# United States Court of Appeals
# For the First Circuit

No. 16-2083

BENJAMIN RIGGS; LAURENCE EHRHARDT; and
RHODE ISLAND MANUFACTURERS ASSOCIATION,

Plaintiffs – Appellants

v.

MARGARET CURRAN, PAUL ROBERTI, and HERBERT DESIMONE, JR., in their official capacity 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 – Appellees

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**Appeal from the United States District Court**
**For the District of Rhode Island**

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**APPELLANTS' BRIEF**


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## CORPORATE DISCLOSURE STATEMENT

Appellant Rhode Island Manufacturers Association is a non-profit trade association and, as such, does not have a corporate parent or a shareholder that owns more than 10% of its stock.

## STATEMENT OF JURISDICTION

A. The District Court had jurisdiction over Appellants' claims arising under the Constitution and laws of the United States pursuant to 28 U.S.C. § 1331, had jurisdiction over Appellants' claims under 42 U.S.C. 42 U.S.C. § 1343, and had jurisdiction over Appellants' claims under the Federal Power Act and under the Public Utility Regulatory Policies Act of 1978 under 16 U.S.C. § 825p and 824a(3)(h)(2).

B. This Court has jurisdiction over this appeal under 28 U.S.C. § 1291, as it is an appeal from a final judgment of a District Court dismissing all of Appellants' claims with prejudice.

C. The District Court entered Judgment dismissing all of Appellants' claims with prejudice on July 22, 2016. Appellants filed a Notice of Appeal within 30 days, on August 15, 2016.

## STATEMENT OF ISSUE ON APPEAL

The issue on appeal is whether the District Court for the District of Rhode Island erred in holding that the Appellants' claims were barred by the statute of limitations. Appellants assert that their claims are not time barred because: 1) their claims did not accrue until, at earliest, September 2014, and therefore were not barred when brought in August 2015 by any statute of limitations; and 2) the applicable statute of limitations was 5 years, not 3 years, as held by the District Court.

## STATEMENT OF THE CASE

In 2009, the Rhode Island General Assembly enacted legislation designed to foster the development of renewable energy sources in the state. P.L. 2009 ch. 53 §1-1 (Addendum, hereinafter "Add.", at 17). At the urging of then-Governor Donald Carcieri, the legislation also included a special provision 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. 2009 ch. 53 §1-7 (Add. 17-18.) There was only ever one entity that bid to build this specially designated wind farm, Appellee Deepwater Wind Block Island ("Deepwater"), which later proceeded to hire Governor Carcieri's Chief of Staff to be its CEO.

Deepwater proposed a method to pay for the energy produced by this specially favored (some might call it "sweetheart") facility that entailed by-passing the competitive auction for energy mandated by the Federal Energy Regulatory Commission ("FERC"), and imposing the above-market cost of that energy on mainland Rhode Island ratepayers over 20 years -- to the tune of almost $500 million.[1]

These facts are directly analogous to those faced by the Fourth Circuit Court of Appeals, and then by the Supreme Court, in the case of *PPL Energyplus, LLC v. Nazarian,* 753 F.3d 467 (3rd Cir. 2014), *aff'd sub nom. Hughes v. Talen Energy Marketing, LLC,* 136 S.Ct. 1288 (2016). In that case, the Maryland Legislature enacted legislation designed to encourage the development of a particular, favored in-state power plant, and the state then proposed to require Maryland ratepayers to pay the large above market cost of the energy produced by this favored facility, again by-passing the prices set in the FERC-mandated competitive energy auction. In a unanimous decision, the Supreme Court held that, by attempting to set the wholesale

[1] When this rate structure was first presented to the members of the Rhode Island Public Utilities Commission ("PUC"), they balked at it, finding that it was not "commercially reasonable." Complaint ¶18 (A.016). In response, Governor Carcieri and the General Assembly changed the definition of "commercially reasonable" to be applied by the PUC solely for the Block Island Wind Farm project, P.L. 2010 ch. 32 (Add. 19), after which the PUC reluctantly gave its approval. Complaint ¶19, 21 (A. 016-017).

rate for the energy to be produced by the new facility, and doing so through a 20-year contract (like Deepwater's), Maryland had improperly contravened the exclusive jurisdiction over wholesale energy rates conferred by the Federal Power Act on FERC. 136 S.Ct. at 1297 ("the FPA allocates to FERC exclusive jurisdiction over 'rates and charges ... received ... for or in connection with' interstate wholesale sales. [16 U.S.C.] §824d(a). Exercising this authority, FERC has approved the PJM capacity auction as the sole ratesetting mechanism for sales of capacity . . . ).

In light of the decision in *Hughes*, there is little question that, if the District Court were to reach the merits of the present case, the result would be the same: Because the rate setting mechanism for the proposed Block Island Wind Farm by-passes the FERC-mandated auction for energy prices in New England, it violates the Federal Power Act, and must be struck down.

The question presented here is whether the District Court will ever reach the merits of this case, or whether Appellants' claims will be blocked at the courthouse door by an erroneous ruling that they are barred by the statute of limitations. The District Court erred in dismissing Appellants' claims because it did not correctly evaluate when the limitations period began to run, and which statute of limitations should apply.

## FACTUAL BACKGROUND

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 (Add. 17) 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. 2009 ch. 53, §1-1 (Add. 17). 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, §1-7 (Add. 17-18). 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." (Add. 18.) Complaint ¶15 (A. 015).

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 (A. 015-16).

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, 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 (A. 016).

The Order of the Rhode Island PUC

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 (A. 016).

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 (Add. 19-21). 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) (Add. 19). Complaint ¶19 (A. 016-017).

Fifteen days later, on June 30, 2010, National Grid and Deepwater Wind submitted to the PUC a revised PPA ("the PPA"). Complaint ¶20 & Ex. 3 (A. 017, 051). 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. Complaint Ex. 3, Letter of Ronald Gerwatowski dated June 30, 2010 & PPA Ex. E and App. X (A. 051, 120, 123). 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) (A. 075, 079). 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. Complaint ¶20; PPA, App. X (A. 017, 123).

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." Complaint ¶21 & Ex. 4, at 152 (A. 017, 282).

The PUC's Order was thereafter appealed by Rhode Island Attorney General Patrick Lynch and others to the Rhode Island Supreme Court, primarily on state law grounds, 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 (that had expired as of July 1, 2011), which was subsequently granted by the

PUC on January 24, 2012. Complaint ¶22 (A.018). 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 & Ex. 5 (A. 018, 297).

Conditions to the PUC's Order

Under the PUC's Order approving the PPA, numerous conditions had to be met before the $497 million above-market cost could be imposed on mainland Rhode Island ratepayers. These included, *inter alia:*

- Obtaining approval and a license from the Rhode Island Coastal Resources Management Council ("CRMC");
- Obtaining permits under the federal Rivers and Harbors Act and the federal Clean Water Act from the U.S. Army Corps of Engineers;
- Obtaining a Clean Air Act conformity determination and a general Stormwater Permit from the U.S. Environmental Protection Agency; and
- Obtaining approval from the Rhode Island Department of Transportation, the Rhode Island Division of Public Utilities and several municipal entities for laying the cable transmitting power from the Wind Farm to the mainland.

Complaint Ex. 4, at 12 & Ex. B (A. 076, 112-113).

Deepwater did not obtain approval to land its transmission cable at a state property on the mainland until December 4, 2013, after first attempting

and failing to obtain approval to land the cable in the Town of Narragansett. (A. 356-359.)

The U.S. Army Corps of Engineers did not issue permits to the Wind Farm until September 2014. Complaint ¶24 (A. 018, 338). The Rhode Island Coastal Resources Management Council did not vote on the Wind Farm project until June 13, 2014, and did not issue its approval and license until November 12, 2014. Complaint ¶23 (A. 018, 330).

It was only after Deepwater Wind obtained these approvals and obtained financing for construction of the Wind Farm that the imposition of above market costs on mainland Rhode Island ratepayers became imminent. Complaint ¶24 (A. 018). Indeed, 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" of the Wind Farm commences, and therefore the above market costs still have not been imposed on mainland Rhode Island ratepayers. Complaint ¶25 & Ex. 4, at 12-13 (A. 019, 076-077).

Impact on Appellants

Appellants 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 ultimately 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, 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 (A. 011,013).

