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 REPLY MEMORANDUM IN SUPPORT OF ITS MOTION TO DISMISS PLAINTIFFS' COMPLAINT

I. INTRODUCTION

In their opening papers, Defendants established that Plaintiffs' claims are time-barred. Plaintiffs' federal constitutional and statutory claims for alleged violations of their individual rights do not contain a specific federal statute of limitations. In those circumstances, the First Circuit and Judges in this District have consistently adopted Rhode Island's three-year personal injury limitations period in selecting the most analogous limitations period. Applying that three year limitation period in this case establishes that the statute of limitations for Plaintiffs' claims expired on August 16, 2013 – three years after the RIPUC issued its final order approving the PPA. Defendants also established that Plaintiffs lack standing to bring this action because courts

have long held that ratepayers with generalized grievances lack standing. Here, Plaintiffs' complaint fails to establish any particularized harm or concrete injury; their alleged injuries are common to the public at large.

Plaintiffs' opposition fails to establish that their complaint is not time-barred. Plaintiffs rely primarily on a five-year federal statute of limitations that applies to government enforcement actions to recover a civil fine, penalty, or forfeiture. However, the Plaintiffs are not the government, this is not an enforcement action, and this is not a proceeding to recover a fine, penalty, or forfeiture. Further, bedrock case law establishes August 16, 2010 as the trigger date, not some later time after Plaintiffs' unsuccessful petitions to FERC or after Deepwater Wind Block Island, LLC ("Deepwater") is more than one year into construction of the wind farm. Plaintiffs' action is time-barred.

Plaintiffs' opposition also fails to establish standing. The plaintiffs' alleged injury from higher utility costs under the Power Purchase Agreement ("PPA") between Deepwater and The Narragansett Electric Company d/b/a National Grid ("Narragansett") is no different from the common effect on all Rhode Island electric ratepayers. Article III does not confer standing for these generalized and political claims held by any citizen who has a grievance about higher rates. Plaintiffs also lack standing because of their inability to show that succeeding in this lawsuit would redress their so-called injury. Plaintiffs' fight against the Block Island Wind Farm does not belong in this Court; it is a political grievance over energy policy in Rhode Island.

Finally, Plaintiffs do not have statutory standing under the Public Utilities Regulatory Policies Act ("PURPA") and the Federal Power Act ("FPA") because they are not within the zone of interests protected by these statutes. PURPA is inapplicable, and in any event does not include Plaintiffs in the category of persons permitted to bring a lawsuit for violations. The FPA

governs wholesale electric rate regulation and does not protect individual retail ratepayers like Plaintiffs with only generalized economic interests.

For all of these reasons as set forth more fully below, the Court should dismiss Plaintiffs' complaint in its entirety.

II. ARGUMENT

A. Rhode Island's Three-Year Personal Injury Statute of Limitations Bars Plaintiffs' Claims

1. Rhode Island's personal injury limitation period applies

The core question in the limitations analysis is not in dispute here. Plaintiffs' core claims lie under PURPA and the FPA, and neither statute contains an express statute of limitations for actions brought by private parties alleging violations.[1] This Court must, therefore, apply the rule established by the United States Supreme Court: "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." *Wilson v. Garcia*, 471 U.S. 261, 266-67 (1985) (emphasis added). "The operative principle . . . is that the most analogous statute of limitations, not the most generous one, should set the benchmark." *Doyle v. Huntress, Inc.*, 513 F.3d 331, 336 (1st Cir. 2008).

The First Circuit and this Court have consistently adopted the three-year personal injury limitations period when applying Rhode Island law to select a limitations period for federal constitutional or statutory claims. *See Walden III, Inc. v. State of Rhode Island*, 576 F.2d 945, 947 (1st Cir. 1978) (applying three-year personal injury statute to a § 1983 claim for an illegal search and seizure); *Doyle*, 513 F.3d at 335-36 (1st Cir. 2008) (applying three-year personal injury statute to claim for violation of a federal statute governing wages paid to seamen); *Tang v.*

[1] The constitutional claims are derivative of the statutory claims and obviously do not contain an internal statute of limitations.

