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

PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANT DEEPWATER'S AND DEFENDANT NARRAGANSETT ELECTRIC CO., INC. D/B/A NATIONAL GRID'S MOTIONS TO DISMISS

Introduction

Defendant Deepwater Wind Block Island, LLC ("Deepwater") has moved to dismiss the plaintiffs' complaint in this case, arguing that the complaint is barred by the statute of limitations and that the plaintiffs lack standing to pursue the complaint. Both arguments fail. Defendant Narragansett Electric Co., Inc. d/b/a National Grid ("National Grid") has also moved to dismiss plaintiff's complaint in this case relying on Deepwater's Memorandum in Support of its Motion to Dismiss.

The statute of limitations applicable to this case is not, as Deepwater contends, the three-year statute of limitations for *personal injury* actions borrowed from Rhode Island

state law; it is the five-year statute of limitations applicable to claims brought to enforce federal statutes, like the Federal Power Act, which is the core cause of action in this case. Perhaps even more important, the date that the statute of limitations began to run in this case is not, as Deepwater contends, the date the PUC approved the Power Purchase Agreement for the Block Island Wind Farm, but rather, at earliest, September 2014, when Deepwater satisfied the condition of the Power Purchase Agreement that it obtain the permits needed to construct the Block Island Wind Farm. Indeed, because the Power Purchase Agreement has not actually been implemented, the statute of limitations arguably has not even started to run.

Likewise, Deepwater's half-hearted argument that the plaintiffs' lack standing is not even supported by the cases it cites. This case, unlike the *Lujan* and *AVX* cases Deepwater cites, does not involve a generalized claim of environmental harm brought by a public interest group. Rather, this is a case brought by two actual electric ratepayers, and the association that represents the largest electric ratepayers in the state, to challenge a government action that will increase their electric bills, in some cases by tens of thousands of dollars a year. The injury the plaintiffs assert here – a loss of money – is the kind of injury that federal courts (indeed, all courts) address every day, and there can be little question that the plaintiffs have standing to seek redress for that injury.

Background

Deepwater has misled the Court about the prior history of this case. This is not a case in which the relevant federal regulatory agency, the Federal Energy Regulatory Commission ("FERC"), has previously considered and "rejected" the plaintiff's federal statutory and constitutional arguments. Plaintiff Riggs filed two petitions asking FERC

to decide these issues, and the defendants tried, and failed, to get the plaintiff's administrative petitions dismissed. Instead, FERC deferred to the court, telling the plaintiff he could proceed to "bring an enforcement action against the Rhode Island Commission in the appropriate court."

Likewise, the Rhode Island Supreme Court has not previously ruled on the plaintiffs' federal statutory and constitutional claims. The important Commerce Clause issue was raised by former Attorney General Patrick Lynch, but never decided by the Rhode Island Supreme Court. 25 A.3d 482 (R.I. 2011).

On the issue of standing, the key portions of plaintiffs' Complaint are these:

2. Plaintiff Benjamin Riggs is a resident of Newport, Rhode Island, and is a mainland Rhode Island ratepayer for electricity supplied by National Grid. Mr. Riggs' electricity rates will be adversely affected if the PUC's Order approving the PPA between National Grid and Deepwater Wind is implemented, because the Order requires National Grid to purchase power at $497 million above market cost from Deepwater Wind, and this cost will, by National Grid's own admission, be paid entirely by the approximately 482,700 mainland Rhode Island ratepayers (out of a total of 1.1 million residents) over the next 20 years.[1]

5. The electricity rates of numerous members of RIMA [Rhode Island Manufacturers Association], including, for example, the electricity rates of members Toray Plastics, Inc. and Materion Technical Materials, Inc., will be adversely affected if

[1] The same is true of plaintiff Laurence Ehrhardt. Complaint ¶ 4.

the PUC's Order approving the PPA between National Grid and Deepwater Wind is implemented . . . .

On the issue of the statute of limitations, the key portions of plaintiffs' Complaint, which reference the key dates, are these:

23. On or before November 15, 2012, Deepwater Wind filed a petition with the Rhode Island Coastal Resources Management Council seeking approval to construct the Block Island Wind Farm, and the underwater cable connecting to the mainland, in Rhode Island state territorial waters. This petition was approved [only] on **June 13, 2014**.

24. On September 12, 2012, Deepwater Wind submitted an application for a Rivers and Harbors Act permit from the United States Army Corps of Engineers to construct the Block Island Wind Farm. This application was approved [only] on **September 17, 2014.** This approval, taken together with the CRMC approval and the announcement in **2015** of new financing, means that construction of the Block Island Wind Farm is now imminent.

