UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

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

RHODE ISLAND PUBLIC UTILITIES COMMISSIONERS CURRAN, ROBERTI AND DESIMONE'S REPLY MEMORANDUM IN SUPPORT OF THEIR MOTION TO DISMISS

Defendant Public Utilities Commissioners Margaret Curran, Paul Roberti and Herbert DeSimone, Jr., in their official capacities as members of the Rhode Island Public Utilities Commission (hereinafter "Commissioners"), hereby reply to Plaintiffs' Memorandum in Opposition to Commissioners' Motion to Dismiss. Plaintiffs' reasons for their opposition to Commissioners' Motion to Dismiss are without any fact specific analysis as to whether immunity or Burford abstention is applicable in the case at bar, and therefore, should be rejected. First, Plaintiffs contend that the defense of judicial immunity is not available to the Commissioners since the lawsuit has been filed against the Commissioners in their official capacity rather than personal capacity. Doc. 23: Plaintiffs' Mem. at 1. Secondly, although

Plaintiffs concede that their claims will require the Court to delve into the meaning of R.I. Gen. Laws § 39-26.1-7 and Order No. 20095 (the "Order"), see id. at 9, they simply opine this is "the sort of claim this Court should adjudicate." Id. As will be seen, Plaintiffs' conclusions are without legal or factual merit.

I. ARGUMENT

A. THE COMPLAINT IS BARRED BY THE APPLICABLE STATUTE OF LIMITATIONS AND STANDING.

For the reasons identified in Deepwater's memorandum and reply memorandum of law, the Commissioners maintain that the Complaint is barred by the applicable statute of limitations and that Plaintiffs are without standing to bring the Complaint. Plaintiffs filed their Complaint in an untimely manner and are asserting rights no different from any other Rhode Island ratepayer. Doc. 1: Complaint ¶ 2. The Commissioners join with the standing and statute of limitations arguments raised by Deepwater in their memorandum and reply memorandum.

B. 42 U.S.C. SECTION 1983 PERMITS A JUDICIAL DEFENDANT TO RAISE IMMUNITY FROM SUIT IN ACTIONS SEEKING PROSPECTIVE EQUITABLE RELIEF.

Plaintiffs contend that 42 U.S.C. Section 1983 does not permit a defendant sued in his official capacity from successfully raising the defense of quasi-judicial immunity because the Commissioners are not "judicial officers." Doc. 23: Plaintiffs' Mem. at 4. In Brown v. Rhode Island, 511 Fed. App'x 4, *6 (1st Cir. 2013) (unreported), however, the First Circuit Court of Appeals recognized that a request for an injunction would probably be barred by the Federal Courts Improvement Act (FCIA)[1], Pub. L. No. 104-317, 110 Stat 3847, § 309(c) which in 1996

[1] Plaintiffs erroneously cite to the "Prisoner Litigation Reform Act." See Doc. 23: Plaintiffs' Mem. at 6, n. 4.

amended Section 1983 to restrict injunctive relief against "judicial officers." The First Circuit Court Appeals observed:

> Most courts to have addressed the issue have concluded that the FCIA applies to quasi-judicial official officers like parole board members, *see Roth v. King*, 449 F.3d 1272, 1287 (D.C. Cir 2006); *Montero v. Travis*, 171 F.3d 757, 761 (2d Cir. 1999), although the vote has not been unanimous, s*ee Simmons v. Fabian*, 743 N.W.2d (Minn. Ct. App. 200).

Id. Under Brown, if the Commissioners act in a judicial or quasi-judicial manner then they fall within the definition of "judicial officer" contained in Section 1983. Id. See also Howard v. Food Lion, Inc., 232 F. Supp.2d 585, 595 (M.D.N.C. 2002). From the face of the Order, the Commissioners clearly acted in a judicial or quasi-judicial capacity when they heard and took evidence and issued the Order.

