Nos. 14-1597 & 14-1598 (Consolidated)

United States Court of Appeals
For the First Circuit

No. 14-1597

TOWN OF BARNSTABLE

Plaintiff - Appellant

HYANNIS MARINA, INC.; MARJON PRINT AND FRAME SHOP LTD.; THE KELLER COMPANY, INC.; ALLIANCE TO PROTECT NANTUCKET SOUND; SANDRA P. TAYLOR; JAMIE REGAN Plaintiffs

v.

ANN BERWICK, in her official capacity as Chair of the Massachusetts Department of Public Utilities; JOLETTE A. WESTBROOK, in her official capacity as Commissioner of the Massachusetts Department of Public Utilities; KATE McKEEVER, in his official capacity as Commissioner of the Massachusetts Department of Public Utilities; MARK SYLVIA, in his official capacity as Commissioner of the Massachusetts Department of Energy Resources; CAPE WIND ASSOCIATES, LLC; NSTAR ELECTRIC COMPANY

Defendants - Appellees

No. 14-1598

HYANNIS MARINA, INC.; JAMIE REGAN; ALLIANCE TO PROTECT NANTUCKET SOUND

Plaintiffs - Appellants

MARJON PRINT AND FRAME SHOP LTD.; THE KELLER COMPANY, INC.; SANDRA P. TAYLOR; TOWN OF BARNSTABLE Plaintiffs

v.

ANN BERWICK, in her official capacity as Chair of the Massachusetts Department of Public Utilities; JOLETTE A. WESTBROOK, in her official capacity as Commissioner of the Massachusetts Department of Public Utilities; KATE McKEEVER, in his official capacity as Commissioner of the Massachusetts Department of Public Utilities; MARK SYLVIA, in his official capacity as Commissioner of the Massachusetts Department of Energy Resources; CAPE WIND ASSOCIATES, LLC; NSTAR ELECTRIC COMPANY

Defendants - Appellees

(*Continued on inside cover*)

On Appeal from the Final Judgment of the United States District Court for the District of Massachusetts, No. 1:14-cv-10148-RGS

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Corporate Disclosure Statement

Defendant Cape Wind Associates, LLC states that it is a Massachusetts limited liability company owned by EMI Cape, LLC and Sound Wind, LLC, each of which is also a Massachusetts limited liability company. No publicly held company has a ten percent or greater ownership interest in Cape Wind Associates, LLC, EMI Cape, LLC, or Sound Wind, LLC.

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JURISDICTIONAL STATEMENT

Cape Wind does not contest this Court's jurisdiction under 28 U.S.C. § 1291 to hear an appeal of a final order and judgment by the U.S. District Court for the District of Massachusetts. Cape Wind contests, however, the subject matter jurisdiction of this Court because Appellants lack standing to bring any of their claims and because the Commonwealth's sovereign immunity bars suit against the named state officials in this proceeding.

STATEMENT OF THE ISSUES

In addition to the four issues identified by Appellants, the following issue is before the Court:

1. Whether Plaintiffs have Article III standing to pursue their Supremacy Clause or Commerce Clause claims.

STATEMENT OF THE CASE

I. Background

This case involves attempts by the Alliance to Protect Nantucket Sound, Inc. ("Alliance"), the Town of Barnstable ("Barnstable"), Hyannis Marina, Inc., and Jamie Regan (collectively, "Plaintiffs")[1] to retroactively nullify a bilateral contract that was freely negotiated and voluntarily executed in 2012 by two sophisticated

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[1] Throughout this brief, Plaintiffs-Appellants in this consolidated matter are referred to jointly as the "Plaintiffs."

private parties – NSTAR Electric Company ("NSTAR") and Cape Wind Associates, LLC ("Cape Wind") – pursuant to Section 83 of a state statute commonly known as the Green Communities Act, St. 2008, c. 169, § 83 ("Section 83").[2] Plaintiffs do not challenge the legality of the Green Communities Act in general or Section 83 in particular. Rather, Plaintiffs challenge the actions of the Commonwealth's Department of Energy Resources ("DOER") leading up to a settlement agreement with NSTAR in a proceeding before the Commonwealth's Department of Public Utilities ("DPU") involving NSTAR's proposal to merge with Northeast Utilities ("NU") (the "Settlement Agreement"). Among a broad array of topics, the Settlement Agreement included a provision pursuant to which NSTAR would *potentially* purchase from Cape Wind 27.5%, or up to 129 megawatts ("MW"), of the output of the Cape Wind Project[3] under a 15-year power-purchase agreement (the "PPA"). App. 125. The Settlement Agreement was independently approved by DPU following adjudicatory proceedings (D.P.U. 10-170).

Subsequently, NSTAR, Cape Wind and DOER entered into a Memorandum

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[2] Section 83 is provided in its entirety in the Addendum ("Add.") to this brief. Add. 9.

[3] For the past 13 years, Cape Wind has been pursuing the development of a 468 MW clean, renewable wind-energy generating facility offshore in the federal waters of Nantucket Sound (the "Project"). Although many of such facilities exist in Europe, the Project would be the first of its kind constructed in the United States.

of Understanding ("MOU"), executed pursuant to Section 83, in which Cape Wind and NSTAR agreed to begin bilateral negotiations with the objective of executing a PPA regarding the output from the Project. App. 252-53. The MOU was approved by DPU in a separate proceeding (D.P.U. 12-19). Thereafter, NSTAR and Cape Wind completed bilateral negotiations and, on March 23, 2012, executed the PPA, with NSTAR agreeing to purchase up to 129 MW of the Project's output. App. 272. Upon the petition of NSTAR, DPU approved NSTAR's proposed purchase under the PPA following adjudicatory proceedings (D.P.U. 12-30).

The fundamental premise of Plaintiffs' Complaint rests on its allegation that somehow DOER coercively used its "influence over NSTAR's merger request" to force NSTAR to purchase electricity from Cape Wind. Compl. ¶¶ 4, 106-08, 115-18. But the Alliance has raised these claims before. Notably, the Alliance participated in both DPU proceedings on the MOU and PPA and argued that DOER *forced* NSTAR to enter into the PPA. App. 106-07, 389-91. DPU considered the Alliance's claim of coercion by DOER and squarely rejected it in D.P.U. 12-30, finding that based on NSTAR's own testimony, NSTAR acted voluntarily in entering into a PPA with Cape Wind. App. 386-87, 400-02.

Rather than appeal DPU's final decision approving the PPA to the Supreme Judicial Court of Massachusetts (the "SJC"), Plaintiffs waited over 14 months after having let any state appeal rights lapse, to file an action in the District Court

asserting violations of: (a) the Supremacy Clause (*i.e.*, that DOER's negotiation as a party-advocate of the Settlement Agreement with NSTAR invaded the Federal Energy Regulatory Commission's ("FERC") jurisdiction over the setting of wholesale electric prices), and (b) the dormant Commerce Clause (*i.e.*, that DOER's action as a party-advocate discriminated against out-of-state renewable energy providers). The State Defendants, Cape Wind and NSTAR each filed motions to dismiss the Complaint on multiple grounds, including that: (1) Plaintiffs' claims are barred by Massachusetts' sovereign immunity under the Eleventh Amendment to the U.S. Constitution; (2) Plaintiffs lack standing to bring their claims; (3) the court should abstain from hearing the case under the *Burford* abstention doctrine; and (4) Plaintiffs fail to state a claim under the Supremacy Clause, the dormant Commerce Clause and 42 U.S.C. § 1983. App. 52-54; 558-60; 574.

The District Court dismissed the case as barred by the Eleventh Amendment because Plaintiffs were seeking impermissible retrospective relief (to undo DPU's past, historical approval of the PPA). Judge Stearns' Memorandum and Order (the "Order") at 18.[4] Further, the District Court stated that "Because the Eleventh Amendment requires that this case be dismissed, there is no reason to consider the

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[4] Plaintiffs provided a copy of the District Court's Memorandum and Order in their Addendum, as well as a copy of the Judgment. *See* Plaintiffs' Addendum at 1, 25.

additional grounds for dismissal advocated by defendants, other than to note that the result would be no different were the court to rule on the substance of the claims, whether brought independently under section 1983, or directly under the Supremacy Clause, or under the dormant Commerce Clause." Order at 22 (footnotes omitted). The final order stated: "For the foregoing reasons, the defendants' motions to dismiss are ALLOWED with prejudice. The Clerk will enter judgment for defendants and close the case." *Id*. at 23.

II. Litigation History Relating to Cape Wind

That the Alliance eschewed its appellate rights to challenge DOER's and DPU's actions immediately in Massachusetts state court is not surprising given the extensive litigation history of the Alliance and its supporters against Cape Wind. This appeal is only the most recent maneuver by Plaintiffs to use the courts to foreclose the development of the Project. Their strategy has been transparent and unabashed. Indeed, Plaintiffs' principal financing source – William Koch – has acknowledged that the relentless litigation by the Alliance is nothing more than a strategy of delay.[5]

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[5] William Koch is also the owner of a grand waterfront estate on Nantucket Sound. He has asserted that the Alliance's strategy for blocking the Cape Wind Project is "to just *delay, delay, delay*, which we're doing." App. 569.

To date, Plaintiffs have brought more than 30 administrative and court challenges against the Project, and Cape Wind has ultimately prevailed in each.[6] Most relevant to this proceeding, among the numerous challenges brought by the Alliance and its cohorts, was an appeal to the SJC of an approval by DPU in 2010 of a long-term PPA between another distribution company in Massachusetts, National Grid, and Cape Wind (the "National Grid–Cape Wind PPA") pursuant to Section 83. *See Alliance to Protect Nantucket Sound, Inc. v. Dep't of Pub. Utils.*, 959 N.E.2d 413 (Mass. 2011). The PPA at issue in this proceeding between NSTAR and Cape Wind is substantially similar to the contract executed by National Grid and Cape Wind as previously approved by DPU. *See* Compl. at ¶ 84. As noted by the District Court, the Alliance asserted in its appeal to the SJC in 2010 that DPU's approval of the National Grid–Cape Wind PPA violated the dormant Commerce Clause. Order at 9. The SJC rejected the Alliance's arguments, including the Alliance's standing to present a Commerce Clause claim, and affirmed DPU's decision. *See Alliance*, 959 N.E.2d at 422.

Subsequently, a separate group of plaintiffs with ties to the Alliance challenged the National Grid-Cape Wind PPA at FERC, asserting that, among other claims, DPU's approval of the PPA violated the Federal Power Act ("FPA") "by approving a contract for purchases of capacity and energy that . . . usurps

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[6] A compilation of the litigation history involving Cape Wind is provided in the Addendum to this brief. Add. 1.

[FERC's] exclusive jurisdiction to determine the rates for wholesale sales of electricity under its jurisdiction." *Californians for Renewable Energy, Inc. (CARE) & Barbara Durkin v. Nat'l Grid, Cape Wind & DPU*, Order Dismissing Complaint, 137 FERC ¶ 61,113, at ¶ 1 (2011), *reh'g denied*, 139 FERC ¶ 61,117; App. 56. FERC wholly rejected that claim, recognizing the distinct state retail role of DPU in approving National Grid's *purchase* decision under Section 83 and FERC's separate role under the PPA to approve the wholesale *sales* rate. FERC also noted that the PPA required review by FERC and there is "no requirement in the FPA or the Commission's regulations that the rates be filed [with FERC] before a retail filing, such as the Massachusetts filing that resulted in the Massachusetts [DPU] decision that it is the subject of [the] complaint." App. 68.

Plaintiffs attempt to impugn the integrity of the District Court and distance themselves from the litigious chaos that they have caused over the years. *See* Joint Opening Brief of Appellants ("Joint Br.") at 19-22. Plaintiffs, for example, assert that "two of the four Plaintiff-Appellants in this case, Hyannis Marina, Inc. and Jamie Regan, have never previously been involved in any litigation concerning Cape Wind." Joint Br. 19. While Hyannis Marina and Jamie Regan may not have been named parties in previous litigation concerning Cape Wind, Plaintiffs cannot seriously assert that Hyannis Marina and Jamie Regan have no connection with the Alliance and thus have not been virtually represented by the Alliance's dogged

strategy of delay. As a matter of public record, Plaintiff Hyannis Marina is owned by Wayne Kurker, a longstanding member of the Alliance Board. Mr. Kurker was a named plaintiff in the Alliance's unsuccessful challenge to this Court of a decision by the United States Army Corps of Engineers to issue a permit to the Project. *See Alliance to Protect Nantucket Sound, Inc. v. United States Department of the Army*, 398 F.3d 105 (1st Cir. 2005). Similarly, Mr. Regan is a long-time Alliance supporter. *See* Cape Wind Memorandum in Support of Motion to Dismiss (ECF Dkt. #28) at 7, n.8.

