UNITED STATES DISTRICT COURT
DISTRICT OF RHODE ISLAND

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| BENJAMIN RIGGS, LAURENCE EHRHARDT, and RHODE ISLAND MANUFACTURERS ASSOCIATION,<br><br>Plaintiffs<br><br>v.<br><br>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,<br><br>Defendants | Civil No. 1:15-CV-00343-S-LDA |

**MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT**

The Commissioners of the Rhode Island Public Utilities Commission ("PUC") did not want to approve the proposed Power Purchase Agreement ("PPA") between Narragansett Electric Company, Inc. (hereinafter "National Grid") and Deepwater Wind Block Island, LLC ("Deepwater Wind"). When the PPA was first presented to them in 2009, they concluded, correctly, that it was "not commercially reasonable" because it would result in Rhode Island ratepayers paying above market rates for electricity for the next 20 years. The General Assembly, however, forced their hands. After the PUC ruled the first time, the General Assembly enacted a new standard of "commercial reasonableness" applicable only to the Deepwater PPA, under which the PUC had no choice but to approve it.

However, as so often happens when political power is exercised in this way, the compelled (second) order of the PUC approving the PPA runs afoul of the United States Constitution and two federal statutes. It interferes with the market for wholesale power that is exclusively regulated by the Federal Energy Regulatory Commission ("FERC"), to the benefit of a single, favored in-state power generator, and in so doing imposes almost $500 million in above market energy costs on Rhode Island ratepayers. For this reason, the plaintiffs – two Rhode Island ratepayers and the trade association of the largest ratepayers in the state – have brought this case and this motion seeking a judgment striking down the PUC's Order.[1]

Specifically, the plaintiffs seek judgment, as a matter of law, that the PUC's Order of August 16, 2010 ("the Order") approving the PPA between National Grid and Deepwater Wind violates the Federal Power Act ("FPA"), the Public Utility Regulatory Policy Act ("PURPA"), the Supremacy Clause of the United States Constitution, and the Dormant Commerce Clause.

## FACTS

### The PUC's Order Approving the PPA

On June 26, 2009, Rhode Island enacted the "Long-Term Contracting Standard for Renewable Energy," ("the 2009 LTC Statute"), P.L. 2009, ch. 53, §1, et seq., codified

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[1] Defendants Margaret Curran, Paul Roberti, and Herbert DeSimone, Jr., are the current members of the PUC. They are named as defendants in their official capacity only, based upon the PUC's Order approving the PPA between National Grid and Deepwater Wind, as federal law allows. *Town of Barnstable v. O'Connor*, 768 F.3d 130 (1st Cir. 2015) (reversing dismissal of challenge to state regulators' action on Cape Wind). *relying upon Ex Parte Young*, 209 U.S. 123, 159-60 (1908).

National Grid and Deepwater Wind are named as defendants because their interests are affected by the relief sought in this action.

at RIGL 39-26.1; Rainer Affidavit ¶2 & Ex. A. One of the stated purposes of the statute was to "encourage and facilitate the creation of commercially reasonable long-term contracts between electric distribution companies [i.e. National Grid] and developers or sponsors of newly developed renewable energy resources . . . ." P.L. ch. 53, §1 (Ex. A), at 39-26.1-1. The legislative goal was not just the development of alternative energy sources, but the development of alternative energy sources *in* Rhode Island. Letter of Governor Donald Carcieri, Rainer Affidavit ¶3 & Ex. B, at 2 ("Rather than purchasing power from New York and elsewhere, I urge them [National Grid] and the Commission [PUC] to help Rhode Island grow its nascent renewable energy sector . . .").

An even more specific purpose of the statute was to require National Grid to solicit proposals and enter into an agreement for the development of a particular "newly developed energy resources project of ten (10) [megawatts] or less" for the Town of New Shoreham (Block Island). P.L. ch. 53, §1 (Ex. A), at 39-26.1-7(a). The statute also expressly stated that "[t]he solicitation shall require that each proposal include provisions for a transmission cable between the Town of New Shoreham and the mainland of the state." *Id.* at 39-26.1-7(b).

Pursuant to the new statute, National Grid entered into an agreement with Deepwater Wind for the development of the 10 MW renewable-energy Town of New Shoreham Project (hereinafter, the "Block Island Wind Farm"). On December 9, 2009, National Grid submitted to the PUC for approval a proposed Power Purchase Agreement with Deepwater Wind ("the 2009 PPA"), under which National Grid would pass on to mainland Rhode Island ratepayers the cost of constructing and operating the Block Island Wind Farm. 2009 PPA, Rainer Affidavit ¶4 & Ex. C.

The 2009 PPA established a bundled price of $235.75/MWh for the power to be generated by the Block Island Wind Farm, which National Grid said translated to a rate of 24.4 cents/kWh for all Rhode Island electricity users, regardless of whether they purchased their power from National Grid (not including the cost of the underwater cable from Block Island to the mainland, or an incentive payment to National Grid). *Id.* at App. X; Ex. D (Cover letter from Ronald Gerwatowski). The 2009 PPA also included an escalation provision that would increase the cost to electricity users at the rate of 3.5% per year for up to 20 years. Rainer Affidavit, Ex. C at 10, 18.

On March 30, 2010, after receiving and reviewing voluminous submissions, the PUC disapproved the 2009 PPA, finding that it was not "commercially reasonable." Rainer Affidavit, ¶6 & Ex. E, at 67. The PUC found that, as compared to a pricing projection for "New England wholesale energy markets," the rate of 24.4 cents/kWh hour, escalated 3.5% per year, would result in ratepayers paying above market rates for their electricity for the entire duration of the 2009 PPA. *Id.* at 69. It also found that the 2009 PPA was not commercially reasonable, even when measured against the terms and pricing of other renewable energy projects. *Id.* at 68.

Within weeks of the PUC's decision disapproving the 2009 PPA, the General Assembly passed a revised LTC statute that directed the PUC to apply different standards in reviewing any future PPA for the Block Island Wind Farm. The revised LTC statute was signed into law on June 15, 2010. P.L. 2010, ch. 32, §1, codified at RIGL 39-26.1-7, Rainer Affidavit ¶7 & Ex. F. The very first line of the revised statute made clear its objective: "[t]he [G]eneral [A]ssembly finds 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 . . . ." Ex. F, at RIGL 39-26.1-7(a).

Fifteen days later, on June 30, 2010, National Grid and Deepwater Wind submitted to the PUC a revised PPA. Rainer Affidavit ¶8 & Complaint Ex. 3 (hereinafter, "the PPA"). The PPA decreased the 2009 PPA's initial bundled price of $235.75/MWh only slightly to $235.70/MWh, but did not change the 24.4 cents/kWh price for ratepayers, or the escalation of 3.5% per year for up to 20 years. PPA (Ex. 3), at Schedule E and Appendix X; Cover Letter of Ronald Gerwatowski dated June 30, 2010. Under the PPA, National Grid committed to purchasing power, capacity, and Renewable Energy Certificates from Deepwater Wind for 20 years. PPA (Ex. 3), at §§ 2.2(b), 4.1(a). It also provided that the initial bundled price *could* be reduced if the total cost of constructing the facility turned out to be less than the then estimated cost of $205,403,512. PPA (Ex. 3), at Appendix X.

