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# Emerging Issue: Coastal and Marine Spatial Planning: In re Review of Proposed Town of New Shoreham Project: A Survey and Commentary on an Important Decision for Rhode Island's Renewable Energy Development

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# ***In re Review of Proposed Town of New Shoreham Project:***

## **A Survey and Commentary on an Important Decision for Rhode Island's Renewable Energy Development**

**David M. DiSegna\***

### INTRODUCTION

Pursuant to chapter 26.1 of title 39 of the Rhode Island General Laws entitled “Long-Term Contracting Standard for Renewable Energy” (“2009 LTC statute”), Narragansett Electric Company d/b/a National Grid (“National Grid”) and Deepwater Wind Block Island, LLC (“Deepwater Wind”) entered into an Power Purchase Agreement (“2009 PPA”) for the construction of a small-scale wind farm off the coast of Block Island and for the sale of the electricity produced there.<sup>1</sup> However, this 2009 PPA was rejected by The Rhode Island Public Utilities Commission (the “PUC” or the “commission”) based on the standards for approval promulgated by the General Assembly in the 2009 LTC statute.<sup>2</sup> In response to the PUC’s rejection of the 2009 PPA, the General

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1. *In re* Proposed New Shoreham Project, 25 A.3d 482, 482, 485-86, 489-90 (R.I. 2011).

2. *Id.* at 491, 494.

Assembly quickly amended the 2009 LTC statute creating a new amended LTC statute that allowed National Grid and Deepwater Wind to amend their contract (the “amended PPA”).<sup>3</sup> This amended LTC statute also changed the criteria that were required for the amended PPA to gain PUC approval.<sup>4</sup> Based on these new statutory criteria, the amended PPA was approved by the PUC.<sup>5</sup> The decision to approve the amended PPA was then challenged in the Rhode Island Supreme Court in the matter entitled *In re Review of Proposed New Shoreham Project*.<sup>6</sup>

Part I of this survey will give a detailed account of the facts and travel of the case. Part II will discuss the many legal issues in the case and the Court’s holding and reasoning on each issue. Part III will explore the decision’s impact on Rhode Island, including potential long-term benefits as well as costs to the State, and will also discuss an interesting legal issue raised by this case concerning the distinction between legislatively-created standards of review and those crafted strictly by the judiciary.

## I. BACKGROUND

### A. The 2009 LTC Statute and 2009 PPA

The PUC is a “quasi-judicial” regulatory body which is charged with overseeing Rhode Island’s public utilities to ensure that there is sufficient competition between energy companies and that reasonable energy rates are maintained.<sup>7</sup> The PUC is made up of three members who are “appointed by the governor with the advice and consent of the senate” based on their expertise.<sup>8</sup> The commission holds investigations and hearings to determine to reasonableness of energy rates and other matters involving energy distribution.<sup>9</sup> It then renders independent decisions in these matters based on the law and evidence presented before it.<sup>10</sup> The General Assembly has also specifically directed the commission to

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3. See R.I. GEN. LAWS § 39-26.1-7 (Supp. 2010); *In re Proposed New Shoreham Project*, 25 A.3d at 495-96.

4. § 39-26.1-7; *In re Proposed New Shoreham Project*, 25 A.3d at 495-96.

5. *In re Proposed New Shoreham Project*, 25 A.3d at 503.

6. *Id.*

7. R.I. GEN. LAWS § 39-1-3(a) (2006).

8. R.I. GEN. LAWS § 39-1-4(a) (Supp. 2010).

9. *Id.* § 39-1-3(a).

10. R.I. GEN. LAWS § 39-1-11 (2006).

promote the use of renewable energy to help decrease the State's use of fossil fuels.<sup>11</sup>

To achieve these goals, the General Assembly passed the 2009 LTC statute which was signed into law by then-Governor Donald L. Carcieri on June 26, 2009.<sup>12</sup> Specific to this case, section 39-26.1-7 entitled "Town of New Shoreham Project" called for National Grid to solicit proposals from developers for a small-scale wind farm off the coast of Block Island along with a separate transmission cable project to transfer energy from Block Island to the mainland.<sup>13</sup> The 2009 version of section 39-26.1-7 also stated that any contract for the wind farm project between National Grid and a developer must be "commercially reasonable," such that the contract must contain "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."<sup>14</sup>

Deepwater Wind was the sole developer to propose a wind farm project to National Grid, and in 2009, the two companies entered into the 2009 PPA to build such a wind farm and distribute the generated electricity throughout Rhode Island for twenty years.<sup>15</sup> The 2009 PPA called for a price of 24.4 cents per kilowatt hour for ratepayers, with a 3.5% increase for each year of the contract beginning in 2013.<sup>16</sup> However, no estimated cost for constructing the project was stated in this contract.<sup>17</sup> The 2009 PPA also included provisions pertaining to the construction and ownership of a transmission cable and called for separate negotiations and contracts for that project.<sup>18</sup> However, National Grid was explicitly given the right to opt out of participating in

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11. *In re Proposed New Shoreham Project*, 25 A.3d at 488. See also R.I. GEN. LAWS §§ 39-1-1, -26-4, -26.1-7 (2006 & Supp. 2010).

12. *In re Proposed New Shoreham Project*, 25 A.3d at 489.

13. *Id.* at 490.

14. *Id.* (citation omitted).

15. *Id.* at 491-92.

16. *Id.* Although certain ratepayers, like petitioners, obtain a portion of their electricity from suppliers other than National Grid, they are still subject to any rate increases because such increases are assessed through the distribution fee which National Grid charges to all ratepayers, regardless of who supplies their electricity. *Id.*

17. *Id.* at 492.