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 ultimately

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,[2] not including the cost of the underwater cable from Block Island to the mainland, estimated at $110-120 million, or the required $19 million incentive payment to National Grid. Complaint ¶5 & Ex. 4, at 62 (A. 013, 192). The initial cost of the PPA to Rhode Island's 15 largest businesses is estimated at over $2 million. Complaint Ex. 4, at 153 (A. 283).

Riggs' Administrative Petitions

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, ¶3 & Ex. 1 (A. 011-012, 037). 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

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

Supremacy Clause of the United States Constitution. Complaint, ¶3 & Ex. 2 (A. 011-012, 043). 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 (A. 012, 309, 363). Contrary to Deepwater's contention, FERC did not "reject" Riggs' petitions.

## RULING OF THE DISTRICT COURT

Appellees filed a motion to dismiss the Appellants' claims on the grounds that they were barred by the applicable statute of limitations, which Appellees asserted was the 3-year statute of limitations applicable to

personal injury actions under Rhode Island law. In its Order granting Appellees' motion to dismiss, the District Court erroneously held that the statute of limitations on Appellants' claims began to run on August 16, 2010 when the PUC approved the PPA, and erroneously applied the 3-year statute of limitations for personal injury actions set forth in section 9-1-14 of the Rhode Island General Laws, instead of the 5-year statute of limitations for violations of federal statutes set forth in 28 U.S.C. § 2462. Memorandum and Order, at 5, 8-9 (Add. 5, 8-9). Both rulings were errors of law, reviewable *de novo* by this Court.

## SUMMARY OF ARGUMENT

The District Court erred in holding that the statute of limitations on Appellants' claims began to run on the date the Rhode Island Public Utilities Commission approved the Power Purchase Agreement for the Wind Farm in August 2010. Under well-established First Circuit precedent, the statute of limitations on Appellants' claims could not, and did not, begin to run until their claims became constitutionally "ripe." Under the specific conditions of the PUC's Order, Appellants faced "imminent" economic harm – and thus their claims became ripe -- only after the Wind Farm obtained the permits it required and the financing it needed to begin construction. This did not

occur until, at earliest, the fall of 2014, and therefore the filing of Appellants' Complaint in August 2015 was timely under any applicable statute of limitations.

The District Court also erred in holding that Appellants' claims are covered by Rhode Island's 3-year statute of limitations for personal injury claims. Appellants primary claim is a claim for violation of the Federal Power Act. When the Federal Energy Regulatory Commission has brought claims for enforcement of the Federal Power Act, it has invoked the 5-year statute of limitations set forth in 28 U.S.C. §2462. The District Court should have done the same.

## ARGUMENT

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

The first error of law made by the District Court was its holding that the statute of limitations began to run in this case on August 16, 2010, when the PUC issued the Order approving the Power Purchase Agreement for the Wind Farm. Memorandum and Order, at 9 (Add. 9). The Court based this ruling, in part, on a finding that the Appellants "admitted" in paragraph 1 of their Complaint that their harm occurred on the date of the PUC's Order. Memorandum and Order, at 8 (Add. 8). However, Appellants' Complaint made no such "admission." Their request in paragraph 1 of the Complaint to

have the PPA declared void was a statement of their request for a relief, not an "admission" of the trigger date for the statute of limitations. Complaint ¶ 1 (A. 010).[3] This is clear just by reading the paragraph.

Contrary to the District Court's finding, Appellants' Complaint specifically pled that their claims did not become concrete or "imminent" until September 2014, when Deepwater obtained the permits required by the Order approving the PPA, and the financing to build the project. Complaint ¶ 23-24 (A. 018). After noting that above-market energy costs had not yet been imposed on Appellants, the Complaint stated, "because construction of the Wind Farm now appears **imminent**, Plaintiffs are seeking prospective injunctive and declaratory relief **before the PPA is implemented**." Complaint ¶ 25 (A. 019)(emphasis added). In other words, Appellants asserted in their Complaint -- and assert now -- that their claims did not accrue until the harm to them became "imminent," that is, when Deepwater obtained financing and obtained the permits needed to begin construction of the Wind Farm. Complaint ¶24-25 (A.018-019).

[3] Indeed, the District Court's decision acknowledged that Appellants have not yet suffered actual, cognizable harm, when it stated, "The crux of Plaintiffs' claim is that Defendants' actions **will cause them** economic injury." Memorandum and Order, at 7 (Add. 7)(emphasis added). The operative phrase here is "will cause."

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). Whether an injury is "actual or imminent" is a question of "ripeness," the threshold for which has recently been elevated by this Court. In *Blum v. Holder*, 744 F.3d 790, 796 (1st Cir.), *cert. denied*, 135 S. Ct. 477, 190 L. Ed. 2d 358 (2014), this Court held that a threatened injury must be "certainly impending" in order to "ripe" for Article III standing.

In the present case, the harm to Appellants was not "certainly impending" and Appellants' claims did not become "ripe" until Deepwater obtained all of the permits required under the PUC Order and obtained financing needed to construct the Wind Farm. The statute of limitations on their claims could not have accrued before their claims became ripe. *See City of Fall River v. FERC,* 507 F.3d 1, 7 (1st Cir. 2007)(holding that a challenge to FERC approval of a proposed liquefied natural gas facility did not become ripe for judicial review, and the statute of limitations on that challenge did not begin to run until the project had been reviewed and approved by two other government agencies). Indeed, it has been held

repeatedly that a cause of action *cannot* accrue for statute of limitations purposes until the claim becomes ripe. "[B]ecause a constitutional injury is not complete until the claim becomes ripe, the statute of limitations cannot accrue before that point in time." *Asociacion De Suscripcion Donjunta Del Seguro de Responsabilidad Obligatorio v. Juarbe-Jimenez*, 659 F.3d 42, 51 (1st Cir. 2011); *Norco Constr., Inc. v. King County*, 801 F.2d 1143, 1146 (9th Cir.1986) (Kennedy, J.) ("[c]ourts have held consistently that a cause of action does not accrue until a party has a right to enforce the claim"); *Hensley v. City of Columbus,* 557 F.3d 693, 696–97 (6th Cir.2009) (holding that the statute of limitations accrues when a takings claim becomes ripe); *Biddison v. City of Chicago*, 921 F.2d 724, 728 (7th Cir.1991) (following *Norco*).[4]

There is a strong argument, under Rhode Island law, that Appellants' claims have not yet become ripe and will not become ripe until Appellants are actually charged for the above-market cost of energy from the Wind

[4] In *Asociacion,* this Court held that a claim of constitutional taking became ripe when the law that appellants claimed effected a facial taking was first passed; however, the Court distinguished the situation of a facial taking from the situation where additional steps are needed in order for a challenged law to actually harm appellants, noting that there is "an important distinction between a claim that the mere enactment of a statute constitutes a taking and a claim that the particular impact of government action on a specific piece of property requires the payment of just compensation." 659 F.3d at 49, quoting *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 494, 107 S.Ct. 1232, 94 L.Ed.2d 472 (1987)(emphasis added).

Farm. In *Paul v. City of Woonsocket*, 745 A.2d 169, 172 (R.I. 2000), the Rhode Island Supreme Court held that the statute of limitations for a constitutional challenge to a "tapping fee" imposed by the City of Woonsocket for connections to the City's water system did not begin to run until the fee was actually charged, not when the ordinance imposing the fee was passed. The District Court in the present case declined to follow the ruling in *Paul*, noting that it would allow a constitutional challenge to be brought after the defendant had already "expend[ed] tens or hundreds of millions of dollars constructing a new power plant," and that this "would make little sense from a policy or economic perspective." Memorandum and Order, at 9-10 (Add. 9-10).[5]

Notably, Appellants in this case did not wait until they received higher electric bills to raise their constitutional challenge. Rather, they waited to do so only until the higher electric bills were "certainly impending." As such, they are asking this Court to adopt the approach, not of *Paul*, but its own precedents in *Blum* and *City of Fall River,* and give weight to the competing policy perspective encompassed in the doctrine of ripeness. That competing

[5] The District Court also drew a false distinction between this case and *Paul*, asserting that the statute of limitations accrued in *Paul* only when the city ordinance enacting the tapping fee was "enforced" against ratepayers. Memorandum and Order, at 10 (Add. 10). There is, however, nothing different in this case. Appellants will not actually be harmed until the PPA's above-market charge for energy is "enforced" against them.

policy perspective is that courts should not decide cases unless it is "certainly" necessary for them to do so. As aptly stated in the Wright & Miller treatise:

> Ripeness doctrine serves the same general purposes as other branches of justiciability theory. The central perception is that courts should not render decisions absent a genuine need to resolve a real dispute. Unnecessary decisions dissipate judicial energies better conserved for litigants who have a real need for official assistance. As to the parties themselves, courts should not undertake the role of helpful counselors, since refusal to decide may itself be a healthy spur to inventive private or public planning that alters the course of possible conduct so as to achieve the desired ends in less troubling or more desirable fashion.