On August 16, 2010, the PUC, in a 2-1 decision, voted to approve the PPA, relying heavily on the new standard for review of the PPA that had been mandated by the General Assembly. Rainer Affidavit ¶9 & Complaint Ex. 4 (hereinafter, "the PUC Order"). In her dissenting opinion, then-PUC Commissioner Mary Bray opined that the economic benefit of the Block Island Wind Farm, admitted by Deepwater to create only six permanent jobs, was outweighed 3 to 1 by the above market power costs to mainland ratepayers, "result[ing] in a net loss for the economy." *Id.* at 152.

The PUC's Order was thereafter appealed to the Rhode Island Supreme Court, primarily on state law grounds,[2] and affirmed on July 1, 2011. *In re Town of New Shoreham Project,* 25 A.3d 482 (R.I. 2011). On September 29, 2011, National Grid filed with the PUC a request for waiver of the one-year time limit for exhaustion of all appeals of the PUC's Order, which was subsequently granted by the PUC on January 24, 2012. Rainer Affidavit ¶11 & Ex. G. On January 6, 2012, prior to this ruling, the PUC submitted a request for information to National Grid seeking updated information about the above-market cost of the power to be purchased under the PPA, to which National Grid responded on January 26, 2012, quantifying the total above market cost over 20 years at over $497 million. Rainer Affidavit ¶10 & Complaint Ex. 5.

The Impending Impact of the PUC's Order

Subsequently, in 2012, Deepwater Wind applied for permits from the Rhode Island Coastal Resources Management Council seeking approval to construct the Block Island Wind Farm, and the underwater cable connecting to the mainland, in Rhode Island state territorial waters. The CRMC did not issue final approvals of the permits until November 17, 2014. Rainer Affidavit ¶12 & Ex. H. On September 12, 2012, Deepwater Wind submitted an application for a Rivers and Harbors Act permit from the United States Army Corps of Engineers to construct the Block Island Wind Farm. This application was approved on September 4, 2014. Rainer Affidavit ¶13 & Ex. I. The Army Corps approval, taken together with the CRMC approval and the announcement in

[2] Appeals by TransCanada Power Marketing Ltd. and Attorney General Patrick Lynch raising claims under the Dormant Commerce Clause were withdrawn prior to ruling, and so were never reached by the Rhode Island Supreme Court. 25 A.3d 482 (R.I. 2011).

2015 of financing for the Block Island Wind Farm, paved the way for the beginning of construction of the Wind Farm.

Under section 3.1(b) of the PPA, Deepwater Wind was allowed to extend to December 31, 2017 the deadline by which it is required to begin commercial operation of the Wind Farm. PPA (Ex. 3), at 11. Under section 3.3(a) of the PPA, National Grid's obligation to purchase energy, capacity, and Renewable Energy Certificates from Deepwater Wind commences only after commercial operation commences. *Id.* at 12. Therefore, the costs of the PPA have not yet been imposed on mainland Rhode Island ratepayers, but the imposition of these costs now appears reasonably imminent.

Like plaintiff Laurence Ehrhardt, plaintiff Benjamin Riggs is a mainland Rhode Island ratepayer for electricity supplied by National Grid. Riggs Affidavit ¶2. His electricity rates will be adversely affected if the PUC's Order approving the PPA between National Grid and Deepwater Wind is implemented, because the Order requires National Grid to purchase power at $497 million above market cost from Deepwater Wind, and this cost will be paid entirely by the approximately 482,700 mainland Rhode Island ratepayers over the next 20 years. *Id.* ¶3; Ex. 5. The average cost of this above-market power to a mainland Rhode Island ratepayer, like Mr. Riggs, will be approximately $1,000 over the life of the PPA, not including the cost of the underwater cable from Block Island to the mainland, recently estimated at $110-120 million (expected to be partly paid for by Block Island ratepayers), or a required $19 million incentive payment to National Grid. *Id.*

The Rhode Island Manufacturers Association ("RIMA") is a nonprofit association of manufacturing companies throughout Rhode Island whose purpose is to enhance the

ability of Rhode Island manufacturers to compete effectively and profitably in local, national and global markets. Lubrano Affidavit ¶3. The electricity costs of numerous members of RIMA, including, for example, the electricity costs of member Materion Technical Materials, Inc., will be adversely affected if the PUC's Order approving the PPA between National Grid and Deepwater Wind is implemented. *Id.* ¶4. The PPA is estimated to cost Materion Technical Materials, Inc. more than $520,000 over its 20-year term, or an average of $26,000 per year,[3] not including the cost of the underwater cable from Block Island to the mainland or the required $19 million incentive payment to National Grid. *Id.* ¶5-6. Similarly, the initial annual cost of the PPA to Rhode Island's 15 largest businesses has been estimated at $2,001,512. PUC Order (Ex. 4), at 153. *See also* PUC Order (Ex. 4), at 62.

Procedural History

Plaintiff Riggs filed an administrative petition with FERC, pursuant to the FPA, 16 U.S.C. § 791, et seq., and PURPA, 16 U.S.C. § 824, on August 22, 2012, seeking an enforcement action by FERC against the PUC on the grounds that the PUC's Order violates the FPA, PURPA, and the Commerce Clause of the United States Constitution. Riggs Affidavit ¶4 & Complaint Ex. 1. Mr. Riggs also filed an administrative petition with FERC on April 21, 2015, seeking an enforcement action by FERC against the PUC on the grounds that the PUC's Order violated the FPA, PURPA, and the Supremacy Clause of the United States Constitution. Riggs Affidavit ¶4 & Complaint Ex. 2. Mr. Riggs' petitions were filed under the Commission's Rule 206, which allows "any person"

[3] The reference in ¶5 of the Complaint to an estimated annual cost to Materion Technical Materials, Inc. exceeding $100,000 was a scrivenor's error.

to file a complaint seeking the Commission's action against "any other person alleged to be in contravention or violation of any statute, rule, order or other law administered by the Commission." 18 CFR 385.206.

National Grid and Deepwater Wind sought to intervene to oppose both proceedings, and, along with the PUC, filed various unsuccessful motions to dismiss. On October 18, 2012 and June 18, 2015, FERC issued notices of its intention not to act on Riggs' administrative petitions, stating in both cases that its "decision not to initiate an enforcement action means that Mr. Riggs may himself bring an enforcement action against the Rhode Island Commission in the appropriate court." Riggs Affidavit ¶5 & Ex. A-B.