25. On or before December 31, 2012, Deepwater Wind gave notice under section 3.1(b) of the PPA of its intention to extend to December 31, 2017 the deadline by which it would be required to begin commercial operation of the Block Island Wind Farm. Under section 3.3(a) of the PPA, National Grid's obligation to purchase energy, capacity, and Renewable Energy Certificates from Deepwater Wind commences **only after commercial operation commences, and therefore the costs of the PPA have not yet been imposed on mainland Rhode Island ratepayers.** Plaintiffs are seeking prospective injunctive and declaratory relief before the PPA is implemented.

3. Plaintiff Riggs filed a petition with the Federal Energy Regulatory Commission ("FERC"), pursuant to the FPA, 16 U.S.C. § 791, et seq., and PURPA, 16 U.S.C. § 824a-3, on August 22, 2012, seeking an enforcement action by FERC against the PUC on the grounds that the PUC's Order violated the FPA, PURPA, and the Commerce Clause of the United States Constitution. . . Mr. Riggs also filed an administrative petition with FERC on April 21, 2015, seeking an enforcement action by FERC against the PUC on the grounds that the PUC's Order violated the FPA, PURPA, and the Supremacy Clause of the United States Constitution. . . . On **October 18, 2012** and **June 18, 2015**, FERC issued notices of its intention not to act on Riggs' administrative petitions, stating in both cases that its "decision not to initiate an enforcement action means that Mr. Riggs may himself bring an enforcement action against the Rhode Island Commission in the appropriate court."

The Facts

The PUC's Order Approving the PPA

On June 26, 2009, Rhode Island enacted the "Long-Term Contracting Standard for Renewable Energy," ("the 2009 LTC Statute"), P.L. 2009, ch. 53, §1, et seq., codified at RIGL 39-26.1 One of the stated purposes of the statute was to "encourage and facilitate the creation of commercially reasonable long-term contracts between electric distribution companies [i.e. National Grid] and developers or sponsors of newly developed renewable energy resources . . . ." P.L. ch. 53, §1, at p. 250. Another, much more specific purpose, was to require National Grid to solicit proposals and enter into an agreement for the development of a particular "newly developed energy resources project of ten (10) [megawatts] or less" for the Town of New Shoreham (Block Island). P.L. ch.

53, §1, at p. 252. The statute also expressly stated that "[t]he solicitation shall require that each proposal include provisions for a transmission cable between the Town of New Shoreham and the mainland of the state." P.L. ch. 53, §1, at p. 253. Complaint ¶15.

Pursuant to the new statute, National Grid entered into an agreement with Deepwater Wind for the development of the 10 MW renewable-energy Town of New Shoreham Project (hereinafter, the "Block Island Wind Farm"). On December 10, 2009, National Grid submitted to the PUC for approval a proposed Power Purchase Agreement with Deepwater Wind ("the 2009 PPA"), under which National Grid would pass on to mainland Rhode Island ratepayers the cost of constructing and operating the Block Island Wind Farm. Complaint ¶16.

The 2009 PPA established a bundled price of $235.75/MWh for the power to be generated by the Block Island Wind Farm, which National Grid said translated to a rate of 24.4 cents/kWh for all Rhode Island electricity users, regardless of whether they purchased their power from National Grid (not including the cost of the underwater cable from Block Island to the mainland, or an incentive payment to National Grid). The 2009 PPA also included an escalation provision that would increase the cost to electricity users at the rate of 3.5% per year for up to 20 years. Complaint ¶17.

On March 30, 2010, after receiving and reviewing voluminous submissions, the PUC disapproved the 2009 PPA, finding that it was not "commercially reasonable." The PUC found that, as compared to a pricing projection for "New England wholesale energy markets," the rate of 24.4 cents/kWh hour, escalated 3.5% per year, would result in ratepayers' paying above market rates for their electricity for the entire duration of the 2009 PPA. It also found that the 2009 PPA was not commercially reasonable, even when

measured against the terms and pricing of other renewable energy projects. Complaint ¶18.

Within weeks of the PUC's decision disapproving the 2009 PPA, the General Assembly passed a revised LTC statute that directed the PUC to apply different standards in reviewing any future PPA for the Block Island Wind Farm. The revised LTC statute was signed into law on June 15, 2010. P.L. 2010, ch. 32, §1, codified at RIGL 39-26.1-7. The very first line of the revised statute made clear its objective: "[t]he [G]eneral [A]ssembly 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, including an undersea transmission cable that interconnects Block Island to the mainland . . . ." RIGL 39-26.1-7(a). Complaint ¶19.

