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

PUC DEFENDANTS' MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION TO DISMISS PLAINTIFFS' COMPLAINT

I. INTRODUCTION

Defendants, Margaret Curran, Paul Roberti and Herbert DeSimone, Jr., in their official capacities as members of the Rhode Island Public Utilities Commission ("PUC Defendants" or "Commissioners") move to dismiss the Complaint pursuant to Fed. R. Civ. P. 12(b)(1) & (6). Plaintiffs lack standing to pursue the claims asserted and the Complaint is barred by the controlling statute of limitations. Additionally, Commissioners Curran, Roberti and DeSimone possess immunity from suit and from the requested relief, and the Complaint fails to aver

sufficient facts against the Commissioners to give the Court subject matter jurisdiction. For these reasons, the Commissioners request that the Court dismiss the Complaint.

II. TRAVEL OF CASE AND STATEMENT OF FACTS

Plaintiffs assert five Counts against the Commissioners. The asserted causes of action are all premised on the affirmative defense of preemption which in turn is allegedly premised on the Supremacy Clause and the Commerce Clause to the United States Constitution (Counts III and IV); various provisions of the Federal Power Act (Count I); various provisions of PURPA (Count II); and 42 U.S.C. § 1983 (Count V). Annexed to and intertwined with these asserted causes of action, Plaintiffs request the following relief against the Commissioners: (i) "injunctive relief preventing the PUC from implementing the Order," Doc. 1: Complaint, ¶ 77, and (ii) a "judgment under 28 U.S.C. §§ 2201 and 2202, declaring that the Order violates the FPA, the Supremacy Clause and the Commerce Clause [and PURPA]." Id.

The Commissioners agree with and join with the description of the historical dates and procedural travel leading up to, and culminating in, the issuance of Order No. 20095 approving of the power purchase agreement ("PPA") between Narragansett Electric Company, Inc. and Deepwater by the Rhode Island Public Utilities Commission ("PUC") (hereinafter referred to as the "Order") as set forth in Defendant Deepwater Wind Block Island, LLC, ("Deepwater")'s memorandum of law.

III. ARGUMENT

A. THE PLAINTIFFS LACK STANDING AND ARE TIME BARRED FROM ASSERTING THE CLAIMS SET FORTH IN THE COMPLAINT

The Commissioners join with the legal arguments that Plaintiffs' Complaint is barred by the applicable statute of limitations and Plaintiffs' lack standing under Article III to the United States Constitution as articulated by Defendant Deepwater in support of its motion to dismiss.

B. THE COMMISSIONERS ARE JUDICIALLY IMMUNE FROM SUIT.

Common law judicial immunity is premised upon the "general principle of the highest importance to the proper administration of justice that a judicial officer, in exercising the authority vested in him, [should] be free to act upon his own convictions, without apprehension of personal consequences to himself." Stump v. Sparkman, 435 U.S. 349, 355 (1978) (quoting Bradley v. Fisher, 80 U.S. 335 (1871)). "A judge will not be deprived of immunity because the action he took was in error, was done maliciously, or was in excess of his authority; rather he will be subject to liability only when he has acted in the 'clear absence of all jurisdiction.'" See id. at 356-57 (quoting Bradley, at 351).

It is axiomatic, then, that judges are absolutely immune from civil suits for their judicial acts. See, Stump, 435 U.S. at 355-56; Cok v. Cosentino, 876 F.2d 1, 2 (1st Cir. 1989); Fariello v. Campbell, 860 F.Supp.54, 67 (E.D.N.Y. 1994). "Neither a state agency nor a state official acting in his official capacity may be sued for damages in a § 1983 action." Destek Grp., Inc. v. State of New Hampshire Pub. Utilities Comm'n, 318 F.3d 32, 40 (1st Cir. 2003). However, judicial immunity is not just immunity from the assessment of damages, *it is immunity from suit*. See Mireles v. Waco, 502 U.S. 9, 11 (1991). Thus, when a judge of a court of record acts within his

or her judicial capacity, the judge is protected from suit by absolute privilege. Harley v. Perkinson, 148 Misc.2d 753, 560 N.Y.S.2d 957 (1990).

