UNITED STATES DISTRICT COURT
DISTRICT OF RHODE ISLAND

BENJAMIN RIGGS, LAURENCE EHRHARDT, and RHODE ISLAND MANUFACTURERS ASSOCIATION, Plaintiffs v. MARGARET CURRAN, PAUL ROBERTI, and HERBERT DESIMONE, JR., in their official capacities as members of the Rhode Island Public Utilities Commission; NARRAGANSETT ELECTRIC COMPANY, INC. d/b/a NATIONAL GRID; and DEEPWATER WIND BLOCK ISLAND, LLC, Defendants	Civil No. 1:15-CV-00343-S-LDA

DEEPWATER WIND BLOCK ISLAND, LLC'S MOTION TO DISMISS PLAINTIFFS' COMPLAINT

Deepwater Wind Block Island, LLC ("Deepwater Wind") moves this Court to dismiss Plaintiffs' Complaint pursuant to Fed. R. Civ. P 12(b)(6). As set forth in the accompanying memorandum of law, Plaintiffs' claims: (1) are barred by the statute of limitations; and (2) fail for lack of standing under Article III to the United States Constitution. This Court, therefore, should grant this motion and dismiss Plaintiffs' Complaint in its entirety.

Respectfully submitted,

Deepwater Wind Block Island, LLC

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Dated: October 30, 2015

CERTIFICATE OF SERVICE

I hereby certify that on the 30th day of October, 2015, a copy of the foregoing Motion to Dismiss was filed electronically. Notice of this filing will be sent to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's Electronic Filing System.

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BENJAMIN RIGGS, LAURENCE EHRHARDT, and RHODE ISLAND MANUFACTURERS ASSOCIATION, Plaintiffs v. MARGARET CURRAN, PAUL ROBERTI, and HERBERT DESIMONE, JR., in their official capacities as members of the Rhode Island Public Utilities Commission; NARRAGANSETT ELECTRIC COMPANY, INC. d/b/a NATIONAL GRID; and DEEPWATER WIND BLOCK ISLAND, LLC, Defendants	Civil No. 1:15-CV-00343-S-LDA

DEEPWATER WIND BLOCK ISLAND, LLC'S MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION TO DISMISS PLAINTIFFS' COMPLAINT

I. INTRODUCTION

The Court should dismiss the Complaint for two reasons: (1) Plaintiffs' claims are barred by the statute of limitations; and (2) each Plaintiff lacks standing.

Rhode Island's three year statute of limitations for injuries to the person bars Plaintiffs' claims. The Rhode Island Public Utilities Commission ("PUC") approved the power purchase agreement ("PPA") between Deepwater Wind Block Island, LLC ("Deepwater Wind") and The Narragansett Electric Company d/b/a National Grid ("National Grid") more than five years ago; the Rhode Island Supreme Court affirmed the PUC's approval of the PPA more than four years ago; and construction of the Block Island Wind Farm, a demonstration wind energy project off

the coast of Block Island, is now well under way. The time for challenging the PUC's order approving the PPA ("PUC Order") has long passed.

Further, Plaintiffs lack standing to pursue any of their claims under well-established Article III principles. Plaintiffs raise claims that are common to all ratepayers in Rhode Island. Such claims do not provide Plaintiffs with Article III standing to pursue this action. For these reasons, the Court should dismiss the Complaint in its entirety.

II. BACKGROUND

A. The Plaintiffs

Plaintiffs are two Rhode Island residents (Benjamin Riggs and Laurence Ehrhardt) and "a nonprofit association of manufacturing companies . . . whose purpose is to enhance the ability of Rhode Island manufacturers to compete effectively and profitably in local, national, and global markets" (the Rhode Island Manufacturers Association ("RIMA")). Compl. ¶¶ 3-5. Plaintiffs claim that their electricity rates and those of all mainland Rhode Island ratepayers will be adversely affected if the PUC Order approving the PPA is implemented. Compl. ¶¶ 2, 4. They base this claim on their allegation that the PPA requires National Grid to purchase power from Deepwater Wind at above market costs. Compl. ¶¶ 2, 4, 5.

