STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS
SUPREME COURT

IN RE: REVIEW OF AMENDED POWER PURCHASE AGREEMENT
BETWEEN NARRAGANSETT ELECTRIC COMPANY
d/b/a NATIONAL GRID AND DEEPWATER WIND BLOCK ISLAND, LLC
PURSUANT TO R.I.G.L. *5* 39-26.1-7
(PUBLIC UTILITIES COMMISSION DOCKET No. 4185)

TORAY PLASTICS (AMERICA), INC.	:	
and	:	
POLYTOP CORPORATION	:	
Petitioners	:	Case No. 2010-273-M.P.
	:	Consolidated with
v.	:	Case No. 2010-272-M.P. and
	:	Case No. 2010-274-M.P.
PUBLIC UTILITIES COMMISSION	:	
Respondent	:	

On Certiorari from an Order Entered
by the Public Utilities Commission

AMICUS BRIEF OF OCEAN STATE POLICY RESEARCH INSTITUTE FILED PURSANT TO MOTION TO FILE OUT OF TIME

Matthew L. Fabisch, Esquire (8017)
26 Gladstone Street
Smithfield, RI 02917
(Tel) 617-759-7541
Email: Fabisch@Fabischlaw.com

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Interest and Standing of Ocean State Policy Research Institute

The Ocean State Policy Research Institute, ("OSPRI"), a non profit think tank focusing on free markets and private initiative as solutions to public policy problems, and its predecessor organizations have maintained an ongoing interest in serious judicial review of administrative adjudication with particular respect to incorporating sound economic reasoning and respect for property rights into these processes.

OSPRI believes that the rushed pace of the PUC's proceedings caused the PUC to defer the vast majority of irregular legal considerations in the instant docket to this Court. The Commission thus took at face value the legislative command for "substantial deference" to the Economic Development Corporation ("EDC") Advisory Opinion. G.L. § 39-26.1-7(c)(iv). OSPRI believes the meaning of the term 'substantial deference,' which played a central role in all three commissioners decisions, is among the most important of the legal questions that were deferred by the Commission for this Court's consideration.

As an organization dedicated to transparent, accountable, and economically sound reform of the administrative process, OSPRI is particularly concerned that the statutory invocation of substantial deference – where factors such as the presentation of substantial, probative, and reliable evidence before a fact-finder, that have traditionally caused the judiciary to defer to such adjudications, are absent – increases the risk for substantial error and arbitrary decision-making in the absence of a judicial hard look at such decisions.

While capably focused on demonstrating that the PUC opinion fails even the purportedly requisite deferential review, no party has enunciated the "danger signals" that commanded the PUC, in accordance with federal administrative law precedents previously cited favorably by this court, to apply a "hard-look" to the EDC opinion – and thus warn this court to take an equally hard-look at the resulting decision.

Given that a standard of review on substantive allegations of error must be established[1] and that the statutory invocation of "substantial deference" is unprecedented[2], a rote citation of administrative review standards[3] is the beginning and not the end of the inquiry. With such a necessity for detailed inquiry into the application of these standards as gleaned from the nation's body of administrative law, and most especially its explication in the precedents of this Court, we trust that many minds are of utility to this Court. We maintain this trust especially because of our unique effort to identify a range of subtleties, and most particularly "danger signs," in the present case that trigger hard-look standards previously applied by this court as part and parcel of arbitrary and capricious review when applying the substantial evidence tenet with an emphasis on the sufficiency of the whole record.

[1] The exception to this point is that this Court might not reach the firmity of the PUC findings if it should dispose of this appeal on issues of law, most notably in doctrinal or constitutional form, *res judicata* or separation of powers, supporting the finality of earlier consideration. OSPRI's views here largely parallel those expressed by the Parties and were detailed in its filing with the PUC of Memorandum in Support of Motions to Dismiss, attached as App. A, and, *see*, *infra*, p. 11, n.8.

[2] The term appears nowhere else in the Rhode Island General Laws and including this recent addition to the Rhode Island General Laws may be found in only 16 instances throughout the full body of statute law of the 50 states and the United States Code. Other than two bland references to the existence of the language, we can find no precedent throughout the land for consideration of its meaning or cabin as statutorily invoked.

[3] For example, the usual standard applied to the review of administrative adjudications in Rhode Island is expressed in the Administrative Procedures Act, G.L. § 42-35-15(g); *see also* § 45-24-69(d) (applying the same standard with respect to zoning appeals); § 45-23-71 (applying the same standard to planning appeals).

ARGUMENTS

I. AWARD OF UNMITIGATED DEFERENCE TO EDC BY EACH COMMISSIONER IN SEPARATE CONCURRING OPINIONS REPRESENTS ERROR SUPPORTING THE TORAY AND POLYTOP ALLEGATIONS I AND V, AND ATTORNEY GENERAL LYNCH'S ALLEGATION III.

A. Deference is a Judicial Doctrine premised on the role of the trial court, or, in the quasi-judicial setting, the tribunal or officer who hears evidence.