Dept. of Elderly Affairs, 904 F. Supp. 55, 60-61 (D.R.I. 1995) (applying three-year personal injury statute to a § 1983 claim for discrimination based on violation of constitutional rights); *Pearman v. Walker*, 512 F. Supp. 228, 229-34 (D.R.I. 1981) (applying three-year personal injury statute to § 1983 action for alleged violations of the 4th and 14th amendments to the U.S. Constitution); *Partin v. St. Johnsbury Co.*, 447 F. Supp. 1297, 1299-1303 (D.R.I. 1978) (applying three-year personal injury statute to § 1981 actions).

These decisions explain the rationale for applying the three-year limitations period to federal constitutional or statutory claims: Rhode Island employs a broad definition of injuries to the person for statute of limitations purposes that extends beyond physical injuries and includes "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." *See Walden III*, 576 F.2d at 946-47 (quoting *Commerce Oil Refining Corp. v. Miner*, 199 A.2d 606, 610 (R.I. 1964)).

More specifically, the First Circuit has previously applied a host state's personal injury limitations period to an alleged violation of PURPA, the principal claim asserted by Plaintiffs here. The First Circuit observed that, because PURPA contains no statute of limitations, the court must apply "the most analogous statute of limitations in the state where the action was brought." *Greenwood v. N.H. PUC*, 527 F.3d 8, 13 (1st Cir. 2008) (citing *Wilson*, 471 U.S. at 266). In *Greenwood*, the First Circuit held that the personal-injury statute of limitations (*i.e.*, three years) was the correct analog for alleged PURPA violations. *Id.* at 13. In so holding, the First Circuit reasoned that the plaintiff's claim for financial harm from the public utilities commission's alleged violation of PURPA was a personal action – not a contractual action. *Id.*

This overwhelming body of case law establishes that Rhode Island's three-year limitations period for personal injuries governs Plaintiffs statutory and constitutional claims. Plaintiffs' alleged (and speculative) injuries arise out of their status as persons – not out of a special status through contract or property rights. *See Commerce Oil Refining Corp. v. Miner*, 199 A.2d 606, 610 (R.I. 1964). Thus their claims are subject to the three-year limitations periods.

Plaintiffs' seek to evade the three year limitations period by contending that the five-year federal statute of limitations in 28 U.S.C. § 2462 should apply here. That statute of limitations, on its face, applies only to "an action, suit or proceeding **for the enforcement of any civil fine, penalty, or forfeiture**." 28 U.S.C. § 2462 (emphasis added). This is not an action by the government. This is not an enforcement action. And, this is not an action to obtain a "civil fine, penalty, or forfeiture." The federal limitation on government enforcement proceedings has no application here.[2] Further, Plaintiffs' cannot pursue and have not pursued a citizens' enforcement action; the FPA and PURPA do not authorize such suits. Rather, Plaintiffs bring personal injury claims for alleged violations of **their rights as citizens**. These claims, therefore, do not fall within the plain language describing the claims covered by 28 U.S.C. § 2462.

Plaintiffs' blunderbuss attempt to find support in the case law for 28 U.S.C. § 2462's longer limitations period also fails. These cases fall into three categories: (1) cases in which the parties agreed that 28 U.S.C. § 2462 applied;[3] (2) enforcement actions brought by governmental

[2] Plaintiffs are not a governmental agency bringing an enforcement action against the RIPUC seeking to fine or penalize it for violations of the FPA or PURPA. In fact, the agency that would have the authority to do so – the Federal Energy Regulatory Commission ("FERC") – expressly declined to do so when it chose not to take any action in response to Plaintiff Riggs' administrative complaints. Plaintiffs' do not stand in the shoes of FERC, which is precisely why Riggs twice unsuccessfully petitioned FERC for relief.

[3] *FERC v. Barclays Bank PLC*, 2015 U.S. Dist. LEXIS 66184, *22 (E.D. Cal. May 20, 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.")

agencies;[4] and (3) citizens' suits brought to enforce statutes pursuant to citizens' enforcement provisions contained within the statute.[5] For example, in *Tri-Dam v. Schediwy*, 2011 U.S. Dist. LEXIS 146789, *15-*16 (E.D. Cal. Dec. 21, 2011), the district court expressly stated that it did not consider whether a three-year state statute of limitations "would be 'the most appropriate statute of limitations provided by state law'" because the parties agreed to apply 28 U.S.C. § 2462.[6] Moreover, in many of these cases, the court applied the five-year federal statute to bar claims – meaning it was immaterial whether a shorter statute of limitations should have applied. *See*, *e.g.*, *Trawinski v. United Technologies*, 313 F.3d 1295, 1298 (11th Cir. 2002) (finding claims time-barred, and applying state personal injury statute of limitations to related 42 U.S.C. § 1985 claim based on same conduct as citizens' suit).