13B Wright & Miller, Fed. Prac. & Proc. § 3532.1 (3d ed. 2016)(footnotes omitted). This Court expressed a similar perspective in *City of Fall River v. FERC,* 507 F.3d 1, 6 (1st Cir. 2007), when it stated:

> the prospect of entangling ourselves in a challenge to a decision whose effects may never be "felt in a concrete way by the challenging parties," *Abbott Labs.,* 387 U.S. at 148–49, 87 S.Ct. 1507, is an especially troublesome one. We have explained that "premature review not only can involve judges in deciding issues in a context not sufficiently concrete to allow for focus and intelligent analysis, but it also can involve them in deciding issues unnecessarily, wasting time and effort." *W.R. Grace & Co. v. EPA,* 959 F.2d 360, 366 (1st Cir.1992) (internal quotation marks and citation omitted). As such, a "claim is not ripe for adjudication if it rests upon 'contingent future events that may not occur as anticipated, or indeed may not occur at all.' " *Texas v. United States,* 523 U.S. 296, 300, 118 S.Ct. 1257, 140 L.Ed.2d 406 (1998) (quoting *Thomas v. Union Carbide* ***7** *Agric. Prods. Co.,* 473 U.S. 568, 580–81, 105 S.Ct. 3325, 87 L.Ed.2d 409 (1985)).

At the time of the PUC Order approving the Power Purchase Agreement in 2010, the Appellants in this case had not yet suffered either "actual" or "imminent" injury. In 2010, there were still numerous conditions that had to be met, and numerous additional processes that needed to be completed before the Power Purchase Agreement could ever be implemented. Put another way, in 2010, Appellants' electric bills had not been increased, nor was such an increase "imminent" or "certainly impending."

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 "[p]ermits related to environmental matters . . . ." Complaint, Ex. 3, at 12 (A. 076). These included, among numerous others, permits by the Rhode Island Coastal Resources Management Council ("CRMC") and the Army Corps of Engineers. *Id.* Ex. B (A. 112-113). Deepwater did not even apply for permits from the CRMC or the Army Corps of Engineers until 2012, did not receive a vote from the CRMC until June 2014, and did not receive Army Corps of Engineers' approval until September 2014. Complaint ¶¶ 23-24 (A. 018, 313, 338).

Another condition precedent to the PPA was that a transmission cable from Block Island to the mainland had to be "completed and placed in service and [be] operable, with all Permits and real property rights and other site control rights needed to own and operate the Transmission Cable being held by the owner of the Transmission Cable." Complaint, Ex. 3, at 13 (A. 077). The transmission cable ran into a roadblock when the Town of Narragansett denied the cable's proposed landing site, and additional hurdles followed. (A. 356-357, 358-359). Yet another hurdle was a separate PUC proceeding whereby National Grid sought authority to charge mainland Rhode Island ratepayers for the excess costs of the wind farm through a monthly "distribution charge." Report and Order in Docket No. 4338 (A. 299-308.) Until that decision was rendered on October 25, 2012 (less than three years before this case was brought), Appellants were not facing an actual or even "imminent" excess energy charge.

Nor, until 2015, did Deepwater have financing for the Wind Farm. Complaint ¶ 24 (A. 018). The PUC was told not to expect financing until the project was "fully permitted." Complaint, Ex. 4, at 98 (A.228). The demise of the Cape Wind project shows just how critical financing is to a wind farm project. In *Town of Barnstable v. O'Connor*, 786 F.3d 130, 141 (1st Cir. 2015), this Court reversed the dismissal of a challenge the Cape

Wind project, similar to the challenge asserted in this case. The subsequent failure of the financing of the Cape Wind project, however, ultimately rendered nugatory all of the Court's work on the matter.[6]

It was only when all the permits were issued, and the financing was put in place, and construction was ready to begin that the harm to the Appellants became "imminent." *See City of Fall River v. FERC,* 507 F.3d 1, 7 (1st Cir. 2007)(holding that a challenge to a decision by FERC approving a proposed liquefied natural gas facility was not ripe for judicial review "because FERC's approval of the project is expressly conditioned on approval by the [U.S. Coast Guard] and the [Department of Interior]," neither of which had yet given its approval to the project); *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").

Contrary to the suggestion of the District Court, Appellants did not sit on their hands waiting until they got their first bill before bringing suit.

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[6] In light of what happened to the Cape Wind project, it would have been an enormous waste of judicial time and resources for the District Court 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.

Believing that their claims were not yet ripe for litigation – and also hoping to avoid litigation, as the ripeness doctrine contemplates – the Appellants consistently involved themselves in each of the permitting processes for the wind farm. Appellants repeatedly submitted letters opposing the permits, arguing, among other things, that the PUC Order violated federal law and the Constitution.

In December of 2013, Riggs wrote to the Rhode Island Coastal Resources Management Council ("CRMC"), objecting to its issuance of a permit for the Wind Farm, again citing federal constitutional and statutory violations. *See* Riggs Letter of Dec. 19, 2013 to CRMC (A. 310). Riggs also wrote to the U.S. Army Corps of Engineers objecting to its issuance of a permit and again asserted that the project violated federal law and the U.S. Constitution. *See* Riggs Letter dated Dec. 18, 2013 to Army Corps (A. 332). Riggs and others appeared before the Narragansett Town Council, and successfully urged the Council to reject the proposed landing site for the transmission cable for the Wind Farm. Vote of Town Council of Town of Narragansett, dated Aug. 1, 2013 (A. 357). The project moved forward after the only other viable landing site (on state property) was approved, and then only after additional permissions could be obtained from the State Properties Committee and federal authorities. Minutes of the State Properties

Committee of Dec. 4, 2013 (A. 358). Appellants Riggs, Ehrhardt, and RIMA also brought their Constitutional and federal law concerns to several permitting authorities in person. Appellants spoke before the CRMC, the Rhode Island Department of Environmental Management, the Rhode Island State Properties Committee, and the United States Bureau of Land Management.

Riggs also continued his efforts to bring to the attention of the PUC the constitutional rulings being handed down in *PPL EnergyPlus, LLC v. Nazarian*, 753 F.3d 467, 476 (4th Cir. 2014), and a companion case, *PPL EnergyPlus v. Solomon*, 766 F.3d 241, 250 (3rd Cir. 2014). These cases provided further support for Plaintiffs' contention that the action of the PUC contravened federal law and the Constitution, in particular the FPA and the Supremacy Clause. Plaintiff Riggs brought this constitutional development to the attention of the PUC in January 2015, and asked it to take action. Riggs Letter dated Jan. 13, 2015 to PUC (A. 361). Riggs also filed another formal complaint with the FERC on April 21, 2015. In this complaint, Riggs identified the FPA and Supremacy Clause claims relied on in *Nazarian* and *Solomon* as additional bases for invalidating the action of the PUC. Complaint, Ex. 2 (A. 043). The FERC again declined to take action, and again instructed that "Mr. Riggs himself may bring an enforcement action

against the Rhode Island Commission in the appropriate court." Complaint, ¶3 and Notice of Intent Not to Act (A. 012, 363).

In their advocacy, Appellants consistently noted the alternative of going to U.S. District Court to litigate their concerns (e.g. A. 312, 360), but truly would have preferred that a public body from Rhode Island or the federal government address the federal law and constitutional questions they were raising. Appellants repeatedly urged numerous public bodies, including FERC, to undertake just such a course of action, which arguably would have been more administratively efficient. It was only after exhausting all these avenues, only after all the permits were issued, only after the financing was in place, and only when construction was ready to begin that Appellants' harm became "certainly imminent." It was only then that their claims became ripe; it was only then that the statute of limitations accrued; and it was then that Appellants timely filed their Complaint with the District Court.

The statute of limitations on Appellants' claims did not, and could not, accrue until those claims became ripe – until the harm to Appellants was "certainly impending" -- and the District Court's first error was holding that it did.

### 2. The Applicable Statute of Limitations is Five Years

The District Court's second error of law was to apply the 3-year statute of limitations applicable to personal injury actions in Rhode Island, rather than the 5-year statute of limitations applicable to the enforcement of federal statutes. The District Court purported to reach this result by applying the principle enunciated by the Supreme Court in *Wilson v. Garcia*, 471 U.S. 261 (1985), that "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." 471 U.S. at 266-67. Memorandum and Order, at 3-4 (Add. 3-4). Here, however, Congress has established an applicable time limitation, and the application of a shorter state statute of limitations is inconsistent with federal law and policy.

