STATE OF RHODE ISLAND
PUBLIC UTILITIES COMMISSION

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

OPPOSITION OF NATIONAL GRID AND DEEPWATER WIND BLOCK ISLAND, LLC TO INTERVENOR TRANSCANADA POWER MARKETING LTD.'S MOTION TO DISMISS

The Narragansett Electric Company d/b/a National Grid ("National Grid") and Deepwater Wind Block Island, LLC ("Deepwater Wind") (collectively, "Applicants") hereby oppose TransCanada Power Marketing Ltd.'s ("TransCanada") Motion to Dismiss.[1] As an initial matter, the Public Utilities Commission ("Commission") lacks jurisdiction to decide the constitutional issues that form the basis for the motion. Therefore, the Commission should not address the merits of the motion. Further, even if the Commission chooses to consider the merits of TransCanada's motion, the motion fails for a number of reasons. First, TransCanada's entire motion rests on the false premise that the Amended Long-Term Contracting Standard for Renewable Energy ("Amended LTC") requires National Grid to purchase renewable energy from Deepwater Wind. It does not. The Amended LTC is non-discriminatory, non-protectionist legislation that provides National Grid with *exactly the same incentives* regardless of whether it purchases energy from out-of-state producers such as TransCanada or from in-state producers

[1] TransCanada also adopts the arguments put forward by the Conservation Law Foundation and the Rhode Island Attorney General in their respective motions to dismiss. *See* TransCanada Mem. Supp. Mot. Dismiss at 1. The Applicants responded to those arguments on July 19, 2010 in a separately filed opposition. In addition, several intervenors, including Toray Plastics (America), Inc., Polytop Corporation, and the Ocean State Policy Research Institute, filed motions to dismiss that incorporate TransCanada's motion. To the extent any intervenor has adopted TransCanada's argument, this opposition responds to those motions to dismiss as well.

such as Deepwater Wind. Moreover, far from discriminating against, or burdening, interstate commerce, the Amended LTC imposes a series of substantive and procedural hurdles – as embodied in this very proceeding – that out-of-state producers such as TransCanada need not clear to sell renewable energy in Rhode Island. If anything, then, the Amended LTC burdens *in*-state producers, not *out*-of-state producers.

Second, the Amended LTC does not implicate the Commerce Clause because it is not protectionist legislation but, to the contrary, a program that falls outside the purview of the Commerce Clause. It is both a valid subsidy program and a form of constitutionally authorized market participation by the state.

Finally, the Amended LTC is constitutionally valid in that it serves a host of legitimate and critical local purposes and chooses non-discriminatory, non-burdensome means to achieve them. Even if the Amended LTC were discriminatory (and it is not), the statute is constitutionally valid because it is the only means to achieve the state's legitimate local purposes.[2]

I. BACKGROUND

On June 26, 2009, the Governor approved Public Law No. 2009-51, entitled Long-Term Contracting Standard for Renewable Energy (the "LTC"), and codified at Chapter 26.1 of Title

[2] TransCanada lacks standing to even challenge the Amended LTC. As the Supreme Court held in *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (quotations and internal citations omitted), the "irreducible constitutional minimum" of standing includes a requirement that "the plaintiff must have suffered an 'injury in fact' – an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical." As shown, TransCanada is entitled to the same ratepayer subsidy that in-state renewable energy producers enjoy and, indeed, has had the opportunity to participate as a bidder on an *at least* equal footing with in-state energy producers. Thus, TransCanada lacks standing because it has failed to allege *any* injury resulting from the alleged constitutional violation embodied in the Amended LTC, let alone an injury that is "concrete" or "imminent," as opposed to "conjectural" or "hypothetical." TransCanada also lacks standing because it has failed to establish that it is even the proper corporate entity allegedly impacted by the Amended LTC.

39 of the Rhode Island General Laws. *See* R.I. Gen. Laws §§ 39-26.1-1 through 39-26.1-8.[3] The LTC is intended to accomplish several economic and environmental goals by facilitating and encouraging "the creation of commercially reasonable long-term contracts between electric distribution companies and developers or sponsors of newly developed renewable energy resources." § 39-26.1-1. By creating a market for this renewable energy, which otherwise would be uncompetitive with traditional energy sources, the General Assembly desires to "stabiliz[e] long-term energy prices, enhanc[e] environmental quality, creat[e] jobs in Rhode Island in the renewable energy sector, and facilitat[e] the financing of renewable energy generation within the jurisdictional boundaries of the state or adjacent state or federal waters or providing direct economic benefit to the state." *Id.*

In order to ensure the continued existence of this new market for renewable energy, the LTC requires National Grid[4] to attain, within a timetable reasonably designed to achieve compliance within four years, a "minimum long-term contract capacity." §§ 39-26.1-2(7), 26.1-3(b). This means that, within the established timetable, National Grid must obtain at least ninety (90) megawatts of capacity through long-term contracts for eligible renewable energy. § 39-26.1-2(7). The LTC permits National Grid to obtain additional capacity, above and beyond the minimum, if it so chooses. *See id.* To facilitate National Grid's compliance, the LTC requires National Grid to "annually solicit proposals from renewable energy developers and, provided commercially reasonable proposals have been received, enter into long-term contracts with terms of up to fifteen (15) years for the purchase of capacity, energy and attributes from newly developed renewable energy resources." § 39-26.1-3(a). While the LTC does not require National Grid to enter into any particular long-term contract, the statute provides for financial

[3] Unless otherwise indicated, all statutory references are to the Rhode Island General Laws.
[4] The statute specifically refers to "electric distribution companies," rather than to National Grid. *See* § 39-26.1-3.

incentives should National Grid enter into one or more such contracts. *See* §§ 39-26.1-2(7), 26.1-3(b), 26.1-4.

In enacting the LTC, the General Assembly sought to achieve one additional goal. As a result of its unique geography and development, the Town of New Shoreham ("Town") on Block Island has long suffered from chronic energy problems, including high electricity costs and air pollution resulting from diesel generators. *See* LaCapra Direct Testimony at 4:8-6:16. Thus, the LTC requires National Grid, on or before August 15, 2009, to solicit proposals for one newly developed renewable energy resources project of ten (10) megawatts or less that includes a proposal to enhance the Town's electric reliability and environmental quality through, among other things, construction of an electricity transmission cable between the Town and the mainland of the state. *See* §§ 39-26.1-3(a), 26.1-7. As with all other long-term renewable contracts that National Grid solicits pursuant to the LTC, the LTC does not require National Grid to actually conclude any such contract regarding the Town. If it does, however, the contract will count towards National Grid's minimum long-term contract capacity, *see* § 39-26.1-7, and National Grid will receive the same financial incentives as it would for executing any other long-term contract.

National Grid solicited proposals from Deepwater Wind and other prospective renewable energy producers that contemplated the installation of a wind energy demonstration project off the coast of Block Island and a transmission cable to the mainland (the "Project"). After only Deepwater Wind bid on the Project, National Grid and Deepwater Wind eventually, and not without difficulty, reached agreement on a Power Purchase Agreement ("Original PPA") for the Project. On April 2, 2010, in Docket No. 4111, the Commission declined to approve the Original PPA. The Commission concluded that the Original PPA was not "commercially

reasonable" as that term was defined in the LTC, which governed the administrative review of the Original PPA.

On June 16, 2010, the Governor signed into law the "Amended LTC."[5] By this point, the LTC's provision requiring National Grid to solicit the Project had expired, *see* § 39-26.1-3(a), and the Amended LTC imposes no further solicitation requirement on National Grid with respect to the Project. The Amended LTC does, however, "authorize[ ]" National Grid to enter into an amended power purchase agreement ("Amended PPA") with Deepwater Wind on terms that are consistent with the Original PPA but that also satisfy the conditions set forth in the Amended LTC. Additionally, the Amended LTC significantly alters the administrative review process set forth in the original LTC by changing the 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.

First and foremost, the Amended LTC redefines the "commercially reasonable" standard embedded in the Commission's review criteria for purposes of reviewing the Amended PPA.[6] In reviewing the Application in this docket the Commission will apply the "commercially reasonable" standard in the context of the specific characteristics of the proposed project.

