UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF VERMONT

| | | |
|---|---|---|
| ALLCO RENEWABLE ENERGY LIMITED, OTTER CREEK SOLAR LLC, CHELSEA SOLAR LLC, APPLE HILL SOLAR LLC and PLH LLC,<br><br>Plaintiffs,<br><br>v.<br><br>JAMES VOLZ, VEPP INC., ANTHONY ROISMAN, SARAH HOFMANN, MARGARET CHENEY, VERMONT PUBLIC UTILITY COMMISSION, PHIL SCOTT, in his official capacity of governor of the State of Vermont, and the STATE OF VERMONT,<br><br>Defendants. | ) | Case No. 5:20-cv-34 |

**ORDER ON DEFENDANTS' MOTIONS TO DISMISS**
**(Docs. 27, 29)**

This case arises from Plaintiffs' attempts to develop five solar energy facilities in the State of Vermont. (*See* Doc. 1.) According to Plaintiffs, each of the five facilities qualifies as a "small power production facility", or "QF," within the meaning of Section 210 of the Public Utility Regulatory Policies Act ("PURPA"). (*Id.* ¶ 85.) Plaintiff Allco Renewable Energy Limited is a developer, owner, and operator of the solar facilities. (Doc. 1 ¶ 85.) Plaintiffs Otter Creek Solar LLC, Chelsea Solar LLC, and Apple Hill Solar LLC are owners and developers of the five facilities. (*Id.* ¶¶ 86–88.) Plaintiff PLH LLC owns the land on which the other Plaintiffs seek to develop the facilities. (*Id.* ¶ 89.)

Plaintiffs have sued four former or current commissioners of the Vermont Public Utility Commission ("VPUC"), the VPUC, Governor Phil Scott in his official capacity, and the State of Vermont (collectively, "State Defendants") alleging violations of the federal and state

constitutions, the Federal Power Act, and the Vermont Tort Claims Act related to Plaintiffs' attempts to secure Certificates of Public Good ("CPGs") and standard-offer contracts for the five projects. (*See generally* Doc. 1.) Plaintiffs have also sued VEPP Inc., the Vermont nonprofit corporation that administers the State's standard offer program, alleging several state-law contract claims and § 1983 conspiracy claims. (*See id.* ¶¶ 271–301; Doc. 35 at 2.) State Defendants (Doc. 27) and VEPP (Doc. 29) have filed motions to dismiss. The court heard argument on the motions on February 17, 2021.

## Background

When reviewing a motion to dismiss, the court credits the factual allegations in a complaint as true. However, a court need not credit a complaint's legal conclusions. *Dane v. UnitedHealthcare Ins. Co.*, 974 F.3d 183, 188 (2d Cir. 2020). The Complaint contains allegations about certain aspects of the State of Vermont's implementation of PURPA and its standard offer program for renewable generation contracts with small qualifying producers. Before addressing Plaintiffs' specific factual allegations, the court reviews the relevant provisions of PURPA and state law.

### A. PURPA and Vermont's Standard Offer Program

"The Federal Power Act ('FPA') gives the Federal Energy Regulatory Commission ('FERC') exclusive authority to regulate the sale of electric energy at wholesale in interstate commerce. . . . [S]tates may not regulate interstate wholesale sales of electricity unless Congress creates an exception to the FPA." *Allco Fin. Ltd. v. Klee*, 861 F.3d 82, 87 (2d Cir. 2017) (internal citations omitted). PURPA is one such exception to the FPA. It

> permit[s] states to foster electric generation by certain power production facilities ("qualifying facilities" or "QFs") that have no more than 80 megawatts ["MW"] of capacity and use renewable generation technology . . . by requiring utilities to purchase power from QFs at the utilities' "avoided costs," which are the costs that

> the utility would have otherwise incurred in procuring the same quantity of electricity from another source.

*Id.* (citing 16 U.S.C. § 824a-3). In addition, Section 210 of PURPA "provides all QFs with a guaranteed right to sell their energy and capacity to electricity utilities at the utilities' avoided costs." *Id.* PURPA requires FERC to promulgate regulations necessary to implement the statute's QF provisions, 16 U.S.C. § 834a-3(a), and requires state regulatory authorities to implement FERC's regulations, *id.* § 824a-3(f). FERC's Section 210 regulations "afford state regulatory authorities and nonregulated utilities latitude in determining the manner in which the regulations are to be implemented." *FERC v. Mississippi*, 456 U.S. 742, 751 (1982).

"Historically, Vermont has implemented PURPA in a unique way." *In re Petition of GMPSolar-Richmond, LLC*, 2017 VT 108, ¶ 22, 179 A.3d 1232 (cleaned up). Under VPUC Rule 4.100, each utility must "purchase a percentage of the power produced by a qualifying facility, . . . equal to each utility's pro-rata share of the total Vermont retail kilowatt-hour ["kWh"] sales for the previous calendar year." *Id.* Prior to 2016, QFs could sell power directly to utilities or could sell power to "an intermediary [who] purchase[d] the power, distribute[d] it and pa[id] the producer." *Id.* ¶ 23. In 2016, the VPUC amended Rule 4.100 to require QFs to sell power directly to interconnecting utilities. *See* Vt. Pub. Util. Comm'n R. 4.104.[1] Rather than selling power at the contracting utility's avoided cost rate, QFs are paid at a statewide avoided cost rate, set by the VPUC, which is "based on the combined avoided costs of all utilities in Vermont." *Id.* ¶ 22. FERC has found the Rule 4.100 program to be consistent with PURPA. *Otter Creek Solar LLC*, 143 FERC ¶ 61,282, 62,969 (2013).

[1] Available at https://puc.vermont.gov/sites/psbnew/files/doc_library/4100-small-power-production_0.pdf.

In addition to overseeing Vermont's Rule 4.100 program, the VPUC also administers Vermont's Standard Offer program, *see* 30 V.S.A. § 8005a, which the Vermont legislature enacted to help achieve the state's renewable energy goals, *see id.* § 8001, by supporting the development of small power production facilities. The Standard Offer program is available to "new standard offer plants," located in Vermont, with a plant capacity of 2.2 MW or less. *Id.* The statute permits the VPUC to issue standard offer contracts for renewable energy production to qualifying plants, up to a cumulative maximum capacity that increases on a yearly basis, for set contract terms between 10 and 25 years, at a price set by the VPUC. *See id.* The statute specifies that the VPUC will set the price for new standard offer contracts using a market-based mechanism, provided that the VPUC determines that such mechanism is consistent with applicable federal law and the goal of timely development at the lowest feasible cost. *Id.* § 8005a(f).