Finally, the rationale for applying the five-year civil penalty statute of limitations in citizens' suits is absent here. In those cases, the plaintiffs "stand in the shoes" of the government agency seeking to enforce the statute. *Sierra Club v. Chevron U.S.A., Inc.*, 834 F.2d 1517, 1520-22. Here, Plaintiffs are seeking to vindicate their private rights; they certainly do not stand in the

[4] *Barclays Bank PLC*, 2015 U.S. Dist. LEXIS 66184; *3M Co. v. Browner*, 17 F.3d 1453, 1455-60 (D.C. Cir. 1994) (applying the statute of limitations to the commencement of administrative actions as well as judicial actions); *FEC v. National Right to Work Comm.*, 916 F. Supp. 10, 13 (D.D.C. 1996).

[5] *Trawinski v. United Technologies*, 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 v. TVA*, 480 F.3d 410, 415 (6th Cir. 2007) (applying the five-year statute of limitations under 28 U.S.C. § 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 28 U.S.C. § 2462 to citizens' enforcement suits is 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) (relying on *Sierra Club* to apply statute in substantially similar circumstances).

[6] FERC has expressly "decline[d] to designate a statute of limitations or otherwise adopt an arbitrary time limitation on complaints or enforcement actions that may arise under . . . FPA section 222." *Prohibition of Energy Market Manipulation*, 114 F.E.R.C. ¶ 61,047, at 62 (2006). FERC's reference to 28 U.S.C. § 2462 in this order merely noted that actions for enforcement of statutes to impose civil penalties are subject to that statute of limitations. FERC made no statement that the statute would apply, but merely stated that it was its intention that "any administrative action for violation of the Final Rule [regarding prohibitions on market manipulating conduct] be commenced within five years of the date of the fraudulent or deceptive conduct." *Prohibition of Energy Market Manipulation*, *Id*. at 62 n.124 (2006). Plaintiffs' claims have nothing to do with market manipulation. This language is irrelevant.

shoes of the government. To the contrary, the government [FERC] twice refused to act on their petitions to halt the project. For these reasons, the five-year limitation period under 42 U.S.C. § 1985 does not apply here.

In sum, these private plaintiffs have filed federal constitutional and statutory claims to vindicate their personal rights. Under settled law in this Circuit and District, Rhode Island's three-year limitation period for personal injuries governs Plaintiffs' claims.

2. Plaintiffs' claims are time-barred

Here, the accrual principle is straightforward: a cause of action for violation of statutory or constitutional rights accrues for statute of limitations purposes when the action that violates the law occurs. *See Randall v. Laconia, N.H.*, 679 F.3d 1, 6-7 (1st Cir. 2012); *Nieves v. McSweeney*, 241 F.3d 46, 52 (1st Cir. 2001) (cause of action accrues at time conduct in violation of rights occurred). Plaintiffs' claims are premised on the assertion that the RIPUC acted in violation of federal law when it approved the PPA. That action occurred on August 16, 2010, when the RIPUC issued its decision and final order approving the PPA. Plaintiffs were participants in the PUC proceedings that resulted in that approval, and they certainly had notice of it. Therefore, the statute of limitations began to run on Plaintiffs' claims on August 16, 2010.[7]

Plaintiffs' arguments to the contrary lack any legal support. Plaintiffs cite no authority for their *ipse dixit* assertion that the statute of limitations could not run until *after* Deepwater satisfied all the conditions of the PPA and the harm to Plaintiffs became imminent. *See* Opposition at 13. Plaintiffs' claim that they were entitled to sit idly by while Deepwater and Narragansett expended substantial resources to perform under the PPA and then construct the wind farm – so they could wait to see if it was really going to happen – is nonsense. The First

[7] The Supreme Court affirmed the RIPUC's approval in July of 2011, more than four years before Plaintiffs filed this action.