Absolute immunity is also available to "certain 'quasi judicial' agency officials who, irrespective of their *title*, perform *functions* essentially similar to those of judges ... in a setting similar to that of a court." Destek Grp, 318 F.3d at 41 (emphasis added). See also Richardson v. Rhode Island Department of Education, 947 A.2d 253, 257 (R.I. 2008) (quasi-judicial immunity affords immunity from suit, rather than mere immunity from damages); Estate of Sherman v. Almeida, 747 A.2d 470, 474 (R.I. 2000) (same). Public Utilities Commissioners perform tasks functionally comparable to judges: they review and decide facts, apply relevant law to those facts, resolve disputes, and issue written orders explaining their decisions. Destek Grp., 318 F.3d at 41. See Butz v. Economou, 438 U.S. 478, 513 (1978) ("There can be little doubt that the role of the modern . . . administrative law judge . . . is 'functionally comparable' to that of a judge").

The General Assembly has explicitly recognized the Commissioners' quasi-judicial role in Title 39, ch. 1, § 3 of the Rhode Island General Laws. That statute, in pertinent part, provides as follows:

> To implement the legislative policy set forth in § 39-1-1 and to serve as the agencies of the state in effectuating the legislative purpose, there is established a public utilities commission and a division of public utilities and carriers. The commission shall serve as a ***quasi-judicial tribunal*** with jurisdiction, powers, and duties to implement and enforce standards of conduct under § 39-1-27.6 and to hold investigations and hearing involving rates, tariffs, tolls and charges and the sufficiency and reasonableness of facilities and accommodations of railroad, gas, electric distribution, water, telephone, telegraph, and pipeline public utilities…

R.I.G.L. § 39-1-3 (emphasis added)

The Rhode Island Supreme Court has also recognized the import of § 39-1-3's explicit language holding:

> It is apparent from the foregoing discussion of the relevant statutory provisions that the Legislature intended that the commission sit as a *quasi-judicial tribunal* and that its administrative affiliate, the division, would appear before it, through counsel, as an adversary participant in commission's hearings.

Narragansett Electric Co v. Harsch, 368 A.2d 1194, 1199 (R.I. 1977) (emphasis added). The High Court reiterated its characterization of the Commission's quasi-judicial role in Providence Gas Company v. Burke, 419 A.2d 263 (R.I. 1980):

> *The Legislature has also created a Public Utilities Commission consisting of three persons who serve as a quasi-judicial tribunal* with jurisdiction to hold investigations and hearing involving rates, tariffs, and charges made by public utilities.

Id. at 270 (emphasis added).

From the face of the Complaint, the Plaintiffs have filed suit against the Commissioners "in their official capacity only, based upon the Order of the PUC on August 16, 2010, approving the PPA between National Grid and Deepwater Wind." Doc. 1: Complaint, ¶ 6. When the Commissioners issued the Order, however, they did so solely in a quasi-judicial capacity, after reviewing the evidence presented at a formal hearing, *i.e.*, oral and written testimony, responses to written and oral data and record requests, among other evidentiary proffers.

Under the principles of judicial immunity cited above, the Commissioners are completely immune *from suit* when they acted in a quasi-judicial capacity in issuing the Order. Richardson, 947 A.2d at 257; Estate of Sherman, 747 A.2d at 474. See also Destek Grp., 318 F.3d at 41. The Complaint fails to state a claim against the Commissioners upon which relief can be granted.

C. THE COMMISSIONERS ARE IMMUNE FROM CLAIMS SEEKING PROSPECTIVE INJUNCTIVE RELIEF UNDER 1983.

Plaintiffs' Complaint seeks an "injunction preventing the PUC from implementing the Order purportedly because the Order violates the FPA, PURPA the Supremacy Clause, the Commerce Clause and 42 U.S.C. § 1983. [1] Doc. 1: Complaint, ¶¶ 1, 78. Just because a party alleges preemption of a State law by the Constitution or federal law does not necessarily mean they have properly asserted, or, possess a right to assert, a cause of action in federal court. Analysis of whether Congress has created a cause of action begins and ends with the text and structure of the statute in question. Alexander v. Sandoval, 532 U.S. 275, 288 (2001). See also 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). Thus, in order to state a cognizable federal claim arising under the Constitution or federal law, the asserted federal statute must explicitly provide for a cause of action whether it be legal or equitable in nature. Id.