Like the United States Supreme Court's first invocation of the phrase, 'substantial deference' in *Aguilar v. State of Texas*, 378 U.S. 108 (1964) this Court's first invocation of the phrase "substantial deference" arose in the context of judicial review of a judicial magistrate's decision to issue a search warrant. *State v. LeBlanc*, 217 A.2d 471, 474 (R.I. 1966).

> [W]hile we should "pay substantial deference" to a magistrate's finding that probable cause exists, we must nonetheless demand that his conclusion rest on a substantial basis and insist that he "perform his `neutral and detached' function and not serve merely as a rubber stamp for the police." *Aguilar v. State of Texas*, 378 U.S. 108, 111 (1964).

LeBlanc, 217 A.2d at 474.

Since then, this Court has invoked the phrase "substantial deference" eleven times, each relating to the deference due to a fact-finding trial judge or magistrate, after the receipt of evidence, with two exceptions, *See City of Providence v. Estate of Tarro*, 973 A.2d 597 (R.I. 2009); *State v. Russell*, 950 A.2d 418 (R.I. 2008); *Kedy v. A.W. Chesterton Co.*, 946 A.2d 1171 (R.I. 2008); *In re Richard A.*, 946 A.2d 204 (R.I. 2008); *State v. Schloesser*, 940 A.2d 637 (R.I. 2007); *Tinney v. Tinney*, 770 A.2d 420 (R.I. 2001); *Supreme Bakery, Inc. v. Bagley*, 742 A.2d 1202 (R.I. 2000); *Nisenzon v. Sadowski*, 689 A.2d 1037 (R.I. 1997); *Dickinson v. Killheffer*, 497 A.2d 307 (R.I. 1985). The deference considered in *Kent County Water Authority v. State Dept. of Health*, 723 A.2d 1132 (R.I. 1999) is to a legislative

determination.[4] *In re Access to Certain Records of Rhode Island Advisory Committee on Code of Judicial Conduct*, 637 A.2d 1063 (R.I. 1994), analyzing deference due to the *de facto* confidentiality policy of the Rhode Island Advisory Committee on the Canons of Judicial Ethics, has administrative context but this Court specifically chose to treat the matter as judicial rather than administrative in nature, *Id* at 1066.

There is no question that this Court affords a measure of deference to quasi-judicial decision-makers, especially as to fact-finding based on the record before it. *See* Brief of Appellant Attorney General Patrick Lynch ("AG"), p. 17, comparing *In re Kent County Water Auth.*, 996 A.2d 123 (R.I. 2010) and *In re Narragansett Bay comm'n*, 808 A.2d 631 (R.I. 2001). But "deference" is not a statutory creature. The term appears but four times through the entirety of the Rhode Island General Laws. The doctrines awarding deference have been judicially constructed in concert with the development of the institution of judicial review of administrative decision-making. Deference serves the clear purpose of honoring the principle, and statutory command of G.L. § 42-35-15(g), that the court not "substitute its judgment for that of the agency."

Rather than command deference statutorily, legislatures have spoken in terms of the incidents that give rise to deference. Thus, for instance, agencies are directed by statute to seek and respond to comment, weigh alternatives, and consider a broad range of relevant factors. Statutory invocation of deference thus appears inspired by the judicial doctrine, not the other way around. The real question in developing a standard for deference to agency action is; how does the statutory command for the agency's action and the agency's execution of that command ensure a fully reasoned decision based on relevant factors, not *ipse dixit* or redundant affirmations of the deference the agency would be due by meeting these administrative review standards?

[4] The award of deference to legislative determination is of the highest deferential character generally triggering only "rational basis" review of the most cursory character. See arguments *infra*, p. 3.

B. Standard of Review of the EDC opinion by the PUC

While obviously not bound to a model identical to that exercised in the benchmark D.C. Circuit Court of Appeals, as reviewed by the US Supreme Court, this Court has quoted approvingly, time and again, from leading precedent in those courts in order to assist in developing Rhode Island's jurisprudence of administrative review.

It is quite clear that judicial review of administrative decision-making, while nominally deferential, entails much more than mere rational basis review.[5] Instead, as cited by this Court and seminally explained by the D.C. Circuit Court of Appeals in *Greater Boston Television Corp v. Federal Communications Commission*, 444 F.2d 841, 852 (D.C. Cir. 1970), cert. denied, 403 U.S. 923 (1971), the appropriate standard is much closer to ensuring that the agency action is fully reasoned and explained:

> [A]lthough the commission is free to alter past standards and practices, it must provide an explanation for such departures. As aptly stated by the United States Court of Appeals for the District of Columbia in *Greater Boston Television Corp. v. Federal Communications Commission*:
>
> > '[A]n agency changing its course must supply a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored, and if an agency glosses over or swerves from prior precedents without discussion it may cross the line from the tolerably terse to the intolerably mute.'

[5] *See*, *e.g.*, *US v. Carolene Products Co.*, 304 US 144, 152 (1938):

> We may assume for present purposes that no pronouncement of a Legislature can forestall attack upon the constitutionality of the prohibition which it enacts by applying opprobrious epithets to the prohibited act, and that a statute would deny due process which precluded the disproof in judicial proceedings of all facts which would show or tend to show that a statute depriving the suitor of life, liberty, or property had a rational basis.