A Standard Offer Facilitator, who is appointed by the VPUC, *id.* § 8005a(a), distributes the electricity purchased under standard offer contracts to Vermont retail utilities "at the price paid to the plant owners, allocated to the providers based on their pro rata share of total Vermont retail kWh sales for the previous calendar year," *id.* § 8005a(k)(2). Retail utilities must "accept and pay the Standard Offer Facilitator for the electricity." *Id.* Participation in the Standard Offer program is optional for Vermont QFs. *Otter Creek Solar*, 143 FERC at 62,969. According to the Complaint, Defendant VEPP, Inc. is "a Vermont non-profit corporation resident in Vermont and the entity designated as the standard offer agent to act under 30 V.S.A. § 805a." (Doc. 1 ¶ 98.) In the past, VEPP has operated under a contract with the VPUC to be the designated purchasing agent for Rule 4.100 programs and the Standard Offer Facilitator for the Standard Offer program. *See GMPSolar-Richmond, LLC*, 2017 VT 108, ¶ 23, 179 A.3d 1232 (discussing VEPP's role as

designated purchasing agent); *In re Programmatic Changes to Standard-Offer Program*, 2014 VT 29, ¶ 2, 95 A.3d 999 (discussing VEPP's role as Standard Offer Facilitator).

Some of the Plaintiffs in this case have brought a Supremacy Clause challenge to Vermont's implementation of PURPA through Rule 4.100 and the Standard Offer program in a separate action that is currently pending in the District of Vermont before a different judge. *See Allco Finance Ltd. v. Roisman*, No. 2:20-cv-00103-cr; *Allco Fin. Ltd. v. Roisman*, No. 2:20-CV-103, 2020 WL 6150971 (D. Vt. Oct. 20, 2020).

**B. Factual Background**

The following facts are drawn from the Complaint (Doc. 1) and exhibits attached to the Complaint.

**1. Chelsea and Apple Hill Solar Projects**

Plaintiffs submitted the three lowest bids in the 2013 competitive solicitation for standard offer contracts administered by the VPUC: the Chelsea solar project, the Apple Hill solar project, and the Sudbury solar project. (*Id.* ¶ 12.) The Apple Hill and Chelsea projects are located on adjacent sites in Bennington. (*Id.* ¶ 13.) Although the VPUC initially rejected Plaintiffs' bid for the Apple Hill project, the Vermont Supreme Court reversed this decision on appeal. (*Id.* (citing *In re Programmatic Changes*, 2014 VT 29, 95 A.3d 999).) After the Chelsea and Apple Hill solar projects received standard offer contracts from VEPP, the projects filed for certificates of public good ("CPGs"), as required by 30 V.S.A. § 248. (*Id.* ¶ 14.)

On October 2, 2015, the hearing officer assigned to the Chelsea solar case recommended approval of a CPG for the Chelsea project. (*Id.* ¶ 16.) Ten days later, however, the chair of the Vermont Legislature's House Energy committee who oversaw the VPUC, Tony Klein, wrote to the VPUC to "express [his] concern" about the VPUC's "retention of authority" if the VPUC did

not exercise its "broad authority" to "proactively" address siting issues related to permitting for large renewable energy projects. (Doc. 1-2 at 2.) On October 10, 2015, two days before the date of Klein's letter, Bennington Representative Mary A. Morrissey wrote to the VPUC and presented arguments for why the VPUC should decline to approve a CPG for the Chelsea solar project. (Doc. 1-3.)

On January 6, 2016, the VPUC issued an order requesting comments on whether the Bennington Town plan prohibited solar facilities in the proposed rural conservation zone site. (Doc. 1 ¶ 25.) Just over a month later, the VPUC denied the CPG for the Chelsea solar project on this basis. (*Id.* ¶ 26.) At a subsequent public hearing, the longtime Bennington town attorney stated that this explanation was not credible. (*Id.*) The VPUC issued a press release and posted the denial on the home page of its website. (*Id.* ¶ 31.)

Plaintiffs subsequently appealed the denial of the Chelsea CPG. The VPUC's denial became final on April 17, 2017. (*Id.* ¶ 32.) Plaintiffs appealed to the Vermont Supreme Court on May 12, 2017. (*Id.* ¶ 34.) On September 7, 2017, Plaintiffs filed a motion for reconsideration of the petition under Vt. R. Civ. P. 60, identifying revised plans for a reduced project footprint as a basis for reconsideration. (*Id.* ¶ 35.) On October 12, 2017, the VPUC denied the Rule 60(b) motion but invited Plaintiffs to drop their Vermont Supreme Court appeal in favor of prompt review at the VPUC. (*Id.* ¶ 37.) Plaintiffs did so. (*Id.*)

The hearing officer presiding over the second Chelsea CPG application issued a favorable decision on January 2, 2019. (*Id.* ¶ 45.) In response, the VPUC issued an order "raising issues that had been settled by the Vermont Supreme Court in 2014, and even decided in Chelsea's favor *by the PUC* in the first go-around of the Chelsea CPG process." (*Id.*) On June 12, 2019, the PUC denied a CPG for the Chelsea project "solely on an issue resolved against the PUC in

2014." (*Id.* ¶ 47.) Plaintiffs appealed this decision to the Vermont Supreme Court, and oral argument was heard in January 2020. (*Id.* ¶ 49; *see also In re Petition of Chelsea Solar, LLC*, No. 2019-226, Vt. argued Jan. 14, 2020.)

In fall 2018, the VPUC approved the CPG for the Apple Hill solar project. *Petition of Apple Hill Solar LLC*, Vt. Pub. Util. Comm'n No. 8454 (Sept. 26, 2018). However, on appeal by the projects' neighbors, the Vermont Supreme Court reversed and remanded the VPUC's decision after finding that the VPUC failed to make proper factual findings. (*Id.* ¶ 39; *see also In re Apple Hill Solar LLC*, 2019 VT 64, 219 A.3d 1295.)

On remand, the VPUC hearing officer "created a brand-new approach to aesthetics tailored to deny a CPG for the Apple Hill project—a drone's view of the project." (*Id.* ¶ 62.) On the basis of this "drone's view" criterion, the hearing officer concluded that the project would be "prominently visible" on a hillside, which would violate a community standard of the Bennington town plan and create an undue adverse effect on aesthetics. (*Id.* ¶ 66.)

**2. Otter Creek Solar Projects**

On June 13, 2019, the VPUC issued an order in case number 19-1596 "stating that it might revoke the power purchase agreements ('PPAs') or already-issued CPGs" for Plaintiffs' OC1 and OC2 projects in Rutland, Vermont. (Doc. 1 ¶ 50.) The order alleged violations of the CPGs by the OC1 and OC2 projects. (*Id.* ¶ 51.) The June 2019 order "caused an immediate cessation of the about to begin construction of the OC1 and OC2 projects, causing substantial damage to Plaintiffs." (*Id.* ¶ 52.) The VPUC eventually concluded that Plaintiffs had not violated the CPGs. (*Id.* ¶ 60.)

In October 2019, the VPUC directed VEPP to terminate OC1's standard offer contract on grounds that Plaintiffs had failed to submit an application for a CPG for the OC1 facility. (*Id.*

¶ 61.) However, the VPUC had previously issued a CPG for the OC1 project that allowed for a substantially larger facility than necessary to satisfy OC1's standard offer contract (4.99 MW instead of 2.2 MW). (*Id.*)

On February 6, 2020, VEPP, at the direction of the VPUC, sent a letter to Plaintiffs terminating the OC3 project's PPA, claiming that Plaintiffs had failed to file a petition for a CPG within one year of the effective date of the PPA. (*Id.* ¶ 70.) The effective date of the OC3 project's PPA was January 30, 2019, and the petition for a CPG was filed on January 30, 2020. (*Id.*) VEPP claimed that the deadline for the CPG application was January 29, 2020. (*Id.* ¶ 71.)