Fifteen days later, on June 30, 2010, National Grid and Deepwater Wind submitted to the PUC a revised PPA ("the PPA," attached to the Complaint as Exhibit 3). The PPA decreased the 2009 PPA's initial bundled price of $235.75/MWh only slightly to $235.70/MWh, but did not change the 24.4 cents/kWh price for ratepayers, or the escalation of 3.5% per year for up to 20 years. PPA, at Ex. E and Appendix X, submitted under Letter of Ronald Gerwatowski dated June 30, 2010. Under the PPA, National Grid committed to purchasing power, capacity, and Renewable Energy Certificates from Deepwater Wind for 20 years. PPA, at §§ 2.2(b), 4.1(a). It also provided that the initial bundled price *could* be reduced if the total cost of constructing the facility turned out to be less than the then estimated cost of $205,403,512. PPA, at Appendix X. Complaint ¶20.

On August 16, 2010, the PUC, in a 2-1 decision, voted to approve the PPA, relying heavily on the new standard for review of the PPA that had been mandated by the General Assembly. In her dissenting opinion, then-PUC Commissioner Mary Bray opined that the economic benefit of the Block Island Wind Farm, admitted by Deepwater to create only six permanent jobs, was outweighed 3 to 1 by the above market power costs to mainland ratepayers, "result[ing] in a net loss for the economy." PUC Order (attached to the Complaint as Exhibit 4), at 152. Complaint ¶21.

The PUC's Order was thereafter appealed to the Rhode Island Supreme Court, primarily on state law grounds,[2] and affirmed on July 1, 2011. On September 29, 2011, National Grid filed with the PUC a request for waiver of the one-year time limit for exhaustion of all appeals of the PUC's Order, which was subsequently granted by the PUC on January 24, 2012. On January 6, 2012, prior to this ruling, the PUC submitted a request for information to National Grid seeking updated information about the above-market cost of the power to be purchased under the PPA, to which National Grid responded on January 26, 2012, quantifying the total above market cost over 20 years at over $497 million. Complaint ¶22 & Exhibit 5.

The Impending Impact of the PUC's Order

On or before November 15, 2012, Deepwater Wind filed a petition with the Rhode Island Coastal Resources Management Council seeking approval to construct the Block Island Wind Farm, and the underwater cable connecting to the mainland, in Rhode Island state territorial waters. This petition was not approved until June 13, 2014. Complaint ¶23. On September 12, 2012, Deepwater Wind submitted an application for a

[2] Appeals by TransCanada Power Marketing Ltd. and Attorney General Patrick Lynch raising claims under the dormant Commerce Clause were withdrawn prior to ruling, and so were never reached by the Rhode Island Supreme Court. 25 A.3d 482 (R.I. 2011).

Rivers and Harbors Act permit from the United States Army Corps of Engineers to construct the Block Island Wind Farm. This application was approved on September 17, 2014. The Army Corps approval, taken together with the CRMC approval and the announcement in 2015 of financing for the Block Island Wind Farm, means that construction of the Wind Farm is now imminent. Complaint ¶24.

On or before December 31, 2012, Deepwater Wind gave notice under section 3.1(b) of the PPA of its intention to extend to December 31, 2017 the deadline by which it would be required to begin commercial operation of the Wind Farm. Under section 3.3(a) of the PPA, National Grid's obligation to purchase energy, capacity, and Renewable Energy Certificates from Deepwater Wind commences only after commercial operation commences, and therefore the costs of the PPA have not yet been imposed on mainland Rhode Island ratepayers, but the imposition of these costs now appears reasonably imminent. Complaint ¶25.

Plaintiffs Benjamin Riggs and Laurence Ehrhardt are mainland Rhode Island ratepayers for electricity supplied by National Grid. Their electricity rates will be adversely affected if the PUC's Order approving the PPA between National Grid and Deepwater Wind is implemented, because the Order requires National Grid to purchase power at $497 million above market cost from Deepwater Wind, and this cost will, by National Grid's own admission, be paid entirely by the approximately 482,700 mainland Rhode Island ratepayers (out of a total of 1.1 million residents) over the next 20 years. The average cost of this above-market power to a mainland Rhode Island ratepayer, like Mr. Riggs and Mr. Ehrhardt, will be approximately $1,000 over the life of the PPA, not including the cost of the underwater cable from Block Island to the mainland, recently

estimated at $110-120 million (expected to be partly paid for by Block Island ratepayers), or a required $19 million incentive payment to National Grid. Complaint ¶2, 4.