New England Telephone and Telegraph v. PUC, 446 A.2d 1376, 1389 (R.I. 1982) (internal citation omitted).

This is by no means a standard for an agency hanging judge. *Greater Boston* contemplated and largely **upheld** a sixteen-year administrative record before the Federal Communications Commission ("FCC") involving the award of the license for VHF Channel 5 in the Boston area. The *Greater Boston* decision gave to this broader scrutiny of administrative decision-making the sobriquet of 'hard look', when Judge Harold Leventhal, writing for a unanimous panel, set about inquiring whether the agency "has really taken a 'hard look' at the salient problems." *Id.* at 851.[6] Common usage suggests that, in such an instance, the court itself is taking a 'hard look' at the agency action. Explaining the reasons for meticulously reviewing the agency process and reasoning on the way to ultimately upholding the agency's decision, rather than simply abandon his efforts upon establishment that there was any rational basis to support the FCC, Judge Leventhal wrote:

> Approaching this case as we have with full awareness of and responsiveness to the court's 'supervisory' function in review of agency decision, it may be appropriate to take note of the salient aspects of that review. It begins at the threshold, with enforcement of the requirement of reasonable procedure, with fair notice and opportunity to the parties to present their case. It continues into examination of the evidence and agency's findings of facts, for the court must be satisfied that the agency's evidentiary fact findings are supported by substantial evidence, and provide rational support for the agency's inferences of ultimate fact. Full allowance must be given not only for the opportunity of the agency, or at least its examiners, to observe the demeanor of the witnesses, but also for the reality that agency matters typically involve a kind of expertise-- sometimes technical in a scientific sense, sometimes more a matter of specialization in kinds of regulatory

[6] Scholars consider Judge Leventhal the exponent of the 'hard look' doctrine and *Greater Boston* as one of its central explications. *See, e.g.,* Patrick M. Garry, *Judicial Review and the "Hard Look" Doctrine*, 7 Nev. L. Rev. 151-170, 157 (2006); *see also* Wald, Patricia, *Thirty Years of Administrative Law in the D.C. Circuit*, available at http://www.dcbar.org/for_lawyers/sections/administrative_law_and_agency_practice/wald.cfm.

> programs. Expert discretion is secured, not crippled, by the requirements for substantial evidence, findings and reasoned analysis. Expertise is strengthened in its proper role as the servant of government when it is denied the opportunity to 'become a monster which rules with no practical limits on its discretion.' *Burlington Truck Lines v. United States*, 371 U.S. 156, 167 (1962). A court does not depart from its proper function when it undertakes a study of the record, hopefully perceptive, even as to the evidence on technical and specialized matters, for this enables the court to penetrate to the underlying decisions of the agency, to satisfy itself that the agency has exercised a reasoned discretion, with reasons that do not deviate from or ignore the ascertainable legislative intent. 'The deference owed to an expert tribunal cannot be allowed to slip into a judicial inertia.' *Volkswagenwerk Aktiengesellschaft v. FMC*, 390 U.S. 261, 272, (1968).
>
> Assuming consistency with law and the legislative mandate, the agency has latitude not merely to find facts and make judgments, but also to select the policies deemed in the public interest. The function of the court is to assure that the agency has given reasoned consideration to all the material facts and issues.

Greater Boston, 444 F.2d at 850-851.

This full consideration model was echoed by the U.S. Supreme Court a year later in *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971), a decision that was, in due course, incorporated by this Court into Rhode Island's jurisprudence:

> [T]he United States Supreme Court stated that to make a finding of arbitrariness, capriciousness or an abuse of discretion, "the court must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment."

Sakonnet Rogers, Inc. v. Coastal Resources Management Council, 536 A.2d 893 (R.I. 1988).

Though this Court has not had the opportunity to address an extension of its own precedents to the deregulatory arena, utilizing a similar standard that comports well with the precedent of this Court and the Federal Courts to which it has turned for guidance, the Superior Court in *Manglass v. Rhode Island Department of Human Services*, PC 03-0125, October 6th, 2003, Thompson, J. cited what is conceived to be the U.S. Supreme Court's later

contribution to the vibrancy of 'hard look' review, *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co*., 463 U.S. 29, 42 (1983):

> The "agency must examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'"

Manglass, PC 03-0125 at 11.

In the larger context, commentators see *State Farm* as representing the final rejection of "the analogy to legislation," and to have "effectively adopted the substantive elements of the hard look." Merrick B. Garland, *Deregulation and Judicial Review,* 98 Harv. L. Rev. 505-591, 542 (1985). *State Farm* thus represents a pivotal re-up for substantive 'hard look' following a rejection of a more procedural approach associated with Judge Leventhal's D.C. Circuit colleague, David Bazelon, in *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519 (1978), and speculation by observers that *Overton Park* was a narrower holding that might only approximate 'rational basis' review. *See* Garland, *Deregulation and Judicial Review* 98 Harv. L. Rev. at 541.

