UNITED STATES DISTRICT COURT
DISTRICT OF RHODE ISLAND

BENJAMIN RIGGS, LAURENCE EHRHARDT, and RHODE ISLAND MANUFACTURERS ASSOCIATION, Plaintiffs	:	
v.	:	Civil Action No. _____
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	:	

COMPLAINT

1. Plaintiffs Benjamin Riggs, Laurence Ehrhardt, and the Rhode Island Manufacturers Association bring this Complaint for Declaratory and Injunctive Relief against Defendants Margaret Curran, Paul Roberti, and Herbert Desimone, Jr., in their official capacity as members of the Rhode Island Public Utilities Commission (hereinafter "PUC"), seeking a declaration that the PUC's Order dated August 16, 2010 ("Order") approving a Power Purchase Agreement ("PPA") between Narragansett Electric Company, Inc. (hereinafter "National Grid") and Deepwater Wind Block Island, LLC ("Deepwater Wind") violates the Federal Power Act ("FPA"), the Public Utility Regulatory Policies Act of 1978 ("PURPA"), the Supremacy Clause of the United States Constitution, the Commerce Clause of the United States Constitution, and 42 U.S.C. §1983. National Grid and Deepwater Wind are named as

additional Defendants herein because the disposition of this action may impair or impede their economic interests.

Parties

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. The average cost of this above-market power to a mainland Rhode Island ratepayer, like Mr. Riggs, 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 the required $19 million incentive payment to National Grid.

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. § 824, on August 22, 2012, seeking an enforcement action by FERC against the PUC on the grounds that the PUC's Order violates the FPA, PURPA, and the Commerce Clause of the United States Constitution (Exhibit 1 hereto). Mr. Riggs also filed a petition with the FERC on April 21, 2015, seeking an enforcement action by FERC against the PUC on the grounds that the PUC's Order violates the FPA,

PURPA, and the Supremacy Clause of the United States Constitution (Exhibit 2 thereto). 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."

4. Plaintiff Laurence Ehrhardt is a resident of North Kingstown, Rhode Island, and is a mainland Rhode Island ratepayer for electricity supplied by National Grid. Mr. Ehrhardt's 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 over the next 20 years. The average cost of this above-market power to a mainland Rhode Island ratepayer, like 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, or the required $19 million incentive payment to National Grid.

5. 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 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, 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 over the next 20 years. The cost of this above-market power to Toray Plastics, Inc. will exceed $287,000 per year, and the cost to Materion Technical Materials, Inc. will exceed $50,000 per year, 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.

6. Defendants Margaret Curran, Paul Roberti, and Herbert DeSimone, Jr., are the members of the Rhode Island Public Utilities Commission ("PUC"), which is an official Commission of the State of Rhode Island, located in Warwick, Rhode Island. They are named as Defendants in their official capacity only, based upon the Order of the PUC on August 16, 2010, approving the PPA between National Grid and Deepwater Wind.

7. Defendant Narragansett Electric Company, Inc. d/b/a National Grid is a for profit corporation incorporated in Rhode Island, with a principal place of

business in Providence, Rhode Island. It is named as a defendant solely because the disposition of this action may affect its economic interests.

8. Defendant Deepwater Wind Block Island LLC is a Rhode Island limited liability company, with a principal place of business in Providence, Rhode Island. It is named as a defendant solely because the disposition of this action may affect its economic interests.

Jurisdiction and Venue

9. This Court has subject matter jurisdiction over Plaintiffs' claims arising under the Constitution and laws of the United States pursuant to 28 U.S.C. § 1331, and has jurisdiction over Plaintiffs' claims under the FPA and PURPA pursuant to 16 U.S.C. §§ 825p and 824a-3(h)(2).

10. This Court has subject matter jurisdiction over Plaintiff's claims under 42 U.S.C. §1983, pursuant to 28 U.S.C. § 1343.

11. This Court is empowered to grant declaratory relief by 28 U.S.C. §§ 2201 and 2202 and Rule 57 of the Federal Rules of Civil Procedure.