Circuit in *Greenwood* noted that the passage of time was cause to dismiss the claim even if the statute of limitations had not expired – stating: "The appropriate time to challenge a state-imposed rate is up to or at the time the contract is signed, not several years into a contract which heretofore has been satisfactory to both parties." *Greenwood*, 527 F.3d at 15 (quoting *Conn. Light & Power Co.*, 70 F.E.R.C. 61,012, 61,029 (1995)). Plaintiffs cite no legal doctrine that permits a party who believes it was harmed by an allegedly illegal act to wait and see how it turns out before commencing suit to protect its rights.[8]

Similarly, there is no legal basis or support for the contention that Riggs' claim did not accrue until after FERC declined to pursue an enforcement action in response to his administrative complaint.[9] To the contrary, cases cited by Plaintiffs clearly demonstrate that the statute of limitations begins to run once the cause of action accrues, regardless of whether an administrative remedy exists, and can even bar a plaintiff from pursuing administrative action. *See, e.g.*, *Browner*, 17 F.3d at 1455-57 (holding that statute of limitations served to bar administrative enforcement action).

Administrative proceedings toll a statute of limitations *only* when exhaustion of administrative remedies is a prerequisite to bringing the lawsuit, such as in Title VII employment discrimination claims. *See Aldahonda-Rivera v. Parke Davis & Co.*, 882 F.2d 590, 594 (1st Cir. 1989). Here, there is no exhaustion of administrative remedies requirement. Riggs chose to pursue a FERC action – twice. The other Plaintiffs did not. Riggs does not get to indefinitely extend the statute of limitations by filing administrative complaints. Riggs' two FERC

[8] If Plaintiffs truly take the position that their cause of action does not accrue until they face actual harm of increased electricity rates, then they must admit that their claim is not ripe and should be dismissed.

[9] Plaintiffs cite *Graham County Soil & Water Conservation Dist. v. United States ex rel. Wilson*, 545 U.S. 409 (2005), in support of this proposition. But *Graham* does not address administrative exhaustion requirements at all. Rather, the portion Plaintiffs cite merely states the well-settled principal that a statute of limitations as a general matter will not expire before a claim arises.

complaints, in 2012 and 2015, were premised on the same facts and arguments. By his nifty reasoning, he could continue to file such complaints *seriatim*, and the statute of limitations on his claims would never run.

Plaintiffs claim that the RIPUC illegally and unconstitutionally approved the PPA on August 16, 2010. That is when this action accrued, and no amount of *ad hoc* justifications for Plaintiffs' delay in filing this action can change that accrual date. Plaintiffs' complaint is barred by Rhode Island's three year limitations period for personal injuries.

B. Plaintiffs' Status as 'Ratepayers' Does Not Confer Standing to Litigate Their Political Grievances

Plaintiffs lack standing because, at base, they seek to use their "ratepayer" status and the projected increase in their utility bills as their "concrete" and "particularized" injury to gain access to this Court. Federal Courts have held for more than a century that ratepayers lack standing, and that time-honored rule applies to Plaintiffs.[10] *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).

Courts throughout the country have rejected ratepayer standing for two key reasons. First, it would impermissibly permit plaintiffs to camouflage generalized grievances as economic injuries. In *Citizens*, for example, an energy company and concerned residents challenged Suffolk County's decision to discontinue its support for a local nuclear power plant. *See* 604 F. Supp. at 1088. The plaintiffs alleged that the County's policy change could lead to the closure of

[10] Contrary to the Plaintiffs' claims, this is the reason the Supreme Court's decision in *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992), is directly applicable. Plaintiffs' claims are not distinguishable from other ratepayers in Rhode Island and cannot confer them with standing. Plaintiffs' reliance on *Los Angeles v. Lyons*, 461 U.S. 95 (1983), also misses the point. Whether or not a rate hike under the PPA is real and imminent is not the issue. Rather, the Plaintiffs lack standing because their claims – even assuming a rate hike will occur in the future -- are not peculiar to them and any alleged injury cannot be redressed by a favorable decision here. Furthermore, the competitor standing doctrine recognized in *Adams v. Watson*, 10 F.3d 915 (1st Cir. 1993), has no application to this case where ratepayers are complaining about higher rates that will apply across the rate base.