From the face of the Complaint, with the possible exception of § 1983 and § 2201, no statutory references exist, other than a generalized allegation of "preemption," that survive Sandoval scrutiny. The only direct nexus between Plaintiffs' claims and the Commissioners as

[1] Plaintiffs allege that the Court has "subject matter jurisdiction over Plaintiffs' claims arising under the Constitution and laws of the United States..." Doc. 1, Complaint, ¶ 9. No debate exists that "if, but for the availability of the declaratory judgment procedure, the federal claim would arise only as a defense to a state created action, jurisdiction is lacking." 10A C. Wright, A. Miller & M Kane, Federal Practice and Procedure § 2767 at 744-45 (2d ed. 1983). See Franchise Tax Bd. v. Construction Laborers Vacation Trust for Southern California, 463 U.S. 1, 16-19 (1983) (conflict preemption under § 514 of ERISA alleged in state complaint is not sufficient to give federal court removal "arising under" subject matter jurisdiction). Here, Plaintiffs assert a defense, preemption, as the sole basis supporting their causes' "arising under" jurisdiction without any detail or explanation (other than wholly summary conclusions) as to specific provisions of federal law, legal or equitable, that provide a jurisdictional predicate for the Complaint. No subject matter jurisdiction lies in such circumstances. Id. The Court should dismiss the Complaint for lack of subject matter jurisdiction.

defendants here is Plaintiffs' averment which requests the Court to issue "an injunction preventing the PUC from implementing the Order." Doc. 1: Complaint, ¶ 78. While the United States Supreme Court recognized in Pulliam v. Allen, 466 U.S. 522 (1984) that "judicial immunity is not a bar to prospective injunctive relief against a judicial officer acting in her judicial capacity," Congress subsequently explicitly recognized for defendants, like the Commissioners here, that judicial immunity would act as a successful defense to such a claim for relief. 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 be granted unless a declaratory decree was violated or declaratory relief was unavailable*.

42 U.S.C. § 1983 (emphasis added).

No debate exists that by the amendment to § 1983 (italicized above), "the Pulliam holding with respect to [the availability of prospective injunctive relief] has been effectively overruled by Congress." Haas v. Wisconsin, 109 Fed App'x. 107, 114 (7th Cir. 2004). Plaintiffs, then, may not obtain prospective injunctive relief as claimed in the Complaint against the Commissioners if they acted "as a judicial officer for an act or omission taken in such officer's judicial capacity." 42 U.S.C. § 1983.

As set forth above, under Rhode Island law, the Commission is an "independent quasi-judicial body" and as such they are quasi-judicial officers. G.L. § 39-1-3. See also Harsch, 368 A.2d at 1199; Burke, 419 A.2d at 270; Brown v. DeBruhl, 468 F. Supp. 513 (D.S.C. 1979) (finding absolute immunity shielded commissioners of the South Carolina Beverage Control

Commission). In issuing the Order the Commissioners acted in a quasi-judicial capacity. Id. Accordingly, the Commissioners are immune from any claim for prospective injunctive relief in this matter.

D. THE COMMISSIONERS ARE IMMUNE FROM PLAINTIFFS' CLAIMS SEEKING DECLARATORY RELIEF.

From the face of the Complaint, the only other conceivable statute that would provide a basis for a putative cause of action is The Declaratory Judgment Act, 28 U.S.C. § 2201.[2] When Congress amended § 1983 to effectively overrule Pulliam to enable a party to raise judicial immunity as a bar to an action seeking prospective injunctive relief, the judiciary recognized that the same amendments enable parties who acted in a judicial or quasi-judicial capacity to raise the same immunity shield to actions seeking declaratory relief under 28 U.S.C. §§ 2201 and 2202. Thus, in Guerin v. Higgins, 8 Fed. App'x. 31 (2d Cir. 2001), in dismissing a plaintiff's cause of action seeking declaratory relief, the Second Circuit Court of Appeals held:

> We . . . reject plaintiff's contention that he is entitled to declaratory relief based on *Pulliam v. Allen, 466 U.S. 522, 536-37, 104 S.Ct. 1970, 80 L.Ed.2d 565 (1984),* given that the *Pulliam* holding with respect to such relief has been effectively over ruled by Congress.