18. *Id.*

the transmission cable project, while Deepwater Wind was not.<sup>19</sup>

The 2009 PPA was submitted to the PUC for approval in DocketNumber 4111, and on March 30, 2010, the three-member commission unanimously denied approval of the contract stating that it was not “commercially reasonable” as required by the 2009 LTC statute.<sup>20</sup> Specifically, the commission found that the 24.4 cents per kilowatt hour pricing along with the annual 3.5% increase would result in a significant rise in Rhode Island energy prices, which would cost the state an estimated \$390 million over the twenty year term of the contract.<sup>21</sup> The PUC compared the “terms and pricing”<sup>22</sup> of the 2009 PPA to those of other renewable energy projects “regardless of sizing restrictions, technology, location, or novelty.”<sup>23</sup> The commission found that the pricing contained in the 2009 PPA was “higher than that which an experienced power market analyst would expect to see in transactions involving newly developed renewable energy resources,” and thus, concluded that the contract was not “commercially reasonable.”<sup>24</sup>

#### B. The Amended LTC Statute and Amended PPA

In response to the PUC’s rejection of the 2009 PPA, the General Assembly amended the Long-Term Contracting statute by editing only section 39-26.1-7, the section regarding the New Shoreham project.<sup>25</sup> This amended statute was signed into law on June 15, 2010, approximately two months after the PUC rejected the 2009 PPA.<sup>26</sup> The General Assembly was perfectly clear in the first sentence of the amended LTC statute when it stated its intention to “facilitate the construction of a small-scale offshore wind demonstration project off the coast of Block Island.”<sup>27</sup> The

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19. *Id.*

20. *Id.* at 492-93.

21. *Id.* at 493.

22. *Id.* (quoting R.I. GEN. LAWS § 39-26.1-2(1) (Supp. 2010)).

23. *Id.* (quoting *In re Proposed New Shoreham Project Pursuant to R.I. Gen. Laws § 39-26.1-7*, R.I.P.U.C. No. 4111, slip op. at 71 (Apr. 2, 2010)).

24. *Id.* at 494 (quoting *In re Proposed New Shoreham Project Pursuant to R.I. Gen. Laws § 39-26.1-7*, R.I.P.U.C. No. 4111, slip op. at 68 (Apr. 2, 2010)).

25. *Id.* at 494-95.

26. *Id.* at 495.

27. R.I. GEN. LAWS § 39-26.1-7(a) (Supp. 2010).

legislature stated that it supported this project in an effort to

[P]osition 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.<sup>28</sup>

In order to effectuate these goals, the General Assembly authorized National Grid and Deepwater Wind to “enter into an amended power purchase agreement . . . on terms that are consistent with the [2009 PPA],” and allowed for changes to “dates and deadlines” as well as changes “made to take into account” any legislative amendments to the 2009 LTC statute, provided that any changes to the agreement “shall ensure that the pricing can only be lower, and never exceed, the original pricing included in the [2009 PPA].”<sup>29</sup>

As with the 2009 PPA, the amended PPA was to be submitted to the PUC for approval, however, this time, the General Assembly delineated an entirely new standard under which the commission was to review the contract.<sup>30</sup> First, the PUC was to review the agreement “taking into account the State’s policy intention to facilitate the development of a small offshore wind project in Rhode Island waters, while at the same time interconnecting Block Island to the mainland.”<sup>31</sup> Next, the legislature laid out a four-part test declaring that the PUC “shall approve” the amended PPA if the four criteria are met.<sup>32</sup>

The first criterion was that the “terms and conditions” of the agreement were to be “commercially reasonable.”<sup>33</sup> However, in the amended LTC statute, this phrase was newly defined to “mean terms and pricing that are reasonably consistent with what an

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28. *Id.*

29. *Id.*

30. *In re Proposed New Shoreham Project*, 25 A.3d at 495.

31. § 39-26.1-7(c).

32. *Id.*

33. § 39-26.1-7(c)(i).

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.”<sup>34</sup> Second, the amended PPA was to “contain[] provisions that provide[d] for a decrease in pricing if savings c[ould] be achieved in the actual cost of the project pursuant to subsection 39-26.1-7(e).”<sup>35</sup> Third, the agreement must have been “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.”<sup>36</sup> Finally, the amended PPA must have been “likely to provide environmental benefits, including the reduction of carbon emissions.”<sup>37</sup> “An advisory opinion on the findings of economic benefit” from the Rhode Island Economic Development Corporation (“EDC”) and “an advisory opinion on the environmental benefits” from the Rhode Island Department of Environmental Management (“DEM”) were to be given “substantial deference” by the PUC when making its findings on the third and fourth criteria.<sup>38</sup>

Expanding on the second criterion, the General Assembly also added three more directives in section 39-26.1-7(e) regarding the price-savings provisions of the agreement.<sup>39</sup> First, the General Assembly stated that the amended PPA “shall provide for terms that shall decrease the pricing if savings can be achieved in the

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34. § 39-26.1-7(c)(iv). These policy goals are

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.

§ 39-26.1-7(a).

35. § 39-26.1-7(c)(ii).

36. § 39-26.1-7(c)(iii).

37. § 39-26.1-7(c)(iv).

38. *Id.*

39. *See* § 39-26.1-7(e).

actual cost of the project, with all realized savings allocated to the benefit of ratepayers.<sup>40</sup> Second, the legislature directed that

The amended [PPA] shall also provide that the initial fixed price contained in the [2009 PPA] shall be the maximum initial price, and any realized savings shall reduce such price. After making any such reduction to the initial price based on realized savings, the price for each year of the amended [PPA] shall be fixed by the terms of said agreement.<sup>41</sup>

Finally, the General Assembly stated that “[t]he amended [PPA] shall require that the costs of the project shall be certified by the developer,” and verified by “[a]n independent third-party. . . at the completion of the construction of the project.”<sup>42</sup> Once verified, these “final costs” were to be used by the PUC to “reduce the expense to ratepayers consistent with a verified reduction in the project costs.”<sup>43</sup>

As a final mandate in the amended LTC statute, the General Assembly declared that “[t]he project shall include a transmission cable between” Block Island and the mainland.<sup>44</sup> Like the 2009 LTC statute, National Grid was permitted to opt out of the transmission cable project in the amended LTC statute.<sup>45</sup> Unlike the 2009 LTC statute, however, the amended LTC statute added that Deepwater Wind “*may elect to*” own the transmission cable if National Grid in fact opted out.<sup>46</sup>

Taking into account the amendments to the LTC statute, National Grid and Deepwater Wind amended their agreement.<sup>47</sup> This amended PPA contained the same pricing terms as the 2009 PPA, but explicitly provided an estimated construction cost of \$205 million which was not found in the 2009 PPA.<sup>48</sup> Additionally, the amended PPA contained a provision which allowed *both* National Grid and Deepwater Wind to opt out of

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40. § 39-26.1-7(e)(i).