Plaintiffs also assert that they "have no relationship" to CARE, the co-litigant in the FERC proceeding relating to the National Grid-Cape Wind PPA. Joint Br. 19. This is likewise a misleading claim in light of the fact that the Alliance, CARE and Barbara Durkin,[7] a leading member of the Alliance, have been co-plaintiffs in *PEER et al. v. Beaudreau*, ___ F. Supp. 2d ___, No. 10-1067 *et al.*, 2014 WL 985394 (D.D.C. Mar. 14, 2014), a separate proceeding in which various parties have challenged certain of Cape Wind's federal approvals. This Court should not be deceived by the Plaintiffs' suggestion that Hyannis Marina and Mr. Regan are entering into the Alliance's litigation game for the first time, or that the Alliance has "no relationship" to its fellow opponents.

[7] Plaintiffs do not dispute their connection to Barbara Durkin, the other named petitioner at FERC. *See* Joint Br. at 19.

Against this backdrop, Plaintiffs have nothing left in pursuit of their delay strategy but the reassertion of meritless claims that have already been made elsewhere and rightfully lost. In part because of the extensive litigation history generated by the Alliance, the District Court was quite right that "[t]here comes a point at which the right to litigate can become a vexatious abuse of the democratic process." Order at 23-24, n.28.

III. The DPU Proceedings and the Independent Roles of FERC, DPU and DOER.

Plaintiffs' Complaint is predicated on a basic misstatement of the distinct roles of FERC, DPU and DOER, as well as the scope of three related proceedings before DPU.[8]

A. The Respective Roles of FERC, DPU and DOER

The FPA establishes FERC as having authority over "the *sale* of electric energy at wholesale in interstate commerce." 16 U.S.C. § 824(b)(1) (emphasis supplied). Thus, under the FPA, Cape Wind must obtain wholesale market-based rate authorization from FERC before it may commence sales under the negotiated

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[8] Copies of the DPU Orders cited in Plaintiffs' Complaint are provided in the Joint Appendix. *See* App. 133 (D.P.U. 10-170), 257 (D.P.U. 12-19), and 357 (D.P.U. 12-30).

rates in its PPAs. This same requirement is expressly incorporated into and stated as a prerequisite to the effectiveness of the PPA.[9]

The FPA, however, also preserves traditional state regulation of electric utilities by limiting FERC's authority "only to those matters which are not subject to regulation by the States." 16 U.S.C. § 824(a). Such traditional state roles include the oversight of utility decisions to enter into agreements such as the PPA to *purchase* electricity at wholesale under statutory provisions like Section 83. This division of authority is commonly known as the *Pike County* doctrine. *See Pike Cnty. Light & Power Co. v. Pa. Pub. Util. Comm'n*, 465 A.2d 735, 738 (Pa. Commw. Ct. 1983) (while FERC retains exclusive jurisdiction over interstate sales of energy at wholesale, state utility commissions *do* have jurisdiction to determine whether a utility should have *purchased* power from that source); *see also New York v. FERC*, 535 U.S. 1, 24 (2002) ("'This Final Rule [FERC Order 888] will not affect or encroach upon state authority in such traditional areas as the authority over . . . *administration of integrated resource planning and utility buy-side and demand-side decisions*, . . . [and] authority over utility generation and resource portfolios. . . .'") (emphasis added) (quoting FERC Order 888); *Commonwealth Elec. Co. v. Dep't of Pub. Utils.*, 491 N.E.2d 1035, 1045 (Mass. 1986), *cert.*

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[9] Section 3.4(l) of the PPA states under the title "FERC Status": "Seller shall… obtain and maintain any requisite authority to sell the output, including Capacity, of the Facility at market-based rates or an exemption from the requirement that it have such authority." App. 298.

denied, 481 U.S. 1036 (1987) ("[W]hile the DPU cannot inquire into the reasonableness of wholesale rates fixed by FERC, the DPU may inquire whether a purchaser . . . is warranted in agreeing to purchase at such a rate considering its alternatives.") (citations omitted).

Chapter 164 of the Massachusetts General Laws establishes DPU as the state agency empowered to exercise traditional state powers of utility regulation, including the "general supervision" of electric companies. *See* G.L. c. 164, § 76; *Alliance*, 959 N.E.2d at 431 ("G.L. c. 164, § 94, gives [DPU] broad power to enter orders concerning the 'rates, prices, charges and practices' in contracts for the sale of electricity by electric companies 'as the public interest requires.'"). In particular, Section 96(c) of Chapter 164 provides DPU with authority to approve proposed utility mergers, and Section 83 of the Green Communities Act grants DPU the exclusive authority to approve proposed long-term purchases of renewable energy by the state's electric companies.

In contrast, DOER is an energy planning and advocacy agency, with a statutory role to "advise, assist, and cooperate with other state, local, regional, and federal agencies in developing appropriate programs and policies relating to energy planning and regulation in the [C]ommonwealth." G.L. c. 25A, § 6(2). DOER lacks any authority over NSTAR's proposed merger, utility rate setting, or the negotiation or approval of the PPA. *See id.* Instead, DOER often intervenes in

DPU proceedings to participate as a party in order to advance the state's energy policies. G.L. c. 25A, § 6(2). Notably, the Alliance specifically acknowledged the absence of DOER's regulatory power in the proceedings before DPU. *See* App. 114-15 ("DOER was acting not in a sovereign capacity, but *as a mere party to the proceeding* before the DPU in D.P.U. 10-170 on the proposed merger") (emphasis added).

B. DPU's Approval of the NSTAR Merger (D.P.U. 10-170)

On November 24, 2010, NSTAR filed a joint petition seeking approval, pursuant to G.L. c. 164, § 96, to merge with NU. Compl. ¶ 60. DPU granted intervenor status to 16 parties in total, including DOER. During the course of DPU's review of the NSTAR-NU merger proposal, DOER and NSTAR negotiated the Settlement Agreement dated February 15, 2012, covering a comprehensive set of topics in support of the proposed merger, including substantial rate reductions, energy efficiency, solar investment, renewable energy procurement, electric vehicles, service quality, and post-merger employment and facility closings. App. 122-32, 159-71.

With regard to renewable energy procurement (the only provisions Plaintiffs contest as having been negotiated involuntarily by NSTAR), the Settlement Agreement included a provision pursuant to which NSTAR would *potentially* purchase up to 129 MW of the Project's output under "substantially the same"

terms as the National Grid-Cape Wind PPA, which had been previously approved by DPU and upheld by the SJC in a challenge brought by, *inter alios*, the Alliance. App. 125, 166; Compl. ¶ 77; *Alliance*, 959 N.E.2d 413. Neither NSTAR nor DOER could implement the terms of the Settlement Agreement without DPU approval of the merger. G.L. c. 164, § 96; App. 126, 130; Compl. ¶¶ 80-81.

DPU's consideration of the Settlement Agreement noted "the importance of the long-term renewable procurement provision of the [Settlement Agreement] . . . to demonstrate NSTAR Electric's 'commitment to advance the goals of the [Global Warming Solutions Act] and the [Green Communities Act].'" App. 227. DPU also noted that the Settlement Agreement "specifically states that [DPU]'s review of the Settlement does not constitute any form of review of the Cape Wind contract or approval or endorsement that the Cape Wind contract is in the best interests of ratepayers[.]" App. 227. On April 4, 2012, DPU issued a final order approving the NSTAR merger and the Settlement Agreement. App. 249; Compl. ¶ 87. No party appealed the DPU order and the merger was consummated in April 2012.

C. DPU Approval of the NSTAR-Cape Wind MOU (D.P.U. 12-19)

Under Section 83, the timetable and method for contracting with renewable energy developers are proposed by electric utilities in consultation with DOER, but must be reviewed and approved by DPU. *See* Section 83. The discretion to enter into a particular contract rests solely with the utility. *Id.* Consistent with Section

83, on February 24, 2012, NSTAR filed a petition seeking DPU approval of the MOU it negotiated with Cape Wind and DOER. Compl. ¶ 82; App. 252. Importantly, the MOU did not obligate NSTAR or Cape Wind to enter into an actual PPA. App. 259. The MOU provided that "[n]otwithstanding any other provisions of this MOU, this MOU does not create a legal obligation on the part of any Party to enter into a PPA. A PPA will be executed only if the terms are mutually agreeable to NSTAR Electric and Cape Wind." App. 256.

In the DPU proceeding, the Alliance asserted many of the same objections it alleges here; namely, that the MOU: (1) violated the U.S. Commerce Clause; and (2) was not voluntary because the terms had been illegally coerced by DOER as part of NSTAR's Settlement Agreement. App. 263. DPU did not rule on the merits of the Alliance's claims in D.P.U. 12-19, instead inviting the Alliance and others to raise any such concerns in a subsequent proceeding before DPU that would occur if NSTAR and Cape Wind later reached agreement on a PPA. App. 268-69. On March 22, 2012, DPU approved the MOU as compliant with the requirements of Section 83. App. 269-70. The Alliance appealed DPU's approval to the SJC, but subsequently abandoned its appeal. *See* App. 399; *Alliance to Protect Nantucket Sound, Inc. v. Department of Public Utilities*, No. SJ-2012-0171 (filed April 23, 2012; dismissed January 8, 2013).

D. DPU Approval of the NSTAR-Cape Wind PPA (D.P.U. 12-30)

After completing bilateral negotiations, NSTAR and Cape Wind reached agreement on March 23, 2012 on the PPA and NSTAR filed a petition under Section 83 with DPU seeking approval of the proposed purchase. App. 272, 367. The Alliance was granted full intervenor status to participate in DPU's adjudicatory proceeding. App. 368. DPU held three public comment hearings and two evidentiary hearings. App. 368-69. The evidentiary record consisted of over 200 exhibits, including direct and cross examination testimony and discovery responses. App. 369.

The Alliance argued before DPU the identical premise underlying all of its claims here: that DOER, acting solely as a party-advocate in the merger settlement negotiations, had illegally coerced NSTAR to contract with Cape Wind in order to have its merger approved. App. 389-91. After considering the evidence presented by all parties, DPU issued a decision on November 26, 2012, approving the PPA and flatly rejecting the Alliance's arguments regarding the voluntariness of NSTAR's actions, finding that:

> [NSTAR] testified that it voluntarily agreed to purchase output from the Cape Wind facility as part of the settlement agreement in D.P.U. 10-170 in order to effect a demonstration of net benefits, pursuant to G.L. c. 164, § 96. . . . The Company further testified that it considered the terms of the PPA between National Grid and Cape Wind to represent the best alternative for customers in terms of diversifying the Company's renewable portfolio and complying with renewable energy and environmental requirements. . . . The Company testified

> that it entered into the proposed PPA in order to capitalize on the Cape Wind facility's unique and significant benefits. . . . Further, with respect to the execution of the contract, the MOU expressly states that it "does not create a legal obligation on the part of [NSTAR Electric or Cape Wind] to enter into a PPA." . . . The MOU provides that a "PPA will be executed only if the terms are mutually agreeable to NSTAR Electric and Cape Wind." . . . For these reasons, we conclude that NSTAR Electric was not required to enter into the PPA.

App. 400-01. DPU also rejected the Alliance's arguments that the Settlement Agreement precluded meaningful negotiations between NSTAR and Cape Wind, and that DOER had acted beyond its authority. App. 401-04. DPU concluded that the PPA was "cost effective" in that the benefits of the PPA were greater than its costs, and therefore, approved it under Section 83 as being in the public interest. App. 503, 547.[10] The Alliance did not seek judicial review of DPU's final order. Instead, Plaintiffs waited 14 months to file this action in federal court, while letting lapse any rights it had to appeal the DPU's approval to the SJC.