Riggs, Ehrhardt, and several of RIMA's members, including Toray Plastics (America) ("Toray") and Polytop Corporation ("Polytop"), have challenged and opposed the Deepwater Wind project for more than five years now in a variety of forums. Ehrhardt, Toray and Polytop intervened in the PUC proceeding and actively fought approval of the PPA; Toray even cross-examined witnesses and submitted evidence. Riggs submitted two rounds of public comment to the PUC arguing against approval of the PPA. The PUC evaluated the PPA under the criteria

and standards promulgated by the General Assembly[1] and, during a six-day hearing, received extensive written and oral testimony both in favor of and opposed to the project, including testimony from the public and from industry experts. On August 16, 2010, the PUC approved the PPA. Compl. ¶ 21. The Rhode Island Supreme Court rejected challenges by Toray and Polytop and affirmed the PUC Order on July 1, 2011.[2] *See In Re: Review of Proposed Town of New Shoreham Project*, 24 A.3d 482 (R.I. 2010).

In 2012 and again in 2015, Riggs filed petitions with the Federal Energy Regulatory Commission ("FERC") demanding an enforcement action against the PUC and claiming that the PUC Order violates the Federal Power Act ("FPA"), the Public Utility Regulatory Policies Act ("PURPA"), and the Supremacy Clause and Commerce Clause of the United States Constitution. FERC refused to entertain either petition. Compl. ¶ 3.

Unhappy with their failures before the PUC, the Rhode Island Supreme Court and FERC, Plaintiffs now ask this Court to declare invalid the PUC Order issued more than five years ago and affirmed more than four years ago. Plaintiffs claim that the PUC usurped FERC's jurisdiction to regulate interstate wholesale energy markets – even though FERC twice declined Riggs' invitations to assert such jurisdiction. Plaintiffs in effect ask this Court to confirm authority in FERC that FERC itself has declined to assert through an enforcement action. Compl. ¶ 35.

B. <u>Plaintiffs' Claims</u>

Plaintiffs assert five separate claims: (I) Violation of the FPA, (II) Violation of PURPA,

[1] Chapter 26.1, Long-Term Contracting Standard For Renewable Energy, as amended by 2010 R.I. Pub. Laws 31 and 32 (the "LTC Statute").

[2] Toray and Polytop were joined by the Attorney General and Conservation Law Foundation ("CLF"). The Rhode Island Supreme Court quashed the writ previously issued pursuant to the Attorney General's certiorari petition following a motion by the Attorney General to withdraw the petition. CLF's writ also was quashed after a finding by the Rhode Island Supreme Court that CLF lacked standing because it was not an aggrieved party.

(III) Violation of the Supremacy Clause, (IV) Violation of the Commerce Clause, and (V) Violation of 42 U.S.C. § 1983. Each of these claims is premised on the fundamental assertion that the PUC Order exceeded the PUC's authority by infringing upon FERC's exclusive jurisdiction to regulate wholesale energy markets. *See, e.g.*, Compl. ¶ 44 (alleging the PUC Order violates the FPA); ¶ 53 (alleging the PUC Order violated PURPA)[3]; ¶ 61 (alleging the PUC Order is pre-empted by the Supremacy Clause); and ¶ 68 (alleging the PUC Order violates the Dormant Commerce Clause). Plaintiffs' claim for violation of 42 U.S.C. § 1983 is a catch-all asserting the alleged violations of federal law and the U.S. Constitution asserted in the other claims. Compl. ¶¶ 71-73. Plaintiffs' prayers for relief seek to invalidate the PUC Order and enjoin the PUC from implementing it. *See* Compl. ¶¶ 74-79.

C. Rhode Island's Decision to Develop Renewable Energy

In 2009, the Governor and the General Assembly decided to encourage and facilitate the development of renewable energy "within the jurisdictional boundaries of the state or adjacent state or federal waters . . . ." R.I. Gen. Laws § 39-26.1-1. The barriers to entry for this new technology, however, were and are substantial. Because the initial energy costs for offshore wind are high, no private financing is available in the absence of long-term contracts to purchase that energy. Rhode Island implemented a two-step process to scale these barriers and obtain a viable development proposal from the private sector. First, the Executive Branch conducted an open bidding process to select a developer. Deepwater Wind, a private energy company, emerged as the successful bidder in that highly competitive process. Second, the General Assembly enacted the LTC Statute.

[3] Plaintiffs fail to understand that PURPA does not even apply in this case. The PPA is not a contract made or approved pursuant to PURPA, and the PPA does not require the Block Island Wind Farm to obtain or maintain "qualifying small power production facility" status, which is the trigger for PURPA to apply in this case.

