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

CONSERVATION LAW FOUNDATION'S MOTION TO DISMISS AND MOTION FOR A STAY

I. INTRODUCTION

On June 16, 2010, Governor Donald L. Carcieri signed into law amendments to Section 7 of Rhode Island's Long-Term Contracting Statute (R. I. Gen. Laws § 39-26.1-1, et seq.) The amendments to the Long-Term Contracting Statute (LTC Statute) are designed to undo the Public Utilities Commission's (PUC) April 2, 2010 decision rejecting the Power Purchase Agreement (PPA) between Deepwater Wind (Deepwater) and National Grid (Grid) as not "commercially reasonable."

Conservation Law Foundation (CLF) submits that the amendments to the LTC Statute are unconstitutional and that therefore this second review of a revised PPA pursuant to the amended Section 7 is not lawful. Specifically, Section 7 as amended violates the Constitutional doctrine of separation of powers and violates Article I, Section 2 of the Rhode Island Constitution, which requires that "all laws be made for the good of the whole."

Moreover, even if the PUC were to proceed beyond these threshold Constitutional questions, the Commission cannot reach the merits of the amended PPA because the doctrine of res judicata bars a second review.

For these reasons, CLF moves to dismiss Docket # 4185.

For reasons of judicial economy and for the convenience of all the parties to this Docket, CLF moves to stay Docket # 4185 until the PUC has ruled on the threshold questions raised by CLF's Motion to Dismiss.[1]

II. INTERVENTION

The PUC's June 21, 2010, Scheduling Notice in this Docket provides that all parties who were parties to the previous Docket, Docket # 4111, will be allowed to intervene simply by filing a notice of intervention. CLF is filing its Notice of Intervention with the PUC today, July 6, 2010, simultaneously with the instant Motion To Dismiss.

Founded in 1966, CLF is a nonprofit, member-supported environmental advocacy organization with offices in Rhode Island, Maine, Massachusetts, New Hampshire and Vermont: CLF's Rhode Island office is located at 55 Dorrance Street, Providence. CLF uses the law, science, and the market to solve New England's most serious environmental problems.

CLF promotes clean, renewable and efficient energy production and use throughout New England and has an unparalleled record of advocacy on behalf of the region's environmental resources. As part of its 40-year legacy, CLF was a party in the landmark case in which the U.S. Supreme Court ruled that the U.S. Environmental Protection Agency has an obligation under the Clean Air Act to consider regulating tailpipe emissions that contribute to global warming. Massachusetts v. E.P.A., 127 S. Ct. 1438 (2007). CLF obtained an injunction to stop drilling for

[1] Pursuant to PUC Rule of Practice and Procedure 1.15(b), CLF has made good-faith inquiry of other parties in this Docket in an effort to determine whether they intend to support or oppose CLF's Motion To Dismiss. CLF has been informed that the following parties intend to oppose CLF's Motion: Town of New Shoreham, Rhode Island Building and Construction Trades Council, National Grid, and Deepwater Wind. The attorney representing the Attorney General stated that the Attorney General "will most likely be supporting the outcome of the motion to dismiss. [However, n]ot having seen the actual supporting arguments [the AG] cannot necessarily adopt [CLF's] theory or grounds." Two parties stated that they were unable to take a position without seeing the Motion: The Division of Public Utilities and Carriers, and Toray Plastics. CLF received no response to its inquiry from any other parties to this Docket.

oil and gas on the environmentally sensitive Georges Bank, Conservation Law Foundation v. Sec'y of the Interior, 790 F.2d 965 (1st Cir. 1986); litigated to ensure enforcement of an earlier settlement agreement in a case stemming from the Big Dig, which settlement agreement required 20 public transit projects in and around Boston including construction of additional subway and rail lines, Conservation Law Foundation v. Romney, 421 F. Supp.2d 344 (D. Mass. 2006); and successfully advanced legal strategies to restore groundfish to the Gulf of Maine and southern New England waters. Conservation Law Foundation v. Evans, 211 F. Supp.2d 55 (D.D.C. 2002).

CLF has participated in every docket opened by the PUC related to renewable energy.

III. FACTS

A. Docket # 4111 – Three Prior Contracts Filed With the PUC

Docket # 4111 was conducted by the PUC pursuant to the provisions of R. I. Gen. Laws § 39-26.1-1, et seq., governing the long-term contracting standards for renewable energy. The stated purpose of this chapter is to "encourage and facilitate the creation of commercially reasonable long-term contracts between electric distribution companies and developers or sponsors of newly developed renewable energy resources with the goals of stabilizing long-term energy prices, enhancing environmental quality, creating jobs in Rhode Island in the renewable energy sector, and facilitating 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." R. I. Gen. Laws § 39-26.1-1 (emphasis supplied).