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[10] DPU found that the projected costs of the Cape Wind facility are "reasonable compared to those of other offshore wind projects." App. 546. To the extent Plaintiffs now suggest that the presence of cheaper, land-based alternatives somehow renders the PPA illegal (*see* Joint Br. 10, 22, 27-28, 57), Plaintiffs misapply the cost-effectiveness standard applicable to Section 83 PPAs, as affirmed by the SJC. *Alliance*, 959 N.E.2d at 423-26. For example, the DPU recognized that the Cape Wind's reliability benefits exceed those of such remotely located alternatives and that "in comparison to onshore wind," Cape Wind would produce more energy when it is most needed and valuable. App. 480, 487. Plaintiffs' economic argument is thus based on the false premise that all energy is of equal value.

SUMMARY OF THE ARGUMENT

This Court should affirm the District Court's order and judgment dismissing the Plaintiffs' Complaint with prejudice for several reasons. *First*, Plaintiffs lack Article III standing to pursue any of their claims. Plaintiffs have utterly failed to satisfy the constitutional minima required under Article III to establish standing. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). Plaintiffs do not and cannot establish that they have suffered an "injury in fact" that is "fairly traceable" to the actions of the Defendants, and that the injury will "likely be redressed" by a favorable decision of this Court. *See id*. Most critically, Plaintiffs' claimed injury – higher future retail electricity rates as a result of the PPA – is entirely speculative and not actual or imminent. Indeed, Plaintiffs' claimed injury may never come to pass given the complex factors governing retail and wholesale electricity rates; Plaintiffs may in fact benefit from the PPA. Even if higher rates were to occur as a result of the PPA, any such injury is merely a "generalized grievance" that would be common to all approximately 1.1 million NSTAR customers. In addition, Plaintiffs' alleged injury is not fairly traceable to DOER because the Settlement Agreement in D.P.U. 10-170 expressly conditioned NSTAR's obligation to execute a PPA with Cape Wind on numerous other contingencies, including subsequent approvals by administrative agencies independent from DOER; namely, DPU and FERC. Lastly, Plaintiffs' alleged

injury of higher electricity costs is not redressable by a decision of this Court because even if the Court were to retroactively vacate DPU's approval of the PPA, there is no certainty that Plaintiffs' electricity costs would not increase anyway.

Second, the District Court was correct that Plaintiffs' claims are barred by the Commonwealth's sovereign immunity. To determine whether the "narrow" *Ex parte Young* exception is met (*Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 146 (1993)), a court conducts a "straightforward inquiry into whether a complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective." *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 296 (1997) (O'Connor, J., concurring in part and concurring in the judgment); *Verizon Md., Inc. v. Pub. Serv. Comm'n of Md.*, 535 U.S. 635, 645 (2002). Here, Plaintiffs have failed to surmount either element of the Supreme Court's "straightforward inquiry" test. Plaintiffs have failed to properly allege, with allegations that this Court must accept as true, *any* violation of federal law, let alone an ongoing violation of federal law. In fact, Plaintiffs conceded before the District Court that DOER is not committing an ongoing violation of federal law; thus, there is no ongoing conduct of DOER for the Court to enjoin. This is fatal to the Plaintiffs' claims because the entire premise of Plaintiffs' Complaint rests on alleged past wrongdoing by DOER. The Complaint does not contain a single allegation that *DPU* has violated or is continuing to violate federal law. And, even

if Plaintiffs' Complaint could somehow be read to properly allege an ongoing violation of federal law, Plaintiffs' requests for relief, as the District Court concluded, are clearly retrospective and are therefore barred by longstanding case law. Plaintiffs' attempts to establish otherwise are without merit.

Third, this Court plainly may affirm the District Court's Order on any independent ground made manifest by the record, including the merits of the Plaintiffs' claims. The District Court granted Defendants their full requested relief and dismissed Plaintiffs' Complaint "with prejudice." Order at 23. Accordingly, it would have been improper for Defendants to file a cross-appeal because, in this Circuit, "a party may not appeal from a favorable judgment." *Neverson v. Farquharson*, 366 F.3d 32, 39 (1st Cir. 2004) (citations omitted). Plaintiffs are simply wrong to claim that this Court lacks appellate jurisdiction to pass on the merits of Plaintiffs' claims.

Fourth, Plaintiffs have failed to state a claim for preemption. As Plaintiffs have acknowledged, federal law expressly permits the execution of bilateral contracts, such as the PPA in this proceeding, where, as here, the transaction is voluntary and freely negotiated. *See Morgan Stanley Capital Group, Inc. v. Pub. Util. Dist. No. 1 of Snohomish Cnty.*, 554 U.S. 527, 537 (2008). Contrary to Plaintiffs' threadbare and conclusory allegations otherwise, the record before this Court demonstrates conclusively that, based on NSTAR's own testimony to DPU,

NSTAR acted of its own free will in entering into the PPA. App. 255-56, 400-02. Plaintiffs conceded this critical point in oral argument before the District Court. Transcript at 62-63.

Even beyond the fact that NSTAR voluntarily entered into the PPA, Plaintiffs have failed to state a claim for preemption for the additional reason that neither DOER nor DPU in any way "set" a wholesale rate in contravention of federal law. DPU's Order does not purport to authorize Cape Wind to *sell* its output at a particular rate. Rather, it approves NSTAR's buyer-side decision to *purchase* power from Cape Wind under Section 83 as a matter of selecting from among alternatives and finds that the PPA's estimated benefits exceed its costs. The PPA itself, and the wholesale rate contemplated therein, do not actually take effect unless and until Cape Wind secures all requisite approvals from FERC, including wholesale sales authorization. In short, DPU's approval of the PPA was entirely consistent with the traditional division of functions between FERC and DPU. *See* App. 383, citing *Pike Cnty., supra*; *see also CARE*, 137 FERC ¶ 61,113, at ¶ 33 (App. 68); *California Public Utilities Commission et al.*, Order Denying Rehearing, 134 FERC ¶ 61,044, at ¶ 30 (2011). The Plaintiffs' preemption argument misapplies the distribution of authority between DPU and FERC, and therefore fails as a matter of law.

Fifth, the District Court was correct that Plaintiffs lack standing to bring their Commerce Clause claims because they do not compete in the wholesale power market and their mere status as retail end-use customers is insufficient to confer standing. Plaintiffs do not challenge any state law, regulation, tax, fee, constitutional provision, or any other such item cognizable as a barrier to interstate commerce under the Commerce Clause. The essence of Plaintiffs' claim is that they will someday be forced to pay above-market costs. Joint Br. at 56-57. However, the purpose of the Commerce Clause is to protect commerce from preferential or discriminatory treatment by a state against out-of-state competitors and the opportunity to participate economically in interstate commerce. *See Alliance*, 959 N.E.2d at 420-23. Plaintiffs' claim has none of these elements and should therefore be rejected.

ARGUMENT

I. Standard of Review

An appellate court will review *de novo* a district court's grant of a motion to dismiss, whether dismissal is granted pursuant to Rule 12(b)(1) or Rule 12(b)(6). *Coggeshall v. Mass. Bd. of Registration of Psychologists*, 604 F.3d 658, 662 (1st Cir. 2010). For purposes of review, the appellate court generally "will accept as true all material allegations in the complaint and construe them in plaintiffs' favor." *Blum v. Holder*, 744 F.3d 790, 795 (1st Cir. 2014). Critically, however,

this tenet "does not apply to statements in the complaint that merely offer legal conclusions couched as facts or are threadbare or conclusory." *Id.* at 795 (internal quotations and citations omitted); *see Schatz v. Republican State Leadership Comm.*, 669 F.3d 50, 55 (1st Cir. 2012) (under the *Twombly/Iqbal* standard for resolving a motion to dismiss, a court must "isolate and ignore statements in the complaint that simply offer legal labels and conclusions or merely rehash cause-of-action elements"). As the District Court rightly stated, a reviewing court is under no obligation to accept allegations as true "where, as here, documents referenced in the Complaint (specifically the DPU order) contradict on their face a supposed fact as plead" and where such allegations are "misleading and ultimately untrue." Order at 18, n.22.

For the reasons that follow, there are ample grounds to affirm the order below.

II. Plaintiffs Lack Article III Standing to Pursue Their Claims.

Plaintiffs do not have standing to bring either their Supremacy Clause or Commerce Clause claim because they allege only speculative, legally flawed and conclusory allegations of economic injury that do not satisfy the constitutional minima required under Article III. *Lujan*, 504 U.S. at 560-61 (Plaintiffs must demonstrate "injury in fact" that is "fairly traceable" to the actions of the defendant, and that the injury will "likely be redressed" by a favorable decision).

Plaintiffs are four NSTAR customers who speculate that, when the Project is operational, which under the current schedule is not until 2017, their electric bills will be higher due to the PPA.[11] Compl. ¶¶ 93, 95, 110-111, 120-121. For the reasons that follow, Plaintiffs lack standing and the Court should dismiss their claims. *Wash. Legal Found. v. Mass. Bar Found.*, 993 F.2d 962, 971 (1st Cir. 1993) (citing *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 541-42 (1986)).

A. Plaintiffs Cannot Establish Injury-in-Fact Because Their Alleged Injury of Higher Electricity Rates Is Speculative and Common to all NSTAR Customers.

Plaintiffs' alleged injury-in-fact—"higher electricity rates" (Compl. ¶ 97)—is not "concrete and particularized," but rather is "generalized" and "common" to all of NSTAR's more than one million customers. *Lujan*, 504 U.S. at 575. The Supreme Court has consistently held that:

> a plaintiff raising only a generally available grievance about government—claiming only harm to his and every citizen's interest in proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits him than it does the public at large—does not state an Article III case or controversy.

Lance v. Coffman, 549 U.S. 437, 439-42 (2007) (per curiam) (explaining that federal courts are not "a forum for generalized grievances"). For this reason, the

[11] NSTAR serves approximately 1.1 million customers. Neither the Alliance nor Barnstable alleges that they are acting in any representative capacity and therefore their alleged injuries must be construed as to them individually as retail customers of NSTAR.

District Court correctly observed that Plaintiffs cannot "claim standing as taxpayers or end use customers." Order at 23, n. 27; *see DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 344 (2006) ("Standing has been rejected in such cases because the alleged injury is not concrete and particularized, but instead a grievance the taxpayer suffers in some indefinite way in common with people generally.") (citations and quotations omitted).[12] While Plaintiffs attempt to distinguish themselves from the long line of taxpayer standing cases, courts have repeatedly refused to recognize "ratepayer standing."[13] *United States v. Michigan*, No. 77-71100, 2006 WL 1374471, at *2 (E.D. Mich. May 18, 2006) ("Allowing any retail ratepayer to object to any contract would be creating 'ratepayer standing'—a concept analogous to taxpayer standing, which the courts have consistently limited to unusual circumstances not present here.") (citing

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[12] Taxpayer standing is available only when plaintiffs "challenge a legislative enactment authorizing the expenditure of funds as violative of the [First Amendment's] Establishment Clause." *Members of Jamestown Sch. Comm. v. Schmidt*, 699 F.2d 1, 3 n.1 (1st Cir. 1983).

[13] Plaintiffs' reliance on *Selevan v. New York Thruway Authority*, 584 F.3d 82 (2d Cir. 2009), is misplaced. They assert that, like the plaintiffs in *Selevan*, they "allege that they *are* paying more money for electricity as a *direct* result of the Cape Wind contract." Joint Br. 59 (emphases added). But that is not correct: Plaintiffs allege only that they *will* at some future date pay more as an *indirect* result of that contract. By contrast, in *Selevan* "plaintiffs . . . contend[ed] that *they have been charged* an inflated toll rate," 584 F.3d at 89 (emphasis added). The *Selevan* plaintiffs were therefore "[the]msel[ves] an object of the action . . . at issue," and in such cases "there is ordinarily little question" as to standing. *Lujan*, 504 U.S. at 561.

Massachusetts v. Mellon, 262 U.S. 447 (1923)); *Citizens for an Orderly Energy Policy, Inc. v. Suffolk Cnty.*, 604 F. Supp. 1084, 1091 (E.D.N.Y. 1985).