[2] 28 U.S.C. § 2201(a) in pertinent part provides:

> In a case of actual controversy within its jurisdiction . . . upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

28 U.S.C § 2202 only authorizes ancillary relief upon a successful § 2201 declaration and provides as follows:

> Further necessary or proper relief based on a declaratory judgment or decree may be granted, after reasonable notice and hearing, against any adverse party whose rights have been determined by such judgment.

Id.

This holding makes eminent sense given the underlying purpose of the Declaratory Judgment Act, and the policy underpinning the assertion of judicial immunity as a defense to a lawsuit. It is universally recognized that the Declaratory Judgment Act merely creates a remedy in cases otherwise within a federal court's jurisdiction; it does not constitute an independent basis for jurisdiction. Skelly Oil Co. v. Phillips Petroleum Co., 339 U.S. 667, 671-74 (1950). See also 6A J.W. Moore, Moore's Federal Practice ¶ 57.05 (2d ed. 1993) (Declaratory Judgment Act is procedural in nature and creates no substantive rights). Thus, by its purely procedural character, the Declaratory Judgment Act claimed by Plaintiffs as a basis of their action, cannot confer or constrain judicial immunity. See id.

Just as importantly, the purpose of judicial immunity is to insulate decision-makers from "harassment and intimidation." Howard v. Food Lion, Inc., 232 F. Supp. 2d 585, 595 (M.D.N.C. 2002). "[A] strong need" exists to insulate administrative decision-makers as targets to controversial litigation so that they are able "to function without fear of harassment" from disappointed claimants. Id. Another Court has aptly expressed the function of judicial immunity as follows:

> *[C]ontroversies sufficiently intense to erupt in litigation are not easily capped by judicial decree. The loser in one forum will frequently seek another, charging the participants in the first with unconstitutional animus. See Pierson v. Ray, 386 U.S. at 554 [87 S.Ct. at 1217]. Absolute immunity is thus necessary to assure that judges, advocates and witnesses can perform their respective functions without harassment or intimidation.*

Jones v. Singer Career Systems, 584 F. Supp. 1253, 1256 (E.D. Ark. 1984) (citing *Butz v. Economou, 438 U.S. 478 (1978)* finding that an appeals referee for the Arkansas Employment Security Division enjoyed absolute immunity) (emphasis added).

A declaratory judgment action that collaterally attacks judicial or quasi-judicial decision-making on matters of important public import, such as the instant matter, is rife with controversy. The necessity of protecting an administrative officer acting in a quasi-judicial capacity from suit exists no less in such circumstances than it does when the same defendant is the target of a suit for damages. It follows, then, that the Commissioners here are immune from suits for declaratory relief under 28 U.S.C. §§ 2201 and 2202 based on the doctrines of common law judicial immunity and the post-Pulliam amendments to § 1983. The Complaint fails to state a claim upon which relief can be granted.

E. THE COURT SHOULD DISMISS THE COMPLAINT PURSUANT TO *BURFORD V. SUN OIL CO.*

In Burford v. Sun Oil Co., 319 U.S. 315 (1943), plaintiff sought to enjoin an Order of the Texas Railroad Commission authorizing drilling oil wells on certain parcels of property claiming that the Fourteenth Amendment to the United States Constitution preempted a rule which the Commission had promulgated pursuant to a Texas statute requiring conservation of oil and gas fields by prohibiting waste and compelling ratable production. Id. at 320. Observing that the Railroad Commission had acquired specialized knowledge and that the State had provided a unified method for the formation of policy and determination of cases by the Commission, the United States Supreme Court held that federal judicial intervention could lead to conflicting interpretations of State law, defeat unified State policies, and that expeditious and adequate state court judicial review of the Commission's decision was available. Id. at 333-34. Based on these principles, the Supreme Court reversed the decision of the Circuit Court of Appeals and affirmed the decision of the district court dismissing the complaint. Id.