41. § 39-26.1-7(e)(ii).

42. § 39-26.1-7(e)(iii).

43. *Id.*

44. § 39-26.1-7(f)

45. *Id.*

46. *See* § 39-26.1-7(i) (emphasis added).

47. *In re Proposed New Shoreham Project*, 25 A.3d 482, 497 (R.I. 2011).

48. *Id.* at 497-98.



participating in the transmission cable project, whereas the 2009 PPA included an opt-out only for National Grid.<sup>49</sup> The amended PPA was then submitted to the PUC for approval on June 30, 2010 in PUC Docket Number 4185.<sup>50</sup>

### C. The PUC Decision

A majority of the PUC including Chairman Elia Germani (“Chairman Germani”) and Commissioner Paul J. Roberti (“Commissioner Roberti”) approved the amended PPA, while Commissioner Mary E. Bray (“Commissioner Bray”) filed a dissenting opinion.<sup>51</sup> Chairman Germani and Commissioner Roberti also filed concurring opinions on a single issue, finding that the amended PPA was likely to provide economic benefits, but coming to that conclusion for different reasons.<sup>52</sup>

Emphasizing the General Assembly’s policy goals, the majority stated that they “interpreted any ambiguities in the law and weighed the evidence in a manner to effectuate ‘the development of a small offshore wind project in Rhode Island waters.’”<sup>53</sup> Through this lens, the majority concluded that the amended PPA met each of the criteria set out by the legislature in the amended LTC statute.<sup>54</sup> Commissioner Bray filed a dissenting opinion, stating that she did not interpret the law or weigh the evidence differently than she would in any other matter.<sup>55</sup> She concluded that the amended PPA was not commercially reasonable, was not likely to provide economic development benefits, and that the price-savings provision did not comply with the amended LTC statute.<sup>56</sup> Thus, she declared that the amended PPA should not be approved.<sup>57</sup>

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49. *Id.* at 498.

50. *Id.* at 497.

51. *Id.* at 498.

52. *Id.*

53. *In re Amended Power Purchase Agreement Between Narragansett Elec. and Deepwater Wind Block Island, LLC Pursuant to R.I. Gen. Laws § 39-26.7, R.I.P.U.C. No. 4185, slip op. at 130 (Aug. 16, 2010) (quoting R.I. GEN. LAWS § 39-26.1-7(c) (Supp. 2010)).*

54. *In re Proposed New Shoreham Project*, 25 A.3d at 498-99.

55. *Id.* at 501.

56. *Id.* at 501-02.

57. *Id.* at 502.

#### D. Petitions for Writ of Certiorari

Pursuant to section 39-1-5, Toray Plastics (America), Inc. (“Toray”), Polytop Corporation (“Polytop”), former Attorney General Patrick Lynch, and the Conservation Law Foundation (“CLF”) all filed petitions for a writ of certiorari with the Rhode Island Supreme Court, which were granted and consolidated.<sup>58</sup> The Court also permitted then-Governor Carcieri, Rhode Island Senate President, M. Teresa Paiva-Weed, and Rhode Island Speaker of the House of Representatives, Gordon D. Fox to intervene on behalf of National Grid and Deepwater Wind (collectively “respondents”).<sup>59</sup> The newly-elected Attorney General Peter Kilmartin then withdrew his petition for writ of certiorari.<sup>60</sup> With the Attorney General no longer party to the case, Toray, Polytop and CLF were required to demonstrate that they had standing to argue before the Court in this matter.<sup>61</sup> After a show-cause hearing on the sole issue of standing, the Court held that Toray and Polytop met the standing requirements, but CLF did not.<sup>62</sup> Thus, Toray and Polytop (collectively “petitioners”) were the only parties left to argue the case.<sup>63</sup> Therefore, only the issues raised by these two parties were before the Court.

### II. *IN RE REVIEW OF PROPOSED TOWN OF NEW SHOREHAM PROJECT*

Petitioners offered many arguments in support of their position, which can be grouped into two large categories: (1) those that focused on the four criteria set out in section 39-26.1-7(c), and (2) those derived from elsewhere in the amended LTC statute.<sup>64</sup> Each of these arguments will be examined in turn.

#### A. Standard of Review

The Court’s standard of review in this case was not the usual

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58. *Id.* at 503.

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.* A majority of the Court also decided that it would not overlook the issue of standing based on the “substantial public interest” presented by the issues in the case. *Id.*

63. *Id.*

64. *Id.* at 506-07.

standard applied in appeals from administrative agencies.<sup>65</sup> Rather, the General Assembly has articulated a separate standard for appeals from the PUC.<sup>66</sup> Section 39-5-3 declares that “[t]he findings of the commission on questions of fact shall be held to be prima facie true. . . and the supreme court, shall not exercise its independent judgment nor weigh conflicting evidence.”<sup>67</sup> On the other hand, the Court reviewed questions of law decided by the commission, including statutory interpretation, de novo, but gave the commission deference in its interpretation of statutory language where ambiguity existed.<sup>68</sup> Finally, the General Assembly has articulated that “[a]n order or judgment of the commission made in the exercise of administrative discretion shall not be reversed unless the commission exceeded its authority or acted illegally, arbitrarily, or unreasonably.”<sup>69</sup> As the Court aptly stated, “[w]ithout question. . . ‘petitioner[s] ha[d] a difficult burden to bear.’”<sup>70</sup>

#### B. The PUC’s Deference to the Amended PPA

The first claim raised by petitioners was that the PUC majority did not act as an “impartial, independent body,” as required by section 39-1-11, but rather gave the amended PPA excessive deference in favor of approval.<sup>71</sup> This contention stems from the PUC majority’s statement that in reviewing the amended PPA, it “purported to resolve ‘any ambiguities in the law and weighed the evidence in a manner to effectuate’” “the development of a small offshore wind project in Rhode Island waters.”<sup>72</sup>

The Court held that the PUC majority did not exceed its authority by taking into account the policy intentions that the General Assembly articulated in section 39-26.1-7(c).<sup>73</sup> Rather,

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65. *Id.* at 504.