Standard Applicable to a Motion for Summary Judgment

Under Rule 56 of the Federal Rules of Civil Procedure, either party may move for summary judgment at any time until 30 days after the close of discovery. The Court shall grant summary judgment if "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." A material fact is one that "might affect the outcome of the suit under the governing law.... Factual disputes that are irrelevant or unnecessary will not be counted." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

The core facts are not disputed in this case: On August, 16, 2010, the PUC entered its Order approving the PPA. Both the Order and the PPA are official records attached to the Complaint, and are therefore matters of which the Court can take judicial notice. *Curran v. Cousins*, 509 F.3d 36, 44 (1st Cir. 2007)(in reviewing a dispositive motion, the court may consider "documents the authenticity of which are

not disputed by the parties; . . . documents central to plaintiffs' claim; [and] documents sufficiently referred to in the complaint.'") The question presented in this case is a purely legal question-- whether the Order violates the FPA, the Supremacy Clause of the Constitution, or the Dormant Commerce Clause.

## ARGUMENT

### I. THE PUC ORDER IS PRE-EMPTED BY THE FEDERAL POWER ACT.

There is very strong authority that the PUC Order is pre-empted by the FPA. Two federal circuit courts have already ruled that orders just like the PUC Order are pre-empted by the FPA. *PPL EnergyPlus, LLC v. Solomon*, 766 F.3d 241 (3rd Cir. 2014); *PPL EnergyPlus, LLC v. Nazarian*, 753 F.3d 467 (4th Cir. 2014). In both cases, state legislatures (one in New Jersey and one in Maryland) had passed legislation requiring local utilities to purchase energy and capacity from particular in-state generators at long-term fixed prices, and state regulators had then allowed the local utilities to re-sell that energy and capacity at wholesale in FERC-regulated regional auctions, and charge to state ratepayers the considerable difference between the fixed price paid to the in-state generators and the lesser amount received in wholesale auctions. The same situation is presented here: the Rhode Island General Assembly passed legislation requiring National Grid to purchase energy and capacity from the Block Island Wind Farm at fixed prices, and the PUC has since purported to allow National Grid to re-sell that energy and capacity in the FERC regulated ISO-New England auctions, and charge to Rhode Island ratepayers the almost $500 million difference between the fixed prices to be paid to the Wind Farm and the price to be received in wholesale auctions. As

more fully explained below, the PUC Order should therefore be struck down, just as the New Jersey and Maryland orders were struck down.

### A. FERC's Market Driven Auction System

In explaining why the PUC Order is pre-empted by the FPA, it makes sense to start by reviewing the regulatory system established by the FPA. The FPA, passed in 1935, drew a bright line between what energy matters states could regulate and what energy matters were reserved to regulation by the federal government. It allowed states to regulate generators of electricity and to set the prices at which generators sold electricity to retail customers. 16 U.S.C. §624(b). It vested FERC with exclusive authority over the "sale of electric energy at wholesale in interstate commerce." 16 U.S.C. §624(b).

FERC initially carried out this authority by directly reviewing and setting rates for wholesale energy, but the agency has since adopted a different approach to regulation. *PPL EnergyPlus, LLC v. Solomon*, 766 F.3d at 247. As explained by the Fourth Circuit in *PPL EnergyPlus, LLC v. Nazarian*, "[r]ather than ensuring the reasonableness of interstate transactions by directly setting rates, FERC has chosen instead to achieve its regulatory aims indirectly by protecting 'the integrity of the interstate energy markets.' *N.J. Bd. of Pub. Utils. v. FERC*, 744 F.3d 74, 81 (3d Cir.2014). To this end, FERC has authorized the creation of 'regional transmission organizations' to oversee certain multistate markets." 453 F.3d at 472. The regional transmission organization that covers Rhode Island is ISO-New England. *See New Eng. Power Generators Ass'n v. FERC*, 757 F.3d 283 (D.C. Cir. 2014). The other states that participate in the wholesale markets coordinated and administered by ISO-New England are:

Connecticut, Maine, Massachusetts, New Hampshire, and Vermont. Because Rhode Island has chosen to participate in this regional market to obtain electricity, it is subject to the FPA and FERC regulations that govern such wholesale interstate markets. *Id.*

Generators of electricity in the ISO-New England market are required to bid at an auction to provide capacity three years into the future. *Id.* at 287 (describing the negotiated auction system that generates the Forward Capacity Market for ISO-New England). Generators bid the capacity that they are willing to sell and the price at which they are willing to sell it. *Id.* ISO-New England uses an administratively determined demand curve, based largely on the cost of building new generating capacity, and the offers supplied by the generators to determine the price at which demand is fully supplied. *Id.* This is the Forward Capacity Auction clearing price ("clearing price") for electricity in the market. *Id.* Generators that offer to sell their capacity at or below this price receive the clearing price for that energy. *See In re Devon Power,* 115 F.E.R.C. ¶61,340 (describing the various mechanisms in place to encourage new capacity while maintaining reasonable rates for consumers). If a generator sells the capacity stated in the auction, it is required to offer energy in the ISO-New England market for energy. *New Eng. Power Generators,* 757 F.3d at 287–88 (noting that capacity generators can exit the market for a year at a time if they give notice prior to the auction).

This auction system is designed to incentivize the generation of new capacity when it is economical to do so based on market forces. *See In re Devon Power,* 115 F.E.R.C. ¶61,340 (2006). To this end, these auctions take into account the location of generators and allow for a higher "clearing price" if there is a need for new production in a particular area. *Id.* Generators are able to determine if the best method of meeting

demand is to invest in new generating facilities, or use existing facilities. *Id.* "Both the capacity and the energy markets[4] are designed to efficiently allocate supply and demand, a function which has the collateral benefit of incentivizing the construction of new power plants when necessary." *Nazarian,* 753 F.3d at 472.

Electricity delivered into ISO-New England by a particular generating facility cannot be segregated from electricity produced elsewhere. Consequently, all sales of energy and capacity within the grid occur in interstate commerce, and are subject to exclusive regulation by Congress and the FERC.

### B. The PUC's Order Trenches on the FERC Auction System

Following the command of the General Assembly, the PUC allowed National Grid to enter into a contract with a selected generator, Deepwater Wind, which guarantees that generator fixed prices for its wholesale energy and capacity for 20 years that are based on the cost of building the wind farm, not based on the prices established in the FERC-approved wholesale markets. PPA (Ex. 3), App. X; PUC Order (Ex. 4), at 4, 40. As mandated by RIGL 39-26.1-5(f), the PUC's Order also provides that National Grid may immediately resell the renewable energy purchased from Deepwater Wind in ISO-New England's Day Ahead or Real Time Energy Markets, where prices are currently 5 cents per kWh on-peak and less than 4 cents per kWh off-peak, and then pass through to ratepayers the difference between the 24.4 cents per kWh paid to Deepwater Wind and

[4] "Capacity" is not electricity itself, but a commitment to provide the energy to meet future demand. "Energy" is the actual electricity that is sold by generators at wholesale, which is resold by electric distribution companies, like National Grid, to electricity end-users. In addition to its capacity auctions, ISO-New England also holds auctions for energy, both a day ahead (the "Day Ahead" auction) and in "Real Time." ISO New England Manual for Market Operations, Manual M-11, Rainer Affidavit ¶14 & Ex. J, at 1-2.

the 4-5 cents per kWh hour obtained in the ISO Markets. PPA (Ex. 3), § 4.2(a); Memorandum from Steve Scialabba of the RI Division of Public Utilities (Ex. 6).