Because the VPUC has not withdrawn its threats to revoke the CPGs or PPAs, the OC1 and OC2 projects remain unconstructed. (*Id.* ¶ 52.) Plaintiffs claim that these threats have caused losses exceeding one million dollars. (*Id.* ¶ 80.)

**3. Plaintiffs' Interactions with State Defendants**

In 2011, Plaintiffs informed Former Commissioner Defendant Volz via letter that Vermont's standard offer program did not comply with PURPA. (Doc. 1 ¶ 3.) The following year, Plaintiffs challenged the standard offer program in comments filed with the VPUC. (*Id.* ¶ 4.) In 2013, Plaintiffs filed a petition for enforcement at FERC, challenging the VPUC's administration of the standard offer program. (*Id.* ¶ 5.) Plaintiff Allco describes itself as "a thorn in the side" of utilities and public utility commissions. (Doc. 34 at 3.)

In 2018, Plaintiffs challenged portions of 30 V.S.A. § 248, which sets forth the procedures and requirements for receiving a certificate of public good. A state trial court invalidated portions of the statute on March 4, 2019. (*Id.* ¶ 41.) During settlement negotiations between Plaintiffs and the state, the state insisted that Plaintiffs release all claims against the state and its agencies, which Plaintiffs declined to do. (*Id.*)

Plaintiffs allege that many of the actions taken by the VPUC, individual State Defendants, and VEPP were pretextual. (*E.g.*, Doc. 1 ¶ 73.) Plaintiffs allege that the VPUC and its hearing officers

> are now simply irretrievably biased against, and retaliatorily targeting, the Plaintiffs and taking Plaintiffs' property as part of their ongoing coverup to escape accountability for the abuse of power and unlawful and tortious conduct against the Plaintiffs, and to chill Plaintiffs' speech and drive Plaintiffs out of the State of Vermont . . .

(*Id.* ¶ 74.) Plaintiffs contend that "all the [V]PUC's actions against plaintiffs have been and are motivated by political pressure from neighbors and other residents and the legislators that those neighbors enlisted in their cause, in retaliation for Allco's speech and exercise of its right to petition . . ." (*Id.* ¶ 76.)

## Analysis

Plaintiffs bring eight claims under 42 U.S.C. § 1983 against all Defendants. Seven of Plaintiffs' counts assert violations of the First, Fifth, or Fourteenth Amendments and an eighth count alleges that the Federal Power Act preempts the terminations of the OC1 and OC3 PPAs by VEPP at the direction of the VPUC. Plaintiffs also bring four claims under the Vermont Constitution, five state-law claims for breach of contract, and one claim under the Vermont Tort Claims Act ("VTCA"). Each cause of action seeks to redress—via damages or injunctive relief—four alleged harms: the denial of the CPG for the Chelsea project, the delay of the CPGs for Chelsea and Apple Hill, the threatened revocation of the Otter Creek projects' CPGs and PPAs, and the termination of the PPAs for OC1 and OC3. (*See* Doc. 1 ¶¶ 105, 117.)

### I. Standard of Review

State Defendants and VEPP assert a variety of immunity defenses to jurisdiction and liability. (Doc. 27 at 47; Doc. 29 at 13.) Defendants also challenge the sufficiency of the pleadings.

A motion for dismissal based on sovereign immunity is properly reviewed as a motion under Fed. R. Civ. P. 12(b)(1). *Wake v. United States*, 89 F.3d 53, 57 (2d Cir. 1996). To resolve questions of subject matter jurisdiction, "the district court can refer to evidence outside the pleadings and the plaintiff asserting subject matter jurisdiction has the burden of proving by a preponderance of the evidence that it exists." *Luckett v. Bure*, 290 F.3d 493, 496–97 (2d Cir. 2002). Although "[t]he court must take all facts alleged in the complaint as true and draw all reasonable inferences in favor of plaintiff, jurisdiction must be shown affirmatively, and that showing is not made by drawing from the pleadings inferences favorable to the party asserting [jurisdiction]." *Morrison v. Nat'l Australia Bank Ltd.*, 547 F.3d 167, 170 (2d Cir. 2008) (internal citations and quotation marks omitted). A claim must be dismissed for lack of subject matter jurisdiction "when the district court lacks the statutory or constitutional power to adjudicate it." *Makarova v. United States*, 201 F.3d 110, 113 (2d Cir. 2000).

To survive a 12(b)(6) motion to dismiss, a complaint "must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). The court accepts all factual allegations in the complaint as true and draws all reasonable inferences in the plaintiff's favor. *Hernandez v. United States*, 939 F.3d 191, 198 (2d Cir. 2019). However, "[t]hreadbare recitals of elements of a cause of action, supported by mere conclusory statements, do not suffice." *Empire Merchants, LLC v. Reliable Churchill LLLP*, 902 F.3d 132, 139 (2d Cir. 2018) (quoting *Iqbal*, 556 U.S. at 678). The court must dismiss the action where "it is clear from the face of the complaint, and matters of which the court may take judicial notice, that the plaintiff's claims are barred as a matter of law." *Parkcentral Glob. Hub Ltd. v. Porsche Auto.*

*Holdings SE*, 763 F.3d 198, 208–09 (2d Cir. 2014) (per curiam) (quoting *Conopco, Inc. v. Roll Int'l*, 231 F.3d 82, 86 (2d Cir. 2000)).

## II. Sovereign Immunity

State Defendants argue that the Eleventh Amendment or general sovereign immunity bar Plaintiffs' claims against the State and the VPUC (Doc. 27 at 15–16), and that the individual State Defendants are immune from certain claims (*id.* at 16). Defendant VEPP likewise contends that it is entitled to sovereign immunity as an instrumentality of the state. (Doc. 29 at 13.) Plaintiffs object to all Defendants' invocations of immunity. (*See* Doc. 34 at 8–15; Doc. 35 at 3–8.) Because sovereign immunity raises a question of jurisdiction, the court addresses it first.

"The concept of state sovereign immunity encompasses different species of immunity." *Beaulieu v. Vermont*, 807 F.3d 478, 483 (2d Cir. 2015). Eleventh Amendment immunity "protects a state's dignity and fiscal integrity from federal court judgments and acts as a limitation on the federal judiciary's Article III powers." *Id.*; *see* U.S. Const. amend. XI. The Eleventh Amendment applies "not only [to] actions in which a State is actually named as the defendant, but also [to] certain actions against state agents and state instrumentalities." *Regents of the Univ. of Cal. v. Doe*, 519 U.S. 425, 429 (1997). Courts have considered "the essential nature and effect of the proceeding" as well as the "nature of the entity created by state law" to determine whether an entity is an "agent" or "instrumentality." *Id.*

In addition to Eleventh Amendment immunity, "[s]tates also enjoy a broader sovereign immunity, which applies against *all* private suits, whether in state or federal court." *Beaulieu*, 807 F.3d at 483; *Fed. Mar. Comm'n v. S.C. State Ports Auth.*, 535 U.S. 743, 754 (2002). Congress may not abrogate states' general sovereign immunity under its Article I authority.