66. *Id.*

67. R.I. GEN. LAWS § 39-5-3 (2006).

68. *In re Proposed New Shoreham Project*, 25 A.3d at 504-05.

69. § 39-5-3.

70. *See In re Proposed New Shoreham Project*, 25 A.3d at 506 (quoting *In re Kent Cnty. Water Auth. Change Rate Schedules*, 996 A.2d 123, 128 (R.I. 2010)).

71. *Id.* at 507. (quoting R.I. GEN. LAWS § 39-1-11 (2006)).

72. *Id.* (citation omitted).

73. *Id.* at 508.

the majority was simply reviewing the case as it was directed to by the legislature.<sup>74</sup> Furthermore, the Court did not believe the commission was acting as a “rubber stamp” given the extensive written opinion and description of evidence that the majority provided.<sup>75</sup>

#### C. Insufficient Time-frame for the PUC to Conduct Its Review

Petitioners next argued that the forty-five day window that was statutorily prescribed for the PUC to review the amended PPA was insufficient “to fully study and evaluate the issues.”<sup>76</sup> However, this issue was not properly before the Court because petitioners did not raise it in their petitions for writ of certiorari.<sup>77</sup> Nonetheless, the Court stated that even if the issue was properly raised, the Court would not substitute its judgment for that of the Legislature, which statutorily mandated a forty-five day period of review.<sup>78</sup>

#### D. Respondents’ Lack of Commitment to Participate in the Transmission Cable Project

Petitioners’ next line of arguments stemmed from respondents’ lack of commitment to participate in the transmission cable project. First, petitioners contended that various portions of the amended LTC statute required the amended PPA to address all aspects of the transmission cable project and that the lack of commitment to such a project violated the amended LTC statute.<sup>79</sup> However, the Court held that petitioners had merely “cherrypick[ed]” from the “overarching policy goals” laid out in the amended LTC statute, and “cobl[ed] together” these provisions in order to fabricate a statutory mandate.<sup>80</sup> The Court stated that the amended LTC statute clearly separates the wind farm and the transmission cable into two distinct projects.<sup>81</sup> While the entire “project shall include a

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74. *Id.*

75. *Id.* at 507.

76. *Id.* at 508.

77. *Id.*

78. *Id.*

79. *Id.* at 509.

80. *Id.* at 509.

81. *Id.*

transmission cable,” the Court held that nothing in the amended LTC statute mandates that this particular agreement provide for such a cable.<sup>82</sup>

Also, within this line of arguments regarding the transmission cable, petitioners contend that the absence of binding transmission-cable provisions in the amended PPA violates section 39-26.1-7(a), which authorizes an amended PPA “enter[ed] into. . . on terms that are consistent with the [2009 PPA].”<sup>83</sup> Petitioners argue that since the 2009 PPA allowed only National Grid to opt out of participating in the transmission cable project while the amended PPA allowed both National Grid and Deepwater Wind to opt out, the two agreements contained inconsistent terms, thus violating the amended LTC statute.<sup>84</sup> The Court first declared that this argument was deemed waived because it was not addressed in the petition for writ of certiorari.<sup>85</sup> The Court also held that even if the argument had not been waived, petitioners would not have prevailed because the terms of both PPAs were consistent.<sup>86</sup> It reasoned that the amended PPA allowed for both parties to opt out of the transmission cable project and the 2009 PPA allowed “permissive, but not mandatory, termination of the” agreement if a transmission cable was not constructed.<sup>87</sup> Thus, both contracts allowed for construction of the wind farm without a commitment from either party to construct the transmission cable, and were, therefore, “consistent.”<sup>88</sup>

#### E. Failure to Stabilize Long-Term Energy Prices

Petitioners’ next contented that the amended PPA failed to “stabiliz[e] long term energy prices” because it called for a 3.5% yearly price increase and, therefore, should have been rejected by the PUC.<sup>89</sup> The Court held that the stabilization of long-term

82. R.I. GEN. LAWS § 39-26.1-7(f) (Supp. 2010); *In re Proposed New Shoreham Project*, 25 A.3d at 509-10.

83. § 39-26.1-7(a); *In re Proposed New Shoreham Project*, 25 A.3d at 513.

84. *In re Proposed New Shoreham Project*, 25 A.3d at 512.

85. *Id.*

86. *Id.* at 514.

87. *Id.*

88. *See* § 39-26.1-7(a); *In re Proposed New Shoreham Project*, 25 A.3d at 514.

89. *In re Proposed New Shoreham Project*, 25 A.3d at 514 (quoting R.I. GEN. LAWS § 39-26.1-1 (Supp. 2010)).

energy prices was merely an “overarching policy aim” of the general “Long-Term Contracting Standard for Renewable Energy” and was not even a policy goal mentioned in section 39-26.1-7, which was specific to the Town of New Shoreham Project.<sup>90</sup> Furthermore, when read with the other policy aims in section 39-26.1-1, it is clear that the legislature intended the stabilization of energy prices to come from a decreased consumption of fossil fuels because of their volatile prices.<sup>91</sup> Thus, the Court held that a steady 3.5% per year increase in price was stable because the increase lacked fluctuation.<sup>92</sup> Therefore, according to the Court, the amended PPA will “stabilize” energy prices within the meaning of section 39-26.1-1.<sup>93</sup>

#### F. Contention that the Amended PPA is not Commercially Reasonable

The first issue raised by petitioners that was derived from the four criteria in section 39-26.1-7(c) was whether the terms and conditions contained in the amended PPA were commercially reasonable.<sup>94</sup> The definition of the term “commercially reasonable” was changed in the amended LTC statute 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.*”<sup>95</sup>

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90. *Id.* at 514-515.

