EDWARDS ANGELL PALMER & DODGE LLP

2800 Financial Plaza Providence, RI 02903 401.274.9200 *fax* 401.276.6611 eapdlaw.com

Richard A. Sherman
401.276.6513
*fax* 888.325.9062
rsherman@eapdlaw.com

July 13, 2010

Ms. Luly Massaro
Clerk
R.I. Public Utilities Commission
99 Jefferson Boulevard
Warwick, Rhode Island 02888

Re: In Re: Review of Amended Power Purchase Agreement between Narragansett Electric Company d/b/a National Grid and Deepwater Wind Block Island, LLC pursuant to R.I.Gen. Laws Sec. 39-26.1-7 - Docket No. 4185

Dear Ms. Massaro:

Enclosed please find for filing the original and 12 copies of the following documents in the above Docket:

1. Motion of TransCanada Power Marketing Ltd. to Dismiss.
2. Memorandum of TransCanada Power Marketing Ltd. in Support of Motion to Dismiss.
3. Entry of Appearance on behalf of TransCanada Power Marketing Ltd.

Electronic copies haven been sent to you by e-mail and to all persons on the Service List for Docket No. 4185.

Sincerely yours,

Richard A. Sherman

Richard A. Sherman
Enclosures

CC: John Cameron, TransCanada Power Marketing Ltd. (w/ enc.) – by e-mail
Robert M. Buchanan, Jr., Esq. (w/ enc.) – by e-mail

PRV 1083598.1

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS
PUBLIC UTILITIES COMMISSION

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

**TRANSCANADA POWER MARKETING LTD.'S**
**MOTION TO DISMISS FOR VIOLATION OF THE COMMERCE CLAUSE**

TransCanada Power Marketing Ltd. ("TransCanada"), which has been granted party status, hereby submits its Motion to Dismiss in the above-captioned matter.

In support of its Motion to Dismiss, TransCanada relies on the contention that the new legislation (2010 R.I. Pub. L. ch. 31 & 32), pursuant to which the Commission is conducting its review of the amended power purchase agreement, violates the Commerce Clause, Article I, Section 8 of the U.S. Constitution as an unlawful restriction by the State of Rhode Island on interstate commerce.

As grounds for its Motion to Dismiss, TransCanada relies on the accompanying Memorandum of Law In Support of the Motion to Dismiss.

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

WHEREFORE, TransCanada respectfully requests that the Commission grant its Motion to Dismiss the Docket 4185 in its entirety and grant such other relief as the Commission deems just and equitable.

Dated: July 13, 2010

Respectfully submitted,

**TRANSCANADA POWER MARKETING LTD.**

By its attorneys,

Richard A. Sherman

Deming E. Sherman

Richard A. Sherman (#1190)
Deming E. Sherman (#1138)
EDWARDS ANGELL PALMER & DODGE LLP
2800 Financial Plaza
Providence, Rhode Island 02903
Tel: 401-274-9200
Fax: 401-276-6111
rsherman@eapdlaw.com
dsherman@eapdlaw.com

OF COUNSEL:

Robert M. Buchanan, Jr. (BBO# 545910)
Choate, Hall & Stewart LLP
Two International Place
Boston, Massachusetts 02210
Tel: 617-248-5000
Fax: 617-248-4000
rbuchanan@choate.com

CERTIFICATE OF SERVICE

I hereby certify that on the 13th day of July, 2010, an original and 12 copies of the within Motion were mailed by first class mail, postage prepaid, to Ms. Luly Massaro, Clerk, Public Utilities Commission, 99 Jefferson Boulevard, Warwick, Rhode Island 02888, and electronic copies were transmitted by e-mail to all persons on the Commission's Service List for Docket 4185 dated July 12, 2010.

Richard A. Sherman

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS
PUBLIC UTILITIES COMMISSION

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

**MEMORANDUM OF LAW IN SUPPORT OF TRANSCANADA'S MOTION TO DISMISS FOR VIOLATION OF THE COMMERCE CLAUSE**

TransCanada Power Marketing Ltd. ("TransCanada") moves to dismiss this proceeding on the ground that Section 39-26.1-1 through 26.1-8, the Long-Term Contracting Statute ("LTC Statute"), violates the Commerce Clause of the U.S. Constitution. The LTC Statute requires electric distribution companies to enter long-term contracts with renewable energy generators. Carrying out a preference for projects that are located "within the jurisdictional boundaries of the state," Subsection 7 purports to mandate a contract with one particular in-state project. The LTC Statute thereby discriminates against out-of-state producers. Discrimination of this nature is forbidden by the Commerce Clause of the U.S. Constitution and a long line of court precedent, as more fully stated below.