Second, the Amended LTC requires the Rhode Island Economic Development Corporation ("EDC") and the Rhode Island Department of Environmental Management ("DEM") to file advisory opinions on the findings of economic and environmental benefit, respectively. *See* § 39-26.1-7(c)(IV). The Commission is obligated to "give substantial

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[5] To be clear, the only section of the LTC that was amended was section 39-26.1-7. The LTC as originally enacted otherwise remains in effect. Therefore, references to the "Amended LTC" are meant to include the entirety of the original statute, and the amended Section 7.

[6] Commercially reasonable is defined by the Amended LTC to 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." § 39-26.1-7(c)(IV); 2010 R.I. Pub. Laws 32.

deference to the factual and policy conclusions set forth in the advisory opinions." *Id.* The Amended LTC also requires Deepwater Wind to fund EDC's efforts to obtain and present expert testimony on the terms and conditions of the Amended PPA. *See* § 39-26.1-7(b).

Third, the Amended LTC establishes a standard of review requiring the Commission to review the Amended PPA while taking into account Rhode Island's policies of facilitating offshore wind power development and interconnecting Block Island to the mainland. *See* § 39-26.1-7(c). Block Island is in dire need of this interconnection and the State's exercise of its police power is necessary to accomplish that goal. *See* LaCapra Direct Testimony at 4:8-6:16. No private energy company, including TransCanada, has stepped forward outside the Project and offered to provide power to Block Island through an interconnection. The Amended LTC specifically references these goals inherent in the state's exercise of its police power by authorizing the Project only if:

(1) "The Amended Agreement contains terms and conditions that are commercially reasonable," (as redefined by the Amended LTC),

(2) "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),"

(3) "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

(4) "The Amended Agreement is likely to provide environmental benefits, including the reduction of carbon emissions."

§ 39-26.1-7(c).

Fourth, the Amended LTC requires the Commission to ensure that there are new terms that cap the price of the produced energy and that any savings resulting from lower-than-

expected project costs will be passed on to ratepayers. An independent third-party must verify the project costs, the expense of which the offshore wind developer must bear. *See* § 39-26.1-7(e).

Consistent with the Amended LTC, National Grid chose to enter into an Amended PPA with Deepwater Wind. That Amended PPA is now, in this Docket 4185, before the Commission for approval.

II. ARGUMENT

A. The Commission lacks jurisdiction to decide the constitutionality of duly enacted legislation

TransCanada contends that the Amended LTC violates the Commerce Clause of the U.S. Constitution. Nevertheless, the Commission lacks the jurisdiction and authority to determine the constitutionality of duly enacted legislation. Consequently, for this reason alone, TransCanada's Motion to Dismiss must be denied and the Commission need not proceed any further.

Under Rhode Island law, administrative agencies lack jurisdiction to decide the constitutionality of the statutes that they administer.[7] As the Rhode Island Supreme Court explained in *Payne & Butler v. Providence Gas Co.*:

> There is only one body that is authorized to interpret the statutes of this State with the view of determining their constitutionality. Under article XII of the amendments to the constitution of the State, adopted in November, 1903, section 1: "The supreme court shall have final revisory and appellate jurisdiction upon all questions of law and equity." Furthermore, a statute is constitutional or not, as the case may be, without reference to the interpretation of any board or boards of commissioners. *It is deemed to be constitutional until this court shall have decided that it is not.*

[7] In the zoning context, the enabling statute for the Commission does give the Commission some limited authority to review *local* ordinances and regulations. *See* § 39-1-30 (respecting Commission review of certain "town" or "city" ordinances and regulations); *East Greenwich v. O'Neil*, 617 A.2d 104 (R.I. 2004). But there is no indication in the enabling statute or the case law that the Commission may review even local legislation for *constitutionality*.

77 A. 145, 153 (R.I. 1910) (emphasis added); *see, e.g., Peoples Liquor Warehouse v. Dep't of Bus. Regulation*, 2007 R.I. Super. LEXIS 78, *5 (R.I. Super. May 21, 2007) (observing favorably that "[t]he Hearing Officer declined to rule on the Appellants' constitutional claims, because she recognized that an administrative agency of the executive branch of government cannot determine the constitutionality of a statute at issue."); *see also In re Advisory Opinion to the Governor*, 732 A.2d 55, 69 (R.I. 1999) ("[I]t has been our long-standing and consistent opinion that questions concerning the governmental structure of this state are constitutional issues that may be determined only by the judiciary.").

Rhode Island law is consistent with the overwhelming case law from other jurisdictions, including her adjacent sister states, holding that administrative agencies lack the authority to rule on the constitutionality of legislative enactments. *See Johnson v. Robison*, 415 U.S. 361, 368 (1974) ("[A]djudication of the constitutionality of congressional enactments has generally been thought beyond the jurisdiction of administrative agencies."); *Maher v. Justices of Quincy Div. of District Court*, 855 N.E.2d 1106, 1111 (Mass. App. Ct. 2006) ("It is for the courts, not administrative agencies, to decide the constitutionality of statutes."); *Fullerton v. Adm'r, Unemployment Compensation Act*, 280 Conn. 745, 759 (2006) ("[I]t is well established that claims regarding the constitutionality of legislative enactments are beyond the jurisdiction of administrative agencies."); *Albe v. Louisiana Workers' Compensation Corp.*, 700 So.2d 824, 827 (La. 1997) (collecting "overwhelming" state and federal authority supporting the rule); *States ex rel. Utilities Comm'n v. Carolina Utilities Customers Ass'n*, 446 S.E.2d 332, 342 (N.C. 1994) ("As an administrative agency created by the legislature, the Commission has not been given jurisdiction to determine the constitutionality of legislative enactments."); *Lincoln v. Arkansas Pub. Serv. Comm'n*, 854 S.W.2d 330, 332 (Ark. 1993) ("no administrative tribunal has

authority to declare unconstitutional the act which it is called on to administer"); *Arapahoe Roofing & Sheet Metal, Inc. v. Denver*, 831 P.2d 451, 454 (Colo. 1992); *Westover v. Barton Elec. Dep't*, 543 A.2d 698, 699 (Vt. 1988) ("[T]he great majority of state courts have held that administrative agencies have no power to determine the constitutional validity of statutes."); *First Bank v. Conrad*, 350 N.W.2d 580, 585 (N.D. 1984); *Bare v. Gorton*, 526 P.2d 379, 381 (Wash. 1974) ("An administrative body does not have authority to determine the constitutionality of the law it administers; only the courts have that power."); *Metz v. Veterinary Examining Bd.*, 741 N.W.2d 244, 254 (Wisc. Ct. App. 2007); *Montez v. J&B Radiator, Inc.*, 779 P.2d 129, 131 (N.M. App. 1989); *Duncan v. Missouri Bd. for Architects, Professional Engineers & Land Surveyors*, 744 S.W.2d 524, 531 (Mo. Ct. App. 1988); *Metropolitan Government v. State Bd. of Equalization*, 1988 Tenn. App. LEXIS 409, **10-11 (Tenn. Ct. App. July 8, 1988).

This rule flows inexorably from the fact that a legislature creates administrative agencies such as the Commission to effectuate its "statutory purposes," and, thus, "the legislature could not have intended" agencies to "be able to question the very validity of [the legislature's] enactments." *Westover*, 543 A.2d at 699; *see Conrad*, 350 N.W.2d at 584-585 ("Basically, administrative agencies are creatures of legislative action. As such, legal logic compels the conclusion that the agencies have only such authority or power as is granted to them or necessarily implied from the grant. . . . To make the system of administrative agencies function the agencies must assume the law to be valid until judicial determination to the contrary has been made.").

Moreover, the rule applies with equal force to allegedly "quasi-judicial" administrative agencies, including utility commissions. In *Carolina Utilities Customers*, for example, the North

Carolina Supreme Court confronted the following question regarding the powers of that state's utilities commission:

> Does a quasi-judicial board of the executive branch of government have jurisdiction to pass upon the constitutionality of a statute?

Carolina Utilities Customers, 446 S.E.2d at 673.

