UNITED STATES DISTRICT COURT
DISTRICT OF RHODE ISLAND

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

PLAINTIFFS' MEMORANDUM IN OPPOSITION TO THE PUC DEFENDANTS' MOTION TO DISMISS

Defendants Margaret Curran, Paul Roberti, and Herbert Desimone, Jr. are the current members of the Rhode Island Public Utilities Commission ("PUC"), who are sued in this case for injunctive and declaratory relief strictly in their *official* capacities as members of the PUC ("the PUC Defendants"). They have moved to dismiss the plaintiffs' claims against them, arguing primarily that, as "quasi-judicial officers," they are absolutely immune from suit. The problem is that the cases they cite to support this point involve officials who are sued in their *personal* capacity, generally for money damages. As the Supreme Court has made clear, however, "in an official-capacity action," the defense of absolute judicial immunity is "unavailable." *Kentucky v. Graham,* 473 U.S. 159, 166-67 (1985).

The PUC Defendants also make a secondary argument, that the Court should abstain from hearing this case under the doctrine established in the 1943 case of *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943). However, the First Circuit has made clear that *Burford* should be applied only in "unusual circumstance," and has specifically rejected its application in a case very similar to this one. *See Public Service Co. v. Patch*, 167 F.3d 15, 19-20 (1st Cir. 1998). [1]

Facts

The plaintiffs rely on the recitation of facts contained in their Memorandum in Opposition to Deepwater's Motion to Dismiss.

Argument

1. The PUC Defendants Do Not Have the Defense of Absolute Judicial Immunity.

The PUC Defendants argue that the claims against them should be dismissed because they are entitled to absolute judicial immunity. In making this argument, the PUC Defendants fail to recognize the distinction between a suit against them in their official capacity for prospective relief (the case here) and a suit against them in their individual capacity for monetary damages. Unlike this case, the cases cited by the PUC Defendants all involve suits for damages brought against officials in their personal capacity.[2] The distinction between these two is critical because officials

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[1] The PUC Defendants also join in the arguments made by defendant Deepwater Block Island LLC and joined by National Grid that the plaintiffs' claims should be dismissed for lack of standing and as time barred. Plaintiffs rely on their Memorandum in Opposition to Deepwater's Motion to Dismiss in response to these contentions.

[2] *See Stump v. Sparkman*, 435 U.S. 349, 353-354 (1978); *Bradley v. Fisher*, 80 U.S. 335, 357 (1872); *Cok v. Cosentino*, 876 F.2d 1, 2 (1st Cir. 1989); *Fariello v. Campbell*, 860

sued in their official capacity do not have the defense of judicial immunity, as the Supreme Court explained in *Kentucky. v. Graham*, 473 U.S. 159, 166-167 (U.S. 1985):

> When it comes to defenses to liability, an official in a personal-capacity action may, depending on his position, be able to assert personal immunity defenses, such as objectively reasonable reliance on existing law. *See Imbler v. Pachtman*, 424 U.S. 409 (1976) (absolute immunity); *Pierson v. Ray*, 386 U.S. 547 (1967) (same); *Harlow v. Fitzgerald*, 457 U.S. 800 (1982) (qualified immunity); *Wood v. Strickland*, 420 U.S. 308 (1975) (same). **In an official-capacity action, these defenses are unavailable.** *Owen v. City of Independence*, 445 U.S. 622 (1980); *see also Brandon v. Holt*, 469 U.S. 464 (1985). **The only immunities that can be claimed in an official-capacity action are forms of sovereign immunity that the entity, *qua* entity, may possess, such as the Eleventh Amendment.** While not exhaustive, this list illustrates the basic distinction between personal- and official-capacity actions

(emphasis added).

> In other words, "an official-capacity suit is, in all respects other than name, to be treated as a suit against the entity." *Kentucky v. Graham*, 473 U.S. 159, 166, 105 S. Ct. 3099, 87 L. Ed. 2d 114 (1985). This means, of course, that a public official, sued only in his official capacity, is a proxy for the government entity that employs him and is in privity with that entity. *See Town of Seabrook v. New Hampshire*, 738 F.2d 10, 11 (1st Cir. 1984) (per curiam). The situation is quite different when an official is sued in his individual capacity. By definition, such a suit takes aim at the individual, not the government entity with which he is associated. Such a defendant is, therefore, not considered to be in privity with the government entity.