Appellants' core claim in this case arises under the Federal Power Act, that is, that the Rhode Island PUC violated the exclusive jurisdiction consigned by the Federal Power Act to FERC when it attempted to set a wholesale electric power rate. Given this core claim, what more logical statute of limitations should a Court use than the statute of limitations that FERC itself has used when it has sought to enforce the FPA?

The 5-year statute of limitations set out in 28 U.S.C. § 2462 is the statute of limitations that FERC itself has applied to actions brought under the FPA. *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); *Prohibition of Energy Market Manipulation,* 114 F.E.R.C. ¶ 61,047, at 62 (2006)(stating FERC's view that section 2642 is the statute of limitations that applies to actions under the Federal Power Act). In its decision, the District Court distinguished these cases from the present case on the grounds that they are "government enforcement cases." Memorandum and Order, at 4 (App. 4). Appellants argue that this Court should follow these cases precisely because they are cases in which FERC has enforced the Federal Power Act, as Appellants are asking the Court to do in their case.

Section 2462 is, likewise, the statute of limitations that federal courts have applied when enforcement has been sought by private parties of not only the FPA, but numerous other federal statutes. *See 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); *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).

Application of the shorter, 3-year statute of limitations for personal injury actions under Rhode Island law is also "inconsistent" with important federal law and policy considerations applicable to this case. As discussed above, earlier this year, in *Hughes v. Talen Energy Marketing, LLC,* 136 S.Ct. 1288, 1297 (2016), the Supreme Court unanimously held that, by attempting to set the wholesale rate for the energy to be produced by a specially designated new facility, Maryland had improperly contravened the exclusive jurisdiction over wholesale energy rates conferred by the Federal Power Act on FERC. This important principle of pre-emption is directly applicable to this case, and should be applied to this case. It should not be shunted aside by the questionable application of a state statute of limitations

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, this case was brought less than five years after that.

## CONCLUSION

For all of the foregoing reasons, the District Court erred in dismissing Appellants' claims under the statute of limitations, and the judgment of dismissal should be reversed and remanded.

Respectfully submitted,

/s/ Andrew A. Rainer

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November 30, 2016

## CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

In conformity with Fed. R. App. P. 32(a)(7), the undersigned states that Appellant's Brief is in compliance with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B)(i). In this regard, according to the word count of the word processing system used to prepare the Brief, the number of words in the Brief is 6,786.

*/s Andrew Rainer*_____

## CERTIFICATE OF SERVICE

I hereby certify that on November 30, 2016, I electronically filed the foregoing document with the United States Court of Appeals for the First Circuit by using the CM/ECF system. I certify that the following parties or their counsel of record are registered ECF filers and they will be served by the CM/ECF system:

| | |
|---|---|
| Gerald Petros<br>Adam Ramos<br>Robin-Lee Main<br>Hinckley, Allen & Synder LLP<br>100 Westminster Street<br>Providence, RI 02903 | representing Deepwater Wind Block Island LLC |
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| Leo Wold<br>Assistant Attorney General<br>150 South Main Street<br>Providence, RI 02903 | representing Curran, Roberti and DeSimone |

*/s Andrew Rainer*_____

# ADDENDUM

## ADDENDUM TABLE OF CONTENTS

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

| | | |
|---|---|---|
| BENJAMIN RIGGS, LAURENCE EHRHARDT, and RHODE ISLAND MANUFACTURERS ASSOCIATION, | ) | |
| Plaintiffs, | ) | |
| v. | ) | C.A. No. 15-343 S |
| 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. | ) | |

**MEMORANDUM AND ORDER**

WILLIAM E. SMITH, Chief Judge.

Before the Court are Motions to Dismiss filed by Defendant Deepwater Wind Block Island, LLC ("Deepwater Wind") (ECF No. 14)[1] and Defendants Margaret Curran, Paul Roberti, and Herbert DeSimone, Jr., in their official capacities as members of the Rhode Island Public Utilities Commission (collectively, the "PUC Defendants") (ECF No. 21). Plaintiffs filed Oppositions (ECF Nos. 22 and 23), and Deepwater Wind and the PUC Defendants both filed

[1] Defendant Narragansett Electric Company, Inc. d/b/a National Grid joined in Deepwater Wind's Motion to Dismiss. (ECF No. 15.)

Replies (ECF Nos. 28 and 29). Additionally, the parties filed post-hearing memoranda. (ECF Nos. 37, 38, 39, and 40.) For the reasons that follow, Defendants' Motions to Dismiss are GRANTED.

## I. Background

Plaintiffs are suing the PUC Defendants, Narragansett Electric Company, Inc. d/b/a National Grid ("National Grid"), and Deepwater Wind for injunctive and declaratory relief. They claim that the PUC Defendants violated the Federal Power Act ("FPA"), the Public Utility Regulatory Policies Act ("PURPA"), and the Supremacy Clause and Commerce Clause of the United States Constitution, when they issued an order on August 16, 2010, approving a power purchase agreement ("PPA") between Deepwater Wind and National Grid related to a new wind farm off the coast of Block Island (the "PUC's Order"). According to Plaintiffs, this agreement has above-market costs, which are in violation of the Federal Energy Regulatory Commission's ("FERC") policies, and will result in a significant increase in their electric bills. Prior to filing this action, Plaintiffs twice petitioned FERC to initiate an enforcement action on the grounds that the PUC's Order violated the FPA, PURPA, and the Supremacy Clause of the United States Constitution. FERC declined to act on either petition, and Plaintiffs filed their Complaint in this Court one day short of five years from the date of the PUC's Order, on August 15, 2015. Defendants have moved to dismiss, arguing that the statute of

limitations has expired and that Plaintiffs do not have standing. The PUC Defendants further argue that they are shielded by quasi-judicial immunity.

II. Discussion

The parties first dispute which statute of limitations applies to this action. Deepwater Wind asserts that the Court should apply Rhode Island's three-year personal injury statute of limitations, while Plaintiffs contend that the appropriate limitations period is five years pursuant to 28 U.S.C. § 2462, which they claim applies to the "enforcement of federal statutes." (Pls.' Opp'n to Deepwater Wind's Mot. 12, ECF No. 22.)

As an initial matter, Plaintiffs' § 1983 claims are clearly governed by the three-year statute of limitations. See, e.g., Rodriguez v. Providence Police Dep't, C.A. No. 08-03 S, 2011 U.S. Dist. LEXIS 2657, *10 (D.R.I. Jan. 11, 2011) (stating that claims brought under 42 U.S.C. § 1983 are "subject to Rhode Island's three-year statute of limitations for personal injury actions"). The other causes of action present a closer question, but, ultimately, for the reasons outlined below, the Court agrees with Defendants that the Rhode Island personal injury statute of limitations should apply to those claims as well.

"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." Barrett ex rel. Estate of Barrett v. United States, 462 F.3d 28, 38 (1st Cir. 2006) (quoting Wilson v. Garcia, 471 U.S. 261, 266-67 (1985)). The question here is whether Plaintiffs' claims fall under the federal five-year statute of limitations set out in 28 U.S.C. § 2462, or whether the Court must look to the state law analog.

By its own text, 28 U.S.C. § 2462 applies only to "the enforcement of any civil fine, penalty, or forfeiture," not all federal statutes; and Plaintiffs here do not seek to enforce a "civil fine, penalty, or forfeiture." All of the cases that Plaintiffs cite are either: 1) cases where the parties agreed that the statute of limitations in § 2462 applied;[2] 2) government enforcement actions;[3] or 3) citizens' suits brought to enforce statutes where the citizens "stood in the shoes" of the

[2] See Fed. Energy Regulatory Comm'n v. Barclays Bank PLC, 105 F. Supp. 3d 1121, 1131 (E.D. Cal. 2015), as amended (May 22, 2015) ("The parties agree that the applicable statute of limitations is governed by 28 U.S.C. § 2462 . . . ."); Tri-Dam v. Schediwy, 2011 U.S. Dist. LEXIS 146789, *15 (E.D. Cal. Dec. 21, 2011) ("The parties have identified 28 U.S.C. § 2462 as a relevant federal statute of limitations.").

