UNITED STATES DISTRICT COURT
DISTRICT OF RHODE ISLAND

BENJAMIN RIGGS, LAURENCE EHRHARDT, and RHODE ISLAND MANUFACTURERS ASSOCIATION, Plaintiffs	:	
v.	:	Civil 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	:	

PLAINTIFFS' POST-HEARING MEMORANDUM

The Plaintiffs submit this Post-Hearing Memorandum in order to address three questions raised by the Court during the hearing on March 29, 2016:

1. Was it necessary to exhaust administrative remedies at the Federal Energy Regulatory Commission ("FERC") before bringing suit in this Court (and therefore did Plaintiff Riggs' FERC complaint toll the accrual of the statute of limitations)?

2. Were Plaintiffs required to bring their current federal constitutional and statutory claims in the 2011 appeal that was taken to the Rhode Island Supreme Court challenging the 2010 Order of the Rhode Island Public Utilities Commission ("PUC")?

3. What actions did the Plaintiffs take, in addition to submitting administrative petitions to the FERC, in the period between the ruling of the Rhode Island Supreme Court in 2011 and the filing of this action in 2015 (i.e. did the Plaintiffs sit on their rights)?

These points will be addressed in turn.

I. It Was Necessary to Exhaust Administrative Remedies with FERC Before Bringing Suit Here

A. FERC's Authority to Hear Plaintiffs' Complaint

The Deepwater Wind ("Deepwater") project is subject to FERC authority because it involves the sale of wholesale electricity. FERC has *sole* jurisdiction over wholesale electricity transactions:

> [T]he FPA gives FERC jurisdiction over the "transmission of electric energy in interstate commerce and ... the sale of electric energy at wholesale in interstate commerce." 16 U.S.C. § 824(b). The references to "transmission" in commerce and "sale" at wholesale were made part of § 201 of the statute when it was enacted in 1935. Subsections (c) and (d) of § 201 explain, respectively, the meaning of the terms "transmission" and "sale of electric energy at wholesale." This statutory text thus unambiguously authorizes FERC to assert jurisdiction over two separate activities–transmitting and selling.

New York v. F.E.R.C., 535 U.S. 1, 18–20 (2002). The specific rate at which a wholesale energy supplier can sell its energy can only be set by the FERC; no state or federal court can act instead, nor can a state itself. *Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953, 963 (1986).

FERC has approved a market-based system for setting wholesale rates for sales of electricity generated in New England. *See New Eng. Power Generators Ass'n v. FERC*, 757 F.3d 283, 287 (D.C. Cir. 2014) (describing the negotiated auction system that generates the Forward Capacity Market for New England). However, under the PUC's Order in this case, Deepwater Wind will sell energy to National Grid, which will then resell it, thus making Deepwater a wholesale supplier of energy. 16 U.S.C. § 824(d) ("The term 'sale of electric energy at wholesale' when used in this subchapter, means a sale of electric energy to any person for resale."). Specifically, the PUC's Order provides that National Grid may immediately resell the energy purchased from Deepwater in ISO-

New England's Day Ahead or Real Time Energy Markets, and then pass through to ratepayers the difference between price paid to Deepwater and the price per kWh hour obtained in the ISO New England Market. Complaint, Exhibit 3 (PPA) § 4.2(a). This arrangement constitutes the setting of a rate for a wholesale energy producer (Deepwater) for transmission in interstate commerce that circumvents the market-based wholesale rate setting system established by the FERC. *See PPL EnergyPlus v. Solomon*, 766 F.3d 241, 250 (3rd Cir. 2014) ("*Solomon*") (FERC regulates aspects of interstate wholesale rates through a capacity auction overseen by an ISO and a state regulatory scheme that supplements the rate received by new generators "regulates the same field occupied by FERC."); *PPL EnergyPlus, LLC v. Nazarian*, 753 F.3d 467, 476 (4th Cir. 2014) ("*Nazarian"*) (same); *see also New Eng. Power Generators Ass'n v. FERC*, 757 F.3d 283 (describing the FERC approved capacity auction process overseen by ISO-New England). The PUC has no authority to set a wholesale rate recoverable by Deepwater. *See Nantahala Power & Light Co. v. Thornburg*, 476 U.S. at 963 (FERC has exclusive jurisdiction over setting wholesale rates). On this basis Plaintiff Riggs, who will be forced to pay the rate approved by the PUC, filed a complaint with the FERC asking it to exercise its jurisdiction over wholesale rate setting and interstate electricity transmission and relieve them from payment of the rates approved by the PUC for Deepwater.