Goldstein v. Galvin, 719 F.3d 16, 23 (1st Cir. Mass. 2013).

F. Supp. 54 (E.D.N.Y. 1994); *Destek Group v. New Hampshire PUC*, 318 F.3d 32, 40 (1st Cir. 2003); *Mireles v. Waco*, 502 U.S. 9, 10 (1991); *Harley v. Perkinson*, 560 N.Y.S.2d 957, 958 (N.Y. Sup. Ct. 1990); *Richardson v. R.I. Dep't of Educ.*, 947 A.2d 253, 257–58, 260 (R.I. 2008); *Estate of Sherman v. Almeida*, 747 A.2d 470, 472-473 (R.I. 2000); *Butz v. Economou*, 438 U.S. 478, 480 (1978)(all involving claims against officials in their personal capacity, generally seeking damages).

The same rule applies to officials who perform in a "quasi-judicial" capacity, assuming, *arguendo,* that the PUC Defendants fall into that category.[3] *See Turner v. Houma Mun. Fire & Police Civ. Serv. Bd.*, 229 F.3d 478, 486 (5th Cir. 2000):

> Finally, appellants place great emphasis on the history and doctrinal development of absolute quasi-judicial immunity as it relates to quasi-judicial entities. *See e.g., Bradley v. Fisher*, 80 U.S. 335, 13 Wall. 335, 20 L. Ed. 646 (1871); *Pierson v. Ray*, 386 U.S. 547, 18 L. Ed. 2d 288, 87 S. Ct. 1213 (1967); *Imbler v. Pachtman*, 424 U.S. 409, 47 L. Ed. 2d 128, 96 S. Ct. 984 (1976); *Butz v. Economou*, 438 U.S. 478, 57 L. Ed. 2d 895, 98 S. Ct. 2894 (1978). We take no issue with this argument as it relates to individuals being sued in their individual capacities. Reliance on these cases for official-capacity claims, however, blurs the distinction between the types of liability, and thus immunity defenses, that arise from an individual-capacity suit and the lack of liability and resulting lack of immunity in official-capacity suits. Pointedly, we note that the above Supreme Court cases and all of the post-*Graham* cases cited by the appellant involve the personal liability of defendants sued in their individual, not official, capacities under § 1983. We therefore find no merit in appellants' argument.

See also VanHorn v. Oelschlager, 502 F.3d 775, 778-79 (8th Cir. 2007) (unlike individual suits, members of a quasi-judicial body have no immunity from suit in an official capacity); *Alkire v. Irving*, 330 F.3d 802, 810-11 (6th Cir. 2003) (same); *Bass v. Attardi*, 868 F.2d 45, 50-51 (3d Cir. 1989) (same); *Tomlins v. Wappinger Falls Zoning Bd. of Appeals*, 812 F. Supp. 2d 357, 366 (S.D.N.Y. 2011) (same); *Kuck v. Danaher*, 822 F. Supp. 2d 109, 147 (D. Conn. 2011) (same); *McKivitz v. Twp. of Stowe*, 769 F. Supp. 2d 803, 819 (W.D. Pa. 2010) (same).

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[3] The action of the PUC Defendants in this case, approving the PPA between Deepwater and National Grid, is more properly characterized as "legislative" or "political," not "quasi-judicial." As set forth more fully in the recitation of facts in Plaintiffs' Memorandum in Opposition to Deepwater's Motion to Dismiss, the members of the PUC did not originally approve the PPA. Complaint ¶18. They approved it only after the General Assembly, in effect, directed them to do so, Complaint ¶¶ 19-21, an act that then-Attorney General Lynch deemed a violation of the separation of powers, Complaint Ex. 4 (Order), at 19-23.

As the Supreme Court made clear in *Kentucky v. Graham,* "[t]he only immunities that can be claimed in an official-capacity action are forms of sovereign immunity that the entity, *qua* entity, may possess, such as the Eleventh Amendment." 473 U.S. at 166-67. However, based on the First Circuit's 2015 decision in *Town of Barnstable v. O'Connor*, 786 F.3d 130 (1st Cir. 2015), it is quite clear that Eleventh Amendment immunity is not available in this case. In *O'Connor,* the First Circuit reversed the dismissal of a suit very similar to this case, in which the members of the Massachusetts Department of Public Utilities were sued for granting an approval for the Cape Wind project. The Court held that the relief the plaintiffs were seeking in that case, as here, was prospective injunctive relief that fell within the doctrine of *Ex parte Young*, 209 U.S. 123 (1908), and thus was not barred by the Eleventh Amendment.