91. *Id.* at 515. *See also* § 39-26.1-1.

92. *In re Proposed New Shoreham Project*, 25 A.3d at 515.

93. *Id.*

94. *Id.*

95. R.I. GEN. LAWS § 39-26.1-7(c)(iv) (Supp. 2010) (emphasis added). These policy goals are

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.

§ 39-26.1-7(a).

Under this new definition, petitioners first argued that the PUC should be reversed because it did not consider the costs of the transmission cable in its analysis, and that adding those costs would render the amended PPA commercially unreasonable.<sup>96</sup> However, the Court held that since the amended LTC statute did not require that the amended PPA contain terms for the construction of a transmission cable, the PUC was not required to consider the cost of the transmission cable project in its analysis of whether the amended PPA was commercially reasonable.<sup>97</sup>

Next, petitioners argued that the amended PPA was not commercially reasonable because of the above-market costs that ratepayers will be charged once the wind farm becomes operational.<sup>98</sup> However, the Court held that petitioners misapplied the statutory definition of “commercially reasonable,” which compares the amended PPA only to “project[s] of a similar size, technology and location,” and not to the price of electricity produced from fossil-fuels.<sup>99</sup>

Finally, petitioners contend that the PUC focused its analysis of the agreement’s commercial reasonableness on the costs of the project, and not on the price of electricity that will be produced therefrom (24.4 cents per kilowatt hour).<sup>100</sup> However, the Court cited to the PUCs reliance on evidence from Deepwater Wind’s expert witness David P. Nickerson (“Mr. Nickerson”), and others, who specifically testified that the pricing of the project was “commercially reasonable when compared to other projects [and] ‘adjusted for size, location, and technology.’”<sup>101</sup> The Court stated that it would not question the factual findings of the commission, and since the commission accepted Mr. Nickerson’s testimony as credible evidence, the Court was not in a position to disagree with that decision.<sup>102</sup> Accordingly, the Court upheld the PUC’s finding

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96. *In re Proposed New Shoreham Project*, 25 A.3d at 516.

97. *Id.* at 516-17; The Court noted that it agreed with petitioners that the amended LTC statute requires the construction of a transmission cable; however, nothing in the statute required that the amended PPA contain terms for the construction of the cable. *Id.*

98. *See id.* at 517.

99. § 39-26.1-7(c)(iv); *In re Proposed New Shoreham Project*, 25 A.3d at 517.

100. *In re Proposed New Shoreham Project*, 25 A.3d at 516-17.

101. *Id.* at 517 (citation omitted).

102. *Id.*

that the amended PPA was commercially reasonable.<sup>103</sup>

#### G. Contention that the Amended PPA did not Contain Proper Price-Savings Provisions

Moving on to the second criterion in section 39-26.1-7(c), petitioners argued that the amended PPA did not “contain[] provisions that provide for a decrease in pricing if savings c[ould] be achieved in the actual cost of the project pursuant to subsection 39-26.1-7(e),” and should have, therefore, been rejected by the PUC.<sup>104</sup> On this front, petitioners first claimed that the amended PPA did not utilize the proper “base amount” of construction and further, petitioners challenged the “cost verification process” contained in the agreement.<sup>105</sup>

Regarding the “base amount” argument, petitioners asserted that the 2009 PPA contained an estimated cost of construction of \$219 million dollars, and the amended PPA contained an estimate of \$205 million, yet the pricing of 24.4 cents per kilowatt hour did not change.<sup>106</sup> Thus, they argued, when the “final costs” are verified, there will be a decrease in costs without an accompanying decrease in price, in violation of section 39-26.1-7(c)(ii).<sup>107</sup> The Court addressed this contention in two ways. First, it stated that the amended LTC statute requires that the “initial fixed price” contained in the 2009 PPA be the “maximum initial price” that can be charged.<sup>108</sup> Thus, the 24.4 cents per kilowatt hour *price* cannot be raised, which it was not in the amended PPA; however, nothing in the amended LTC statute requires that the estimated *cost* of construction must be the same in the amended PPA as it was in the 2009 PPA.<sup>109</sup> Second, the Court stated that, despite evidence that the 2009 PPA’s pricing was based on an estimated cost of \$219 million, there was also credible evidence that such pricing was actually based on an estimated cost of \$205 million.<sup>110</sup>

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103. *Id.*

104. § 39-26.1-7(c)(ii); *In re Proposed New Shoreham Project*, 25 A.3d at 518.

105. *In re Proposed New Shoreham Project*, 25 A.3d at 518.

106. *Id.* at 517-18.

107. *Id.* at 518.

108. *Id.* at 520 (quoting § 39-26.1-7(e)(ii)).