The Court answered in the negative:

> As an administrative agency created by the legislature, the Commission has not been given jurisdiction to determine the constitutionality of legislative enactments. We hold that the Commission did not have the authority to determine the constitutionality of [the state statutes at issue] and properly declined to do so.

Id. at 674.

In *Lincoln*, similarly, the Arkansas Supreme Court held that Arkansas' utility commission could not adjudicate the constitutionality of a state statute – further explaining that Separation of Powers principles support the rule that administrative agencies, even those operating in a quasi-judicial capacity, may not rule on the constitutionality of state statutes:

> Lincoln asserts a claim founded solely on a state constitutional right to be free from a monopolistic market in the supply and demand of electric service. Other jurisdictions have held that a claim asserted solely on a constitutional right is singularly situated in a judicial forum rather than an administrative forum, and that no administrative tribunal has authority to declare unconstitutional the act which it is called on to administer. In fact, the Supreme Court has stated that adjudication of the constitutionality of congressional enactments has generally been thought to be beyond the jurisdiction of administrative agencies. *Johnson v. Robison*, 415 U.S. 361 (1974). *We agree with such holdings as they follow the doctrine of separation of powers.* Therefore, we hold that while an administrative agency is vested with quasi-judicial powers to determine some incidental questions of law, and while that agency receives great deference from judicial forums in its areas of exclusive jurisdiction, issues based solely on constitutional claims are not within the agency's jurisdiction.

Lincoln, 854 S.W.2d at 332 (emphasis added) (internal citations omitted); *see also* *Communications Workers, Local 3170 v. City of Gainesville*, 697 So.2d 167, 170 (Fla. D.C.A.

1997) (explaining that Public Employee Relations Commission, which exercised "quasi-judicial power," lacked authority to invalidate legislative enactments).

Accordingly, because it asks this Commission to decide the constitutionality of an act of the General Assembly that the Commission must administer, TransCanada's Motion to Dismiss must be denied.[8] *See Payne & Butler*, 77 A. at 153 (stating that a statute is "deemed to be constitutional" until the Supreme Court decides otherwise).

B. The Amended LTC does not violate the Commerce Clause

1. Acts of the General Assembly are presumed to be constitutional.

As explained above, the Commission lacks jurisdiction to review the constitutionality of the Amended LTC and so it must *deem* the statute to be constitutional unless and until the Supreme Court instructs otherwise. *See Payne & Butler*, 77 A. at 153. If the Commission considers TransCanada's commerce clause challenge on the merits, the Commission, no less than a court of law, must adhere to the principle that all laws regularly enacted by the legislature are presumed to be constitutional and valid. *See Driver v. Town of Richmond*, 570 F. Supp. 2d 269, 275 (D.R.I. 2008); *City of Pawtucket v. Sundlun*, 662 A.2d 40, 45 (R.I. 1995). Courts must give effect, if possible, to a state statute, and approach all constitutional questions with caution. *See DEPCO v. Brown*, 659 A.2d 95, 100 (R.I. 1995); *United Nuclear Corp. v. Cannon*, 553 F. Supp. 1220, 1233 (D.R.I. 1982). Every reasonable inference must be made in favor of the constitutionality of a particular legislative act. *See R. I. Med. Soc'y v. Whitehouse*, 66 F. Supp. 2d 288, 305-06 (D.R.I. 1999); *City of Pawtucket*, 662 A.2d at 45. Whether a court believes an enactment to be unwise or unnecessary is largely irrelevant, for those are judgments to be made

[8] Remarkably, TransCanada failed to make any showing that the Commission has the jurisdiction or authority to consider its constitutional claim. The Conservation Law Foundation has already conceded in this proceeding that the Commission has no such jurisdiction, and the Attorney General's office has acknowledged before the Commission that indeed it may have no jurisdiction to decide constitutional issues, merely the authority to construe statutes in a manner that avoids constitutional issues if there is an alternative reasonable construction.

by the legislature. *See FCC v. Beach Comm'ns, Inc.*, 508 U.S. 307, 313-14 (1993). Any doubt possessed by the Commission as to the constitutionality of the Amended LTC therefore must be resolved in favor of the statute.

2. The Commerce Clause has no bearing on the Amended LTC because the Amended LTC neither discriminates against, nor burdens, interstate commerce.

TransCanada argues that the Amended LTC violates the Commerce Clause because it requires National Grid to buy renewable energy from an in-state generator, Deepwater Wind. *See* TransCanada Mot. Dismiss at 4. TransCanada is wrong, and its argument is without merit. The plain language of the Amended LTC does not require National Grid to purchase any portion of its renewable energy quota from the Project.

Under the Commerce Clause of the United States Constitution, statutes which "affirmatively discriminate" against interstate "transactions," are valid if the state's "legitimate local purpose" "could not be served as well by available nondiscriminatory means." *Maine v. Taylor*, 477 U.S. 131, 138 (1986).[9] Relying on this provision, TransCanada claims that the Amended LTC affirmatively discriminates against interstate commerce in violation of the Commerce Clause because, "[r]ead as a whole, the [Amended] LTC . . . purports to *require* [National Grid] to enter a long-term contract with this favored in-state generator [*i.e.* Deepwater Wind]." TransCanada Mot. Dismiss at 4 (emphasis added).

This claim – which constitutes TransCanada's only objection to the Amended LTC – rests on a patently false premise. The Amended LTC *does not* require National Grid to enter into

[9] As discussed further in Part II.B.4, a more deferential standard of review applies to statutes that do not "affirmatively discriminate." Such statutes are generally upheld and are valid, "even though interstate commerce may be affected," so long as they address a "legitimate local concern" and the burdens on interstate commerce are "clearly excessive in relation to the putative local benefits." *Maine v. Taylor*, 477 U.S. 131, 138 (1986) (internal quotations omitted).

any contract with Deepwater Wind or any other in-state generator of Block Island's wind power. To the contrary, the Amended LTC only *authorizes* National Grid to enter into a contract with Deepwater Wind. *See* § 39-26.1-7 ("The Narragansett Electric Company is hereby authorized to enter into an amended power purchase agreement with the developer of offshore wind . . . ."). National Grid remains free to exercise its discretion in selecting generators to fulfill its ninety megawatt renewable energy quota. National Grid has already entered into a much larger contract with a generator at the Central Landfill, Ridgewood Power, to satisfy part of that quota. And, it is currently soliciting proposals from other generators for renewable energy, including TransCanada which expressed interest at a pre-bid meeting. Concurrently with all of that activity, National Grid decided to enter into the Amended PPA to purchase renewable energy from Deepwater Wind, subject to the Commission's review and approval. Furthermore, TransCanada's own motion acknowledges that TransCanada's opportunities to contract with National Grid will be reduced *only if the Amended PPA is approved by the Commission* and recognizes that a contract between National Grid and Deepwater Wind is not a forgone conclusion. TransCanada Mot. Dismiss at 4. After all, this Commission rejected the Original PPA.[10]

Even the LTC's solicitation provision, which TransCanada appears to rely upon in structuring its argument, only required National Grid to *solicit proposals* for an in-state project of the kind contemplated by Deepwater Wind. *See* § 39-26.1-3(a) ("Notwithstanding any other provisions of this chapter, on or before August 15, 2009, the electric distribution company shall solicit proposals for one newly developed renewable energy resources project as required in § 39-26.1-7."). Requiring National Grid to entertain proposals for an in-state project, however,

[10] Even the General Assembly's statement of policy, set forth in the first section of the statute, recognizes that the renewable energy projects that the statute is designed to facilitate may or may not be located in Rhode Island. *See* § 39-26.1-1.

is not the same as requiring National Grid to purchase power from a particular project, in-state or otherwise, and imposed no identifiable burden on interstate commerce. Put another way, the LTC did not discriminate with respect to solicitation (let alone contracting) because National Grid held the authority to solicit out-of-state proposals as well, and on an equal footing, which it has now done in addition to entering into the Amended PPA. Furthermore, even this limited, non-discriminatory solicitation requirement has expired by its own terms. The LTC required National Grid to solicit a project that would meet the requirements of § 39-26.1-7 *on or before August 15, 2009. See* § 39-26.1-3(a). National Grid did so, and the only bidder was an out-of-state developer – Deepwater Wind. TransCanada elected not to even submit a bid on the Project.