the plant and "spell financial doom and bankruptcy for the company," which would lead to higher cost energy. *Id.* at 1087. Plaintiffs claimed standing to challenge the policy on several grounds, including their status as utility ratepayers.[11] The court expressly rejected the argument that the plaintiffs' financial stake through their monthly bills cloaked them with standing: "[C]onferring standing on any person who is a LILCO ratepayer would permit judicial actions by millions of persons with only the most 'generalized grievance.'" *Id.* at 109. Here, Plaintiffs' claim that their bills will increase annually over the next twenty years does not give them any greater stake than the generalized grievance advanced by their Long Island ratepayer counterparts. *Id.*; *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.").[12]

Second, courts decline to find "ratepayer" standing because forecasting the future of utility rates is conjectural and ratepayers cannot satisfy their burden to show that a victory in court will redress their predicted injury. When ratepayers cannot allege that the vindication of their claims leads to lower rates, they cannot satisfy constitutional standing principles. In *N. Laramie Range All. v. FERC*, 733 F.3d 1030 (10th Cir. 2013), a group of ratepayers sought the decertification of two wind energy projects that allegedly would lead to increased electricity

[11] The court ultimately granted the plaintiffs standing because of concerns of environmental harms not present in this case. *See id.* at 1092.

[12] The plaintiffs cite to the taxpayer standing doctrine discussed in *Hein v. Freedom from Religion Found., Inc.*, 551 U.S. 587, 599 (2009), as alleged support for their argument in favor of standing. Any comparison to taxpayer standing is irrelevant. The narrow taxpayer standing doctrine applies only to Establishment Clause challenges. *See, e.g.*, *Hein*, 551 U.S. at 602 ("In *Flast*, the Court carved out a narrow exception to the general prohibition against taxpayer standing" for establishment clause challenges); *Valley Forge Christian College v. Americans United for Separation of Church & State*, 454 U.S. 464, 508 (1982); *Rocks v. City of Philadelphia*, 868 F.2d 644, 649 (3d Cir. 1989) ("*Flast* and *Bowen* are extremely limited holdings. They hold that federal taxpayers have standing to raise establishment clause claims against exercises of congressional power under the taxing and spending power of article I, section 8 of the constitution."); *Taub v. Kentucky*, 842 F.2d 912, 916 (6th Cir.), *cert. denied*, 488 U.S. 870, 102 L. Ed. 2d 148, 109 S. Ct. 179 (1988) ("*Flast v. Cohen* appears to create a fairly narrow exception to the [rule against taxpayer standing], and may apply only to Establishment Clause cases ….").

rates. The Tenth Circuit held that the plaintiffs failed to meet their burden to show their injury was redressable because such an inquiry "turns on what [the plaintiff and state regulatory agencies] would do if the Wasatch [wind] projects were decertified. And there is no way of knowing what they would do." (internal citation omitted); *see also Burton v. Central Interstate Low-Level Radioactive Waste Compact Comm'n*, 23 F.3d 208, 210 (8th Cir. 1994) (holding that an individual ratepayer complaining of "increased electrical services rates" due to "illegal taxes" cannot demonstrate redressability without evidence that a favorable decision would cause the utility company to lower those rates). Similarly, if it were found that the RIPUC's approval of the PPA exceeded the RIPUC's authority and the PPA was voided, there is no factual basis to conclude that the predicted rate hike would disappear. The General Assembly found in the passage of the LTC Statute that 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. *See* R.I. Gen. Laws § 39-26.1-7. Plaintiffs cannot establish that success on their claims would mean that Deepwater or another developer would not build a wind farm resulting in higher rates pursuant to the LTC Statute. Plaintiffs' real grievance is the construction of the project; not the procedural path it follows. Without a redressable injury, plaintiffs lack standing to bring this suit. *See also Steir v. Girl Scouts of the USA*, 383 F.3d 7, 15 (1st Cir. 2004) ("[I]t must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable judicial decision.") (internal quotation marks, citations and alterations omitted); *see also United States v. AVX*, 962 F.2d 108, 115 (1st Cir. 1992) (holding that the First Circuit applies a "heightened" review of pleadings when "standing is at issue").