[3] See 3M Co. (Minnesota Min. & Mfg.) v. Browner, 17 F.3d 1453, 1455-60 (D.C. Cir. 1994) (applying § 2462 to an administrative civil penalty case brought by the Environmental Protection Agency); Barclays Bank, 105 F. Supp. 3d at 1131-33 (applying § 2462 to FERC Petition); Fed. Election Comm'n v. Nat'l Right to Work Comm., Inc., 916 F. Supp. 10, 13 (D.D.C. 1996) (applying § 2462 to claim for civil penalties by the Federal Election Commission).

government.[4] (See Deepwater Wind's Reply 5-7, ECF No. 29.) This action does not fall into any of these categories. Plaintiffs cite no case in which the § 2462 statute of limitations has been used instead of a state law statute of limitations (absent agreement of the parties) in a case like this.

Simply put, this suit is not an enforcement action or citizens' suit. Plaintiffs' reliance on a statement in FERC's Notice that its decision "means that Mr. Riggs himself may bring an enforcement action against the Rhode Island Commission in the appropriate court" is incorrect. (See Pls.' Post-Hearing Mem. 4, ECF No. 37.) As Defendants correctly note, "[t]his boilerplate language, which is specific to actions under PURPA, does not and cannot alter the true nature of Plaintiffs' complaint: they allege personal injury from violations of federal statutes and the

[4] See Trawinski v. United Techs., 313 F.3d 1295, 1298 (11th Cir. 2002) ("Section 2462 by its text is generally applicable to 'proceedings for the enforcement of any civil fine,' and the Trawinskis' citizen suit under the EPCA is precisely this sort of action."); Nat'l Parks Conservation Ass'n, Inc. v. Tennessee Valley Auth., 480 F.3d 410, 414-15 (6th Cir. 2007) (applying the five-year statute of limitations under § 2462 because plaintiff brought suit pursuant to provision in statute allowing citizens to enforce statute to assess civil penalties); Sierra Club v. Chevron U.S.A., Inc., 834 F.2d 1517, 1520-22 (9th Cir. 1987) (explaining rationale for applying § 2462 to citizens' enforcement suits is that "in those suits citizen plaintiffs effectively stand in the shoes of the" government agency and "the citizen plaintiff does not personally benefit from bringing the action"); Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York, 451 F.3d 77, 88 n.14 (2d Cir. 2006) (relying on Sierra Club to apply statute in substantially similar circumstances).

Constitution; they do not challenge a FERC order or seek to enforce a FERC requirement." (Deepwater Wind's Post-Hearing Mem. 3, ECF No. 39.) Because Plaintiffs do not seek to enforce a "civil fine, penalty, or forfeiture," the Court finds that 28 U.S.C. § 2462 does not apply, and it must look to an appropriate analog under state law.

Rhode Island law takes an expansive view of "injury":

> [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 Ref. Corp. v. Miner, 199 A.2d 606, 610 (R.I. 1964). The Rhode Island Supreme Court has used this definition of "injury" to apply the three-year limitations period to an action involving utility costs. See Paul v. City of Woonsocket, 745 A.2d 169, 172 (R.I. 2000). In Paul, the plaintiffs contended that a tapping fee for water service connection to the city's water distribution main constituted an impermissible tax. The Court found this to be an economic injury and applied the three-year statute of limitations; in doing so, it rejected the plaintiffs' argument that it should apply the limitations period set out in 9 R.I. Gen. Laws § 9–1–

13(a), which provides that "[e]xcept as otherwise specially provided, all civil actions shall be commenced within ten (10) years next after the cause of action shall accrue, and not after." Id. at 172. This Court has likewise used the definition of "injury" established in Commerce Oil to apply the three-year personal injury statute of limitations – rather than the limitations period for a breach of contract - to claims alleged under 42 U.S.C. § 1981, which "prohibits racial discrimination in the making and enforcement of private contracts." Partin v. St. Johnsbury Co., 447 F. Supp. 1297, 1300 (D.R.I. 1978). Furthermore, the First Circuit has applied a state tort law three-year statute of limitations to a PURPA action. See Greenwood ex rel. Estate of Greenwood v. New Hampshire Pub. Utilities Comm'n, 527 F.3d 8, 14 (1st Cir. 2008) ("Greenwood's claim is most analogous to a New Hampshire law claim of tortious interference with contractual relations, that is, that the PUC rescission order interfered with Greenwood's advantageous contractual relationship with PSNH. Such a claim is governed by New Hampshire's general three-year statute of limitations.").

The crux of Plaintiffs' claim is that Defendants' actions will cause them economic injury. There is no indication in § 2462 or the cases cited by Plaintiffs that it would be "inconsistent with federal law or policy," Barrett, 462 F.3d at 38, to impose the three-year Rhode Island statute of limitations for personal

injury. Accordingly, the Court finds that the three-year personal injury statute of limitations applies to this action.

The next dispute is when the statute of limitations began to run. Plaintiffs argue that, even if the three-year statute of limitations applies, the period did not begin to run until September 2014 at the earliest — the date that Deepwater Wind obtained the permits needed under the PPA; according to Plaintiffs, this is when the harm became "imminent." Plaintiffs claim they did not have a viable cause of action prior to this date. Yet this assertion appears to be belied by the very first paragraph of Plaintiffs' Complaint, which states what they seek: "a declaration that the PUC's Order dated August 16, 2010 . . . violates the [FPA], [PURPA], the Supremacy Clause of the United States Constitution, the Commerce Clause of the United States Constitution, and 42 U.S.C. § 1983." (Compl. ¶ 1, ECF No. 1 (emphasis added).) By Plaintiffs' own admission then, the date of the PUC's Order is the date the harm occurred, and therefore the appropriate trigger date for the statute of limitations.

As noted above, Plaintiffs try to get around this by claiming that the harm did not become "imminent" until September 2014, when Deepwater obtained the permits needed under the PPA; however, they cite no authority suggesting this can be a factor for a statute of limitations (as opposed to standing) analysis, nor do they show that the harm was not imminent when the PPA was approved. Indeed,

the September 2014 event seems somewhat arbitrarily chosen to fit them into the statute of limitations.

At oral argument, Plaintiffs pointed the Court's attention to the Rhode Island Supreme Court's decision in Paul, where a tapping fee was alleged to be an impermissible tax. See 745 A.2d at 172. There, the Court found that because "the alleged personal injury to the plaintiffs was the actual payment of the tapping fee[,] . . . the three-year statute of limitations began to accrue for each plaintiff upon individual payment of the tapping fee." Id. However, as Defendants point out, "the plaintiffs in Paul alleged their injury arose from enforcement of the ordinance requiring them to pay unconstitutional tapping fees. Here, Plaintiffs allege that the entry of the [PUC's Order] alone was the unlawful and unconstitutional action that caused their injury." (Deepwater Wind's Post-Hearing Mem. 11, ECF No. 39 (emphasis in original) (citation omitted)); see Paul, 745 A.2d at 172 ("In the instant matter, the plaintiffs assert that the adoption, implementation and enforcement of the city council's amendment to the 'Water and Sewers and Sewage Disposal' Ordinance caused each of them to suffer a personal injury." (emphasis added)). Moreover, giving such a broad reading to Paul in a case like this would make little sense from a policy or economic perspective. Paul was a fee case that, unlike the present matter, involved no investment of capital or construction of infrastructure. Plaintiffs' reading of Paul would

allow a defendant to expend tens or hundreds of millions of dollars constructing a new power plant only to file an action once the first electrical bill is received. This makes no sense.

Alternatively, Plaintiffs argue that the statute of limitations began to run after FERC declined to act on their petition. There is no dispute that the statute of limitations does not begin to run "when administrative remedies must first be exhausted." Aldahonda-Rivera v. Parke Davis & Co., 882 F.2d 590, 594 (1st Cir. 1989). The parties submitted supplemental briefing on whether exhaustion was required in this case.

Defendants admit that "certain claims must be raised before FERC," prior to being brought in federal court. (Deepwater Wind's Post-Hr'g Mem. 7, ECF No. 39.) For example, "PURPA requires administrative exhaustion for claims brought by qualified facilities that are attempting to enforce the requirements of § 824a–3(f)." Allco Fin. Ltd. v. Klee, 805 F.3d 89, 96 (2d Cir. 2015), as amended (Dec. 1, 2015). Here, however, "Plaintiffs do not challenge a FERC order or action – nor do they claim that a FERC rule has been violated. They claim that the RIPUC infringed upon FERC's exclusive jurisdiction to set wholesale rates when it approved the PPA." (Deepwater Wind's Post-Hr'g Mem. 8, ECF No. 39 (emphasis added) (citation omitted).) The United States Supreme Court has held that:

> [i]t is beyond dispute that federal courts have jurisdiction over suits to enjoin state officials from interfering with federal rights. . . . A plaintiff who seeks injunctive relief from state regulation, on the ground that such regulation is pre-empted by a federal statute which, by virtue of the Supremacy Clause of the Constitution, must prevail, thus presents a federal question which the federal courts have jurisdiction under 28 U.S.C. § 1331 to resolve.