109. *Id.*

110. *Id.*



Since the PUC majority ultimately chose to credit the \$205 million estimate over the \$219 million estimate, it was perfectly acceptable for the amended PPA to also use the \$205 million estimate as its base cost.<sup>111</sup> As such, if there is a decrease in actual “final costs” below the \$205 million base, the Court noted, there still would be a trigger to decrease the price in the amended PPA.<sup>112</sup> Therefore, according to the Court, it was not improper for the amended PPA to utilize the base cost amount of \$205 million and a price of 24.4 cents per kilowatt hour.<sup>113</sup>

Petitioners’ second challenge to the price-savings provision was that the amended PPA does not comply with section 39-26.1-7(e)(iii) which requires that “[t]he reasonable costs of” the third party verification of the actual costs of the project be paid by “the developer.”<sup>114</sup> Petitioners read this statute as adding a “reasonableness’ criterion” such that the independent third-party may verify the costs only if they are reasonable.<sup>115</sup> The Court first stated that the issue was not mentioned in a petition for writ of certiorari, and was therefore waived.<sup>116</sup> However, even had the issue been properly raised, the Court refused to read the statute as adding a “reasonableness’ criterion” in the verification process.<sup>117</sup> The statute requires only that the developer pay for reasonable costs “for *conducting* the verification.”<sup>118</sup>

#### H. Contention that the Amended PPA is not Likely to Provide Economic Development Benefits

Next petitioners argued that the amended PPA fails to meet the third criterion in section 39-26.1-7(c).<sup>119</sup> The amended statute required that the amended PPA must be “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;

111. *Id.*

112. *Id.* at 518.

113. *In re Proposed New Shoreham Project*, 25 A.3d at 520-21.

114. R.I. GEN. LAWS § 39-26.1-7(e)(iii) (Supp. 2010); *In re Proposed New Shoreham Project*, 25 A.3d at 521.

115. *In re Proposed New Shoreham Project*, 25 A.3d at 521.

116. *Id.*

117. *Id.*

118. *Id.* (emphasis in original).

119. *Id.* at 521-22.

and, increasing the training and preparedness of the Rhode Island workforce to support renewable energy projects.”<sup>120</sup> Additionally, the Legislature required an expert from the EDC to provide “an advisory opinion on the findings of economic benefit,” of which the PUC was to give “substantial deference” when making its own findings regarding this criterion.<sup>121</sup>

Petitioners offered several arguments as to why the EDC advisory opinion was not based on credible evidence and was not entitled to substantial deference.<sup>122</sup> However, the Court stated that the EDC put forth credible evidence before the PUC, which the majority found to be more credible than contrary evidence offered by petitioners.<sup>123</sup> The Court again declared that it would not disturb the commission’s fact-finding, nor second guess its credibility determinations.<sup>124</sup>

Petitioners also argued that respondents failed to put forth any evidence of likely economic development benefits before the PUC, and thus, the commission should have rejected the amended PPA.<sup>125</sup> The Court rejected this argument and held that the Legislature’s direction that the PUC give “substantial deference” to the EDC advisory opinion indicated that respondents were not required to proffer any of their own evidence concerning the likely economic benefits of the project.<sup>126</sup> Rather, evidence from the advisory opinion was all that was necessary to approve the amended PPA because the General Assembly clearly felt that the EDC was “best equipped” to analyze economic benefits.<sup>127</sup>

Finally, petitioners claimed that since a majority of the commissioners utilized the “net-benefits test” in analyzing economic benefits, this test became the “law of the case.”<sup>128</sup>

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120. R.I. GEN. LAWS § 39-26.1-7(c)(iii) (Supp. 2010).

121. § 39-26.1-7(c)(iv).

122. *In re Proposed New Shoreham Project*, 25 A.3d at 522.

123. *Id.* at 522-23.

124. *Id.* at 523.

125. *Id.*

126. *Id.*

127. *Id.*

128. *Id.* Chairman Germani did not believe a “net-benefits” test was required under the amended LTC statute and instead looked simply at economic benefits without examining any offsetting economic detriments. *Id.* at 523 n.45, 524. However, Commissioners Bray and Roberti both believed the net-benefits test was required, but only Chairman Roberti felt that the amended PPA passed this test. *Id.* Thus, two of the three members of the

Furthermore, they argued, the amended PPA failed to pass this test because it would cause a net loss to the Rhode Island economy when both costs and benefits are computed.<sup>129</sup> The Court first held that the “law of the case” doctrine is discretionary and applies only to courts of the same judicial level, not to reviewing courts on appeal.<sup>130</sup> Next, the Court stated that there were three distinct interpretations of the economic benefits criterion by the three PUC commissioners and, thus, the Court could grant no deference to any one interpretation.<sup>131</sup> The Court then went on to give its own interpretation of this criterion and declared that it did not require a net-benefits test, and thus, the PUC was required only to look at possible economic benefits and not potential costs of the project.<sup>132</sup>

In reaching this conclusion, the Court first noted that the General Assembly offered specific examples of the types of economic benefits that were to be examined under the statute, and did not list a single potential cost that should be included in the analysis.<sup>133</sup> Furthermore, the General Assembly explicitly called for a net-benefits test in section 39-26.1-8 regarding a future utility-scale wind farm in Rhode Island waters.<sup>134</sup> Thus, the Court concluded that the legislature would have explicitly called for a net-benefits test in the amended LTC statute, if it intended for such a test to apply to the small-scale wind farm at issue in this case.<sup>135</sup> Therefore, the Court held that the amended LTC statute did not require a net-benefits test, and when examining only economic benefits, the amended PPA satisfied the third criterion of section 39-26.1-7(c).<sup>136</sup>

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PUC applied the net-benefits test, but, the actual majority (Chairman Germani and Commissioner Roberti) approved the amended PPA while applying two different tests. *Id.*

129. *Id.* at 524.

130. *Id.* at 523.

131. *Id.* at 524.

132. *Id.* at 525.

133. *Id.*

134. *Id.* (citing R.I. GEN. LAWS § 39-26.1-8(b)(i) (Supp. 2010)).

135. *Id.* at 525-26. The Court noted the “parade of irrational possibilities that could incur” from analyzing only the benefits of the project without examining any costs. *Id.* at 526. However, the Court felt that this analysis was the “clear intention” of the Legislature and refused to add “unwritten words into the statute[.]” *Id.*

136. *Id.* at 526.