In *Public Service Company of New Hampshire v. Patch,* 136 F.3d 197 (1st Cir. 1998), this Court for the same reasons rejected precisely Plaintiffs' claimed injuries in the context of intervention as of right under Fed. R. Civ. P. 24(a). *Patch* involved the deregulation of the New Hampshire electric utility market and an electric utility's numerous claims against the state public utility. Various ratepayers and ratepayer advocates sought to intervene in the suit, arguing that, if the Court were to strike down the deregulation plan it "would sunder their shared interest in obtaining lower electric rates" (*i.e.*, they would be injured by being forced to pay higher electric rates). *Id.* at 205. The Court affirmed the district court's denial of intervention, stating that "[i]t is settled beyond peradventure . . . that an undifferentiated, generalized . . . economic interest operates at too high a level of generality. After all, every electricity consumer in New Hampshire and every person who does business with any electricity consumer yearns for lower

electric rates."[14] *Id.* While the First Circuit has yet to rule on the issue specifically, the interest needed to establish standing under Article III is at least as great as the interest needed to intervene in federal court. *See Cotter v. Mass. Ass'n of Minority Law Enforcement Officers*, 219 F.3d 31, 34 (1st Cir. 2000) (generally noting the equivalent level of interests between intervention under Rule 24(a) and standing under Article III). As in *Patch*, Plaintiffs' claimed injury is identical "to those of all other consumers of electricity" served by NSTAR—some 1.1 million people. If that interest is too "generalized" to support intervention, it is surely not enough to establish standing to bring suit.

Moreover, Plaintiffs' alleged future injury of higher electric rates is neither actual nor imminent. Where standing depends upon allegations of future harm, as it does here, the Supreme Court has "repeatedly reiterated that 'threatened injury must be *certainly impending* to constitute injury in fact,' and that '[a]llegations of *possible* future injury' are not sufficient." *Clapper v. Amnesty Int'l USA*, 133 S.

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[14] Although this Court in *Patch* did not use the phrase "taxpayer standing," the district court opinion it affirmed leaves no doubt as to its doctrinal basis:

> [T]his sort of 'consumer interest' argument, akin to a 'taxpayer standing' claim, could be made any time a legal challenge is brought to a legislative or regulatory act that might affect market conditions in a given industry. If such a generalized consumer interest were sufficient to justify intervention, this would make the interest requirement of Rule 24(a)(2) so broad that it would become meaningless.

Pub. Serv. Co. of N.H. v. Patch, 173 F.R.D. 17, 26 (D.N.H. 1997).

Ct. 1138, 1147 (2013) (emphasis in original). At best, Plaintiffs allege only a *possibility* of future harm, but as DPU concluded "[i]t is possible . . . that the PPA will be below market, in which case NSTAR Electric will *credit customers* the difference." App. 549 (emphasis added). Because Plaintiffs may thus actually benefit economically from the PPA, *i.e.*, experience lower utility rates during the life of the contract, they cannot demonstrate imminent injury.

Plaintiffs' alleged injury is also "not imminent because it depends upon several tenuous contingencies." *Sea Shore Corp. v. Sullivan*, 158 F.3d 51, 56 (1st Cir. 1998). In *Sea Shore*, this Court rejected liquor retailers' challenge to state price-listing laws, where the alleged future injury depended on two intervening contingencies: that third parties would violate the laws to such an extent as to disadvantage a party that obeyed them, and that existing enforcement mechanisms would be insufficient "to alleviate the posited violations." 158 F.3d at 56-58. Here, Plaintiffs' asserted future injury depends on a far longer chain of contingencies. First, Cape Wind must begin offshore construction before December 31, 2015; otherwise by its terms, the PPA terminates. App. 292. Second, the Project must be constructed, a process that is expected to take approximately two years. Third, and perhaps most importantly, Cape Wind must obtain approval from FERC to sell its power to NSTAR at a wholesale rate. App. 297-98. DPU made clear in D.P.U. 12-30 that its "approval pursuant to Section 83

does not encompass a determination of the rate at which the power would be sold, which is subject to the jurisdiction of [FERC] pursuant to sections 205 and 206 of the [FPA], 16 U.S.C. §§ 824d, 824e." App. 383. Thus, FERC approval is needed before the PPA has any effect on Plaintiffs.

Finally, there is no certainty as to what the market prices will be when Cape Wind becomes operational in 2017, much less what market prices will be over the 15-year life of the PPA. In *Patch,* this Court correctly observed that "numerous market variables will impact . . . electric rates . . . [and] [w]hether the interaction of these variables will produce lower rates is anybody's guess, thus demonstrating the *fatally contingent nature of the asserted economic interest*." *Patch*, 136 F.3d at 206 (emphasis added). For the same reasons, Plaintiffs' asserted economic harm is fatally contingent on unknown future market variables. Because "[t]he challenge [here] is not rooted in the present, but depends on a lengthy chain of speculation as to what the future has in store, [this Court] . . . should always be hesitant to answer hypothetical questions." *Ernst & Young v. Depositors Econ. Prot. Corp.*, 45 F.3d 530, 538 (1st Cir. 1995). In sum, Plaintiffs do not have standing because they cannot demonstrate an "imminent" injury that is likely to occur, and likely to do so immediately. *Lujan*, 504 U.S. at 565, n.2.

B. Plaintiffs Cannot Demonstrate a "Causal Connection" Between Their Alleged Injury of Higher Electric Rates and DOER's Alleged Wrongdoing.

Even if Plaintiffs could establish injury-in-fact, they cannot show that it is "'fairly . . . trace[able] to the challenged action of the defendant,'" *Lujan*, 504 U.S. at 560. The fundamental premise of Plaintiffs' claimed economic injury is that DOER, acting in its capacity as a party-advocate before DPU in the NSTAR merger proceeding, used its "influence over NSTAR's merger request" to force NSTAR to enter into the Settlement Agreement under which NSTAR was required to purchase electricity from Cape Wind.[15] Compl. ¶¶ 4, 106-08, 115-18. But DOER has no authority to compel NSTAR or DPU to take any action and thus, Plaintiffs' claims are wholly without merit. *See infra* at V.B. Nevertheless, even if the Court were to accept Plaintiffs' allegation that NSTAR was forced to enter into the Settlement Agreement, Plaintiffs' alleged injury is not fairly traceable to DOER because the Settlement Agreement expressly conditions NSTAR's obligation to execute a contract with Cape Wind on numerous other contingencies.

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[15] Plaintiffs assert, in the most cursory fashion, that they will experience "negative impacts to the environment" and other vague harms. Compl. ¶ 98. These allegations do not confer standing because neither DOER nor DPU has the jurisdictional power to prevent the Project on these grounds. "'[W]here an agency has no ability to prevent a certain effect due to its limited statutory authority over the relevant actions, the agency cannot be considered a legally relevant 'cause' of the effect.'" *Town of Barnstable v. FAA*, 740 F.3d 681, 691 (D.C. Cir. 2014) (alteration in original) (quoting *Dep't of Transp. v. Pub. Citizen*, 541 U.S. 752, 770 (2004)).

Similarly, the PPA is expressly conditioned on Cape Wind obtaining FERC authorization to sell its power to NSTAR. If Plaintiffs have any injury at all, it is caused by the intervening and superseding actions of two independent third parties—DPU and FERC—not by DOER.[16]

As Plaintiffs concede, the Settlement Agreement was contingent upon DPU approval of the Agreement and the merger. App. 126, 130; Compl. ¶¶ 80-81. The Settlement Agreement also required that an MOU among NSTAR, Cape Wind, and DOER be filed with DPU to authorize contract negotiations between NSTAR and Cape Wind for the potential PPA. App. 126; Compl. ¶ 79. But the MOU expressly provides that it "does not create a legal obligation on the part of any Party to enter into a PPA," and that a "PPA will be executed only if the terms are mutually agreeable to NSTAR Electric and Cape Wind." App. 256. The Settlement Agreement further provides that the PPA must be approved by the DPU. App. 126. In addition to the contingencies set forth in the Settlement Agreement, the PPA provides that Cape Wind must obtain FERC approval to sell its power to NSTAR. Consequently, between DOER's alleged wrongdoing and Plaintiffs' alleged future injury, three independent proceedings before DPU have been held and Cape Wind must still secure FERC approval for the negotiated rates contained in the PPA.

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[16] Plaintiffs do not allege that DPU violated either the Supremacy Clause or Commerce Clause. *See* Compl. ¶¶ 107, 108 and 115.

Plaintiffs do not allege any wrongdoing by DPU or challenge the validity of any of the three DPU proceedings. Nor can they credibly contend that DPU's decisions regarding the Settlement Agreement, the MOU, and the PPA were predetermined by DOER's alleged wrongdoing since DOER has no authority whatsoever over the DPU. Indeed, the Alliance conceded the limitations of DOER's authority in DPU's adjudicatory proceeding on the merger, arguing that DOER was "a *mere party to the proceeding* before the DPU." App. 114 (emphasis added). DPU indisputably made its own independent judgment regarding the relative merits of the PPA. Neither can Plaintiffs credibly argue that DOER's alleged wrongdoing is determinative of FERC's future decision on Cape Wind's sale of its output to NSTAR. Where, as here, the injury complained of is "the result [of] the independent action of some third party"—in this case DPU and FERC—the alleged injury is not fairly traceable to the challenged action. *Lujan*, 504 U.S. at 560. Accordingly, Plaintiffs lack standing.

C. Plaintiffs' Alleged Injuries Are Not Redressable by the Court.

For the same reasons that Plaintiffs' alleged injury of higher electric costs is not imminent, it is not redressable by a favorable decision by the Court. It is based on the flawed assumption that the costs of the PPA will exceed market prices for electricity over the 15-year life of the PPA. As shown above, that is not the case; according to DPU, Plaintiffs may actually benefit from the PPA. App. 503.

Moreover, even if the Court were to invalidate the PPA, there is no certainty that Plaintiffs' electric costs would not increase. Just as in *Lujan*, where the Supreme Court held that the plaintiffs' alleged injuries were not redressable because the challenged actions contributed "only a fraction of" the funding for a foreign project and it was "entirely conjectural" whether other projects would do less harm if that fraction were eliminated, the PPA costs at issue here are a minute portion of NSTAR's overall rates. *Lujan*, 504 U.S. at 571; *see also Northern Laramie Range Alliance v. FERC*, 733 F.3d 1030, 1039 (10th Cir. 2013) (holding that ratepayers lacked standing to challenge costs associated with wind project because "redressability assumes future rates and actions by third parties that [the Court] cannot predict with any reasonable measure of comfort.").

III. The District Court Correctly Held That Plaintiffs' Claims Are Barred by the Commonwealth's Sovereign Immunity.

Cape Wind adopts and incorporates by reference the State Defendants' arguments in full that all of Plaintiffs' claims are barred by Massachusetts' sovereign immunity. However, several points warrant particular emphasis.

First and foremost, under the "straightforward inquiry" test, the Complaint contains absolutely no allegations, much less allegations that must be accepted as true, of an ongoing violation of federal law. Second, Plaintiffs do not seek relief that can properly be characterized as prospective. All of the alleged actions of

DOER and DPU are entirely completed. Plaintiffs conceded as much in their pleadings before the District Court. *See* Pls. Opp. Memo (ECF Dkt. # 48) at 26 ("But Plaintiffs are not contending that *DOER* is causing a continuing violation of federal law") (emphasis in original); ECF Dkt. #48, at 20 ("Plaintiffs are challenging the actions that state regulators took in forcing NSTAR into the Cape Wind contract and permitting NSTAR to pass on the costs of that contract to Plaintiffs. Each of those actions – including the DPU's passage of Order 12-30 – has already occurred"). As correctly determined by the District Court, the relief being sought by Plaintiffs is clearly retrospective as is "easily ascertained by turning to the specific demands" set out in the Complaint which, in the end, seek to "return the relationship between NSTAR and Cape Wind to the *status quo ante*." Order at 18-19. Thus, the relief sought by the Plaintiffs is barred by the Eleventh Amendment.

A. The Complaint Does Not Allege an Ongoing Violation of Federal Law.

Even through a generous review of the Complaint, Plaintiffs utterly fail to allege an *ongoing* violation of federal law. *See Schatz*, 669 F.3d at 55. The Complaint makes a variety of conclusory and threadbare allegations of an *historical* violation of federal law committed by DOER. Yet, each of these allegations is focused on DOER's past actions leading up to the Settlement Agreement in NSTAR's merger proceeding in D.P.U. 10-170. It is clear from the

Complaint that the Plaintiffs' case rests completely on the allegation that *DOER*, in the past, improperly and illegally coerced NSTAR to enter into the PPA with Cape Wind and that DOER's actions prior to the execution of the PPA amounted to violations of the Supremacy Clause and the dormant Commerce Clause. *See, e.g.*, Compl. at ¶¶ 107 ("DOER intruded on FERC's exclusive jurisdiction to regulate wholesale electric energy prices"), 108 ("DOER violated federal law and policy which requires wholesale electric energy prices to be set pursuant to freely-negotiated market transactions"); 115 ("DOER's actions had a discriminatory effect on out-of-state business and violated the dormant Commerce Clause"); 118 ("DOER used its influence to bring about a contract between NSTAR and Cape Wind because Cape Wind was located in Massachusetts, not because of the Commonwealth's interest in promoting renewable energy").