In sum, TransCanada's claim fails because it rests on the faulty premise that the Amended LTC requires that National Grid purchase renewable energy from an in-state generator.

Two other aspects of the Amended LTC bear noting. First, the Amended LTC affords the same financial incentives to National Grid – and, by extension, the same subsidy to renewable energy producers – regardless of whether National Grid purchases power from out-of-state renewable energy producers or in-state renewable energy producers. *See* § 39-26.1-4. Specifically, the "financial remuneration and incentives" that National Grid would be provided should it execute a long-term contract to purchase renewable energy from TransCanada's Maine-based wind farm would be "equal to two and three quarters percent (2.75%) of the actual annual payments made under the contract[ ]," *id.*, *the very same incentive that National Grid receives if it purchases energy from Deepwater Wind.* In a broader context, all renewable energy producers receive the same subsidy from Rhode Island's ratepayers regardless of where each producer generates its energy. The equivalence of the subsidy, as explained in the next section,

demonstrates that this is by no means protectionist legislation designed to benefit only local industry but a far-ranging and ambitious Rhode Island plan to obtain renewable energy by subsidizing producers both in-state and out-of-state on an equal basis.

Second, unlike Deepwater Wind, out-of-state renewable energy producers such as TransCanada do not need to undergo the rigorous review process that this proceeding entails. In fact, far from disadvantaging out-of-state developers, the Amended LTC subjects only the in-state developer, Deepwater Wind, to a series of substantive and procedural hurdles that no out-of-state developer needs to cross to participate in the Rhode Island renewable energy market. For example, the Amended LTC requires the EDC and DEM to file advisory opinions addressing whether the Amended PPA provides the economic and environmental benefits contemplated by the statute. *See* § 39-26.1-7(c)(IV). The Commission is obligated to give "substantial deference" to these advisory opinions in deciding whether to approve the Amended PPA. *See id.* The Amended LTC also requires Deepwater Wind to fund EDC's efforts to obtain and present expert testimony on the terms and conditions of the Amended PPA. *See* § 39-26.1-7(b). In addition, the Amended LTC also sets forth a specific standard of review applicable to the Amended PPA but no other long-term contract. Finally, the Amended LTC requires the Commission to review the Amended PPA while taking into account Rhode Island's policies of facilitating offshore wind power development and interconnecting Block Island to the mainland. *See* § 39-26.1-7(c). No other renewable energy producer will need to clear any hurdle comparable to interconnecting Block Island to the mainland to sell renewable energy to Rhode Island customers through National Grid. Perhaps that is why only Deepwater Wind responded to the Request for Proposals.

These additional burdens, imposed exclusively on an *in*-state producer, further demonstrate that this non-discriminatory statute, which does not mandate a National Grid—Deepwater Wind contract and which subsidizes interstate renewable energy producers on the same basis and to the same extent as Rhode Island renewable energy producers, easily satisfies the requirements of the Commerce Clause.

3. The Amended LTC does not violate the Commerce Clause because when properly viewed as a whole the Project does not implicate Commerce Clause principles.

As just demonstrated, the Amended LTC does not discriminate against, or even incidentally burden, interstate commerce. It effectively provides out-of-state producers with the *same* subsidy and same opportunity that it provides to the Project and, in fact, erects in the way of this in-state Project procedural and substantive hurdles that do *not* apply to renewable energy projects outside Rhode Island. On its face, the Amended LTC discriminates in *favor* of out-of-state projects at the expense of this one.

Even more fundamentally, the Project, when correctly understood and viewed in its entirety, does not even implicate Commerce Clause principles. As TransCanada acknowledges, the central rationale for the rule against discrimination is to prohibit state laws whose object is local protectionism. As the Supreme Court states the principle, "[p]reservation of local industry by protecting it from the rigors of interstate competition is the hallmark of the economic protectionism that the Commerce Clause prohibits." *W. Lynn Creamery v. Healy*, 512 U.S. 186, 205 (1994). The Amended LTC, however, is not a law designed to protect local economic interests. It is perfectly valid as a subsidy program designed to *generate* a market where there currently is none. *See New Energy Co. v. Limbach*, 486 U.S. 269, 278 (1988) ("The Commerce clause does not prohibit all state action designed to give its residents an advantage in the market

place, but only action of that description in connection with the State's regulation of interstate commerce. Direct subsidization of domestic industry does not ordinarily run afoul of that prohibition[.]"); *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 815 (1976) (Stevens, J., concurring) (explaining that in assessing a claim that a state statute violates the Commerce Clause "[i]t is important to differentiate between commerce which flourishes in a free market and commerce which owes its existence to a state subsidy program.").

It is significant, first, that the General Assembly did not enact the Amended LTC to protect a local industry. *Contrast Healy*, 512 U.S. at 194-95 (invalidating on Commerce Clause grounds a Massachusetts statute that taxed out-of-state producers to fund subsidy to in-state producers of milk, serving the avowed purpose of enabling higher-cost Massachusetts dairy farmers to compete with lower-cost out-of-state farmers). The General Assembly enacted the Amended LTC to promote the development of renewable energy by requiring National Grid over several years to enter into long-term contracts to purchase ninety megawatts of renewable energy for Rhode Island. The Amended LTC does not require National Grid to enter into any particular contract, but it authorizes National Grid, subject to numerous conditions, to enter into the Amended PPA with Deepwater Wind, subject to Commission review and approval. *See* § 39-26.1-1. The General Assembly did not bar or disadvantage out-of-state energy companies from developing that project; to the contrary, the law encourages out-of-state developers. And in fact, an out-of-state developer signed the Amended PPA with National Grid and is now seeking to develop the Project. Furthermore, the Amended LTC provides equally generous subsidies and incentives to other out-of-state producers who can bid on the remaining renewable energy requirements. This is, simply put, not economic protectionist legislation.[11] Indeed, the General

[11] In this respect, the Amended LTC is easily distinguishable from the extreme, discriminatory, protectionist schemes at issue in the cases that TransCanada cites. For example, in *City of Philadelphia v. New Jersey*, 437 U.S.

Assembly's intent with respect to the Project is very much like promoting the development of a state industrial park to attract jobs and promote business development – an activity promoted and implemented by states across the country. *See Hughes*, 416 U.S. at 816 (Stevens, J., concurring) (concluding that the Commerce Clause does not "inhibit a State's power to experiment with different methods of encouraging local industry. . . [w]hether the encouragement takes the form of a cash subsidy, a tax credit, or a special privilege intended to attract investment capital"); Walter Hellerstein & Dan T. Coenen, *Commerce Clause Restraints on State Business Development Incentives*, 81 Cornell L. Rev. 789, 790 (1996) (observing that "[t]oday, every state provides tax and other economic incentives as an inducement to local industrial location and expansion").

The General Assembly recognized that developing the Project could not occur without a mechanism to sell the resulting energy into the grid. Today, renewable energy is more costly than energy produced through fossil fuels. No renewable energy source, within or outside of Rhode Island, can compete on price, and thus no renewable energy industry of any significance could serve the Rhode Island market at traditional utility rates. In other words, renewable energy is not financially sustainable without government market participation in the form of a ratepayer subsidy program. That is why Rhode Island, for example, has required National Grid to include renewable energy in its energy portfolio for Rhode Island, even though that purchase must be subsidized by the ratepayers at higher rates. So, to enable and facilitate the development of the

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617, 625-29 (1978), the Supreme Court struck down a New Jersey statute that flatly prohibited the importation into New Jersey of most solid and liquid wastes which originated or were collected outside of the state. The Amended LTC does not prohibit the importation of renewable energy from outside the state. Again, it encourages such importation by affording out-of-state renewable energy sources a generous subsidy equal to the subsidy applicable to in-state sources. In *C & A Carbone v. Town of Clarkstown*, 511 U.S. 383, 390 (1994), another case relied on by TransCanada, the Supreme Court addressed the opposite extreme, a town ordinance that prohibited garbage from being sent out-of-state by requiring that it be sent to the local facility for processing. The case again represents blatant protectionism and is equally distinguishable on that basis. Nothing in the Amended LTC excludes in-state facilities from selling their renewable energy out-of-state, and the statute encourages importation of renewable energy from other states.