Deepwater proposes to build an 8-turbine demonstration wind project off the coast of Block Island and to install a transmission cable between Block Island and the mainland.

On October 15, 2009, pursuant to Section 7 of the LTC Statute, after a bilateral negotiation with the developer, Deepwater, Grid filed with the Commission an unsigned PPA (hereinafter, October 15 PPA). In response to Grid's filing, the Commission opened Docket # 4111.

CLF was a party to Docket # 4111.

The October 15 PPA was 59 pages long (including appendices). The October 15 PPA: (a) provided for open-book pricing; (b) contained a price of 30.7¢/KWh for the anticipated first full year of operation (plus an annual price-escalation provision); and (c) allocated 100% of the risk of cost over-runs to ratepayers. Grid did not sign the October 15 PPA. In its October 15 filing with the Commission, Grid stated its view that the unsigned October 15 PPA was not commercially reasonable because the price of the power was too high and the upside risk to ratepayers was improper. Both Deepwater and Grid, however, indicated to the PUC that the parties were still involved in negotiations and expected to be able to file a signed agreement shortly.

On November 18, 2009, after further negotiation with Deepwater, Grid filed a second PPA, also unsigned, with the Commission (November 18 PPA). The November 18 PPA was 58 pages in length (including appendices). The November 18 PPA: (a) dropped the proposal for open-book pricing; (b) contained a price of 25.3¢/KWh for the anticipated first full year of operation (plus an annual price-escalation provision); and (c) allocated the risk of cost over-runs to the developer, Deepwater. Deepwater and again indicated that their negotiations were continuing and that they expected to file a signed PPA shortly.

On December 10, 2009, Grid filed a third PPA with the Commission (December 10 PPA). The December 10 PPA was 61 pages in length. The December 10 PPA was signed by

both Deepwater and Grid. Like the November 18 PPA, the December 10 PPA did not include open-book pricing and allocated the risk of cost over-runs to the developer, Deepwater; but in the December 10 PPA the price of electricity for the anticipated first full year of operation had come down by 0.9¢/KWh from 25.3¢/KWh to 24.4¢/KWh (plus the annual price-escalation provision).

The PUC conducted a full evidentiary hearing and contested case in Docket # 4111 to consider whether the December 10 PPA was "commercially reasonable" as that term is defined in R.I. Gen. Laws § 39-26.1-1, et seq.

Section 2 of the LTC Statute defines "commercially reasonable" to mean:

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

In Docket # 4111, three expert witnesses (Madison Milhous, David P. Nickerson, and Richard S. Hahn) testified and were cross-examined. Deepwater's Chief Executive Officer, William M. Moore, an experienced wind-project developer, testified at length and was cross-examined. Thousands of pages of pre-filed testimony and responses to data requests went into the record. Governor Carcieri appeared before the Commission to testify. The PUC conducted at least four public hearings, including on Block Island, at which the public was invited to comment. The proceeding concluded with a full evidentiary hearing.

In Docket # 4111, CLF supported the PPA, arguing that it was commercially reasonable.

On March 30, 2010, after a seven-month proceeding that culminated in a four-day hearing in Docket # 4111, the PUC ruled, by a vote of 3-0 that the December 10 PPA between

Deepwater and Grid was not "commercially reasonable" as that term is defined by Section 2 of the LTC statute.

On April 2, 2010, the PUC issued an 85-page written Order explaining in detail the Commissioners' reasoning for their decision.

Appeal by statutory writ of certiorari within 7 days of the PUC decision is the appeal process set forth in Chapter 5 of Title 39 of the Rhode Island General Laws. Deepwater did not appeal the decision in Docket # 4111. No other party elected to appeal the PUC's decision. Thus, the unchallenged April 2, 2010, PUC decision became a final decision on April 9, 2010.

B. The Long-Term Statute Is Amended

On June 10, 2010, unhappy with the PUC's decision, the Rhode Island General Assembly passed amendments to R.I.G.L. §39-26.1-7. These amendments were designed to require the PUC to revisit the Deepwater PPA under a new review standard that would apply only to Deepwater's proposed Block Island project.

CLF opposed this legislation in the General Assembly.

On June 16, 2010, Governor Carcieri signed the amendments to Section 7 of the LTC Statute amendments into law.

