7(e) required Deepwater to utilize as its base amount, against which savings would be measured, the estimate which was provided in Docket No. 4111 rather than the new estimate in the current docket. In addition, Toray & Polytop, the RIAG, and OSPRI argued that the Commission may take into account the above-market costs and whether there is any negative effect on existing businesses when determining whether the Amended PPA would likely provide economic development benefits to the State of

Rhode Island.⁵²⁴ Citizen Intervenors concurred with the Briefs of Toray & Polytop, the RIAG and the Division.⁵²⁵

A. Question One:

In its Brief, Deepwater pointed out that the Amended PPA includes a provision to reduce the first year price in the event certain costs fall below \$205,403,512.⁵²⁶ Deepwater also noted that the Amended PPA provides that the price in the initial year is “equal to ‘the initial fixed price in the signed power purchase agreement submitted in docket 4111.’”⁵²⁷ Next, Deepwater argued that unlike the language in the law linking the pricing to Docket No. 4111, there is no corresponding law to link the cost to Docket No. 4111.⁵²⁸ Therefore, Deepwater argued that the legislature expressed its intent not to link the construction costs against which savings are to be measured to those provided to the Commission in Docket No. 4111. Deepwater stated that “realized savings are measured against actual cost, not construction cost estimates.”⁵²⁹ Therefore, one must apply the “target construction budget” set forth in this docket rather than the estimates in Docket No. 4111. Next, even recognizing that the only figure that was disclosed in Docket No. 4111 as the estimated cost of the proposed Project was \$219,311,412, Deepwater argued that because Mr. Moore testified that the proposed Project could not be constructed for that amount, using anything other than the \$205,403,512 would lead to a thwarting of the

⁵²⁴ The Division did not weigh in on briefing question number two.

⁵²⁵ “Citizen Intervenors” Affirmation and Adoption of the Briefs Filed by Toray Plastics (America), Inc. and Polytop Corporation, the Division of Public Utilities and Carriers, and Patrick Lynch, Attorney General Regarding RIGL § 39-26.1-7(c) in Lieu of a Brief.

⁵²⁶ Deepwater’s Brief at 2.

⁵²⁷ *Id.* at 2, *quoting* R.I.G.L. 39-26.1-7(e)(ii).

⁵²⁸ *Id.* at 3-4.

⁵²⁹ *Id.* at 4.

General Assembly’s intent for the proposed Project to advance the goal of offshore wind projects.⁵³⁰

In its Brief, Grid maintained that the Commission is not bound to rely on the cost estimates Deepwater provided in Docket No. 4111, noting that Mr. Milhous testified that Grid always believed that the 2009 PPA pricing was based on a cost estimate of approximately \$204 million based on the financial model Deepwater provided to Grid during the Fall 2009 negotiations.⁵³¹

In their Brief, Toray & Polytop (“Toray”) argued that because the General Assembly referenced Docket No. 4111 at least five times in R.I. Gen. Laws 39-26.1-7, as amended in 2010, it was clearly mandating that the Commission use the evidence from Docket No. 4111 as its starting point for reviewing the Amended PPA. Toray noted that the General Assembly granted automatic party status in this docket to those who were parties to Docket No. 4111. Additionally, Toray noted that the only cost estimate the General Assembly had before it when debating the law was the \$220 million figure provided by Deepwater. Therefore, Toray maintained that the only logical reading of the statute “is that ‘all realized savings’ must be ‘allocated to the benefit of ratepayers’ and ‘shall reduce [the Docket 4111] price’...mandates that the savings calculation must be made with specific reference to the cost and other evidence produced to the Commission in Docket 4111, including the construction cost estimate of \$219,311,412....” that Deepwater previously provided to the Commission.⁵³² Any other interpretation, according to Toray, would frustrate the legislative intent to pass all cost savings on to

⁵³⁰ *Id.* at 4-6. Deepwater also states that it would be inappropriate to utilize the \$219 million figure because Deepwater was not required to share savings in the 2009 PPA as it is now. *Id.* at 4.

⁵³¹ *Id.* at 5-6.

⁵³² Toray & Polytop Brief at 1-2.

customers by allowing Deepwater to retain the first \$14 million of such savings before ever sharing a single dollar.⁵³³

In its Brief, the RIAG argued that because the only construction estimate presented to the Commission in Docket No. 4111 was approximately \$219 million, that the only construction estimate provided to the General Assembly was \$220 million, and that “the figure of \$219 million was a major driver of (factor in establishing) the bundled price of 24-plus cents/kWh...the decrease must be measured from \$219 million not, as co-applicants attempt, from \$205 million.”⁵³⁴

In its Brief, the Division stated that while the Amended PPA does contain a price reduction mechanism, the mechanism does not operate to “allocate[e] all savings to the benefit of ratepayers” nor “provid[e] for any realized savings reducing the docket 4111 capped price, as provided by the statute.”⁵³⁵ Setting forth what the Division described as the salient facts, the Division noted that the 2009 PPA included a bundled price for power of \$235.75 per MWH in 2012 while the Amended PPA includes a bundled price for power of \$235.70 per MWH in 2012, an “immaterial difference.” According to the Division, the corresponding estimate of capital costs including contingencies is \$219,311,412 which was associated with the 2009 PPA. In this Docket, Deepwater confirmed that the pricing in the 2009 PPA was based on the \$219,311,412. Furthermore, Deepwater never presented a different cost estimate as part of the record in Docket No. 4111. However, under the Amended PPA, the 2012 price will not be lower than \$235.70 per MWH unless the total facility cost is less than \$205,403,512.⁵³⁶

⁵³³ *Id.* at 2-3.

⁵³⁴ RIAG’s Brief at 8-9.

⁵³⁵ Division’s Brief at 3.

⁵³⁶ *Id.* at 3-5.

The Division maintained that it is clear that the language of R.I. Gen. Laws 39-26.1-7(e)(i) and (ii) links the pricing from Docket No. 4111 “to the estimated project costs underlying the [2009] PPA prices. It further seems clear that the legislature expected the price reductions to capture savings for the benefit of ratepayers if the project cost comes in below that aforementioned estimate.”⁵³⁷ Relying on Deepwater’s own testimony in Docket No. 4111, the pricing was based on \$219 million.⁵³⁸ Furthermore, the Division stated that Grid’s filing letter in this docket suggests that the Amended PPA pricing mechanism “requires the price to be reduced to the extent that the project costs are lower than originally estimated.”⁵³⁹ The Division noted that the only estimate provided to the Commission was that of \$219 million.⁵⁴⁰

Finally, the Division maintained that the two provisions of R.I. Gen. Laws 39-26.1-7(c) and (e) are clear that “the price reduction is triggered ‘if savings can be achieved in the actual costs of the project pursuant to subsection 39-26.1-7(e),’ which price in the signed PPA ‘submitted in Docket 4111 shall be the maximum initial price, and any realized savings shall reduce such price.’”⁵⁴¹ Thus, according to the Division, the only way to read these two subsections in harmony is to reduce the 2012 price if the costs upon which that price was originally based, \$219 million, are reduced during construction.⁵⁴²

⁵³⁷ *Id.* at 5.

⁵³⁸ *Id.*

⁵³⁹ *Id.* at 6, n.33 [sic].

⁵⁴⁰ *Id.* at 4, 5, 6.

⁵⁴¹ *Id.* at 6.

⁵⁴² *Id.*

Question 2:

In its Brief, Deepwater argued that R.I. Gen. Laws 39-26.1-7(c)(iii) which requires the Commission to find that the Amended PPA will “provide economic development benefits” including ““facilitating new and existing business expansion and the creation of new renewable energy jobs; the further development of Quonset Business Park; and, increasing the training and preparedness of the Rhode Island workforce to support renewable energy projects,”” “only requires a finding that the Amended PPA provides economic development benefits” without any mention of related costs. Deepwater contrasted this to the review of the utility scale project provided for in R.I. Gen. Laws 39-26.1-8 which addresses the ““economic impact and potential risks, if any, of the proposal on rates to be charged by the electric distribution company.””⁵⁴³ Therefore, according to Deepwater, because the General Assembly did not include such language related to costs, the Commission must only review whether there is evidence in the record of potential benefits from the Amended PPA.⁵⁴⁴ Deepwater maintained that in reviewing the evidence, including EDC’s Advisory Opinion to which the Commission is to give substantial deference, the Commission needs only to determine whether EDC overlooked material evidence.⁵⁴⁵

Not disputing the fact that there are cost impacts resulting from the Amended PPA, Deepwater nonetheless argued that consideration of these impacts would “be an absurd result to conclude that the General Assembly intended a broader economic

⁵⁴³ *Id.* at 8, n.25, *quoting* R.I. Gen. Laws 39-26.1-7(c)(iii). In response to the RIAG, whose Brief was filed one day before the deadline, Deepwater argued that the recent United States Supreme Court case, *Entergy Corp. v. Riverkeeper*, 129 S.Ct. 1498 (U.S. 2009) does not stand for the proposition that the Commission could undertake a cost-benefit analysis under R.I. Gen. Laws § 39-26.1-7(c)(iii) because in this case, unlike the *Entergy* case, the Commission can apply the economic benefit test absent a cost-benefit analysis without confronting a logical impossibility as was the situation in the *Entergy* case. *Id.* at 7, n.21.

⁵⁴⁴ *Id.* at 8-9.