The Order trenches on FERC's exclusive authority to set wholesale energy and capacity rates, which it exercises through ISO-New England's auctions. The FERC's system for setting rates, as set out above, is based on producing energy at the lowest cost to the consumer while still allowing for new generating capacity to be created. By contrast, the PUC Order sets rates based on Rhode Island's interest in creating the Block Island Wind Farm by exempting a specific generator and a specific utility from being subject to the federal rate-setting scheme. The Order thus attempts to secure for Rhode Island the advantages of the interstate wholesale markets approved by FERC, while simultaneously distorting those markets' federally governed pricing mechanism. National Grid will have no incentive to price the energy it resells from Deepwater Wind at market prices, because of the reimbursement it will receive under the PPA, thus disadvantaging other sellers in those markets. The PUC's Order usurps FERC's exclusive role in regulating wholesale transactions and disrupts the wholesale energy markets supervised by FERC, and does so in a manner calculated to favor a new generating facility in Rhode Island over out-of-state facilities that participate in the regional wholesale markets.

### C. This Court Should Follow the Third and the Fourth Circuit Courts of Appeal in Holding that the PUC Order is Pre-empted.

The facts at issue in the cases of *PPL EnergyPlus, LLC v. Nazarian*, 753 F.3d 467 (4th Cir. 2014), and *PPL EnergyPlus, LLC v. Solomon*, 766 F.3d 241 (3rd Cir. 2014), are directly analogous to the facts presented here, and this Court should follow the two Circuit Courts in holding that the PUC Order is pre-empted by the FPA. In *Nazarian*, the

Maryland Public Service Commission solicited proposals for construction of a new power plant, to be located in a particular part of Maryland. The Public Service Commission offered the successful bidder, Commercial Power Ventures ("CPV" the equivalent of Deepwater Wind here) a fixed, 20-year contract under which one of the state's electric distribution companies ('EDCs," the equivalent of National Grid here) would pay the difference between CPV's contractually fixed price for energy and capacity and what CPV could actually earn for that energy and capacity at auction in the regional transmission organization that covered Maryland, "PJM." 753 F.3d at 473-74. The cost differential between the fixed price and the auction price "would in turn be passed on to the EDCs' retail ratepayers." *Id.*

In ruling that the Maryland Public Service Commission's order was pre-empted by the FPA, the Fourth Circuit pointed to FERC's reliance on the auction system of PJM, a regional transmission organization like ISO-New England. It held:

> If Congress evidences an intent to occupy a given field, any state law falling within that field is pre-empted." *Silkwood v. Kerr–McGee Corp.*, 464 U.S. 238, 248, 104 S.Ct. 615, 78 L.Ed.2d 443 (1984). Statutory text and structure provide the most reliable guideposts in this inquiry. *See Medtronic, Inc. v. Lohr,* 518 U.S. 470, 486, 116 S.Ct. 2240, 135 L.Ed.2d 700 (1996) ("Congress' intent, of course, primarily is discerned from the language of the pre-emption statute and the statutory framework surrounding it.") (internal quotation marks omitted).
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> The FPA's "declaration of policy" states:
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> It is declared that the business of transmitting and selling electric energy for ultimate distribution to the public is affected with a public interest, and that Federal regulation of matters relating to generation to the extent provided in this subchapter and subchapter III of this chapter and of that part of such business which consists of the transmission of electric energy in interstate commerce and the sale of such energy at wholesale in interstate commerce is necessary in the public interest, such Federal regulation, however, to extend only to those matters which are not subject to regulation by the States. 16 U.S.C. § 824(a); *see also id.* at § 824(b). . . . .

A wealth of case law confirms FERC's exclusive power to regulate wholesale sales of energy in interstate commerce, including the justness and reasonableness of the rates charged. "The [FPA] long has been recognized as a comprehensive scheme of federal regulation of all wholesales of [energy] in interstate commerce," *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 300, 108 S.Ct. 1145, 99 L.Ed.2d 316 (1988) (internal quotation marks omitted), and "FERC's jurisdiction over interstate wholesale rates is exclusive," *Appalachian Power Co. v. Pub. Serv. Comm'n*, 812 F.2d 898, 902 (4th Cir.1987); *see also New England Power Co. v. New Hampshire*, 455 U.S. 331, 340, 102 S.Ct. 1096, 71 L.Ed.2d 188 (1982). In this area, "if FERC has jurisdiction over a subject, the States cannot have jurisdiction over the same subject." *Miss. Power & Light Co. v. Mississippi ex rel. Moore*, 487 U.S. 354, 377, 108 S.Ct. 2428, 101 L.Ed.2d 322 (1988) (Scalia, J., concurring in the judgment).

Indeed, the Supreme Court has expressly rejected the proposition that the "scope of [FERC's] jurisdiction ... is to be determined by a case-by-case analysis of the impact of state regulation upon the national interest." *Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953, 966, 106 S.Ct. 2349, 90 L.Ed.2d 943 (1986) (quoting *FPC v. S. Cal. Edison Co.*, 376 U.S. 205, 215, 84 S.Ct. 644, 11 L.Ed.2d 638 (1964)) (internal quotation marks omitted). Instead, "Congress meant to draw a bright line easily ascertained, between state and federal jurisdiction.... This was done in the [FPA] by making [FERC] jurisdiction plenary and extending it to all wholesale sales in interstate commerce except those which Congress has made explicitly subject to regulation by the States." *Id.* (quoting *S. Cal. Edison Co.*, 376 U.S. at 215–16, 84 S.Ct. 644) (internal quotation marks omitted).

The federal scheme thus "leaves no room either for direct state regulation of the prices of interstate wholesales of [energy], or for state regulations which would indirectly achieve the same result." *N. Natural Gas Co.*, 372 U.S. at 91, 83 S.Ct. 646 (citation omitted). "Even where state regulation operates within its own field, it may not intrude indirectly on areas of exclusive federal authority." *Pub. Utils. Comm'n v. FERC*, 900 F.2d 269, 274 n. 2 (D.C.Cir.1990) (internal quotation marks omitted). As a result, states are barred from relying on mere formal distinctions in "an attempt" to evade preemption and "regulate matters within FERC's exclusive jurisdiction." *Schneidewind*, 485 U.S. at 308, 108 S.Ct. 1145....