Project, which involves not only a wind energy demonstration project but also a critically important transmission cable between Block Island and the mainland, the General Assembly created a structure that permits the electricity generated from the Project to be sold, at an economically feasible price, into the power grid.[12]

In deploying a ratepayer subsidy to establish a feasible new market in wind power production, the General Assembly created a regime that is analogous to the subsidy program the Supreme Court affirmed against a Commerce Clause challenge in *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794 (1976). There, the Supreme Court held that a statute did not violate the Commerce Clause, even though the state paid a bounty only to wreckers who maintained *in-state* junkyards, in exchange for the wreckers' disposal of junked cars and allowed Maryland junk-car processors to prove car ownership by a simple indemnity agreement, requiring out-of-state car processors to provide additional proof. *Id.* at 808-09. The Court sustained the statute, holding that "[n]othing in the purposes animating the *Commerce Clause* prohibits a State, in the absence of congressional action, from participating in the market and exercising the right to favor its citizens over others." *Id.* at 810; *see also Toomer v. Wisell*, 334 U.S. 385, 408 (1948) (Frankfurter, J., concurring) ("A state may care for its own in utilizing the bounties of nature within her boundaries because it has technical ownership of such bounties or, when ownership is in no one, because the State may for the common good exercise all the authority that technical ownership ordinarily confers.").

[12] When a state develops an industrial park, it does not need to worry about the sale of energy into a highly regulated industry comprised of monopolistic companies. Here, however, the General Assembly had to provide an outlet for the energy generated from the renewable energy project. It did so by establishing a subsidy from Rhode Island ratepayers. If the Commission approves the Project and it moves forward the ratepayers will pay a little more in rates to subsidize this renewable energy project, in the same way that they will pay more in rates to subsidize National Grid's purchases of renewable energy from sources outside the state.

Here, too, the General Assembly has stepped into the market for renewable energies, using a ratepayer subsidy to make the wind energy demonstration project and transmission cable financially feasible. While the General Assembly has *not* discriminated in carrying out the Project – or in awarding the ratepayer subsidy – the General Assembly, as a market participant in accomplishing this project and structuring the pertinent rates to fund it, would have been free to take this "discriminatory" step without implicating the Commerce Clause.

Moreover, it is significant that the Amended LTC is what makes the Project even possible. As a well-reasoned concurrence by Justice Stevens in *Hughes* explained:

> It is important to differentiate between commerce which flourishes in a free market and commerce which owes its existence to a state subsidy program. Our cases finding that a state regulation constitutes an impermissible burden on interstate commerce all dealt with restrictions that adversely affected the operation of a free market. *This case is unique because the commerce which Maryland has 'burdened' is commerce which would not exist if Maryland had not decided to subsidize* a portion of the automobile scrap-processing business.

Id. at 815 (Stevens, J., concurring) (emphasis added). Justice Stevens further observed that "[b]y artificially enhancing the value of certain abandoned hulks, Maryland created a market that did not previously exist." *Id.*

The "unique" situation that Justice Stevens described in *Hughes* has become the "new normal" for the renewable energy industry. Government intervention is necessary to create a market where there previously was no market of any significance. Rate setting and project development, in this particular context, are policymaking of a sort which cannot be distinguished, in substance, from traditional and valid governmental subsidies or from more traditional governmental participation in the marketplace.[13] Thus, in the Rhode Island market,

[13] As the eminent legal historian, Harvard Law School professor Morton J. Horwitz, traced in his seminal work, *The Transformation of American Law: The Crisis of Legal Orthodoxy* (1870-1960) (Oxford University Press 1992) at 160-64, legal theorists demonstrated long ago that, in setting rates, policymakers (and administrative bodies such as the Commission) necessarily shape the market value of utility companies, since it is the rates that the regulators set

neither intra-state nor *inter*-state trade between Rhode Island's residents and renewable energy producers would be financially feasible without the presence of the ratepayer subsidy embodied in the Amended LTC. And a ratepayer subsidy program designed to establish such a market in renewable energy does not implicate the Commerce Clause, even if it results in Rhode Island taking advantage of its own natural bounty – the winds off Block Island. Furthermore, it would not do so even if it *was* mandatory with respect to the in-state purchase of renewable energy from the Project. That the statute is not mandatory, and that the subsidy is the same for both out-of-state producers (such as TransCanada) and in-state producers (such as Deepwater Wind), only bolsters the Amended LTC's validity under the Commerce Clause. Indeed, in establishing a non-discriminatory ratepayer subsidy program, Rhode Island has taken the constitutionally generous and environmentally responsible step of subsidizing the development of renewable energy markets both locally and nationally.

TransCanada attacks the Amended LTC and charges that it will result in increased costs and rates that will harm the public. TransCanada does not care one whit about the public interest. It is happy to see the public pay more for renewable energy, as long as the public is buying the energy from TransCanada and no one else. Indeed, when recently TransCanada believed its New Hampshire hydroelectric assets to be under threat from a proposal to import renewable energy from Canada, it wrote a letter to the New Hampshire Department of Environmental Services expressing distaste for imported energy: "We believe that indigenous renewable resources are

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that determines, in part, the worth of the companies' previous assets and investments. Put another way, ratemaking is, by necessity, policymaking. Hence, some "independent ground of policy" aside from traditional free-market yardsticks must be used to justify the rates that regulators set. *Id.* (quoting Robert L. Hale, *Rate Making and the Revision of the Property Concept*, 22 Colum. L. Rev. 209 (1922)). If ratemaking is policymaking, a necessary corollary in the renewable energy context, where there is no substantial existing market, is that policymaking is *market* making. Therefore, it is market participation. It is only through interventions such as the Amended LTC that the General Assembly can construct and participate in a viable market in Rhode Island's wind or, for that matter, a Rhode Island market for renewable energy sources imported from other jurisdictions. In sum, the Commerce Clause does not apply in this context, where the state necessarily participates in the market by creating and subsidizing it.

preferable to imports and therefore caution against spending ratepayer funds for transmission upgrades that do not benefit renewable energy generators located *within* New Hampshire or the region." Exhibit A at 2 (emphasis in original). But the General Assembly has established broader goals than enriching TransCanada, or even enriching any Rhode Island company: the General Assembly seeks to improve public health, create environmental benefits, generate economic benefits, and promote the development of renewable energy. The Project, although important for its environmental and energy reliability benefits on Block Island, is only a minor part of that effort. TransCanada myopically and incorrectly focuses only on the sale of energy while ignoring the other aspects of the Project, because when viewed as a whole, it is apparent that the Amended LTC does not contravene the Commerce Clause or its underlying principles.

4. The Amended LTC does not violate the Commerce Clause because the Amended LTC is a valid exercise of Rhode Island's police power intended to advance a legitimate local purpose.

Finally, the Amended LTC passes muster under the Commerce Clause as a valid exercise of Rhode Island's police power, tailored properly to promoting legitimate local purposes.