⁵⁴⁵ *Id.* at 10.

analysis of the [proposed Project] when it has already concluded that the [proposed Project] is in the public interest.”⁵⁴⁶ Regardless, even if a full economic analysis was required, Deepwater argued that it would have to include analysis of the utility scale project, evidence of which was stricken.⁵⁴⁷

In its Brief, Grid presented the same arguments as Deepwater maintaining that the language of R.I. Gen. Laws 39-26.1-7(c)(iii) means the Commission need only find whether benefits are likely, that the General Assembly included language of net economic benefits in another section of the Title, and that if the General Assembly meant that a full net economic analysis be employed it would produce an absurd result.⁵⁴⁸ Grid maintained that a demonstration project of eight wind turbines could never meet such a test and therefore, could not advance the General Assembly’s intent. Grid also noted that the General Assembly was aware of the costs when the bill was passed.⁵⁴⁹ Finally, Grid maintained that while the Commission had to employ such a standard in Docket No. 4111, the section of the law was subsequently changed to eliminate that need.⁵⁵⁰

In its Brief, EDC argued that in conducting the economic development benefits review, “[t]here is plainly no requirement in this prong that the EDC present an opinion, or that the Commission consider, the economic or other social costs for renewable energy in this section of the statute.”⁵⁵¹ EDC asserted that the appropriate review of above-market costs and other related costs should be taken into account when reviewing the commercial reasonableness of the Amended PPA, not in reviewing the economic

⁵⁴⁶ *Id.* at 9.

⁵⁴⁷ *Id.* at 9-10.

⁵⁴⁸ Grid’s Brief at 2-3.

⁵⁴⁹ *Id.*

⁵⁵⁰ *Id.* at 4.

⁵⁵¹ EDC’s Brief at 2.

development benefits.⁵⁵² EDC stated that “the above market energy costs found in the signed agreement submitted in docket 4111 were accepted by the General Assembly as the potential maximum price in the Amended PPA.” According to EDC, insertion of above-market costs into the economic analysis would “utterly frustrate the General Assembly’s intent to facilitate a demonstration project to achieve the articulated goals associated with the development potential of the emerging renewable energy industry in Rhode Island.”⁵⁵³

In their Brief, Toray & Polytop (“Toray”) argued that in light of the language of R.I. Gen. Laws 39-26.1-7(c)(iii) which requires a finding that the amended PPA will “facilitate new and existing expansion and...the further development of Quonset Business Park,” ignoring the associated “costs necessary to achieve the estimated benefits” would defy logic and common sense and the plain reading of the statute where, hypothetically, under Grid’s read of the statute, spending \$1 billion on the creation of a single job would meet the economic benefit test.⁵⁵⁴ According to Toray, the economic benefits sought by the General Assembly could only come to fruition if the Amended PPA results in net economic benefits. A net economic cost, therefore, would discourage business expansion and the expansion of Quonset Business Park, a result contrary to the General Assembly’s intent, something that must be avoided in the course of statutory interpretation.⁵⁵⁵ Finally, Toray relied on the Commission’s history of reviewing the costs and benefits when approving funding through rates of a capital investment,

⁵⁵² *Id.* at 4. Like Deepwater and Grid, EDC also contrasted the language in Section 7 with that of Section 8. *Id.* at 3.

⁵⁵³ *Id.* at 5.

⁵⁵⁴ *Id.* at 4-5.

⁵⁵⁵ *Id.* at 5-6, 8. Toray cited a recent United State Supreme Court Case, *Entergy Corp. v. Riverkeeper, Inc.*, 129 S.Ct. 1498 (U.S. 2009) for the proposition that a regulatory agency can read a cost-benefit test into a statute where common sense dictates. *Id.* at 10, n.3.

something the Court has approved despite a lack of specific language allowing such a balancing test in Title 39.⁵⁵⁶

In its Brief, the RIAG argued that based on a recent United States Supreme Court case, *Entergy Corp. v. Riverkeeper*,⁵⁵⁷ the Commission is permitted to apply a cost-benefit analysis even absent specific language in the statute.⁵⁵⁸ According to the RIAG, a statute stated that an industry must utilize “the best technology available for minimizing adverse environmental impact.”⁵⁵⁹ The Environmental Protection Agency (“EPA”) promulgated regulations which declined to mandate use of the highest level of technology without regard to the associated costs.⁵⁶⁰ The Second Circuit found that the EPA’s regulations were not in compliance with the statute in question on the basis that the statute required the use of “‘technology that achieves the greatest reduction in adverse environmental impacts,’ even if the costs outweighed the benefits,” although the Second Circuit would have reviewed the cost impact on the entire industry even under this standard.⁵⁶¹ According to the RIAG, the United State Supreme Court reversed the Second Circuit, finding that the EPA had discretion to apply a cost-benefit analysis even in the absence of one specifically set forth in the statute and even where other parts of the statute specifically set forth a cost-benefit analysis.⁵⁶² According to the RIAG, “in the Court’s view, while a legislature might reject a strict cost-benefit balancing, it would be absurd to reject all consideration of cost. Likewise, Grid’s position here” is extreme.⁵⁶³

⁵⁵⁶ *Id.* at 6-7.

⁵⁵⁷ 129 S.Ct. 1498 (U.S. 2009).

⁵⁵⁸ RIAG’s Brief at 2.

⁵⁵⁹ *Id.* at 3.

⁵⁶⁰ *Id.*

⁵⁶¹ *Id.* citing, *Riverkeeper v. EPA*, 475 F.3d 83, 88-100 (2nd Cir. 2007).

⁵⁶² RIAG’s Brief at 3-5.

⁵⁶³ *Id.* at 5.

The RIAG suggested that reading R.I. Gen. Laws § 39-26.1-7(c)(iii) to preclude a cost analysis as part of the economic development benefit test would violate principles of statutory construction, namely that “no construction of a statute should be adopted that would demote any significant phrase or clause to mere surplusage.”⁵⁶⁴ According to the RIAG, foreclosing an inquiry into the costs “would render this proceeding superfluous” rather than meaningful and would lead to the conclusion that the Commission may only act as a rubber stamp on the Amended PPA.⁵⁶⁵

The RIAG characterized Grid’s position as an attempt to establish that the General Assembly had already determined the economic development benefits of the proposed Project and that the Commission is required to accept “the promises of the [proposed] [P]roject.”⁵⁶⁶ However, the RIAG argued, the General Assembly already had before it evidence of the economic development benefits from Docket No. 4111 (job creation and Deepwater’s lease option at Quonset). Therefore, because those facts were available to the General Assembly, and it failed to make a finding that the proposed Project would result in economic development benefits, but instead required the Commission to do so, it intended for the Commission to weigh all of the evidence, including the costs associated with the proposed Project.⁵⁶⁷

In its Brief, OSPRI supported the proposition that the Commission should take into account the costs associated with the Amended PPA when analyzing the economic benefits prong of R.I. Gen. Laws § 39-26.1-7. OSPRI argued that while the General Assembly specifically circumscribed the Commission’s findings of the Amended PPA in

⁵⁶⁴ *Id.* at 6, *citing, In re Harrison*, 992 A.2d 990, 994 (R.I. 2010) (citations omitted).

⁵⁶⁵ *Id.* at 6.

⁵⁶⁶ *Id.*

⁵⁶⁷ *Id.* at 6-7.

part (c)(i) by changing the definition of “commercially reasonable,” in Section 7, it did not change the Commission’s analysis of economic development benefits from Docket No. 4111, but merely specifically included it as part of the Commission’s analysis of the overall PPA.⁵⁶⁸

With regard to the argument that the General Assembly specifically set forth a full cost-benefit test in R.I. Gen. Laws § 39-26.1-8(b) and not in Section 7, OSPRI contended that reliance on the Section 8 language requiring a cost-benefit analysis is misplaced. OSPRI noted that under Section 8, the Commission will not be reviewing a power purchase agreement, but rather a proposal for an offshore wind project prior to the negotiation of a PPA. Therefore, according to OSPRI, a power purchase agreement entered into after a Section 8 review would already include the cost-benefit analysis and thus, this language supports its position that Section 7 must be read to include a cost-benefit analysis.⁵⁶⁹

Similar to the RIAG, OSPRI argued that it appears that Grid’s argument stems from the argument set forth in their Joint Motion to Strike Testimony seeking to exclude testimony on “avoided cost” as it related to the definition of “commercially reasonable” that “[t]he General Assembly has already decided that the benefits of the [proposed] Project justify its costs and the slightly higher electric rates that will result.”⁵⁷⁰ Regardless of the context in which the statement was made, OSPRI maintained that if this were the case, there would be no need to include an economic analysis in R.I. Gen. Laws § 39-26.1-7(c)(iii) rendering the provision superfluous.⁵⁷¹

⁵⁶⁸ OSPRI’s Brief at 2-3.

⁵⁶⁹ *Id.* at 3.

⁵⁷⁰ *Id.* at 7 *citing* National Grid and Deepwater Wind Block Island, LLC’s Motion to Strike Testimony at 6.

⁵⁷¹ *Id.* at 7-8.

XXII. Commission Findings

On August 11, 2010, pursuant to public notice, a majority of the Commission approved the Amended PPA at an Open Meeting, finding that the Amended PPA met the intent and requirements of the 2010 Amendments to R.I. Gen. Laws § 39-26.1-7. A majority of the Commission found that the Amended PPA: (1) contains terms and conditions that are commercially reasonable as defined in the 2010 Amendment; (2) contains provisions that provide for a decrease in pricing if savings can be achieved in the actual cost of the project pursuant to subsection 39-26.1-7(e); and (3) is likely to provide economic development benefits, including: facilitating new and existing business expansion and the creation of new renewable energy jobs; the further development of Quonset Business Park, and, increasing the training and preparedness of the Rhode Island workforce to support renewable energy projects. In addition, the Commission unanimously found that the construction of a transmission cable between Block Island and the mainland of Rhode Island, a necessary component to the proposed Project (although not included in the price of the Amended PPA), will likely provide environmental benefits, including the reduction of carbon emissions.