Applying these principles, we conclude that the [Public Service Commission's] Order is field preempted because it functionally sets the rate that CPV receives for its sales in the [ ] auction.... Furthermore, the Order ensures—through a system of rebates and subsidies calculated on the basis of the [ ] market rate—that CPV receives a fixed sum for every unit of capacity and energy that it clears (up to a certain ceiling). The scheme thus effectively supplants the rate generated by the auction with an alternative rate preferred by the state. *See Appalachian Power Co.*, 812 F.2d at 904 (holding that the agreement at issue did not "set a rate per se," but that it nevertheless "sufficiently resemble[d] a filed

rate to come within the realm of exclusive federal jurisdiction"). The Order thus compromises the integrity of the federal scheme and intrudes on FERC's jurisdiction. 753 F.3d at 474-76.

The Fourth Circuit went on to observe:

> If states are required to give full effect to FERC-mandated wholesale rates on the demand side of the equation, it stands to reason that they are also required to do so on the supply side. Here, the contract price guaranteed by the [Public Service Commission's] Order supersedes the PJM auction rates that CPV would otherwise earn—rates established through a FERC-approved market mechanism. The Order ensures that CPV receives a fixed price for every unit of energy and capacity it sells in the PJM auction, regardless of the market price. The fact that it does not formally upset the terms of a federal transaction is no defense, since the functional results are precisely the same. . . .
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> Although states plainly retain substantial latitude in directly regulating generation facilities, they may not exercise this authority in a way that impinges on FERC's exclusive power to specify wholesale rates. As the Supreme Court noted in a similar context:
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> [T]he problem of this case is not as to the existence or even the scope of a State's power to [regulate generation facilities]; the problem is only whether the Constitution sanctions the particular means chosen by [the state] to exercise the conceded power if those means threaten effectuation of the federal regulatory scheme. *N. Natural Gas Co.*, 372 U.S. at 93, 83 S.Ct. 646.
> 753 F.3d at 476-77.[5]

The Third Circuit reached the same result in *PPL EnergyPlus, LLC v. Solomon*, 766 F.3d 241 (3rd Cir. 2014), striking down an Order of the New Jersey Board of Public Utilities, taken in response to a new law enacted by the New Jersey Legislature. The new law, the Long Term Capacity Pilot Program Act ("LCAPP"), aimed to encourage

[5] The Fourth Circuit went on to hold that the Order of the Maryland Public Service Commission should be struck down not only under the principle of "field pre-emption" (that is, the Order was pre-empted by the FPA,) but also under the principle of "conflict pre-emption." It defined conflict pre-emption as arising where a "challenged state law stands as an obstacle to accomplishment and execution of the full purposes and objectives of Congress." 753 F.3d at 478. It held that the Order should be struck down under conflict pre-emption, in part because it guaranteed fixed prices for CPV for 20 years, whereas the applicable FERC regulatory scheme allowed fixed prices for new generators for only 3 years. The same principle should be applied in this case. The Order of the PUC grants Deepwater Wind fixed prices for 20 years, far more than any new entry price ever allowed by ISO-New England. 147 FERC ¶ 61,173 (2014).

power generation companies to construct new power plants in New Jersey. It did so by authorizing the Board of Public Utilities to require electricity distribution companies in New Jersey (again the equivalent of National Grid here) to enter into long-term capacity contracts with new generators (the equivalent of Deepwater Wind here) that guaranteed a fixed level of revenue over a 15-year contract term.

In ruling that the New Jersey Board's Order was pre-empted by the FPA, the Third Circuit held:

> Because FERC has exercised control over the field of interstate capacity prices, and because FERC's control is exclusive, New Jersey's efforts to regulate the same subject matter cannot stand. "Where Congress has delegated the authority to regulate a particular field to an administrative agency, the agency's regulations issued pursuant to that authority have no less preemptive effect than federal statutes, assuming those regulations are a valid exercise of the agency's delegated authority." *Fellner v. Tri–Union Seafoods, L.L.C.*, 539 F.3d 237, 243 (3d Cir.2008). Here, FERC's use of the Base Residual Auction [the equivalent of ISO-New England's auctions here] to set interstate capacity prices is a lawful exercise of its authority. *See N.J. Bd. of Pub. Utils.*, 744 F.3d at 97. Indeed, only FERC has the authority to set interstate capacity prices. *Id.* So the Federal Power Act, as administered by FERC, preempts and, therefore, invalidates, state intrusions into the field. *Cf. Fid. Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 153, 102 S.Ct. 3014, 73 L.Ed.2d 664 (1982). New Jersey's regulations must yield.
>
> LCAPP's defenders respond that New Jersey's interference with capacity prices does not trigger preemption because it is a lawful exercise of the state's authority to promote new generation resources. New Jersey does have authority over local energy matters, including the construction of power plants. *See, e.g., So. Cal. Edison Co. & San Diego Gas & Elec. Co.*, 71 FERC ¶ 61,269, at 3 (1995). But LCAPP incentivizes the construction of new power plants by regulating the rates new electric generators will receive for their capacity. New Jersey could have used other means to achieve its policy goals.[6] Because Congress has evinced its intent to occupy the entire field of interstate capacity rates, however, New Jersey's reasons for regulating in the federal field cannot save its effort: "any

[6] The Court gave examples of other, constitutional ways New Jersey could have incentivized new power generation, such as utilization of tax exempt bonding authority, the granting of property tax relief, the ability to enter into favorable site lease agreements on public lands, the gifting of environmentally damaged properties for brownfield development, and the relaxing or acceleration of permit approvals. 766 F.3d at 253 n.4.

> state law falling within that [federal] field is preempted." *Silkwood v. Kerr–McGee Corp.*, 464 U.S. 238, 248, 104 S.Ct. 615, 78 L.Ed.2d 443 (1984). 766 F.3d at 253-54.

This Court should follow the decisions of the Third and Fourth Circuits, and hold that the Order of the PUC must be struck down. It may do so under the principle of field pre-emption, or it may do so under the Supremacy Clause of the Constitution. *See* Complaint Count I (¶¶42-50) and Count III (¶¶58-65). As the Third Circuit observed in *Solomon,*

> Congress has distinguished between those matters that belong exclusively to the federal government, such as regulation of interstate sales and transmissions of energy, and those matters that remain within the regulatory authority of the states, such as the regulation of energy generators. *See* 16 U.S.C. § 824(b).
>
> In the American system of federalism, federal law commands primacy over state law. The "Constitution, and the Laws of the United States which shall be made in Pursuance thereof ... shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. art. VI, cl. 2. As between state and federal law, therefore, any state law that "interferes with or is contrary to federal law ... must yield." *Free v. Bland,* 369 U.S. 663, 666, 82 S.Ct. 1089, 8 L.Ed.2d 180 (1962) (citing *Gibbons v. Ogden,* 22 U.S. (9 Wheat.) 1, 210, 6 L.Ed. 23 (1824)).
>
> Accordingly, if [state law] intrudes into the exclusively federal field or conflicts with valid federal regulation, federal law preempts its effect and renders it invalid. *See Farina v. Nokia Inc.*, 625 F.3d 97, 115 (3d Cir.2010). 766 F.3d at 250.