The Attorney General's Office and the Conservation Law Foundation ("CLF") have earlier moved to dismiss this proceeding on the grounds that the recent amendment of Subsection 39-26.1-7 is an improper action by the legislature. TransCanada supports their Motions, and concurs that this proceeding should be dismissed for that reason as well.

## I. THE COMMERCE CLAUSE FORBIDS DISCRIMINATION BASED ON PLACE OF ORIGIN.

The requirements of the Commerce Clause of the United States Constitution are well established. They were summarized earlier this year by the First Circuit Court of Appeals:

> The Commerce Clause prevents states from creating protectionist barriers to interstate trade.... Discrimination under the Commerce Clause means differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter, as opposed to state laws that regulate evenhandedly with only incidental effects on interstate commerce.... [A] discriminatory law is virtually per se invalid ... and will survive only if it advances a legitimate local purpose that cannot be adequately served by reasonable non-discriminatory alternatives.... The state bears the burden of showing legitimate local purposes and the lack of non-discriminatory alternatives, and discriminatory state laws rarely satisfy this exacting standard.

Family Winemakers of California v. Jenkins, 592 F.3d 1, 9 (1st Cir. 2010) (internal citations and quotations omitted) (emphasis added). State laws that favor in-state producers contravene the founding principles of the United States. See Camps Newfound/Owatonna, Inc. v. Town of Harrison, 520 U.S. 564, 578 (1997) ("Avoiding... economic Balkanization, and the retaliatory acts of other States that may follow, is one of the central purposes of our negative Commerce Clause jurisprudence.") (internal citations omitted); see also C & A Carbone v. Town of Clarkstown, 511 U.S. 383, 390 (1994) ("The central rationale for the rule against discrimination is to prohibit state or municipal laws whose object is local economic protectionism, laws that would excite those jealousies and retaliatory measures the Constitution was designed to prevent."). Even where a state claims an environmental purpose, this does not justify a regulation that discriminates based on the point-of-origin of commerce. City of Philadelphia v. New Jersey, 437 U.S. 617, 625-57 (1978).

In keeping with these well-established principles, "[a] discriminatory law is virtually per se invalid." Family Winemakers, 592 F.3d at 9. Such a state law "will survive only if it

advances a legitimate local purpose that cannot be adequately served by reasonable non-discriminatory alternatives." Id.[1]

In New England Power Co. v. New Hampshire, 455 U.S. 331, 338-40 (1982), the Supreme Court held that to restrict the flow of privately-owned and produced electricity in interstate commerce is forbidden by the Commerce Clause. The Supreme Court has similarly held, on many other occasions, that the states have no role to impede the flow of electricity in interstate commerce. See, e.g., Morgan Stanley Capital Group v. Pub. Util. Dist. No. 1 of Snohomish County Wash., 128 S.Ct. 2733, 2737-38 (2008); Miss. Power & Light Co. v. Miss. *ex rel.* Moore, 487 U.S. 354, 371 (1988).

As a result, the principle of unrestricted free trade is well-known among energy regulators. For example, the same type of restriction at issue here was addressed in a publication prepared for the National Association of Regulatory Utility Commissioners, titled "The Renewables Portfolio Standard: A Practical Guide":

> Some states have limited renewable resource eligibility to production from generation facilities located within the state. Absent a significant change in Supreme Court application of the Commerce Clause of the U.S. Constitution, the restriction to in-state generation will, if challenged, be found unconstitutional. The courts have continually found that facial discrimination by a state against out-of-state resources is 'virtually *per se* invalid.' *Philadelphia v. New Jersey*, 437 U.S. 617, 624 (invalidating New Jersey's ban on imports of out-of-state garbage). The exclusion of out-of-state generation is sufficiently similar to court precedents to expect invalidation....

[1] The goal of supporting in-state development is not sufficient to justify discrimination, because it may be advanced by other means. Instead of discriminating against interstate commerce, in many cases a state is free to spend general tax revenues on subsidies to local producers. Ordinarily, such subsidies do not restrain the flow of commerce between the states, and therefore do not violate the Commerce Clause. See West Lynn Creamery, Inc. v. Healy, 512 U.S. 186, 199 (1994).