The new amendments to Section 7 require the PUC to approve the Deepwater PPA within 45 days of it being filed with the PUC if it: (1) contains conditions that are commercially reasonable for what an experienced power market analyst would expect to see for a project of a similar size, technology and location (elsewhere defined in the law as a 10MW, 8-turbine wind demonstration project off the coast of Block Island); (2) contains provisions that provide for a decrease in pricing if savings can be achieved in the actual cost of the project; (3) the amended agreement is likely to provide economic development benefits; and (4) the amended agreement is

likely to provide environmental benefits. Whether the agreement is likely to provide economic and environmental benefits will be set forth in separate advisory opinions that shall be issued by the Economic Development Corporation (EDC) and the Department of Environmental Management (DEM) within 20 days of the date the amended PPA is filed with the PUC. According to the newly enacted amendments, the advisory opinions of EDC and DEM are entitled to substantial deference.

On June 21, 2010, the PUC opened this docket, Docket # 4185, in compliance with the newly amended statute, and in anticipation of receiving yet another revised PPA between Deepwater and Grid.

On June 30, 2010, a fourth PPA was filed with the PUC (June 30 PPA).

IV. THE STANDARDS GOVERNING CLF'S MOTION TO DISMISS

CLF's Motion to Dismiss is governed both by Constitutional standards and by doctrinal standards.

A. Constitutional Standards

CLF's Motion to Dismiss is governed by the Constitutional doctrines of separation of powers and Article I, Section of the Rhode Island Constitution.

In passing the June 2010 amendments to the LTC Statute, the legislature not only seeks to retroactively undo a quasi-judicial decision, but also attempts to directly control the execution of its policy preference by creating new criteria intended to severely constrain the discretion of the PUC with respect to its review of only this PPA. See Request for Advisory Opinion (CRMC), 961 A.2d 930, 940 (R.I. 2008) (citing and quoting Bowsher v. Synar, 478 U.S. 714, 733-34, 106 S. Ct. 3181, 92 L.Ed.2d 583 (1986) "[T]he principle of separation of powers is violated where the legislative department tries to control the execution of its enactments

directly . . . ."); see also Plaut v. Spendthrift Farm, 514 U.S. 211, 115 S. Ct. 1447, 131 L.Ed.2d 328 (1995).

Article I Section 2 of the Rhode Island Constitution states, in relevant part, "All laws . . . should be made for the good of the whole." The amendments to Section 7 of the LTC Statute are designed solely for the benefit of a single project and a single company. The amendments to Section 7 alter the LTC review standards for only one project and one company and essentially establish a second appeal for one party -- a benefit that will not inure to any other parties to the previous docket.

B. Doctrinal Standard

Review of the revised PPA is barred by the doctrine of res judicata, notwithstanding the 2010 amendments to Section 7 of the LTC Statute.

The doctrine of res judicata "serves as an absolute bar to a second cause of action where there exists identity of parties, identity of issues, and finality of judgment in an earlier action." Bossian v. Anderson, 991 A.2d 1025, 1027 (R.I. 2010) (internal quotation marks and case citations omitted).

With respect to determining whether there exists an identity of issues Rhode Island takes a broad view Id. (quoting DiBattista v. State, 808 A.2d 1081, 1086 (R.I. 2002) "[A]ll claims arising from the same transaction or series of transactions which could or might have been raised in the previous action are barred from a later action" (emphasis supplied)).

V. DISCUSSION

A. Constitutional Issues

1. The 2010 Amendments to the LTC Statute Violate the Constitutional Requirement of Separation of Powers

The new review criteria in Section 7, enacted by the General Assembly in June 2010, are designed to bring about a specific result, approval by the PUC of a contract that is substantially similar to a contract that the PUC has already rejected. In this fundamental respect, the legislature over-reached and, in so doing, violated the separation of powers provisions of the Rhode Island Constitution.

a. The legislature cannot undo a judicial decision without violating separation of powers.

The PUC is an independent "quasi-judicial tribunal." See R. I. Gen. Laws § 39-1-3(a). Accord Providence Gas Co. v. Burke, 419 A.2d 263, 269 (R.I. 1980) (PUC is a "quasi-judicial tribunal"). As another Court put it: "[T]he commission [PUC] is clothed with the 'powers of a court of record' in determining and adjudicating matters within its jurisdiction." In re Narragansett Electric Co., No. 88-5578, 1989 WL 1110237 *3 (Feb. 21, 1989) (citing Narragansett Electric Co. v. Harsch, 368 A.2d 1194, 1199 (R.I. 1977)). The same Court went on to explain that the PUC is "empowered to make orders and render judgments and to enforce the same by suitable process" and that the PUC is an "impartial, independent body." Id.