## II. THE PUC ORDER IS PREEMPTED BY PURPA

In addition to the broad regulatory mandate conveyed by the FPA, Congress gave FERC additional authority when it passed the Public Utility Regulatory Policies Act of 1978 (PURPA). Section 210 of PURPA, codified at 16 U.S.C. §§ 824a-3, was designed to reduce the country's dependence on fossil fuels and encourage the development of

alternative energy sources, such as cogeneration facilities and small power production plants. *American Paper Institute, Inc. v. American Electric Power Service Corp.*, 461 U.S 402, 402 (1983). It directed FERC to prescribe rules requiring electric utilities to purchase power from qualifying alternative energy facilities, and governing the prices to be paid for this power. *Id.*

FERC has since exercised this authority, issuing regulations that prohibited utilities from paying more for alternative energy than it would cost them to produce the same energy themselves or purchase from another source. *Id., citing* 16 U.S.C. § 824a-3(d) and 18 CFR 292.304(b)(2). This was the rule that was in place at the time the PUC issued its Order of August 16, 2010 approving the PPA, and the PUC plainly did not follow it. The PUC's Order approved rates for the purchase of energy from Deepwater Wind that were based on the cost of constructing the Wind Farm, which were palpably higher than the rates at which National Grid could purchase energy from other sources -- $497 million higher. PUC Order (Ex. 4), at 4, 40. Indeed, the testimony submitted to the PUC by National Grid itself acknowledged that the rates to be paid under the contract were higher than the rates it could buy energy elsewhere. *Id.* at 39.[7]

In October 2010 – after the PUC's Order -- FERC issued a decision interpreting PURPA to allow utilities to pay a qualifying alternative energy generator a price up to the price the utility would need to pay to acquire energy from other *renewable* energy sources. *See In re Southern California Edison Co.*, 133 FERC ¶ 61,059, at *61266-67

[7] Indeed, in the testimony submitted to the PUC in its first hearings on the PPA, every witness who testified opined that the price that National Grid is to pay under the PPA is and will remain higher than the price of otherwise available electricity for the next 20 years. Ex. D, at 69. Indeed, according to one calculation, the price at the end of the 20-year term will be seven times currently available electricity rates. *Id.* at 69 n.340.

(2010). However, even under this more flexible standard, the PUC Order failed. National Grid admitted to the PUC that the price to be paid to Deepwater Wind under the PPA was "still higher than other renewable energy projects available in the market." PUC Order (Ex. 4), at 39.

As was true when the FPA was first passed, state utilities commissions objected to FERC dictating under PURPA the rates to be paid for alternative energy by utilities within their jurisdictions. However, as with the FPA, the Supreme Court upheld PURPA as a valid exercise of federal power to regulate interstate commerce. *See FERC v. Mississippi,* 456 U.S. 742 (1982). So, as with the FPA, PURPA is the supreme law of the land and pre-empts rulings by state regulatory commissions that conflict with and undermine its mandates, like the Order of the PUC in this case.

Applying its exclusive authority under PURPA, FERC has said that a utility cannot pay more to a particular supplier of alternative energy than it would pay in the market for alternative energy. 133 FERC ¶ 61,059, at *61266-67 (2010). Yet, the PUC purported to allow National Grid to pay Deepwater Wind two to three times that amount. More importantly, the PUC purported to allow National Grid to pay a price based not on the market, but based on the cost of constructing and operating the Block Island Wind Farm, plus a nice profit for Deepwater Wind. PUC Order (Ex. 4), at 40.

In this second, important respect, the PUC's Order undermines the market system that FERC now relies upon to price energy. As in Nazarian, the Order allows Deepwater to:

> receive[] a fixed sum for every unit of capacity and energy that it clears .... The scheme thus effectively supplants the rate generated by the auction [in this case, for renewable energy] with an alternative rate preferred by the state. *See Appalachian Power Co.,* 812 F.2d at 904 (holding that the agreement at issue did

not "set a rate per se," but that it nevertheless "sufficiently resemble[d] a filed rate to come within the realm of exclusive federal jurisdiction"). The Order thus compromises the integrity of the federal scheme and intrudes on FERC's jurisdiction. 753 F.3d at 476.

The PUC's Order also completely undermines one of the stated objectives of PURPA, which was to ensure that the rates charged to ratepayers for alternative energy be "just and reasonable" and "in the public interest." 16 U.S.C. §824a-3(a); 18 CFR 292.304(a)(i). Indeed, in enacting PURPA, Congress made clear that section 210 "is not intended to require the ratepayers of a utility to subsidize cogenerators or small power producers." *Joint Explanatory Statement of the Committee of Conference,* H.R. Rep. No. 1750, 95th Cong. 2d Sess. 98 (1978), *reprinted* in 1978 U.S. Code Cong. & Ad. News 7797, 7832. However, the PUC did precisely that.

Accordingly, the Court should strike down the Order of the PUC as violating the FPA, PURPA, and the Supremacy Clause.

## III. THE PUC ORDER VIOLATES THE DORMANT COMMERCE CLAUSE.

### A. The PUC Order Implements the General Assembly's Express Preference for a Particular In-State Generator, and Thus Burdens Ratepayers as well as Out-of-State Generators.

The LTC Statute enacted in 2009, RIGL 39-26.1-1 through 8, requires electric distribution companies in Rhode Island to enter long-term contracts to purchase capacity, energy, and energy attributes from renewable energy generators. The statute contains an express preference for projects that are located "within the jurisdictional boundaries of the state." RIGL 39-26.1 (Ex. A). In describing the purpose of the LTC statute, then-Governor Donald Carcieri reinforced this point, "Rather than purchasing power from New York and elsewhere, I urge them [National Grid] and the Commission

[PUC] to help Rhode Island grow its nascent renewable energy sector into a vibrant, innovative and job creating industry." Carcieri Letter (Ex. B), at 2.

Moreover, section 7 of the statute, as amended in 2010, mandates a contract with one particular in-state project, the Block Island Wind Farm. RIGL 39-26.1-7 (Ex. F). In particular, section 7 calls upon National Grid to enter into a PPA with the developer of the Block Island Wind Farm (i.e. Deepwater Wind). Section 3 of the LTC statute set a requirement – a "minimum long-term contract capacity" -- that electric distribution companies in Rhode Island must purchase from renewable energy generators. RIGL 39-26.2, 3. Under subsection 7(h), the amount purchased from the Block Island Wind Farm "shall count as part of the minimum long-term contract capacity" that electric distribution companies in the state must purchase. RIGL 39-26.1-7(h).