Nowhere does the Complaint properly allege any violation of federal law, let alone an *ongoing* violation of federal law by DOER, that could be prospectively enjoined by the Court. *See generally* Compl. Neither does the Complaint contain a single allegation that DPU has violated or is continuing to violate federal law. On brief to this Court, however, Plaintiffs now characterize their assertion of an ongoing violation of federal law by referring nebulously to the "state" as having improperly coerced NSTAR into the PPA. Joint Br. at 27. Vague references to the "state" in the Complaint and on brief, however, will not do. *See Bagheri v.*

Galligan, 160 Fed. Appx. 4, 5 (1st Cir. 2005) (per curiam) (to satisfy pleading requirements, a plaintiff must "state clearly which defendant or defendants committed each of the alleged wrongful acts"); *Gary v. McDonald*, 2014 U.S. Dist. LEXIS 65819, at *4 (D. Mass., May 13, 2014) (noting that "a plaintiff cannot 'lump' multiple defendants together").

With respect to DPU, all of its actions are likewise completed; DPU has approved both the subject PPA and a retail tariff allowing NSTAR to pass through any PPA-related costs. App. 551-55. Regarding the Plaintiffs' assertion now on brief that a pass-through of PPA costs in the future is a violation of federal law (*see* Joint Br. 32-33), Plaintiffs have it completely backwards. Quite simply, once Cape Wind secures FERC's authorization for the negotiated wholesale rate in the PPA, and once NSTAR seeks the recovery of its actual PPA costs in a separate proceeding before DPU, it would be a violation of federal constitutional law for DPU *not* to allow NSTAR to pass such costs on to customers. *See Entergy Louisiana, Inc. v. Louisiana Public Service Commission*, 539 U.S. 39, 47 (2003) (explaining that the "filed rate doctrine requires that interstate power rates filed with FERC or fixed by FERC must be given binding effect by state utility commissions determining intrastate rates" and that when the filed rate doctrine applies to state regulators, "it does so as a matter of federal pre-emption through the Supremacy Clause") (internal quotations omitted); *Nantahala Power and Light*

Co. v. Thornburg, 476 U.S. 953, 970 (1986); App. 551-55.[17] Plaintiffs cannot seriously allege that DPU's future exercise of its retail ratemaking function in separate proceedings, governed by the filed rate doctrine, amounts to a continuing violation of federal law.

B. The Relief Plaintiffs Seek Is Retrospective.

Plaintiffs fail to establish that the relief they seek is prospective. Plaintiffs acknowledge that "Massachusetts is immune from suit for retrospective relief" in describing their speculation of "substantial economic losses due to increased energy costs." Compl. ¶¶ 110, 120. Indeed, that is the case. As the Supreme Court found in *Green*, sovereign immunity bars suit where there was "no claimed continuing violation of federal law, and therefore no occasion to issue an injunction." *Green v. Mansour*, 474 U.S. 64, 73 (1985); *see also Papasan v. Allain*, 478 U.S. 265 (1986). This Circuit has likewise emphasized the importance of the difference between prospective and retrospective relief. *See, e.g., Whalen v. Mass. Trial Court*, 397 F.3d 19, 29 (1st Cir. 2005).

Plaintiffs argue on brief that they are seeking prospective relief to "block the legal effect of Order 12-30, which ratified the state's coercive influence in bringing

[17] To emphasize, DPU did not purport to authorize Cape Wind to make sales at wholesale at specific rates in approving the PPA. App. 383. DPU approved only the purchase and the mechanism by which NSTAR would be able to pass such costs on to customers as a matter of retail ratemaking, if the wholesale rates are later authorized by FERC. App. 551-55; *see Nantahala*, 476 U.S. at 970.

the PPA into existence, and approved the PPA thereby making it effective." Joint Br. at 28. Fairly translated, however, Plaintiffs seek the rescission and nullification of a bilateral PPA, negotiated and entered into freely by two private parties, and subsequently approved by DPU. As noted by the District Court, Plaintiffs are not seeking to restrain DPU from approving future contracts between NSTAR and Cape Wind (or even third parties), "but to undo a contract already in force by way of a declaration that state officials violated federal law in the past." Order at 20, n.24. In seeking to void DPU's approval of the PPA, Plaintiffs are seeking relief that is "quintessentially retrospective." *Republic of Paraguay v. Allen*, 134 F.3d 622, 628 (4th Cir. 1998) ("But when the essence is considered, the only presently effective relief sought for the violations claimed and conceded is quintessentially retrospective: the voiding of a final state conviction and sentence."). That the Plaintiffs seek injunctive relief directed at state officials "does not alter the inescapable fact" that it is designed to "undo accomplished state action" and not to enjoin the continuation of a past violation. *Id.*

Plaintiffs' claim on brief that there will be ongoing effects from DPU's enforcement of the PPA is irrelevant and misapprehends the effect of DPU's final decision in D.P.U. 12-30. *See* Joint Br. 32-34. The critical point, as the District Court noted, is that DPU has no further authority under law to approve or disapprove the PPA. *See* Order at 19, n.23. The PPA approval by DPU is a

completed, historical fact and, as Plaintiffs have conceded, there is no further action for DPU to take with respect to approving the PPA.[18] *See* ECF Dkt. #48, at 20.

Negron-Almeda and other cases cited by Plaintiffs do not require a different result. *See* Joint Br. 35-39; *Negron-Almeda v. Santiago*, 579 F.3d 45 (1st Cir. 2009). The doctrine illustrated in *Negron-Almeda* is clearly distinguishable in that the employer has not just fired the plaintiff in the past, but is "keeping [them] out of" their position on an *ongoing* basis or would "deny[] them employment *in the future*." *See Elliot v. Hinds*, 786 F.2d 298, 302 (7th Cir. 1986) ("Elliott's alleged wrongful discharge is a continuing violation; as long as the state official keeps him out of his allegedly tenured position the official acts in what is claimed to be derogation of Elliott's constitutional rights."); *Doe v. Lawrence Livermore National Laboratory*, 131 F.3d 836, 841 (9th Cir. 1997).

In the employment context at issue in *Negron-Almeda*, improper termination and the relief of reinstatement are flip sides of the same coin. That is far different from the facts here, where the DPU has approved NSTAR's purchase decision under Section 83, but in order for the PPA to be effective, Cape Wind still must obtain separate FERC authorization for the wholesale sale under the FPA. And,

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[18] Plaintiffs argue DPU's continuing role in implementing NSTAR's tariff, but DPU has already approved the tariff, which recovers the costs incurred from all of its renewable energy PPAs under Section 83. Thus, DPU's decision-making role regarding the tariff is complete.

only thereafter, once costs are actually incurred under the PPA, which will be years in the future, will DPU in later proceedings and under different statutory authority undertake the ministerial review of NSTAR's proposed flow through of FERC-approved wholesale costs into retail rates, as it is required to do under the filed rate doctrine.[19] Those are separate and distinct actions by different regulatory agencies operating under different statutory frameworks, and occurring at different points in time, marked by a series of disparate intervening events, which do not represent an ongoing violation of federal law.

Plaintiffs' reliance on *Irizarry* is also inapt. *See* Joint Br. at 38-39. The defendants in *Irizarry* had claimed on appeal that the portion of the district court's injunction order requiring a state entity "to establish a regulatory accrual account constituted issuance of retroactive compensatory relief, in violation of defendant's sovereign immunity." *Vaqueria Tres Monjitas, Inc. v. Irizarry*, 587 F.3d 464, 472 (1st Cir. 2009). This Court specifically "*decline[d] to rule* on plaintiffs' characterization of the regulatory accrual as prospective" because the Court determined that other arguments provided a sufficient basis for its conclusion that none of the compensation would come from the state treasury. *Irizarry*, 587 F.3d

[19] In addition, unlike in *Negron-Almeda* (where the loss of employment and the associated harm is certain and immediate), the Plaintiffs' alleged harm of higher rates once DPU authorizes the pass through of costs is speculative. *See Nantahala*, 476 U.S. at 967-68 ("the courts [have] observed that an increase in FERC-approved wholesale rates need not lead to an increase in retail rates"), citing *Narragansett Electric Co. v. Burke,* 381 A.2d 1358 (R.I. 1977).

at 478 (emphasis added). Thus, *Irizarry* is not dispositive on the issue of determining whether requested relief is retroactive or prospective.

Plaintiffs also make much of the District Court's discussion on the potential monetary ramifications in the event the District Court granted the requested declaratory and injunctive relief. Joint Br. at 28-32. But such issues were not the fundamental basis for the District Court's judgment and, as the District Court recognized, impacts to the public treasury are clearly not the sole interest underlying a state's sovereign immunity. Order at 17, citing *Muirhead v. Meacham*, 427 F.3d 14, 18 (1st Cir. 2005); *see also Va. Office for Prot. & Advocacy v. Stewart*, 131 S.Ct. 1632, 1638 (2011); *Fed. Maritime Comm'n v. S.C. State Ports Auth.*, 535 U.S. 743, 766 (2002) ("Sovereign immunity does not merely constitute a defense to monetary liability or even to all types of liability. Rather, it provides an immunity from suit."); *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 58 (1996). The "preeminent purpose of [sovereign immunity] is to accord States the dignity that is consistent with their status as sovereign entities." *Fed. Maritime Comm'n*, 535 U.S. at 760; *Vaqueria Tres Monjitas v. Pagan*, 748 F.3d 21, 26-27 (1st Cir. 2014). It is simply incorrect that the Eleventh Amendment bars claims only for money damages. *Coggeshall*, 604 F.3d at 662, n.4 ("We do not imply that the Eleventh Amendment bars claims only for money damages. That is not the case.").

Lastly, Plaintiffs' attempt to distinguish *Tyler* also fails. *See* Joint Br. 39, n.10. Plaintiffs contend that "there was no future legal effect of the acknowledgement of paternity" in *Tyler* (*id.*), but Plaintiffs are plainly wrong. In *Tyler*, there were serious, ongoing effects by forcing a rape victim, against her wishes, to cooperate with her perpetrator by virtue of a condition of the rapist's 16-year probation that required the rapist to acknowledge paternity and to abide by any child support orders issued by the Probate and Family Court, including the potential for visitation rights in the future. *Tyler v. Massachusetts*, 981 F. Supp. 2d 92, 94 (D. Mass. 2013). The "ongoing effects" in *Tyler* are both obvious and compelling. Nevertheless, sovereign immunity barred the rape victim's claim. *Id.* at 95-96. In any event, the District Court here rejected Plaintiffs' "ongoing effects" argument, noting that "the doctrine if applied would have the effect of vitiating the right guaranteed to the States in the Eleventh Amendment to be free from unconsented suits in the federal courts." Order at 20-21.

IV. The Court Can and Should Consider Alternative Grounds for Dismissal.

Plaintiffs argue that this Court should not decide their appeal on grounds other than the Eleventh Amendment because the Defendants did not file a cross appeal and should not be permitted to enlarge the judgment. Joint. Br. at 40. But this Court may affirm the District Court's Order on any independent ground made manifest by the record, including the merits of the Plaintiffs' claims. *DeAndrade*

v. Trans Union LLC, 523 F.3d 61, 68 (1st Cir. 2008) ("'[W]e are not committed to the district court's reasoning, but, rather, may affirm its order on any independent ground made apparent by the record.'") (citations omitted). Moreover, where complete relief was requested by Defendants in the District Court and was granted, the filing of a cross appeal is not only unnecessary, it would be an improper procedure.

The District Court granted Defendants their full requested relief and dismissed Plaintiffs' complaint "with prejudice." Order at 23; Judgment (incorporating by reference order of dismissal). Defendants do not seek to "enlarge the judgment" because the Judgment was exactly what Defendants sought: a dismissal with prejudice of Plaintiffs' entire case. In this Circuit, "a party may not appeal from a favorable judgment." *Neverson*, 366 at 39. Here, Cape Wind merely seeks to defend the dismissal "on an alternate legal ground that is manifest in the record. . . . [and] [t]here is no defect in [this Court's] appellate jurisdiction." *See id.* at 39. "Under these circumstances, a cross-appeal would have been improper." *Id.* (citing *Alberty-Velez v. Corp. de P.R. Para La Difusion Publica*, 361 F.3d 1, 5 n.4 (1st Cir. 2004)).