At the outset, it is well settled that “the 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.”⁵⁷² It is in that context that the Commission observes that the standard of review of this Amended PPA has been substantially altered by the Rhode Island General Assembly from the standard of review granted to the Commission in the 2009 version of R.I. Gen. Laws § 39-26.1-7. The effect of these statutory changes dramatically reduced the plenary discretion afforded to the

⁵⁷² *Bristol County Water Co. v. Public Utilities Commission*, 117 R.I. 89, 98 363 A.2d 444, 449 (R.I. 1976).

Commission under the earlier version of the law, most particularly with respect to the exercise of judgment concerning whether or not the project, and its associated PPA pricing, meets the test of commercial reasonableness. Despite the statutory revisions, it is not for the Commission to determine the State's energy policy, but rather to implement the policy articulated by the General Assembly through its statutes.

The General Assembly has mandated that:

The [C]ommission shall review the amended power purchase agreement *taking into account the state's policy intention to facilitate the development of a small offshore wind project in Rhode Island waters, while at the same time interconnecting Block Island to the mainland.* The Commission shall review the amended power purchase agreement and shall approve if... [the Amended PPA meets each of the findings articulated above].⁵⁷³

In reaching this decision, the Commission is mindful that the General Assembly has specifically mandated that the Commission take into account the State's policy intent as part of its consideration of the Amended PPA. Thus, the Commission has interpreted any ambiguities in the law and weighed the evidence in a manner to effectuate "the development of a small offshore wind project in Rhode Island waters."⁵⁷⁴

A. Commercial Reasonableness

In Order No. 19941, finding that the 2009 PPA was not commercially reasonable, the Commission adopted a two-pronged analysis to evaluate the commercial reasonableness of a particular project. The first prong was "to compare the pricing of the contract with other renewable energy projects, generally. The second prong of the analysis [was] to compare the IRR achieved at the PPA price to those which an

⁵⁷³ R.I. Gen. Laws § 39-26.1-7(c).

⁵⁷⁴ *Id.* The Rhode Island Supreme Court has held that the Public Utilities Commission is entitled to deference of its enabling statute "even when the agency's interpretation is not the only permissible interpretation that could be applied." *Pawtucket Power Associates v. City of Pawtucket*, 622 A.2d 452, 456-57 (R.I. 1993).

experienced power market analyst would expect from other renewable energy projects.”⁵⁷⁵ The first prong of analysis reflected the broader context of the Long Term Energy Contract law and the consequence that any adopted definition of commercially reasonable would ultimately apply to all long-term renewable energy contracts considered in the future. The second prong of the analysis reflected not only the fact that Deepwater was the only respondent to National Grid’s 2008 competitive solicitation for the Block Island Wind Farm, but also a concern that the comparability analysis was too limited in the context of the broader long-term contracting standard. Thus, the Commission was quite deliberate in its approach to ensure that renewable energy projects would be judged against the economics of other available technologies and projects. As the Commission observed in Docket No. 4111, to do otherwise would potentially allow every project to be compared only to itself because “by definition, every project could arguably be constrained by size, location, and [technology or] novelty.”⁵⁷⁶

In finding that the Amended PPA meets the commercial reasonableness standard, the Commission notes that the General Assembly has now included a unique, stand alone definition for this Amended PPA: “terms and pricing that are reasonably consistent with what an experienced power market analyst would expect to see for a project of similar size, technology and location; and meeting the policy goals in subsection (a)”⁵⁷⁷ of this

⁵⁷⁵ Order No. 19941 (issued April 2, 2010), p. 71.

⁵⁷⁶ *Id.*

⁵⁷⁷ [I]t is in the public interest for the state to facilitate the construction of a small-scale offshore wind demonstration project off the coast of Block Island, including an undersea transmission cable that interconnects Block Island to the mainland in order to: position the state to take advantage of the economic development benefits of the emerging offshore wind industry; promote the development of renewable energy sources that increase the nation’s energy independence from foreign sources of fossil fuels; reduce the adverse environmental and health impacts of traditional fossil fuel energy sources; and provide the Town of New Shoreham with an electrical connection to the mainland. To effectuate these goals, notwithstanding any other provisions of the general or public laws to the contrary, the Town of New Shoreham project, its associated power purchase agreement, transmission arrangements, and related costs

section.”⁵⁷⁸ For purposes of the review of *this one single PPA*, the General Assembly, by this definition, has eliminated the first prong Commission’s analysis of price as previously adopted in Docket No. 4111.⁵⁷⁹ Stated another way, the General Assembly has instructed this Commission to accept the high cost of offshore wind technology for a project with limited economies of scale, so long as the slated costs, and concomitant PPA pricing, terms and conditions, duly reflect those costs.

The Commission heard evidence from four credible power market analysts and a financial analyst regarding the terms and pricing of the Amended PPA. After reviewing the testimony from each, the Commission finds that Deepwater’s witness Mr. Nickerson analyzed the pricing in the Amended PPA in a manner that most closely matched the standards set forth in the new definition of “commercially reasonable.” Furthermore, only Deepwater’s witness, Mr. Stahle, provided an IRR analysis using Deepwater’s proforma model, which the Division’s witness, Mr. Hahn, was able to fairly closely replicate using Mr. Stahle’s assumptions. That IRR analysis indicated that project returns were within the zone of reasonableness, if not at the low end of the zone. In this docket, no other witness contested the financial model employed by Mr. Stahle nor with the outcome of the computed returns. Additionally, no evidence was presented to dispute

are authorized pursuant to the process and standards contained in this section. R.I. Gen. Laws § 39-26.1-7(a).

⁵⁷⁸ R.I. Gen. Laws § 39-26.1-7(c)(iv).

⁵⁷⁹ However, because this provision only applies to the Amended PPA which is the subject of this Order, the Commission finds its analysis still to be reasonable under the definition of commercially reasonable set forth in R.I. Gen. Laws § 39-26.1-2(1) for purposes of reviewing other long-term renewable energy contracts. R.I. Gen. Laws § 39-26.1-7(d) states: [t]he pricing under the agreement shall not have any precedential effect for purposes of determining whether other long-term contracts entered into pursuant to this chapter are commercially reasonable.”

that Deepwater's projected return, on an unlevered basis, was at the low end of the range of returns with respect to the project's need to attract the necessary investment.⁵⁸⁰

With regard to Mr. Nickerson's comparability analysis, which by necessity now becomes the only avenue for determining commercial reasonableness under the amended law, Mr. Nickerson engaged in a very detailed analysis that compared the Amended PPA price (and the proposed Project) to European projects which he then adjusted for size (28.8 MW), location (water depth and distance from shore), technology, and in some cases, the cost of the transmission cable from the project to the delivery point. He concluded that the installed cost of the proposed Project falls in the middle of the range of installed costs for the projects he used as comparables. He also concluded that the projected O&M costs and rate of return for the proposed Project were reasonable. Thus, he concluded that because he found each of these elements to be reasonable, the proposed Project and thus, the Amended PPA, is commercially reasonable within the meaning of the statute.⁵⁸¹

Other power market analysts did not conduct the same level of analysis making the adjustments for size, location and technology. RIEDC's witness, Mr. Parker, conducted a more limited comparability analysis comparing the project with two domestic offshore wind projects (Bluewater in Delaware and Cape Wind in Massachusetts) and also concluded that, after making the same adjustments for size, location and technology, the Amended PPA price was commercially reasonable as defined by statute. While Citizen Intervenors witness, Mr. McCullough, reviewed other

⁵⁸⁰ In Docket No. 4111, Mr. Hahn performed his own IRR analysis, but inexplicably, did not do so in this docket. When asked to perform his own analysis during the hearings in this matter, Deepwater objected on the basis of the limited time and opportunity to respond. The record request from the Commission was disallowed.

⁵⁸¹ Deepwater Exhibit 3 at 2-17.

offshore wind projects that appeared to be of similar size, upon cross-examination it did not appear that he made appropriate adjustments for location (depth of the water).⁵⁸² Furthermore, Mr. Nickerson testified that three of the five projects to which Mr. McCullough compared the proposed Project were merely the first stage of larger projects that would be guaranteed pricing under the European feed-in tariffs and therefore, he questioned whether the developers might be spreading the costs among the various project stages.⁵⁸³

The Commission notes that Mr. Nickerson did not include the cost of the transmission cable from Block Island to the mainland in the installed cost for the proposed Project, something that would have to be constructed in order to effectuate the purchase of power by Grid. Inclusion of this cost would have increased the installed cost of the project to 23% above the highest cost of the comparables Mr. Nickerson used. However, Mr. Nickerson testified that he only included the estimated cost of the transmission line between the proposed Project and Block Island because the delivery point is on Block Island. Therefore, he stated that this allowed for an “apples-to-apples” comparison of pricing.⁵⁸⁴ Furthermore, the Commission notes that the Amended PPA does not include the cost of the cable between Block Island and the mainland, so comparison of the Amended PPA price plus the transmission line to other projects that did not have a second transmission line would not meet the standards set forth in the statute regarding the locational aspect of the proposed Project.

