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Roger Williams University School of Law

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# Newsroom

## Farady on 'Deepwater Wind' Controversy

Marine Affairs Institute director Susan Farady on the uncharted legal waters surrounding what could become the first offshore wind farm in North America.

The "FOCUS: LAW" section of the Sept 13, 2010 edition of **Providence Business News** quotes RWU Law's Marine Affairs Institute director Susan Farady in an article titled, "[Deepwater wind farm attracts a crowd ... of lawyers](#)" by Staff Writer Chris Barrett:



**Sept. 13, 2010:** The uncharted waters surrounding what could become the first offshore wind farm in North America has left a bevy of attorneys navigating legal minefields that could still sink the proposal by Deepwater Wind, if not significantly alter its course.

When the R.I. Public Utilities Commission this summer mulled a power-purchase contract between Deepwater Wind and National Grid, at least 20 lawyers played a role. During some hearings, lawyers sat at four tables with support staff in the audience. The state's top lawyer, Attorney General Patrick C. Lynch, made a personal appearance at the last hearing and vowed to appeal the commission's approval of the contract to the R.I. Supreme Court.

He eventually did just that, and the legal challenge will undoubtedly lead to more lawyers, the addition of at least one judge and countless paralegals and interns.

**Susan Farady, director of the Marine Affairs Institute at Roger Williams University**, said the strong legal turnout for the wind farm proposal was expected given the high political profile of the project – Gov. Donald L. Carcieri is a prominent backer – and the lack of precedent for approving such a project.

“It’s a case of first impressions,” she said. “We’ve never sited one of these things before, so there’s a lot of interesting unresolved legal issues.”

Lynch and the environmental group Conservation Law Foundation argue the law that governed the PUC process violates the state’s constitution by favoring one company. Both also claim that the legislature trampled judicial precedent by forcing the commission to review the same contract twice, having rejected the original power agreement in March.

Plastics manufacturers Toray Plastics (America) Inc. and Polytop Corp. also filed an appeal, arguing the commission misinterpreted a state law requirement that a contract be “commercially reasonable.”

The legal issues don’t stop at the state line either. As more people fight over uses in the ocean – from fishermen to environmentalists – the place for wind farms is unclear. And no one knows exactly how the states and federal government will share jurisdiction of wind farms and their associated cables to the mainland.

The stakes could be high for businesses. Deepwater Wind needs regulatory approval in time to complete its planned eight-turbine farm by the end of 2012 or risk losing expiring federal tax credits.

And if the Deepwater turbines start spinning off Block Island, Toray and Polytop say they will pay \$7.3 million and \$1.1 million more, respectively, in electric costs during the course of the 20-year contract. Sending lawyers to PUC hearings and the R.I. Supreme Court just makes sense, **Farady** said.

“It’s a bit of a risk for them,” she said. “But I also suspect from the private industry’s point of view, they want to try and drive that bus to help create that legal structure before it’s cemented into place and it may not be favorable to industry.”

Shigeru Osada, senior vice president for engineering and maintenance at Toray, said the company appealed to ensure the court reviewed its concerns as well as those of the attorney general and Conservation Law Foundation. Osada described the cost of Toray’s legal services as “very painful” and “very expensive,” though he declined to cite a specific dollar amount. But Osada called the expense of the appeal worth it.

“If we didn’t [appeal], the Supreme Court would not review the PUC process,” he said.

Not headed to the Supreme Court is a group of Block Island homeowners, who hired a lawyer to formally intervene in the PUC hearings. Rosemarie Ives, a former mayor of Redmond, Wash., said the group did not appeal because of a number of factors, including the cost.

“The large developers, whatever they’re developing, always have a cadre of the best attorneys they can hire and the public relations consultant and the government-relations consultant, the list goes on and on,” she said. “It feels like a less-than-level playing field, and from my perspective as a former mayor, it is not a level playing field. It is not fair.”

The PUC case also involved lawyers representing government, including the Block Island town of New Shoreham, the R.I. Economic Development Corporation, the R.I. Department of Environmental Management and the attorney general’s office. The attorney general was the only one to appeal.

Michael Healey, a spokesman for the attorney general, said Assistant Attorney General Michael Rubin has spent almost all his time working on Deepwater Wind legal questions for the past three months. This summer a team of three or four interns supported him, along with part-time assistance from staff.

Healey said the amount of time spent on a particular case “is driven by the importance of the issue,” and Lynch believes the contract approved by the PUC “is a really bad deal.”

Also calling the contract a bad deal were lawyers from the Ocean State Policy Research Institute, Canadian power company TransCanada Corp. and the Conservation Law Foundation.

“The matters that the PUC considers are important both in terms of the cost implications for ratepayers and ... in terms of public policy issues for the state,” Conservation Law Foundation attorney Jerry Elmer said.

As scale goes, Elmer said the complexity of the case is typical for the foundation but thus far a relatively brief legal fight. The foundation has been fighting an expansion of a marina on Block Island since 2003. It's been following the battle over a liquefied natural gas terminal in Mount Hope Bay for more than six years.

"The Deepwater cases definitely were complicated, sophisticated cases: 20 lawyers, many witnesses, lots of testimony, but not out of the norm with what you see" in similar cases, Elmer said.

In such cases legal bills naturally mount for many parties, though not everyone neatly bills by the hour. The law foundation and attorney general said they do not break out costs by case, so the exact amounts spent on Deepwater Wind issues are difficult to establish. The R.I. Economic Development Corporation drew on an outside law firm it already had on retainer and did not incur additional costs because of the case, spokesman Mike Blazek said.

Ives declined to say how much the Block Island residents spent on legal fees during the PUC hearings.

The town of New Shoreham has spent \$69,213 on legal costs associated with the wind farm, not counting additional work by the town solicitor as part of his normal duties, Finance Director Amy Land said. Town Manager Nancy Dodge said Deepwater Wind agreed to reimburse the town for all its expenses associated with hiring two outside law firms. So far, the developer has paid the town \$56,496.

Spokespeople for National Grid and Deepwater Wind both declined to detail legal fees incurred by the companies. National Grid spokesman David Graves called them "the cost of doing business."

The two companies could ask electric customers to pick up the tab, although the PUC recently frowned upon such a request. In 2009, the Block Island Power Co. asked the PUC to approve a rate increase of a penny per kilowatt-hour during the summer. The money would raise \$50,000 annually to pay for legal costs associated with the Deepwater Wind project. The commission said no, and the power company skipped the PUC hearings involving the contract between National Grid and Deepwater. Lawyers were just too expensive, power company co-owner Cliff McGinnes Sr. explained.

"At \$300 or \$400 an hour, it adds up pretty quick," he said. •