UNITED STATES DISTRICT COURT
DISTRICT OF RHODE ISLAND

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

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

I. INTRODUCTION

In its opening papers, Deepwater Wind Block Island, LLC ("Deepwater") established that the applicable statute of limitations and bedrock standing principles bar Plaintiffs' claims. Plaintiffs failed, both at the hearing and in their post-hearing brief, to rebut the clear legal principles demonstrating that: (1) Rhode Island's three-year personal injury statute of limitations applies to and bars Plaintiffs' claims; (2) Plaintiffs lack standing because their claims are not within the zone of interests of the Federal Power Act (the "FPA"), and Plaintiffs lack standing under the Public Utilities Regulatory Policies Act ("PURPA") because this is not a PURPA case;

and (3) Plaintiffs do not have a concrete and particularized injury sufficient to confer standing to bring suit under Article III of the United States Constitution.

More broadly, and as this Court observed at the hearing on the motion to dismiss, the public policy behind the regulatory processes in place for approval of projects like the Block Island Wind Farm (the "Project") strongly supports applying the three-year limitations period for claims challenging the legality of that regulatory process. That conclusion resonates here, where Plaintiffs actively participated in every step of that regulatory process and had multiple opportunities to bring their claims within the three-year limitation period. This Court should dismiss Plaintiffs' claims and allow this carefully examined and fully and finally approved Project to continue with its construction.

II. ARGUMENT

A. Plaintiffs' Claims are Time-Barred

1. Rhode Island's Three-Year Personal Injury Statute of Limitations Applies

Plaintiffs' claims rest on statutes and constitutional provisions that do not contain statutes of limitation. Plaintiffs concede that federal law requires this Court to look to state law for the most analogous statute of limitations unless there is a federal statute of limitations directly on point. This District Court routinely has applied the Rhode Island three-year personal injury statute of limitations to claims for violation of federal statutes and constitutional provisions, reasoning that such claims are for personal injuries as that term is broadly defined by the Rhode Island Supreme Court.

Plaintiffs do not contest that their claims seek to vindicate personal rights. However, Plaintiffs try to morph these personal claims into an enforcement action governed by the five-year federal statute of limitations for "an action, suit or proceeding **for the enforcement of any**

civil fine, penalty, or forfeiture[]." *See* 28 U.S.C. § 2462 (emphasis added). Plaintiffs' argument fails on its face: this is plainly not an enforcement action, and Plaintiffs cannot and do not seek a civil fine, penalty, or forfeiture. Plaintiffs' sole support for their untenable position is the Federal Energy Regulatory Commission's ("FERC") notice of intent not to act on Plaintiff Riggs' prior FERC petitions (asserting the same claims asserted here): "Our decision not to initiate an enforcement action means that Mr. Riggs may bring an enforcement action . . . ." Plaintiffs' Post-Hearing Memorandum, Exhibit A. This 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 Constitution; they do not challenge a FERC order or seek to enforce a FERC requirement.

At the hearing, this Court questioned Plaintiffs' naked assertion that FERC's boilerplate language somehow converts Plaintiffs' complaint into an enforcement action: "is there any authority for that proposition?" Transcript of Hearing on Motion to Dismiss ("Hearing Transcript") at 27:15-29:5. Plaintiffs failed to cite any authority in response to this Court's question, but promised to do so in their Post-Hearing Memorandum. *Id.* at 29:6-30:18. They did not; Plaintiffs have failed to provide any statutory or legal support for their assertion that their claims are the types of enforcement actions encompassed by 28 U.S.C. § 2462.

Plaintiffs' failure is not surprising because no authority supports their position. Although FERC has the authority to impose and enforce civil penalties for violations of the FPA and the rules promulgated under the FPA, *see* 16 U.S.C. § 825o-1, this lawsuit does not invoke that authority for two reasons. First, unlike the statutes at issue in the cases cited in Plaintiffs' Opposition Memorandum,[1] the FPA does not contain a citizens' suit provision authorizing a

[1] The cases cited by Plaintiffs that were brought by private citizens all arose from alleged violations of statutes that contained express provisions authorizing citizens' suits to enforce civil penalties. *See Trawinski v. United*

private party to bring an enforcement action to impose a civil penalty in lieu of FERC action. *Compare* 16 U.S.C. § 825o-1 *with* 33 U.S.C. § 1365 (authorizing citizen suits under the Clean Water Act). Thus, as a matter of law, Plaintiffs complaint cannot be an action to enforce a civil penalty as described in 28 U.S.C. § 2462. Second, Plaintiffs do not bring claims seeking a civil penalty, fine, or forfeiture for violation of the FPA or its regulations. Rather, Plaintiffs' claims seek to invalidate the RIPUC approval of the PPA because they allege that approval invaded exclusive federal jurisdiction over interstate wholesale rate regulation. Complaint, ¶¶ 35-65. Plaintiffs make no claims that the defendants failed to take an action required by the FPA, PURPA or any regulations promulgated under either statute. *See generally*, Complaint. Moreover, Plaintiffs have not even requested the imposition of civil penalties (because they have no authority to do so). *See generally, id.*