The extent to which the structure of 'hard look' review responds well to concerns with activist judicial review cannot be overstated, as the result of such undertaking is virtually never the choice of an alternative policy by the courts, but a remand for fuller consideration and explanation, as resulted, for example in *Manglass*.[7]

The tension of judicial activism and judicial review is resolved well by the *Greater Boston* court in the famous passage first naming the 'hard look' doctrine which explains its "reasoned analysis" requirement endorsed by this Court in *New England Telephone*:

> Its supervisory function calls on the court to intervene not merely in case of procedural inadequacies, or bypassing of

[7] The *Sakonnet Rogers* case was dispositional, based on the "substantial evidence" test. While *Overton Park* was invoked for the proposition that all **relevant** factors be considered, this Court found the record below *Sakonnet Rogers* replete with evidence of consideration of less relevant or irrelevant factors at the expense of any consideration of the central factor. In *New England Telephone* this Court used the *Great Boston* standard to uphold the PUC because it **explained** its decision.

> the mandate in the legislative charter, but more broadly if the court becomes aware, especially from a combination of danger signals, that the agency has not really taken a 'hard look' at the salient problems, and has not genuinely engaged in reasoned decision-making. If the agency has not shirked this fundamental task, however, the court exercises restraint and affirms the agency's action even though the court would on its own account have made different findings or adopted different standards a significant [footnotes omitted].

Greater Boston 444 F.2d at 851.

A final note on this tension is offered in the thoughtful consideration of the history of 'hard look' by Administrative Law Professor Patrick M. Garry. Garry suggests that the continued relevance of 'hard look' relates not to judicial adherence to a skeptical 'agency failure' model, a view which might be conceived to arise from judicially harbored preference with regard to agency actions – potentially wielded by judges leaning either way on the policy scale depending whether the action contemplated is regulatory or deregulatory in nature – but to providing a meaningful context for judicial review:

> [T]his Article [does not] argue that hard look review is intended to be a corrective device for an administrative state that fails to provide for adequate public participation or sufficient allegiance to congressional commands. To the contrary, this Article posits a much simpler reason for the elevated standards of judicial review articulated in decisions like Overton Park and State Farm. These standards are not a sign that courts believe the APA to be an inadequate governor of administrative agencies; rather, they are simply the ingredients of what courts have come to deem necessary for a meaningful process of judicial review.

Partick M. Garry, *Judicial Review and the "Hard Look" Doctrine*, 7 Nev. L. Rev. 151, 153(2006).

Notably, these 'hard-look' precedents, while clearly informing "substantial evidence" review of formal agency action as they did in *Greater Boston*, are particularly applicable in arbitrary and capricious review of **informal** agency action, see, *Id*, passim; and *see*, Garland, *Deregulation and Judicial Review* 98 Harv. L. Rev. at 509, n.15, which is precisely the issue

at hand in considering the triggers for and limits of deference to the EDC opinion that should have been applied by the PUC.

C. 'Danger Signals' that command a 'hard look' at EDC opinion

If *Greater Boston* is the canonical font of 'hard look,' it was nonetheless alive and well years earlier when the D.C. Circuit first called out the "danger signals" cited by *Greater Boston*, as heightening the need to ensure the agency had taken a 'hard look'. 444 F.2d at 851. 'Danger signals' then, were various obvious sources of suspicion about the fully reasoned nature of informal agency decisions first recognized by that name in *Joseph v FCC*, 404 F.2d 207 (D.C. Cir. 1968):

> When the subject of surveillance is as sensitive as that involved here, when there is no hearing at which the full facts are brought out, promoting confidence that all relevant facts and aspects have been considered and that the public interest would be served by the grant, when the affirmative finding of public interest required by Congress does not appear expressly, when there is no opinion or other statement providing a reasoned application of articulated standards to the facts of the case, and when the Commission has at least some concern that under today's conditions the public interest requires a strict approach, there exists a combination of danger signals that cannot be ignored or bypassed.

Id at 212. The PUC is called upon not to consider whether its own proceedings take into account the public interest, but whether the advisory opinion begging deference does so in a fully reasoned way. Otherwise the award of deference is a bar to the full vindication of the public interest.

Joseph's recitation of 'danger signals' is illustrative rather than exhaustive and several similar or related cautions arise in the current proceedings that constitute 'danger signals'.

First, and most obvious, as in *Joseph*, EDC had no hearings or other process related to the preparation of its opinion. The fact that the PUC would later hold hearings on the topic is

of much less import if the opinion is awarded substantial deference over evidence taken at those hearings.

Second, and equally obvious, although not at issue in *Joseph*, the EDC was committed by the state's joint development agreement with Deepwater Wind ("DWW") to:

> make all reasonable efforts to assist DWW to complete a Fully Developed Project for Phase I and II . . . to the extent that it is lawful and within their authority to, assist . . . in (i) expediting permitting and approvals during all phases of the Project; and (ii) assisting DWW **in securing one or more PPAs** . . . including taking appropriate administrative, judicial, and legislative actions reasonably requested by DWW to secure such PPA or PPAs . . ."

Joint Development Agreement, JA II, p. 380. Though not unlawful for EDC to act both as a cheerleader for DWW and as the principal due diligence analyst of the likely "economic development benefits" of DWW's proposals, this relationship is by definition the kind of 'danger signal' which alone and on its face should command 'hard look' scrutiny regardless of deferential claims.