B. Procedure for Filing a Formal Complaint with FERC.

"Any person may file a complaint seeking Commission action against any other person alleged to be in contravention or violation of any statute, rule, order, or other law administered by the Commission, or for any other alleged wrong over which the Commission may have jurisdiction." 18 C.F.R. § 385.206(a). A formal complaint to the

FERC is subject to a number of requirements including: identifying the alleged wrong and how it violates the law, explaining the complainant's interests in the action including a quantification of financial and non-financial impacts, identifying the relief requested, and providing relevant documentation. 18 C.F.R. § 385.206(b). The complainant must also identify whether other dispute resolution mechanisms were used (and if not why not) and make the complaint suitable for publication in the Federal Register. *Id.* The complaint must be served on interested parties by the complainant while the FERC gives public notice of the complaint and handles the procedural aspects of responses and hearings.

Plaintiff Benjamin Riggs filed a complaint with FERC on August 22, 2012 that met all of the criteria set out in 18 C.F.R. §385.206, including service of the complaint on the Defendants in this case. *See* Complaint, Ex. 1**. Rather that take this opportunity to ask FERC to weigh in on the constitutional and statutory issues raised by Riggs, the Defendants instead asked FERC to dismiss his complaint.** FERC did not dismiss his complaint. Instead, on October 18, 2012, FERC sent Mr. Riggs a Notice of Intent Not to Act on his complaint. The Notice informed Riggs that the FERC's decision not to bring an enforcement action "means that Mr. Riggs himself may bring an enforcement action against the Rhode Island Commission in the appropriate court." See Exhibit A hereto.

C. Administrative Exhaustion is Required under the FPA and PURPA.

It is firmly established that the FPA requires that administrative remedies be exhausted prior to bringing a suit regarding FERC regulated rates. *Miss. Power & Light Co. v. Miss.*, 487 U.S. 354, 375 (U.S. 1988) ("The reasonableness of rates and agreements regulated by FERC may not be collaterally attacked in state or federal courts.

The only appropriate forum for such a challenge is before the Commission or a court reviewing the Commission's order."); *see also Montana-Dakota Utils. Co. v. Northwestern Pub. Serv. Co.*, 341 U.S. 246, 250 (U.S. 1951) (failure to exhaust administrative remedies with the FERC regarding a rate dispute would result in dismissal). This exhaustion requirement has been extended to other areas governed by the FERC under the FPA such as whether a utility is in compliance with its hydropower license. *See Dilaura v. Power Auth. of NY*, 982 F.2d 73, 79 (2d Cir. 1992) (holding that the District Court lacked jurisdiction over the case because administrative review with the FERC was not exhausted). This same exhaustion requirement extends to questions of whether the FERC itself took an action that was proper under the FPA. *See Platte River Whooping Crane Critical Habitat Maint. Trust v. F.E.R.C.*, 876 F.2d 109, 112-13 (D.C. Cir. 1989) ("As we have repeatedly emphasized, the requirements imposed by the [FPA] are strict and go well beyond judicially-imposed standards requiring the exhaustion of administrative remedies prior to the exercise of federal court jurisdiction."). Once the FERC has decided not to act "its declination would clear the way for [a party] to bring its own enforcement action in district court." *Connecticut Valley Elec. Co. v. F.E.R.C.*, 208 F.3d 1037, 1043 (D.C. Cir. 2000).