Through the LTC Statute, the General Assembly authorized National Grid to engage in bilateral negotiations with Deepwater Wind and to submit the resulting long-term "power purchase agreement" for offshore wind energy to the PUC for a determination of whether it met the economic and other legislative objectives and criteria set forth in R.I. Gen. Laws § 39-26.1-7. Under the PUC's enabling legislation, the PUC has "the exclusive power and authority" over economic issues relating to public utility providers. R.I. Gen. Laws § 39-1-1(c).

The LTC Statute established a multi-pronged standard of review for the PUC, including:

(1) "The Amended Agreement contains *terms and conditions that are commercially reasonable*,"

(2) "The Amended Agreement contains provisions that provide for *a decrease in pricing if savings can be achieved in the actual cost of the project* pursuant to subsection 39-26.1-7(e),"

(3) "The Amended Agreement is *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*," and

(4) "The Amended Agreement is likely to provide environmental benefits, including the reduction of carbon emissions."

R.I. Gen. Laws § 39-26.1-7(c) (emphasis added).

On June 30, 2010, National Grid and Deepwater Wind entered into the PPA, and National Grid submitted it to the PUC for review. The PUC received extensive written and oral testimony both in favor of and opposed to the project and evaluated it under the criteria and standards in the LTC Statute. During the PUC proceedings, Plaintiffs were active participants. Ehrhardt intervened in the PUC proceeding, and Riggs submitted two sets of comments. In addition, two of RIMA's members, Toray and Polytop, intervened.

The LTC Statute required that the PUC approve the PPA if it satisfied the economic and

other criteria enumerated in the statute. The PUC carefully and scrupulously reviewed the testimony, written and live, and all the evidence submitted, and determined that the PPA met the criteria, finding:

1. The 2010 PPA contains terms and conditions that are commercially reasonable and the project's expected returns are within the zone of reasonableness, if not at the low end of that zone.

2. The 2010 PPA contains provisions that provide for a decrease in pricing if savings can be achieved in the actual cost of the project.

3. The 2010 PPA is 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.

On August 16, 2010, the PUC applied these standards and entered the PUC Order, a comprehensive written decision that painstakingly reviewed all the evidence, applied the appropriate legal standards established by the General Assembly, and approved the PPA.

Thereafter, several parties, including Toray and Polytop, sought review of the PUC's decision before the Rhode Island Supreme Court. On July 1, 2011, the Rhode Island Supreme Court, in a unanimous decision, affirmed the PUC Order. *In re Review of Proposed New Shoreham Project*, 25 A.3d 482 (R.I. 2011). In its decision, the Rhode Island Supreme Court concluded that ". . . the [RIPUC's] majority accurately interpreted the law and properly applied the law by making findings that are 'lawful and reasonable, fairly and substantially supported by legal evidence, and sufficiently specific enabl[ing] us to ascertain [that] the evidence upon which the commission based its findings reasonably support[ed] the result.'" *Id.* at 527.

III. THE COURT SHOULD DISMISS PLAINTIFFS' COMPLAINT FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED

A. Legal Standard

A court considering a motion to dismiss under Fed. R. Civ. P. 12(b)(6) should "isolate and ignore statements in the complaint that simply offer legal labels and conclusions or merely rehash cause-of-action elements," and then "take the complaint's well-pled (*i.e.*, non-conclusory, non-speculative) facts as true, drawing all reasonable inferences in the pleader's favor, and see if they plausibly narrate a claim for relief." *Schatz v. Republican State Leadership Comm.*, 669 F.3d 50, 55 (1st Cir. 2012). "Plausible, of course, means something more than merely possible" and "compels [a court] 'to draw on' [its] 'judicial experience and common sense.'" *Id.* (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009)). In considering whether a complaint states a plausible cause of action, the court may "consider (a) 'implications from documents' attached to or fairly 'incorporated into the complaint,' (b) 'facts' susceptible to 'judicial notice,' and (c) 'concessions' in plaintiff's 'response to the motion to dismiss.'" *Id.* at 55-56 (citations omitted).

For the reasons set forth below, Plaintiffs have failed to state a claim upon which relief can be granted because Plaintiffs' claims are untimely and Plaintiffs lack standing to bring any such claims.