With regard to Mr. McCullough’s testimony on the reasonableness of non-price terms of the Amended PPA, the Commission finds that with regard to those provisions

⁵⁸² See Citizen Intervenors Exhibit 1; Tr. 7/26/10 at 26-35.

⁵⁸³ Tr. 7/26/10 at 34.

⁵⁸⁴ Tr. 8/2/10 at 12-14, 27.

which had not been changed from the 2009 PPA, it appears to the Commission that the General Assembly did not intend for the Commission to reassess the propriety of any of the provisions contained in the 2009 PPA which the Commission had already deemed to be commercially reasonable in Order No. 19941, with the one exception related to the assignment provision, which is specifically modified in the amended PPA.

Even if the Commission were to consider Mr. McCullough's criticisms of the lack of a net present value analysis of damages in the termination provision, the Commission notes that in Rebuttal, Mr. Milhous testified that it would be commercially *unreasonable* to apply the provision without conducting a net present value analysis.⁵⁸⁵ This would be contrary to the plain language of the provision requiring that it be implemented in a commercially reasonable manner.⁵⁸⁶ In addition, on cross-examination, Mr. Moore stated that he agreed with Mr. Milhous' interpretation of the provision and other provisions criticized by Mr. McCullough.⁵⁸⁷ Therefore, the Commission finds that Mr. McCullough's concerns, while highly technical in nature, collectively did not amount to a level of concern that would cause the Commission to deem the Amended PPA commercially unreasonable. In fact, the evidence demonstrated that other offshore wind PPAs (such as the Bluewater/Delmarva PPA) contain similar technical omissions.⁵⁸⁸ As a result, the Commission concludes that based on the evidence, particularly with respect to the collective response of Deepwater and Grid to the principal criticisms advanced by

⁵⁸⁵ If Grid is wrong, termination costs would fall on Grid in the first instance, and any effort to recover damages from ratepayers would necessitate a proceeding before the Commission that would entail a prudence review. Tr. 8/3/10 at 127-28.

⁵⁸⁶ Tr. 7/26/10 at 72-73.

⁵⁸⁷ Tr. 8/2/10 at 182-83. With regard to the issues raised by the Commission regarding the proper interpretation of certain aspects of the definition of "Cost" set forth in Appendix X to the Amended PPA, Deepwater filed a response which sufficiently explains the provision to the Commission. Deepwater's Response to Commission Record Request 11.

⁵⁸⁸ Tr. 8/3/10 at 200.

Mr. McCullough, the Commission can not conclude that the terms and conditions of the Amended PPA in their entirety should be deemed commercially unreasonable. Furthermore, no other power market analysts who reviewed the Amended PPA took issue with those provisions in this Docket.

B. Price Reduction Provision

With regard to the price reduction provision, the Commission notes at the outset that no party disputed the existence of a provision that provides for a decrease in pricing if savings can be achieved in the actual cost of the proposed Project. There was substantial dispute, however, over the appropriate base cost against which to measure the savings. Based on the parties' briefs and the evidence, the Commission finds that the appropriate Base Amount is \$205,403,512, as agreed to by Deepwater and Grid.

Under the terms of the Amended PPA, Deepwater and Grid agreed that the Base Amount should be \$205 million. The Division and other parties maintained that the Base Amount should be set at \$219,311,412 because that was the cost projection contained in the record of Docket No. 4111. Further, those parties further claim that the \$219 million figure was represented to be the cost of the project during the 2010 legislative session that enacted the recent amendments that govern this proceeding. Deepwater's CEO William Moore conceded this during the evidentiary hearings. The question before the Commission is whether the difference between \$219 million and \$205 million should necessarily translate into a reduction in the PPA price should the project actually be constructed for the lower amount.

After substantial probing of this issue during the proceedings, the Commission cannot reasonably conclude that the \$219 million construction estimate was intended to

be “locked in” as part of the pricing reduction provisions of the amended law. First, it is clear that there were a number of different construction cost estimates utilized by Deepwater over the past year, and no party or witness could credibly suggest that a cutting-edge project of this nature and magnitude is susceptible to a static cost estimate. Second, the terms of the amended law make it rather clear that the legislature, in its effort to advance the project, placed considerable focus on ensuring that the PPA prices rejected in Docket No. 4111 would serve as an absolute ceiling for any PPA price considered in this docket. In terms of the open book pricing feature of the Amended PPA, it seems only logical for the signing parties to agree to a construction cost figure that (1) represents the most up-to-date projection; and (2) provides an adequate return in order to attract the necessary investment. Under such reasonable criteria, there is no evidence to suggest that use of \$205 million as the trigger for pricing reductions is either unreasonable or inappropriate. In fact, at any cost greater than \$205 million, the projected returns under Deepwater’s IRR model would be substandard, and therefore would imperil the project in terms of financial feasibility. For the pricing reduction provision to be triggered at \$219 million, as some parties and our dissenting colleague aver, the project would be relegated to failure since the evidence incontrovertibly demonstrated that the project returns would be so low as to make the project non-financeable, and in so doing, would frustrate the entire legislative desire to see that the planned wind farm comes to fruition. Such an outcome contravenes the entire thrust of the legislation, and thus leads the Commission to conclude that the amended PPA should reflect the most recent cost estimate for the project. Accordingly, the Commission finds that it is appropriate for Deepwater and Grid to utilize an updated construction estimate

of \$205 million for purposes of triggering the pricing reductions that are required under the new law.

Additionally, it is of significance to the Commission that the cost figure which was provided as part of the initial discussion of open book pricing between Deepwater and Grid was approximately \$203.9 million. Mr. Milhous specifically testified that \$203.9 million, albeit slightly lower than the latest \$205 million projection, was the cost figure upon which Grid relied in negotiating the 2009 PPA. The \$204 million estimate was based on a proposed PPA with open book pricing where the pricing could go up or down, whereas the \$219 million estimate was based on a fixed price contract. It is clear that the \$219 million estimate included contingencies that would allow Deepwater to reap the benefits of any construction cost savings, which according to Mr. Moore, would become a necessity given the substandard returns that Deepwater's IRR model predicted in the event the project did, in fact, come in at a cost as high as \$219 million.⁵⁸⁹ Moreover, despite the fact that the \$219 million figure was the only estimate provided to the Commission in Docket No. 4111, it was provided specifically in response to a data request issued by the Division to permit Mr. Hahn to perform an IRR analysis to determine the return on the proposed Project.⁵⁹⁰ In this docket, the estimate is being provided as the cost against which to provide savings to ratepayers.

⁵⁸⁹ See Tr. 7/26/10 at 41-47. Mr. Moore's Rebuttal Testimony made it clear that his prior testimony in Docket No. 4111 was that the pricing in the 2009 PPA would produce a return that was so low in the event that the project cost \$219 million that he was concerned that Deepwater would not be able to obtain financing. Therefore, in developing a Base Amount, Deepwater would have necessarily started with a revenue stream based on the maximum pricing allowed under the law, determined a necessary return, and then calculated the Base Amount off of those figures.

⁵⁹⁰ Again, the outcome of Mr. Hahn's IRR analysis in Docket No. 4111 played a critical role in the Commission's determination that the 2009 PPA was not commercially reasonable. In this docket, no witnesses, including Mr. Hahn, attempted to replicate Deepwater's IRR Model to verify the accuracy and reasonableness of projected returns by running different modeling assumptions.

The Commission must determine the intent of the General Assembly from the plain language of the statute.⁵⁹¹ R.I. Gen. Laws § 39-26.1-7(e) states:

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. 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.⁵⁹²

The Commission notes that the statute never uses the word “cost” in conjunction with Docket 4111, but it does provide that the “maximum initial price” shall be tied to Docket No. 4111 PPA (2009 PPA) and that any project cost savings shall reduce the Docket No. 4111 price. Therefore, it appears from the language of the R.I. Gen. Laws § 39-26.1-7(e) that the General Assembly was far more concerned with the price being capped pursuant to the 2009 PPA, and that the potential for price reductions be determined based upon verified project cost estimates as presented in the instant docket.

Furthermore, had the General Assembly determined otherwise, it could easily have tied the “costs” to Docket No. 4111 as well as the price. It is more logical to conclude that the framers of the legislation were equally cognizant of the fact that construction cost estimates are dynamic over time and subject to revisions as a project progresses through the PPA, permitting, engineering and vendor negotiation processes.⁵⁹³ Finally, if the Commission is to effectuate the intent of the General Assembly that the

⁵⁹¹ See Deepwater’s Brief at 2, citing, *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)).

⁵⁹² R.I. Gen. Laws § 39-26.1-7(e)(i)-(ii).

⁵⁹³ See Tr. 8/2/10 at 162.

project come to fruition, Commission approval of the Base Amount contained in the Amended PPA is not unreasonable given that Deepwater testified that it will not move forward if the Base Amount does not afford Deepwater the opportunity to earn a 10.5% unlevered return, and this return is only possible with the use of a Base (cost) Amount of \$205 million.

C. Economic Development Benefits

The Commission finds that the Amended PPA is likely to provide economic development benefits as anticipated by the law. However, the Commission majority reached this conclusion based on two different analyses.⁵⁹⁴

D. Environmental Benefits

In addressing the potential environmental benefits, the Commission notes that neither the standard of review nor the facts before the Commission have changed significantly since the findings set forth in Order No. 19941. In this case, however, the Commission has additional findings made by DEM in its Advisory Opinion to which we are required to give substantial deference.