12. This Court is empowered to grant injunctive relief by 28 U.S.C. § 2202 and Rule 65 of the Federal Rules of Civil Procedure.

13. This Court has personal jurisdiction over the Defendants Curran, Roberti, and DeSimone in their official capacity, because each conducts a significant portion of his or her duties as a Commissioner of the PUC at the PUC's offices in Warwick, Rhode Island. The Court has personal jurisdiction over National Grid and Deepwater Wind because both conduct business in Rhode Island.

14. Venue is proper under 28 U.S.C. § 1391(b)(1) and (2) because a substantial portion of the events giving rise to this action occurred in this District.

FACTS

The PUC's Order Approving the PPA

15. 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, codified at RIGL 39-21.1-1. Another, much more specific purpose, was to require National Grid to solicit proposals for 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.

16. Pursuant to the 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 of 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.

17. 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 included in this price was the required cost of constructing 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.

18. 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.

19. 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).

20. Fifteen days later, on June 30, 2010, National Grid and Deepwater Wind submitted to the PUC a revised PPA ("the PPA," attached as Exhibit 3 hereto). 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.

21. On August 16, 2010, the PUC, in a 2-1 decision, voted to approve the PPA, relying heavily on the new standards 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 at least 3 to 1 by the above market power costs to mainland ratepayers, "result[ing] in a net loss for the economy." PUC Order (attached as Exhibit 4 hereto), at 152.

22. The PUC's Order was thereafter appealed to the Rhode Island Supreme Court, primarily on state law grounds,[1] 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 (Exhibit 5 hereto), quantifying the total above market cost over 20 years at over $497 million.

23. On or before November 15, 2012, Deepwater Wind filed a petition with the Rhode Island Coastal Resources Management Council ("CRMC") 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 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 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.

[1] 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 that issue was never reached by the Rhode Island Supreme Court.

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. However, because construction of the Wind Farm now appears imminent, Plaintiffs are seeking prospective injunctive and declaratory relief before the PPA is implemented.

FERC's Market Driven Regulatory System

26. Wholesale electricity markets are interstate markets, regulated exclusively by FERC under the FPA, 16 U.S.C. § 824. FERC has exclusive authority over all aspects of the wholesale markets for energy, which is the actual electricity sold by generators to electric distribution companies, like National Grid, which re-sell in the retail market to electricity end-users. FERC also regulates the market for wholesale electric "capacity." Capacity is not electricity itself, but a commitment to provide the energy to meet future demand.

27. The FPA gives FERC exclusive jurisdiction to regulate wholesale electricity transactions in interstate commerce, including the transactions that affect the price of wholesale energy and capacity. It thereby establishes a bright line barring states from regulating such wholesale sales in any way. *See* 16 U.S.C. §

824(b)(1) (giving FERC exclusive jurisdiction over the sale of electricity "at wholesale").

28. In exercising its exclusive authority over wholesale markets for energy and capacity, FERC has directed that wholesale energy and capacity prices for the New England region be set by competitive auctions administered by ISO-New England. FERC has designated ISO-New England, a regional transmission organization, to coordinate and administer the wholesale markets for electricity and capacity in the multi-state region that includes Connecticut, Maine, Massachusetts, New Hampshire, Vermont and Rhode Island.

29. Generators of electricity in New England, such as power plants, participate in ISO-New England markets for energy and capacity. In ISO-New England's capacity market, utilities purchase capacity from generators to ensure a supply of electricity at all times, including periods of peak demand. Wholesale customers and their end-user customers in Rhode Island thus satisfy their energy and capacity needs by purchasing from generators located throughout the ISO-New England region.

30. A key component of ISO-New England's capacity market is an auction that requires generators to make bids for capacity to be delivered three years in the future. Thus, a capacity auction in August 2015 auctions capacity to be delivered in August 2018. In the auction, generators state an amount of capacity that they are willing to sell and bid a price at which they are willing to sell that capacity. ISO-New England uses those offers to create a supply curve and matches this supply curve against an administratively determined demand curve, based primarily on the

marginal cost of building new generating capacity, to determine the price at which demand is fully supplied. That price is called the "market clearing price."