This same requirement that administrative remedies be exhausted has also been extended to requests for enforcement under PURPA. *See Niagara Mohawk Power Corp. v. Fed. Energy Regulatory Comm'n*, 306 F.3d 1264, 1270 (2d Cir. 2002) ("We hold that the District Court correctly dismissed Niagara's PURPA claim as against the PSC and its commissioners for lack of subject matter jurisdiction because of Niagara's failure to exhaust its administrative remedy by petitioning FERC to bring an enforcement action

against the PSC in the first instance."); *Allco Fin. Ltd. v. Klee*, 805 F.3d 89, 96 (2d Cir. 2015) (extending this reasoning to another section of PURPA).

The Supreme Court has made clear that a cause of action does not begin to run until administrative remedies are exhausted:

> We have repeatedly recognized that Congress legislates against the "standard rule that the limitations period commences when the plaintiff has a complete and present cause of action." *Bay Area Laundry and Dry Cleaning Pension Trust Fund v. Ferbar Corp. of Cal.*, 522 U.S. 192, 201, 139 L. Ed. 2d 553, 118 S. Ct. 542 (1997) (internal quotation marks omitted); *see also Johnson v. United States*, 544 U.S. 295, 305, 161 L. Ed. 2d 542, 125 S. Ct. 1571 (2005) (calling it "highly doubtful" that Congress intended a time limit on pursuing a claim to expire before the claim arose); *Reiter v. Cooper*, 507 U.S. 258, 267, 122 L. Ed. 2d 604, 113 S. Ct. 1213 (1993) (declining to countenance the "odd result" that a federal cause of action and statute of limitations arise at different times "absen[t] . . . any such indication in the statute"); *TRW Inc. v. Andrews*, 534 U.S. 19, 37, 151 L. Ed. 2d 339, 122 S. Ct. 441 (2001) (Scalia, J., concurring in judgment) ("Absent other indication, a statute of limitations begins to run at the time the plaintiff has the right to apply to the court for relief" (internal quotation marks omitted)). Therefore, where, as the case is here, there are two plausible constructions of a statute of limitations, we should adopt the construction that starts the time limit running when the cause of action (here retaliation) accrues.

Graham County Soil & Water Conservation Dist. v. United States ex rel. Wilson, 545 U.S. 409, 418–19 (2005).

The First Circuit has also ruled that the statute of limitations does not begin to run until administrative remedies are exhausted, stating: "'[i]f disputes are subject to mandatory administrative proceedings, then the claim does not accrue until their conclusion.'" *United States v. Meyer*, 808 F.2d 912, 916 (1st Cir. 1987) (quoting *Lins v. United States*, 688 F.2d 784, 786 (Ct.Cl.1982)). In *Meyer,* the court reviewed when the statute of limitations began to run for an enforcement action under 28 U.S.C. § 2462 and held that it would begin to run when the administrative process was complete.

So also in this case. Here, the statute of limitations began to run, at the earliest, when FERC first gave notice, on October 18, 2012, that it did not intend to take action administratively. The complaint in this Court was filed less than three years later.

II. Plaintiffs Were Not Required to Raise Federal Constitutional and Statutory Issues Before the Rhode Island Supreme Court.

A. Plaintiffs were Not Parties to the Rhode Island Supreme Court Appeal.

As is plain from the face of the Rhode Island Supreme Court's decision in *In re Proposed Town of New Shoreham Project*, 25 A.3d 482 (R.I. 2011) ("*New Shoreham*"), none of the Plaintiffs in this action – Riggs, Ehrhardt, or RIMA -- was a party to that case. Plaintiff RIMA, a trade association of manufacturing companies, did submit an *amicus* brief in *New Shoreham*, but an amicus is not a party to a case. *See Int'l Union, United Auto., Aerospace & Agr. Implement Workers of Am. AFL-CIO, Local 283 v. Scofield*, 382 U.S. 205, 209 (1965) ("an amicus is not a 'party' to the case").