It is strikingly clear that Plaintiffs' claims do not fall within the class of "enforcement actions" governed by the five-year statute of limitations in 28 U.S.C. § 2462. Rather, Plaintiffs contend that the RIPUC order approving the PPA infringes their perceived individual rights under the FPA, PURPA, and the United States Constitution to block any increased electricity costs that may result from the PPA. Under Rhode Island law, these claims fall comfortably within the broad definition of claims for personal injury. *See Commerce Oil Refining Corp. v. Miner*, 199 A.2d 606, 610 (R.I. 1964) (including "injuries resulting from invasions of rights . . . to which one is entitled by reason of being a person in the eyes of the law"). And, these are precisely the types of claims that this District Court and the First Circuit have previously

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Technologies, 313 F.3d 1295, 1298 (11th Cir. 2002) (citizen suit under the EPCA, 42 U.S.C. § 6305); *Nat'l Parks Conservation Ass'n v. TVA*, 480 F.3d 410, 415 (6th Cir. 2007) (citizens suit to enforce civil penalties under the Clean Air Act, 42 U.S.C. § 7604, 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) (citizens suit under Clean Water Act and explaining that "in those suits citizen plaintiffs effectively stand in the shoes of the" government agency); *Catskill Mts. Chapter of Trout Unlimited, Inc. v. City of New York*, 451 F.3d 77, 88 n.14 (2d Cir. 2006) (citizens suit under Clean Water Act).

concluded the Rhode Island Supreme Court intended to capture within the broad definition of injuries to the person set forth in *Commerce Oil*, which are subject to the three-year personal injury statute of limitations. *See Walden III, Inc. v. State of Rhode Island*, 576 F.2d 945, 947 (1st Cir. 1978) (illegal search and seizure claim); *Partin v. St. Johnsbury Co.*, 447 F. Supp. 1297, 1300 (D.R.I. 1978) (claim under 42 U.S.C. § 1981); *Tang v. Dept. of Elderly Affairs*, 904 F. Supp. 55, 60-61 (D.R.I. 1995) (42 U.S.C. § 1983 claim for discrimination based on violation of constitutional rights); *Pearman v. Walker*, 512 F. Supp. 228, 229-34 (D.R.I. 1981) (42 U.S.C. § 1983 claim for alleged violations of the 4th and 14th amendments to the United States Constitution). This Court, therefore, should apply the Rhode Island three-year personal injury statute of limitations to Plaintiffs' claims as the most analogous state law statute of limitations. *See Wilson v. Garcia*, 471 U.S. 261, 266-67 (1985); *Greenwood v. N.H. PUC*, 527 F.3d 8, 13 (1st Cir. 2008).

2. Plaintiffs' Claims Accrued When the RIPUC Approved the PPA

Plaintiffs' claims accrued, at the latest, on August 16, 2010 – the date that the RIPUC entered the order approving the PPA. Plaintiffs assert that the RIPUC order violated their statutory and constitutional rights. Plaintiffs make no claim that the RIPUC, Deepwater, or National Grid have done anything since that date that violates the FPA, PURPA or the United States Constitution. The facts that Plaintiffs allege in support of their claims were complete at the time the RIPUC approved the PPA. Plaintiffs had a "complete and present cause of action" at the time of the RIPUC approval. *See Wallace v. Kato*, 549 U.S. 384, 388 (2007) (quoting *Bay Area Laundry and Dry Cleaning Pension Trust Fund v. Ferbar Corp. of Cal.*, 522 U.S. 192, 201 (1997)). Consequently, the statute of limitations began to run on that date. Despite Plaintiffs' unsupported arguments to the contrary, Plaintiffs did not have to petition FERC before the

statute of limitations began to run; nor could Plaintiffs sit and wait until it became more clear that the Project would actually be built (or until they actually received an increased electric bill) before the limitations period began.

3. Plaintiffs Had No Obligation to Exhaust Administrative Remedies

Plaintiffs' claims challenge the authority of the RIPUC to approve the PPA. Such claims can be raised directly in federal district court, without any obligation to first pursue administrative remedies. *See New York State Elec. & Gas Corp. v. Saranac Power*, 117 F. Supp. 2d 211, 247-48 n.72 (N.D.N.Y. 2000) (challenges to authority to take action are not subject to exhaustion requirements). Plaintiffs allege that the RIPUC usurped FERC's authority to regulate rates for the sale of electricity in the interstate wholesale energy market and therefore violated the Supremacy Clause of the United States Constitution when it approved the PPA. There is no prerequisite to exhaust administrative remedies before filing these claims.