*Alden v. Maine*, 527 U.S. 706, 712–13 (1999). A state may, however, waive its general or Eleventh Amendment immunity in state or federal court. *Beaulieu*, 807 F.3d at 483.

Absent waiver, courts have recognized two exceptions to Eleventh Amendment immunity: where "Congress abrogates the state's immunity, or the case falls within the *Ex Parte Young* exception." *NAACP v. Merrill*, 939 F.3d 470, 475 (2d Cir. 2019) (per curiam). The congressional abrogation exception applies where Congress both "unequivocally expresses its intent to abrogate the immunity" and acts "pursuant to a valid exercise of power.'" *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 55 (1996) (quoting *Green v. Mansour,* 474 U.S. 64, 68 (1985)). Legislation enacted under § 5 of the Fourteenth Amendment has been held to be a valid exercise of congressional authority to abrogate Eleventh Amendment immunity. *See id.*; *Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1976). Contrary to Plaintiffs' assertion (Doc. 34 at 8), 42 U.S.C. § 1983 does not abrogate states' Eleventh Amendment immunity. *Hafer v. Melo*, 502 U.S. 21, 30 (1991); *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 71 n.10 (1989) ("[N]either a State nor its officials acting in their official capacities are 'persons' under § 1983."); *Huminski v. Corsones*, 396 F.3d 53, 70 (2d Cir. 2005).

The exception recognized by *Ex Parte Young*, 209 U.S. 123 (1908), allows official-capacity suits for prospective injunctive relief against state officials that seek "to end ongoing violations of federal law and vindicate the overriding federal interest in assuring the supremacy of [the] law." *In re Deposit Ins. Agency*, 482 F.3d 612, 618 (2d Cir. 2007). "The theory of *Young* was that an unconstitutional statute is void, and therefore does not impart to [the official] any immunity from responsibility to the supreme authority of the United States." *Green*, 474 U.S. at 68 (citations omitted). The *Ex Parte Young* exception encompasses actions that seek to enjoin state regulatory action on grounds of federal preemption, and "[t]he inquiry into

whether suit lies under *Ex Parte Young* does not include an analysis of the merits of the claim." *Verizon Md., Inc. v. Pub. Serv. Comm'n of Md.*, 535 U.S. 635, 646 (2002). However, this exception does not extend to suits in federal court that seek to enjoin violations of state law by state officials, *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 117 (1984), or to suits against state agents or instrumentalities where the state is the "real, substantial party in interest," *Edelman v. Jordan*, 415 U.S. 651, 663 (1974).

**A. State and VPUC Immunity**

This review of the case law clarifies that, under the Eleventh Amendment, this court lacks the constitutional power to adjudicate Plaintiffs' federal- and state-law claims against the State of Vermont and the VPUC.[2] Vermont has waived its Eleventh Amendment immunity only in the limited circumstances articulated in the Vermont Tort Claims Act ("VTCA"), *see* 12 V.S.A. § 5601(g), and Congress did not abrogate states' immunity by enacting § 1983. Furthermore, the *Ex Parte Young* exception applies to suits against state *officials* rather than claims against the State or its instrumentalities. Consequently, the court dismisses all of Plaintiffs' claims against the State and the VPUC—except for the VTCA claim—for lack of subject matter jurisdiction under Fed. R. Civ. P. 12(b)(1).

For the following reasons, the court also dismisses Plaintiffs' VTCA claim against the State and the VPUC under Fed. R. Civ. P. 12(b)(6). The VTCA waives the State's immunity for "injury to persons or property or loss of life cause by the negligent or wrongful act or omission of an employee of the state while acting within the scope of employment, under the same circumstances, in the same manner, and to the same extent as a private person would be liable."

[2] The Complaint recognizes that the VPUC "is an agency of the State of Vermont." (Doc. 1 ¶ 94.)

12 V.S.A. § 5601. The Vermont Supreme Court has explained that the VTCA "is primarily directed at the 'ordinary common-law torts.' . . . [T]his approach serves to prevent the government's waiver of sovereign immunity from encompassing purely 'governmental' functions." *Zullo v. State*, 2019 VT 1, ¶ 20, 205 A.3d 466 (quoting *Denis Bail Bonds, Inc. v. State*, 622 A.2d 495, 498 (1993)). To state a claim under the VTCA, a plaintiff must "demonstrate that his 'factual allegations satisfy the necessary elements of a recognized cause of action.'" *Id.* ¶ 21, 205 A.3d at 479 (quoting *Kane v. Lamothe*, 2007 VT 91, ¶ 7, 936 A.2d 1303).

The Complaint alleges only that Individual State Defendants "have committed [] wrongful acts against Plaintiffs . . . causing substantial damage to Plaintiffs," and that these "wrongful acts if committed by a private person would cause such person to be liable to Plaintiffs for damages." (Doc. 1 ¶¶ 304–305.) The Complaint does not elsewhere explain how these "wrongful acts" embrace a recognized tort claim against Defendants. These allegations are devoid of factual content that would allow "the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678. Consequently, the VTCA claim must be dismissed.

## III. State Officials' Liability

Individual State Defendants assert a variety of immunity defenses with respect to Plaintiffs' federal claims (*see* Doc. 27 at 15–18), the availability of which depends on whether the defendants are sued in their personal or individual capacities. First, individual Defendants claim to be "immune from retrospective relief, including damages, because "Plaintiffs assert claims against the individual Defendants in their official capacities." (Doc. 27 at 16.) They also claim immunity under *Ex Parte Young* "because the Complaint does not allege ongoing violations of federal law or seek to compel the individual Defendants to comply with federal law

prospectively." (*Id.*) Finally, individual State Defendants contend that the VPUC commissioners who are sued in their personal capacities are entitled to judicial immunity. (*Id.* at 17.)

Individual Defendants include former VPUC chair Volz; the three current commissioners of the VPUC, Roisman, Cheney, and Hofmann; and the current governor of Vermont, Phil Scott. The Complaint specifies that Governor Scott is sued in his official capacity (Doc. 1 ¶ 95) but does not clarify the capacities in which the current commissioners are sued. This distinction between official- and individual-capacity suits is relevant where, as here, individual state defendants assert immunity defenses. *See Hafer*, 502 U.S. at 25–29 ("[T]he only immunities available to the defendant in an official-capacity action are those that the governmental entity possesses. . . . [O]fficials sued in their personal capacities, unlike those sued in their official capacities, may assert personal immunity defenses such as objectively reasonable reliance on existing law."); *Kentucky v. Graham*, 473 U.S. 159, 166–67 (1985). Where a complaint does not state whether officials are sued in their personal or official capacities, or both, "'[t]he course of proceedings' . . . typically will indicate the nature of the liability sought to be imposed." *Graham*, 473 U.S. at 167 n.14 (quoting *Brandon v. Holt*, 469 U.S. 464, 469 (1985)).