Finally, prudential limits on standing also block plaintiffs from advancing generalized grievances on settled policy choices. *See, e.g., Benjamin v. Aroostook Med. Ctr.*, 57 F.3d 101, 104 (1st Cir. 1995) (recognizing that prudential considerations prevent plaintiffs from "advanc[ing] abstract questions of wide public significance essentially amounting to generalized grievances more appropriately addressed to the representative branches"); *Apache Bend Apartments v. United States*, 987 F.2d 1174, 1176 (5th Cir. 1993) ("Prudential principles are judicial rules of self-restraint founded upon the recognition that the political branches of government are generally better suited to resolving disputes involving matters of broad public significance."). Whether climate change concerns justify increased energy costs for renewable energy is a pressing political question that has occupied the political branches at the state, national and even international level. *See*, *e.g.*, Coral Davenport, Paris Deal Would Herald an Important First Step on Climate Change, N.Y. TIMES, Nov. 29, 2015, at A1. The General Assembly has stated its policy preferences on the matter through the LTC Statute. That Plaintiffs point to an alleged economic injury does not alter the fact that their suit is about a generalized grievance against higher cost utility rates shared by all Rhode Islanders with electrical service. *See*, *e.g.*, *Western Mining Council v. Watt*, 643 F.2d 618, 632 (9th Cir. 1981). Their complaint about the General Assembly's choice to legislate certain policy through the LTC Statute should be directed at elected representatives, not this Court.

Plaintiffs raise claims that are common to all ratepayers and are actually political complaints that show their distrust of the process to approve the PPA. Such claims do not provide standing before this Court. As such, this Court should decline to exercise jurisdiction.

C. **Plaintiffs Are Not Within the Zone of Interests for the FPA or PURPA**

Deepwater previously explained that Plaintiffs lack standing to pursue their claims for violations of PURPA and the FPA because those statutes do not protect Plaintiffs' interests. PURPA does not apply in this case, and, even if it did, Plaintiffs, as retail customers, are not within the class of persons (utilities and generators) with statutory standing to bring suit for alleged violations of PURPA. Plaintiffs' bare economic interest also is insufficient to demonstrate that they are within the zone of interests of the FPA.[13] Consequently, Plaintiffs' claims of standing under PURPA and the FPA must fail.

1. PURPA Standing

Plaintiffs fail to understand that PURPA does not apply in this case. For PURPA to apply, the PPA must be a contract made or approved pursuant to a state's implementation of PURPA. The PPA is not a PURPA contract.[14] The PUC was not acting pursuant to PURPA when it approved the PPA. The PPA does not impose any PURPA-related requirements on the Block Island Wind Farm, such as obtaining "qualifying small power production facility" status. Accordingly, there can be no PURPA violation.

Further, Section 210(h)(2) of PURPA permits only any "electric utility, qualifying cogenerator, or qualifying small power producer" to bring an action in United States District Court for alleged PURPA violations. 16 U.S.C. § 824a-3(h)(2)(A) – (B). Plaintiffs clearly do not fall within any of these statutorily-defined categories of eligible petitioners and therefore lack statutory standing to request relief under PURPA in the instant proceeding. Plaintiffs are not

[13] Plaintiffs also are not aggrieved by a FERC order that allows them to seek judicial relief under the FPA. The FPA expressly limits judicial review to parties aggrieved by an order issued by FERC in proceeding under the FPA. 16 U.S.C. § 825l (providing for review by the appropriate United States court of appeals); *see also, Louisiana Energy and Power Authority v. FERC*, 141 F.3d 364 (D.C. Cir. 1998). No such order has been issued by FERC with respect to the matter before this Court

[14] Congress passed PURPA as part of the National Energy Act. PURPA is meant to promote energy conservation and promote renewable energy for certain types of facilities that are known as qualifying facilities ("QF"). PURPA only applies to QFs. The PUC's approval of the PPA did not fall under PURPA because Deepwater is not a QF.

within the zone of interests protected by PURPA. Thus even if the Court found it relevant to examine the intent of PURPA to protect consumers, the plain language of the statute makes it clear that Plaintiffs have no standing under PURPA to challenge the PUC's approval of the PPA.