The Rhode Island Manufacturers Association ("RIMA") is a nonprofit association of manufacturing companies throughout Rhode Island whose purpose is to enhance the ability of Rhode Island manufacturers to compete effectively and profitably in local, national and global markets. The electricity costs of numerous members of RIMA, including, for example, the electricity rates of members Toray Plastics, Inc. and Materion Technical Materials, Inc., will be adversely affected if the PUC's Order approving the PPA between National Grid and Deepwater Wind is implemented. Toray Plastics, Inc. testified before the PUC that the PPA would increase its energy bill by approximately $287,000 per year, and it is currently estimated that the above market cost to Materion Technical Materials, Inc. will exceed $25,000 per year,[3] not including the cost of the underwater cable from Block Island to the mainland, recently estimated at $110-120 million, or the required $19 million incentive payment to National Grid. Complaint ¶5; Order, at 62. The initial cost of the PPA to Rhode Island's 15 largest businesses would be $2,001,512. Order, at 153.

Procedural History

Plaintiff Riggs filed an administrative petition with the Federal Energy Regulatory Commission ("FERC"), pursuant to the FPA, 16 U.S.C. § 791, et seq., and PURPA, 16 U.S.C. § 824a-3, on August 22, 2012, seeking an enforcement action by FERC against the PUC on the grounds that the PUC's Order violated the FPA, PURPA, and the Commerce Clause of the United States Constitution. Complaint Exhibit 1. Mr. Riggs

[3] The reference in ¶5 of the Complaint to estimated costs to Materion exceeding $100,000 was a scrivenor's error.

also filed an administrative petition with FERC on April 21, 2015, seeking an enforcement action by FERC against the PUC on the grounds that the PUC's Order violated the FPA, PURPA, and the Supremacy Clause of the United States Constitution. Complaint Exhibit 2. Mr. Riggs' petitions were filed under the Commission's Rule 206, which allows "any person" to file a complaint seeking the Commission's action against "any other person alleged to be in contravention or violation of any statute, rule, order or other law administered by the Commission." 18 CFR 385.206.

National Grid and Deepwater Wind sought to intervene to oppose both proceedings, and, along with the PUC, filed various unsuccessful motions to dismiss. On October 18, 2012 and June 18, 2015, FERC issued notices of its intention not to act on Riggs' administrative petitions, stating in both cases that its "decision not to initiate an enforcement action means that Mr. Riggs may himself bring an enforcement action against the Rhode Island Commission in the appropriate court." Complaint ¶3. Contrary to Deepwater's contention, FERC did not "reject" Riggs' petitions.

Argument

I. The Statute of Limitations Has Not Run

A. The Applicable Statute of Limitations is Five Years

Deepwater argues, citing to the Supreme Court's decision in *Wilson v. Garcia*, 471 U.S. 261, 266-67 (1985), that the statute of limitations applicable to this case is Rhode Island's three-year statute of limitations for personal injury actions. However, even the sentence from *Wilson* that Deepwater quotes in its brief makes clear that a state statute of limitations should not be used here: "*When Congress has not established a time limitation for a federal cause of action*, the settled practice has been to adopt a local

time limitations as federal law if it is not inconsistent with federal law or policy to do so." 471 U.S. at 266-67 (emphasis added). Here, Congress has established a time limitation.

Plaintiffs' core claim and cause of action in this case is not 42 U.S.C. § 1983, as Deepwater would have it, but "Violation of the FPA [Federal Power Act]," Complaint, Count I, ¶¶ 42-50, and "Violation of PURPA [the Public Utility Regulatory Policies Act of 1978]", Complaint, Count II, ¶¶ 51-57. As such, the Court should apply the five-year statute of limitations that Congress has enacted for enforcement of federal statutes, set forth at 28 U.S.C. § 2462.

Section 2462 is the statute of limitations that courts have, in the past, applied to actions brought under the Federal Power Act. *See FERC v. Barclays Bank PLC*, 2015 U.S. Dist. LEXIS 66184, *22–23 (E.D. Cal. 2015) (applying 28 U.S.C. §2462 to action brought by the Federal Energy Regulatory Commission under the Federal Power Act); *Tri-Dam v. Schediwy*, 2011 U.S. Dist. LEXIS 146789 at *14–18 (E.D. Cal. 2011) (applying 28 U.S.C. §2462 to an action brought by private party under the Federal Power Act). Indeed, section 2642 is the statute of limitations that FERC itself says applies to enforcement actions under the Federal Power Act. *Prohibition of Energy Market Manipulation,* 114 F.E.R.C. ¶ 61,047, at 62 (2006).