Plaintiffs' challenges to the PUC order in this action and in two prior failed FERC petitions are plainly not within FERC's "exclusive jurisdiction over the transmission of electric energy in interstate commerce and . . . the sale of electric energy at wholesale in interstate commerce." *See New York v. FERC*, 535 U.S. 1, 18 (2002) (quoting 16 U.S.C. § 824(b)). The RIPUC order was not a rate-setting order and did not violate FERC rules, and Plaintiffs have not challenged the RIPUC order on that basis. *See* Complaint of Benjamin Riggs Relating to Public Utility Commission of Rhode Island Decision on Docket #4185 Re: Power Purchase Agreement Between National Grid and Deepwater Wind Block Island, Docket No. EL12-100-000 ("2012 FERC Petition") (seeking relief because of alleged PURPA and constitutional violations by the RIPUC, but not seeking a rate-setting proceeding); Complaint of Benjamin Riggs Relating to Public Utility Commission of Rhode Island Decision on Docket #4185 Re: Supremacy Clause

Conflict in the Amended Power Purchase Agreement Between National Grid and Deepwater Wind Block Island, Docket No. EL15-61-000 ("2015 FERC Petition") (same and adding Supremacy Clause argument). Rather, the 2012 FERC Petition and the 2015 FERC Petition asked FERC to: (a) determine that the RIPUC acted outside its jurisdiction, (b) invalidate the order approving the PPA, and (c) enjoin the RIPUC from approving similar contracts in the future. *Id.* There is no statutory requirement in the FPA to bring claims of this nature to FERC before filing an action in court. Plaintiffs were not required to petition FERC even once (and certainly not twice).

This Court asked Plaintiffs to provide a case establishing the requirement that Plaintiffs exhaust administrative remedies at FERC before bringing this lawsuit. Hearing Transcript at 30:2-18. Not one of the cases cited by Plaintiffs does so. Instead, the cases relied on by Plaintiffs discuss exhaustion requirements in FERC proceedings considering claims unlike the claims Plaintiffs make here.

To be sure, certain claims must be raised before FERC. For example, in *Mississippi Power & Light Co. v. Miss.*, 487 U.S. 354, 375 (1988), the United States Supreme Court recognized that it was improper for the plaintiffs to challenge the reasonableness of a FERC-established rate in state court. As another example, in *Dilaura v. Power Auth. of N.Y.*, 982 F.2d 73, 79 (2d Cir. 1992), the court held that administrative exhaustion precluded a claim that a FERC-issued license had been violated. *See also Platte River Whooping Crane Critical Habitat Maintenance Trust v. FERC*, 876 F.2d 109, 112-13 (D.C. Cir. 1989 (rejecting jurisdiction over the claim because an express statutory provision of the FPA requires a petition for rehearing at FERC when challenging a FERC order). Moreover, several of the cases Plaintiffs cite for the proposition that they must exhaust administrative remedies relate to specific administrative

remedies available under PURPA that are inapplicable to Plaintiffs' claims. *See Connecticut Valley Co. v. FERC*, 208 F.3d 1037, 1042-43 (D.C. Cir. 2000) (claim asserting that a state commission failed to comply with a FERC order under PURPA must first be brought to FERC before instituting a suit in federal district court); *Niagara Mohawk Power Corp. v. FERC*, 306 F.3d 1264, 1269-71 (2d Cir. 2002) (claim by utility that state public service commission did not comply with PURPA regulations is subject to administrative exhaustion under PURPA); *Allco Fin. Ltd. v. Klee*, 805 F.3d 89, 96 (2d Cir. 2015) (same reasoning applied to claim by qualifying facility).

These administrative exhaustion requirements do not apply here. First, for reasons explained in detail below, PURPA is wholly inapplicable to this case and therefore the administrative procedures set forth in PURPA do not and cannot apply. Second, Plaintiffs do not challenge a FERC order or action – nor do they claim that a FERC rule has been violated. *See* 16 U.S.C. § 825l (providing mechanism to petition for rehearing and seek federal court review of FERC orders). They claim that the RIPUC infringed upon FERC's exclusive jurisdiction to set wholesale rates when it approved the PPA. There is no statute requiring that such challenges to state action first be raised through a petition to FERC. Consequently, Plaintiffs had no obligation to pursue administrative remedies before bringing their claims here. *Acción Social de P.R., Inc. v. Viera Perez*, 831 F.2d 365, 369 (1st Cir.1987).

Incredibly, the chief cases relied on by Plaintiffs undermine their exhaustion argument. In both *Nazarian* and *Solomon* 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.[2] Plaintiffs' own cases demonstrate that they did not need to file any petition with FERC before commencing this action; that argument is an after-the-fact attempt to find purchase before this court.

In short, Plaintiffs had no obligation to exhaust administrative remedies with FERC.[3] Plaintiffs' claims differ from the types of claims that must first be raised before FERC. *See*, *e.g.*, *Freehold Cogeneration Assocs., L.P. v. Board of Regulatory Comm'rs*, 44 F.3d 1178, 1185 (3d Cir. 1995) (distinguishing between challenge to implementation of PURPA subject to administrative exhaustion and alleged violation of other rights under PURPA not subject to administrative proceedings). Plaintiffs concede that only mandatory administrative proceedings toll the statute of limitations. *See* Plaintiffs' Post-Hearing Memorandum at 6 (quoting *United States v. Meyer*, 808 F.2d 912, 916 (1st Cir. 1987)). Because no such mandatory obligation exists here, the statute of limitations began to run on the date the RIPUC approved the PPA – August 16, 2010.