2. FPA Standing

Plaintiffs' claim of statutory standing under the FPA is also meritless. To establish standing under the FPA, Plaintiffs must satisfy the requirements of Article III, which, as discussed above, Plaintiffs have failed to do, and Plaintiffs also must establish that they fall within the FPA zone of interest. While the rates under the PPA are wholesale rates subject to regulation under the FPA, Plaintiffs are not within the zone of interest protected by the FPA.

The FPA protects and regulates wholesale energy market participants. *See New York v. F.E.R.C.*, 535 U.S. 1, 6 (2002) (stating that Congress enacted the FPA to provide effective federal regulation of the business of transmitting and selling electric power in interstate commerce). 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 beyond the scope of the FPA. Rather, protection of retail customers is reserved to the states, which derive no authority from the FPA. *See Niagara Mohawk Power Corp. v. FERC*, 452 F.3d 822, 824 (D.C. Cir. 2006)(regulation of retail rates is left to the exclusive jurisdiction of the state). Because Plaintiffs are unable to demonstrate that their interests are protected by the FPA, they fail to satisfy the zone of interest test required to establish statutory standing.

Plaintiffs' argument that *Potomac-Appalachian Transmission Highline, LLC*, 140 FERC ¶ 61,229 (2011) ("*PATH*"), provides Plaintiffs with statutory standing under the FPA is blatantly misleading. FERC's decision in *PATH* merely provides that "any person" can institute a

proceeding at FERC, but it does not obviate the need to show a basis for a claim. Moreover, *PATH* does not provide Plaintiffs with any basis for bringing suit in federal court.[15]

Plaintiffs also selectively and misleadingly quote language from 16 U.S.C. § 2631 in support of their contention that they are included within the FPA's zone of interest. 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.

Further, Plaintiffs' reliance on the federal circuit court decisions in *PPL EnergyPlus, LLC v. Solomon*, 766 F.3d 241 (3d Cir. 2014) ("*Solomon*") and *PPL EnergyPlus, LLC v. Nazarian*, 753 F.3d 467 (4th Cir. 2014) ("*Nazarian*") is misplaced. Plaintiffs have mischaracterized these cases as having "already . . . recognized" their interests as protected under the FPA. In fact, these cases did not address standing and do nothing to establish Plaintiffs' statutory standing in this case.[16] Plaintiffs, like wholesale and retail ratepayers everywhere, have an economic interest in transactions conducted in the wholesale energy markets. However, this type of generalized

[15] Not only do Plaintiffs lack standing under the FPA, they are asking the Court to usurp a function that Congress has granted to a federal agency. *See Montana-Dakota Utilities Co. v. Northwestern Public Service Co.*, 341 U.S. 246, at 254-55 (1951) ("If the court is presented with a case it can decide but some issue is within the competence of an administrative body, in an independent proceeding, to decide, comity and avoidance of conflict as well as other considerations make it proper to refer that issue."); *Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571, at 581 (1981) (noting that the Supremacy Clause does not permit a court to infringe upon FERC's rate regulation function). Only FERC can determine whether the rates under the PPA are "just and reasonable" under the FPA.

[16] Additionally, Plaintiffs here are retail ratepayers. The plaintiffs in *Solomon* and *Nazarian*, were power generators and electric distribution companies, and therefore were not similarly situated to Riggs and the other plaintiffs.

economic concern alone is not sufficient to convey standing. Plaintiffs have established only a bare economic interest, which is merely incidental to the zone of interests intended to be protected or regulated by FERC under the FPA. Plaintiffs therefore fail to satisfy both the constitutional and prudential requirements for standing under the FPA.[17]

III. CONCLUSION

For these reasons, as well as those set forth in Deepwater's initial memorandum, this Court should dismiss all Plaintiffs' claims with prejudice.

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[17] Moreover, because Plaintiffs cannot meet Article III's standing test, Plaintiffs do not have standing under the zone of interest of the dormant commerce clause.

CERTIFICATE OF SERVICE

I hereby certify that on the 21st day of January, 2016, a copy of the foregoing Reply Memorandum 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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