### I. Contention that the Amended PPA is not Likely to Provide Environmental Benefits

The final contention by petitioners was that the amended PPA is not likely to provide environmental benefits as required by the amended LTC statute because there is no commitment to construct a transmission cable, and without the cable, no environmental benefits will be realized.<sup>137</sup> However, the Court stated that there was ample evidence of environmental benefits in DEM's advisory opinion, which was given "substantial deference" by the PUC as required by the statute.<sup>138</sup> Furthermore, the Court emphasized the word "likely" in the amended LTC statute and held that even without a commitment to construct a transmission cable, approval of the amended PPA brings the state one step closer to a fully operational wind farm, thus creating the "likelihood" that environmental benefits will be realized.<sup>139</sup>

### J. Conclusion

The Court concluded by noting its "trepidation" over the wind farm project, but cited the narrow standard of review which constrained its decision in this case.<sup>140</sup> Finally, the Court offered its "fervent hope" that the wind farm project will be as successful as the Legislature believes it will be.<sup>141</sup>

### III. COMMENTARY

This was arguably the most important case decided by the Rhode Island Supreme Court during the 2010-2011 term. Its outcome will affect the Rhode Island economy, the environment, and every Rhode Island citizen both now and far into the future. The first noticeable consequence of this decision and the construction of the wind farm is that Rhode Island electricity prices will likely rise, at least for the twenty-year term of the amended PPA. Even using National Grid's estimate, this increase in electricity rates will cost Rhode Island ratepayers \$390 million

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137. *Id.*

138. *Id.*

139. *Id.* (emphasis omitted).

140. *Id.* at 526-27.

141. *Id.* at 527.

dollars over the life of the contract.<sup>142</sup> Additionally, the increased energy rates will likely drive some businesses out of the state while deterring new businesses from entering, both of which will decrease tax revenues and available jobs.

However, despite the costs to the Rhode Island economy, the project also has its benefits. While only six permanent jobs will be created, many workers will be needed on a temporary basis during the organization and construction phases of the project.<sup>143</sup> Furthermore, it is important to note that this particular wind farm is merely a “small-scale. . . demonstration project” and is designed to be the first step in establishing Rhode Island as a hub of renewable energy production.<sup>144</sup> In the future, the Legislature’s goal is to construct a “utility-scale” wind farm off the coast of Rhode Island which will be significantly larger and produce much more energy.<sup>145</sup> Based on economies of scale, the electricity produced by this larger wind farm should be sold at a far more reasonable rate than that which will be produced by the small-scale wind farm.<sup>146</sup> Another goal of this demonstration project is to make Rhode Island the first state with an offshore wind farm and to establish it as the center of the industry.<sup>147</sup> This, in turn, may help develop Quonset Business Park as a heart of training for workers in the renewable energy field.<sup>148</sup> While these appear to be lofty goals, in order for any of them to be realized, the demonstration project must first be completed.

Additionally, the project will provide environmental benefits including a reduction in pollution and carbon emissions, not to mention a decreased reliance on foreign sources of fossil fuels. While these benefits will be minute in the whole energy scheme, again, they are only the first step toward a clean-energy future and energy independence.

It is far too early to tell if this “William Seward-esque”<sup>149</sup>

142. *Id.* at 493.

143. *See id.* at 524.

144. R.I. GEN LAWS § 39-26.1-7(a) (Supp. 2010).

145. *See id.* § 39-26.1-8.

146. *See In re Amended Power Purchase Agreement Between Narragansett Elec. and Deepwater Wind Block Island, LLC Pursuant to R.I. Gen. Laws § 39.26.7, R.I.P.U.C. No. 4185, slip op. at 42 (Aug. 16. 2010).*

147. *See id.*

148. *See* § 39-26.1-7(c)(iii).

149. *In re Proposed New Shoreham Project*, 25 A.3d at 527. The Court

project will bring about all of the benefits that it is intended to provide, and while the Court has very justified reservations,<sup>150</sup> the future is still unknown. Certainly, there will be upfront costs that Rhode Island will have to bear in order gain entry into the offshore wind industry. There are, however, many potential long-term benefits that an offshore wind farm will bring to Rhode Island.

Surely all of these considerations were weighed in the minds of the Justices when deciding this case. However, from a legal standpoint, the Court's review of this matter was severely constrained by the legislature.<sup>151</sup> In several ways, the PUC was given little choice but to approve the amended PPA and the Court was given even less latitude in its review of the PUC's decision.<sup>152</sup>

It is quite obvious that the General Assembly amended the 2009 LTC statute specifically in order to gain approval of a PPA and advance the wind farm project.<sup>153</sup> This intention is stated expressly in the first line of the amended LTC statute and can be inferred from the amendments to several sections of the statute, which were based on the PUC's expressed reasons for rejecting the 2009 PPA.<sup>154</sup> One example of these amendments is the definition of "commercially reasonable" that the Legislature changed so that only projects of "similar size, technology and location" could be compared to the proposed Block Island wind farm when the PUC reviewed the amended PPA.<sup>155</sup> This new definition was clearly a

described the legislature's decision to advance the offshore wind project as "William Seward-esque" referring to former Secretary of State William Seward's decision to purchase Alaska in 1867. *Id.* Like the General Assembly, Seward had many skeptics; however, he was vindicated when large amounts of gold were discovered in Alaska. *Id.* at 527 n.47.

150. *See id.* at 526-27.

151. *See* R.I. GEN. LAWS § 39-5-3 (2006) (stating that a decision from the PUC "shall not be reversed unless the commission exceeded its authority or acted illegally, arbitrarily, or unreasonably").

152. *See id.*

153. § 39-26.1-7(a) ("The general assembly finds it is in the public interest for the state to facilitate the construction of a small-scale offshore wind demonstration project off the coast of Block Island . . .").