The EDC is not typically an adjudicative agency charged with hearing evidence and setting standards for the treatment of business entities in Rhode Island of the sort commonly considered by truly quasi-judicial agencies, whose actions might directly apply to all entities through adoption of rules or policies and indirectly through the precedential effect of rulings in individual petitions, such that the outcome is likely to be reasonably equal treatment and even-handed results for other players in the economy.

It is unsurprising that a state board such as EDC would act as a cheerleader for signature businesses. While OSPRI would disagree with the role of the state in all these 'winner picker' activities, our point here is not to debate their efficacy, but demonstrate the very nature of EDC is a *Greater Boston/Joseph* 'danger signal' both because the agency has been chosen to assess the benefits of a program it is already committed to promote and because the very nature of EDCs institutional DNA is to operate as a 'winner picker' through *ad hoc* measures, especially in the rarified air of projects running to tens or hundreds of

millions of dollars. The idea that a truly adjudicative agency should give deference to such an opinion, even if the normal cheerleading is rhetorically absent and some measure of analysis has been carried out, is suspect, most especially where there is reasonable suspicion of a less than fully relevant analysis.

As to expertise, the EDC opinion is based on a consultant's findings, *see* EDC Advisory Opinion, JA VII, p. 1885. While a detached request for proposals and transparent non-directed, nor outcome-oriented award of this work might have served to insulate EDC from some of the concerns expressed, that did not take place here. Instead this consultancy results from *ad hoc* intransparent actions of the EDC.

The reality that this informal decision might fall well short of considering relevant factors is hinted at by the fact that the legislature went out of its way to avoid the standard for commercial reasonableness being employed as any kind of precedent. The same consultant extensively analyzing commercial reasonableness was responsible for the preparation of the majority of the EDC Advisory Opinion on economic development benefits, working contemporaneously and coordinately, *see* Transcript of Seth G. Parker, Cross-examination by Mr. McElroy:

> I have two separate contracts with the EDC, one for the direct testimony addressing the PPA price comparison and the other related to power market issues and another contract for the advisory opinion that addresses economic development issues.

tr. 8/4/10 at 269, JA V, p. 1339.

While the work appears to have been purposefully bifurcated with regard to whether the EDC or DWW paid the bill, it is fairly clear that no more rigorous consideration of alternatives or unintended consequences attended the consultant's work in the economic development realm. Thus, care was not taken against setting a potentially Pyrrhic precedent as to what constitutes "economic development benefits," if not a matter of literal concern to the statutory scheme, an obvious facet of the public interest.

Third, a reflective 'danger sign' from the process that was to provide the crucible for challenging the EDC opinion is the retreat of National Grid from its initial skepticism about the contract as expressed throughout *National Grid - Review of Proposed Town of New Shoreham Project Pursuant to R.I.G.L. § 39-26.1-7*, PUC Docket No. 4111 ("#4111"), the predecessor to *Review of Amended Purchase Power Purchase Agreement Between Narragansett Electric d/b/a National Grid and Deepwater Wind Block Island, LLC Pursuant to R.I.G.L § 39-26.1-7* ("#4185") here at issue[8]. In first refusing to sign the Power Purchase Agreement at the core of #4111 and in its continued critical analysis of that agreement's cost throughout the docket, National Grid provided a level of expertise and resource for critical contemplation that was unmatched in #4185 in which National Grid reversed its views 180 degrees.

The principal intervening change in circumstances relative to National Grid was the adoption of "decoupling" legislation, *see generally*, S2841, App. D, that eliminates the relationship of the company's income and the quantity of power it sells.[9] Decoupling severs

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[8] While OSPRI is concerned about the tension of administrative accountability where exercise of delegated decision making may be protected by the invocation of *res judicata* by that same body, due consideration of both form and function leads us to vigorously support the arguments before this Court of the Conservation Law Foundation and Attorney General Patrick Lynch regarding the application of *res judicata* to bar this illusory separate docket from being used to overturn the decision in #4111.

We believe in the settled principle that one legislature cannot bind another, *see*, e.g., *Wisconsin & M.R. Co. v Powers*, 191 U.S. 379 (1903) (A law providing for a ten-year tax exemption for new railways was not a contract and the exemption subject to suspension by future legislature). The legislature was not prevented from withdrawing the delegation, as it initially proposed to do in S-2819 as introduced.

But, if it chose to try to beard its action with the expertise, process and dignity attached to the PUC process it is bound to observe the result of #4111. If the legislature is, as we argued in our Memo in Support of Motions to Dismiss, OSPRI Appendix A, p. 5, attempting to select from the discretionary range of outcomes available to the PUC in #4111, it violates *res judicata* and the separation of powers, despite the fact that it could legitimately obtain the same result by legislating in different form. Form here is at the root of accountability.

[9] Because this change between the two dockets, #4111 and #4185, is potentially important as a 'danger sign', it should be noted that there is some confusion amongst the Commissioners as to the global applicability of this 'decoupling' legislation. This is understandable given its recent passage and that the Commission has not yet been called

the innate interest that National Grid would normally hold in selling an affordable product, and thus in avoiding significantly over-market contracts. Under decoupling legislation, if electricity costs rise and consumption falls, National Grid may automatically raise its rates without making additional filings at the PUC. Thus, the new regime removes an important and capable skeptic from the process.