31. Generators that offer to provide capacity at or below the market clearing price successfully sell their capacity in the auction – "clear the auction" – and receive the market clearing price for that capacity. If generators successfully clear their sales of capacity in the auction, ISO-New England rules require that they also offer to sell the electricity they generate in the separate ISO-New England market for energy.

32. The ISO-New England capacity auction is designed to provide the marketplace with incentives to add new generating capacity in New England when, but only when, it is economical to do so. When the anticipated prices for capacity and energy yield a revenue stream over the life of the facility that exceeds the cost of new entry, generators have an incentive to increase supply by building additional generation capacity or by upgrading existing plants, and purchasers have an incentive to curtail their use of electricity at times of peak demand. When the price for capacity falls below the cost of new entry, generators have an incentive to reduce supply by retiring inefficient plants. The capacity auction is designed so that, in the long run and on average, the price for capacity will provide a return that supports the cost of building new generating capacity.

33. In addition, the capacity auction has a locational element, designed to take into account locational differences in the value of capacity caused by constraints on the transmission system. The locational element enables generation resources located in more constrained areas with less supply to receive a higher

price for their capacity than generation resources located in other regions. The auction thereby provides potential generation developers with price signals that reflect not only the cost of new entry, but also the areas in which new entry is needed the most.

34. When the capacity market signals that new capacity is needed, it induces investment in the most economical means of meeting capacity needs, which may entail investment in a particular type of generating capacity, or may instead entail investment in other efforts, such as so-called demand response investments designed to serve a given amount of load with less generating capacity.

The PUC's Violation of FERC's Regulatory System

35. The Rhode Island PUC's Order approving the PPA seeks to regulate interstate wholesale transactions in the energy and capacity markets, contrary to Congress's reservation of that role exclusively to FERC. Following the command of the revised LTC statute, the PUC allowed National Grid to enter into a contract with a selected generator, Deepwater Wind, that guarantees that generator fixed prices for its wholesale energy and capacity for 20 years. The PUC's Order thus usurps FERC's exclusive role in regulating wholesale transactions, disrupts the wholesale energy markets supervised by FERC, and does so in a manner calculated to favor a new generating facility in Rhode Island over out-of-state facilities that participate in the same regional wholesale markets. The PUC's Order thus violates the FPA, PURPA, the Supremacy Clause of the United States Constitution, and the Commerce Clause of the Constitution.

36. The PUC's Order allows National Grid to enter into a long-term

contract with Deepwater Wind, a single hand-picked generator, to finance the cost of a new generating facility off Block Island, and allows Deepwater Wind to receive a fixed price for the energy and capacity from that facility, regardless of the prices established in the FERC-approved wholesale markets. The fixed price also provides a state-directed incentive for investment in Deepwater Wind's proposed new Block Island Wind Farm, contrary to the market mechanism designed by FERC to determine when and where new generator facilities should be built.

37. As mandated by RIGL 39-26.1-5(f), the PUC's Order also provides that National Grid may immediately resell the renewable energy purchased from Deepwater Wind in ISO-New England's Day Ahead or Real Time Energy Markets, where prices are currently 5 cents per kWh on-peak and less than 4 cents per kWh off-peak, and then pass through to ratepayers the difference between the 24.4 cents per kWh paid to Deepwater Wind and the 4-5 cents per kWh hour obtained in the ISO Markets. PPA, § 4.2(a); Memorandum from Steve Scialabba of the RI Division of Public Utilities (attached as Exhibit 6). The Order thus attempts to secure for Rhode Island the advantages of the interstate wholesale markets approved by FERC, while simultaneously distorting those markets' federally governed pricing mechanism. National Grid will have no incentive to price the energy it resells from Deepwater Wind at market prices, because of the subsidy it will receive under the PPA, thus disadvantaging other sellers in those markets.