4. Plaintiffs' Claims Accrued When the Alleged Violation Occurred

Controlling law dictates that the limitations period on Plaintiffs' claims began to run on the date the RIPUC allegedly violated Plaintiffs' statutory and constitutional rights (August 16, 2010) – not on some later date when substantial steps toward the construction of the Project were

[2] Both cases went to and were ultimately decide by the United States Supreme Court, a court that does not decide cases with jurisdictional defects.

[3] Plaintiffs' claim that there was a requirement to exhaust administrative remedies before bringing their claims is undermined by their own actions. First, only Riggs filed a FERC petition; Ehrhardt and the Rhode Island Manufacturers Association ("RIMA") did not. As such, applying Plaintiffs' argument, Ehrhardt's and RIMA's claims would have to be dismissed for failure to exhaust administrative remedies. Second, Riggs brought two similar FERC petitions before instituting suit. If the purpose of bringing a FERC petition was to exhaust administrative remedies, then Riggs should have proceeded to file claims in this Court after FERC declined to take action on the first FERC petition, which was issued in October of 2012, well within the three-year statute of limitations for Plaintiffs' claims.

complete[4] or when Plaintiffs received a bill with higher electric rates resulting from the PPA. The actions giving rise to Plaintiffs' claims were complete when the RIPUC issued the approval. Plaintiffs were free to wait and see if the Project cleared other hurdles, but they were not free to ignore the applicable statute of limitations.[5] As a result, the statute of limitations expired on August 16, 2013, long before Plaintiffs filed this action.

The date Plaintiffs' claims accrue for statute of limitations purposes is a question of federal law – not state law. *Randall v. Laconia, NH*, 679 F.3d 1, 6 (1st Cir. 2012) ("While we are utilizing New Hampshire law for the applicable statute of limitations, the date of accrual is a federal law question."). Under federal law, when a plaintiff alleges an injury arising from the violation of a statute or constitutional provision, the cause of action accrues at the time that the alleged violation occurs. *See, e.g.*, *id.* (claim for violation of Residential Lead-Based Hazard Reduction Act accrued at time of closing when seller failed to make required disclosure); *Asociación de Suscripción Conjunta del Seguro de Responsabilidad Obligatorio v. Juarbe-Jiménez*, 720 F. Supp. 2d 152, 157-58 (D.P.R. 2010) (claim that regulation was unconstitutional accrued when the regulation was enacted). Applying this maxim, the First Circuit has held, for example, that a claim that a state regulatory agency order violated PURPA accrued on the date that the public utilities commission entered the order. *Greenwood v. N.H. Pub. Utils. Comm'n*, 527 F.3d 8, 14 (1st Cir. 2008).

[4] Plaintiffs falsely stated at the hearing on the motion to dismiss that they filed the Complaint before construction of the Project began. *See* Hearing Transcript at 39:3-4. Component manufacturing (the wind turbine blades) began in December 2013 (more than 3 years after the RIPUC approved the PPA and almost 3 years before the instant complaint was filed); jacket fabrication began in November 2014, a full notice to proceed was issued to the turbine manufacturer in February 2015 and mobilization to begin physical installation began in early July 2015. Plaintiffs did not file this lawsuit until August 10, 2015.

[5] The failure of other potential wind farm projects is irrelevant to the determination of when Plaintiffs' claims accrued; if they, in fact, ever accrued. Plaintiffs' reference to such failures, therefore, has no impact on this matter.

Plaintiffs' reliance on *Paul v. City of Woonsocket*, 745 A.2d 169 (R.I. 2000) ("*Paul*"), to support their argument that their claims do not accrue until they pay higher electric bills is misplaced for multiple reasons. First, the plaintiffs in *Paul* alleged their injury arose from enforcement of the ordinance requiring them to pay unconstitutional tapping fees. *Id.* at 172. Here, Plaintiffs allege that the entry of the RIPUC order alone was the unlawful and unconstitutional action that caused their injury. Thus, *Paul* is plainly distinguishable on the facts.

Second, the First Circuit has expressly stated that it is preferable to have certainty on the application of the statute of limitations for constitutional and statutory claims. *See Walden III, Inc.*, 576 F.2d at 947. Federal law governs the statute of limitations accrual date, and taking the approach the Rhode Island courts took in *Paul* would undermine this desire for certainty by focusing on the peculiar facts of each case to determine when the statute of limitations accrued. This Court should avoid this overly granular analysis and apply the well-established principal that the cause of action accrues for statute of limitations purposes when the alleged statutory or constitutional violation occurred. *Nieves v. McSweeney*, 241 F.3d 46, 52 (1st Cir. 2001) (cause of action accrues at time conduct in violation of rights occurred). Here, that is the entry of the RIPUC order, and the statute of limitations thus began to run on August 16, 2010 and expired on August 16, 2013.[6]

To find otherwise would be contrary to public policy, which favors new energy infrastructure development. No energy project, or any other privately financed infrastructure

[6] This Court should not rely on *Paul* to determine the accrual date for two additional reasons: (1) it is a state case and therefore not applicable to the federal law determination of when the claim accrued, and (2) the court in *Paul* did not undertake a thorough analysis of when the statute of limitations should begin to run because it determined that the claims were untimely even under the very liberal accrual date the court applied. *Paul*, 745 A.2d at 172.

project, would be financed or built if regulatory approvals could be challenged years after the owners invested hundreds of millions of dollars in the project.