A portion of the EDC opinion refers to "Potential Long-Term Economic Development Benefits"[10], *see*, EDC Advisory Opinion, JA VII, p. 1894. This section relies on the "Eastern Wind Integration and Transmission Study", which places possible offshore wind power growth in Rhode Island and Southeastern MA at 3,000 MW, a market sizeable enough to incentivize "a wind turbine manufacturer to locate turbine or blade manufacturing facilities at Quonset Business Park." We think it unlikely this representation could be considered substantial evidence that such an outcome is "likely," but the approach shows the propensity of the opinion to ignore relevant factors, as here it ignores "Southeastern MA." Given a similarly expressed favoritism of Massachusetts renewable contracting legislation for local content[11], it seems inconceivable that Quonset would find itself without competition for such

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upon to consider a docket implementing it. While the statutes may have been inspired by a prior rate decision (unfavorable to decoupling) the new "decoupling" law does not apply narrowly to that or similar decisions, *e.g., Narragansett Electric Company d/b/a National Grid Application for Approval of a Change in Electric Base Distribution Rates,* RIPUC Docket 4065 (4/29/2010), but states clearly: "(a) The general assembly finds and declares that electricity and gas revenues shall be fully decoupled from sales pursuant to the provisions of this chapter."

[10] Although the entire Opinion is entered in the Joint Appendix, that portion relating to the specific RI Sound project which represents a portion of the future benefits the EDC opined upon was struck from the record of the proceedings on an OSPRI motion that challenged it as not meeting the plain meaning of "likely" announced in the DWW legislation, RIGL 39-26.1-7 c (iii).

[11] Mass. Pub. L. 2008, Ch. 169, § 83 provides, in pertinent part:

> [E]ach distribution company, as defined in section 1 of chapter 164 of the General Laws, shall be required twice in that 5 year period to solicit proposals from renewable energy developers and, provided reasonable proposals have been received, enter into cost-effective

a facility, even were one to be located in Southern New England. No analysis is offered why Quonset would prevail over such competition, especially with Massachusetts having considerably more consumer capacity to allot in sweetening its protectionist bid, but the issue is simply not considered by the EDC Advisory Opinion.[12]

Fourth, the failure to adhere to legislative intent by failing to follow the standards enunciated by the legislature, itself constitutes a 'danger signal' in the *Joseph* checklist. The course laid by the legislature here is manifestly different than a legislative command for pretextual approval, as can be seen in the only probative manner for following legislative history in this state, by comparing the initial language of S-2819 as proposed with the final amended language. As we have opined, *supra*, p. 11, n. 8, the legislature was free to withdraw its delegation but not to delegate discretion that was not discretion in our view.[13] EDC's failure to even consider the impacts of higher electricity cost on

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> long-term contracts to facilitate the financing of renewable energy generation within the jurisdictional boundaries of the commonwealth

[12] Of note, these local content requirements in Massachusetts have been attacked in federal court as a violation of the dormant commerce clause, *see*, generally, *Transcanada Marketing Ltd. V. Ian Bowles, individually and in his official capacity as Secretary of the Massachusetts Executive Office of Energy and Environmental Affairs, et al*, USDC Civil Action No. 4:10-CV-40070-FDS. This litigation lead to emergency alterations to implementing regulations setting aside the local content requirement, *see*, generally, *Order Adopting Emergency Regulations*, Mass DPU Docket # 10-58. While this might hearten champions of Quonset as a superior facility for manufacturing of wind turbine components, the apparent vindication of the commerce clause rationale in Massachusetts' action leaves open to serious question whether the legislation at issue in the present matter would survive such a challenge, although we concur with the Conservation Law Foundation that the issue is not raised in this appeal, see CLF Brief, n. 4.

[13] An intellectual predecessor to this *Amicus*, RI Wiseuse has begged this court to police the bounds of "delegation run riot", A.L.A. Schecter Poultry Corporation v. United StatesA.L.A. SCHECHTER POULTRY CORPORATION v. UNITED STATES, 295 U.S. 495 (1935), since filing as *Amicus* in *In re Advisory Opinion to the Governor*, 732 A.2d 55 (R.I. 1999) by taking hand in judicial efforts to restore the non-delegation doctrine to a more revered place in the judicial pantheon. One need not recount at length to an audience familiar with administrative law the paradox of this doctrine that promises the sun but has failed to deliver a meaningfully administrable bright line. While OSPRI remains committed to harder look at "intelligible principles," the present matter threatens

"existing business expansion" as required by RIGL 39-26.1-7(c)(iii), to consider rates as a matter of consumer protection given the context of a proceeding before the PUC, and as a matter of not rendering the commanded inquiry a nullity, does not demonstrate a fealty to the legislative intent, especially as its history may be assessed (for authorities and explication *see generally*, OSPRI Final Memorandum, App. B).[14]

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political accountability at the opposite end of the spectrum, if the DWW statute is read to effectively require the EDC and/or the PUC to parrot a legislative finding on the general desirability of the DWW project to the public, simply because that context precedes a command for a finding on "economic development benefits." It seems no secret that the legislature was predisposed to favor the DWW project, but given conflicting testimony before the legislature and in the media regarding whether the projects economic merits outweighed its costs, the legislature consigned the factfinding both to the EDC and the PUC. If the statute were instead read to mean that the least bit of economic activity, regardless of cost, requires the EDC or the PUC to make a finding in the affirmative as to RIGL 39-26.1-7(c)(iii) this would constitute a violation of political accountability that might be termed the "apparent delegation" doctrine. While this Separation of Powers analysis focuses on the same area as the *Res Judicata* oriented claims, it is explained by a differing rationale. The legislature ought not, through the illusory purported delegation, be able to command the apparent endorsement of its legislative agenda. It can command execution, but not endorsement as a precondition for execution.