B. Plaintiffs' Claims Are Time-Barred

Plaintiffs filed the Complaint on August 14, 2015. Their claims hinge on the assertion that the PUC acted improperly when it issued the PUC Order on August 16, 2010 – nearly five years before Plaintiffs brought this suit.

Under well-settled Rhode Island law, each of Plaintiffs' claims is subject to R.I. Gen. Laws § 9-1-14's three-year statute of limitations. For purposes of the statute of limitations, each of these claims accrued no later than August 16, 2010 – when the PUC entered the PUC Order.

The statute of limitations was not tolled or extended for any period of time. Plaintiffs' claims are time-barred.

1. The Three-Year Personal Injury Statute of Limitations Applies to All of Plaintiffs' Claims

Because the federal statutes and constitutional provisions at issue in this case do not contain specific statutes of limitations for the alleged claims, the Court must apply the most analogous statute of limitations under state law. *Wilson v. Garcia*, 471 U.S. 261, 266-67 (1985) ("When Congress has not established a time limitation for a federal cause of action, the settled practice has been to adopt a local time limitation as federal law if it is not inconsistent with federal law or policy to do so."); *AMTRAK v. McDonald*, 779 F.3d 97, 101 (2d Cir. 2015) (noting the various statutes of limitations that could apply to a Supremacy Clause claim, but not deciding the issue); *Eggers v. City of Key West*, Case Number: 05-10093-CIV-MARTINEZ-BROWN, 2008 U.S. Dist. LEXIS 96246, *11-*12 (S.D. Fla. Nov. 25, 2008) (applying personal injury statute of limitations to claim for violation of Dormant Commerce Clause). Thus, this Court must look to Rhode Island law to determine which statute of limitations applies to each of Plaintiffs' claims. It is clear under Rhode Island law that the three-year personal injury statute of limitations set forth in R.I. Gen. Laws § 9-1-14 applies to each claim.

The statute of limitations for injuries to the person under Rhode Island law is three years. R.I. Gen. Laws § 9-1-14 ("Actions for injuries to the person shall be commenced and sued within three (3) years next after the cause of action shall accrue."). The Rhode Island Supreme Court takes an expansive view of what constitutes a claim for an injury to the person for statute of limitations purposes:

> [T]he phrase "injuries to the person" . . . is to be construed comprehensively and as contemplating its application to actions involving injuries that are other than physical. Its purpose is to include within that period of limitation actions brought

> for injuries resulting from invasions of rights that inhere in man as a rational being, that is, rights to which one is entitled by reason of being a person in the eyes of the law. Such rights, of course, are to be distinguished from those which accrue to an individual by reason of some peculiar status or by virtue of an interest created by contract or property.

Commerce Oil Refining Corp. v. Miner, 199 A.2d 606, 610 (R.I. 1964). Courts sitting in Rhode Island have consistently applied the three-year statute of limitations to claims for constitutional violations and violations of federal law brought pursuant 42 U.S.C. § 1983. *See, e.g., Rodriguez v. Providence Police Department*, C.A. No. 08-03 S, 2011 U.S. Dist. LEXIS 2657, *10 (D.R.I. Jan. 11, 2011) (civil rights claims under 42 U.S.C. § 1983 subject to three-year personal injury statute of limitations).

In *Walden III, Inc. v. State of Rhode Island*, 576 F.2d 945, 947 (1st Cir. 1978), the First Circuit affirmed the District Court's decision to apply the three-year personal injury statute of limitations under Rhode Island law to a claim alleging an unconstitutional search and seizure. The First Circuit explained that applying the personal injury limitation period to a constitutional claim is proper under Rhode Island law because it is consistent with *Commerce Oil*'s expansive definition of injuries to the person. *Id.* The First Circuit ruled that the plaintiff's claimed constitutional violations asserted that the defendant "maliciously violated a duty owed to plaintiffs, founded on social policy, not to interfere with their constitutionally protected rights." *Id.* As such, the First Circuit concluded that the alleged constitutional "injuries are properly construed as personal injuries under Rhode Island law." *Id.* The First Circuit added that "it is obviously preferable that one statute of limitations" should encompass all such claims. *Id.*

Similarly, in *Partin v. St. Johnsbury Co.*, 447 F. Supp. 1297, 1300 (D.R.I. 1978) (Pettine, J.), this Court applied the three-year personal injury statute of limitations to bar claims alleged under 42 U.S.C. § 1981. In reaching that conclusion, this Court expressly considered and

rejected the reasoning of decisions from other jurisdictions applying different statutes of limitations. *Id.* at 1301. Relying on the expansive definition of injuries to the person announced in *Commerce Oil*, this Court concluded that "the Rhode Island 'injuries to the person' period would clearly apply[.]" *Id.* at 1300.