5. Plaintiffs' Lack of Standing Does Not Mean The Statute Of Limitations Could Expire Before Their Claims Accrue

At oral argument, this Court inquired whether the Plaintiffs' alleged lack of standing was in conflict with the argument that the statute of limitations expired because it might create a circumstance where the statute of limitations expired before Plaintiffs had standing to bring their claims. Hearing Transcript at 12:16-13:5. No such conflict exists. Simply put, Plaintiffs either had standing at the time the RIPUC approved the PPA or they did not. Plaintiffs cannot and did not grow into standing under PURPA, the FPA, or the United States Constitution.

Plaintiffs will not obtain standing at some point in the future, such as when it becomes more imminent that Deepwater will sell power to National Grid under the PPA, or when Plaintiffs make the first payment of an electric bill that includes higher rates. The Court can assume for purposes of this motion that someday the Plaintiffs will pay higher rates because of the Project. It does not matter; Plaintiffs' lack of standing is incurable.

There is no tension between the standing and the statute of limitations arguments. This Court can apply either or both arguments to dismiss Plaintiffs' claims. In short, even if Plaintiffs could overcome the standing hurdle, their claims are time-barred because they failed to challenge the RIPUC order within the three-year limitation period.

6. Public Policy Favors a Short Limitations Period for Challenges to Regulatory Agency Action

The three-year statute of limitations serves the salutary purpose of ensuring that challenges to agency action are made in a timely manner and are foreclosed after a date certain. The consequences of allowing parties to challenge major power projects after they begin

construction (and years after obtaining the required approvals) would be catastrophic to the energy market.

The Rhode Island General Assembly passed the statute establishing the process for the RIPUC review of the PPA. R.I. Gen. Laws § 39-26.1-1 (the "LTC Statute"). The process required hearings before the RIPUC that permitted all interested parties to participate. Moreover, the RIPUC's order was appealed to the Rhode Island Supreme Court. Plaintiffs here had the right to participate in that appeal process, which some members of RIMA, in fact, did.[7]

One of the legislative purposes of the LTC Statute was to facilitate the financing of renewable energy generation facilities, including the Block Island Wind Farm. R.I. Gen. Laws § 39-26.1-1 ("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 . . . 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."). The statute, therefore, is an acknowledgment by the General Assembly that developers like Deepwater need to obtain assurances of a revenue stream for the sale of their energy to obtain the financing necessary to construct desired facilities like the Block Island Wind Farm. The

[7] Under R.I. Gen. Laws § 39-5-1, "[a]ny person aggrieved by a decision or order of the commission may, within seven (7) days from the date of the decision or order, petition the supreme court for a writ of certiorari to review the legality and reasonableness of the decision or order." This provision permits anyone to appeal so long as they are "aggrieved," regardless of whether the party appealing intervened in the RIPUC proceeding that resulted in the order. *See Blackstone Valley Chamber of Commerce v. Pub. Utils. Comm'n*, 452 A.2d 931, 934 (R.I. 1982) (explaining that the right to appeal is conditioned only on a demonstration that the appealing party is aggrieved by the order and distinguishing the test for whether a party is aggrieved from the test for whether a party may intervene in an RIPUC proceeding). Ehrhardt, a party to the RIPUC proceeding, and Riggs and RIMA, even though they did not intervene as parties in the RIPUC proceeding, all could have sought to appeal from the RIPUC order even though they did not intervene as a party in the RIPUC proceeding. Plaintiffs could have raised all the claims they assert here before the Rhode Island Supreme Court in such an appeal. RIPUC orders have the force of statute. *New Eng. Tel. & Tel. Co. v. Public Utils. Comm'n*, 358 A.2d 1, 21 (R.I. 1976). Therefore, they are applicable to Riggs and RIMA, regardless of the fact that they did not intervene in the proceeding that resulted in the order. It is also worth noting that, in fact, RIMA filed an amicus brief in the Rhode Island Supreme Court proceeding.

RIPUC's approval of the PPA, a bilateral negotiated contract, therefore provides assurance that Deepwater and National Grid will not face subsequent challenges from state regulators and other interested parties regarding the legality of the deal struck between them.

The RIPUC approval process allowed other interested parties and the public at large to participate in the RIPUC proceeding. Similarly, the other permits and approvals that Deepwater obtained from other agencies, such as the Rhode Island Coastal Resources Management Council ("CRMC"), allowed for public participation and intervention to ensure that all concerns were aired and carefully considered before approval. And, just as before the RIPUC, the proceedings before these other agencies provided an appeal process for parties such as Plaintiffs to challenge agency actions.[8]

Through these processes, Deepwater obtains assurances that any challenges to the development of the Project are resolved, and Deepwater can finance and build the Project without risk that someone lying in the weeds will later seek to upend those investment decisions through a late-filed challenge to an approval or an approving agency's jurisdiction. Plaintiffs' complaint is just what the regulatory process seeks to avoid: a late-filed challenge to an approval that seeks to entirely disrupt the legislative goal of providing the certainty that a project developer is entitled to receive after running the gauntlet and securing each permit and approval required by law. Deepwater ran that gauntlet, obtained the required permits and approvals, and began construction of this substantial Project more than one year ago.