It is a foundational principle of our federal system that every state possesses, and retains, the inherent police power "to safeguard the vital interest of its people." *Kunelius v. Town of Stow*, 588 F.3d 1, 20 (1st Cir. 2009) (quoting *Energy Reserves Group v. Kan. Power & Light Co.*, 459 U.S. 400, 410 (1983)). This police power, which is broad in scope,[14] has significant

[14] The police power encompasses a variety of areas of the law affecting state and local economies. Thus, in the exercise of its police power, a state may establish minimum wages, maximum prices, and zoning restrictions, impose taxes and duties, restrict entry into particular business fields or professions, condemn or destroy property not meeting health or safety standards, and establish public monopolies. *See, e.g., De Canas v. Bica*, 424 U.S. 351, 356 (1976) (sustaining state statute regulating employment of known illegal aliens against preemption challenge); *North Dakota Pharmacy Bd. v. Snyder's Stores*, 414 U.S. 156, 167 (1973) (sustaining constitutionality of statute requiring majority of a state-registered pharmacist's stock to be owned by a registered pharmacist); *Ferguson v. Skrupa*, 372 U.S. 726, (1962) (sustaining debt adjusting statute; explaining that "[i]t is now settled that States have power to legislate against what are found to be injurious practices in their internal commercial and business affairs, so long as their laws do not run afoul of some specific federal constitutional prohibition, or of some valid federal law" (internal quotations omitted)); *Goldblatt v. Hempstead*, 369 U.S. 590, 592 (1961) (rejecting takings challenge to ordinance

implications here because the limitation on state power reflected in the Commerce Clause "is not absolute and in the absence of conflicting legislation by Congress, the States retain authority under their general police powers to regulate matters of legitimate local concern, *even though interstate commerce may be affected.*" *Pharm. Care Mgmt. Ass'n v. Rowe*, 429 F.3d 294, 311 (1st Cir. 2005) (emphasis added) (quoting *Maine v. Taylor*, 477 U.S. 131, 138 (1986)). Indeed, the U.S. Supreme Court has recognized that utility regulation is among the most important of the functions traditionally associated with the police power. *See Ark. Elec. Cooperative Corp. v. Ark. Pub. Serv. Comm'n*, 461 U.S. 375, 377 (1983) (citing *Munn v. Illinois*, 94 U.S. 113 (1877)). Thus, state statutes deploying the police power to regulate matters of "legitimate local concern" are valid, "even though interstate commerce may be affected," unless the burdens on interstate commerce are "clearly excessive in relation to the putative local benefits." *Taylor*, 477 U.S. at 138 (internal quotations omitted). As mentioned earlier, even state statutes that do "affirmatively discriminate" against interstate "transactions," are valid if the state's "legitimate local purpose" purpose "could not be served as well by available nondiscriminatory means." *Id.*

The Amended LTC satisfies either standard. As discussed above, the statute is non-discriminatory on its face and effectively affords the same ratepayer subsidy to out-of-state producers that it provides to in-state producers. It is plain, therefore, that any hypothetical impact on interstate commerce is only incidental. It is equally obvious that such a hypothetical incidental burden is not "clearly excessive" in relation to the numerous "putative" local and

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regulating pit excavating on in-state property; explaining that "[i]f this ordinance is otherwise a valid exercise of the town's police powers, the fact that it deprives the property of its most beneficial use does not render it unconstitutional"); *Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440, 442-48 (1960) (sustaining city air pollution code; explaining that "[i]n the exercise of [the police power], the states and their instrumentalities may act, in many areas of interstate commerce and maritime activities, concurrently with the federal government"). These numerous examples only illustrate the scope of the police power and do not delimit it. *See Berman v. Parker*, 348 U.S. 26, 32 (1954) ("An attempt to define [the police power's] reach or trace its outer limits is fruitless, for each case must turn on its own facts.").

legitimate benefits that the Project will serve. The General Assembly enacted the Amended LTC as a means of ensuring that any final agreement would advance the public's economic, environmental, and other interests and concerns, and improve Block Island's environment and increase its energy security. These purposes are prominently stated in the first paragraph of the Amended LTC:

> 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.

R.I. Gen. Laws § 39-26.1-7(a). The Amended LTC facilitates these goals, consonant with Rhode Island's police power, by establishing criteria by which the Commission is to review any Amended PPA, ensuring, by way of the DEM and EDC review process, that the Project, as contemplated in the Amended PPA, will, in fact, serve the local economy and environment. Both obvious and substantial, the legitimate local benefits clearly outweigh any hypothetical incidental burden on interstate commerce.

Indeed, the Amended LTC even satisfies the more exacting criteria applicable to statutes which, unlike this one, do discriminate against interstate commerce and do not fall into the subsidy or market participant exceptions discussed above. The statute serves a variety of important local purposes that a wind project in another jurisdiction would not serve. In addition to the reasons just cited, the statute addresses a pilot project serving an important and legitimate state interest that is completely unrelated to commerce: testing the feasibility of a particular means of capturing a renewable energy source that is present in this state. For obvious reasons,

the General Assembly can only "experiment with," participate in, and sponsor, such a project within the jurisdiction of Rhode Island. *Cf. Hughes*, 416 U.S. at 816 (Stevens, J., concurring) (concluding that the Commerce Clause does not "inhibit a State's power to experiment with different methods of encouraging local industry").

Furthermore, this Project will generate significant benefits at the local level. Block Island remains in dire need of a new source of electricity. The current diesel generators are plagued by pollution and performance issues, and they require a diesel tanker to make it over to the island by ferry almost every day. The specified location of the wind farm off Block Island requires a cable to transfer the energy from the wind farm to the mainland. This creates the opportunity for the wind farm to first run its cable and resulting energy to Block Island – typically resulting in more than enough electricity to power the island. The remaining energy will run through a second cable from the island to the mainland where it will enter the Grid. And, when the wind farm is not producing enough energy, Block Island can draw energy from the mainland through the same cable. Thus, the Project will bring energy stability to the island, reduce pollution, and unburden valuable and scenic land now marred by diesel generators and their resulting emissions. Block Island will receive these important benefits as an integral part of the Project and as a result of the Amended LTC if the Commission approves the Project. *See id.*; *see also* DEM Advisory Op. at 3 ("[T]he approval of the [Amended] PPA will provide Block Island and the region with measurable environmental benefits . . . [including] a reduction in cancer risk and a reduction in the risk of respiratory disease."). A wind farm operated in some other location, including TransCanada's proposed wind farm in Maine, will not and can not deliver these benefits to Block Island. These benefits are only possible with a project plan of the type contemplated by the Amended LTC and reflected in the Amended PPA, one that creates, for

the first time, a substantial renewable energy market in Rhode Island by making it financially feasible for a producer to take on this Project, here and now.

III. CONCLUSION

For the foregoing reasons, the Commission should deny TransCanada Power Marketing Ltd.'s Motion to Dismiss.

Respectfully submitted,

THE NARRAGANSETT ELECTRIC COMPANY d/b/a NATIONAL GRID and DEEPWATER WIND BLOCK ISLAND, LLC

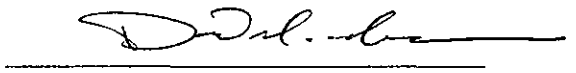
By their Attorneys,

Gerald J. Petros (#2931)
gpetros@haslaw.com
David M. Marquez (#8070)
dmarquez@haslaw.com
HINCKLEY, ALLEN & SNYDER LLP
50 Kennedy Plaza, Suite 1500
Providence, RI 02903-2319
(401) 274-2000
(401) 277-9600 (FAX)

DATED: July 23, 2010

CERTIFICATION

I hereby certify that an original and twelve copies of the within were hand-delivered to the Commission Clerk, Public Utilities Commission, 99 Jefferson Boulevard, Warwick, Rhode Island 02888. In addition, electronic copies were transmitted by e-mail to all persons on the below service list. I hereby certify that all of the foregoing was done on July 23, 2010.