Plaintiffs seek retroactive and prospective relief for their claims under 42 U.S.C. § 1983. It is well established that a federal plaintiff may bring an action for damages under 42 U.S.C. § 1983 against state officials in their individual capacities.[3] *Hafer*, 502 U.S. at 30; *see also Mitchum v. Foster*, 407 U.S. 225, 242 (1972) ("The very purpose of § 1983 was to interpose the federal courts between the States and the people, as guardians of the people's federal rights—to

[3] Section 1983 provides that "[e]very person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . ., subjects, or causes to be subjected, any citizen . . . 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."

protect the people from unconstitutional action under color of state law."). Although the Complaint does not clearly specify which relief Plaintiffs seek from which individual State Defendants, the nature of the facts pleaded suggests that Plaintiff sues at least Defendants Volz and Cheney in their personal capacities. (*See* Doc. 1 at 21 (referring to Volz and Cheney's status as former commissioners).) Such claims are proper under § 1983, and, contrary to Defendants' suggestion, not all individual State Defendants are "immune" from Plaintiffs' claims for retrospective relief. (*See* Doc. 27 at 16.)

It is similarly well established that the *Ex Parte Young* exception enables plaintiffs to sue in federal court to enjoin state officials from prospectively violating federal law in their official capacities. *Will*, 491 U.S. at 71 n.10; *Graham*, 473 U.S. at 167 n.14; *Ex Parte Young*, 209 U.S. at 159–60. The pleaded facts suggest that Plaintiff sues the current VPUC commissioners in their official capacities. (*See, e.g.*, Doc. 1 ¶ 220 (requesting that the court "enjoin[] the current PUC Commissioners" from taking an action).) Thus, Defendants who are current VPUC commissioners—Roisman and Hofmann—are not facially immune under *Ex Parte Young* because of a failure to "allege ongoing violations of federal law or seek to compel the individual Defendants to comply with federal law prospectively." (Doc. 27 at 16.)

Because the Complaint seeks prospective relief from at least some of the individual State Defendants in their official capacities, and retroactive relief against individual State Defendants in their personal capacities, Plaintiffs have sufficiently alleged jurisdiction for their claims under § 1983.[4] In contrast, the Supreme Court's interpretation of the Eleventh Amendment in

[4] Whether the Complaint plausibly alleges any claims for relief under § 1983 against any of the individual defendants is a question to be evaluated under the Rule 12(b)(6) standard. *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 96 (1998) ("[T]he nonexistence of a cause of action [i]s no[t a] proper basis for a jurisdictional dismissal.").

*Pennhurst*, 465 U.S. at 121, clearly bars this court from adjudicating Plaintiffs' state-law claims against state officials acting in their official capacities. Consequently, the court dismisses all of Plaintiffs' state-law claims against the individual State Defendants.

Having concluded that the Eleventh Amendment does not deprive this court of subject matter jurisdiction over Plaintiffs' federal claims against the individual State Defendants, the court considers their alternative argument that judicial immunity shields them from liability.

**A. Judicial Immunity**

Judicial immunity protects judges from "liability for damages for acts committed within their judicial jurisdiction." *Pierson v. Ray*, 386 U.S. 547, 554–55 (1967). It exists "not for the protection or benefit of a malicious or corrupt judge, but for the benefit of the public, whose interest it is that the judges should be at liberty to exercise their functions with independence and without fear of consequences.'" *Id.* (internal citations and quotation marks omitted). "Quasi-judicial" immunity is available to officials who "exercise discretion similar to that exercised by judges. Like judges, they require the insulation of absolute immunity to assure the courageous exercise of their discretionary duties." *McCray v. Maryland*, 456 F.2d 1, 3 (4th Cir. 1972).

Courts employ a "functional" approach in determining whether to grant quasi-judicial immunity. *Imbler v. Pachtman*, 424 U.S. 409, 423 n.20 (1976); *Butz v. Economou*, 438 U.S. 478, 513 (1978) (holding that quasi-judicial immunity is available where the official's role is "functionally comparable" to that of a judge). The Supreme Court has identified the following "*Butz* factors" as relevant to this analysis:

> (a) the need to assure that the individual can perform his functions without harassment or intimidation; (b) the presence of safeguards that reduce the need for private damages actions as a means of controlling unconstitutional conduct; (c) insulation from political influence; (d) the importance of precedent; (e) the adversary nature of the process; and (f) the correctability of error on appeal.

*Cleavinger v. Saxner*, 474 U.S. 193, 202 (1985) (citing *Butz*, 438 U.S. at 512).

Courts in the Second Circuit have granted quasi-judicial immunity to a variety of non-judicial officers. *E.g.*, *Giammatteo v. Newton*, No. 3:10-CV-153 (AVC), 2011 WL 13196431, at *5 (D. Conn. Mar. 21, 2011) ("Not only do the [Connecticut Board of Examiners for Physical Therapists] proceedings contain procedural safeguards that resemble those of the judicial process, but the process itself is designed to maintain the rights of any physical therapist brought before the board."), *aff'd*, 452 F. App'x 24 (2d Cir. 2011); *Scotto v. Almenas*, 143 F.3d 105, 111 (2d Cir. 1998) ("[A] parole board official is absolutely immune from liability for damages when he decide[s] to grant, deny, or revoke parole, because this task is functionally comparable to that of a judge." (citations and quotation marks omitted)). *But see, e.g.*, *Mitchell v. Fishbein*, 377 F.3d 157, 172–73 (2d Cir. 2004) (rejecting quasi-judicial immunity for members of a committee that screened and appointed counsel for indigent defendants because the committee acted as an administrative body and its procedures provided no avenue for judicial review or a formal hearing); *DiBlasio v. Novello*, 344 F.3d 292, 297-98 (2d Cir. 2003) (holding that quasi-judicial immunity was not available for New York Department of Health officials who had "virtually unfettered authority" to temporarily suspend a physician's license and where the hearing mechanism provided "no meaningful review" because the commissioner could simply ignore the hearing committee's recommendation). In each of these cases, the availability of procedural safeguards, including meaningful access to judicial review, was a key factor in the court's decision to grant the defendant-official quasi-judicial immunity.

Plaintiffs argue that the Vermont Supreme Court has held that the VPUC exercises "legislative" rather than quasi-judicial authority. (Doc. 34 at 16.) In fact, the Court has described the VPUC's consideration of CPG petitions as both a legislative and quasi-judicial function. *Compare Apple Hill Solar*, 2019 VT 64, ¶ 27, 219 A.3d 1295 ("The PUC's consideration of a

petition for a CPG is a 'legislative, policy-making process and is thus accorded great deference.'" (quoting *In re Cross Pollination*, 2012 VT 29, ¶ 8, 47 A.3d 1285 (mem.))), *with In re SolarCity Corp.*, 2019 VT 23, ¶ 13, 210 A.3d 1255 ("In its quasi-judicial role, the Commission oversees many different types of proceedings, such as . . . petitions for CPGs."). However, even where it has described the CPG process as "legislative," the Vermont Supreme Court has emphasized that the VPUC functions as an impartial, expert adjudicator of law and fact. *See, e.g.*, *In re Vt. Elec. Power Co., Inc.*, 2006 VT 69, ¶ 6, 895 A.2d 226 ("The [VPUC] must employ its discretion to weigh alternatives presented to it, utilizing its particular expertise and informed judgment." (citations omitted)).