The doctrine of separate of powers requires that judicial and quasi-judicial decisions be final and conclusive, appealable only to a higher court; the doctrine specifically requires that such decisions not be reversible by legislative fiat. Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 218-219, 115 S. Ct. 1447, 1453, 131 L. Ed.2d 328 (1995). The PUC was acting in its quasi-

judicial capacity in Docket # 4111, and Deepwater presumably made a careful, conscious, and deliberate decision not to appeal the PUC's adverse decision in Docket # 4111 to the Rhode Island Supreme Court pursuant to Chapter 5 of Title 39 of the General Laws. Thus, the legislature's amendments to Section 7 were tantamount to a legislative reopening of the decision.

Importantly, separation of powers is violated by the mere re-opening of a case at the insistence of the legislature, even if the legislature does not -- as it seems to have done here -- seek to influence or pre-determine the outcome. Id., 514 U.S. at 219, 115 S. Ct. at 1453.

The Supreme Court in Plaut explains the historical underpinning that led the Framers to such a firm view on separation of powers:

> In the 17th and 18th centuries colonial assemblies and legislatures functioned as courts of equity of last resort . . . Often [legislatures] chose to correct the judicial process through special bills or other enacted legislation. It was common for such legislation not to prescribe a resolution of the dispute, but rather simply to set aside the judgment and order a new trial . . . ." * * * This sense of sharp necessity to separate the legislative from the judicial power, prompted by the crescendo of legislation interference with . . . judgments of the courts, triumphed among the Framers of the new Federal Constitution. [Citation omitted.] The Convention made the critical decision to establish a judicial department independent of the Legislative Branch . . . .

Plaut, 514 U.S. at 219-221, 115 S. Ct. at 1453-1454 (emphasis supplied).

In Docket # 4185, the legislature seeks to "correct" a prior quasi-judicial decision of the PUC decision by enacting a special bill. As the Plaut decision makes clear, using special legislation to re-open a prior judicial decision, or to otherwise prescribe the outcome of a proceeding is impermissible. The mere fact that Docket # 4185 has been opened (the legislation ordered a new hearing) represents the kind of legislative interference with the judicial process that separation of powers was designed and intended to prohibit. The only way to "correct" a judicial decision is by appeal to a higher tribunal.

Indeed, what the General Assembly did in June 2010 is a quintessential example of why the Framers created separation of powers.

b. The 2010 Amendments to Section 7 Represent A Constitutionally Impermissible Attempt By the Legislature to Control Directly the Execution of Its Enactments.

For over two hundred years after the U.S. Constitution was adopted, Rhode Island was the only state in the country that did not recognize the doctrine of separation of powers. After much controversy, a state constitutional amendment adopting separation of powers was approved in a voter referendum on November 2, 2004. But the General Assembly would not honor the newly enacted amendment -- in a case involving legislative appointments to the State's Coastal Resources Management Council (CRMC) -- without clarification from the Rhode Island Supreme Court decision in In re Request for Advisory Opinion, 961 A.2d 930 (R.I. 2008). Both the Rhode Island Supreme Court in In re Advisory Opinion and the United States Supreme Court in Bowsher v. Synar, 478 U.S. 714 (1986), to which the Rhode Island Supreme Court in In re Advisory Opinion makes favorable reference, strongly support CLF's separation of powers argument in this case that the General Assembly overstepped the constitutional boundaries between the legislative branch and the judicial and executive branches of government when it enacted the amendments to Section 7. Specifically, the United States Supreme Court has held that "direct legislative control of executive powers would be an impermissible usurpation of the central function of a coordinate branch." See In re Advisory Opinion (CRMC), 961 A.2d 930, 940 (R.I. 2008) (citing and quoting Bowsher v. Synar, 478 U.S. 714, 733-34, 106 S. Ct. 3181, 92 L.Ed.2d 583 (1986)).

The amendments to Section 7 state that the PUC shall approve the Deepwater PPA within 45 days of it being filed with the PUC if it: (1) contains conditions that are commercially

reasonable, that is, what an experienced power market analyst would expect to see for a project of a similar size, technology and location (elsewhere defined in the law as a 10MW, 8 turbine wind demonstration project off the coast of Block Island); (2) contains provisions that provide for a decrease in pricing if savings can be achieved in the actual cost of the project; (3) is likely to provide economic development benefits; and (4) is likely to provide environmental benefits.