National Grid – Review of Proposed Town of New Shoreham Project
Docket No. 4185 – Service List Updated 7/22/10

Name/Address	E-mail Distribution	Phone/FAX
Thomas R. Teehan, Esq. National Grid. 280 Melrose St. Providence, RI 02907	Thomas.teehan@us.ngrid.com Joanne.scanlon@us.ngrid.com	401-784-7667 401-784-4321
Ronald T. Gerwatowski, Esq. National Grid 40 Sylvan Rd. Waltham, MA 02451	Ronald.gerwatowski@us.ngrid.com Celia.obrien@us.ngrid.com Jennifer.brooks@us.ngrid.com	781-907-1820 781-907-2153 781-907-2121
Gerald J. Petros, Esq. David M. Marquez, Esq. Hinckley, Allen & Snyder LLP 50 Kennedy Plaza, Suite 1500 Providence, RI 02903-2319 (National Grid)	gpetros@haslaw.com dmarquez@haslaw.com	401-274-2000 401-277-9600
Joseph A. Keough, Jr., Esq. Keough & Sweeney 100 Armistice Blvd. Pawtucket, RI 02860 (Deepwater Wind)	jkeoughjr@keoughsweeney.com	401-724-3600
Alan Mandl, Esq. Smith & Duggan LLP Lincoln North 55 Old Bedford Road Lincoln, MA 01773 (Town of New Shoreham)	amandl@smithduggan.com	617-228-4464 781-259-1112
Katherine A. Merolla, Esq., Merolla & Accetturo 469 Centerville Road Suite 206 Warwick, RI 02886 (Town of New Shoreham)	KAMLAW2344@aol.com	401-739-2900 401-739-2906

Jerry Elmer, Esq. Tricia K. Jedele, Esq. Conservation Law Foundation 55 Dorrance Street Providence, RI 02903 (Conservation Law Foundation)	Jelmer@clf.org tjedele@clf.org	401-351-1102 401-351-1130
Richard A. Sinapi, Esq. Sinapi Formisano & Company, Ltd. 100 Midway Place, Suite 1 Cranston, RI 02920-5707 (RIBCTC)	dicks@sfclaw.com	401-944-9690 401-943-9040
Alan Shoer, Esq. Adler Pollock & Sheehan One Citizens Plaza, 8th Floor Providence, RI 02903-1345 (EDC)	Ashoer@apslaw.com	401-274-7200 401-751-0604
Leo Wold, Esq. Dept. of Attorney General 150 South Main St. Providence, RI 02903 (DPUC)	lwold@riag.ri.gov Steve.scialabba@ripuc.state.ri.us Al.contente@ripuc.state.ri.us David.stearns@ripuc.state.ri.us Tahern@ripuc.state.ri.us John.spirito@ripuc.state.ri.us	401-222-2424 401-222-3016
Jon Hagopian, Esq. Dept. of Attorney General 150 South Main St. Providence, RI 02903 (DPUC)	jhagopian@riag.ri.gov Dmacrae@riag.ri.gov Mtobin@riag.ri.gov	
Mike Rubin, Esq. Asst. Atty. General Dept. of Attorney General 150 South Main St. Providence, RI 02903 (Attorney General) Gregory S. Schultz, Esq. Dept. of Attorney General	Mrubin@riag.ri.gov gschultz@riag.ri.gov	401-274-4400 x-2116
Michael Sullivan, Executive Director Dept. of Environmental Management	Michael.sullivan@dem.ri.gov	401-222-4700 Ext. 2409
Mary E. Kay, Esq. Acting Executive Counsel Department of Environmental Management 235 Promenade Street Providence, Rhode Island 02908	mary.kay@dem.ri.gov	401 222-6607 ext 2304

Michael McElroy, Esq. 21 Dryden Lane PO Box 6721 Providence, RI 02940-6721 (Toray Plastics & Polytop Corporation)	McElroyMik@aol.com	401-351-4100 401-421-5696
Dr. Edward M. Mazze, Ph.D. Witness for Toray and Polytop.	emazze@cox.net	
John J. Kupa, Jr., Esq. 20 Oakdale Road North Kingstown, RI 02852 (Ocean State Policy Research Institute)	JohnKupaLaw@aol.com	401-294-5566
Richard D. Sherman, Esq. Edwards Angell Palmer & Dodge LLP 2800 Financial Plaza Providence, RI 02903 (TransCanada) Deming E. Sherman, Esq. Edwards Angell Palmer & Dodge LLP Robert M. Buchanan, Jr. Choate, Hall & Stewart LLP Two International Place Boston, MA 02110	rsherman@eapdlaw.com dsherman@eapdlaw.com rbuchanan@choate.com	401-274-9200
Joseph J. McGair, Esq. Petrarca & McGair, Inc. 797 Bald Hill Rd. Warwick, RI 02886 (Citizen Intervenors)	jjm@petrarcamcgair.com	401-821-1330
Original & twelve (12) copies w/: Luly E. Massaro, Commission Clerk Public Utilities Commission 89 Jefferson Blvd. Warwick RI 02889	Lmassaro@puc.state.ri.us Cwilson@puc.state.ri.us Nucci@puc.state.ri.us Anault@puc.state.ri.us Sccamara@puc.state.ri.us Adalessandro@puc.state.ri.us Dshah@puc.state.ri.us	401-780-2017 401-941-1691
Thomas Kogut, DPU	tkogut@ripuc.state.ri.us	
Richard Hahn Mary Neal Lacapra Associates 1 Washington Mall, 9th floor Boston, MA 02108	rhahn@lacapra.com mneal@lacapra.com	
Susan Demacedo, Deepwater Wind	susan@dwwind.com	

David Schwartz, Deepwater Wind	dschwartz@dwwind.com	
David Nickerson from Mystic River Energy Group, LLC	dave@nickersons.org	
Richard LaCapra, LaCapra Associates	Rlacapra@lacapra.com	212-675-8123
William P. Short, III	w.shortiii@verizon.net	917-206-0001
Matt Auten, Office of Lt. Governor	mauten@ltgov.state.ri.us	
Julian Dash, RIEDC	jdash@riedc.com	
Rep. Laurence Ehrhardt	rep-ehrhardt@rilin.state.ri.us	
Dr. Albert Cassaza	albertrc@optimum.net	
Cliff McGinnes	ifrtruck35@mac.com	
Marie DeCastro	mdecastro@rilin.state.ri.us	
Bob Grace	bgrace@seadvantage.com	
Representative Eileen Naughton	rep.naughton@gmail.com	
Brian Bishop (OSPRI)	riwiseuse@cox.net	
Michael & Maggie Delia	maggie@biaero.com mikdelia@biaero.com	
Mike Beauregard	mbeauregard@huroncapital.com	
Rosemarie Ives Jonathan Ives	ivesredmond@aol.com jives98836@aol.com	
Nancy Dodge,Town Manager Town of New Shoreham	townmanager@new-shoreham.com kpson@aol.com	401-466-3219
Emilie Joyal	ejoyal@rilin.state.ri.us	
Benjamin Riggs	rmcriggs@earthlink.net	
Tina Jackson, Pres. American Alliance of Fishermen in their Communities	liteangel3367@yahoo.com	
Shigeru Osada	shigeru.osada@toraytpa.com	
Tom D'Amato	tdamato@polytop.com	
Kevin Rowles	krowles@polytop.com	

EXHIBIT

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TransCanada
In business to deliver

US Northeast Hydro Region
Concord Office
4 Park Street, Suite 402
Concord, NH 03301-6313

tel 603.225.5528
fax 603.225.3260
email cleve_kapala@transcanada.com
web www.transcanada.com

Christopher C. Skoglund
Energy and Transportation Analyst
Air Resources Division
NH Department of Environmental Services
29 Hazen Drive, PO Box 95
Concord, NH 03302-0095

November 3, 2008

Dear Mr. Skoglund:

These comments by TransCanada respond to issues associated with the "New Actions Under Consideration" set forth by the New Hampshire Climate Change Policy Task Force. We appreciate the opportunity to comment briefly and for the record, note that we have various concerns and issues with respect to the New Actions.

EGU Action 2.6 – Importation of Canadian Hydro and Wind Generation

TransCanada supports the Governor's intent and that of many parties to address climate change issues by increasing the supply and availability of renewable energy resources to customers in New Hampshire. We question, however, whether a reliance on Canadian sources of hydro and wind are a "complimentary policy" as stated in the Action 2.6 Summary or are, in fact, harmful to the development of non-carbon generating assets in New Hampshire. As Action 2.6 correctly observes Canada is developing "vast new hydro and wind generation resources, which are greater than their local needs". In fact, those resources are to some extent already in place and would, presumably under the recently adopted RPS standards, be fully capable of swamping the New Hampshire electricity and renewable energy credit market and depressing prices to the extent that indigenous renewable resources or development projects under consideration would be at a distinct disadvantage.