The PUC carried out the mandate of section 7 (against its better judgment) when it entered the Order approving the PPA for the Block Island Wind Farm. Pursuant to section 7(h) of the LTC statute, the PUC Order reduces the amount of renewable energy that may be sold by any other generators seeking to compete for long-term contracts in Rhode Island. As a result, the statute, and the PUC Order, discriminate against out-of-state producers of renewable energy, in favor of a particular in-state generator. Such discrimination is prohibited by the Commerce Clause of the Constitution.

The PUC's Order also discriminates against all generators of energy that participate in ISO-New England's Day Ahead and Real Time auctions. That is because the Order allows National Grid to resell the energy it purchases from Deepwater Wind in those auctions at low prices, because National Grid can recover from mainland Rhode

Island ratepayers any difference between the price it obtains at auction and the fixed price it pays to Deepwater Wind. PPA (Ex. 3), §4.2(a); Scialabba Memorandum (Ex. 6). This disadvantages other generators, including out-of-state generators, because no other generator has this price guarantee. The Order thus unfairly favors National Grid, and unfairly burdens out-of-state generators.

This discrimination unfairly burdens not only out-of-state generators, but Rhode Island ratepayers like the plaintiffs. If the required long-term contracts for renewable energy were open to out-of-state bidders, the ensuing competition would reduce the rates paid by those ratepayers. Conversely, limiting the program to a specific in-state project will markedly increase their rates.

B. **The Prohibitions of the Dormant Commerce Clause.**

In *Family Winemakers of California v. Jenkins*, 592 F.3d 1 (1st Cir. 2010), the First Circuit Court of Appeals summarized the prohibition of the Dormant Commerce Clause this way:

> The Commerce Clause prevents states from creating protectionist barriers to interstate trade .... Discrimination under the Commerce Clause means differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter, as opposed to state laws that regulate evenhandedly with only incidental effects on interstate commerce. ... [A] discriminatory law is virtually per se invalid ... and will survive only if it advances a legitimate local purpose that cannot be adequately served by reasonable non-discriminatory alternatives.... The state bears the burden of showing legitimate local purposes and the lack of non-discriminatory alternatives, and discriminatory state laws rarely satisfy this exacting standard. 592 F.3d at 9 (internal citations and quotations omitted).

State laws that favor in-state producers contravene the founding principles of the United States. *See Camps Newfound/Owatonna, Inc. v. Town of Harrison,* 520 U.S. 564, 578 (1997)("Avoiding ... economic Balkanization, and the retaliatory acts of other

States that may follow, is one of the central purposes of our negative Commerce Clause jurisprudence."); *see also C&A Carbone v. Town of Clarkstown,* 511 U.S. 383, 390 (1994)("The central rationale for the rule against discrimination is to prohibit state or municipal laws whose object is local economic protectionism, laws that would excite those jealousies and retaliatory measures the Constitution was designed to prevent."). Even where a state claims an environmental purpose, this does not justify a regulation that discriminates based on the point of origin of commerce. *City of Philadelphia v. New Jersey,* 437 U.S. 617, 625-57 (1978).

The Supreme Court has held repeatedly that the Commerce Clause prevents states from impeding the flow of electricity in interstate commerce. *See, e.g., Morgan Stanley Capital Group v. Public Utilities Dist. No. 1,* 554 U.S. 527, 531 (2008); *Miss. Power & Light Co. v. Miss. ex rel Moore,* 487 U.S. 354, 371 (1988); *New England Power Co. v. New Hampshire,* 455 U.S. 331, 338-40 (1982). The prohibition on regulating electricity in interstate commerce is so well established that the National Association of Regulatory Utility Commissioners has specifically warned its members not to violate it when adopting regulation on renewable energy:

> Some states have limited renewable resource eligibility to production from generation facilities located within the state. Absent a significant change in Supreme Court application of the Commerce Clause of the U.S. Constitution, the restriction to in-state generation will, if challenged, be found unconstitutional. The courts have continually found that facial discrimination by a state against out-of-state resources is 'virtually *per se* invalid.' *Philadelphia v. New Jersey,* 437 U.S. 617, 624 (invalidating New Jersey's ban on imports of out-of-state garbage). The exclusion of out-of-state generation is sufficiently similar to court precedents to expect invalidation. The Renewables Portfolio Standard: A Practical Guide (emphasis added).

### C. The Order's Facial Discrimination Against Out-of-State Generators Violates the Dormant Commerce Clause.

A state law that discriminates against out-of-state resources on its face is "virtually *per se* invalid." *Family Winemakers,* 592 F.3d at 9. Such a law "will survive only if it advances a legitimate local purpose that cannot be adequately served by reasonable non-discriminatory alternatives." *Id.*

The LTC statute is discriminatory on its face. It requires electric distribution companies in Rhode Island to purchase a limited amount of renewable energy and capacity. RIGL 39-26.3 (Ex. A). It then directs a portion of that limited amount of renewable energy and capacity to a particular, favored in-state producer, the Block Island Wind Farm, a command that was subsequently implemented by the Order of the PUC. RIGL 39-26.7 (Ex. F).

This is precisely the kind of protectionism in electricity generation that the U.S. Supreme Court has previously struck down. *See Wyoming v. Oklahoma,* 502 U.S. 437, 455 (1992). In that case, Oklahoma had required that in-state utilities purchase 10% of their needs from coal mined in Oklahoma. *Id.* at 443. The Supreme Court held that "[s]uch a preference for coal from domestic sources cannot be characterized as anything other than protectionist and discriminatory, for the Act purports to exclude coal mined in other States based solely on its origin." *Id.* at 456.

A facially discriminatory state law "receives a form of strict scrutiny so rigorous that it is usually fatal." *See Alliance of Auto. Mfrs. v. Gwadosky,* 430 F.3d 30, 35 (1st Cir. 2005). In this case, to defend its Order, the PUC would have to show that the Order advances a legitimate local purpose that cannot be adequately served by a reasonable non-discriminatory alternative. It cannot do so, because *there are* reasonable non-

discriminatory alternatives – the state could utilize its tax exempt bonding authority to fund wind power in Rhode Island or grant tax relief to Rhode Island wind generators. These approaches do not restrain the flow of commerce between the states, and therefore do not violate the Commerce Clause.[8]

The Order also discriminates against out-of-state generators because of the favored status it deliberately gives the Block Island Wind Farm in the competitive marketplace. As the First Circuit has observed, "[s]tate laws that alter conditions of competition to favor in-state interests over out-of-state competitors in a market have long been subject to invalidation." *Family Winemakers*, 592 F.3d at 10-11. Here, the Order grants a single generator a tremendous competitive advantage by allowing it to circumvent the federally mandated ISO auction to determine the rate it will be paid. PUC Order (Ex. 4), at 4. As set forth above, the energy produced by Deepwater Wind Farm will be sold at fixed prices to National Grid, and National Grid will be able to re-sell that energy at auction without concern for the market price, because it will be able to recoup the difference between the market price and the fixed price it pays to Deepwater Wind from mainland Rhode Island ratepayers. PPA (Ex. 3), §4.2(a); Scialabba Memorandum (Ex. 6).