Freehold Cogeneration Associates, L.P. v. Bd. of Regulatory Comm'rs of State of N.J., 44 F.3d 1178, 1184 (3d Cir. 1995) (quoting Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 96 n.14 (1983)); see also New York State Elec. & Gas Corp. v. Saranac Power Partners L.P., 117 F. Supp. 2d 211, 248 n.72 (N.D.N.Y. 2000), aff'd, 267 F.3d 128 (2d Cir. 2001) ("If a litigant challenges the jurisdiction of a public service commission to act in particular circumstances, the action is not precluded for failure to have sought prior review of the agency's underlying administrative order."). Indeed, as Defendants point out,

> the chief cases relied on by Plaintiffs undermine their exhaustion argument. In both [PPL EnergyPlus, LLC v. Nazarian, 753 F.3d 467 (4th Cir. 2014)] and [PPL EnergyPlus, LLC v. Solomon, 766 F.3d 241 (3d Cir. 2014)], the plaintiffs alleged that the state orders or laws infringed upon FERC's exclusive jurisdiction to set wholesale rates, exactly as Plaintiffs allege here. The plaintiffs in both Nazarian and Solomon filed suit directly in federal court without ever filing a FERC petition.

(Deepwater Wind's Post-Hr'g Mem. 8-9, ECF No. 39 (emphasis in original).)

The cases Plaintiffs rely on to support their argument that exhaustion is required fall into two categories – neither of which applies to this case. First, they cite cases in which the plaintiffs sought review of a FERC order, which pursuant to 16 U.S.C. § 825l may only be done after exhausting administrative remedies. See Mississippi Power & Light Co. v. Mississippi ex rel. Moore, 487 U.S. 354, 375 (1988) ("The reasonableness of rates and agreements regulated by FERC may not be collaterally attacked in state or federal courts. The only appropriate forum for such a challenge is before the Commission or a court reviewing the Commission's order." (emphasis added)); Montana-Dakota Utilities Co. v. Nw. Pub. Serv. Co., 341 U.S. 246, 251-52 (1951) ("We hold that the right to a reasonable rate is the right to the rate which the Commission files or fixes, and that, except for review of the Commission's orders, the courts can assume no right to a different one on the ground that, in its opinion, it is the only or the more reasonable one." (emphasis added)); DiLaura v. Power Auth. of State of N.Y., 982 F.2d 73, 79 (2d Cir. 1992) ("In enacting the FPA, Congress established a system for dealing with complaints to FERC, see 16 U.S.C. §§ 825e–h, and created a special procedure to review FERC's action or inaction." (emphasis added)); Platte River Whooping Crane Critical Habitat Maint. Trust v. Fed. Energy Regulatory Comm'n, 876 F.2d 109, 112-13 (D.C. Cir. 1989) ("Parties seeking review of FERC orders must petition for rehearing of those

orders . . . .” (emphasis added)). Here, Plaintiffs do not seek review of a FERC order, and therefore these cases are inapposite.[5]

The second category is cases brought under PURPA § 210(h)(2)(B), 16 U.S.C. § 824a-3(h)(2)(B). This section provides:

> Any electric utility, qualifying cogenerator, or qualifying small power producer may petition the Commission to enforce the requirements of subsection (f) of this section as provided in subparagraph (A) of this paragraph. If the Commission does not initiate an enforcement action under subparagraph (A) against a State regulatory authority or nonregulated electric utility within 60 days following the date on which a petition is filed under this subparagraph with respect to such authority, the petitioner may bring an action in the appropriate United States district court to require such State regulatory authority or nonregulated electric utility to comply with such requirements . . . .

Id. (emphasis added); see Allco, 805 F.3d at 96 (“PURPA requires administrative exhaustion for claims brought by qualified facilities that are attempting to enforce the requirements of § 824a–3(f).” (emphasis added)); Niagara Mohawk Power Corp. v. Fed. Energy Regulatory Comm’n, 306 F.3d 1264, 1269 (2d Cir. 2002) (“As

[5] Moreover, if Plaintiffs were seeking review of a FERC order, they would have had to bring their case in either the District of Columbia or the First Circuit within sixty days of the order. See 16 U.S.C. § 825l(b) (“Any party to a proceeding under this chapter aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the United States Court of Appeals for any circuit wherein the licensee or public utility to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part.”).

discussed in section I. A., supra, PURPA § 210(h)(2)(B) permits an electric utility such as Niagara to maintain a private action against a state regulatory authority such as the PSC, provided the utility first satisfies certain administrative prerequisites." (emphasis added)); Connecticut Valley Elec. Co. v. Fed. Energy Regulatory Comm'n, 208 F.3d 1037, 1043 (D.C. Cir. 2000) ("[I]f a private party petitions the Commission [under § 210(h)(2)(B)] to initiate an enforcement action against a PUC and the Commission declines, then that party may itself sue the PUC in federal district court to force implementation of the regulations."). Because Plaintiffs are not "electric utilit[ies], qualifying cogenerator[s], or qualifying small power producer[s]," their claims do not fall under § 210(h)(2)(B), and exhaustion is not required.

Accordingly, the Court finds that the three-year statute of limitations applies and began to run on August 16, 2010, when the PUC Defendants issued their Order. Plaintiffs' claims are thus barred by the statute of limitations, and the Court need not reach Defendants' arguments concerning standing and quasi-judicial immunity.

III. Conclusion

For the foregoing reasons, Defendants' Motions to Dismiss (ECF Nos. 14 and 21) are hereby GRANTED.

IT IS SO ORDERED.

William E. Smith
Chief Judge
Date: July 7, 2016

UNITED STATES DISTRICT COURT
DISTRICT OF RHODE ISLAND

| | | |
|---|---|---|
| BENJAMIN RIGGS, LAURENCE EHRHARDT, and RHODE ISLAND MANUFACTURERS ASSOCIATION,<br><br>Plaintiffs | : | |
| v. | : | Civil No. 1:15-CV-00343-S-LDA |
| 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,<br><br>Defendants | : | |

**FINAL JUDGMENT**

For the reasons stated in the Memorandum and Order dated July 7, 2016, the Court hereby enters Final Judgment in favor of all defendants dismissing with prejudice all claims raised in the Complaint.

Enter:

Smith, J.

Dated: 7/21/16

Order:

Barbara Barletta
Clerk

Dated: 7/22/16

# Chapter 53
# 2009 -- S 0111 SUBSTITUTE A AS AMENDED
# Enacted 06/26/09

# A N A C T
# RELATING TO PUBLIC UTILITIES AND CARRIERS

**Introduced By:** Senators Miller, Paiva-Weed, Sosnowski, Picard, and Connors
**Date Introduced:** January 29, 2009

It is enacted by the General Assembly as follows:

Section 1. Title 39 of the General Laws entitled "PUBLIC UTILITIES AND CARRIERS" is hereby amended by adding thereto the following chapter:

## CHAPTER 26.1
## LONG-TERM CONTRACTING STANDARD FOR RENEWABLE ENERGY

**39-26.1-1. Purpose. –** The purpose of this chapter is to encourage and facilitate the creation of commercially reasonable long-term contracts between electric distribution companies and developers or sponsors of newly developed renewable energy resources with the goals of stabilizing long-term energy prices, enhancing environmental quality, creating jobs in Rhode Island in the renewable energy sector, and facilitating the financing of renewable energy generation within the jurisdictional boundaries of the state or adjacent state or federal waters or providing direct economic benefit to the state.

. . .