The Action Step correctly identifies that building additional high voltage transmission interconnections with Canada would be a facilitating step for imports. In fact, a clear impediment to development of similar resources within New Hampshire (which among other things would create local jobs, local self-reliance, much-needed additions to local and New Hampshire's Utility Property tax bases and associated economic advantages) is the lack of transmission access **within** the State of New Hampshire. We would respectfully request that the New Hampshire intrastate issues be addressed and resolved by transmission providers prior to embarking on efforts to create additional interstate and international linkages that

don't facilitate economic development issues and other opportunities within New Hampshire. Governor Lynch's strong endorsement of the North Country Council and Northern Forest Center's Sustainable Economy Initiative (SEI) identifies many of the "economic backbone" issues associated with a concerted effort in the northern part of the State to "harness renewable energy". We believe that indigenous renewable resources are preferable to imports and therefore caution against spending ratepayer funds for transmission upgrades that do not benefit renewable energy generators located **within** New Hampshire or the region.

Facilitation of the importation of Canadian hydro and wind would potentially undermine renewable energy goals in New Hampshire. While Canada is a valued neighbor, trading partner and friend, part of the benefit of generation diversity and increased access to renewables within New Hampshire is the much needed economic development advantages associated with locating those resources here. We should not be taking steps in the name of "Climate Change" to destroy or hinder the economic development opportunities associated with renewable energy resources that are sited within New Hampshire.

Also, omitted from the Action Step discussion is the tie between the existing RPS rules and the proposed importation of Canadian hydro and wind. The existing RPS rules in every state, as they presently stand, allow qualifying renewable imports to count if the energy is "delivered" to NEPOOL. Essentially the only requirement is "delivery". No term, no firm obligation, no consequences of delivery failure are specified. TransCanada would describe that as a "Seller's convenience" delivery standard. No one buys power on that basis – yet by 2015 NH will potentially have 6% of its power delivered on those terms (MA will be 10%) and 11% by 2020 (MA will be 15%).

In Massachusetts legislation was recently passed as the Green Communities Act (GCA) to, among other things, begin to deal with importers and the utility preferences identified in this draft Action Step. TransCanada believes this "sleeper issue" threatens the further development of renewable energy resources in New England. New Hampshire might be an appropriate place to consider whether the RPS law needs to be modified? Recently in Maine, the chair of the Joint Committee on Utilities and Energy of the State Senate went on record with the NEPOOL Markets Committee with respect to this issue. The letter objects to the proposal to amend the Generator Information System (GIS) to recognize unit-specific attributes of generators located beyond adjacent control areas. Specifically, the letter points out that Maine's enactment of RPS in 2007 considered the status of the GIS rules at the time, which restricted generator imports to adjacent control areas. The letter sent by Maine continues that "...the need to build new renewable generation in Maine not only to satisfy the state's RPS requirement, but also to build provide jobs, economic development, electric infrastructure, etc..." is socially and economically beneficial and the proposed modification of the GIS operating rules is "...inconsistent with the policy objectives of this state." It is TransCanada's view that New Hampshire's Climate Change Policy Task Force, in its "New Actions Under Consideration", should also reconsider and refine their approach to this issue.

EGU Action 2.7 – Allow Regulated Utilities to Build Renewable Generation

History in New Hampshire and across the United States has demonstrated multiple times that the construction of electric generation is a capital and risk intensive business. Even with substantial regulatory oversight, it is difficult and challenging to accurately forecast future electricity prices and

costs associated with large capital projects in a volatile economy. Everyone of age in New Hampshire remembers well projects that were expected to ultimately be "too cheap to meter". When mistakes have been made in the regulated utility sector ratepayers have been required to pick up regulated utility costs that have been subsequently stranded. We believe that this was an important driving force behind the state policy embodied in RSA 374-F, which put the state on the course toward deregulation of the electric generation sector in New Hampshire. If a regulated utility chooses to build generation in New Hampshire, TransCanada would have no objection to the utility using or establishing an un-regulated subsidiary to accomplish that purpose with shareholder funds. Captive ratepayers should not be forced to take risks associated with new generation investments.

TransCanada Corporation operates both regulated and competitive businesses successfully. Regulated utilities doing business in New Hampshire are investor-owned. TransCanada would have no objection to regulated utilities building generation as long as the associated risks fall to utility investors instead of its ratepayers. The shareholders who invest in competitive energy companies have assumed both the rewards and the risks of their investment decisions. If a competitive market did not exist in New Hampshire and there was no alternative to a cleaner and more renewable asset fleet, the situation might be different. However, given that there are many competitive electricity resources either already operating in New Hampshire or hoping to do business here, it would be extremely unfair to allow new generation be built by utilities with guaranteed revenues through regulated rates. Climate change policy should complement not undermine the competitive electricity market and the policy embodied in RSA 374-F by the NH Legislature.

The reality exists that there are renewable generation development companies that have projects waiting in a queue to build. Those businesses are risky, margins are tight, and access to transmission is frequently poor and costly. With recent turmoil in the financial markets we have seen scale-backs of development projects and a general lack of new renewable development. TransCanada is proud of its recent redevelopment of Vernon Station on the Connecticut River but acknowledges that what began as a $30 million project ended up costing well over $50 million. This environment is, we think, relatively typical, of the generation build and refurbish landscape. The risks, challenges and rewards should be shouldered by investors, either utility or competitive, not captive ratepayers going forward.

Although the Action Step 2.7 imagines a history of electric generation restructuring in New Hampshire, we believe that it is "safe" to say that the so-called "safety net" created by the decision to forego full divestiture by PSNH is anything but safe to ratepayers and deserves serious discussion before allowing new construction of utility-owned renewable generation to proceed.

Action 2.7 properly acknowledges that transmission is a major constraint and need associated with new renewable generation. Regulated utilities in New Hampshire operate transmission businesses and are compensated fairly for providing transmission services. Traditional and current scenarios envision competitive power projects paying for the construction of transmission in order to generate when transmission capacity is lacking. This Action states that "customers in New Hampshire and potentially throughout New England would pay for enhanced transmission". If "customers" and "ratepayers" are synonymous then this is an important step in the right direction in creating renewable generation opportunity within New Hampshire. While TransCanada readily acknowledges that transmission infrastructure is also capital intensive and risky, it is not infrastructure that would clearly benefit by competing providers at this time. It will likely remain regulated and therefore ratepayers are presumably

safeguarded by regulatory oversight and resulting prudent investments in transmission upgrades that have public benefit. New Hampshire should support policies that encourage regionalization of the costs of transmission upgrades that will bring benefits to the region, so that New Hampshire ratepayers only pay a fair share of those costs. New Hampshire should also support policies that provide mechanisms for renewable generation developers to share the costs of transmission upgrades with ratepayers.

EGU Action 2.8 – Identify and Deploy the Next Generation of Electric Grid Technologies

TransCanada supports Action 2.8. Optimizing energy efficiency and conservation of natural resources are goals that should be readily shared by all participants in electric markets.

EGU Action 2.9 – Promote Low and Non CO2 Emitting Distributed Generation

TransCanada generally supports Action 2.9 and notes that although SB 451 authorizes utility investment in distributed generation, opportunities for customers to invest in distributed generation already exist in the marketplace without the necessity of guaranteed ratepayer/utility funding. Although there are many elements of actualizing a distributed generation project that fall to the utility side of the meter, for those that benefit customers directly in electricity savings those costs don't need the participation of utility ratepayers to produce the intended result of additional penetration of cost-effective distributed generation.

In closing, TransCanada commends the hard work of the Task Force and notes that climate change is a real issue deserving the attention that this Task Force has provided. We note, however, the membership of the Governor's Climate Change Policy Task Force has not included all stakeholders. There has been no representation from the competitive and unregulated generation sector, whose members own clean, renewable generating assets in New Hampshire, provide local jobs, pay taxes to municipalities and the State and do it all without receiving guaranteed cost recovery from ratepayers. To the extent that electric generation is a contributor to climate issues, we feel that all options and all stakeholders should be included in the discussion to optimize the benefits of collaborative thinking. Accordingly, we are pleased by the opportunity to comment on these Actions.

Sincerely,

Cleve Kapala
Director, Government Affairs and Relicensing

Cc: Thomas S. Burack, Commissioner, NH Department of Environmental Services
Michael Hachey