Section 2462 is, likewise, the statute of limitations that federal courts have applied when enforcement has been sought of numerous other federal statutes, whether the enforcement actions were brought by private parties, *see Trawinski v. United Techs.*, 313 F.3d 1295, 1298 (11th Cir. 2002) (applying § 2462 to a private action under the Energy Policy and Conservation Act); *Nat'l Parks Conservation Ass'n v. TVA*, 480 F.3d 410, 415 (6th Cir. 2007) (applying § 2462 to suit under Clean Air Act); *Sierra Club v. Chevron*

U.S.A., Inc., 834 F.2d 1517, 1521 (9th Cir. 1987) (applying § 2462 to suit under the Clean Water Act); *Catskill Mts. Chapter of Trout Unlimited, Inc. v. City of New York*, 451 F.3d 77, 88 n.14 (2d Cir. 2006) (same), or by the government itself, *see 3M Co. v. Browner*, 17 F.3d 1453, 1457 (D.C. Cir. 1994) (applying 28 U.S.C. § 2462 to agency enforcement of the Toxic Substances Control Act); *FEC v. National Right to Work Comm.*, 916 F. Supp. 10, 13 (D.D.C. 1996) (applying 28 U.S.C. § 2462 to agency enforcement of the Federal Election Campaign Act).

When the five-year limitations period of section 2462 is applied to this case, it is clear that the case is not time barred. Even assuming, *arguendo*, that the statute of limitations began to run when the Rhode Island Public Utilities Commission ("PUC") issued its Order of August 16, 2010, Deepwater concedes that this case was brought less than five years after that. Deepwater Memorandum, at 7.

B. The Statute of Limitations Did Not Begin To Run Until, At Earliest, September 2014.

The second flaw in Deepwater's statute of limitations argument is its contention that the statute of limitations began to run on August 16, 2010, when the PUC issued the Order approving its Power Purchase Agreement with National Grid. Deepwater Memorandum, at 10-11. However, the plaintiffs' claims in this case did not accrue, and the statute of limitations did not begin to run, at the time of the PUC Order. The statute of limitations did not begin to run until, at earliest, September 2014, when the harm to the plaintiffs became "imminent," that is, when Deepwater satisfied the condition of the Power Purchase Agreement that it obtain the permits needed to construct the Block Island Wind Farm.

As more fully discussed below, in order to have Article III standing, a plaintiff "must have suffered or imminently will suffer injury – an invasion of a legally protected interest that is (a) concrete and particularized, and (b) actual or imminent (that is, neither conjectural nor hypothetical; not abstract)." *Los Angeles v. Lyons*, 461 U.S. 95, 101-02 (1983); *O'Shea v. Littleton*, 414 U.S. 488, 494 (1974). At the time of the PUC Order approving the Power Purchase Agreement in 2010, the plaintiffs in this case had not yet suffered an "actual or imminent" injury. In 2010, the Power Purchase Agreement had not yet been implemented, and the plaintiffs' electric bills had not yet increased, nor was such an increase imminent -- as it is now.[4]

As approved by the PUC, the Power Purchase Agreement contained numerous conditions precedent. One such condition was that Deepwater had to obtain "all material Permits required for the lawful construction, ownership and operation of the Facility, including "Permits related to environmental matters . . . ." Complaint, Ex. 3, at 12. These included permits by the Rhode Island Coastal Resources Management Council ("CRMC") and the Army Corps of Engineers. *Id.* Ex. B. Deepwater did not even apply for permits from the CRMC or the Army Corps of Engineers until 2012, did not receive CRMC approval until June 2014, and did not receive Army Corps of Engineers' approval until September 2014. Complaint ¶¶ 23-24.[5] Nor, until 2015, did Deepwater have

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[4] Notably, in its argument about standing, Deepwater argues that the plaintiffs' claims must be "actual or imminent, not conjectural or speculative." Yet, in its statute of limitations argument, Deepwater argues that the plaintiffs should have brought their claims when their injury was not at all "imminent," when many difficult permitting challenges had to be overcome and its financing was not even in place.