While the 2010 amendments to Section 7 create the appearance that the PUC is simply being asked to apply a new set of criteria to a new PPA, this appearance is nothing more than an empty pretense.

Under the new amendments to Section 7 the EDC is required to certify that a new PPA "is likely to provide economic development benefits including . . . the creation of new renewable energy jobs [and] the further development of the Quonset Point Business Park" (newly revised Section 7(c)(iii)); and the DEM is required to certify that a new PPA "is likely to provide environmental benefits including the reduction of carbon emissions" (newly revised Section 7(c)(iv)).

In Docket # 4111, the EDC already certified, through sworn testimony delivered under penalty of perjury, that the Block Island demonstration project "is likely to provide economic development benefits including . . . the creation of new renewable energy jobs [and] the further development of the Quonset Point Business Park." January 19, 2010, Direct Testimony of Fred S. Hashway on Behalf of EDC; March 11, 2010 Hearing Transcript (Hashway sworn testimony) at 4-5. And, in Docket # 4111, there is already evidence in the record that the Block Island demonstration project "is likely to provide environmental benefits including the reduction of carbon emissions." See Deepwater's Supplemental Response to CLF's Fifth Data Request, Question 28.

The General Assembly's 2010 revisions of Section 7 of the LTC Statute ask EDC and DEM to certify things in the future that have already been proven and are of record in Docket # 4111. This is a violation of separation of powers.

A review of separation of powers rulings from sister jurisdictions supports CLF's argument in this regard.

The recent Maryland case Schisler v. State, 394 Md. 519, 907 A.2d 175 (2006) is on point. The Maryland legislature was unhappy with certain past and expected future actions of the state's Public Service Commission (PSC), the Maryland analogue to Rhode Island's PUC. The Maryland General Assembly had thus passed what was called "Senate Bill 1," specifically "in reaction to certain [unpopular] acts taken by the Public Service Commission . . ." 394 Md. at 524, 907 A.2d at 178-179. Senate Bill 1 differed from the amendments to the LTC Statute at issue in this case because the Maryland legislation sought to remove PSC members. However, Senate Bill 1 was exactly like the amendments to the LTC Statute at issue in this case because in both cases the legislature was dissatisfied with how the PUC was implementing state energy laws and in both cases the legislature was motivated by that dissatisfaction to reach out impermissibly and tell the PUC how to "correct" the perceived problem. As the Maryland Supreme Court explained:

> The case sub judice is a rare case when it is alleged that the Legislative department of government is attempting to exercise what are essentially executive functions, and doing so not only in disregard for the general precepts of the duties and powers of the respective branches of government, but in violation of express [separation of powers] provisions of the Maryland Constitution . . . .

394 Md. at 566-67, 907 A.2d at 203. The Maryland Supreme Court in Schisler went on to discuss the separation of powers doctrine at some length, and quoted precisely the same passage from Bowsher that the Rhode Island Supreme Court quoted in Request for Advisory Opinion

(CRMC): "[A]s Chadha makes clear, once Congress makes its choice in enacting legislation, its participation ends. . . ." Schisler, 394 Md. at 590, 907 A.2d at 217; Request for Advisory Opinion (CRMC), 961 A.2d at 940.

Here, the General Assembly passed the LTC Statute in 2009, and gave the PUC authority to review a proposed PPA under the Statute. That is just what the PUC did in Docket # 4111. The General Assembly cannot retroactively rescind a PUC decision without violating separation of powers. Schisler, 394 Md. at 541, 907 A.2d at 188 (General Assembly cannot undo actions of "the Public Service Commission, whose decisions the Legislature, or some members of the Legislature, opposed.")

To similar effect is the Alabama Supreme Court's recent holding in McInnish v. Riley, 925 So.2d 174 (Ala. 2005). In that case, the Alabama Supreme Court declared that a state law in which a legislative committee was actually involved in doling out monetary appropriations that had been properly made by the legislature violated separation of powers. The Alabama Supreme Court quoted the U.S. Supreme Court in Bowsher: "[T]he Constitution does not permit the Congress to execute the laws." McInnish, 925 So.2d at 180 (quoting Bowsher, 478 U.S. at 726).

The 2010 amendment to Section 7 is an attempt by the legislature to step into the shoes of the PUC. But "[t]he Constitution does not contemplate an active role for the [legislature] in the supervision of officers charged with the execution of the laws it enacts." Bowsher, 478 U.S. at 722, 106 S. Ct. at 3186.