Plaintiffs assert claims based on federal statutes and constitutional provisions that do not include unique statutes of limitations. Under established Rhode Island law, these claims are injuries to the person and subject to the three-year statute of limitations. The thorough reasoning of *Commerce Oil* applies squarely to Plaintiffs' claims.[4] Plaintiffs are asserting injuries to the person, and, accordingly, the three-year statute of limitations under R.I. Gen. Laws § 9-1-14 applies to those claims.

2. <u>The Personal Injury Limitations Period Bars Plaintiffs' Claims</u>

"Generally, a cause of action accrues and the applicable statute of limitations begins to run at the time of the injury to the aggrieved party." *McNulty v. Chip*, 116 A.3d 173, 181 (R.I. 2015) (quoting *Martin v. Howard*, 784 A.2d 291, 299 (R.I. 2001)). As such, when a plaintiff alleges a violation of federal rights, whether founded on constitutional principles or statutory principles, the cause of action accrues when the alleged violation actually occurred. *See Marrapese v. Rhode Island*, 749 F.2d 934, 943 (1st Cir. 1984).

Here, Plaintiffs allege that the wrong occurred when the PUC approved the PPA. All of Plaintiffs' allegations of wrongful conduct are premised upon that action. *See, e.g.*, Compl. ¶ 44 (alleging the PUC Order violates the FPA); ¶ 53 (alleging the PUC Order violated PURPA); ¶ 61 (alleging the PUC Order is pre-empted by the Supremacy Clause); and ¶ 68 (alleging the PUC Order violates the Dormant Commerce Clause). Plaintiffs' prayers for relief seek a declaration

[4] Plaintiffs allege that the actions of the PUC in approving the PPA violated their rights as persons under the law – not rights that they accrued through special relationships or through contract.

that the PUC Order violates federal law and the U.S. Constitution and an injunction preventing implementation of the PUC Order. *See* Compl. ¶¶ 74-79. It is clear that the injury Plaintiffs complain of is the August 16, 2010 entry of the PUC Order; Plaintiffs' causes of action accrued on that date, and the three-year statute of limitations began to run on that day. The causes of action accrued, and the statute of limitations began to run, nearly five years before Plaintiffs filed the Complaint. The three-year statute of limitations bars Plaintiffs' claims.[5]

C. Plaintiffs Lack Article III Standing

The Court can and should independently dismiss the Complaint because each Plaintiff lacks standing. Standing involves a threshold inquiry into the parties' status before reaching the merits of their claims. Plaintiffs have not alleged the type of particularized injury necessary to establish standing.

Here, the gravamen of the complaint is that the PUC Order approving the PPA treads on FERC's jurisdiction and violates the U.S. Constitution. This is the type of "generalized grievance" that fails to establish standing under a long line of Supreme Court and First Circuit precedent. *See, e.g.*, *United States v. AVX Corp.*, 962 F.2d 108, 117 (1st Cir. 1992). It is a bedrock principle, long-established and repeatedly reaffirmed by the Supreme Court, that "standing to sue may not be predicated upon an interest of the kind alleged here which is held in common by all members of the public, because of the necessarily abstract nature of the injury

[5] Plaintiffs have no basis to assert that the statute of limitations should somehow be tolled or extended. In *Niagara Mohawk Power Corp. v. FERC*, 162 F. Supp. 2d 107, 139-40 (N.D.N.Y. 2001), the court analyzed whether the continued implementation of an allegedly illegal contract approved by the public service commission ("PSC") might constitute a continuing harm that would lengthen the limitations period for claims arising from the allegedly illegal contract. The court said that any ministerial acts that the PSC undertook to implement the contract likely do not "justify extending the statute of limitations on a 'continuing wrong' theory." *Id.* Here, like in *Niagara Mohawk*, the PUC does not play a substantial role in the implementation of the PPA between Deepwater Wind and National Grid. There is no action by the PUC after the entry of its order related to the implementation of the PPA that could amount to a continuing wrong. The approval of the contract sets the transactions between National Grid and Deepwater Wind in motion. The wrong alleged by Plaintiffs was the approval of the PPA. There is no basis to conclude that there are any other wrongs associated with the PPA that could support an accrual date for the statute of limitations other than the date of the PUC Order.