In the "functional" approach to immunity determinations, the dispositive inquiry is whether the official exercised quasi-judicial authority when undertaking the specific challenged action. *See Butz*, 438 U.S. at 512. A state supreme court's characterization of an official's authority is relevant to the immunity determination, but the determination must be made with respect to the appropriate function. In *Scott v. Central Maine Power Co.*, 709 F. Supp. 1176, 1187 (D. Me. 1989), the district court concluded that the chairman of the Maine Public Utilities Commission ("MPUC") was entitled to absolute, quasi-judicial immunity for actions taken in connection with a proceeding under Maine Statutes tit. 35 § 296.[5] Although the Maine Law Court had previously characterized the MPUC as "clothed with certain judicial powers," whose "functions are mainly legislative and administrative and not judicial," *id.* (quoting *Hamilton v. Caribou Water, Light & Power Co.*, 117 A. 582 (Me. 1922)), the district court concluded that the plaintiff's claims only implicated the chairman's role as the presiding officer in a § 296 hearing, *id.* at 1188. The court concluded that quasi-judicial immunity was appropriately conferred on the

[5] Section 296 was repealed and replaced by Me. Stat. Ann. tit. 35–A § 1303 (1988).

chairman in this role because of the "legal safeguards available to Scott in those proceedings" and the chairman's authority to "perform judicial acts." *Id.* at 1187–88. Applying this functional approach, the First Circuit reached the same conclusion regarding commissioners of the New Hampshire Public Utilities Commission in *Destek Group, Inc. v. State of New Hampshire Public Utilities Commission*, 318 F.3d 32, 41 (1st Cir. 2003).

Evaluating the VPUC commissioners' function in the CPG process against the *Butz* factors clarifies that the commissioners' role is functionally comparable to the role of a judge. The CPG process requires the VPUC to consider whether a proposed project advances the public interest, and to weigh the public's interest alongside the competing interests of developers and individual property owners. *Apple Hill Solar*, 2019 VT 64, ¶ 16, 219 A.3d 1295. At the request of a party or member of the public, the VPUC must hold a public hearing on a CPG petition and must address each area of concern raised at the hearing in its written decision. 30 V.S.A. § 248(a)(4)(A). Vermont law sets forth criteria with which the CPG must comply and requires the VPUC to make specific findings before it approves a CPG petition. *Id.* § 248(b)(1)–(2). And although VPUC decisions need not conform strictly to precedent, the VPUC must justify departures from its "own established law" on bases that are not arbitrary, unreasonable, or discriminatory. *Apple Hill Solar*, 2019 VT 64, ¶ 25, 219 A.3d 1295.

A person aggrieved by the VPUC's grant or denial of a CPG may appeal the decision to the Vermont Supreme Court, 30 V.S.A. § 234, which reviews CPG decisions under the deferential standard of review traditionally enjoyed by administrative agencies, *Cross Pollination*, 2012 VT 29, ¶ 8, 47 A.3d 1285 ("[B]ecause we presume that decisions made within the [VPUC's] expertise are correct, valid and reasonable, we will uphold the [VPUC's] legal conclusions if they are rationally derived from a correct interpretation of the law and supported

by the findings." (citations and quotation marks omitted)). "Despite the limited standard of review," the Vermont Supreme Court "do[es] not abdicate [its] responsibility to examine a disputed statute independently and ultimately determine its meaning." *In re Rutland Renewable Energy, LLC*, 2016 VT 50, ¶ 8, 147 A.3d 621. Where the VPUC's legal conclusions are not supported by its factual findings, the Supreme Court will remand for further proceedings. *E.g.*, *Apple Hill Solar*, 2019 VT 64, ¶ 25, 219 A.3d 1295.

Finally, in addition to the procedural safeguards that apply to both VPUC and Vermont Supreme Court review of petitions for CPGs, the structure of the Commission ensures a degree of insulation from the political process. The chair of the VPUC is appointed according to the same procedures that apply to the appointments of state trial court judges. 30 V.S.A. § 3(b). The other commissioners are appointed as follows:

> Whenever a vacancy occurs, public announcement of the vacancy shall be made. The Governor shall submit at least five names of potential nominees to the Judicial Nominating Board for review. The Judicial Nominating Board shall review the candidates in respect to judicial criteria and standards only and shall recommend to the Governor those candidates the Board considers qualified. The Governor shall make the appointment from the list of qualified candidates. The appointment shall be subject to the advice and consent of the Senate.

(*Id.* § 3(c).) All members of the Commission are appointed for six-year terms. *Id.* § 3(d)(1).

The presence of procedural safeguards, articulable standards of review, and insulation from political influence enables VPUC commissioners to perform their functions free from harassment and intimidation. When commissioners consider petitions for CPGs, they perform judicial acts and exercise discretion similar to that exercised by judges. As in *Scott*, 709 F. Supp. at 1187, the VPUC commissioners are entitled to quasi-judicial immunity from claims arising from their role in CPG proceedings. Granting them quasi-judicial immunity is essential "to assure the courageous exercise of their discretionary duties." *McCray*, 456 F.2d at 3.

Because all of Plaintiffs' claims against Individual State Defendants arise from actions taken by the VPUC Commissioners in their function of adjudicating CPG petitions, the court dismisses Plaintiffs' claims against the individual defendants who are current and former VPUC commissioners on the basis of quasi-judicial immunity. The court also dismisses Plaintiffs' claims against Governor Scott, because the Complaint alleges no basis on which to hold Governor Scott liable under an *Ex Parte Young* theory or under § 1983.

## IV. VEPP's Liability

The Complaint alleges that VEPP is liable for Plaintiffs' § 1983 claims because the VPUC "enlisted VEPP in the conspiracy and directed VEPP" to take certain adverse actions. (Doc. 1 ¶ 61; *see also id.* ¶¶ 70–72.) VEPP contends that it is entitled to Eleventh Amendment immunity as an instrumentality of the state. (Doc. 29 at 13.) In the alternative, VEPP contends that it is not a state actor within the meaning of 42 U.S.C. § 1983, and consequently cannot be liable for any of Plaintiffs' federal-law claims. (*Id.* at 14.)

### A. Eleventh Amendment Immunity

Eleventh Amendment immunity extends to state instrumentalities that are "more like an arm of the State, such as a state agency, than like a municipal corporation or other political subdivision." *Woods v. Rondout Valley Cent. Sch. Dist. Bd. of Educ.*, 466 F.3d 232, 236 (2d Cir. 2006) (quoting *Mancuso v. New York State Thruway Auth.*, 86 F.3d 289, 292 (2d Cir. 1996)). Courts examine "the relationship between the State and the entity in question" to determine whether an entity may claim Eleventh Amendment immunity. *Id.* "This inquiry has sometimes focused on the essential nature and effect of the proceeding, and, at other times, has looked to the nature of the entity created by state law." *Id.* (quoting *Regents of the Univ. of Cal.*, 519 U.S. at 429). In either case, "'the Eleventh Amendment's twin reasons for being'—preserving the

state's treasury and protecting the integrity of the state—'remain [courts'] prime guide.'" *Leitner v. Westchester Cmty. Coll.*, 779 F.3d 130, 134 (2d Cir. 2015) (quoting *Hess v. PATH*, 513 U.S. 30, 47–48 (1994)). It is well established that "the governmental entity invoking the Eleventh Amendment bears the burden of demonstrating that it qualifies as an arm of the state entitled to share in its immunity." *Id.* at 134; *Woods*, 466 F.3d at 237.