Plaintiffs robustly participated in the public hearings on these permits and approvals, opposing the Project at every turn. They had every right to do so. However, they did not have the right to launch this late-filed collateral attack after construction began, and they fail to explain why they opted to sit on their hands and not file a federal court complaint until nearly 5

[8] The CRMC order was, in fact, challenged unsuccessfully in Rhode Island Superior Court.

years after the RIPUC order.[9] If Plaintiffs believed the RIPUC lacked jurisdiction to issue an approval, they should have raised their claims much sooner. The certainty of applying the three-year statute of limitations that begins to run on the RIPUC order date is fair to all parties and allows project developers to initiate the construction of these significant power projects. There is no unfairness to Plaintiffs in imposing such a rule. They had every opportunity to assert their challenges.[10] Plaintiffs' persistent opposition throughout the various regulatory processes along the way demonstrates that Plaintiffs are not unfairly prejudiced by the application of the statute of limitations to bar their claims. Plaintiffs' claims are time-barred.

B. Plaintiffs Lack Standing

1. Plaintiffs Lack Zone-of-Interest Standing Under PURPA and the FPA[11]

Deepwater has previously demonstrated that Plaintiffs are not within the class of persons protected under PURPA and the FPA. PURPA does not apply in this case, and, even if it did, as

[9] Plaintiffs' assertion that they thought their claims were not ripe rings hollow. The 2012 FERC petition filed by Mr. Riggs raised substantially similar claims, clearly suggesting that Mr. Riggs thought the claims were ripe for adjudication at that time. Plaintiffs have provided no explanation for why they did not file this claim after FERC decided to take no action on the 2012 FERC Petition. Contrary to Plaintiffs' statement, Mr. Riggs did not tell FERC in a 2014 letter that he thought the claims were not yet ripe for a federal court claim. *See* Plaintiffs' Post-Hearing Memorandum at 12. Rather, Mr. Riggs merely told FERC: "Because this project has still not obtained its final permit approval (from the U.S. Army Corps of Engineers), and a legal challenge to its permit approval by the Coastal Resources Management Council is pending, no action has been taken to date by any party to file the appropriate suit in the U.S. District Court." *Id.*, Exhibit G.

[10] The fact that the Rhode Island Attorney General originally participated in the appeal to pursue claims that the approval of the PPA violated the Commerce Clause, but later reversed course and withdrew from the appeal, does not alter the fact that Plaintiffs could have raised those arguments. Even if they were originally relying on the Attorney General to pursue the arguments, once the Attorney General reversed course, Plaintiffs could have sought to intervene in the appeal to pursue the argument. Moreover, the RIMA members who were already parties to the appeal could have raised the arguments the Attorney General abandoned. Notably, RIMA itself did not raise the issue in its amicus brief.

[11] Deepwater also maintains its argument that Plaintiffs lack standing to bring any of their claims under Article III of the United States Constitution because they have not alleged an actual or imminent particularized injury. *See, e.g.*, *Citizens for Orderly Energy Policy, Inc. v. County of Suffolk*, 604 F. Supp. 1084, 1091 (E.D.N.Y. 1985); *Burton v. Central Interstate Low-Level Radioactive Waste Compact Comm'n*, 23 F.3d 208, 210 (8th Cir. 1994); *see also United States v. Western Elec. Co.*, 1992 U.S. Dist. LEXIS 588, *2 (D.D.C. Jan. 15, 1992) (holding that granting standing to plaintiff due to status as a ratepayer "would stretch the meaning of standing beyond all reason."). Plaintiffs' statement at oral argument that Deepwater does not dispute standing for Plaintiffs' Commerce Clause claim is incorrect. It is Deepwater's position that Plaintiffs lack Article III standing on all their claims.

retail customers, Plaintiffs are not within the class of persons (utilities and generators) with statutory standing to bring suit under PURPA. Similarly, Plaintiffs' bare economic interest fails to bring them within the FPA zone of interests. Finally, the United States Supreme Court's recent decision in *Hughes v. Talen Energy Marketing, LLC*, 2016 U.S. LEXIS 2797 (April 19, 2016) ("*Talen*") further demonstrates that: (a) Plaintiffs do not have zone-of-interest standing to assert their claims under the FPA, and, in any event, (b) Plaintiffs' claims fail on the merits. Each point is explained seriatim below.

2. Plaintiffs Are Not Within the PURPA Zone of Interests

Plaintiffs erroneously claim that the RIPUC order violates PURPA by according Deepwater "the benefits accorded by PURPA to a small power production facility, without requiring that [Deepwater] satisfy the statutory and regulatory requirements for such a facility."[12] Plaintiffs fail to understand that PURPA does not apply in this case. The PPA is not a PURPA-jurisdictional contract. Deepwater has no obligation to certify the Block Island Wind Farm as a qualifying small power production facility ("QF") under PURPA. The only relief available under PURPA is an enforcement action against a state regulatory commission for failure to comply with the requirements of PURPA. 16 U.S.C. § 824a-3(h)(2). Because the RIPUC was not acting pursuant to PURPA when it approved the PPA, there is no relief available under PURPA. Plaintiffs present no contrary information or facts.