Therefore, as in Order No. 19941, the Commission once again finds that there is the likelihood that the Deepwater demonstration project will enhance the environmental quality of the Town of New Shoreham because there will be some environmental improvement in the form of a reduction in carbon emissions resulting from Block Island Power Company's ability to purchase power from mainland power suppliers, thus eliminating its reliance on its diesel generators except in isolated instances of a cable outage. The transmission cable is part of the proposed Project and is mandated by R.I. Gen. Laws § 39-26.1-7.

⁵⁹⁴ Concurring opinions are attached hereto.

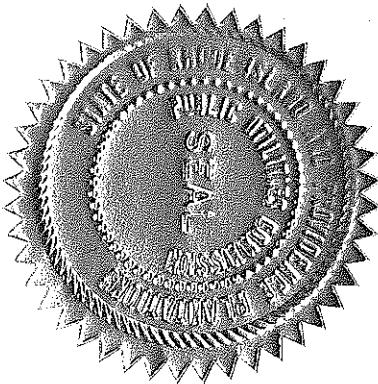
Accordingly, it is hereby

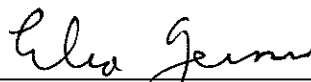
(20095) ORDERED:


1. The Purchase Power Agreement between The Narragansett Electric Company d/b/a National Grid and Deepwater Wind Block Island, LLC on June 30, 2010, is hereby approved.
2. The Motions to Dismiss filed by Conservation Law Foundation, the Rhode Island Attorney General, TransCanada Power Marketing Ltd., and Ocean State Policy Research Institute are hereby denied.


EFFECTIVE AT WARWICK, RHODE ISLAND PURSUANT TO AN OPEN MEETING ON AUGUST 11, 2010. WRITTEN DECISION ISSUED AUGUST 16, 2010.

PUBLIC UTILITIES COMMISSION




Elia Germani, Chairman*


Mary E. Bray, Commissioner**


Paul J. Roberti, Commissioner***

* Chairman Germani concurs with the majority on the issue of Economic Development Benefits. A separate opinion is attached hereto.

** Commissioner Bray dissents on all findings except those on the issue of Environmental Benefits on which she joined the majority.

*** Commissioner Roberti concurs with the majority on the issue of Economic Development Benefits. A separate opinion is attached hereto.

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

Concurring Opinion of Chairman Germani.

I concur with Commissioner Roberti that the Amended PPA is likely to provide economic development benefits as anticipated by the law. In the course of reaching my conclusion, I first determined that there is no requirement nor any expectation in the language of R.I. Gen. Laws § 39-26.1-7(c)(iii) that the Commission apply a “net economic benefit test.” As Deepwater pointed out in its Brief on this issue, “[w]hen construing a statute, the Commission must “look to the plain and ordinary meaning of the statutory language.”⁵⁹⁵ The language of this provision of the law only refers to economic benefits. There is no corresponding reference to the costs associated with the proposed Project.

The General Assembly was well aware of the costs associated with the proposed Project when it passed the current version of R.I. Gen. Laws § 39-26.1-7. If it had meant for the Commission to compare the economic benefits to the costs, it would have included specific language requiring the Commission to do so. As Deepwater noted in its Brief, it is inappropriate to insert language into a law when it was clearly evident that the General Assembly did not mean for the language to be included.⁵⁹⁶

In fact, the General Assembly has required the Commission to conduct a net economic benefit test in a related statute, R.I. Gen. Laws § 39-26.1-8, pertaining to the Commission’s review of a utility scale project proposed by the State’s preferred

⁵⁹⁵ Deepwater’s Brief at 2, citing, *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 Denisewich*, 643 A.2d 1194, 1197 (R.I. 1994)).

⁵⁹⁶ Deepwater’s Brief at 7.

developer, Deepwater Wind. In that section, when undertaking its review of the utility scale wind project, the Commission is charged with assessing “[t]he economic impact and potential risks, if any, of the proposal on rates to be charged by the electric distribution company.”⁵⁹⁷ Therefore, because the language of R.I. Gen. Laws § 39-26.1-7(c)(iii) does not include language requiring such a comparison and only speaks to the economic benefits, I find that a net economic benefit test is not applicable in this proceeding.

Next, I note that the law requires that the Commission grant substantial deference to an Advisory Opinion filed by EDC regarding the economic development benefits likely to result from the proposed Project. EDC provided the Commission with an Advisory Opinion which concludes that, based on its use of the IMPLAN model, a generally accepted input-output model used to measure the benefits of certain cost expenditures, the proposed Project would result in economic development benefits of \$129 million over the term of the Amended PPA. Giving EDC the deference required under the law, I find that the Amended PPA will likely provide the economic development benefits as set forth in the law.



Elia Germani, Chairman

⁵⁹⁷ R.I. Gen. Laws § 39-26.1-8(b)(i).

Concurring Opinion of Commissioner Roberti.

I concur with the Chairman that the Amended PPA is likely to provide economic development benefits as defined by the law. However, I reached my determination using a different analysis. Even under my view that we are entitled, under R.I. Gen. Laws § 39-26.1-7(c)(iii), to apply a net economic benefits test, the evidence of benefits outweighed the evidence of detriment, particularly where the law mandates that the Commission give substantial deference to EDC's Advisory Opinion.

In applying a net economic benefits test, I note that it was abundantly clear from the Commission's Order in Docket No. 4111 that the above market costs were expected to be in excess of \$370 million. However, despite these facts, the General Assembly still found that the proposed Project was in the public interest as long as it would produce economic development benefits. Therefore, in applying the net economic benefits, I have weighed EDC's Advisory Opinion, giving it substantial deference, against the evidence of economic detriment in this docket and found that Deepwater and Grid have met the requirements of the statute.

EDC's Advisory Opinion concluded that there would likely be \$129 million of economic development benefits resulting from the proposed Project. However, it was difficult to quantify the impact of higher rates on Toray and Polytop. Had these businesses testified that they would curtail existing operations or leave the State of Rhode Island because of the rate increases stemming from projected above-market costs from the Amended PPA, then the evidence of detriment would have been quantifiable. However, the thrust of the evidence they provided was that the increased electricity costs associated with the Amended PPA may negatively affect future decisions regarding

business expansion. Thus, any detriment aside from increased operating costs in the future are somewhat speculative and difficult, if not impossible, to quantify. Thus, I do not find sufficient evidence to offset or cancel out the projected economic benefits as described in EDC's Advisory Opinion. This conclusion is further bolstered by the substantial deference standard that I am constrained to apply to the EDC's conclusions, which omit any findings relative to economic detriments to existing businesses.

Therefore, based on the conclusion of quantifiable economic benefits as set forth in the Advisory Opinion and the unquantifiable economic detriments as set forth in the record of this case, I conclude that the Amended PPA is likely to result in economic development benefits as defined by the General Assembly in R.I. Gen. Laws § 39-26.1-7(c)(iii).



Paul J. Roberti, Commissioner

Dissenting Opinion of Commissioner Bray

I dissent from the majority's findings that the Amended PPA is commercially reasonable, includes a price reduction provision designed as intended under the statute, and will provide economic development benefits.

I. Standard

Regardless of the particular circumstances that brings a case to this agency or the manner in which a specific law is drafted, the Commission must "sit as an impartial, independent body" with a "duty of rendering independent decisions affecting the public interest based upon the law and the evidence."⁵⁹⁸ In Docket No. 4111, the Commission rejected a power purchase agreement between Grid and Deepwater pursuant to R.I. Gen. Laws § 39-26.1-7. Subsequent to this decision, the Rhode Island General Assembly passed and the Governor signed a law revising R.I. Gen. Laws § 39-26.1-7 and giving Deepwater a second chance to have a power purchase agreement reviewed by this Commission. The amended R.I. Gen. Laws § 39-26.1-7 required evidentiary hearings and allowed for parties to fully participate as would happen in any other case before the Commission. In other words, it gave all parties an opportunity to be heard which "implies a reasonable hope of being heeded"⁵⁹⁹ Therefore, I weighed the evidence and interpreted the law in this case as I would in any other case, and not in a way that was most favorable to one position over another. If the General Assembly had simply wanted the Deepwater purchase power agreement to be approved, it would have done so itself and not sent it back to the Commission for further proceedings.

⁵⁹⁸ R.I. Gen. Laws § 39-1-11.

⁵⁹⁹ *Golden Gate Corp. v Town of Narragansett*, 116 R.I. 552, 561 (1976).

To interpret R.I. Gen. Laws § 39-26.1-7, I looked to the plain language of the statute and did not interpret it in a way that I thought led to absurd, unreasonable or inane results.⁶⁰⁰ In addition, I also presumed that the General Assembly knew how this Commission had interpreted similar statutory language in the past, and that if the General Assembly did not specifically include language in the amended R.I. Gen. Laws § 39-26.1-7 to limit that interpretation, then the General Assembly must have expected the Commission to follow that interpretation of that language again.⁶⁰¹ Furthermore, I read R.I. Gen. Laws § 39-26.1-7(c) taking into account that the State's policy goals would be met if the four elements in R.I. Gen. Laws § 39-26.1-7(c)(i)-(iv) were met.⁶⁰² Therefore, I reviewed each element based on the evidence and arguments presented by all parties without adding any presumption that the outcome of my decision must meet the policy goals of R.I. Gen. Laws § 39-26.1-7. If for some reason my understanding of how to apply and interpret R.I. Gen. Laws § 39-26.1-7 is incorrect, then I do not understand why this case was sent back to the Commission or how this statute can be considered fair to all parties.