38. The effect of the Order is to advance parochial state policies and undermine federal policies. The Order overrides FERC's pricing signals with PUC-

determined energy and capacity prices. The Order also favors a wholesale generating facility located in Rhode Island over out-of-state facilities.

39. Under the FPA, Congress has occupied the field of wholesale electricity. Only FERC may set wholesale rates or regulate wholesale markets. The PUC's Order invades this exclusive federal domain by requiring National Grid to provide a guaranteed fix price for energy and capacity to a favored generator and by dictating how it must interact with the FERC-regulated wholesale capacity and energy auctions.

40. The Order thus contravenes and stands as an obstacle to FERC's regulatory policy choices. FERC has determined that a market-based approach is the most efficient means of determining the wholesale price of energy and capacity, and signaling when and where new generation capacity is needed. FERC's regulatory policy also calls for market-based pricing signals to determine the most effective means of satisfying those capacity needs, whether through investments in upgrades to existing units, investments in particular types of new generating facilities, or investments in demand response that reduce capacity needs at times of peak usage. The Order explicitly rejects this approach, overriding FERC's decision to use market forces to determine wholesale capacity prices and instead requiring National Grid to provide guaranteed fixed prices for energy and capacity to a specific generating plant that Deepwater Wind proposes to build. The Order thus guarantees that Deepwater Wind will receive artificially inflated prices for energy and capacity that are not available to existing generators, in derogation of FERC's

determination that new generation units should not enjoy preferential compensation relative to other means of meeting the region's need for capacity.

41. In addition, the Order violates the Commerce Clause of the United States Constitution, because the intent and effect of the Order is to favor an in-state producer over out-of-state competitors. The Order explicitly promotes the construction of a new generator facility located within Rhode Island and the sale of energy and capacity from that facility, despite the fact that generators outside Rhode Island can and do participate in supplying energy and capacity to Rhode Island consumers.

CAUSES OF ACTION

COUNT I – VIOLATION OF THE FPA

42. Plaintiffs incorporate by reference the allegations of paragraphs 1-41 as if fully set forth herein.

43. Plaintiff Riggs sought enforcement of the FPA by filing two administrative petitions with FERC, under 18 CFR 385.206. FERC declined to initiate enforcement action in response to these petitions, and authorized Riggs to seek enforcement in this Court.

44. Riggs seeks an order declaring that the PUC's Order violates the FPA, and an injunction prohibiting the implementation of the PPA, for all the reasons set forth in his two petitions, Exhibits 1 and 2, including pursuant to 16 U.S.C. §§ 824, 824d, 824e, 825e, and 2631.

45. The Order violates the FPA because, inter alia, in passing the FPA, Congress granted FERC exclusive jurisdiction over the field of wholesale electricity

regulation. Section 201(b) of the FPA, codified at 16 U.S.C. § 824(b), sets out the scope of federal regulatory power and draws a bright line between mutually exclusive spheres of state and federal authority. The FPA left no power to the states to regulate wholesale electricity transactions, including wholesale sales of energy and capacity, in interstate commerce.

46. The Order violates the FPA because it intrudes on FERC's exclusive jurisdiction to regulate wholesale transactions for capacity and energy. By guaranteeing Deepwater Wind specific state-approved prices for wholesale energy and capacity, the Order invades FERC's exclusive jurisdiction to set wholesale prices. It also guarantees Deepwater Water fixed rates for up to 20 years, whereas the longest available new entry price adjustment allowed within ISO-New England is 6 years.

47. The Order also violates the FPA because it erects obstacles to FERC's achievement of its regulatory goals in the wholesale energy and capacity markets. The Order interferes with FERC's decision to have capacity prices in New England set by market forces. By requiring that a particular generator receive a guaranteed price for its capacity from National Grid, the Order will distort the clearing price for capacity, which is a critical component of the FERC-regulated wholesale capacity market. By disincentivizing National Grid to price the energy it receives from Deepwater Wind in the Day Ahead and Real Time markets, it also distorts those markets – and FERC's regulatory design.