Second, even if this Project implicated PURPA, Plaintiffs cannot raise a PURPA claim because Plaintiffs lack standing to bring an action in this Court under section 210(h)(2) of PURPA. Under PURPA, only an "electric utility, qualifying cogenerator, or qualifying small power producer" have the right to petition FERC to enforce the requirement that a state regulatory authority implement FERC rules governing sales between utilities and QFs. 16

[12] Complaint, ¶ 54.

U.S.C. § 824a-3(h)(2)(B); and, if FERC does not act, PURPA permits these same utilities, cogenerators, and power producers to pursue such claims in federal court. Plaintiffs here are individual, retail ratepayers – not electric utilities, qualifying cogenerators, or qualifying small power producers. Additionally, Plaintiffs' claims do not seek to require the RIPUC to implement FERC's PURPA rules. Thus, the remedies (both administrative and in the federal courts) under PURPA upon which Plaintiffs rely are unavailable under the circumstances of this case.

3. Plaintiffs' Claims Are Not Within the FPA Zone of Interests

Plaintiffs' claim of standing under the FPA is equally unavailing. Regardless of whether the rates under the PPA are wholesale rates that are subject to regulation under the FPA, Plaintiffs are neither within the zone of interest protected by the FPA nor aggrieved under the FPA.

The FPA is intended to protect and regulate wholesale energy market participants. While regulation of wholesale power sales under the FPA may have an incidental effect on retail energy sales, the protection of individual retail customers is outside the scope of the FPA. Rather, the protection of retail customers is reserved to the states, which derive no authority from the FPA. Because Plaintiffs are unable to demonstrate that their individual interests are protected by the FPA, they fail to satisfy the zone-of-interest test required to establish statutory standing.

Plaintiffs selectively quote language from 16 U.S.C. § 2631 in support of their contention that they are included within the FPA's zone of interest. Plaintiffs' Opposition Memorandum at 20 (ECF No. 22). A more complete reading of that section reveals that it does not apply to wholesale rates subject to FERC regulation under the FPA (i.e., the rates under the PPA). Specifically, Section 2631(a) states that "any electric consumer of an affected electric utility may intervene and participate as a matter of right in any ratemaking proceeding or other appropriate

regulatory proceeding relating to rates or rate design *which is conducted by a State regulatory authority (with respect to an electric utility for which it has ratemaking authority) or by a nonregulated electric utility*" (emphasis added). Therefore, Section 2631 provides no support for Plaintiffs' argument that they have standing under the FPA to bring the instant suit.

4. *Talen* Confirms that Plaintiffs and their Claims are Outside the FPA Zone of Interests

The United States Supreme Court's recent decision in *Talen Energy Marketing, LLC* (*Talen*) does not support Plaintiffs' position in this suit. In *Talen,* the Supreme Court affirmed the Fourth Circuit's holding in *PPL EnergyPlus, LLC v. Nazarian*, 753 F.3d 467 (4th Cir. 2014) ("*Nazarian*"),[13] that the Supremacy Clause of the United States Constitution pre-empted a state program that interfered with FERC's exclusive jurisdiction to set rates for the sale of wholesale energy in interstate commerce. *Talen,* 2016 U.S. LEXIS 2787 at *22-*27. *Talen* undermines Plaintiffs' argument that *Nazarian* and *Solomon* establish their FPA zone-of-interest standing to bring their claims for multiple reasons.

First, *Nazarian* and *Solomon* did not address standing issues, and neither did *Talen*. Therefore, there is nothing about the analyses or holdings that establishes statutory standing for Plaintiffs in this case.

Second, the Supreme Court's analysis in *Talen* focused only on claims of pre-emption under the Supremacy Clause – not on alleged violations of the FPA. *Id.* at *21-*28; *see also* *28-*31 (Sotomayor, J., concurring). Plaintiffs argue that their claims are the same as those raised in *Nazarian* and *Solomon*. However, the *Talen* decision confirms that those claims were not for violations of any provisions in or regulations under the FPA. Rather, the claims in *Talen,*

[13] *Talen* is the Supreme Court decision on appeal from *Nazarian*, but it applies equally to *PPL EnergyPlus, LLC v. Solomon,* 766 F.3d 241 (3d Cir. 2014) ("*Solomon*"). *Talen,* 2016 U.S. LEXIS at *20 n.8.

and therefore Plaintiffs' claims, are, at their heart, pre-emption claims raised under the Supremacy Clause. As such, they are not claims that are contemplated under the FPA.

Third, the plaintiffs in *Nazarian* and *Solomon* are power generators and electric distribution companies. They are not similarly situated to Plaintiffs because, unlike Plaintiffs, they are participants in the interstate market for the wholesale sale of electricity. Plaintiffs are retail electric customers who do not participate directly in the FERC-governed wholesale interstate electricity market. As such, the standing of the plaintiffs in *Nazarian* and *Solomon* is irrelevant to Plaintiffs' standing to pursue their claims. Nothing in *Talen* suggests that individual retail ratepayers would have standing to assert such claims.

