UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

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

THE COMMISSIONERS' REPLY TO PLAINTIFFS' POST-HEARING MEMORANDUM

Defendant Public Utilities Commissioners Margaret Curran, Paul Roberti and Herbert DeSimone, Jr., in their official capacities as members of the Rhode Island Public Utilities Commission (hereinafter "Commissioners"), hereby reply to Plaintiffs' Post-Hearing Memorandum.

During oral argument on March 29, 2016, the Court inquired as to whether the Plaintiffs could have participated in either Docket No. 4185 before the Commission or In Re: Proposed Town of New Shoreham Project, 25 A.3d 482 (R.I. 2011) ("*New Shoreham*") and what the legal consequences are now in having failed to do so:

> THE COURT: I understand those arguments. I may or may not agree with them, but what I'm trying to figure out is there's an enormous benefit to having all of these issues fully litigated before investments are made and projects built. That's how our legal system is structured. And it seems to me that the place where that could have been done is at the Rhode Island Supreme Court in the appeal of the PUC order.

Transcript dated March 29, 2016 at 50.

In their Post-Hearing Memorandum, Plaintiffs responded to the Court's inquiry, contending that they believed their claims "were not ripe for litigation," and, that "hoping to avoid litigation in court altogether," they sought to exhaust their administrative remedies before FERC and engage in opposition to the permitting process. Doc. 37: Post-Hearing Memorandum at 10. Plaintiffs' response may provide insight as to why the Plaintiffs did not participate in Docket No. 4185 and *New Shoreham*. It does not, however, explain how their failure to participate in those proceedings entitle Plaintiffs to pierce the statutory immunity provided to the Commissioners under 42 U.S.C. § 1983 or to seek declaratory relief for a past act in approving the power purchase agreement between Deepwater Wind Block Island, LLC ("Deepwater") and The Narragansett Electric Company, Inc., d/b/a National Grid ("National Grid") under 28 U.S.C. § 2201.

42 U.S.C. § 1983[1] permits a plaintiff to seek prospective "injunctive relief" against a "judicial officer" for "an act or omission taken in such officer's judicial capacity" only when

[1]42 U.S.C. § 1983 provides as follows:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not

either one of two conditions are met: (i) "a declaratory decree *was* violated" or (ii) "declaratory relief *was* unavailable."[2] See 42 U.S.C. § 1983 (emphasis added).

The first condition is not applicable here, and the second is not satisfied. Declaratory relief "was" most certainly available to Plaintiffs before the issuance of Order No. 20095 (the "Order") in Docket No. 4185. At that time, Plaintiffs could have filed an action pursuant to 28 U.S.C. § 2201 seeking a determination as to whether R.I. Gen. Laws § 39-26.1-7 was preempted by federal law. Such an action would have constituted an appropriate use of 28 U.S.C § 2201 where a "declaratory judgment is meant *to define the legal rights and obligations of the parties in anticipation of some future conduct, not simply to proclaim liability for a past act."* Brown v. Rhode Island, 511 Fed. App'x 4, 6 (1st Cir. 2013) (emphasis added). See also Andela v. Administrative Office of United States Courts, 569 Fed. App'x 80, 83 (3rd Cir. 2014) (unpublished) (per curiam) (because conduct allegedly violating substantive rights took place in the past, claim for declaratory judgment was properly dismissed); Haggard v. Bank of the

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be granted unless a declaratory decree was violated or declaratory relief was unavailable.

[2]At oral argument, Plaintiffs contended that even if the Commissioners correctly asserted statutory immunity, their action seeking prospective injunctive relief is saved by the existence of four other causes of action contained in the Complaint: (Count I - FPA, Count II - PURPA, Count III - Supremacy Clause and Count IV - Commerce Clause). Transcript dated March 29, 2016 at 57. Plaintiffs are incorrect. 42 U.S.C. § 1983 is the sole and exclusive statutory provision set forth in the Complaint which might conceivably afford Plaintiffs a federal cause of action for any alleged deprivations of "rights, privileges, or immunities secured by the Constitution and laws" against the Commissioners. 28 U.S.C. § 2201 is the sole and exclusive statutory provision set forth in the Complaint which might conceivably afford Plaintiffs a federal cause of action for declaratory relief against the Commissioners. Implied causes of action under the Constitution or federal law absent authorization under an explicit statutory provision simply do not exist. Alexander v. Sandoval, 532 U.S. 275, 288 (2001) (analysis of whether Congress has created a cause of action begins and ends with the text and structure of the statute in question); Bonano v. Eastern Carribean Airline, Corp., 365 F.3d 81, 84 (1st Cir. 2004) (the source of any private right of action must be found in the text of the statute). The four other Counts contained in the Complaint, therefore, derive from, and do not exist independently of 42 U.S.C. § 1983 and 28 U.S.C. § 2201.