**39-26.1-7. Town of New Shoreham Project.--** (a) On or before August 15, 2009, the electric distribution company shall solicit proposals for one newly developed renewable energy resources project of ten (10) megawatts or less that includes a proposal to enhance the electric reliability and environmental quality of the Town of New Shoreham. The electric distribution company shall select a project for negotiating a contract that shall be conditioned upon approval by the commission. Negotiations shall proceed in good faith to achieve a commercially reasonable contract. Should the distribution company and the selected party agree to a contract, the contract shall be filed with the commission no later than October 15, 2009 for commission approval. The commission shall review the contract and issue an order approving or disapproving the contract on or before December 31, 2009. If the parties are unable to reach agreement on a contract prior to October 15, 2009, an unsigned copy shall be filed by the electric distribution company prior to that same date, and the commission shall have the discretion to order the parties to arbitrate the dispute on an expedited basis. Upon approval of the contract, the provisions of section 39-26.1-4 and the provisions of paragraphs (a), (b), (c), (d), and (f) of section 39-26.1-5 shall apply, and all costs incurred in the negotiation, administration, enforcement, and implementation of the agreement shall be recovered annually by the electric distribution company in electric distribution rates. To the extent that there are benefits for customers of the Block Island Power Company or its successor, the commission shall determine an allocation of cost responsibility between customers of the electric distribution company and customers of Block Island Power Company or its successor after the cost estimates are filed with the commission, but

the commission need not determine the final cost allocation at the time the commission considers and/or approves the contract between the electric distribution company and the project developer. The allocation of costs shall assure that individual customers in the Town of New Shoreham pay higher charges related to the project on their individual bills than any charges for the same project that may be included in individual bills of customers of the electric distribution company. The commission shall provide for an appropriate rate design and billing method between the electric distribution company and Block Island Power Company at the appropriate time.

(b) The solicitation shall require that each proposal include provisions for a transmission cable between the Town of New Shoreham and the mainland of the state. The electric distribution company, at its option, may propose to own, operate, or otherwise participate in such transmission cable project, subject to commission approval. The electric distribution company, however, has the option to decline to own, operate, or otherwise participate in the transmission cable project, even if the commission approves such arrangements. Should the electric distribution company own, operate, and maintain the cable, the annual costs incurred by the electric distribution company shall be recovered annually through a fully reconciling rate adjustment from customers of the electric distribution company and/or from the Block Island Power Company or its successor, subject to any federal approvals that may be required by law; provided, however, the parties shall use all reasonable efforts to obtain socialization of the costs of the cable in New England transmission rates administered by the ISO New England, to the extent permitted. The allocation of the cable costs shall be determined by the commission and assure that individual customers in the Town of New Shoreham pay higher charges related to the cable on their individual bills than any charges for the same project that may be included in individual bills of customers of the electric distribution company.

(c) Any charges incurred by the Block Island Power Company or its successor pursuant to this section shall be recovered annually in rates through a fully reconciling rate adjustment, subject to approval by the commission. If the electric distribution company owns, operates, or otherwise participates in the transmission cable project, pursuant to subsection 39-26.1-7(b) the provisions of section 39-26.1-4 shall not apply to the cable cost portion of the Town of New Shoreham Project.

(d) Any contract entered into pursuant to this section shall count as part of the minimum long-term contract capacity.

# Chapter 32
# 2010 -- S 2819 SUBSTITUTE A AS AMENDED
# Enacted 06/15/10

# A N A C T
# RELATING TO PUBLIC UTILITIES AND CARRIERS -- CONTRACTING STANDARD FOR RENEWABLE ENERGY

**Introduced By:** Senators Sosnowski, Miller, Felag, Ruggerio, and McCaffrey
**Date Introduced:** April 28, 2010

It is enacted by the General Assembly as follows:

SECTION 1. Section 39-26.1-7 of the General Laws in Chapter 39-26.1 entitled "Long-Term Contracting Standard for Renewable Energy" is hereby amended to read as follows:

**39-26.1-7. Town of New Shoreham Project. --** (a) The general assembly finds it is in the public interest for the state to facilitate the construction of a small-scale offshore wind demonstration project off the coast of Block Island, including an undersea transmission cable that interconnects Block Island to the mainland in order to: position the state to take advantage of the economic development benefits of the emerging offshore wind industry; promote the development of renewable energy sources that increase the nation's energy independence from foreign sources of fossil fuels; reduce the adverse environmental and health impacts of traditional fossil fuel energy sources; and provide the Town of New Shoreham with an electrical connection to the mainland. To effectuate these goals, and notwithstanding any other provisions of the general or public laws to the contrary, the Town of New Shoreham project, its associated power purchase agreement, transmission arrangements, and related costs are authorized pursuant to the process and standards contained in this section. The Narragansett Electric Company is hereby authorized to enter into an amended power purchase agreement with the developer of offshore wind for the purchase of energy, capacity, and any other environmental and market attributes, on terms that are consistent with the power purchase agreement that was filed with the commission on December 9, 2009 in docket 4111, and amendments changing dates and deadlines, provided that the pricing terms of such agreement are amended as more fully described in subsection 39-26.1-7(e), in addition to other amendments that are made to take into account the provisions of this section as amended since the filing of the agreement in docket 4111. Any amendments shall ensure that the pricing can only be lower, and never exceed, the original pricing included in the power purchase agreement that was reviewed in docket 4111. ~~On or before August 15, 2009, the electric distribution company shall solicit proposals for one newly developed renewable energy resources project of ten (10) megawatts or less that includes a proposal to enhance the electric reliability and environmental quality of the Town of New Shoreham. The electric distribution company shall select a project for negotiating a contract that shall be conditioned upon approval by the commission. Negotiations shall proceed in good faith to achieve a commercially reasonable contract. Should the distribution company and the selected party agree to a contract, the contract shall be filed with the commission no later than October 15, 2009 for commission approval. The commission shall review the contract and issue an order approving or disapproving the contract on or before January 31, 2010. If the parties are unable to reach agreement on a~~

~~contract prior to October 15, 2009, an unsigned copy shall be filed by the electric distribution company prior to that same date, and the commission shall have the discretion to order the parties to arbitrate the dispute on an expedited basis. Notwithstanding anything in this section to the contrary, and notwithstanding any solicitation made pursuant to this section, the distribution company and the selected party may agree to a contract for a~~ The demonstration project subject to the amended power purchase agreement shall ~~that includes~~ include up to (but not exceeding) eight (8) wind turbines with aggregate nameplate capacity of no more than thirty (30) megawatts, ~~subject to and conditioned upon the approval of the commission,~~ even if the actual capacity factor of the project results in the project technically exceeding ten (10) megawatts.

(b) The amended power purchase agreement shall be filed with the Public Utilities Commission. Upon the filing of the amended power purchase agreement, the commission shall open a new docket. The commission shall allow the parties to docket 4111 to become parties in the new docket who may file testimony within fifteen (15) days of the filing of the amended agreement. The commission shall allow other interventions on an expedited basis, provided they comply with the commission standards for intervention. The developer shall provide funding for the economic development corporation to hire an expert experienced in power markets, renewable energy project financing, and power contracts who shall provide testimony regarding the terms and conditions of the power purchase agreement to assist the commission in its review, provided that the developer shall be precluded from influencing the choice of expert, which shall be in the sole discretion of the economic development corporation. This testimony shall be filed within twenty (20) days after the filing of the amended power purchase agreement. The parties shall have the right to respond to the testimony of this expert through oral examination at the evidentiary hearings. The commission shall hold one public comment hearing within five (5) days after the filing of the expert testimony. Evidentiary hearings shall commence no later than thirty (30) days from the filing of the amended power purchase agreement.

(c) The commission shall review the amended power purchase agreement taking into account the state's policy intention to facilitate the development of a small offshore wind project in Rhode Island waters, while at the same time interconnecting Block Island to the mainland. The commission shall review the amended power purchase agreement and shall approve it if:

(i) The amended agreement contains terms and conditions that are commercially reasonable;

(ii) 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);

(iii) 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

(iv) The amended power purchase agreement is likely to provide environmental benefits, including the reduction of carbon emissions. An advisory opinion on the findings of economic benefit set forth in (iii) above shall be provided by the Rhode Island economic development corporation and an advisory opinion on the environmental benefits set forth in (iv) above shall be filed by the Rhode Island department of environmental management. The advisory opinions shall be filed with the commission within twenty (20) days of filing of the amended power purchase agreement. The commission shall give substantial deference to the factual and policy conclusions set forth in the advisory opinions in making the required findings. Notwithstanding any other provisions of the general laws to the contrary, for the purposes of this section, "commercially reasonable" shall mean terms and pricing that are reasonably consistent with what an experienced power market analyst would expect to see for a project of a similar size, technology and location, and meeting the policy goals in subsection (a) of this section.