It is clear that the FPA governs only the participants in the wholesale energy and transmission markets. Plaintiffs, as retail ratepayers who do not participate in the interstate market for wholesale sales of electricity, are not within the class of persons protected by the FPA and thus lack zone-of-interest standing to bring their claims in federal court.[14]

5. *Talen* Confirms that Plaintiffs' Claims are Meritless

The Supreme Court confirmed that the specific "auction-upsetting" arrangement employed by Maryland and New Jersey impermissibly interfered with the interstate wholesale electricity markets; it did not call into question whether the type of bilateral contract between Deepwater and National Grid is an acceptable method to contract for the sale of energy. To the contrary, the Supreme Court ruling in *Talen* specifies that the reason the Maryland and New Jersey programs invaded the exclusive jurisdiction of FERC was the requirement that generators

[14] At the hearing on the motion to dismiss, this Court inquired as to what the result would be if Plaintiffs prevailed. This question raises the additional standing issue of whether success on Plaintiffs' claims would redress Plaintiffs' claimed injury. *See Wine & Spirits Retailers, Inc. v. Rhode Island*, 418 F.3d 36, 44 (1st Cir. 2005) (redressability is a necessary element of standing). Here, it is not at all clear that Plaintiffs' claimed harm of increased rates for electricity would be redressed if they are successful on their claims. *See* Hearing Transcript at 42:5-46:4 (Plaintiffs discussing what will happen if they are successful). Therefore, the lack of redressability provides another basis for this Court to conclude that Plaintiffs lack standing under Article III of the United States Constitution.

participate in the FERC capacity auction and "adjust[ed] an interstate wholesale rate[.]" *Talen*, 2016 U.S. LEXIS 2787 at *22. *Talen* makes it clear that states are free to encourage the development of "new or clean [energy] generation . . . [s]o long as a State does not condition payment of funds on capacity clearing the [FERC-governed] auction[.]" *Id.* at *27-*28. The National Grid/Deepwater PPA is a bilateral contract at negotiated rates that are neither set nor guaranteed by the RIPUC.

Plaintiffs have repeatedly tried to inject the merits of their claims into the consideration of this motion to dismiss. This Court need not address the merits – Plaintiffs' claims fail because they are untimely and because Plaintiffs lack standing – but *Talen* demonstrates that Plaintiffs cannot succeed on the merits, regardless.[15]

III. CONCLUSION

For these reasons, as well as those set forth in Deepwater's previous memoranda and those articulated at the hearing on the motion to dismiss, this Court should dismiss Plaintiffs' Complaint with prejudice.

[15] *Talen* invalidated the Maryland program because the pricing method employed by Maryland directly interfered with FERC's exclusive federal right under the FPA to regulate interstate wholesale rates. *Talen*, 2016 U.S. LEXIS 2797 at *22. The RIPUC approval of the PPA does not disrupt or interfere with FERC's jurisdiction. Unlike the program at issue in *Talen*, where the state regulators set the guaranteed rate, the RIPUC approval did not set the rate in the PPA; it merely determined that the rate negotiated by Deepwater and National Grid was commercially reasonable. This function has long been a fundamental aspect of state regulation. *See Philadelphia Electric Co.*, 15 FERC ¶ 61,264, at P 61,601 (1981); *Pennsylvania Power & Light Co.*, 23 FERC ¶ 61,006, *order on reh'g*, 23 FERC ¶ 61,325, at P 61,716 (1983); *Southern Company Service*, 26 FERC ¶ 61,360, at P 61,795 (1984); *Pacific Power & Light Co.*, 27 FERC ¶ 61,080, at P 61,148 (1984); *Palisades Generating Co.*, 48 FERC ¶ 61,144, at P 61,574 and n.10 (1989). The Supreme Court's ruling does not limit the RIPUC's right to approve the reasonableness of the negotiated rates in the PPA. In fact, the LTC Statute is among the "various other measures States might employ to encourage development of new or clean generation" that do not interfere with FERC's rate regulation mechanisms and, therefore, are permissible. *See id.* at *27-28. Although the RIPUC order may have an incidental or indirect effect on the wholesale market, that is not sufficient to render it invalid or to impinge upon FERC's jurisdiction. *See Nw. Cent. Pipeline Corp. v. State Corp. Comm'n*, 489 U.S. 493 at 514 (1989); *see also Connecticut Dep't of Pub. Util. Control v. F.E.R.C.*, 569 F.3d 477, 481 (D.C. Cir. 2009). Although there is no need for this Court to reach the merits of Plaintiffs' claims, the Supreme Court's holding in *Talen* establishes that Plaintiffs' pre-emption claims under the Supremacy Clause fail on substance as well as procedure because the RIPUC approval of the PPA does not interfere with FERC's interstate wholesale rate-setting authority.

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CERTIFICATE OF SERVICE

I hereby certify that on the 29th day of April, 2016, a copy of the foregoing document was filed electronically. Notice of this filing will be sent to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's Electronic Filing System.

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