Plaintiffs' citation to *Haley v. City of Boston*, 657 F.3d 39 (1st Cir. 2011), is off-point because in that case "[t]he district court dismissed Haley's state-law malicious prosecution claim *without prejudice* . . . [and] [t]he defendants

asseverate[d] that th[e] claim should have been dismissed *with prejudice*. . . ." *Id.* at 53 (emphases added). Thus, *Haley* does not support Plaintiffs' argument because the controlling facts in that case are inapposite to those here where Defendants were granted a dismissal with prejudice of the entire case. Defendants merely seek to defend, and not to expand, their rights under the judgment below in urging alternative grounds for affirmance.

Further, Plaintiffs are wrong when they assert that a dismissal on grounds of sovereign immunity must necessarily be without prejudice. Joint Br. at 41. This Court has repeatedly affirmed sovereign-immunity and other jurisdictional dismissals that were granted with prejudice. *E.g.*, *Baez v. Connelly*, 478 Fed. Appx. 674, 675 (1st Cir. 2012) (per curiam) ("We also find no error in the district court's dismissal with prejudice of the claims against [certain law-enforcement officers] in their official capacities. Those claims are barred by principles of

sovereign immunity."); *Sanchez ex rel. D.R.S. v. United States*, 671 F.3d 86, 89 (1st Cir. 2012).[20]

Lastly, Plaintiffs urge this Court to "decline as a matter of discretion" to entertain alternative grounds for affirmance. Joint Br. at 43. But they fail to give any reason why the Court should do so. Cape Wind respectfully submits that Plaintiffs' motive is transparent: they seek to continue their attempts to run the clock out on the Project, this time by thwarting the principles of judicial economy and arguing for a needless remand should they prevail on sovereign immunity (which they should not). The alternative grounds for affirmance offered here are questions of law that are all manifest in the record and briefs.

V. Plaintiffs Cannot As a Matter of Law State a Claim for Preemption.

On brief, Plaintiffs assert that they have stated a claim for preemption and that the District Court's conclusions in this regard were incorrect. Joint Br. 45. According to the Plaintiffs, the Supremacy Clause "does not permit Massachusetts

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[20] All of Plaintiffs' authority is distinguishable. Central to the decision in *Mills v. Harmon Law Offices, P.C.*, 344 F.3d 42 (1st Cir. 2003) was the federal removal statute that mandates a remand and not a dismissal with prejudice. This Court held that the language of the federal removal statute, 28 U.S.C. § 1447(c), "unambiguously precludes federal courts from reaching the merits *of a removed case* when it lacks subject matter jurisdiction over the dispute." *Id.* at 45 (emphasis added). But removal from state to federal court is not at issue in this case, and therefore *Mills* is distinguishable. And in *Ernst v. Rising*, 427 F.3d 351, 367 (6th Cir. 2005), the court noted that jurisdictional dismissals with prejudice are appropriate in certain circumstances. The District Court's reference to Plaintiffs' "vexatious abuse of the democratic process" is certainly justification enough. Order at 23, n.28.

to achieve indirectly, through the exercise of its regulatory leverage over mergers, what it plainly would be barred from achieving directly." Joint Br. 47-48. In so doing, Plaintiffs continue to misstate the authority of DOER with respect to NSTAR and DPU and ignore the fact that, based on NSTAR's testimony, DPU conclusively determined that NSTAR acted voluntarily in electing to contract with Cape Wind.

The District Court correctly concluded that Plaintiffs failed to state a preemption claim.

A. NSTAR Acted Voluntarily in Electing to Contract With Cape Wind.

First, there is no preemption in this instance because the FPA creates a system of harmonious and "interlocking" jurisdiction between FERC and the states within which this case comfortably fits. *See, e.g., Pub. Utils. Comm'n of Cal. v. FERC*, 900 F.2d 269, 274-75 (D.C. Cir. 1990); *Conn. Light & Power Co. v. Fed. Power Comm'n*, 324 U.S. 515, 525-31 (1945). Critically, Plaintiffs do not make any allegation that Section 83 is preempted by the FPA. As Plaintiffs acknowledge, according to the Supreme Court, federal law permits the negotiation of bilateral contracts, such as the PPA, which become effective as wholesale rates after receiving FERC authorization. *See Morgan Stanley*, 554 U.S. at 537.

The record before this Court demonstrates conclusively that *NSTAR acted of its own free will* in entering into the PPA and this Court is not bound to accept

Plaintiffs' threadbare and conclusory allegations otherwise that are contrary to law and at odds with documents referenced in the Complaint. App. 255-56, 400-02; *see Blum*, 744 F.3d at 795. The Plaintiffs' vague and fictional account of what "Massachusetts" purportedly imposed unilaterally on NSTAR does not represent a well pled fact that must be accepted as true (*see Gary*, 2014 U.S. Dist. LEXIS 65819, at *4); in any event, it is belied by adjudicated facts determined by DPU.

As NSTAR testified before DPU, and DPU found, NSTAR was not forced to enter into the PPA with Cape Wind by either DOER or DPU; instead, it was a voluntary decision made by NSTAR in its independent business judgment. App. 386-87, 400-02. DPU specifically concluded that NSTAR "voluntarily agreed to purchase output from Cape Wind" to "capitalize on the Cape Wind facility's unique and significant benefits." App. 400-01. Moreover, the MOU executed prior to the PPA provides that the MOU "*does not create a legal obligation* on the part of [NSTAR Electric or Cape Wind] to enter into a PPA" and that a "PPA will be executed *only if* the terms are *mutually agreeable* to NSTAR Electric and Cape Wind." App. 401, citing App. 256 (emphasis added). In fact, in response to questions from the District Court regarding the voluntariness of NSTAR's actions throughout, Plaintiffs' counsel conceded that NSTAR was "free" to walk away from the negotiations with DOER in D.P.U. 10-170 to the extent NSTAR

considered the terms unpalatable. Transcript pp. 62-63.[21] Thus, the Plaintiffs have not plausibly alleged that NSTAR acted involuntarily in electing to enter into the PPA.

B. DOER Lacks Authority to Compel Any Action by NSTAR.

Even aside from NSTAR's testimony and the express language of the MOU demonstrating that NSTAR voluntarily entered into the PPA, it is equally clear that DOER had no authority to compel NSTAR or DPU to take any action. Simply stated, there can be no coercion where there is no authority.

Contrary to the Plaintiffs' claims, DOER had absolutely no power to "approve" NSTAR's merger with NU. *See* Joint Br. 47. DOER is a policy and advocacy agency charged with developing and promoting energy initiatives (G.L. c. 25A, § 6). DOER has no regulatory authority over proposed mergers, the approval of Section 83 contracts, or the setting of retail or wholesale rates. In DPU adjudicatory proceedings, DOER is merely a party-advocate, free to pursue whatever position it wants, without the authority to compel or force NSTAR to do anything. And, like its review of positions taken by any party before it, DPU may accept or reject recommendations from DOER, as it did in the NSTAR merger proceeding. App. 84-86, 101-04. In approving the PPA, DPU made its own

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[21] Plaintiffs' counsel stated as follows: "And to answer your Honor's previous question, why didn't NSTAR just walk away, it was free to do that, sure, but it also had the privilege under state law of merging." Transcript at 62-63.

judgment regarding the relative merits of the PPA, irrespective of positions taken by DOER.

To contest this point, Plaintiffs attempt to create a false equivalence between: (1) the actions of a party-advocate (*i.e.*, DOER) and a private party acting in its own interest (*i.e.*, NSTAR) in pursuit of a settlement agreement in a merger proceeding; and (2) a state statute or administrative order specifically directing and compelling NSTAR to take a particular action. *See* Joint Br. 47-50. This claim does not withstand scrutiny. The Plaintiffs' argument that "Massachusetts" (*i.e.*, DOER) cannot use its "regulatory leverage over mergers" to do indirectly what it could not do directly, *see* Joint Br. 47-48, misses the mark because Plaintiffs' analysis assumes that the underlying "direct or indirect" action of the state has the force and effect of law, such as a statute or regulatory mandate. *See, e.g., 520 S. Mich. Ave. Assocs., Ltd. v. Shannon*, 549 F.3d 1119, 1129 (7th Cir. 2008) (analyzing whether a state statute was preempted by federal law). Because as a party-advocate DOER had no legal authority, either direct or indirect, to require or approve anything relating to the Merger, the Settlement Agreement or the PPA, the Plaintiffs' argument is meritless. *See* G.L. c. 25A, § 6(2); *see, e.g.*, *Am. Airlines, Inc. v. Wolens*, 513 U.S. 219, 233 (1995) (recognizing "distinction between what the State dictates and what [a party] itself undertakes" in preemption analysis).

C. Neither DOER nor DPU Set a Wholesale Rate in Contravention of Federal Law.

DOER and DPU did not in any way set a wholesale rate in contravention of the FPA. As DPU stated in D.P.U. Order 12-30, "[t]he [DPU]'s approval pursuant to Section 83 does not encompass a determination of the rate at which the power would be sold, which is subject to the jurisdiction of [FERC] pursuant to sections 205 and 206 of the Federal Power Act, 16 U.S.C. §§ 824d, 824e." App. 383. DPU approval under Section 83 "is an approval of an electric distribution company's decision to enter into a long-term contract with a renewable energy developer and the attendant cost recovery in light of the alternatives." *Id*., citing *Pike Cnty., supra*; *see also California Public Utilities Commission et al.*, Order Denying Rehearing, 134 FERC ¶ 61,044, at ¶ 30 (2011) ("it is the *states* that have the authority to dictate a utility's actual purchase decisions") (emphasis in original). DPU's final decision does not authorize Cape Wind to sell its output at a particular rate. Rather, it approves NSTAR's decision to *purchase* power from Cape Wind as a matter of selecting from among alternatives and it finds that the PPA's benefits exceed its costs. App. 383-84.

Plaintiffs' current allegation on brief (but never stated in the Complaint) that DPU set a wholesale rate in approving the PPA is wrong as a matter of law, because the actions of DPU dealt exclusively with reviewing NSTAR's *buyer*-side decision to *purchase* under the PPA, a matter within the regulatory authority

clearly reserved to the states, and DPU did not authorize Cape Wind to *sell* on such terms (a distinct matter of seller-side authorization reserved to FERC). *See Pike Cnty.*, 465 A.2d at 738. As the District Court concluded, the "allegation that DPU dictated that NSTAR procure power from Cape Wind at a specified price is misleading and ultimately untrue." Order at 18, n.22.

Plaintiffs' allegations that DOER utilized its "regulatory authority" to dictate pricing to NSTAR is likewise facially wrong. *See* Joint Br. 46-48. In no way did DOER impose a wholesale rate of any kind, nor could it. DOER was not a signatory to the PPA that established the actual pricing terms and it had no regulatory authority to require NSTAR to do anything. The terms of the Settlement Agreement, MOU and PPA were willingly accepted by NSTAR, exercising its considered business judgment. Thus, there is no merit to the Plaintiffs' bare assertion that DOER infringed upon FERC's wholesale rate authority.

D. FERC Has Already Validated DPU's Section 83 PPA Review Process.

The PPA will not take effect unless and until, among other conditions precedent, Cape Wind secures all requisite approvals in the future, including authorization from FERC. App. 297-98. The seed of the Plaintiffs' Supremacy Clause argument was first planted in 2011 at FERC, but FERC nipped it in the bud. In *CARE v. Nat'l Grid, Cape Wind & DPU*, CARE and Barbara Durkin (a member

of the Alliance) filed a complaint specifically alleging that DPU's approval of the National Grid-Cape Wind PPA violated the FPA because it "usurps" FERC's exclusive jurisdiction. *CARE*, 137 FERC ¶ 61,113, at ¶ 1 (2011); App. 56. On this precise issue, FERC acknowledged the independent state role of DPU in approving National Grid's *purchase* decision under Section 83, noting that the PPA required separate review by FERC and there is "no requirement in the FPA or the Commission's regulations that the rates be filed [with FERC] before a retail filing, such as the Massachusetts filing that resulted in the Massachusetts [DPU] decision that is the subject of [the] complaint." *Id.* at ¶ 33; App. 68.