Plaintiff Ehrhardt, along with a number of other citizens, was a party in the underlying PUC proceedings that gave rise to the appeal in *New Shoreham*. Complaint Exhibit 4 (PUC Decision) at 9 (allowing Motion of Thomas Doyle, et al. to intervene). Notably, Plaintiff Ehrhardt's inclusion as a party before the PUC was objected to by Defendants Deepwater and National Grid, who contended that Plaintiffs' interests would be adequately represented by the Rhode Island Attorney General ("Attorney General") and the PUC itself. *Id*. However, when it came to the appeal before the Rhode Island Supreme Court, only the Attorney General was a party. The citizens expected their interests would be represented by the Attorney General, until a new Attorney General

was elected who sought leave, and was granted leave, to withdraw from the case. *New Shoreham*, 25 A.3d at 503.

The parties to this action were not "necessary" parties to the *New Shoreham* action because their interests were distinct and severable, and the court could render justice for the parties then at bar. *See Anderson v. Anderson*, 283 A.2d 265, 269 (R.I. 1971) (adopting a four part test for necessary parties). If the citizens who intervened at the PUC hearing were necessary parties, then the Rhode Island Supreme Court should have joined them to the *New Shoreham* action. *See id.* at 267 (construing Super. R. Civ. P. 19 to require joinder of necessary parties). The fact that Plaintiffs were not joined left their "rights or liabilities" in tact. *Id.*

Moreover, it is completely clear that the Rhode Island Supreme Court did *not* rule in *New Shoreham* on the federal constitutional and statutory issues raised in this case. To the contrary, the Court stated: "the constitutional issues raised . . . were clearly not cognizable by the PUC . . . we leave for another day the question of whether constitutional issues may be raised by a party with standing in the context of a PUC appeal, or whether such issues must first be raised in an action for declaratory judgment." *New Shoreham*, 19 A.3d 1226, 1229 (Memorandum Order of April 21, 2011).

B. Plaintiffs Were Not Represented in the *New Shoreham* Case.

In *Taylor v. Sturgell*, 553 U.S. 880, 128 S.Ct. 2161(2008), the Supreme Court described at length the circumstances in which a person not a party to litigation can be "bound by a judgment *in personam*." The Court rejected the concept of "virtual representation" of parties. *Id.* at 885. The Court found six exceptions to the rule that neither claim preclusion nor issue preclusion will apply to a person who was not a party

to a prior action because that party has not had their day in court. *Id.* at 892–93. These six exceptions are: 1) agreement to be bound by a decision, 2) a substantive legal relationship such as successive ownership, 3) class action, 4) control over the original litigation by a subsequent party, 5) litigation by personal representative, and 6) litigation under a "special statutory scheme if the scheme is otherwise consistent with due process." *See Taylor v. Sturgell*, 553 U.S. at 893–95.

None of the six exceptions to the rule allowing a nonparty plaintiff to be bound by a prior decision is found here. Plaintiffs did not agree to be bound by the *New Shoreham* case, they did not have one of the enumerated "substantive legal relationships" such as succeeding real property ownership, and the case was not a class action. *Id.* at 893–94. Plaintiffs did not have control over the *New Shoreham* litigation and the case did not involve a "special statutory scheme" with express language terminating preexisting rights and foreclosing successive litigation. *Id.* at 894–95.

The one category that could conceivably be the source of an attempt to shoehorn these Plaintiffs into an exception is the fifth exception —litigation by a representative or agent. Although RIMA itself was not a party to the *New* Shoreham appeal, two of its members, Toray Plastics and Polytop Corporation, were the plaintiffs in the appeal. However, the cases relied upon for this fifth exception make clear that the exception is for formal, legal representatives, such as a trustee or administratrix. *See Chicago, R. I. & P. Ry. Co. v. Schendel*, 270 U.S. 611 (1926) (case brought by trustee on behalf of beneficiary precluded due to prior case by beneficiary; case brought by administratrix on behalf of estate of prior plaintiff precluded). Here, it cannot be claimed that RIMA is the fiduciary of each of its member organizations; instead both RIMA and its members have

individual interests that can be asserted in court. See *Massachusetts Delivery Ass'n v. Coakley*, 671 F.3d 33, 44–45 (1st Cir. 2012) ("[M]embers have an interest in determining the constitutionality of the state law. The [organization] itself has a distinct interest in challenging the Ordinance. As a result, the [organization]'s basis for bringing suit is not entirely derived from those of its members who are state-court defendants."). The First Circuit also deemed applying *res judicata* to "distinct parties" such as these based on virtual representation improper. *See id.* at 46 n.10. Plaintiffs were neither necessary parties nor represented by the parties in the *New Shoreham* appeal. For these reasons, Plaintiffs were not required to bring their federal constitutional and statutory claims in the *New Shoreham* case, and have a right to bring them before this Court.