[5] Another condition precedent to the operation of the Wind Farm is that a transmission cable from Block Island to the mainland "has been completed and placed in service and is operable, with all Permits and real property rights and other site controls rights needed to

financing for its wind farm, Complaint ¶ 24, a deficiency that has proved fatal to at least one other prominent wind project in New England.[6] It was only when these conditions were met, and construction began on the Wind Farm, that the harm to the plaintiffs became "imminent." *See Verizon New England, Inc. v. IBEW,* 651 F.3d 176, 188 (1st Cir. 2011)("where challenges are asserted to government actions and ripeness questions arise, a court must consider . . . questions of finality, definiteness, and the need for further factual development"). Indeed, the plaintiffs will not suffer "actual" harm until the Wind Farm starts operating. Under the Power Purchase Agreement, National Grid is not obligated to begin purchasing power from the Wind Farm (and charging ratepayers) until the Wind Farm begins "Commercial Operation." Complaint, Ex. 3, at 12.

C. For Plaintiff Riggs, the Statute of Limitations Did Not Begin to Run Until He Had Exhausted Administrative Remedies.

A separate statute of limitations analysis applies to the claims of plaintiff Benjamin Riggs because Mr. Riggs sought administrative review of those claims by the Federal Energy Regulatory Commission before bringing suit in this Court. As set forth above, Mr. Riggs filed an administrative petition with FERC on August 22, 2012, seeking

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own and operate the Transmission Cable being held by the owner of the Transmission Cable." Complaint, Ex. 3, at 13. To plaintiffs' knowledge, this condition is far from satisfied.

[6] In *Town of Barnstable v. O'Connor*, 786 F.3d 130, 141 (1st Cir. 2015), the First Circuit reversed the dismissal of a challenge the Cape Wind project, similar to the challenge asserted in this case. However, the failure of the financing of the Cape Wind project has put the entire project, and the litigation, on hold.

The demise of the Cape Wind project shows just how critical financing is to a wind farm project. Given this, it would have been an enormous waste of judicial time and resources for the Court and the parties to have addressed the statutory and constitutional issues raised in this case, only to learn that the Block Island Wind Farm did not have the financing to be built.

an enforcement action by FERC against the PUC on the grounds that the PUC's Order violated the FPA, PURPA, and the Commerce Clause of the United States Constitution. Complaint Exhibit 1. Mr. Riggs filed a second administrative petition with FERC on April 21, 2015, seeking an enforcement action by FERC against the PUC on the grounds that the PUC's Order violated the FPA, PURPA, and the Supremacy Clause of the United States Constitution. Complaint Exhibit 2.

Contrary to Deepwater's contentions, FERC did not "reject" Riggs' petitions. Rather, on October 18, 2012 and June 18, 2015, FERC issued notices of its intention not to act on Riggs' administrative petitions, stating in both cases that its "decision not to initiate an enforcement action means that Mr. Riggs may himself bring an enforcement action against the Rhode Island Commission in the appropriate court." Complaint ¶3.

It is well established that, when a plaintiff pursues administrative remedies, the statute of limitations does not begin to run against his or her claims until the administrative process is completed. As the U.S. Supreme Court has stated:

> We have repeatedly recognized that Congress legislates against the "standard rule that the limitations period commences when the plaintiff has a complete and present cause of action." *Bay Area Laundry and Dry Cleaning Pension Trust Fund v. Ferbar Corp. of Cal.*, 522 U.S. 192, 201, 139 L. Ed. 2d 553, 118 S. Ct. 542 (1997) (internal quotation marks omitted); *see also Johnson v. United States*, 544 U.S. 295, 305, 161 L. Ed. 2d 542, 125 S. Ct. 1571 (2005) (calling it "highly doubtful" that Congress intended a time limit on pursuing a claim to expire before the claim arose); *Reiter v. Cooper*, 507 U.S. 258, 267, 122 L. Ed. 2d 604, 113 S. Ct. 1213 (1993) (declining to countenance the "odd result" that a federal cause of action and statute of limitations arise at different times "absen[t] . . . any such indication in the statute"); *TRW Inc. v. Andrews*, 534 U.S. 19, 37, 151 L. Ed. 2d 339, 122 S. Ct. 441 (2001) (Scalia, J., concurring in judgment) ("Absent other indication, a statute of limitations begins to run at the time the plaintiff has the right to apply to the court for relief" (internal quotation marks omitted)).

Graham County Soil & Water Conservation Dist. v. United States ex rel. Wilson, 545 U.S. 409, 418-419 (2005). Because he sought administrative review, the earliest date the statute of limitations can be held to run against Mr. Riggs is October 18, 2012, the first date he received a notice of intention not to act from FERC. Even assuming, *arguendo*, that a three year statute of limitations applies to his claims, Mr. Riggs' claims, brought on August 14, 2015, are not time barred.