Ozarks, Inc., 547 Fed. App'x 616, 620 (5th Cir. 2013) (unpublished) (same as Brown); Abebe v. Seymour, 479 Fed. App'x 464 (4th Cir. 2012) (unpublished) (per curium) (affirming district court that held district judge sued in her official capacity was immune from suit and declaratory relief was unavailable since action merely sought remedy for conduct that "already occurred"); Ysais v. New Mexico, 373 Fed. App'x 863, 866 (10th Cir. 2010) (judicial officers are immune against suits for injunctive relief and the requested declaratory relief was not justiciable since action only involved past conduct that will not recur); Lawrence v. Kuenhold, 271 Fed App'x 763, 766 (10th Cir 2008) (unpublished) (complaint seeking a declaration that a state court judge violated the plaintiff's due process rights by entering default judgment and seeking did not request declaratory relief in the true legal sense because it simply sought to "proclaim liability for a past act"). It also accords with the Court's observation that "there's an enormous benefit to having all of these issues fully litigated before investments are made and projects built." Transcript dated March 29, 2016 at 50.

Plaintiffs also could have participated as parties in Docket No. 4185 and obtained rulings from the Commission on the same claims that they raise now. Plaintiffs also could have filed a petition for declaratory relief with the Commission under R.I. Gen. Laws § 42-35-8 and Rule 1.10(a) & (c) of the Commission's Rules of Practice and Procedure. Rule 1.10(c) authorizes a petitioner to identify whether the statutory provision "should or should not apply."

Relief also "was" available to Plaintiffs immediately after the issuance of the Order. Plaintiffs could have participated as "aggrieved persons" in *New Shoreham.* Under Rhode Island law, challenges to Commission decision-making are not restricted to parties in Commission proceedings. R.I. Gen. Laws § 39-5-1 (where any "person," as opposed to any "party," may appeal a Commission Order). See e.g., Gardiner v. Kennelly, 89 A.2d 184, 185 (R.I. 1952)

(telephone subscriber who sustained certain rate increases as a result of a Commission Order could prosecute appeal to the Supreme Court under R.I. Gen. Laws § 39-5-1). Newport National Bank v. Hawksley, 226 A.2d 137, 142 (R.I. 1967) (recognizing distinction between aggrieved person and party made in Kennelly). There "were" adequate state remedies readily available to Plaintiffs prior to investments being made and commencement of construction, yet they elected to forgo participation not once, but twice in this case. Plaintiffs did not participate in the PUC proceedings, nor did they appeal in *New Shoreham*, instead allowing the statute of limitations to expire only to raise their arguments several years later in Federal Court. At oral argument, the Court deliberated whether the constitutional question raised by Plaintiffs should have been tested "back in 2011…in the Rhode Island Supreme Court" and not have had Plaintiffs "wait until 2015 and do it in Federal Court." Transcript dated March 29, 2016 at 51. Should the Court adopt its initial observation, all of Plaintiffs' causes of action must fail against the Commissioners under Section 1983.

That Plaintiffs chose to focus their resources in other areas such as the permitting process or exhausting their administrative remedies to start the litigation process anew is beside the point. Since declaratory relief *"was"* available to Plaintiffs (and the Commissioners acted in a quasi-judicial capacity when they issued the Order) statutory immunity precludes the requested imposition of prospective injunctive relief against the Commissioners pursuant to 42 U.S.C. § 1983. Haas v. Wisconsin, 109 Fed App'x. 107, 114 (7th Cir. 2004); Bolin v. Story, 225 F.3d 1234, 1242 (11th Cir. 2000).

The same reasoning supports the conclusion that declaratory relief under 42 U.S.C. §2201 *is* not now available to Plaintiffs. At oral argument, Plaintiffs contended that under 42 U.S.C. § 1983 it is "completely clear that you get an injunction or you get a declaratory judgment

. . . You don't get neither." Transcript dated March 29, 2016 at 58. Plaintiffs confuse the issue of whether the Commissioners have properly asserted statutory immunity against an action seeking an injunction (by showing that neither of the conditions for the successful prosecution of a Section 1983 action have been satisfied), with the requirement under 28 U.S.C § 2201 that declaratory relief must define the legal rights and obligations of the parties in anticipation of some future conduct. Prospective injunctive relief against the Commissioners is barred under 42 U.S.C § 1983 as declaratory relief "was" available both prior to and immediately after the issuance of the Order. E.g., Haas, 109 Fed App'x. at 114. Declaratory relief is now unavailable to Plaintiffs under 28 U.S.C. § 2201, as the Commission's approval of the power purchase agreement between Deepwater Wind and National Grid in 2010 involves past agency conduct that will not recur, and, therefore, is not justiciable under that statute. E.g., Brown, 511 Fed. App'x at 6; Ysais, 373 Fed. App'x at 866.

For the foregoing reasons, as well as for those set forth in the Commissioners' memorandum in support of their motion to dismiss and original reply memorandum, the Court should dismiss the Complaint against Commissioners and enter judgment in their favor.

MARGARET CURRAN, PAUL ROBERTI, and HERBERT DESIMONE, JR., in their official capacities as members of the Rhode Island Public Utilities Commission
By their attorney,

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CERTIFICATE OF SERVICE

I certify that I filed this motion through the ECF filing system and that a copy is available for viewing and downloading. I have also caused a copy to be sent via the ECF system to the following attorneys of record on the 29th day of April, 2016.

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