II. Economic Development Benefits

The amended R.I. Gen. Laws § 39-26.1-7(c)(iii) states that the Commission shall approve the Deepwater purchase power agreement if “the amended agreement is likely to

⁶⁰⁰ *Zannelli v. DiSandro*, 84 R.I. 76, 80-82 (1956), *In re Jones*, 122 R.I. 716, 718 (1980).

⁶⁰¹ *See Colletta v. State*, 106 R.I. 765, 769-771 (1970).

⁶⁰² The [C]ommission shall review the amended power purchase agreement taking into account the state's policy intention to facilitate the development of a small offshore wind project in Rhode Island waters, while at the same time interconnecting Block Island to the mainland. The [C]ommission shall review the amended power purchase agreement and shall approve it if: (i) The amended agreement contains terms and conditions that are commercially reasonable; (ii) The amended agreement contains provisions that provide for a decrease in pricing if savings can be achieved in the actual cost of the project pursuant to subsection 39-26.1(e); (iii) The amended agreement is likely to provide economic development benefits, including; facilitating new and existing business expansion and the creation of new renewable energy jobs; the further development of Quonset Business Park, and, increasing the training and preparedness of the Rhode Island workforce to support renewable energy projects, and (iv) The amended power purchase agreement is likely to provide environmental benefits, including the reduction of carbon emissions.

provide economic development benefits, including; facilitating new and existing business expansion....”⁶⁰³ Based on the law and evidence, it is clear to me that it does not. Deepwater, Grid and EDC have argued that in looking at economic development benefits, the Commission can not take into account any economic harm or costs that may occur if the Amended PPA is approved. Instead they argue that the Commission can only look at the benefits that will arise from the proposed Project since R.I. Gen. Laws § 39-26.1-7(c)(iii) does not refer to costs or net economic development benefits. I find this argument to be absurd because it would lead to an absurd result. Under this interpretation, the Commission would be obligated to approve the Amended PPA because it “is likely to” cause some economic benefits even though the potential economic harm would outweigh it. This defies common sense or logic because it ignores all of the costs that result from the Amended PPA. Under that approach, natural disasters like the 2010 floods in Rhode Island could be great economic development engines because they produce economic development benefits in some sectors of the economy although they cause more damage and economic harm overall.⁶⁰⁴

In support of the interpretation that the Commission not determine if there are net economic development benefits, the proponents of the Amended PPA state that R.I. Gen. Laws § 39-26.1-7(c)(iii) does not expressly refer to costs or net economic development benefits. I do not agree with this argument because in Docket No. 4111, when the Commission reviewed the 2009 PPA, the Commission applied a net economic development test.⁶⁰⁵ In that docket, the Commission used a net economic benefits test based on R.I. Gen. Laws § 39-26.1-5(e), which requires the Commission to only approve

⁶⁰³ R.I. Gen. Laws § 39-26.1-7(c)(iii).

⁶⁰⁴ See Tr. 8/3/10 at 103-104.

⁶⁰⁵ Order No. 19941, pp. 79-82 (April 2, 2010)

long term renewable energy contracts that “provide other direct economic benefits to Rhode Island.” Even the Commission’s regulations implementing R.I. Gen. Laws § 39-26.1-5 specifically state that Grid in analyzing the economic benefits from a contract will do so “in relation to the cost” under the contract.⁶⁰⁶ When you compare the statutory language of R.I Gen. Laws § 39-26.1-5 which requires “other direct economic benefits” to the statutory language of R.I Gen. Laws § 39-26.1-7(c)(iii), which calls for “economic development benefits”, there is no real difference. The Commission has consistently interpreted R.I Gen. Laws § 39-26.1-5(e) with the phrase “direct economic benefits” to mean net direct economic benefits. Since the Rhode Island General Assembly is presumed to know what its previously passed laws mean and how this Commission has interpreted the phrase “direct economic benefits” to mean net direct economic benefits, it should be assumed that when the General Assembly enacted R.I Gen. Laws § 39-26.1-7(c)(iii) with the phrase “economic development benefits” it must have expected this Commission to be consistent in its statutory interpretations and look at net economic development benefits.⁶⁰⁷

Furthermore, if the General Assembly had wanted to prevent the Commission from looking at net economic development benefits or the economic harm that higher energy costs cause, the General Assembly could have easily done so. At the time it was considering legislation to amend R.I Gen. Laws § 39-26.1-7, the Rhode Island General Assembly adopted R.I Gen. Laws § 39-26.1-9 or Public Law Chapter 18. This new law

⁶⁰⁶ R.I.P.U.C. Regulations Governing Long-Term Contracting Standards for Renewable Energy, p. 6. As noted in the Commission’s Report promulgating these Regulations, there were four drafts proposed before passage and several areas of disagreement were resolved. During the formal comment period, not one comment was received regarding the Commission’s interpretation of the economic benefit test set forth in R.I. Gen. Laws § 39-26.1-5(e).

⁶⁰⁷ See *Colletta v. State*, 106 R.I. 765, 769-771 (1970).

allowed for approval of a specific long term renewable energy contract as long as it led to the “creation of jobs in Rhode Island in the renewable energy sector”. R.I Gen. Laws § 39-26.1-9(4)(ii). I read this to mean that instead of taking into account economic harm or determining if the contract resulted in a net economic benefit to the overall economy, you can only look at one sector of the economy and determine if the power contract had a positive impact on that sector. The fact that the Rhode Island General Assembly did not restrict the Commission to determine whether a contract simply creates jobs “in the renewable energy sector” makes it clear to me that the General Assembly expected the Commission to review the evidence presented to assess the overall impact that the Amended PPA would have on the economy, and thus determine if there were net economic development benefits to Rhode Island.

Fortunately, a majority of the Commission found that the amended R.I Gen. Laws § 39-26.1-7 allowed for a net economic development benefits test, but unfortunately disagreed as to its application.⁶⁰⁸ In applying a net economic development benefits test, I first looked at the study performed by EDC, which was mandated by the General Assembly. The study stated that the proposed Project would generate \$129 million of benefits. I assume this figure includes the 6 permanent jobs that Deepwater stated it will create from the proposed Project.⁶⁰⁹ I granted substantial deference to this study as required by R.I Gen. Laws § 39-26.1-7(iv). I note that the model chosen by EDC will always result in a positive economic impact because it does not allow for the consideration of higher energy costs or other negative impacts on the overall economy

⁶⁰⁸ Because a majority of the Commission interpreted R.I Gen. Laws § 39-26.1-7 to allow for a net economic development test, this legal interpretation of R.I Gen. Laws § 39-26.1-7 is entitled to deference. *Pawtucket Power Associates v. City of Pawtucket*, 622 A.2d 452, 456 (R.I. 1993).

⁶⁰⁹ Order No. 19941, p. 80 (April 2, 2010).

that may result from the proposed Project.⁶¹⁰ However, even accepting this positive benefit as true, despite the assumptions contained in the model, this figure of \$129 million of economic benefits does not offset the above-market power costs of \$370 million that will be generated by the Amended PPA, and this figure does not include the approximate cost of an additional \$40-\$50 million for building a cable from Block Island to the mainland. This is simple math. If the above market energy costs of a purchase power agreement are higher than the economic development benefits the purchase power agreement will create, then it will result in a net loss for the economy and should be disapproved.⁶¹¹ The Commission in Docket No. 4111 already stated:

It is basic economics to know that the more money a business spends on energy, whether it is renewable or fossil based, and whether it is produced in Rhode Island or elsewhere, the less Rhode Island businesses can spend or invest, and the more likely existing jobs will be lost to pay for these higher costs.⁶¹²

I still believe, as I did in Docket No. 4111 that, the higher the above market energy costs, the less money we can spend or invest in other areas of the economy.

This forecast of above-market costs can not be ignored or dismissed because they are projections. These forecasts have been relied upon by the Commission in Docket No. 4111, by Grid in more than one docket, and by another state agency in its review of an energy contract.⁶¹³ Certainly, the General Assembly was aware of these above market costs when it enacted the amended R.I. Gen. Laws § 39-26.1-7, but they were not aware

⁶¹⁰ Tr. 8/4/10 at 100-01; Tr. 8/5/10 at 277, Mr. Parker stating, "...certainly IMPLAN, and I will take Dr. Mazze's word that the other two models are not set up to accept these changes in electricity prices as inputs."

⁶¹¹ Conversely, there are long term renewable energy contracts that produce energy at prices that are below market. Order No. 20047, Division Docket D-10-36, pp. 18-19 (2010); Order No. 19941, p. 69 fn. 338 (2010) In those circumstances, it can be assumed that such an energy contract will produce economic benefits because the less businesses and consumers spend on energy the more than can invest and spend on other things to generate economic growth.