Accordingly, FERC has specifically granted its imprimatur to the division of authority between FERC and DPU with respect to power contracts, such as the PPA, that are executed pursuant to Section 83 and found that the authority of the two agencies do not conflict. There is no basis for a distinction here.

E. <u>Plaintiffs' Reliance on *Nazarian* Is Misplaced.</u>

Plaintiffs try futilely to find support from the Fourth Circuit's recent decision in *Nazarian*. *See, e.g.,* Joint Br. 46-50, citing *PPL EnergyPlus, LLC v. Nazarian*, 974 F. Supp. 2d. 790 (D. Md. 2013), *aff'd*, 753 F.3d 467 (4th Cir. 2014). But *Nazarian* gets Plaintiffs nothing in this proceeding. In *Nazarian*, both the district court and the Fourth Circuit Court of Appeals found preemption only where a state agency with adjudicatory authority actually forced a utility to make a

purchase at a state-mandated price. In *Nazarian*, the Maryland Public Service Commission (the "PSC") issued an order that *compelled* utilities to enter a PPA at pricing determined unilaterally by the PSC that required those utilities to reimburse the generators' costs of financing. 974 F. Supp. 2d. at 831, n.48 ("PSC Chairman Nazarian testified that the contract price accepted by the PSC in the Generation Order represented a unilateral decision by the PSC. . . .").

In contrast to *Nazarian*, here there was no compulsion regarding a state-determined rate because: (1) there was no state law or regulatory order that forced the PPA or set the wholesale rate; (2) DPU approved a contract with price terms negotiated independently by two sophisticated parties; (3) in contrast to a compulsory or unilateral mandate, here DPU approved NSTAR's own petition voluntarily requesting approval of its purchase proposal; and (4) DPU, in its review of NSTAR's purchase under the PPA, did not authorize Cape Wind's *sale* at wholesale rates. These same distinctions apply with equal force to a similar, recent decision of the Third Circuit regarding a case Plaintiffs relied upon before the District Court. *See PPL EnergyPlus, LLC v. Hanna*, 977 F. Supp. 2d 372 (D. N.J. 2013), *aff'd*, *PPL EnergyPlus, LLC v. Solomon*, Case No. 13-4330 (3d Cir. 2014). Accordingly, the instant proceeding is both factually and legally distinguishable from *Nazarian* and *Hanna/Solomon*.

VI. Plaintiffs Are Not Within the Class of Persons Protected by the Dormant Commerce Clause.

The essence of Plaintiffs' complaint is speculation that, if NSTAR had been permitted to obtain electricity from competing out-of-state sources, Plaintiffs as "ratepayers" would pay less for electricity. Compl. ¶¶ 94-97. Plaintiffs argue that they have Article III standing and "prudential standing" to pursue these claims because they "are bearing the *entire* economic burden" of those costs. Joint Br. at 63 (emphasis in original). Not so. As shown in Section II, *supra,* Plaintiffs lack Article III standing to bring any of their claims.

Plaintiffs also fail to state a claim under the Dormant Commerce Clause ("Commerce Clause") because: (1) their asserted injury is not within the zone of interests that the Clause protects; and (2) their alleged "injury" is not proximately caused by any alleged violation of the Commerce Clause. The Supreme Court has recently clarified the zone-of-interests doctrine with regard to a legislatively conferred cause of action and branded prudential standing a "misnomer." *Lexmark International, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1387 (2014). The Supreme Court explained that "[w]hether a plaintiff comes within the 'zone of interests' is an issue that requires us to determine, using traditional tools of statutory interpretation, whether a legislatively conferred cause of action encompasses a particular plaintiff's claim." *Id.* at 1387. In other words, the

doctrine does not require a court to consult its own notions of "prudence," but rather to determine legislative intent.

In *Lexmark*, the Court considered a claim under the Lanham Act, but its analytical construct is equally applicable to the Dormant Commerce Clause. The question remains whether the provision at issue "encompasses a particular plaintiff's claim."

A. Plaintiffs' Asserted Injury Is Not Within the Zone of Interests that the Commerce Clause Protects.

Plaintiffs' claim is not cognizable under the Commerce Clause. In its dormant aspect, the Commerce Clause "'confers a 'right' to engage in interstate trade free from restrictive regulation.'" *Starlight Sugar, Inc. v. Soto*, 253 F.3d 137, 142 (1st Cir. 2001) (quoting *Dennis v. Higgins*, 498 U.S. 439, 448 (1991)). In *General Motors Corp. v. Tracy*, the Supreme Court held that "cognizable injury" under the Clause "does not stop at members of the class against whom a State ultimately discriminates, and *customers of that class* may also be injured, as . . . where the customer [itself] is liable for payment of [a] tax . . . ." 519 U.S. 278, 286 (1997) (emphasis added). But Plaintiffs are *not* customers of out-of-state renewable-energy generators, the allegedly discriminated-against class here. Instead, they are merely retail customers of NSTAR who is not an out-of-state renewable generator. That is a critical distinction. As such, Plaintiffs fall out of

the group that *Tracy* instructs "*may* . . . be injured" under the Commerce Clause, 519 U.S. at 286 (emphasis added).

Numerous courts of appeal have rejected the proposition "that consumers paying the end-line cost of an economic regulation have standing to challenge the regulation under the Commerce clause." *Ben Oehrleins & Sons & Daughter, Inc. v. Hennepin Cnty.*, 115 F.3d 1372, 1381 (8th Cir. 1997) (distinguishing *Tracy*). *Accord Individuals for Responsible Gov't, Inc. v. Washoe Cnty.*, 110 F.3d 699, 703 (9th Cir. 1997) (end-line costs are "an injury not even marginally related to the purposes underlying the dormant Commerce Clause"); *Lane v. Holder*, 703 F.3d 668, 672 (4th Cir. 2012) (*Tracy* limited to parties "burdened directly, as [where] the government required them to pay a tax upon buying products from out-of-state sellers").

Plaintiffs take issue with *Ben Oehrleins,*[22] but the Eighth Circuit's reasoning is sound:

> We are aware of no Commerce Clause case in which the [Supreme C]ourt has granted standing to a plaintiff who was a consumer whose alleged harm was the passed-on cost incurred by the directly regulated

[22] Plaintiffs note that in *Houlton Citizens' Coal. v. Town of Houlton*, 175 F.3d 178, 183 (1st Cir. 1999), this Court did not reach the issue of whether it agreed with *Ben Oehrleins*. It was able to "take refuge behind" what is glaringly absent in this case—the uncontestable standing of a party who asserts actually incurred injury to a *business* interest as a *direct* result of the challenged government action. *See id.* These Plaintiffs' claims are not proximately related to any cognizable claim under the Commerce Clause. Neither the Supreme Court nor any court of appeals has ever recognized such a Commerce Clause claim.

> party. . . . [I]f the ultimate cost of economic regulation to consumers were within the zone of interests of the Commerce Clause, then every consumer could properly challenge such regulations. We decline to expand the scope of claims cognizable under the Commerce Clause this far.

Ben Oehrleins, 115 F.3d at 1380, 1382.[23] From these cases, the following principle emerges: the Commerce Clause in its dormant aspect protects *interstate markets*, and while it *may* in appropriate circumstances extend to protect the *business* interests of direct, commercial customers, it does not embrace the *consumer* interests of those paying rates at the end of the line.

B. Plaintiffs' Alleged "Injury" Is Not Proximately Caused by any Alleged Violation of the Commerce Clause.

In addition to falling outside of the Commerce Clause's "zone of interest," Plaintiffs so-called "injuries" are not proximately caused by any violation of the Commerce Clause. Plaintiffs are at bottom asserting third-parties' rights: either those of an allegedly discriminated-against class of out-of-state indeterminate

[23] Plaintiffs incorrectly represent this Court's holding in *Alliance of Automobile Manufacturers v. Gwadosky*, 430 F.3d 30, 37 (1st Cir. 2005). There, the Court "brush[ed] aside" a challenge to a *trade association's* standing under the Commerce Clause, because such an association derives standing from its members. It was that association—*not*, as Plaintiffs assert (Joint Br. 58) its manufacturer-member—that this Court described as "not a member" of the allegedly discriminated-against class.

Similarly, the SJC acted in keeping with federal law when it noted that the Alliance lacked standing to bring a claim under the Commerce Clause. The SJC ruled on the Commerce Clause claim only because co-appellant TransCanada, an out-of-state generator, *was* within the allegedly discriminated-against class. No such party is before this Court here. *See Alliance*, 959 N.E.2d at 421 n.13.

renewable-energy generators, or those of NSTAR. With regard to NSTAR, Plaintiffs argue that they have third-party standing and can raise NSTAR's rights because the controlling inquiry is whether NSTAR has the "appropriate incentive" to step into the shoes of NSTAR and bring a claim. But Plaintiffs' own case, *Kowalski v. Tesmer,* 543 U.S. 125 (2004), is to the contrary. There the Court required "two additional showings." *Id.* at 130. Plaintiffs must demonstrate that they have a "*close relationship* with the person who possesses the right," and that "there is a *hindrance* to the possessor's ability to protect his own interests." *Id.* (emphases added) (internal quotation marks omitted). Plaintiffs have failed to demonstrate either requirement.

Furthermore, even if Plaintiffs could somehow validly assert end-of-the-line consumer interests here (which they cannot), they have still failed to state a claim because the Commerce Clause is "a self-executing limitation on state authority *to enact laws* imposing substantial burdens on interstate commerce." *N.Y. State Dairy Foods, Inc. v. Northeast Dairy Compact Comm'n*, 198 F.3d 1, 8 (1st Cir. 1999) (citations omitted) (emphasis added). Plaintiffs do not challenge any state law, regulation, tax, fee, constitutional provision, or any other such cognizable barrier to interstate commerce. Out-of-state renewable-electricity generators remain free to contract with in-state distributors. Indeed, NSTAR has actually contracted with several out-of-state generators, and those contracts remain unaffected by the

conduct challenged here. *See* Compl. ¶ 54. Thus, Plaintiffs have failed to state a claim under the Commerce Clause.

CONCLUSION

For all of the foregoing reasons, this Court should affirm the District Court's dismissal of Plaintiffs' Complaint.

Respectfully submitted,

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Dated: October 20, 2014

Certificate of Compliance

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 13,991 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii) and Local Rule 34.0(a).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirement of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in Times New Roman, 14-point font.

Dated: October 20, 2014

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Certificate of Service

I hereby certify that on October 20, 2014, using the Appellate CM/ECF system, I electronically caused to be filed with the Clerk of Court for the U.S. Court of Appeals for the First Circuit the foregoing Brief. Participants in the case are registered CM/ECF users and service will be accomplished by the Appellate CM/ECF system.