that all citizens share." *See Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 220 (1974) (citing *Ex Parte Levitt*, 302 U.S. 633 (1937)). Plaintiffs seek to contort their political grievance or policy objections into a judicially cognizable claim by arguing violations of federal law. But because they fail to demonstrate a harm that is peculiar to them rather than common to the world at large, there is no Article III case and controversy that permits the court to reach the merits; the Court should dismiss this case based on a lack of standing.[6]

1. <u>The Individual Plaintiffs Lack Standing</u>

It is Plaintiffs' burden to establish that they have standing to advance their claims. *See AVX Corp.*, 962 F.2d at 114. To do so, they must establish each element of a three-part test:

> First, the plaintiff must have established an injury in fact—an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical. Second, there must be a causal connection between the injury and the conduct complained of – the injury has to be fairly . . . trace[able] to the challenged action of the defendant, and not . . . the result [of] the independent action of some third party not before the court. Third, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992) (internal quotation marks and citations omitted). Plaintiffs fail to demonstrate or allege a "concrete and particularized" injury and therefore fail to establish standing.

[6] Plaintiffs also lack standing to pursue their claims for violations of the FPA and PURPA because those statutes do not protect their interests. To bring a claim for a statutory violation, a plaintiff must fall within the zone of interests protected by the statute. *See Bennett v. Spear*, 520 U.S. 154, 162-63 (1997) (zone of interests test applies to all causes of action for statutory violations). PURPA does not apply here and, even if it did, PURPA does not include Plaintiffs in the class of persons with statutory standing to bring suit for any alleged violation. PURPA permits <u>only</u> any "electric utility, qualifying cogenerator, or qualifying small power producer" to petition FERC to enforce the requirements of PURPA before bringing an action. 16 U.S.C. § 824a-3(h)(2)(A) – (B). Similarly, Plaintiffs are not within the zone of interests protected by the FPA. The FPA governs only the participants in the wholesale energy and transmission markets and addresses the interests of electric utilities and other entities that buy, sell, and transmit power in those markets, such as independent generators and power marketers. 16 U.S.C. § 824(b). Plaintiffs do not fall into any of these categories.

In *Lujan*, the Court starkly contrasts the remediation of personal injuries versus the vindication of public rights. There, environmental groups challenged the Secretary of the Interior's interpretation of a statute, claiming that the alleged misinterpretation could lead to the global extinction of endangered species. This injury failed to establish standing absent proof that the harm had a particular impact on the plaintiffs that was distinguishable from all citizens. *Id.* at 564-67; *see also United States v. Richardson*, 418 U.S. 166, 176-77 (1974) (finding no standing where "the impact on [plaintiff] is plainly undifferentiated and 'common to all members of the public'"). "The province of the Court, as Justice Marshall said in *Marbury v. Madison*, is, solely, to decide on the rights of individuals. Vindicating public rights . . . is the function of Congress and the Chief Executive." *Lujan*, 504 U.S. at 576 (internal citation omitted). Taking the environmental group's case would have placed the Court squarely in the business of solving public controversies rather than remedying injuries and, therefore, standing was lacking.

Similarly, the First Circuit consistently declines to find standing where parties cannot demonstrate a particular and personalized injury. In *AVX Corp*., an environmental association attempted to block a potential settlement between alleged polluters of the New Bedford Harbor and the federal and state government. *See* 962 F.2d at 110-11. The association predicated its standing based on two purported injuries: (1) the general increased risk to public health due to the pollution, and (2) the harm to its members caused by the government's failure to adhere to its own rules. Both "generalized allegation[s] of individual harm" failed to provide "a particularized showing, of the type of 'concrete injury' that we have said is needed to confer standing in an environmental suit." *Id.* at 117. The Court concluded that "it is not enough, at least in the post-*Lujan* era, that a plaintiff possesses a generalized, undifferentiated interest" in protecting some public benefit. *Id.* at 118; *see also Conservation Law Found. v. Reilly*, 950 F.2d