## II. THE LTC STATUTE DISCRIMINATES AGAINST OUT-OF-STATE PRODUCERS.

Notwithstanding these clear legal rules, the LTC Statute discriminates on its face against out-of-state producers. According to Subsection 1 of Section 39-26.1, the LTC Statute is intended to facilitate the financing of renewable energy generation "within the jurisdictional boundaries of the state or adjacent state or federal waters."

Pursuant to Subsection 3, each electric distribution company must enter long-term contracts to purchase capacity, energy and attributes from renewable energy resources. By 2013 these contracts are expected to reach 100% of the "minimum long-term contract capacity," which is a defined quantity specified in Subsection 2. Within this limited set of contract opportunities, one of the contract solicitations must be for a "newly developed renewable energy resources project as required in § 39-26.1-7."

The amended Subsection 7 sharpens the discriminatory focus of the LTC Statute. As amended on June 15, Subsection 7 states that its purpose is to facilitate the construction of a wind project "off the coast of Block Island."[2] Subsection 7 purports to authorize the Narragansett Electric Company to enter a PPA with the developer of the Block Island project. Read as a whole, the LTC Statute purports to require Narragansett to enter a long-term contract with this favored in-state generator. According to Subsection 7(h), the amount purchased under this PPA "shall count as part of the minimum long-term contract capacity" that is required under Subsection 3. Thus the Subsection 7 PPA (if it is approved) will reduce the volume that may be won by any other generators seeking to compete for long-term contracts pursuant to the LTC Statute.

[2] The Amendment was enacted June 15, 2010. It amends only Subsection 39-26.1-7. The other subsections of the LTC Statute remain unchanged.

## III. THE DISCRIMINATION IN THE LTC STATUTE VIOLATES THE COMMERCE CLAUSE.

"States may not enact laws that burden out-of-state producers or shippers simply to give a competitive advantage to in-state businesses." Granholm v. Heald, 544 U.S. 460, 472 (2005). The LTC statute is designed to favor production in Rhode Island. A state statute is unconstitutional if it is applied in such a manner as to favor in-state producers, even if the statute purports to permit use of out-of-state producers as well. See Walgreen Co. v. Rullan, 405 F.3d 50 (1st Cir. 2005). Likewise, it is unconstitutional to require purchases from one designated in-state producer, to the exclusion of all out-of-state and in-state rivals. See C & A Carbone v. Town of Clarkstown, 511 U.S. 383 (1994).

The Supreme Court struck down a state law analogous to the LTC Statute in Wyoming v. Oklahoma, 502 U.S. 437 (1992). Oklahoma had legislated that utilities must purchase 10% of their needs from coal mined in Oklahoma, to the exclusion of coal mined in Wyoming. Id. at 443. The Supreme Court declared that "[s]uch a preference for coal from domestic sources cannot be characterized as anything other than protectionist and discriminatory, for the Act purports to exclude coal mined in other States based solely on its origin." Id. at 456. The same is true here.

There is no non-discriminatory purpose that supports the discrimination built into the LTC Statute. The flow of electrons derived from Rhode Island renewable sources is absolutely identical to the flow of electrons derived from Maine renewable sources. Renewable energy sources in both states are connected to the same ISO-New England power grid. From an engineering or physical perspective, once power has been generated, there is no way to trace the moving electrons from the generation source to their consumer. The LTC Statute purports to discriminate solely on the basis of where the generation unit is located.

### A. Other States Are Successfully Supporting Renewable Energy Without Discrimination.

The great majority of electrical energy produced and distributed in the United States derives from fuels that are not renewable, principally coal, natural gas and nuclear. Many states have put in place successful programs to encourage renewable energy. Under these established programs, retail electricity suppliers must obtain a percentage of their power from renewable energy sources -- but they are free to purchase renewable energy from the most efficient sources, whether those sources generate their energy in-state or out-of-state.[3]

### B. TransCanada Has Invested In Renewable Energy.

Relying on these existing non-discriminatory programs, and relying on the well-established ability to market energy in Rhode Island and in other states, TransCanada's corporate affiliates have invested $300 million to date in developing the Kibby Wind Farm project in Maine. TransCanada is a power marketing company with its principal place of business in Westborough, Massachusetts. It purchases electricity from generation sources, including a variety of power plants, and resells that electricity to distribution companies and to retail customers throughout the northeastern United States. Its corporate parent and sister companies generate power in various locations, including Rhode Island, Maine, New Hampshire, Vermont, New York, Arizona and Canada.