⁶¹² Order No. 19941, p. 82 (2010)

⁶¹³ Order No. 20047, Division Docket D-10-36, pp. 18-19 (2010).

that the study they ordered to be performed by EDC would show that the economic benefits are approximately three times lower than the amount of above market costs, which is why this was sent back to us for review. Remember, for \$370 million in above market energy costs, Rhode Island gets \$129 million of economic benefits. I can think of no rational person, who would want to invest their money into something that they know will cost three times more than what they will get out of it.⁶¹⁴

In addition to above market costs, we have bill impact data showing that “Rhode Island businesses will pay higher energy costs because of this proposed Project. For example, the initial increase in energy costs from this project to Rhode Island’s five largest businesses will be \$1,122,521, and for Rhode Island’s fifteen largest businesses it would be \$2,001,512.”⁶¹⁵ In addition to this data, we had testimony from Rhode Island businesses, Toray and Polytop, about the negative impact that the higher energy costs from the Amended PPA would have on their businesses as well as other businesses in the state. In addition, we had expert testimony by Dr. Mazze that approving the Amended PPA would discourage new business from locating or expanding to Rhode Island where the electric costs are already considered to be high. Based on all of the evidence and the law, I found that the Amended PPA is not likely to provide economic development benefits, including facilitating new and existing business expansion.

III. Price Reduction Provision

The amended R.I. Gen. Laws § 39-26.1-7(c)(ii) states that the Commission shall approve the Amended PPA if “the amended agreement contains provisions that provide for a decrease in pricing if savings can be achieved in the actual cost of the project

⁶¹⁴ See Tr. 7/27/10 at 20, Mr. Osada stating, “...give me \$3, I’ll give \$1. From this sense, there’s no sense to say this is economic benefit. This is economic detriment.”

⁶¹⁵ Order No. 19941, p. 82 (April 2, 2010)

pursuant to subsection 39-26.1-7(e).” R.I. Gen. Laws § 39-26.1-7(e) states: “(i) the amended power purchase agreement...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”.

At the outset, it is clear that the Amended PPA does include a first year price equal to that in the 2009 PPA and that there is a provision in the Amended PPA for price reductions if certain cost savings are achieved. However, the Amended PPA calculates the cost savings using a Base Amount of approximately \$205 million. This is the first time a cost figure of \$205 million was presented to the Commission or the public. The use of \$205 million is inconsistent with the evidence presented in Docket No. 4111 and thus does not conform with R.I. Gen. Laws § 39-26.1-7(c)(ii) and R.I. Gen. Laws § 39-26.1-7(e). There is no dispute that the pricing contained in the 2009 PPA was based on a cost estimate of \$219,311,412 or approximately \$219 million.⁶¹⁶ Furthermore, as late as May 10, 2010, in communications to the General Assembly regarding efforts to amend R.I. Gen. Laws § 39-26.1-7, Deepwater was representing this proposed Project as costing approximately \$220 million.⁶¹⁷

⁶¹⁶ Division Exhibit 3 (Deepwater’s Response to Division DR 1-1) states “The \$219,311,412 capital cost estimate from Docket 4111 included all of the elements of ‘Cost’ as defined in the [Amended] PPA, and also included contingency. This figure was the basis for the fixed price in the [2009 PPA] that was the subject of Docket 4111.”

⁶¹⁷ This is in evidence as RIAG Exhibit 6. Deepwater’s witness admitted that a typical recipient of his email to the General Assembly, reading this document, would believe the cost of the proposed project was \$220 million. Tr. 8/2/10 at 88.

Deepwater argued that there is nothing in the statutory language that would require the use of the cost estimate in Docket No. 4111 for purposes of the cost-savings provision in this docket. This is incorrect. The amended R.I. Gen. Laws § 39-26.1-7(e)(ii) refers to the “price contained in the signed power purchase agreement submitted in docket 4111” while amended R.I. Gen. Laws § 39-26.1-7(c)(ii) requires “a decrease in pricing if savings can be achieved in the actual cost of the project”. Thus, pricing in Docket No. 4111 must be connected to cost estimates in Docket No. 4111. To read it otherwise would lead absurd results and render the price reduction provision in R.I. Gen. Laws § 39-26.1-7 meaningless. Under the Deepwater’s interpretation, Deepwater could have offered any cost estimate in this docket while keeping the price from Docket No. 4111 the same. This is unreasonable. Instead of a 5 percent reduction in the cost estimate from \$219 million to \$205 million, Deepwater could have reduced the cost estimate by 50 percent, and still argue that it is consistent with the amended law. With a \$205 million figure, Deepwater keeps the first \$14 million of the savings based on the cost levels to which Deepwater testified before this Commission in Docket No. 4111 and the cost levels Deepwater represented to the General Assembly to get this law passed.⁶¹⁸ Allowing Deepwater to keep the first \$14 million of savings before ratepayers received any savings frustrates the General Assembly’s intent that “all realized savings” be passed on to ratepayers under R.I. Gen. Laws § 39-26.1-7(e)(i).⁶¹⁹

⁶¹⁸ Toray & Polytop’s Brief at 1-3.

⁶¹⁹ This interpretation is also consistent with the Division’s proposed interpretation. In its Brief, the Division stated, it is clear that the language of R.I. Gen. Laws § 39-26.1-7(e)(i) and (ii) links the pricing from Docket No. 4111 ‘to the estimated project costs underlying the [2009] PPA prices. It further seems clear that the legislature expected the price reductions to capture savings for the benefit of ratepayers if the project cost comes in below that aforementioned estimate’ of \$219 million. The Division further stated that the two provisions of R.I. Gen. Laws § 39-26.1-7(c) and (e) are clear that “the price reduction is triggered ‘if savings can be achieved in the actual costs of the project pursuant to subsection 39-26.1-7(e),’ which price in the signed PPA ‘submitted in Docket 4111 shall be the maximum initial price, and any realized

Deepwater has argued that the \$219 million cost figure from Docket No. 4111 was a “budgetary estimate” while the \$205 million is an updated estimate or a target.⁶²⁰ At the same time, Grid, another proponent of the proposed Project, states they thought the cost figure for purposes of determining cost savings was approximately \$205 million.⁶²¹ On the one hand, the \$219 million figure was just an estimate, and at another time \$205 million was the correct number all along. This conflicting testimony is not credible. I will not weigh this evidence in the best light to proponents of this proposed Project to ensure that it is built. Instead I will weigh the evidence like it was any other case. A credible party does not give one set of figures to regulators and legislators, and then a couple of months later present another.⁶²² It appears somebody was not being forthright with the regulators or the legislators on this issue.

The price reduction provision in the amended PPA must use the cost figure in Docket No. 4111 which included the cost for contingencies. The cost estimate in Docket No. 4111 did include a contingency and it should also be used now for purposes of determining cost savings in this docket. Prices are inextricably linked to costs. This

savings shall reduce such price.” Thus, the only way to read these two sections in harmony is to reduce the 2012 price if the costs upon which that price was originally based, \$219 million, are reduced during construction. Division’s Brief at 5-6.

⁶²⁰ Deepwater’s Brief at 4; During cross-examination, Mr. Moore stated, “[u]nder the definition of the new PPA, savings can only be achieved in terms of the actual costs to build. We haven’t built anything yet. We have not achieved any savings.” Tr. 8/2/10 at 101-02, 235. The \$205 million has also been described as a target. Whether characterized as a target or an estimate, Mr. Moore testified that the \$205 million amount was an updated estimate. Tr. 8/2/10 at 126-28.

⁶²¹ On behalf of Grid, Mr. Milhous said the \$205 million figure was provided to them in 2009 and upon which he believed Deepwater would realize the return they were seeking based on a first year price of \$235.75/MWH. (Tr. 8/3/10 at 57-58). Also, according to Grid, the figure of \$203.9 million was used during the 2009 PPA negotiations with Deepwater, but the figure did not include the cost for contingencies. Tr. 8/3/10 at 134-35.

⁶²² It is possible that the higher cost figure of \$219 million was used by Deepwater in Docket No. 4111 to help its claim that its return was not too high while in this docket, the lower cost figure of \$205 million is being used to ensure Deepwater retains cost savings to earn a sufficiently high enough return. One expert witness concurred that the cost estimates used in this docket appeared to be designed to result in a particular return. Tr. 8/3/10 at 209-12.

Commission sets rates. These rates are prices. These prices are based on costs. You can not separate price from cost. You can not use the price from Docket No. 4111 without using the underlying costs estimates from Docket No. 4111. As a result, I will use the figure that the Commission relied on in Docket No. 4111 and which is similar to one the General Assembly had when it passed the amended law. Based on the evidence and the law, I found that the price reduction provision contained in the Amended PPA does not comply with the standard set forth in R.I. Gen. Laws § 39-26.1-7(e)(i)-(ii).

IV. Commercially Reasonable

The amended R.I Gen. Laws § 39-26.1-7(c)(i) states that the Commission shall approve the Amended PPA if “the amended agreement contains terms and conditions that are commercially reasonable”. In Docket No. 4111, the Commission determined that the pricing of the 2009 PPA was not commercially reasonable using a two prong test. The first prong compared the price in the Deepwater agreement with pricing from “other renewable energy projects” while the second prong compared the internal rate of return (“IRR”) that Deepwater would achieve compared to the IRR that “an experienced power market analyst would expect from other renewable energy projects”.⁶²³

I used a two prong test modified to reflect the language in the amended R.I Gen. Laws § 39-26.1-7. In the amended R.I Gen. Laws § 39-26.1-7(iv), commercially reasonable was defined as “terms and pricing that are reasonably consistent with what an experienced power market analyst would expect to see for a project of a similar size, technology and location.” Therefore, I could not look at all renewable energy projects, but only projects using offshore wind technology with adjustments for small size and location. This made it difficult, to nearly impossible, to find a comparable renewable

⁶²³ Order No. 19941, p. 71 (2010)

project. Deepwater provided an analysis of the installed cost of various offshore European wind projects which was adjusted for size, location, technology, and cable costs. However, Deepwater did not adjust the proposed Project to reflect the cost of the transmission cable from Block Island to the mainland, a necessary component of the proposed Project, even if not included in the Amended PPA.⁶²⁴ As for the IRR analysis,⁶²⁵ Deepwater did provide one, but the Commission had previously rejected the methodology Deepwater had used in reaching its IRR.⁶²⁶ Unfortunately, due to time constraints required of an expedited review, the Chairman did not allow the Division to update its IRR analysis, which the Commission had previously accepted in Docket No. 4111, based on the information provided in this proceeding.⁶²⁷

In addition to reviewing the pricing, I also reviewed all the terms in the Amended PPA to determine if they were commercially reasonable because the Rhode Island General Assembly did not limit the Commission's review to only the new terms included in the Amended PPA. As to the terms, I heard compelling testimony from an expert witness, Mr. McCullough, who raised various objections to terms included in the PPA, including Appendix X. I was not satisfied with the explanations Deepwater and Grid provided. It is my opinion that the proponents of the Amended PPA failed to meet their burden of proof as to commercial reasonableness on terms and pricing. Based on the evidence and the law, I found that the Amended PPA is not commercially reasonable.