[14] An additional grounds that the legislative language was not respected by the EDC Advisory Opinion was revealed by Counsel Michael Rubin's Crossexamination of Seth G. Parker, tr. 8/4/10 at 255-268, JA V, pp 1335-1338, the ambit of which is that the legislature did not tie the economic benefits test to the erection of the wind farm itself, but to the Power Purchase Agree that would facilitate its construction ("The **amended agreement** is likely to provide economic development benefits" RIGL 39-26.1-7(c)(iii)(emphasis added)).The PPA has a price and its effect cannot be disaggregated from determining the **PPA's** "economic development benefits".:

Q. [Mr. Rubin] When you go to iii and we find the phrase "amended agreement" we're referring to something that has both a benefit and a cost, isn't that correct?

A. Absolutely correct.

Q. And it has - - there's product and there's price being paid for that product?

A. As I agreed with you before, I agree again.

. . .

Q. I'm not asking you whether you made any comparisons. I'm not asking you for whether you made an assessment of commercial reasonableness. I'm asking you whether you considered the effects of the price.

A. I did not.

Id at 266-268, JA V, 1338.

The EDC in analyzing the project clearly had not only a 'hard-look' duty to consider alternatives and unintended consequences, but a statutory duty to model or analyze the effects on existing businesses. G.L. § 39-26.1-7(c)(iii). Their failure to do so voids deference to their opinion, even as it also informs the "substantial evidence" theory for the PUC decision that the record does not contain evidence that the amended agreement will facilitate the expansion of existing business. In fact the record is to the contrary, *see generally*, Direct Testimonies of Shigeru Osada, Thomas A. D'Amato, and Dr. Edward Mazze in #4185.

In any event, it is deferential to legislative intent to include the savings to Block Islanders in the economic benefits calculation, given that these savings are merely redistributed from other rate payers who will pay more so Block Islanders can pay less, *see* Testimony of Seth G. Parker, RIPUC Docket # 4185 (July 20, 2010)("*Parker*"), p. 38, JA VII, p. 1860 (". . . BIPCO ratepayers would save approximately $5 million annually and a total of $95 million"), but it is patently absurd and unreasoned not to recognize and consider that if these additional costs to others are sufficiently detrimental to the cost of living and doing business in Rhode Island, that economic development benefits will not be realized.

Likewise, it is exceedingly deferential to legislative intent not to simply laugh off the idea that the creation of six permanent jobs constitutes economic development benefits worthy of consideration in support of almost $500 million of excess ratepayer charges ($370 million identified by National Grid and cited in Commissioner Brays dissent, Report and Order *in re: Review of Amended Power Purchase Agreement*, RIPUC, Docket No. 4185, at 152, August 16, 2010, JA I, p. 254 ("*PUC Order*") approx $100 million in amortized costs for the $40 -$50 million power transmission line cable, and approximately $20 million

dollars in incentive payments to National Grid, totaling the payments explained in *Parker*, p. 44, JA VII, p. 1866). But to consider those jobs in isolation from the potential for what must axiomatically be understood to be a degree of job loss, or lost opportunity for creating jobs, in order to pay those over-market costs represents the epitome of rational pretext, *i.e* six jobs as a superior weight to virtually any cost.

Finally, as we began, that the legislature should have awarded "substantial deference" as a statutory matter simply accentuates all of these 'danger signals.' If the agency exercised its powers with the encompassing consideration and explanatory thoroughness that is meant to attend administrative decision-making, it would be entitled to deference without the legislature saying so. The absence of virtually any of the incidents that give rise to deference as a matter of course in most administrative undertakings demands a 'hard look.' The simplest of separation of powers rationale reveal that if the legislature and executive administrators seem predisposed to a course of action, that the real due diligence must come from the third branch. Of course, should the pollyannish approach of the other branches be justified by full consideration of relevant factors, it could no more be dislodged by a 'hard look' than by a free pass.

D. Proper standard is "fully rational" or "fully reasoned"

The standard of the 'hard-look' evoked here, in consequence of the identified 'danger signals,' follows from this Court's invocation of *Overton Park*'s command to "consider whether the decision was based on a consideration of the relevant factors." 401 U.S. at 416. We urge the Court to articulate this standard as requiring that administrative decisions in the state subject to the 'hard look' be "fully reasoned." This is not meant to invoke such an exhaustive inquiry as to be a nearly insatiable standard. Rather, it commands that the agency not only have a rational basis for its policy choice, but, at minim, have arrived at that choice through the clear consideration of obvious alternatives to, and unintended consequences of, the chosen policy, subsuming regard for possible negative effects as relevant factors.