2. Article I, Section 2: All Laws Should Be Made For the Good of the Whole

The 2010 revisions of Section 7 also violate Article I, Section 2 of the Rhode Island Constitution, which states, in relevant part: "All free governments are instituted for the protection, safety, and happiness of the people. All laws, therefore, should be made for the good

of the whole; and the burdens of the state ought to be fairly distributed among its citizens." The 2010 revision of Section 7 violates this provision because it is clearly intended to benefit one specific developer, Deepwater. The revised Section 7 benefits only Deepwater, and it does so in two ways: first, the amendments create a new review standard that applies only to the review of the long-term contract between Deepwater and Grid; and, second, the very fact that the amendments were passed creates essentially an appeal right for Deepwater -- a special benefit that does not inure to any other party in the previous docket.

In In the Matter of Dorrance Street, 4 R.I. 230, 1856 WL 2331 (1856), the Rhode island Supreme Court considered whether a state law that allowed additional costs, above and beyond costs assigned to all city taxpayers alike, to be assessed against property owners that would benefit directly from certain road improvements and expansions made in the City of Providence violated the provision of Article I, Section 2 that requires all laws to be made for the good of the whole; and the burdens fairly distributed amongst the citizens. Although in reviewing Article I, Section 2, the Court noted the "very general language and declaratory form of [the] clause," Dorrance Street, 4 R.I. at *12, and acknowledged that "wide discretion with regard to the distribution of the burdens of state amongst citizens was intended to be reposed in the general assembly by the will of the people," id., the Court did, in fact, reach the merits of the question. Before setting forth the question that must be answered when reviewing a state law against Article I, Section 2, the Court established a basic judicial principle, i.e., that although the General Assembly is entitled to wide latitude, "we do not mean to say that a law . . . may not be . . . both in its design and effect, so outrageously subversive of all the rules of fairness, as not to come so far within the purview of this general clause, as to enable the court to . . . [declare] it to be void." Id. The Court determined that the "practical question" that must be answered when measuring a

statute against this clause is "has this law been so clearly shown to be subversive of the great principles, 'that ... all laws should be made for the good of the whole' ... that this court can with any propriety declare it to be void?" Id. at *13.

The Court examined Article I, Section 2 in other cases as well. See Sayles v. Foley Same, 38 R.I. 484, 96 A. 340 (R.I. 1916) (challenge to constitutionality of Workmen's Compensation Act); Sepe v. Daneker, 76 R.I. 160, 68, A.2d 101 (R.I. 1949) (challenge to Liquor Control Administration's rule governing the holding of liquor licenses); Opinion to the Governor, 88 R.I. 202, 145 A.2d 87 (R.I. 1958) (question concerning constitutionality of clause in act relating to bonds and powers delegated to Rhode Island Industrial Building Authority). Although in each of these cases, the Court harkens back to the dicta in Dorrance Street, i.e., that this section is advisory and not constitutional restraint upon the legislative powers of the General Assembly, it is also true that in each of these cases the Court examines the challenged law on the merits and measures the law against Article I, Section 2.

CLF submits that the amendments to Section 7 are, in both design and effect, so subversive of all the rules of fairness, and of the great principle that "all laws should be made for the good of the whole"[2] that the Court has the authority to strike the amendments as void.

A renewable energy law that is enacted for the sole benefit of a single project and a single company is neither good for renewable energy nor for the good of the whole.

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[2] Sister jurisdictions place considerable weight on similar Constitutional provisions. See, e.g., Baker v. Vermont, 170 Vt. 194, 206-215, 744 A.2d 864, 873-880 (1999); State v. Ludlow Supermarkets, Inc., 141 Vt. 261, 266-269, 448 A.2d 791, 794-795 (1982).

B. Doctrinal Issues

Even if the PUC does not decide the constitutional issues that CLF argues warrant dismissal of Docket # 4185, the Docket must be dismissed under doctrines that preclude relitigation of claims and issues that have already been litigated. The preclusion doctrines "are expressions of a fundamental public policy favoring repose for both society and litigants," and are not "mere technical rules of convenience." DeCosta v. Viacom International, Inc., 758 F. Supp. 807, 811 (D.R.I. 1991), rev'd on other grounds, 981 F.2d 602 (1st Cir. 1992). "It is well settled that the underlying basis of the doctrine of res judicata is that an issue need and should be judicially determined only once." Silva v. Silva, 122 R.I. 178, 183, 404 A.2d 829, 832 (1979).