III. The Plaintiffs Took Numerous Actions Between the *New Shoreham* Decision and the Filing of this Case in 2015

As set out above, after the issuance of the *New Shoreham* decision, Riggs' filed a formal complaint with the FERC on August 11, 2012, which raised both statutory issues under the Federal Power Act and PURPA and claims under the Commerce Clause of the Constitution. Complaint, Ex. 1. Riggs turned to FERC as the regulatory body with primary jurisdiction over these issues. As noted above, FERC declined to act on Riggs' complaint in October 2012, and granted him leave to pursue an enforcement action in Court. *See* Exhibit A hereto.

Believing that their claims were not yet ripe for litigation – and also hoping to avoid litigation in court altogether – the Plaintiffs then proceeded to involve themselves in the permitting process for the Deepwater project. Under the terms of the PPA approved by the PUC, Deepwater could not proceed without a number of necessary

permits. Complaint, Ex. 3 (PPA) at 12. The PUC hearing also included testimony that Deepwater likely could not get financing until all of the permits were obtained. Complaint, Ex. 4 (PUC Decision) at 98. Plaintiffs therefore submitted letters opposing the permits, raising, among other things, that the PUC order violated federal law and the Constitution.

Specifically, in December of 2013, Riggs wrote to the Rhode Island Coastal Resources Management Council ("CRMC"), objecting to its issuance of a permit for Deepwater, again citing federal constitutional and statutory violations. *See* Riggs Letter to CRMC (Dec. 19, 2013), attached hereto as Exhibit B.[1] Riggs also wrote to the U.S. Army Corps of Engineers ("Army Corps") objecting to its issuance of a permit to Deepwater and again asserted that the project violated federal law and the U.S. Constitution. *See* Riggs Letter to Army Corps (Dec. 18, 2013), attached as Exhibit C. In furtherance of his objection, Riggs also communicated with the Army Corps about the approvals needed from the United States Coast Guard and the Federal Aviation Administration. *See* Riggs Email to Army Corps and Response of Michael Elliott (Feb. 25-26, 2014), attached as Exhibit D. Plaintiffs Riggs, Ehrhardt, and RIMA also brought their Constitutional and federal law concerns to several permitting authorities in person. Plaintiffs spoke before the CRMC, the Rhode Island Department of Environmental Management, the Rhode Island State Properties Committee, and the United States Bureau

[1] Plaintiffs are mindful that, on a motion to dismiss, the Court is generally limited to a review of the Complaint and its attachments, and matters that are part of the public record. They are, however, providing this background information and exhibits in response to the questions raised by the Court at the hearing on March 29.

of Land Management. As the prior experience of Cape Wind demonstrated, these approvals were far from certain.[2]

As another example, the PPA required as a condition of the Deepwater project that all approvals be obtained for the transmission cable transmitting power from the wind farm onshore. Complaint, Ex. 2 (PPA), at 10. After several hearings of the Narragansett Town Council at which Riggs and others opposed the proposed landing site for the transmission cable at Narragansett Beach, the Narragansett Town Council voted unanimously to deny permission. *See* Exhibit E. The project moved forward months later after the only other viable landing site (on state property) was approved, and then only after additional permissions could be obtained from the State Properties Committee. *See* Exhibit F.