E. The PUC Commissioners while aware of 'danger signals' were unaware that they should have limited their awards of deference to EDC.

a. Chairman Germani's Concurring Opinion

Chairman Germani was not sanguine during the proceedings about the sufficiency of EDC's opinion on "economic development benefits," specifically asking National Grid why they "punted" on the question and expressing some consternation that "we're left with the EDC opinion to which we're supposed to be give substantial deference, whatever that means . . .", Examination of Madison N. Milhous Jr., Tr. 8/3/10 at 133-134, JA V, p. 1251.

But when it came to making his decision, Chairman Germani decided on a standard that, if unexplicated, seems to approximate purely deferential review of agency decision-making, unmitigated by his earlier concerns or those we raise here in support of a harder look:

> I note that the law requires that the commission grant substantial deference to an Advisory Opinion filed by EDC regarding the economic development benefits likely to result from the proposed Project. . . . Giving EDC the deference required under the law, I find that the Amended PPA will likely provide the economic development benefits as set forth in the law.

PUC Order at 144, JA I, p. 246.

b. Commissioner Roberti's Concurring Opinion

While his opinion supported cost/benefit analysis as a guide to the commission's exercise of its discretion in disposing of this docket, Commissioner Roberti notably tied the outcome of his "net economic benefits test" to the legislative award of "substantial deference" to EDC.

> Even under my view that we are entitled, under R.I. Gen. Laws § 39-26.1-7(c)(iii), to apply a net economic benefits test, the evidence of benefits outweighed the evidence of detriment, *particularly where the law mandates the Commission give substantial deference to EDC's Advisory Opinion.*

Id. at 145, JA I, p. 247 (emphasis added).

c. Commissioner Bray's Dissenting Opinion

Commissioner Bray observed, in regards to political accountability for the determination to go forward with this project:

> If the General Assembly had simply wanted the Deepwater purchase power agreement to be approved, it would have done so itself and not sent it back to the Commission for further proceedings.

Id. at 147, JA I, p. 249. But having boldly gone where no man had gone before her, and even with the outcome of her net economic benefits test in mind, Commissioner Bray was equally deferential to EDC as the other Commissioners:

> In applying a net economic development benefits test, I first looked at the study performed by EDC . . . I granted substantial deference to this study as required by R.I. Gen. Laws § 39-26.1-7(iv). I note that the model chosen by EDC will always result in a positive economic impact because it does not allow for consideration of higher energy costs . . .

Id. at 253. Commissioner Bray's deference is thus parsed. She accepted at face value the IMPLAN calculations of $129 million of benefits attested to in the EDC opinion but did not find credulous the notion that higher energy costs should not be taken into account. "Deepwater, Grid and EDC have argued that in looking at economic development benefits, the Commission can not take into account any economic harm or costs that may occur if the Amended PPA is approved. . . .I find this argument to be absurd because it would lead to an absurd result. . . .Under that approach, natural disasters like the 2010 floods in Rhode Island could be great economic development engines because they produce economic development benefits in some sectors of the economy although they cause more damage and economic harm overall.", *Id*. at 149, JA I, p. 251.

Her dissent on this finding results from weighing the higher energy costs. In that sense she may be said to have implicitly taken a 'hard[er] look', but, to the extent that deference to the EDC opinion might be thought to implicitly refute a "net economic benefits test," since

they did not apply one, we return to our argument that 'danger signals' here should properly invoke a 'hard look' that diminishes deference on aspects of the EDC Advisory Opinion that are not "fully reasoned."

CONCLUSION

For the foregoing reasons, this Docket should be remanded to the PUC, voiding the rote application of "substantial deference" and directing the commissioners to reconsider the extent of their award of deference to the EDC Advisory Opinion based on the fullness of its reasoning with regard to all relevant factors with *Greater Boston, Joseph,* and *State Farm* as their jurisprudential guides.

Respectfully Submitted,
Ocean State Policy Research Institute
by Counsel

Matthew L. Fabisch, Esquire (8017)
26 Gladstone Street
Smithfield, RI 02917
(Tel) 617-759-7541
Email: Fabisch@Fabischlaw.com

CERTIFICATION

The undersigned hereby certifies that a true copy of the within has been sent to the below listed attorneys of record by regular mail, postage prepaid on this _____ day of December 2010.

_____

Brian H Bishop

Jerry Elmer, Esq.
Tricia Jedele, Esq.
Conservation Law Foundation
55 Dorrance Street
Providence, RI 02903

Michael Rubin, Esq.
Department of Attorney General
150 South Main Street
Providence, RI 02903

Michael McElroy, Esq.
Schacht & McElroy
Box 6721
Providence, RI 02940-6721

Gerald Petros, Esq.
Hinckley Allen & Snyder LLP
50 Kennedy Plaza, Suite 1500
Providence, RI 02903-2319

Thomas Dickinson, Esq.
Box 9184
Providence, RI 02940-9184

John A. MacFayden
MacFayden, Gescheidt & O'Brien
101 Dyer Street, 3rd Floor
Providence, RI 02903