Under Federal and Rhode Island law, a quasi-judicial tribunal acts in an adjudicatory capacity when it decides a "contested case." Rhode Island Medical Soc. v. Pfeiffer, 1986 WL 714225 (Super. Ct. 1986); R.I. Gen. Laws Section 42-35-1 (the term "contested case" means "a proceeding, including but not limited to ratemaking, price fixing, and licensing, in which the legal rights, duties, or privileges of a specific party are required to be determined by an agency after an opportunity for hearing"). See also K. Davis, Administrative Law (1972) § 5.01 (an "adjudication operates concretely upon individuals in their individual capacity"). Agency process that can be characterized in this manner is considered adjudication, and the tribunal's or officer's decision-making, quasi-judicial. International Tel. and Tel. Corp. v. Local 134 International Brotherhood of Electrical Workers, AFL-CIO, 419 U.S. 428, 443 (1975); 5 U.S.C. Section 551 (defining "adjudication" as "agency process for the formulation of an order").

Docket No. 4185 was conducted as a "contested case." It involved the "legal rights" and "privileges" of a "specific party," Deepwater—the rights and privileges Deepwater had

negotiated with National Grid and consummated by the PPA—to be determined by an "agency" (the Commissioners) after an opportunity for hearing. The "proceeding"—Docket No. 4185—was virtually identical to a court proceeding. The Commissioners published formal Notice, considered interventions, heard and adjudicated motions to dismiss, and permitted parties to engage in discovery. Doc. 1-4: Report and Order, 8-37. Pre-filed testimony and various Advisory Opinions were filed. Doc. 1-4: Report and Order, 39-59, 75-78. The Commissioners then conducted hearings, formally taking evidence and rebuttal testimony. Doc. 1-4: Report and Order at 78, 94. Cross-examination was permitted. Doc. 1-4: Report and Order at 94. After this extensive administrative process transpired, the Commissioners adjudicated the rights of the parties, making findings of fact and determinations of law that found their final formulation in the Order. Doc. 1-4: Report and Order at 129. Review is available from the Order in the Rhode Island Supreme Court pursuant to R.I. Gen. Laws § 39-5-1. Agency process that can be characterized in this manner is considered an adjudication, and the Commissioners' decision-making, quasi-judicial. International Tel. and Tel. Corp, 419 U.S. at 443; Pfeiffer, 1986 WL at 714225. Plaintiffs' contention that Docket No. 4185 was "legislative" and not "quasi-judicial" is simply not borne out by the facts or law.

Lastly, relying on Kentucky v. Graham, 473 U.S. 159 (1985), Plaintiffs contend that the defense of immunity is unavailable to a defendant who is sued in his official capacity in a 42 U.S.C. Section 1983 action seeking prospective equitable relief. There are several flaws in this last contention. First, Graham is wholly inapplicable to the case at bar. In that case, the United States Supreme Court ruled it was inappropriate to award attorneys' fees under 42 U.S.C. Section 1988 to a prevailing party against a governmental entity in a personal capacity action. Id. at 169. Graham preceded the 1996 Amendments to 42 U.S.C. Section 1983 and did not

involve consideration of the plain and unambiguous language of those Amendments barring actions for equitable relief against judicial and quasi-judicial officers. As amended, 42 U.S.C. Section 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. Section 1983 (emphasis added). The emphasized language plainly imposes a bar against a claim for equitable relief against judicial and quasi-judicial officers acting in their official capacity such as the Commissioners in the case at bar. Brown , 511 Fed. App'x. at *6.

Graham and the case law that Plaintiffs cite on Page 4 of their memorandum involve the defense of common law immunity raised in the context of *"damage actions* against public officials." They do not involve 42 U.S.C. Section 1983's statutory bar and do not involve actions seeking prospective injunctive and/or declaratory relief.[2] Turner v. Houma Mun. Fire and Police Civil Service Bd., 229 F.3d 478 (5th Cir. 2000), for example, involves an *action for damages* against board members in their individual and official capacities for a denial of due process and equal protection rights committed in the course of adjudicative proceedings disciplining plaintiffs. Id. at 481. The Court upheld the district court's granting summary

[2] With the exception of Van Horn v. Oelschlager, 502 F.3d 775 (8th Cir. 2007), the other cases cited by Plaintiffs on Page 4 of their memorandum are similarly inapplicable as they appear to involve claims for damages rather than claims for equitable relief under Section 1983. Van Horn does involve a claim for declaratory and injunctive relief; however, in holding that immunity was not available to the defendants, the Eighth Circuit Court of Appeals did not discuss the 1996 Amendments which overrule Pulliam and permit the defense of immunity in equitable Section 1983 actions. Van Horn is of little precedential value.

judgment in the personal capacity action and the denial of summary judgment in the official capacity action. Relying on Graham, the Court observed that a plaintiff seeking to *recover damages* on a judgment in an official-capacity suit is really seeking to recover damages from the government itself not the individual actor. Id. at 485.