48. The Order also interferes with FERC's decision to structure the wholesale markets for capacity and energy on market-based principles in order to

encourage the entry of new generating capacity only when and where, and in what form, such entry is needed. According to those market-based principles, new facilities are added only when anticipated capacity and energy revenues will yield an adequate return on investment over the new facility's life. The Order circumvents those market principles in order to foster new generation in Rhode Island, even if the FERC-approved ISO-New England auction has signaled that such new generation is not needed. The Order also allows Deepwater Wind to turn a profit by giving it a price guarantee outside the auction.

49. The Order also interferes with FERC's design to provide incentives to add capacity when and where, and in what form, it is economical to do so, by permanently chilling private investment in new generation. Private investors will be reluctant to construct new generators, even when market signals indicate that such investment will be profitable, if new plants could lose expected market share to comparatively inefficient facilities that can sell capacity at fixed prices owing to a state-ordered subsidy.

50. Riggs is therefore entitled a declaration that the PUC's Order violates the FPA, and an injunction prohibiting the implementation of the PPA.

COUNT II – VIOLATION OF PURPA

51. Plaintiffs incorporate by reference the allegations of paragraphs 1-50 as if fully set forth herein.

52. Plaintiff Riggs sought enforcement of the PURPA by filing two administrative petitions with FERC, under 18 CFR 385.206. FERC declined to

initiate enforcement action in response to these petitions, and authorized Riggs to seek enforcement in this Court.

53. Riggs seeks an order declaring that the PUC's Order violates PURPA, and an injunction prohibiting the implementation of the PPA, for all the reasons set forth in his two petitions, Exhibits 1 and 2, including pursuant to 16 U.S.C. §§ 824a-3.

54. The Order violates PURPA because it accords Deepwater Wind the benefits accorded by PURPA to a small power production facility, without requiring that Deepwater Wind satisfy the statutory and regulatory requirements for such a facility. Instead, the Order follows the very different mandates of RIGL 39-26.1, which are also inconsistent with PURPA.

55. Because it fails to comply with PURPA, the Order again intrudes on FERC's exclusive jurisdiction to regulate wholesale transactions for capacity and energy. By guaranteeing Deepwater Wind specific state-approved rates for wholesale energy and capacity, the Order invades FERC's exclusive jurisdiction to set such rates. Among other things, the Order requires National Grid to purchase energy at a rate which discriminates in favor of a particular small power producer, and which exceeds the incremental, market-based cost of alternative energy, in violation of 16 U.S.C. § 824a-3(b).

56. Because it fails to comply with PURPA, the Order interferes with FERC's decision to structure the wholesale markets for capacity and energy on market-based principles, even for renewable energy facilities under 16 U.S.C. § 824a-3(m). According to those market-based principles, new facilities are added only when anticipated capacity and energy revenues will yield an adequate return

on investment over the new facility's life. The Order circumvents those market principles in favor of Deepwater Wind. It allows Deepwater Wind alone to build a facility and turn a profit by giving it a price guarantee outside market forces through a state-ordered subsidy.

57. Riggs is therefore entitled a declaration that the PUC's Order violates PURPA, and an injunction prohibiting the implementation of the PPA.

COUNT III - VIOLATION OF THE SUPREMACY CLAUSE

58. Plaintiffs incorporate by reference the allegations of paragraphs 1-57 as if fully set forth herein.

59. Under the Supremacy Clause of the Constitution (Article VI, Clause 2), a state law is pre-empted when Congress intends federal law to occupy the field, as well as in cases where the state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.

60. In passing the FPA, Congress granted FERC exclusive jurisdiction over the field of wholesale electricity regulation. Section 201(b) of the FPA, codified at 16 U.S.C. § 824(b), sets out the scope of federal regulatory power and draws a bright line between mutually exclusive spheres of state and federal authority. The FPA left no power to the states to regulate wholesale electricity transactions, including wholesale sales of energy and capacity, in interstate commerce.