The Second Circuit has applied two different tests to determine whether an entity is an instrumentality of the state entitled to Eleventh Amendment immunity. *Leitner*, 779 F.3d at 135–36. Under the six-factor *Mancuso* test, a court considers

> (1) how the entity is referred to in the documents that created it; (2) how the governing members of the entity are appointed; (3) how the entity is funded; (4) whether the entity's function is traditionally one of local or state government; (5) whether the state has a veto power over the entity's actions; and (6) whether the entity's obligations are binding upon the state.

*Id.* at 135 (quoting *Mancuso*, 86 F.3d at 293). Under the two-factor *Clissuras* test, the court considers "(1) the extent to which the state would be responsible for satisfying any judgment that might be entered against the defendant entity, and (2) the degree of supervision exercised by the state over the defendant entity." *Id.* (quoting *Clissuras v. City Univ. of N.Y.*, 359 F.3d 79, 82 (2d Cir. 2004) (per curiam)); *see also id.* at 137 ("The *Clissuras* test incorporates four of the six *Mancuso* factors."). Courts in the Second Circuit continue to apply both tests. *See id.* at 136.

VEPP incorporates by reference State Defendants' arguments regarding Eleventh Amendment immunity. (Doc. 30 at 12–13.) However, apart from pointing out that the 30 V.S.A. § 8005a designates the *Standard Offer Facilitator* an "instrumentality of the state" (*Id.* at 13),[6]

[6] VEPP suggests that 30 V.S.A. § 8005a "designates VEPP an instrumentality of the state." (Doc. 39 at 3.) In fact, the statute refers to the "Standard Offer Facilitator." Prior judicial decisions of which this court may take judicial notice recognize that VEPP previously has operated as the Standard Offer Facilitator and the Rule 4.100 designated purchasing agent pursuant to a contract with the VPUC. *GMPSolar-Richmond*, 2017 VT 108, 179 A.3d 1232; *In re Programmatic Changes to Standard-Offer Program*, 2014 VT 29, 95 A.3d 999. VEPP does

VEPP fails to engage with the *Mancuso* or *Clissuras* factors or to cite to other legal authority for why it—a nonprofit organization—is entitled to the same immunity as states and state agencies.[7] The fact that 30 V.S.A. § 8005a identifies the Standard Offer Facilitator as an "instrumentality of the state and precludes liability for "[t]he State and its instrumentalities . . . with respect to any matter related to the Standard Offer Program," 30 V.S.A. § 8005a(r), does not automatically entitle the current Standard Offer Facilitator to Eleventh Amendment immunity in federal court. *See Mancuso*, 86 F.3d at 296–97 (finding the New York State Thruway Authority not entitled to Eleventh Amendment Immunity even though it "enjoy[s] sovereign immunity under state law").

Because VEPP has not met its burden of demonstrating its entitlement to Eleventh Amendment immunity, the court will not dismiss the Complaint on this basis.

**B. State Action Requirement**

VEPP next argues that it cannot be liable for Plaintiffs' federal claims under § 1983 because it is not a "state actor." To prevail on a claim under § 1983, a plaintiff must establish that the defendant "deprived him of a right secured by the 'Constitution and laws' of the United States" and that the defendant "deprived him of this constitutional right . . . 'under color of law.'" *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 150 (1970). This second element is known as the "state action" requirement.

Case law on the state action requirement "tr[ies] to plot a line between state action subject to Fourteenth Amendment scrutiny and private conduct (however exceptionable) that is

---

not present any evidence that it is a statutorily, rather than contractually, designated Standard Offer Facilitator.

[7] VEPP's citation to *Filarsky v. Delia*, 566 U.S. 377, 390 (2012), is not relevant to this point (*see* Doc. 29 at 13), as *Filarsky* addressed whether an individual employed as a contractor with the state was entitled to assert *qualified* immunity as a defense to liability under § 1983.

not." *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 295 (2001). The Supreme Court has employed a variety of tests to determine whether private conduct may nevertheless be properly characterized as state action, including whether the conduct

> results from the State's exercise of coercive power, when the State provides significant encouragement, either overt or covert, or when a private actor operates as a willful participant in joint activity with the State or its agents. We have treated a nominally private entity as a state actor when it is controlled by an agency of the State, when it has been delegated a public function by the State, when it is entwined with governmental policies, or when government is entwined in [its] management or control.

*Id.* at 296 (internal citations and quotation marks omitted). In response to VEPP's motion to dismiss, Plaintiffs contend that VEPP participated in a conspiracy with State Defendants to violate § 1983. (*See* Doc. 35 at 10.) The court evaluates VEPP's claim that it is not a "state actor" for purposes of § 1983 liability under the standard of Fed. R. Civ. P. 12(b)(6). *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 279 (1977).

Under Second Circuit precedent, a private actor may be liable for conspiracy to violate § 1983 where there is "(1) an agreement between a state actor and a private party; (2) to act in concert to inflict an unconstitutional injury; and (3) an overt act done in furtherance of that goal causing damages." *Ciambriello v. Cnty. of Nassau*, 292 F.3d 307, 324–25 (2d Cir. 2002). The complaint must plausibly allege each element of the § 1983 conspiracy claim. *See id.* "[C]omplaints containing only conclusory, vague, or general allegations that the defendants have engaged in a conspiracy to deprive the plaintiff of his constitutional rights are properly dismissed; diffuse and expansive allegations are insufficient, unless amplified by specific instances of misconduct." *Id.* at 325 (quoting *Dwares v. City of New York*, 985 F.2d 94, 99 (2d Cir. 1993)).

The Complaint alleges that "[a]ll Defendants conspired to deprive, and participated in the deprivation of, Plaintiffs' rights" under the First Amendment and the Takings Clause of the Fifth

Amendment. (Doc. 1 ¶¶ 114, 126, 188.) Specifically, Plaintiffs allege that the VPUC directed VEPP to terminate Plaintiffs' standard offer contracts (PPAs) for the OC1 and OC3 projects, for pretextual reasons. (*See* Doc. 1 ¶¶ 61, 70.) The Complaint alleges that VEPP sent Plaintiffs a termination letter on February 6, 2020 "purporting to terminate" the contracts. (Doc. 1 ¶¶ 70–72, 257, 262.) This action "upset settled investment-backed expectations reasonably held by Plaintiffs" when they invested in the Otter Creek projects (*id.* ¶ 75) and "caused a serious financial loss to the Plaintiffs[], exceeding one million dollars" (*id.* ¶¶ 78–79).