1. The Doctrine of Res Judicata Bars Reconsideration of the Revised PPA in Docket # 4185

Res judicata is an absolute bar to any claim that was brought or that could have been or might have been brought earlier. Bossian v. Anderson, supra, 991 A.2d at 1027; Corrado v. Providence Redevelopment Agency, 113 R.I. 274, 277, 320 A.2d 331, 332 (1974) (citing Perez v. Pawtucket Redevelopment Agency, 111 R.I. 327, 302 A.2d 785 (1973) for the proposition that the "prior proceeding is conclusive not only on the issues actually raised and determined, but also on every issue which might properly have been litigated and decided therein."). The doctrine of res judicata "operates as an absolute bar to the repetition of litigation of the same claim between the same parties, and a verdict rendered on the merits of the first case is not only conclusive regarding the issues that were actually determined but also precludes reconsideration of all other issues that might have been raised in the original litigation." Estate of Bassett v. Stone, 458 A.2d 1078, 1080 (R.I.1983).

In Bossian, supra, the Rhode Island Supreme Court restated the three requirements for res judicata to apply in a second action: "[I]dentity of parties, identity of issues, and finality of judgment in [the] earlier action." Bossian, 991 A.2d at 1027 (quoting In re Sherman, 565 A.2d 870, 872 (R.I. 1989)). Each of these three requirements is satisfied here.

a. Identity of the Parties.

Docket # 4111 involved review of a PPA between Deepwater and Grid, and both Deepwater and Grid were parties; the Division of Public Utilities and Carriers (the Division) was a party acting as ratepayer advocate. The June 30 PPA filed in Docket # 4185 is the result of renewed bilateral negotiations between Deepwater and Grid with respect to the same proposed demonstration project reviewed in Docket # 4111 and both Deepwater and Grid again are parties in Docket # 4185; once again, the Division is a party. In fact, in this Docket, the PUC is using the very same service list used in Docket # 4111 to provide the same parties notification of scheduling. The Commission's June 21, 2010 Scheduling Order in this Docket states that all entities and individuals that were parties to the previous docket could intervene in this Docket as of right.

b. Identity of Issues.

In Rhode Island, the "transactional rule" governs the preclusive effect of res judicata. DiBattista v. State, 808 A.2d 1081, 1086 (R.I. 2002). Under this approach, "all claims arising from the same transaction or series of transactions which could have been properly been raised in a previous litigation are barred from a later action." Id., 808 A.2d at 1086.

In Docket # 4111, the PUC considered (and rejected) a PPA between Deepwater and Grid for a long-term contract for a 10 MW Block Island demonstration wind farm. Docket # 4185 has now been opened for the sole purpose of considering a PPA between Deepwater and

Grid for a long-term contract for the same 10 MW Block Island demonstration wind farm. The sole legal issue in Docket # 4111 was whether the PPA was commercially reasonable; the sole legal issue in this Docket is whether the new PPA is commercially reasonable.

It does not aid Deepwater (or another party) to argue that the June 30 PPA has price terms and non-price terms that are slightly different than those contained in the December 10 PPA. The terms of the contract considered in Docket # 4111 and the terms of the contract being considered in this Docket need not be identical in every particular respect in order for the doctrine of res judicata to apply. Res judicata is an absolute bar that "prohibits the relitigation of all issues that were tried or might have been tried in the original suit." Bossian, 991 A.2d at 1027 (quoting Carrozza v. Voccola 962 A.2d 73, 78 (R.I. 2009) (emphasis as it appears in Bossian). It is clear that the PPA now before the PUC in Docket # 4185 could have been presented earlier. Indeed, in Docket # 4111, Deepwater and Grid filed three separate PPAs with the PUC; each one contained different price and non-price terms. Deepwater and Grid could have filed in the previous Docket a PPA with terms like the ones now presented in the June 30 PPA. For reasons that seemed sufficient to Deepwater and Grid at the time, they chose not to do so.

Three separate PPAs were before the PUC in the prior Docket; this Docket is nothing more than a litigation of the next PPA in the series. It is barred by res judicata. Mills v. Toselli, 916 A.2d 756, 757 (R.I. 2006); see generally Foster-Glocester Regional School Comm. v. Bd. of Review, 854 A.2d 1008, 1014 n.2 (R.I. 2004); Thomas v. Ross, 477 A.2d 950, 953 (R.I. 1984). See also Restatement (Second) Judgments (1982) § 24.

c. Finality of Judgment in Earlier Action.