In 2014, a change in law occurred when the *Nazarian* and *Solomon* cases were decided by the Third and Fourth Circuit Courts of Appeals. *See PPL EnergyPlus v. Solomon*, 766 F.3d 241, 250 (3rd Cir. 2014); *PPL EnergyPlus, LLC v. Nazarian*, 753 F.3d 467, 476 (4th Cir. 2014). These cases provided new support for Plaintiffs' contention that the action of the PUC contravened federal law and the Constitution, in particular the FPA and the Supremacy Clause. Plaintiff Riggs raised this constitutional development with FERC in a letter dated July 30, 2014, noting that it was still premature for him to file an action in court. *See* Exhibit G. He then brought it to the attention of the

[2] Not only did the financing of Cape Wind collapse, but the Federal Aviation Administration's approval of the project was reversed for failing to properly evaluate the effect on navigation, and the authorization for its transmission cable by the state's energy facilities siting board expired. *See Town of Barnstable v. O'Connor,* 786 F.3d 130, 141-42 (1st Cir. 2015); *Town of Barnstable v. Federal Aviation Administration,* 659 F.3d 28, 34-35 (D.C. Cir. 2011); *Petition of Cape Wind Associates, LLP,* Recommended Decision, Energy Facilities Siting Board Docket No. 02-2C (March 29, 2016), http://www.mass.gov/eea/docs/dpu/siting/3-29-16-cape-wind-td-final.pdf.

PUC in January 2015, and asked *it* to take action. Riggs Letter to PUC (January 13, 2015), attached as Exhibit H.

Getting no action, Riggs filed another formal complaint with the FERC on April 21, 2015. In this complaint, Riggs identified the FPA and Supremacy Clause claims relied on in *Nazarian* and *Solomon* as additional bases for invalidating the action of the PUC. Complaint, Ex. 2. **Again, the Defendants did not ask FERC to resolve the constitutional and statutory issues raised by Riggs, but tried to get FERC to dismiss his complaint.** The FERC again declined to take action, and again instructed that "Mr. Riggs himself may bring an enforcement action against the Rhode Island Commission in the appropriate court." Complaint, ¶3. Plaintiffs then filed their complaint in this Court.

Plaintiffs would have preferred that a public body from Rhode Island or the federal government address the federal law and Constitutional questions that are raised here. As set forth above, Plaintiffs repeatedly urged numerous public bodies, including FERC, to undertake just such a course of action, which arguably would have been more administratively efficient. However, finding no other body willing to answer these concerns, Plaintiffs have brought them to this Court in a timely manner, when they are barely ripe for adjudication. See e.g. *Paul v. City of Woonsocket*, 745 A.2d 169, 172 (R.I. 2000) (injury occurred only upon payment of unconstitutional assessment); *Blum v. Holder*, 744 F.3d 790, 796 (1st Cir.), *cert. denied*, 135 S. Ct. 477, 190 L. Ed. 2d 358 (2014)("'threatened injury must be certainly impending to constitute injury in fact,' . . . '[a]llegations of possible future injury' are not sufficient.'") (citing cases); *Meyer v. City of Newport*, 844 A.2d 148, 151 (R.I. 2004) ("Injury in fact may be characterized as an

invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical.") (citing cases).

Conclusion

1. The Federal Power Act and PURPA both require a party to exhaust administrative remedies before proceeding to court, and therefore the statute of limitations on Riggs' claims did not begin to run until he had exhausted those remedies at FERC.

2. Riggs and the other Plaintiffs were not parties to the *New Shoreham* appeal, and were not required to litigate their federal statutory and constitutional claims in that case; indeed, the Rhode Island Supreme Court expressly declined to adjudicate such claims.

3. The Plaintiffs did not sit on their hands after the Rhode Island Supreme Court ruled. They opposed Deepwater's applications for permits and approvals from the CRMC, the Army Corps, and numerous other agencies; and they twice sought relief from FERC. The Plaintiffs did not have standing under federal law to assert imminent, concrete, and particularized personal damages until numerous permitting requirements had been met, financing was obtained, and it was imminent that the Deepwater project would proceed.

Respectfully submitted,

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Certificate of Service

I hereby certify that on this 12th day of April, 2016 I served the foregoing Post-Hearing Memorandum on all counsel of record using the Court's electronic docketing system.

*/s/ Andrew Rainer*_____