II. Plaintiffs Have Standing

A. Plaintiffs' Claims are Concrete, Particularized, and Imminent.

At the heart of Deepwater's argument about standing are two environmental cases, *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992), and *United States v. AVX Corp.*, 962 F.2d 108 (1st Cir. 1992). In both cases, the courts held that citizens who claimed a generalized interest in the protection of the environment did not have standing to challenge government decisions, in one case about the protection of endangered species, and in the other case about the clean-up of a harbor. This case is nothing like *Lujan* or *AVX*.[7]

[7] Nor is it like the other cases cited by Deepwater, in which plaintiffs claimed only an abstract or unidentified injury. *See Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 211 (U.S. 1974) ("The only interest all citizens share in the claim advanced by respondents is one which presents injury in the abstract."); *United States v. Richardson*, 418 U.S. 166, 177 (U.S. 1974) ("[The plaintiff] has not alleged that, as a taxpayer, he is in danger of suffering any particular concrete injury as a result of the operation of this statute."); *Conservation Law Found. v. Reilly*, 950 F.2d 38, 41 (1st Cir. Mass. 1991) ("The injury alleged by plaintiffs is 'the increased threat to public health and natural resources from exposure to contaminants from the unevaluated facilities.'"); *Charlestown v. United States*, 696 F. Supp. 800, 808 (D.R.I. 1988) ("it appears that the only grievance that the residents assert is that the contested legislation will affect the quality of life in the town in which they reside."); *Moncier v. Haslam*, 570 Fed. Appx. 553, 557 (6th Cir. Tenn. 2014) ("'[Plaintiff] was pursuing this litigation on behalf of the people of Tennessee to make a point about the manner in which appellate court judges are selected and retained.'")

In this case, Plaintiffs are claiming they will incur a distinct economic injury caused by the PUC's decision to impose a $497 million above market cost on certain (not all) Rhode Island electric ratepayers. This is precisely the kind of concrete, particularized, actual and imminent economic injury that the courts have recognized confers Article III standing. *Adams v. Watson*, 10 F.3d 915, 920-921 (1st Cir. 1993) ("Although at the pleading stage 'injury-in-fact' need not entail currently realized economic loss, Article III standing in the commercial context must be premised, at a minimum, on particularized future economic injury which, though latent, nonetheless qualifies as 'imminent.'").

Applying the test for standing laid out by the Supreme Court in *Los Angeles v. Lyons*, 461 U.S. 95, 101-02 (1983), the plaintiffs here are threatened with an invasion of a legally protected interest that is "concrete and particularized" ($1,000 on average for each mainland Rhode Island ratepayer, and much more for businesses) as well as "actual or imminent" (now that the permits and financing for the Wind Farm have been secured, construction has begun and higher electric bills will start soon). There is a causal connection between the injury claimed and the challenged conduct of the defendants, that is, the plaintiffs will incur this economic injury due to defendants' decision to impose the $497 million in above market power costs on them. Moreover, that economic injury is redressable through the relief that is sought in this Court, that is, if implementation of the Power Purchase Agreement is enjoined, the $497 million in above market power costs will not be imposed.

This is a case in which the claimed injury is "shared by many others," but is not "common to everyone." *See Dubois v. United States Dep't of Agriculture*, 102 F.23

1273, 1281 (1st Cir. 1996), distinguishing *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669, 697-88 (1973), from *Warth v. Seldin,* 412 U.S. 490, 499 (1975). As the Court explained in *Hein v. Freedom from Religion Found., Inc.,* 551 U.S. 587, 599 (2007):

> As a general matter, the interest of a federal taxpayer in seeing that Treasury funds are spent in accordance with the Constitution does not give rise to the kind of redressable "personal injury" required for Article III standing. [On the other hand], a taxpayer has standing to challenge the collection of a specific tax assessment as unconstitutional; being forced to pay such a tax causes a real and immediate economic injury to the individual taxpayer.

Like the taxpayer described in *Hein*, the plaintiffs here have standing to contest the increase in electrical rates being imposed on them under the PPA.