Unlike Graham and its progeny, the case at bar involves a 42 U.S.C. Section 1983 action seeking prospective injunctive relief and declaratory relief, not damages and involves 42 U.S.C. Section 1983 immunity, not common law immunity. When prospective equitable relief is sought for conduct committed or to be committed as a Commissioner, the distinction present in damage actions between the governmental entity and a Commissioner's official capacity does not exist. Equitable relief is sought against each Commissioner acting as a Commissioner. Thus, in Pulliam v Allen, 466 U.S. 522 (1984), the United States Supreme Court observed that in Section 1983 actions "judicial immunity is not a bar to prospective injunctive relief *against a judicial officer acting in her judicial capacity."* Id. at 541-42. As discussed above, Congress overruled Pulliam in 1996, restoring by statute the common law rule ("immunity from suit") to actions seeking equitable relief in Section 1983 actions. Guerin v. Higgins, 8 Fed. App'x 31 (2nd Cir. 2001) (unreported).

Plaintiffs' only rejoinder is that the Commissioners rely on two "unreported appellate decisions from other circuits," Plaintiffs' Mem. at 6, that explicitly hold Section 1983 allows a party to raise immunity from suit as a complete bar to both *injunctive* and *declaratory* relief, without providing a single citation of their own for the contrary position. Since Congress amended 42 U.S.C. Section 1983 in 1996, the overwhelming weight of federal authority recognizes that prospective equitable injunctive relief, such as Plaintiffs seek here against the Commissioners, is not available in 42 U.S.C. Section 1983 actions when opposed with an

immunity defense. E.g., Bolin v. Story, 225 F.3d 1234, 1242 (11th Cir. 2000); Kampfer v. Scullin, 989 F. Supp. 194, 201 (N.D.N.Y. 1997). Plaintiffs' contention that the Commissioners only rely on two "unreported appellate decisions" is simply incorrect.

What remains of Plaintiffs' opposition to the Commissioners' motion is their contention that the 1996 Amendments do not preclude a claim for declaratory relief under 28 U.S.C. Section 2201. This assertion is also erroneous. As Plaintiffs concede, the Second Circuit Court of Appeals rejected a plaintiff's assertion that a defendant could not raise immunity to defeat a claim for declaratory relief under Section 1983 holding:

> 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.

Guerin, 8 Fed. App'x at 31. (emphasis added).

The spirit of the Legislative history to the 1996 Amendments bears out the Second Circuit Court of Appeals' holding in Guerin interpreting the meaning of the Amendments:

> In *Pulliam*, the Supreme Court broke with 400 years of common-law tradition and weakened judicial immunity protections . . . Section 311 restores the full scope of judicial immunity lost in *Pulliam* and will go far in eliminating frivolous and harassing lawsuits which threaten the independence and objective decision-making essential to judicial process.

S. Rep. 104-366, S. Rep. No. 366, 104th Cong., 2nd Sess. 1996, 1996 WL 520492 (1996).

Other courts recognize that the Congressional intent behind the amendments is to overrule Pulliam and restore a defendant's right to raise judicial immunity in 42 U.S.C. Section 1983 actions seeking all equitable relief, including declaratory relief. Haas, 109 Fed App'x at 114. Thus, courts have restricted a plaintiff's right to seek declaratory relief under Section 1983 against a judicial or quasi-judicial official raising immunity, holding a declaratory judgment: (i)

is meant to define the legal rights and obligations of the parties in anticipation of some future conduct, not simply to proclaim liability for a past act," Brown, 511 Fed. App'x at *6, and (ii) may only be brought upon a showing that the plaintiff does not have an adequate remedy of law. Bolin, 225 F.3d at 1243; Yellen v. Hara, 2015 WL 4877805, *6 (D. Haw. 2015); Cromer v. Braman, 2008 WL 907468, *4 (W.D. Mich. 2008). Plaintiffs cannot satisfy either criterion.