⁶²⁴ Deepwater Exhibit 3 at 2-17; Tr. 8/2/10 at 12-14.

⁶²⁵ An IRR analysis is appropriate in this case because the Rhode Island General Assembly knew this Commission had used an IRR analysis in reviewing renewable energy agreements and if the Rhode Island General Assembly did not want the Commission to use an IRR analysis it would have expressly said so in the amended R.I.G.L. Section 39-26.1-7. See *Colletta v. State*, 106 R.I. 765, 769-771 (1970)

⁶²⁶ Order No. 19941, pp. 74-77 (2010)

⁶²⁷ Tr. 8/5/10 at 89.

V. Conclusion

During its routine rate cases, the Commission regularly decides disputes, but usually the amount in question is no more than a few million dollars. However, in the contract approved in this proceeding, the public will be paying hundreds of millions of dollars more in energy costs for two decades which will not be offset by economic development benefits. Several parties have indicated their intention to appeal the Commission's decision. Much of this case seemed to turn on the proper interpretation of the law. I am hopeful the Court will agree with my interpretation.


Mary E. Bray, Commissioner

“Appendix A”

39-26.1-7. Town of New Shoreham Project. -- (a) The general assembly finds it is in the public interest for the state to facilitate the construction of a small-scale offshore wind demonstration project off the coast of Block Island, including an undersea transmission cable that interconnects Block Island to the mainland in order to: position the state to take advantage of the economic development benefits of the emerging offshore wind industry; promote the development of renewable energy sources that increase the nation's energy independence from foreign sources of fossil fuels; reduce the adverse environmental and health impacts of traditional fossil fuel energy sources; and provide the Town of New Shoreham with an electrical connection to the mainland. To effectuate these goals, and notwithstanding any other provisions of the general or public laws to the contrary, the Town of New Shoreham project, its associated power purchase agreement, transmission arrangements, and related costs are authorized pursuant to the process and standards contained in this section. The Narragansett Electric Company is hereby authorized to enter into an amended power purchase agreement with the developer of offshore wind for the purchase of energy, capacity, and any other environmental and market attributes, on terms that are consistent with the power purchase agreement that was filed with the commission on December 9, 2009 in docket 4111, and amendments changing dates and deadlines, provided that the pricing terms of such agreement are amended as more fully described in subsection 39- 26.1-7(e), in addition to other amendments that are made to take into account the provisions of this section as amended since the filing of the agreement in docket 4111. Any amendments shall ensure that the pricing can only be lower, and never exceed, the original pricing included in the power purchase agreement that was reviewed in docket 4111. ~~On or before August 15, 2009, the electric distribution company shall solicit proposals for one newly developed renewable energy resources project of ten (10) megawatts or less that includes a proposal to enhance the electric reliability and environmental quality of the Town of New Shoreham. The electric distribution company shall select a project for negotiating a contract that shall be conditioned upon approval by the commission. Negotiations shall proceed in good faith to achieve a commercially reasonable contract. Should the distribution company and the selected party agree to a contract, the contract shall be filed with the commission no later than October 15, 2009 for commission approval. The commission shall review the contract and issue an order approving or disapproving the contract on or before January 31, 2010. If the parties are unable to reach agreement on a contract prior to October 15, 2009, an unsigned copy shall be filed by the electric distribution company prior to that same date, and the commission shall have the discretion to order the parties to arbitrate the dispute on an expedited basis. Notwithstanding anything in this section to the contrary, and notwithstanding any solicitation made pursuant to this section, the distribution company and the selected party may agree to a contract for a~~ The demonstration project subject to the amended power purchase agreement shall that includes include up to (but not exceeding) eight (8) wind turbines with aggregate nameplate capacity of no more than thirty (30) megawatts, ~~subject to and conditioned upon the approval of the commission,~~ even if the actual capacity factor of the project results in the project technically exceeding ten (10) megawatts.

(b) The amended power purchase agreement shall be filed with the Public Utilities Commission. Upon the filing of the amended power purchase agreement, the commission shall open a new docket. The commission shall allow the parties to docket 4111 to become parties in the new docket who may file testimony within fifteen (15) days of the filing of the amended agreement. The commission shall allow other interventions on an expedited basis, provided they comply with the commission standards for intervention. The developer shall provide funding for the economic development corporation to hire an expert experienced in power markets, renewable energy project financing, and power contracts who shall provide testimony regarding the terms and conditions of the power purchase agreement to assist the commission in its review, provided that the developer shall be precluded from influencing the choice of expert, which shall be in the sole discretion of the economic development corporation. This testimony shall be filed within twenty (20) days after the filing of the amended power purchase agreement. The parties shall have the right to respond to the testimony of this expert through oral examination at the evidentiary hearings. The commission shall hold one public comment hearing within five (5) days after the filing of the expert testimony. Evidentiary hearings shall commence no later than thirty (30) days from the filing of the amended power purchase agreement.

(c) The commission shall review the amended power purchase agreement taking into account the state's policy intention to facilitate the development of a small offshore wind project in Rhode Island waters, while at the same time interconnecting Block Island to the mainland. The commission shall review the amended power purchase agreement and shall approve it if:

(i) The amended agreement contains terms and conditions that are commercially reasonable;

(ii) The amended agreement contains provisions that provide for a decrease in pricing if savings can be achieved in the actual cost of the project pursuant to subsection 39-26.1-7(e);

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

(iv) The amended power purchase agreement is likely to provide environmental benefits, including the reduction of carbon emissions. An advisory opinion on the findings of economic benefit set forth in (iii) above shall be provided by the Rhode Island economic development corporation and an advisory opinion on the environmental benefits set forth in (iv) above shall be filed by the Rhode Island department of environmental management. The advisory opinions shall be filed with the commission within twenty (20) days of filing of the amended power purchase agreement. The commission shall give substantial deference to the factual and policy conclusions set forth in the advisory opinions in making the required findings. Notwithstanding any other provisions of the general laws to the contrary, for the purposes of this section, "commercially reasonable" shall mean terms and pricing that are reasonably consistent with what an experienced power market analyst would expect to see for a project of a

similar size, technology and location, and meeting the policy goals in subsection (a) of this section.

(d) The commission shall issue a written decision to accept or reject the amended power purchase agreement, without conditions, no later than forty-five (45) days from the filing of the amended power purchase agreement, without delay or extension of the timeframes contained in this section. Any review of the commission's decision shall be according to chapter 5 of title 39, and the supreme court shall advance any proceeding under this section so that the matter is afforded precedence on the calendar and shall be heard and determined with as little delay as possible. Upon approval of the contract, the
~~The provisions of section 39-26.1-4 and the provisions of paragraphs (a), subsections (b), (c), (d), and (f) of section 39-26.1-5 shall apply, and all costs incurred in the negotiation, administration, enforcement, transmission engineering associated with the design of the cable, and implementation of the project and agreement shall be recovered annually by the electric distribution company in electric distribution rates. To the extent that there are benefits for customers of the Block Island Power Company or its successor, the commission shall determine an allocation of cost responsibility between customers of the electric distribution company and customers of Block Island Power Company or its successor after the cost estimates are filed with the commission, but the commission need not determine the final cost allocation at the time the commission considers and/or approves the contract between the electric distribution company and the project developer. The allocation of costs shall assure that individual customers in the Town of New Shoreham pay higher charges related to the project on their individual bills than any charges for the same project that may be included in individual bills of customers of the electric distribution company. The commission shall provide for an appropriate rate design and billing method between the electric distribution company and Block Island Power Company at the appropriate time. The pricing under the agreement shall not have any precedential effect for purposes of determining whether other long-term contracts entered into pursuant to this chapter are commercially reasonable.~~

(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. After making any such reduction to the initial price based on realized savings, the price for each year of the amended power purchase agreement shall be fixed by the terms of said agreement. (iii) The amended power purchase agreement shall require that the costs of the project shall be certified by the developer. An independent third-party acceptable to the division of public utilities and carriers shall within thirty (30) days of this certification by the developer, verify the accuracy of such costs at the completion of the construction of the project. The reasonable costs of this verification, shall be paid for by the developer. Upon receipt of such third-party verification, the division shall notify the Narragansett Electric Company of the final costs. The public utilities commission shall reduce the expense to ratepayers consistent with a verified reduction in the project costs.

....

(d)(h) Any contract entered into pursuant to this section shall count as part of the minimum long-term contract capacity.