61. The Order is pre-empted by the FPA because it intrudes on FERC's exclusive jurisdiction to regulate wholesale transactions for capacity and energy. By guaranteeing Deepwater Wind specific state-approved prices for wholesale energy

and capacity, the Order invades FERC's exclusive jurisdiction to set wholesale prices. It also guarantees Deepwater Water fixed rates for up to 20 years, whereas the longest available new entry price adjustment allowed within ISO-New England is 6 years.

62. The Order is also pre-empted by the FPA because it erects obstacles to FERC's achievement of its regulatory goals in the wholesale energy and capacity markets. The Order interferes with FERC's decision to have capacity prices in New England set by market forces. By requiring that a particular generator receive a guaranteed price for its capacity from National Grid, the Order will distort the clearing price for capacity, which is a critical component of the FERC-regulated wholesale capacity market. By disincentivizing National Grid to price the energy it receives from Deepwater Wind in the Day Ahead and Real Time markets, it also distorts those markets – and FERC's regulatory design.

63. The Order also interferes with FERC's decision to structure the wholesale markets for capacity and energy on market-based principles in order to encourage the entry of new generating capacity in New England only when and where, and in what form, such entry is needed. According to those market-based principles, new facilities are added only when anticipated capacity and energy revenues will yield an adequate return on investment over the new facility's life. The Order circumvents those market principles in order to foster new generation in Rhode Island, even if the FERC-approved ISO-New England auction has signaled that

such new generation is not needed. The Order allows Deepwater Wind to turn a profit by giving it a price guarantee outside the auction.

64. The Order also interferes with FERC's design to provide incentives to add capacity when and where, and in what form, it is economical to do so, by permanently chilling private investment in new generation. Private investors will be reluctant to construct any new generators, even when market signals indicate that such investment will be profitable, if new plants could lose expected market share to comparatively inefficient facilities that can sell capacity at fixed prices owing to a state-ordered subsidy.

65. The Plaintiffs are entitled to a declaration that the PUC's Order violates the Supremacy Clause, and an injunction prohibiting the implementation of the PPA.

COUNT III- VIOLATION OF THE COMMERCE CLAUSE

66. Plaintiffs incorporate by reference the allegations of paragraphs 1-65 as if fully set forth herein.

67. The negative aspect of the Commerce Clause (Article I, section 8, clause 3), also known as the Dormant Commerce Clause, erects a rule against state laws favoring in-state economic interests over out-of-state economic interests. States may not use their regulatory power to give in-state producers an advantage over producers located in other states.

68. The PUC's Order violates the Dormant Commerce Clause because its intent and effect are to discriminate in favor of an in-state generator and against out-of-state generators in several respects:

a. First, the Order's intent and effect is to reserve to an in-state producer, a guaranteed portion of the purchases of capacity and energy made by Rhode Island consumers, by mandating that National Grid procure a portion of its energy and capacity from Deepwater Wind's Block Island Wind Farm, thereby precluding out-of-state generators capable of serving Rhode Island from competing to supply that portion of the state's capacity and energy needs. The Order will have the intended effect of making capacity generated in state constitute a larger share, and capacity generated outside the state a smaller share, of the total Rhode Island energy and capacity market.

b. Second, the statute that mandated the Order was expressly premised on an intention to favor in-state producers. In signing the 2009 LTC statute, then-Governor Donald Carcieri stated, "Rather than purchasing power from New York and elsewhere, I urge . . . the Commission to help Rhode Island grow its nascent renewable energy sector into a vibrant, innovative and job creating industry."

c. Third, the Order states explicitly that a major purpose of the PPA is to create jobs and investment in Rhode Island. Among the non-price related criteria that the PUC was required to use to review the PPA was whether the PPA "is likely to provide economic development benefits, including: facilitating new and existing business expansion and the creation of new renewable energy jobs . . . ." However, promoting in-state jobs and investment are not legitimate local purposes that justify a discriminatory law under the Dormant Commerce Clause.

d. Fourth, the discriminatory intent and effect of the Order is reinforced by the fact that the PPA allows National Grid to pass on to Rhode Island ratepayers

the cost of their forced subsidy of Deepwater Wind. The Order justifies requiring Rhode Island consumers to foot the bill for this subsidy on the basis that the PPA would, at least purportedly, stimulate economic development in Rhode Island. Plaintiffs will be harmed here because they will be expected to pay the non-competitive cost of the Deepwater Wind Power, a total of $497 million, or approximately $1,000 per ratepayer.