In reaching this conclusion, the First Circuit relied on the Supreme Court's decision in *Verizon Maryland, Inc. v Public Service Commission of Maryland,* 535 U.S. 635 (2002), as follows:

> In *Verizon Maryland, Inc. v Public Service Commission of Maryland,* 535 U.S. 635 (2002), where, as here, plaintiffs sued a state regulatory commission for issuing an order that was allegedly preempted by federal law, the Supreme Court articulated the sovereign immunity inquiry as follows: "In determining whether the doctrine of *Ex parte Young* avoids an Eleventh Amendment bar to suit, a court need only conduct a straightforward inquiry into whether [the] complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective." *Id.* at 645. . . The Court reasoned that a request "that state officials be restrained from enforcing an order in contravention of controlling federal law . . . clearly satisfies our 'straightforward inquiry.'" *Verizon*, 535 U.S. at 646.

The same rule applies to this case. Here, the plaintiffs have sued the members of the PUC for, among other things, issuing an order that was pre-empted by federal law,

and are requesting, as relief, that the Court declare the order to be in violation of the Federal Power Act, PURPA, and the Constitution and/or enjoin the members of the PUC from implementing the Order.

The PUC Defendants are also mistaken in their argument that plaintiffs' cause of action under 42 U.S.C. §1983, and their claim for relief under the Declaratory Judgment Act, 28 U.S.C. §§ 2201-2202, are both barred by an amendment to section 1983 that was passed by Congress in 1996 as part of the "Prisoner Litigation Reform Act."[4] Passing the fact that the only support they cite for these arguments are two, unreported appellate decisions from other circuits,[5] the Defendants' argument also fails on the face of the statutory language. The amendment to section 1983 that PUC Defendants cite, which was passed to create limits on prisoner appeals, only prohibits the issuance of injunctions to "judicial officer[s]," not to other types of public employees, like the members of the PUC.

More importantly, the amendment to section 1983 on its face makes clear that a plaintiff asserting a cause of action under section 1983 is entitled to either declaratory relief or injunctive relief. An injunction to a judge is allowed, on the face of the statute, if declaratory relief is "unavailable." If declaratory relief is available, then an injunction is not available. A plaintiff under section 1983 is entitled to either

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[4] For an explanation of the purpose of the Prisoner Litigation Reform Act, see "Procedural Means of Enforcement under 42 U.S.C. §1983," 88 Geo. L.J. 1753 (2000).

[5] *Haas v. Wisconsin*, 109 Fed. App'x 107 (7th Cir. 2004); *Guerin v. Higgins*, 8 Fed. App'x 31 (2d Cir. 2001).

an injunction or a declaratory judgment, not neither, as the PUC Defendants contend. [6]

2. Burford Abstention Does Not Apply

As a secondary argument, the PUC Defendants argue that the Court should abstain from hearing this case under the doctrine established in the 1943 case of *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943). In *Vaqueria Tres Monjitas, Inc. v. Irizarry*, 587 F.3d 464, 473–74 (1st Cir. 2009), the First Circuit described *Burford* as follows:

> In *Burford*, the Supreme Court upheld a federal court's decision to abstain from reviewing an order of the Texas Railroad Commission granting Burford a permit to drill oil wells in east Texas. Plaintiff, Sun Oil, had brought suit not to determine the constitutional validity of the state regulation, which had been settled in prior litigation, but to challenge whether the order was reasonable under a state statute. *Burford*, 319 U.S. at 328, 332. While the plaintiffs in *Burford* did allege that the commission order violated their right to due process, resolving the issues on appeal required interpreting state, not constitutional, law. *Id.* at 331. Since the constitutional validity of the commission's complex procedures was not at issue, the Supreme Court recognized that the federal court was simply being called upon to review the state agency's determination in light of the policy outlined by state law. *Id.* at 320-21, 331. On these facts, the Court held that, despite the existence of federal subject matter jurisdiction, abstention was proper to maintain the balance between state control over its own regulatory policies and federal oversight. *Id.* at 327, 332.