No debate exists that the Commission issued the Order on August 16, 2010, effective August 10, 2010 and provided simply, "[t]he Purchase Power Agreement between The Narragansett Electric Company d/b/a National Grid and Deepwater Wind Block Island LLC on June 30, 2010 is hereby approved." In their complaint, the Plaintiffs repeatedly allege it is the Order which is the basis for their request for declaratory relief. See e.g., Doc. 1: Complaint, ¶¶ 44, 45, 46, 47, 54, 55, 56, 61, 62, 63, 68, 75. The Order represents the culmination of Commission decision-making regarding the New Shoreham project. After the Order was issued, the Record and proceedings in Docket No. 4185 are deemed closed. Commission Rule or Practice and Procedure 1.27(b).

By challenging the Order's validity on August 14, 2015, nearly five years after the Order's issuance (August 16, 2010), Plaintiffs seek a declaration of "liability for a past act" not to "define the legal rights and obligations of the parties in anticipation of some future conduct." Brown, 511 Fed. App'x at *6. See also Wilborn v. Wall, 2015 WL 5662717, *6 (D. Mass. 2015) (declaratory relief is not available when "the hearing and all that led up to it are in the past"). Declaratory relief under 28 U.S.C. Section 2201 does not exist in such circumstances. Id.

Plaintiffs also possessed adequate remedies at law. Plaintiffs could have intervened to challenge R.I. Gen. Laws § 39-26.1-1 *et seq.* in Docket No. 4185, see Penn-Central and N & W Inclusion Cases, 389 U.S. 486, 505-06 (1968) (non-party who had notice but did not intervene

may be bound by results of prior litigation), and were virtually represented by the Division of Public Utilities and Carriers, Rhode Island's ratepayer advocate in that docket. See Aerojet General Corp v. Askew, 511 F.2d 710,719 (5th Cir. 1975) (non-party virtually represented prohibited from subsequent collateral attack).

Plaintiffs also possessed the right to challenge the statute and Order in the Rhode Island Supreme Court. Pursuant to R.I. Gen. Laws § 39-5-1 ratepayers and parties in Docket No. 4185, Toray Plastics, Inc. and Polytop Corporation, sought review of the Order in the Rhode Island Supreme Court. In Re: Review of Proposed Town of New Shoreham Project, 25 A.3d 482 (R.I. 2011) (No. 2010-273-M.P.) Challenges to Commission decision-making, however, are not necessarily restricted to parties to Commission proceedings. R.I. Gen. Laws § 39-5-1 (where any "person," as opposed to any "party," may appeal a Commission Order). See e.g., Gardiner v. Kennelly, 89 A.2d 184, 185 (R.I. 1952) (telephone subscriber who sustained certain rate increases as a result of a Commission Order could prosecute appeal to the Supreme Court under R.I. Gen. Laws § 39-5-1). Plaintiffs could have sought review of the Order in In Re: Review of Proposed Town of New Shoreham Project, 25 A.3d 482 (R.I. 2011) as well.

Instead of exercising these adequate remedies at law, Plaintiffs chose to sit back and avoid participating in the State administrative and judicial processes for review and approval of the purchase power agreement between National Grid and Deepwater. Dismissal of Plaintiffs' claims for declaratory relief is proper under such circumstances as well. Yellen 2015 WL 4877805, at *6; Cromer, 2008 WL 907468, at *4.

C . THE COURT SHOULD ABSTAIN AND DISMISS THE COMPLAINT UNDER *BURFORD V. SUN OIL CO.*

This case presents the unique and limited circumstance where Burford abstention is appropriate. Plaintiffs fail to recognize that that the case at bar is distinguishable from Public Serv. Co. v. Patch, 167 F.3d 15 (1st Cir. 1998) in that the cited First Circuit cases, neither involve an untimely collateral attack on a State agency Order nor a mandatory right of State Court adjudication and review pursuant to a single, unified state administrative and appellate process.