(d) The commission shall issue a written decision to accept or reject the amended power purchase agreement, without conditions, no later than forty-five (45) days from the filing of the

amended power purchase agreement, without delay or extension of the timeframes contained in this section. Any review of the commission's decision shall be according to chapter 5 of title 39, and the supreme court shall advance any proceeding under this section so that the matter is afforded precedence on the calendar and shall be heard and determined with as little delay as possible. ~~Upon approval of the contract, the~~ The provisions of section 39-26.1-4 and the provisions of ~~paragraphs (a),~~ subsections (b), (c), (d), and (f) of section 39-26.1-5 shall apply, and all costs incurred in the negotiation, administration, enforcement, transmission engineering associated with the design of the cable, and implementation of the project and agreement shall be recovered annually by the electric distribution company in electric distribution rates. ~~To the extent that there are benefits for customers of the Block Island Power Company or its successor, the commission shall determine an allocation of cost responsibility between customers of the electric distribution company and customers of Block Island Power Company or its successor after the cost estimates are filed with the commission, but the commission need not determine the final cost allocation at the time the commission considers and/or approves the contract between the electric distribution company and the project developer. The allocation of costs shall assure that individual customers in the Town of New Shoreham pay higher charges related to the project on their individual bills than any charges for the same project that may be included in individual bills of customers of the electric distribution company. The commission shall provide for an appropriate rate design and billing method between the electric distribution company and Block Island Power Company at the appropriate time.~~ The pricing under the agreement shall not have any precedential effect for purposes of determining whether other long-term contracts entered into pursuant to this chapter are commercially reasonable.

(e) Cap and lower price. (i) The amended power purchase agreement subject to subsection 39-26.1-7(a) shall provide for terms that shall decrease the pricing if savings can be achieved in the actual cost of the project, with all realized savings allocated to the benefit of ratepayers. (ii) The amended power purchase agreement shall also provide that the initial fixed price contained in the signed power purchase agreement submitted in docket 4111 shall be the maximum initial price, and any realized savings shall reduce such price. After making any such reduction to the initial price based on realized savings, the price for each year of the amended power purchase agreement shall be fixed by the terms of said agreement. (iii) The amended power purchase agreement shall require that the costs of the project shall be certified by the developer. An independent third-party acceptable to the division of public utilities and carriers shall within thirty (30) days of this certification by the developer, verify the accuracy of such costs at the completion of the construction of the project. The reasonable costs of this verification, shall be paid for by the developer. Upon receipt of such third-party verification, the division shall notify the Narragansett Electric Company of the final costs. The public utilities commission shall reduce the expense to ratepayers consistent with a verified reduction in the project costs.

~~(b)~~(f) The ~~solicitation shall require that each proposal include provisions for~~ project shall include a transmission cable between the Town of New Shoreham and the mainland of the state. The electric distribution company, at its option, may elect ~~propose~~ to own, operate, or otherwise participate in such transmission cable project~~, subject to commission approval~~. The electric distribution company, however, has the option to decline to own, operate, or otherwise participate in the transmission cable project~~, even if the commission approves such arrangements~~. The electric distribution company may elect to purchase the transmission cable and related facilities from the developer or an affiliate of the developer, pursuant to the terms of a transmission facilities purchase agreement negotiated between the electric distribution company and the developer or its affiliate, an unexecuted copy of which shall be provided to the division of public utilities and carriers for the division's consent to execution. The division shall have twenty (20) days to review the agreement. If the division independently determines that the terms and pricing of the agreement are reasonable, taking into account the intention of the legislature to advance the

project as a policy-making matter, the division shall provide its written consent to the execution of the transmission facilities purchase agreement. Once written consent is provided, the electric distribution company and its transmission affiliate are authorized to make a filing with the federal energy regulatory commission to put into effect transmission rates to recover all of the costs associated with the purchase of the transmission cable and related facilities and the annual operation and maintenance. The revenue requirement for the annual cable costs shall be calculated in the same manner that the revenue requirement is calculated for other transmission facilities in Rhode Island for local network service under the jurisdiction of the federal energy regulatory commission. The division shall be authorized to represent the State of Rhode Island in those proceedings before the federal energy regulatory commission, including the authority to enter into any settlement agreements on behalf of the state to implement the intention of this section. The division shall support transmission rates and conditions that allow for the costs related to the transmission cable and related facilities to be charged in transmission rates in a manner that socializes the costs throughout Rhode Island. Should the electric distribution company own, operate, and maintain the cable, the annual costs incurred by the electric distribution company directly or through transmission charges shall be recovered annually through a fully reconciling rate adjustment from customers of the electric distribution company and/or from the Block Island Power Company or its successor, subject to any federal approvals that may be required by law~~; provided, however, the parties shall use all reasonable efforts to obtain socialization of the costs of the cable in New England transmission rates administered by the ISO New England, to the extent permitted~~. The allocation of the costs related to the transmission cable through transmission rates or otherwise shall be structured so that the estimated impact on the typical residential customer bill for such transmission costs for customers in the Town of New Shoreham shall be higher than the estimated impact on the typical residential customer bill for customers on the mainland of the electric distribution company. This higher charge for the customers in the Town of New Shoreham shall be developed by allocating the actual cable costs based on the annual peak demands of the Block Island Power Company and the electric distribution company, and these resultant costs recovered in the per kWh charges of each company. In any event, the difference in the individual charge per kWh or per customer/month shall not exceed the ratio of average demand to peak demand for Block Island Power Company relative to the electric distribution company, currently at 1.8 to 1.0 respectively. To the extent that any state tariffs or rates must be put into effect in order to implement the intention of this section, the public utilities commission shall accept filings of the same and shall approve them. ~~costs shall be determined by the commission and assure that individual customers in the Town of New Shoreham pay higher charges related to the cable on their individual bills than any charges for the same project that may be included in individual bills of customers of the electric distribution company.~~

~~(c)~~(g) Any charges incurred by the Block Island Power Company or its successor pursuant to this section or other costs incurred by the Block Island Power Company in implementing this section, including the cost of participation in regulatory proceedings in the state or at the federal energy regulatory commission shall be recovered annually in rates through a fully reconciling rate adjustment, subject to approval by the commission. If the electric distribution company owns, operates, or otherwise participates in the transmission cable project, pursuant to subsection 39-26.1-7(b) the provisions of section 39-26.1-4 shall not apply to the cable cost portion of the Town of New Shoreham Project.

~~(d)~~(h) Any contract entered into pursuant to this section shall count as part of the minimum long-term contract capacity.

(i) If the electric distribution company elects not to own the transmission cable, the developer may elect to do so directly, through an affiliate, or a third-party and the power purchase agreement pricing shall be adjusted to allow the developer, an affiliate or a third-party, to recover the costs (including financing costs) of the transmission facilities, subject to complying with the

terms as set forth in the power purchase agreement between the developer and the electric distribution company.

SECTION 2. This act shall take effect upon passage.

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# TITLE 9
# Courts and Civil Procedure–Procedure Generally
# CHAPTER 9-1
# Causes of Action
# SECTION 9-1-14

**§ 9-1-14 Limitation of actions for words spoken or personal injuries.**

(a) Actions for words spoken shall be commenced and sued within one year next after the words spoken, and not after.

(b) Actions for injuries to the person shall be commenced and sued within three (3) years next after the cause of action shall accrue, and not after, except as provided for otherwise in subsection (c) herein.

(c) As to an action for personal injuries wherein an injured party is entitled to proceed against an insurer pursuant to § 27-7-2, where an action is otherwise properly filed against an insured within the time limitations provided for by this section, and process against the insured tortfeasor has been returned "non estinventus" and filed with the court, then the statutory limitation for filing an action under § 27-7-2 directly against an insurer shall be extended an additional one hundred twenty (120) days after the expiration of the time limitation provided for in subsection (b) herein.

History of Section.(C.P.A. 1905, § 248; G.L. 1909, ch. 284, § 1; G.L. 1923, ch. 334, § 1; G.L. 1938, ch. 510, § 1; G.L. 1956, § 9-1-14; P.L. 1971, ch. 200, § 1; P.L. 1973, ch. 162, § 1; P.L. 1976, ch. 188, § 1; P.L. 1985, ch. 123, § 1; P.L. 2009, ch. 123, § 1; P.L. 2009, ch. 142, § 1.)

# 28 U.S. Code § 2462 - Time for commencing proceedings

Except as otherwise provided by Act of Congress, an action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise, shall not be entertained unless commenced within five years from the date when the claim first accrued if, within the same period, the offender or the property is found within the United States in order that proper service may be made thereon.

(June 25, 1948, ch. 646, 62 Stat. 974.)