As noted in the preceding section, in Docket # 4111, the PUC was acting in its quasi-judicial capacity.[3] The PUC is empowered to make orders; render judgments; and to enforce the same by suitable process. Rhode Island Gen. Laws § 39-1-7(a). The PUC is defined by its organic statute as an impartial independent body which renders decisions affecting both the public interest and private rights based upon the law and the evidence. It was in its quasi-judicial capacity that the PUC reviewed the December 10 PPA and rendered its decision. The PUC's decision in Docket # 4111 became final seven days after the decision was rendered (April 9, 2010) because no party appealed it pursuant to the provisions of Chapter 5 of Title 39 of the General Laws.

In summary, this Docket concerns exactly the same subject matter as Docket # 4111 -- a PPA between Deepwater and Grid for a long-term contract for a 10 MW Block Island demonstration wind farm. The PUC has already ruled. The PUC decision was not appealed. Deepowater and Grid could have filed the current PPA in the prior docket but chose not to do so. They are barred from doing so now -- and the fact that the PPA at issue in the prior docket was not exactly identical to the PPA presented in this Docket is of no legal import.

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[3] The doctrine of res judicata applies to the decisions of administrative agencies. Town of Richmond v. Wawaloam Reservation, Inc., 850 A.2d 924, 933 (R.I. 2004) (citing Dep't of Corrections v. Tucker, 657 A.2d 546, 550 (R.I. 1995)).

2. In the Alternative, Administrative Finality Bars Review of the June 30 PPA

If the PUC were to find that the doctrine of res judicata does not bar relitigation of the revised PPA, CLF argues in the alternative that the doctrine of administrative finality bars the PUC in this Docket from considering a PPA between Deepwater and Grid for a long-term contract for a 10 MW Block Island demonstration wind farm. Johnston Ambulatory Surgical Assoc. v. Nolan, 755 A.2d 799, 808 (R.I. 2000). Under the doctrine of administrative finality, when an administrative agency such as the PUC has denied an application once, a subsequent application for the same action "may not be granted absent a showing of a change in material circumstances during the time between the two applications." Id. (emphasis supplied). Importantly, "[t]his rule applies . . . even if the two applications rely on different legal theories." Id. The burden is on the applicant (here Deepwater and/or Grid) to demonstrate the required change in material circumstances. Id., at 809.

The doctrine of administrative finality applies to this Docket despite the fact that the provisions of Section 7 of the LTC Statute have been amended, because the doctrine of administrative finality "applies . . . even if the two applications rely on different legal theories." Johnston Ambulatory, supra, 755 A.2d at 808. Similarly, administrative finality applies despite the differences in terms between the December 10 PPA and the June 30 PPA. The terms of the contract considered in Docket # 4111 and the terms of the contract considered in this Docket need not be identical in every particular in order for the doctrine of administrative finality to apply. "The rule [of administrative finality] applies in all situations where the outcome sought in each application is substantially similar. . . ." Bluff Head Corp. v. Zoning Bd. of Review, No.

NC 01-0103, 2001 WL 1558776, at *7 (R.I. Super. Nov. 15, 2001) (emphasis supplied, citing May-Day Realty Corp. v. Bd. of Appeals, 107 R.I. 235, 237, 167 A.2d 400, 401-02 (1983)).

C. The PUC Should Stay the Proceeding Pending Consideration of the Motion to Dismiss

CLF respectfully requests that the PUC issue a stay until it has ruled on CLF's Motion to Dismiss. If allowed to proceed, this is going to be an expensive and time-consuming docket for the parties and for the Commission. There are multiple parties to this Docket and some parties are represented by more than one attorney. The EDC may hire a new expert witness (paid for by Deepwater), pursuant to the new law. Interested citizens from Block Island will travel to the mainland, incurring both travel and lodging expenses. CLF, as a non-profit organization will have to make assessments as to its use of both financial and staff resources. The Commissioners as well as their staff attorneys, clerks, and other personnel were sufficiently busy before this Docket – with its 45-day time frame – was opened.

If the Motion To Dismiss is granted, all the time and money expended on this matter by the Commissioners, the Commission's staff, the parties, and the parties' lawyers up to that point will have been for naught. Accordingly, CLF seeks a stay of this proceeding while its Motion To Dismiss is considered. PBM Nutritionals, LLC v. Dornoch, Ltd., 667 F. Supp.2d 621, 631 (E. D. Va. 2009) (convenience of parties and judicial economy reasons for granting a stay).

VI. CONCLUSION

WHEREFORE, for the foregoing Constitutional reasons (separation of powers and Article I, Section 2) and because res judicata bars relitigation, CLF respectfully requests that the PUC dismiss the current docket.

CLF further requests that the PUC stay the current docket during the pendency of CLF's Motion to Dismiss.

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CERTIFICATE OF SERVICE

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