No debate exists that in enacting G.L. § 39-26.1-7, the Rhode Island General Assembly sought to implement a coherent policy involving a substantial concern to the public. In the statute, itself, the General Assembly found:

> …it is in the public interest for the state to facilitate the construction of small-scale off shore wind demonstration project of the coast of Block Island, including an undersea transmission cable that interconnects Block Island to the mainland in order to: positon the state to take advantage of the economic development benefits of emerging offshore wind industry; promote the development of renewable energy sources that increase the nation's energy independence from foreign sources; and provide the Town of New Shoreham with an electrical connection to the mainland. *To effectuate these goals, and notwithstanding any other provisions of the general or public laws to the contrary*, the Town of New Shoreham projects, its associated power purchase agreement, transmission arrangements and related costs are authorized pursuant to the process and standards in this section.

G.L. § 39-26.1-7 (emphasis added). The italicized clause above is particularly indicative of the General Assembly's efforts to implement a unified policy regarding the very substantial public concern of the development of offshore wind, its accompanying economic benefits, and the promotion of renewable energy sources.

Nor can there be any debate that adequate state court judicial review of the Commission's decision was available. See Alabama Pub. Serv Comm'n v. Southern R. Co., 341 U.S. 341 (1951) (where the right of statutory appeal from a State Commission Order indicated "adequate state court review . . . was available" and required the district court to have abstained from exercising its jurisdiction under Burford). The Rhode Island Supreme Court reviewed and affirmed the Commission's decision in In Re: Review of Town of New Shoreham Project, 25 A.3d 482 (R.I. 2011).[3]

[3] The statutory scheme detailed by the High Court in Alabama Pub. Serv. Comm'n, contained a mandatory right of review. So too here G.L. § 39-5-1 provides a mandatory review process by

The pending Complaint will require the Court to engage in a comprehensive analysis and interpretation of Title 39, Ch. 26. 1, § 7, among other sections to determine the scope of the claimed preemption. It is hard to conceive, given the length and complexity of the proceedings before the Commission (two Commission dockets, containing thousands of pages of documents taking place over multiple hearing days), that this Court might not be placed in the position of having to interpret State law in a manner that might conflict with an interpretation given or to be given to the same law by the Commission.

In sum, the State of Rhode Island "provides a unified method for the formation of policy and determination of cases" by the PUC pursuant to Title 39, Ch. 1-5 and Ch. 26. 1, § 7. "Judicial review of the Commission's decision in the state courts [was] expeditious and adequate." Burford, 319 U.S. at 333-334. Any such review demands significant familiarity with, is almost certain to produce "conflicts in the interpretation of state law dangerous to the success of state policies." Id. See Liberty Mutual Ins. Co. v Hurlbut, 585 F.3d 639, 650 (2d Cir. 2009) (Burford abstention was proper where worker's compensation law provided a complex and integrated system of comprehensive reform); Goodhart v. Bd. of Visitors of the University of Virginia, 451 F. Supp.2d 804 (W.D.Va. 2006) (Burford abstention was appropriate to dismiss § 1983 challenge alleging Virginia means test that allegedly denied a student his right to travel and privileges and immunities given State's avowed goal of having uniform admission criteria and the existence of an absolute right of appeal in state court).

All of the criteria identified by the United States Supreme Court in Burford v. Sun Oil Co. for dismissing the Complaint are satisfied in the case at bar. The Court should exercise its "wise discretion . . . out of a scrupulous regard for the rightful independence of the state

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the Rhode Island Supreme Court. Any person aggrieved by a decision or order of the Commission may obtain review through a statutory petition for certiorari.

governments and for the smooth working of the federal judiciary" and dismiss the Complaint. Burford, 319 U.S. 332.

IV. CONCLUSION

For all of the foregoing reasons as well as those that may be presented in oral argument, the Commissioners respectfully request that the Court dismiss the Complaint and enter Judgment in favor of the Commissioners and against the Plaintiffs.

Respectfully submitted,

MARGARET CURRAN, PAUL ROBERTI, and HERBERT DESIMONE, JR., in their official capacities as members of the Rhode Island Public Utilities Commission
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Dated: November 20, 2015

CERTIFICATE OF SERVICE

I hereby certify that on the 20th day of November, 2015, a copy of the foregoing Memorandum was filed electronically. Notice of this filing will be sent to all counsel by operation of the Court's electronic filing system. Parties may access this filing through the Court's Electronic Filing System.

Donna MacRae