38, 41 (1st Cir. 1991) (holding that a "showing of general harm . . . is insufficient to support standing in this case"); *Moncier v. Haslam*, 570 Fed. Appx. 553 (6th Cir. 2014) (affirming dismissal of case on standing because claim is the type of generalized grievance common to all members of the public that courts have found ill-suited for judicial resolution); *Citizens to End Animal Suffering & Exploitation v. New England Aquarium*, 836 F. Supp. 45, 54 (D. Mass. 1993) ("Such generalized challenges, absent specific injury, are rarely if ever appropriate for federal-court adjudication.") (internal quotation marks and citation omitted).[7]

Plaintiffs seek to remedy a generalized grievance that nearly every ratepayer of the State could attempt to bring in equal measure. This is a far cry from the type of particular personal injury required to establish Article III standing. "The Supreme Court has held on many occasions that when the harm is a generalized grievance shared in substantially equal measure by all or a large class of citizens, that harm alone normally does not warrant exercise of jurisdiction." *Charleston v. United States*, 696 F. Supp. 800, 808 (D.R.I. 1988). That same rule plainly applies here, and this Court should not exercise jurisdiction over Plaintiffs' claims.

2. <u>RIMA Lacks Standing</u>

RIMA fares no better in demonstrating that it has standing to bring the instant suit. An association only has standing to sue when it can prove three prerequisites: "(1) at least one of the members possesses standing to sue in his or her own right; (2) the interests that the suit seeks to vindicate are pertinent to the objectives for which the organization was formed; and (3) neither the claim asserted nor the relief demanded necessitates the personal participation of affected individuals." *AVX Corp.*, 962 F.2d at 116.

[7] Rhode Island's state courts have likewise declined to allow plaintiffs to bring suit when they fail to demonstrate a particularized harm. *See, e.g., Watson v. Fox*, 44 A.3d 130, 138 (R.I. 2012) ("This Court has held fast to the notion that a plaintiff's injury must be 'particularized' and that he must 'demonstrate that he has a stake in the outcome that distinguishes his claims from the claims of the public at large.'").

RIMA fails under the first prong. None of the individual members of RIMA possess a claim distinguishable from Rhode Islanders at large. The same calculus that disproves standing for the individuals applies in equal measure to the individual RIMA members who each lack standing. Each member can assert only the same generalized grievance about an alleged harm impacting the public at large. It is of no moment that manufacturers may argue about whether state action is preempted or is unconstitutional; and their aversion to increased energy rates is beside the point. *See Schlesinger*, 418 U.S. at 225 ("We have no doubt about the sincerity of respondents' stated objectives and the depth of their commitment to them. But the essence of standing is not a question of motivation but of possession of the requisite . . . interest that is, or is threatened to be, injured by the unconstitutional conduct."). *See also Charlestown*, 696 F. Supp. at 113 ("The Supreme Court has repeatedly 'refrained from adjudicating 'abstract questions of wide public significance' which amount to 'generalized grievances,' pervasively shared and most appropriately addressed in the representative branches."') (quoting *Valley Forge Christian College v. Americans United For Separation of Church and State, Inc.*, 454 U.S. 464 (1982)). Any member of the public could advance the same argument and claim the same injury. No RIMA member has the specific, concrete and individualized harm necessary to show an injury in fact, and, for that reason alone, RIMA cannot demonstrate the standing necessary to bring this case.[8]

IV. CONCLUSION

For these reasons, this Court should dismiss Plaintiffs' Complaint in its entirety.

[8] While RIMA's failure on the first prong of the standing test is dispositive, RIMA also fails the second prong of the standing test because it seeks to litigate abstract questions of law that are unrelated to its organizational purpose. According to the complaint, RIMA's purpose is to enhance the ability of Rhode Island manufacturers to compete effectively and profitably in local, national and global markets. Compl, ¶ 5. Here, the preemption and constitutional challenges that RIMA raises are not related to its mission, and its underlying interest in lower electricity rates implicates policy issues that are better left for the political arena.

Respectfully submitted,

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Dated: October 30, 2015

CERTIFICATE OF SERVICE

I hereby certify that on the 30th day of October, 2015, a copy of the foregoing Memorandum of Law was filed electronically. Notice of this filing will be sent to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's Electronic Filing System.

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