These allegations, taken as true for purposes of the motion to dismiss, do not establish all the requisite elements of a § 1983 conspiracy claim and are too conclusory to state a plausible claim for relief against VEPP. The allegation that the VPUC directed VEPP to send a letter terminating the Otter Creek PPAs does not plausibly suggest that the VPUC and VEPP intended to enter into an *agreement*, with the intent to take certain actions, that ultimately resulted in a deprivation of Plaintiffs' constitutional rights. Plaintiffs' allegations of damages are similarly conclusory. The Complaint does not plausibly allege how a letter "purporting to terminate" certain standard offer PPAs upset Plaintiffs' settled investment-backed expectations and caused them millions of dollars in financial loss. Because Plaintiffs have not plausibly alleged each of the elements of a § 1983 conspiracy claim against VEPP, the court grants VEPP's motion to dismiss the federal claims.

### C. State-law Claims Against VEPP

Having dismissed the federal claims against all Defendants and the state-law claims against the State of Vermont, the VPUC, and the individual State Defendants, only Plaintiffs' state-law claims against VEPP remain. As an initial matter, the Complaint does not plausibly allege this court's diversity jurisdiction over Plaintiffs' state-law claims against VEPP. The

Complaint alleges that VEPP is a Vermont non-profit corporation (Doc. 1 ¶ 98), but contains no information about the citizenship of the LLC-Plaintiffs' members. For diversity purposes, limited liability companies have the citizenship of their members. *Handelsman v. Bedford Vill. Assocs. Ltd. P'ship*, 213 F.3d 48, 51 (2d Cir. 2000). Although Plaintiffs contend, in opposition to State Defendants' Motion to Dismiss, that all of their members are citizens of Delaware and Florida (*see* Doc. 34 at 5, 45), this information does not appear in the Complaint or in an affidavit.

However, even if the court lacks diversity jurisdiction, 28 U.S.C. § 1367 provides for supplemental jurisdiction "over all claims that are so related to claims in the action within [the court's] original jurisdiction that they form part of the same case or controversy." Because the court had federal-question jurisdiction over Plaintiffs' § 1983 claims against VEPP, and the state-law claims arise from the same underlying circumstances, the court may exercise supplemental jurisdiction over Plaintiffs' state-law claims unless the factors enumerated in § 1367(c) counsel otherwise. *Valencia ex rel. Franco v. Lee*, 316 F.3d 299, 305 (2d Cir. 2003). These factors include whether:

> (1) the claim raises a novel or complex issue of State law,
>
> (2) the claim substantially predominates over the claim or claims over which the district court has original jurisdiction,
>
> (3) the district court has dismissed all claims over which it has original jurisdiction, or
>
> (4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction.

28 U.S.C. § 1367(c).

Plaintiffs' state-law claims include a claim for breach of contract (count XIII), a claim for breach of the obligation to act in good faith under the Vermont Uniform Commercial Code (count XIV), and three claims for declaratory relief (counts XV–XVII). (Doc. 1 ¶¶ 271–301.)

The injury at the heart of all claims is the purported termination of the OC1 and OC3 contracts by VEPP, allegedly at the behest of the VPUC. Two of the three claims for declaratory relief allege that VEPP acted as an agent of the VPUC when it terminated Plaintiffs' PPAs (*see, e.g.*, *id.* ¶¶ 280, 287.)

Although the court has dismissed all claims over which it had original jurisdiction, the court finds that the first and second § 1367(c) factors counsel in favor of exercising supplemental jurisdiction over Plaintiffs' state-law claims. The state-law claims do not raise novel or complex issues of state law, and are closely related and do not predominate the claims over which the court had original jurisdiction. *See United Mine Workers of Am. v. Gibbs*, 383 U.S. 715, 727 (1966) ("There may . . . be situations in which the state claim is so closely tied to questions of federal policy that the argument for exercise of pendent jurisdiction is particularly strong.") The court considers whether VEPP is entitled to dismissal of the state-law claims under Fed. R. Civ. P. 12(b)(6).

Plaintiffs allege that VEPP breached the OC1 and OC3 contracts and the obligation to act in good faith by "wrongful[ly] terminat[ing]" the contracts. (Doc. 1 ¶¶ 272, 276.) Plaintiffs seek damages in the amount of future net income expected from the OC1 and OC3 projects or, alternatively, the sum of Plaintiffs' expected receipts over the 25-year lifespan of the OC1, OC2, and OC3 projects. (*Id.* ¶¶ 272–273, 276–277.) However, the factual allegations in the Complaint are insufficient to plausibly plead breach of contract or breach of good-faith obligation claims against VEPP. As described above, Plaintiffs have alleged that VEPP sent Plaintiffs a letter on February 6, 2020 "purporting to terminate" the contracts. (Doc. 1 ¶¶ 70–72, 257, 262.) Although Plaintiffs claim that this action "caused a serious financial loss" (*id.* ¶¶ 78–79), the Complaint alleges no facts regarding the contractual terms giving rise to VEPP's liability. Plaintiffs'

allegations regarding the consequences of the purported termination are likewise "no more than 'mere conclusory statements,' and do not present sufficient factual matter to state a plausible claim for relief." *Landmark Ventures, Inc. v. Wave Sys. Corp.*, 513 F. App'x 109, 111 (2d Cir. 2013) (quoting *Iqbal*, 556 U.S. at 678). Consequently, the court dismisses Counts XIII and XIV.

For similar reasons, the court also dismisses Plaintiffs' requests for declaratory relief based on the alleged conspiracy between the VPUC and VEPP. Plaintiffs allege that the VPUC's "June 2019 order was not issued in good faith, and was part of the Defendants' conspiracy against Plaintiffs." (Doc. 1 ¶¶ 280, 288.) Because of this, Plaintiffs seek declarations that the VPUC's order "constituted a default by VEPP under the OC1, OC2 and OC3 contracts" (Doc. 1 ¶ 283); that the order "prevented, hindered, and/or rendered impossible" certain of Plaintiffs' contractual obligations (*id.* ¶ 293); and that VEPP's "termination notices are invalid" (*id.* ¶ 292). But, as described above, the Complaint has not plausibly alleged that VEPP and the VPUC entered into a conspiracy together or that the injuries of which Plaintiffs complain were caused by the alleged conspiracy. Furthermore, the Complaint lacks nonconclusory allegations regarding the effects of the VPUC's June 2019 order on VEPP and on the parties' contractual obligations. Because the Complaint does not state a plausible claim for relief against VEPP related to the VPUC's June 2019 order, the court dismisses Counts XV and XVI.

Finally, the court dismisses Plaintiffs' request for a declaration that VEPP's termination notices are invalid under the doctrine of disproportionate forfeiture (Count XVII). The Complaint does not allege sufficient factual matter regarding the content of VEPP's termination notices, the condition that Plaintiffs seek to have excused, or the mechanism whereby Plaintiffs "would lose substantial amounts of the value of investments" in the OC1 and OC3 projects. (Doc.1 ¶¶ 296–298.) The Complaint's allegations on this point are too conclusory and

speculative to enable the court to draw any reasonable inferences about the misconduct alleged or VEPP's liability for that misconduct. *See Iqbal*, 556 U.S. at 678. Consequently, Count XVII must be dismissed.

**Conclusion**

The court GRANTS State Defendants' Motion to Dismiss (Doc. 27) and GRANTS VEPP's Motion to Dismiss (Doc. 29).

Dated at Rutland, in the District of Vermont, this 26th day of March, 2021.

Geoffrey W. Crawford, Chief Judge
United States District Court