B. Plaintiffs' Claims are Within the Zone of Interest of the FPA, PURPA, and the Constitution.

Contrary to Deepwater's contention, plaintiffs are also within the "zone of interest" of the statutes and constitutional provisions upon which they rely. Both the FPA and PURPA contain provisions expressly designed to protect consumers of electricity, like the plaintiffs. Indeed, one of the express purposes of PURPA was to ensure that the rates charged to ratepayers for alternative energy be "just and reasonable" and "in the public interest." 16 U.S.C. §824a-3(a); 18 CFR 292.304(a)(i). The same is true of the FPA. *See* 16 U.S.C. § 824d(a)(FPC requires that electric rates be "just and reasonable"); *Potomac-Appalachian Transmission Highline, LLC*, 140 FERC ¶ 61,229 (2011)(observing, in upholding the standing of two pro se ratepayers, whose only standing was as consumers, "[a]ny person may file a complaint seeking Commission action against any other person alleged to be in contravention or violation of any statute, rule, order, or other law administered by the Commission, or for any other alleged wrong

over which the Commission may have jurisdiction"). *See also* 16 USC § 2631 ("any electric consumer of an affected electric utility may intervene and participate as a matter of right in any ratemaking proceeding or other appropriate regulatory proceeding relating to rates").

Likewise, plaintiffs have a clear economic interest in the market system for wholesale energy that FERC has created. This interest has already been recognized in two federal circuit decisions, upon which the plaintiffs base their claims. *PPL EnergyPlus, LLC v. Solomon*, 766 F.3d 241 (3rd Cir. 2014); *PPL EnergyPlus, LLC v. Nazarian,* 753 F.3d 467 (4th Cir. 2014)(both striking down rulings of state utility commissions requiring local utilities to purchase energy and capacity from particular in-state generators at long-term fixed prices, and then allowing the local utilities to re-sell that energy and capacity at wholesale in FERC-regulated regional auctions, and charge state ratepayers the considerable difference between the fixed price paid to the in-state generators and the lesser amount received in wholesale auctions). *See also PPL EnergyPlus, LLC v. Solomon*, 2011 U.S. Dist. LEXIS 120748, *13 (D.N.J. Oct. 19, 2011) (trial court decision holding that interference with the FERC market for wholesale energy is sufficient to show an injury because the "consequential injuries they anticipate are more than uncertain possibilities.").

With respect to plaintiffs' standing to assert claims under the Commerce Clause, it is such settled law that Deepwater's brief does not even challenge it. *See GMC v. Tracy*, 519 U.S. 278, 286 (U.S. 1997) ("[C]ognizable injury from unconstitutional discrimination against interstate commerce does not stop at members of the class against whom a State ultimately discriminates, and customers of that class may also be injured").

This is true both for individual consumers of electricity and business consumers. *See Houlton Citizens' Coalition v. Town of Houlton*, 175 F.3d 178, 183, 1999 (1st Cir. 1999)("Thus, an in-state business which meets constitutional and prudential requirements due to the direct or indirect effects of a law purported to violate the dormant Commerce Clause has standing to challenge that law."). As the First Circuit stated in *Harvey v. Veneman*, 396 F.3d 28, 34 (1st Cir. 2005):

> It is well established that consumers injured by impermissible regulations satisfy Article III's standing requirements. See *GMC v. Tracy*, 519 U.S. 278, 286, 136 L. Ed. 2d 761, 117 S. Ct. 811 (1997) ("Consumers who suffer [higher costs] from regulation forbidden under the Commerce Clause satisfy the standing requirements of Article III."); *Baur v. Veneman*, 352 F.3d 625, 628, 641-42 (2d Cir. 2003) (finding cognizable injury in fact where consumer alleged that USDA regulations permitting use of downed livestock for human consumption caused him increased risk of contracting food-borne illness).

C. RIMA Has Standing

While it is not necessary that RIMA have standing,[8] there is no question that it does. A membership organization may assert the claims of its members, provided that one or more of its members would satisfy the individual requirements for standing in his or its own right. *See UAW v. Brock*, 477 U.S. 274, 281-82 (1986). In this case, "[t]he electricity rates of numerous members of RIMA, including, for example, the electricity rates of members Toray Plastics, Inc. and Materion Technical Materials, Inc., will be adversely affected if the PUC's Order approving the PPA between National Grid and Deepwater Wind is implemented, …." Complaint ¶ 5. Thus, RIMA has standing to assert its member's interests.

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[8] In *Washington Legal Found. v. Massachusetts Bar Found., 993 F.2d 962, 971-72 (1st Cir. 1993)*, the First Circuit held that the court need not determine the standing of all plaintiffs if at least one plaintiff has standing to maintain each claim.

Conclusion

For the foregoing reasons, the plaintiffs respectfully request that the Court deny Deepwater's motion, in which National Grid joined.

Respectfully submitted,

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Certificate of Service

I, Andrew Rainer, hereby certify that, on this 4th day of December, 2015, the foregoing was served on all counsel of record through the Court's electronic filing system.

Andrew Rainer