TransCanada Maine Wind Development, Inc. is developing the Kibby Wind Farm along Kibby Mountain and Kibby Range in the Boundary Mountains of Maine. TransCanada wishes to market this wind-produced electric energy in interstate commerce to customers in Rhode

[3] More than 35 states have enacted various kinds of renewable energy programs. A majority of these have enacted requirements that retailers of electric power must obtain a certain percentage of their power each year from renewable energy sources. To our knowledge, no court yet has been asked to uphold discrimination against interstate commerce of the type enacted in the LTC Statute.

Island. The Kibby Wind Farm is interconnected to the ISO-New England power transmission grid, and transmits its power to Rhode Island in interstate commerce.

During the next 15 years, the long-term contracts required by the LTC Statute are likely to be the principal purchases and sales of renewable energy in Rhode Island. There are a finite number of these contracts for a finite amount of power stated in Subsection 2. These contracts are steered toward in-state producers by the language of the LTC Statute. One of the first large contracts has now been given special status by the Legislature, which has purported to award it to a favored in-state producer in the amended Subsection 7. These measures seek to shelter Rhode Island producers from competition by TransCanada and other out-of-state generators. This discrimination violates the U.S. Constitution.

### C. An Open Market Is In The Public Interest.

Moreover, this discrimination is against the public interest. Competition on price and viability serves the public interest. If the required long-term contracts are opened to out-of-state bidders in the future, then TransCanada will have the opportunity to offer wind energy at better prices and terms. This competition will tend to reduce the rates for electric power paid by Rhode Island businesses and citizens. Conversely, by earmarking the program contract for a project that is physically located in Rhode Island, the LTC Statute tends to increase the rates paid for renewable energy. Increased costs and rates harm the public. See Mississippi Power & Light Co. v. United Gas Pipe Line Co., 760 F.2d 618, 626 (5th Cir. 1985) (recognizing "[t]he vital public interest involved in protecting the consumers of [a utility company] against the harmful effect of overcharges").

Finally, where a violation of the Commerce Clause leads to increased costs for renewable energy, this slows the adoption of renewable energy by the purchasing public, which in turn contravenes the legitimate objectives of a renewable energy program. See, e.g., Kassel v.

Consol. Freightways Corp., 450 U.S. 662, 675 (1981). The discrimination embodied in the LTC Statute cannot be justified.

## IV. CONCLUSION

The LTC Statute, which purports to govern this proceeding, violates the Commerce Clause of the U.S. Constitution. TransCanada respectfully requests that this proceeding be dismissed.

Dated: July 13, 2010

Respectfully submitted,

**TRANSCANADA POWER MARKETING LTD.**

By its attorneys,

Richard A. Sherman
Deming E. Sherman

Richard A. Sherman (#1190)
Deming E. Sherman (#1138)
EDWARDS ANGELL PALMER & DODGE LLP
2800 Financial Plaza
Providence, Rhode Island 02903
Tel: 401-274-9200
Fax: 401-276-6611
rsherman@eapdlaw.com
dsherman@eapdlaw.com

OF COUNSEL:

Robert M. Buchanan, Jr. (BBO# 545910)
Choate, Hall & Stewart LLP
Two International Place
Boston, Massachusetts 02110
Tel: 617-248-5000
Fax: 617-248-4000
rbuchanan@choate.com

CERTIFICATE OF SERVICE

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Richard A. Sherman

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NOTICE OF ENTRY OF APPEARANCE

Richard A. Sherman and Deming E. Sherman hereby give notice of their entry of appearance on behalf of TransCanada Power Marketing Ltd. in the above captioned matter.

Dated: July 13, 2010

Respectfully submitted,

TransCanada Power Marketing Ltd.
By its attorneys,

Richard A. Sherman (#1190)
Deming E. Sherman (#1138)
EDWARDS ANGELL PALMER & DODGE LLP
2800 Financial Plaza
Providence, Rhode Island 02903
Tel: 401-274-9200
Fax: 401-276-6111
rsherman@eapdlaw.com
dsherman@eapdlaw.com

OF COUNSEL:

Robert M. Buchanan, Jr. (BBO# 545910)
Choate, Hall & Stewart LLP
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Boston, Massachusetts 02210
Tel: 617-248-5000
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Richard A. Sherman