154. *Id.*

155. § 39-26.1-7(c)(iv). While there are clearly instances where a project could be commercially reasonable under this definition, but would not be commercially reasonable using the ordinary meaning of the phrase, the courts must apply the law using the definitions articulated by the Legislature. Thus, in a statute, if the Legislature explicitly defines "black" to

response to the PUC's finding that the 2009 PPA was not commercially reasonable because its pricing was far higher than all "newly developed renewable energy resources," regardless of size, technology and location.<sup>156</sup> Additionally, in rejecting the 2009 PPA, the PUC indicated that the definition of "commercially reasonable" in the 2009 LTC statute did not include an analysis of economic benefits.<sup>157</sup> Instead only pricing could be examined.<sup>158</sup> Based on this conclusion, the General Assembly amended the standard such that economic benefits were explicitly included in the definition of "commercially reasonable."<sup>159</sup>

These amendments and this case as a whole highlight an interesting aspect of the law regarding a judicial or quasi-judicial body's standard of review and the separation of powers doctrine. The PUC is a legislatively-created entity that possesses only those powers that the Legislature has delegated to it.<sup>160</sup> Therefore, it must perform its function within the confines that the General Assembly has established for it. The Rhode Island Supreme Court, on the other hand, is the highest authority in an entirely separate branch of government with constitutionally-derived jurisdiction over "all questions of law and equity."<sup>161</sup> Thus, it would be an unconstitutional violation of the separation of powers doctrine for the Legislature to dictate the standard by which the Court must review such questions.<sup>162</sup> However, the specific issue of whether the PUC correctly approved the amended PPA is not a

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mean "white," the courts should not apply the word's ordinary connotation, nor should they define it to mean any shade of gray.

156. See *In re Proposed New Shoreham Project Pursuant to R.I. Gen. Laws § 39-26.1-7*, R.I.P.U.C. No. 4111, slip op. at 68 (Apr. 2, 2010).

157. See *id.* at 68-69.

158. See *id.* at 69.

159. § 39-26.1-7(c)(iii).

160. See generally R.I. GEN. LAWS § 39-1-3 (2006) ("To implement the legislative policy set forth in § 39-1-1 and to serve as the agencies of the state in effectuating the legislative purpose, there are hereby established a public utilities commission and a division of public utilities and carriers.").

161. R.I. Const. art. X, § 2.

162. See *Chicago Joe's Tea Room LLC v. Vill. of Broadview*, No. 07 C 2680, 2009 WL 3824723, at \*2 (N.D.Ill., Nov. 12, 2009) (citing *Millineum Maint. Mgmt., Inc. v. County of Lake*, 894 N.E.2d 845, 860 (Ill. App. Ct. 2008) ("[T]he legislature had the legal authority (under Illinois' separation of powers doctrine) to dictate the appropriate standard of review to the courts only because the decision [being reviewed] is an administrative-not legislative-decision.").

question of law or equity, but rather an instance in which the Legislature has conferred additional jurisdiction upon the Court pursuant to article X, section 2 of the Rhode Island Constitution.<sup>163</sup> Therefore, the Legislature was free to establish the standard by which the Court reviewed the PUC's approval of the amended PPA.<sup>164</sup> In this instance, the General Assembly has essentially delegated power to the Supreme Court, just as it has delegated power to administrative bodies such as the PUC.<sup>165</sup>

It should be pointed out that certain matters raised in this case constituted "questions of law," and thus, the Court itself established the standards by which those issues were reviewed.<sup>166</sup> These matters included any instance where the Court interpreted the provisions of a statute, such as section 39-26.1-7. Thus, in stating the standard of review, the Court articulated that it would apply one standard for "questions of law" and a different standard in its review of the PUC's "[u]ltimate [d]ecision-[m]aking."<sup>167</sup>

In applying the law to the facts and specifically in reviewing the PUC's approval of the amended PPA, the Court was forced to apply the deferential standard prescribed by the legislature whereby the PUC could be reversed only if it "exceeded its authority or acted illegally, arbitrarily, or unreasonably."<sup>168</sup> Given this standard and the General Assembly's unequivocal desire that a wind farm be built, the Court's decision affirming the PUC's approval of the amended PPA was the proper legal result.

Additionally, even if the Court had reversed the decision of

163. See R.I. Const. art. X, §2; § 39-5-1; § 39-5-3.

164. Clearly if the Legislature could establish the Court's standard of review in all matters, it could set a standard by which the Court defers fully to the Legislature, thus, usurping all of the Court's power. This would effectively eliminate an entire branch of government and would, thus, be an obvious violation of the separation of powers doctrine.

165. The delegation of power from the legislative to the judicial branch raises separate concerns regarding the separation of powers doctrine; however, this delegation is likely constitutional in Rhode Island because article X, section 2 allows additional jurisdiction to be conferred upon the Court when "prescribed by law." R.I. Const. art. X, § 2.

166. See *In re Proposed New Shoreham Project*, 25 A.3d 482, 504-06 (R.I. 2011).

167. *Id.* at 504-06. The Court also articulated a separate standard by which it reviewed questions of fact, which was also created judicially. *Id.* at 504.

168. R.I. GEN. LAWS § 39-5-3 (2006).



the PUC, the Legislature almost inevitably would have amended the LTC statute again to allow for the project to move forward. In that case, a reversal of the PUC's decision would have only postponed the inevitable. However, in the meantime, other states could have constructed wind farms, thus ruining any possibility of establishing Rhode Island as a hub of renewable wind energy.

Finally, despite the Court's "trepidation" over the proposed wind farm project, it adhered to its proper role in government by "put[ting] aside" its own "appraisal of the wisdom or unwisdom of a particular course consciously selected by the [Legislature]," and correctly elected not to interfere with the public policy decisions of the General Assembly.<sup>169</sup>

#### CONCLUSION

The Legislature's unequivocal intention to have a wind farm built in Rhode Island waters, along with the prescribed standard of review in this case, dictated that the Court affirm the PUC's decision approving the amended PPA. Yet, aside from the legal aspects of this case, the Court's decision will have many significant implications for the future of Rhode Island and all of its citizens. To state it succinctly, this case is as important as it is complicated and will have as many ramifications as it has acronyms. And while there are many reasons to remain leery of the wind farm project, there are just as many reasons to remain hopeful that the project will bring many long-term benefits to the state.

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169. See *In re Proposed New Shoreham Project*, 25 A.3d at 503, 527 (citation omitted).