Relying principally on Patch, 167 F.3d 15, Plaintiffs contend that the Court should not abstain from addressing the Complaint under the doctrine Burford v. Sun Oil Co. Patch, however, is distinguishable from the case at bar in two material respects. First, Patch concerned a plaintiff-utility that sought to enjoin a State utility restructuring plan in federal court contending that the plan would result an immediate $400 million write-off in investment and default on loans and credit agreements. The litigation shifted from the State PUC to the federal court. No further proceedings regarding the Plan transpired in the State courts. The only issue was whether the Plan engendered write-off conflicted with FERC authority allowing recovery of the write-off. Id. at 24. See also New Orleans Public Service, Inc. v. Council of City of New Orleans, 491 U.S. 350 (1989) (where the "primary claim" was whether without a State court process in place for reviewing the City Council's decision, the City Council was barred from allowing reimbursement of FERC allocated wholesale costs to the utility).

By contrast, in the case a bar, certain parties in Docket No. 4185 exercised their mandatory right of State Court review pursuant to R.I. Gen. Laws § 39-5-1 and sought review of the Order in the Rhode Island Supreme Court. Unlike in Patch, Plaintiffs here could have intervened and pursued their grievances before the Commission or the Rhode Island Supreme

Court. An absolute right of appeal by any person was concentrated in one court which exercised sole and exclusive supervisory powers over Commission decisions. Alabama Pub. Serv. Comm'n v. Southern R. Co., 341 U.S. 341, 348 (1951). The First Circuit Court of Appeals weighs this criterion heavily in its analysis of whether Burford abstention is applicable:

> …rather than focusing on either party's characterization of the case a federal judge must perform an independent evaluation and "assess the essential nature of the litigation to see whether its proper objections could be obtained without the intrusion into internal operations of the state judiciary."

Vaqueria Tres Monjitas, Inc. v. Irizarry, 587 F.3d 464, 476 (1st Cir 2009). See also Chico Service Station, Inc. v. Sol Puerto Rico Limited, 633 F.3d 20, 34 (1st Cir. 2011) (recognizing that Burford abstention is appropriate where the citizen suit is in reality a collateral attack on a State decision). Rather than a simple complaint involving a "within the four corners" assessment about the whether a particular expense was properly denied, Plaintiffs' complaint in reality represents a collateral attack on the Order. "This is . . . [ ] a case where review is, in effect sought for a final state administrative decision in federal rather than state court, 'effectively creat[ing] a dual review structure for adjudicating a state's specific regulatory actions.'" Id.

Secondly, the case at bar markedly differs from Patch and more closely resembles Burford in another way. The case at bar involves consideration of a complex regulatory scheme that in turn required consideration of paramount local concerns of promoting emerging off shore wind and the development of renewables, reducing environmental and health impacts from traditional fossil fuels, stimulating economic development and facilitating Block Island interconnection to the mainland. R.I. Gen. Laws § 39-26.1-7(c)(iv). Here, this Court will be required to assess how the factual and policy conclusions set forth in advisory opinions of the Rhode Island Department of Environmental Management and Rhode Island Economic

Development Corporation factored into the outcome of the Order. R.I. Gen. Laws § 39-26.1-7(iii) & (iv). The environmental impact of the project as well as the economic benefits to the people of the State of Rhode Island are "predominantly" local factors, not unlike the local need for transportation services, Alabama, 341 U.S. at 353 or conservation of oil and gas fields in Burford. Burford, 319 U.S. at 315. Consideration of predominantly local factors simply did not factor into the deregulation plan that was at issue in Patch. The Court should exercise its discretion and dismiss the Complaint under Burford.

II. CONCLUSION

For the foregoing reasons, as well as those that may be set forth at oral argument, the instant Complaint should be dismissed against Public Utilities Commissioners Margaret Curran, Paul Roberti and Herbert DeSimone, Jr.

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

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CERTIFICATE OF SERVICE

I certify that I filed this motion through the ECF filing system and that a copy is available for viewing and downloading. I have also caused a copy to be sent via the ECF system to the following attorneys of record on the 21th day of January, 2016.

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