69. Because the Order discriminates against out-of-state generators in its intent and effect, it is subject to strict scrutiny. The Order does not survive strict scrutiny because it does not advance a legitimate local purpose that cannot be adequately served by reasonable non-discriminatory alternatives. The purported justification for requiring the purchase of renewable energy and capacity from a new facility located within Rhode Island is pretextual. Wholesale customers within Rhode Island can meet their needs for renewable energy and capacity by purchasing from generating facilities located outside Rhode Island, such as TransCanada Power Marketing, Ltd.

70. The Plaintiffs are entitled to a declaration that the PUC's Order violates the Dormant Commerce Clause, and an injunction prohibiting the implementation of the PPA.

COUNT IV- VIOLATION OF 42 U.S.C. § 1983

71. Plaintiffs incorporate by reference the allegations of paragraphs 1-70 as if fully set forth herein.

72. 42 U.S.C. § 1983 provides a cause of action to a person who is deprived "of any rights, privileges, or immunities secured by the Constitution and laws" of the United States by another person acting under color of "any statute, ordinance, regulation, custom, or usage, of any State."

73. Plaintiffs are entitled to a judgment under 42 U.S.C. § 1983 because they were deprived of their rights under the Constitution and laws of the United States by the members of the PUC, who were Rhode Island state officials, acting under color of Rhode Island law.

PRAYER FOR RELIEF

74. Plaintiffs have no adequate remedy at law and no opportunity for compensation for the Order's violation of the FPA, PURPA, the Supremacy Clause, and the Commerce Clause, because the members of the PUC are immune from suit for retrospective relief.

75. Plaintiffs will suffer irreparable harm from the Order's violation of the FPA, PURPA, the Supremacy Clause and the Commerce Clause because such violations, in and of themselves, constitute irreparable injury, and because Plaintiffs will be required to pay for the above-market cost of energy and capacity that will be purchased by National Grid, and because they will be required to pay to subsidize a favored in-state generator.

76. The public interest will be harmed by the violations of the FPA and the Supremacy Clause because the Order frustrates Congress's desire to place wholesale energy and capacity markets under the exclusive purview of FERC and, by interfering with the workings of the ISO auctions, will undermine FERC's policy

choice to rely on market forces to signal the need for investment in additional capacity. The public interest will also be harmed by the violations of the FPA, PURPA, the Supremacy Clause, and the Commerce Clause, because Rhode Island ratepayers will be required to pay the above-market cost for energy and capacity generated by a favored in-state generator, instead of the market cost for renewable energy available from numerous out-of-state generators.

77. Plaintiffs are entitled to a judgment under 28 U.S.C. §§ 2201 and 2202, declaring that the Order violates the FPA, the Supremacy Clause, and the Commerce Clause.

78. Plaintiffs are also entitled to an injunction preventing the PUC from implementing the Order.

79. Entry of the requested injunctive relief will harm Defendants less than denying the relief would harm Plaintiffs.

WHERFORE, Plaintiffs pray that the Court enter an order:

A. Declaring that the Order violates the FPA, PURPA, the Supremacy Clause, and the Commerce Clause.

B. Declaring that the Order deprives Plaintiffs of their rights, in violation of the 42 U.S.C. § 1983.

C. Enjoining the Defendants from implementing the Order.

D. Awarding Plaintiffs' their reasonable attorneys' fees and costs.

E. Granting Plaintiffs such other and further relief as the Court deems just and proper.

Respectfully submitted,

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