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[6] The PUC Defendants also raise -- in a footnote -- an argument that plaintiffs have not properly asserted subject matter jurisdiction. This argument may be put to bed by reference to paragraph 9 of the Complaint, which asserts subject matter jurisdiction under 28 U.S.C. § 1331. Section 1331 is the familiar statute that confers on the district courts subject matter jurisdiction for civil actions arising under the "Constitution" and "laws" of the United States. Section 1331, rather plainly, provides subject matter jurisdiction for plaintiff's claims under the Federal Power Act, PURPA, and the Constitution, just as 28 U.S.C. § 1343 provides subject matter jurisdiction for plaintiffs' claims under 42 U.S.C. § 1983.

The Court went on to point out that *Burford* abstention should be "the exception, not the rule," and should be applied only in "unusual circumstances," and that, in particular, "*Burford* abstention does not apply . . . when the effect of an entire state regulatory scheme is challenged as unconstitutional." 587 F.3d at 473-74, citing *Bath Mem'l Hosp. v. Maine Health Care Fin. Comm'n*, 853 F.2d 1007, 1012-13 (1st Cir. 1988), and *Tenoco Oil v. Dep't of Consumer Affairs*, 876 F.2d 1013, 1028 n.23 (1st Cir. 1989). In this case, the plaintiffs are challenging, on constitutional grounds, the validity of R.I.G.L. § 39-26-1-7, as applied by the PUC, and thus *Burford* abstention is not appropriate.

Indeed, that was the ruling of the First Circuit in *Public Service Co. v. Patch*, 167 F.3d 15, 19-20 (1st Cir. 1998), when faced with a challenge to a rate restructuring plan by the New Hampshire Public Utilities Commission, similar to the challenge raised in this case. In particular, the plaintiff in that case (the Public Service Company of New Hampshire) "argued that the Plan was preempted by specific provisions of the Federal Power Act, 16 U.S.C. §§ 791a to 825r, under which the Federal Energy Regulatory Commission ("FERC") regulates utilities; the Public Utilities Regulatory Policies Act of 1978 [PURPA] . . . [and] that the Plan constituted an unconstitutional taking and violated substantive due process, the Contracts Clause, the Commerce Clause, and the First Amendment." *Public Serv. Co. v. Patch*, 167 F.3d 15, 19–20 (1st Cir. N.H. 1998).

In that case, as here, the defendants argued that the court should abstain under *Burford* given the complex regulatory scheme at issue. The First Circuit held:

> *Burford* abstention does not bar federal court injunctions against state administrative orders where there are predominating federal issues that do not require resolution of doubtful questions of local law and policy. *See New Orleans Pub. Serv.*, 491 U.S. at 362; *Bath*, 853 F.2d at 1013. In such cases, *Burford* abstention is not required merely because the federal action may impair or even entirely enjoin the operation of the state scheme. *See Zablocki v. Redhail*, 434 U.S. 374, 379 n.5, 54 L. Ed. 2d 618, 98 S. Ct. 673 (1978); see also *New Orleans Pub. Serv.*, 491 U.S. at 361-64; *Bath*, 853 F.2d at 1014-15.
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> Thus focused, the *Burford* doctrine has no application to most of the claims advanced by PSNH. It does not require looking beyond "the four corners" of the Final Plan, *New Orleans Pub. Serv.*, 491 U.S. at 363, to confirm that the Final Plan is intended to shift from cost-based regulation to market-driven rates for electricity. To the extent that such a shift in regime is itself claimed to violate the Contracts Clause, or interfere with FERC's preemptive authority or contravene orders of the *Seabrook* bankruptcy court, *Burford* abstention is not even arguable.

Applying the reasoning of *Patch* in this case, it is clear that *Burford* abstention is inappropriate here. Plaintiffs here assert that the regulatory scheme established by R.I.G.L. § 39-26-1-7, and applied in the PUC's Order approving the PPA, violates federal law and the Constitution, and that is precisely the sort of claim this Court should adjudicate, not defer. And any suggestion that these federal law issues were already decided by the Rhode Island Supreme Court is simply incorrect. *See In re Town of New Shoreham Project,* 25 A.3d 482 (R.I. 2011).

Conclusion

For all the foregoing reasons, the plaintiffs respectfully request that the Court deny the PUC Defendants' Motion to Dismiss.

Respectfully submitted,

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Certificate of Service

I, J. William W. Harsch, hereby certify that, on this 7th day of December, 2015, this Motion was served upon all counsel of record by electronic service, by filing with the ECF filing system.

J. William W. Harsch