Moreover, the circumstances in which the LTC statute was enacted, then amended to change the criteria for review of the Block Island Wind Farm, belie a deliberate intention to favor a particular in-state business, as opposed to serving the

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[8] Indeed, many states have put in place successful programs to encourage renewable energy. Under these established programs, electric distribution companies must obtain a percentage of their power from renewable energy sources, but they are free to purchase the renewable energy from the most efficient sources, whether those sources generate their energy in-state or out-of-state.

interests of the state as a whole. This history is also subject to strict scrutiny under the Commerce Clause. *See Family Winemakers*, 592 F.3d at 13 (In determining whether the statute was designed to provide benefits to the state or merely provide a benefit to an in-state business, courts look to "'the statute as a whole,' . . . including statutory text, context, and legislative history, [and] also consider whether the statute was 'closely tailored to achieve the legislative purpose' the state asserted.").

Added to this, the effect of this discrimination against interstate commerce is to increase the rates paid by the plaintiffs. Thus, when strict scrutiny is applied, the Order of the PUC must be struck down under the Dormant Commerce Clause.

### D. The Commerce Clause Rulings in *Nazarian* and *Solomon* Are Distinguishable.

Although a Dormant Commerce Clause challenge was raised in both *Nazarian* and *Solomon*, the Third and Fourth Circuits did not reach the issue, once they concluded that the regulatory orders they were reviewing were pre-empted by the FPA. 753 F.3d at 480; 766 F.3d at 246. However, the District Courts in both cases considered, and rejected, Commerce Clause challenges on grounds that are distinguishable from this case.

In *Nazarian*, the District Court for the District of Maryland considered at length, and rejected, the defendants' arguments that the Order approving contracts to fund a new in-state power generation facility was exempt from Commerce Clause review (including arguments that the Order amounted to a permissible state subsidy for a particular in-state generator, the argument that the Maryland Public Service Commission was a "market participant" in the market for energy and capacity, and the argument that Congress has allowed states to discriminate against interstate commerce

in the siting of generation facilities). 974 F.Supp.2d 790, 842-49 (D. Md. 2013). However, the District Court also rejected the plaintiffs' argument that the siting of a new generator facility in Maryland discriminated against out-of-state generators, observing:

> The mere fact that the PSC sought to procure a new generation facility located within [Maryland] does not, standing alone, discriminate against the flow of interstate commerce. The Generation Order does not erect any barriers to the sale or transmission of electric energy at wholesale in and out of [Maryland] and within the PJM [regional transmission organization] region or to providing a competitive advantage to an in-[state] generation facility selling electric energy at wholesale at the expense of other generation facilities competing in the same market. CPV's facility would compete in the PJM Markets with all other resources to sell its energy and capacity to PJM. 974 F.Supp. 2d at 851.

The present case is distinguishable in a critical respect. In the present case, the Order of the PUC does provide "a competitive advantage to an in-state generation facility selling electric energy at wholesale at the expense of other generation facilities competing in the same market." Here, the LTC statute requires the electric distribution companies in Rhode Island to purchase a limited amount of renewable energy, and mandates that a portion of that renewable energy be purchased from a particular in-state generator, the Block Island Wind Farm. This is at the expense of out-of-state generators of renewable energy, like TransCanada Power Marketing, which challenged the PPA on that very ground, and therefore at the expense of all mainland Rhode Island ratepayers. As TransCanada pointed out, there are a finite number of contracts for renewable energy for a finite amount of power set forth in the LTC statute, and the General Assembly mandated that the first of those contracts go to a particular in-state generator, Block Island Wind Farm. *See* PUC Order (Ex. 4), at 28-29; RIGL 39-26.2, 26.7 (Ex. A, F).

In this case, it is also not true that the Block Island Wind Farm will "compete in the [ISO-New England] Markets with all other resources to sell its energy and capacity". Rather, Deepwater Wind will get a fixed price for its energy from National Grid, and National Grid can re-sell this energy at any price it wishes, because it will recoup the difference between the price it gets in the market and the fixed price it pays to Deepwater Wind from all mainland Rhode Island ratepayers. This disadvantages all other generators selling energy in the market who do not have the benefit of this price support. Thus, the Order of the PUC, unlike the Order of the PSC in *Nazarian,* does discriminate against the flow of interstate commerce, and does violate the Commerce Clause.

The District Court decision in *Solomon* (decided under the name *PPL EnergyPlus v. Hanna*) rejected the plaintiffs' Commerce Clause argument on different grounds from *Nazarian,* but also on grounds that are not relevant to the present case. Without deciding whether the siting of new generation facilities in New Jersey in fact discriminated against out-of-state generators, the District Court in *Hanna* held that the New Jersey Board of Public Utilities had a "legitimate local interest" in siting the new generation facilities in New Jersey that it could not advance by any other means. 977 F.Supp.2d 372, 411 (D.N.J. 2013). Specifically, the District Court heard evidence that the only way to address demonstrated issues with the reliability of power delivery was to site the new generation facilities in the part of New Jersey where the reliability issues were expected to occur. *Id.* There was no such evidence presented to the PUC in this case. See PUC Order (Ex. 4). Moreover, as noted above, there <u>are</u> other recognized ways that Rhode Island can satisfy the objectives of the LTC statute without violating

the Commerce Clause; it can provide tax incentives, it can ease environmental regulations, it can fast-track permits; it can also mandate the purchase of renewable energy from both in-state and out-of-state sources. Either way, the ruling of the District Court in *Hanna* offers no guidance on the Commerce Clause claim in this case.

**Conclusion**

For all the foregoing reasons, the plaintiffs respectfully request that the Court enter judgment, as a matter of law, striking down the PUC's Order of August 16, 2010, approving the PPA between National Grid and Deepwater Wind, under the FPA, PURPA, the Supremacy Clause of the Constitution, and the Dormant Commerce Clause.[9] Because declaratory relief will not affect state coffers, it is precisely the sort of relief the Court is empowered to enter here. *See Town of Barnstable v. O'Connor*, 768 F.3d 130 (1st Cir. 2015) (reversing dismissal of challenge to state regulators' action on Cape Wind).

Respectfully submitted,

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[9] Plaintiffs have not moved for summary judgment on their claim under 42 U.S.C. §1983, but rather will litigate it if the Court denies summary judgment on their other claims.