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ADDENDUM

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Litigation History of Cape Wind (in chronological order)

1	Court: Federal District Court of Massachusetts Case: Ten Taxpayers v. Cape Wind Associates, LLC, 278 F. Supp. 2d 98 (2003) Determination: Commonwealth of MA has no jurisdiction to require state permits for data tower located in federal waters of Nantucket Sound. Date: August 19, 2003 **Outcome: Favorable Ruling for Cape Wind**
2	Court: Federal District Court of Massachusetts Case: Alliance to Protect Nantucket Sound v. Department of the Army, 288 F.Supp. 2d 64 (2003) Determination: Army Corps of Engineers had jurisdiction to issue permit for data tower in Nantucket Sound, followed proper procedures. Date: September 18, 2003 **Outcome: Favorable Ruling for Cape Wind**
3	Court: First Circuit Court of Appeals Case: Ten Taxpayer Citizens Group v. Cape Wind Assocs., LLC, 373 F.3d 183 (2004) Determination: Upheld District Court decision that state permitting requirements cannot apply to federal waters in Nantucket Sound where wind park will be located. Date: June 28, 2004 **Outcome: Favorable Ruling for Cape Wind**
4	Court: First Circuit Court of Appeals Case: Alliance to Protect Nantucket Sound v. Department of the Army, 398 F.3d 105 (2005) Determination: Upheld District Court decision that Army Corps of Engineers had jurisdiction to issue permit for data tower in Nantucket Sound. Date: February 16, 2005 **Outcome: Favorable Ruling for Cape Wind**

5	Court: Massachusetts Supreme Judicial Court Case: Alliance to Protect Nantucket Sound v. Energy Facilities Siting Bd., 448 Mass. 45 (2006) Determination: Affirmed Energy Facilities Siting Board decision approving transmission lines Date: December 18, 2006 **Outcome: Favorable Ruling for Cape Wind**
6	Court: Barnstable Superior Court Case: Alliance to Protect Nantucket Sound and Town of Barnstable v. Cape Wind BACV2008-00399 Determination: Challenge to MEPA Cert; withdrawn by plaintiffs Date: August 1, 2008 **Outcome: Favorable Outcome for Cape Wind; withdrawn by plaintiffs**
7	Court: Barnstable Superior Court Case: Ten Taxpayer Citizens Group v. Cape Wind Associates, LLC, BACV 2007-00296 Determination: Challenge to MA MEPA CERT., Judge Nickerson dismissed lawsuit for lack of subject matter jurisdiction. Date: September 10, 2008 **Outcome: Favorable Ruling for Cape Wind**
8	Court: Barnstable Superior Court Case: Town of Barnstable v. Mass. Energy Facilities Siting Board, Cape Wind, BACV2008-00281 Determination: Town filed declaratory judgment action seeking determination that EFSB does not have authority to issue a Certificate of Public Interest and Environmental Impact with regard to Cape Cod Commission's Development of Regional Impact. Judge dismissed case. Date: May 5, 2009 **Outcome: Favorable Ruling for Cape Wind**

9	Court: Barnstable Superior Court Case: Alliance to Protect Nantucket Sound and Town of Barnstable v. Cape Wind et al., Civil Action No. 2009-001009 Determination: Complaints challenging MA Coastal Zone Management's Consistency Determinations; dismissed by Judge Rufo. Date: February 18, 2010 **Outcome: Favorable Ruling for Cape Wind**
10	Court: Barnstable Superior Court Case: Ten Residents of Massachusetts, et al. v. Cape Wind et al., Civil Action No. 2009-00107 Determination: Complaints challenging MA Coastal Zone Management's (CZM) Consistency Determinations; dismissed by Judge Rufo. Date: February 18, 2010 **Outcome: Favorable Ruling for Cape Wind**
11	Court: Barnstable Superior Court Case: Alliance to Protect Nantucket Sound and Town of Barnstable v. Cape Wind BACV2007-00506-A Determination: Most counts dismissed by Judge Kane on June 17, 2008, remaining 2 counts dismissed by Judge Rufo on April 27, 2010 Date: April 27, 2010 **Outcome: Favorable Ruling for Cape Wind**
12	Court: Massachusetts Supreme Judicial Court Case: Alliance to Protect Nantucket Sound, Inc. v. Energy Facilities Siting Bd., 457 Mass. 663 (2010) Determination: Affirmed EFSB decision granting Certificate of Public Interest and Environmental Impact with respect to Cape Cod Commission Determination of Regional Impact. Date: August 31, 2010 **Outcome: Favorable Ruling for Cape Wind**

13	Court: Massachusetts Appeals Court Case: Town of Barnstable v. Cape Wind 2010-P-1236 Determination: Appeal of Barnstable Superior Court decision, Withdrawn Date: September 17, 2010 **Outcome: Favorable Outcome for Cape Wind; withdrawn by plaintiffs**
14	Court: Massachusetts Appeals Court Case: Alliance to Protect Nantucket Sound v. Cape Wind, 2010-P-1127 Determination: Appealed Barnstable Superior Court decision on CZM; withdrawn by plaintiff Date: September 27, 2010 **Outcome: Favorable Outcome for Cape Wind; withdrawn by plaintiff**
15	Court: Massachusetts Appeals Court Case: Town of Barnstable v. Cape Wind, 2010-P-1194 Determination: Appealed Barnstable Superior Court decision on CZM; withdrawn by plaintiff Date: September 27, 2010 **Outcome: Favorable Outcome for Cape Wind; withdrawn by plaintiff**
16	Administrative Body: Environmental Appeals Board Case: Cape Wind Associates, OCS Appeal No. 11-01 Determination: EPA acted appropriately in granting Cape Wind a permit Date: May 11, 2011 **Outcome: Favorable Ruling for Cape Wind**
17	Court: U.S. Court of Appeals for the District of Columbia Case: Town of Barnstable v. FAA, No. 10-1276 Determination: On Petitions for Review of an Order of the FAA, the Court of Appeals vacated and remanded the FAA's 3rd Determination of No Hazard directing the FAA to better explain its decision. Date: October 28, 2011 **Outcome: Unfavorable Ruling for Cape Wind (temporary in nature and now moot)**

18	Court: Massachusetts Supreme Judicial Court Case: Alliance to Protect Nantucket Sound v. Department of Public Utilities, SJ-2010-0564 Determination: Affirmed MA Department of Public Utilities Final Order 10-54 approving long term Power Purchase Agreement between Cape Wind and National Grid. Date: December 28, 2011 **Outcome: Favorable Ruling for Cape Wind**
19	Court: Massachusetts Supreme Judicial Court Case: Associated Industries of Massachusetts v. Department of Public Utilities, SJ-2010-0538 Determination: Affirmed MA Department of Public Utilities Final Order 10-54 approving long term Power Purchase Agreement between Cape Wind and National Grid. Date: December 28, 2011 **Outcome: Favorable Ruling for Cape Wind**
20	Court: Massachusetts Supreme Judicial Court Case: New England Power Generators Association v. Department of Public Utilities, SJ-2010-0537 Determination: Affirmed MA Department of Public Utilities Final Order 10-54 approving long term Power Purchase Agreement between Cape Wind and National Grid. Date: December 28, 2011 **Outcome: Favorable Ruling for Cape Wind**
21	Court: Massachusetts Supreme Judicial Court Case: TransCanada v. Department of Public Utilities, SJ-2010-0555 Determination: Affirmed MA Department of Public Utilities Final Order 10-54 approving long term Power Purchase Agreement between Cape Wind and National Grid. Date: December 28, 2011 **Outcome: Favorable Ruling for Cape Wind**
	(Note: The 4 cases above were consolidated under the caption Alliance to Protect Nantucket Sound, et. al. v. Department of Public Utilities, SJC-10934)

22	Court: Massachusetts Supreme Judicial Court Case: Alliance to Protect Nantucket Sound, et. al. v. Department of Public Utilities, No. SJC-11000 Determination: Affirmed DPU determination to not re-open record in D.P.U. 10-54 Date: December 28, 2011 **Outcome: Favorable Ruling for Cape Wind**
23	Administrative Body: Federal Energy Regulatory Commission Complaint: Complaint filed by Californians for Renewable Energy (CARE) and Barbara Durkin, challenging MA D.P.U. 10-54, approval of PPA between Cape Wind and National Grid Determination: FERC issued tolling order rejecting complaint Date: January 3, 2012 (and again on May 17, 2012 rejected CARE's request for rehearing) **Outcome: Favorable Ruling for Cape Wind**
24	Court: Massachusetts Supreme Judicial Court Case: Alliance to Protect Nantucket Sound v. Department of Public Utilities, No. SJ-2012-171 Determination: None; (APNS had appealed DPU's approval of MOU in D.P.U. 12-19) Date: April 11, 2012 **Outcome: Favorable Outcome for Cape Wind (complaint withdrawn by plaintiff)**
25	Administrative Body: Federal Energy Regulatory Commission Complaint: CARE, Michael Boyd and Robert Sarvey filed Petition for Enforcement to Section 210(h) of PURPA at FERC challenging DPU's decision in D.P.U. 10-54, PPA between National Grid and Cape Wind. Determination: FERC issued Notice of Intent Not to Act in which FERC declined to initiate an enforcement action against the MA DPU. Date: August 29, 2012 **Outcome: Favorable Ruling for Cape Wind**

26	Court: U.S. Court of Appeals for the District of Columbia Case: Town of Barnstable v. FAA, No. 12-1362 (2012) Determination: FAA's 4th Determination of No Hazard Upheld Date: January 22, 2014 **Outcome: Favorable Ruling for Cape Wind**
27	Court: U.S. Court of Appeals for the District of Columbia Case: Alliance to Protect Nantucket Sound v. FAA, No. 12-1363 (2012) Determination: FAA's 4th Determination of No Hazard Upheld Date: January 22, 2014 **Outcome: Favorable Ruling for Cape Wind**
	(Note: the above 2 cases were consolidated under the caption Town of Barnstable et al., v. FAA Case No. 12-1362)
28	Court: U.S. District Court, District of D.C. Case: Alliance to Protect Nantucket Sound et al. v. Salazar et al., C.A. No. 1:10-cv-01079 (RMU) (filed June 25, 2010) Determination: The U.S. Department of the Interior acted appropriately in approving Cape Wind. Date: March 14, 2014 **Outcome: Favorable Ruling for Cape Wind**
29	Court: U.S. District Court, District of D.C. Case: Town of Barnstable v. Salazar et al., C.A. No. 1:10-cv-01073 (GK) (filed June 25, 2010) Determination: The U.S. Department of the Interior acted appropriately in approving Cape Wind. Date: March 14, 2014 **Outcome: Favorable Ruling for Cape Wind**
30	Court: U.S. District Court, District of D.C. Case: Public Employees for Environmental Responsibility et al. v. Salazar et al., C.A. No. 1:10-cv-01067 Determination: The U.S. Department of the Interior acted appropriately in approving Cape Wind. Date: March 14, 2014 **Outcome: Favorable Ruling for Cape Wind**

31	Court: U.S. District Court, District of Columbia Case: The Wampanoag Tribe of Gay Head (Aquinnah) v. Salazar et al., Determination: The U.S. Department of the Interior acted appropriately in approving Cape Wind. Date: March 14, 2014 **Outcome: Favorable Ruling for Cape Wind**
	(Note: the above 4 cases were consolidated under the caption Public Employees for Environmental Responsibility v. Beaudreau, Civil No. 10-cv-01067 (RW)
32	Court: Federal District Court of Massachusetts Case: Town of Barnstable, MA et al., v. Ann G. Berwick et al. (Challenge of NSTAR PPA, 2014) Determination: Plaintiffs' Complaint dismissed Date: May 6, 2014 **Outcome: Favorable Ruling for Cape Wind**

St. 2008, c. 169, § 83 ("Section 83")

Commencing on July 1, 2009, and continuing for a period of 5 years thereafter, each distribution company, as defined in section 1 of chapter 164 of the General Laws, shall be required twice in that 5 year period to solicit proposals from renewable energy developers and, provided reasonable proposals have been received, enter into cost-effective long-term contracts to facilitate the financing of renewable energy generation within the jurisdictional boundaries of the commonwealth, including state waters, or in adjacent federal waters. Distribution companies may also voluntarily solicit additional proposals over the 5 year period. The timetable and method for solicitation and execution of such contracts shall be proposed by the distribution company in consultation with the department of energy resources and shall be subject to review and approval by the department of public utilities. This long-term contracting obligation shall be separate and distinct from the electric distribution companies' obligation to meet applicable annual renewable portfolio standard, hereinafter referred to as RPS, requirements, set forth in section 11F of chapter 25A of the General Laws.

For purposes of this section, a long-term contract is defined as a contract with a term of 10 to 15 years. In developing the provisions of proposed long term contracts, the distribution company shall consider multiple contracting methods, including long-term contracts for renewable energy certificates, hereinafter referred to as RECs, for energy, and for a combination of both RECs and energy. The electric distribution company shall select a reasonable method of soliciting proposals from renewable energy developers, which may include public solicitations, individual negotiations or other methods. The distribution company may decline to consider contract proposals having terms and conditions that it determines would require the contract obligation to place an unreasonable burden on the distribution company's balance sheet. The distribution company shall consult with the department of energy resources regarding its choice of contracting methods and solicitation methods. All proposed contracts shall be subject to the review and approval of the department of public utilities.

The department of public utilities and the department of energy resources each shall adopt regulations consistent with this section. The regulations shall: (a) allow renewable energy developers to submit proposals for long-term contracts conforming to the contracting methods specified in the second paragraph; (b) require that contracts executed by the distribution company under such proposals are filed with, and approved by, the department of public utilities before they

become effective; (c) provide for an annual remuneration for the contracting distribution company equal to 4 per cent of the annual payments under the contract to compensate the company for accepting the financial obligation of the long-term contract, such provision to be acted upon by the department of public utilities at the time of contract approval; and (d) require that the renewable energy generating source to be used by a developer under the proposal meet the following criteria: (1) have a commercial operation date, as verified by the department of energy resources, on or after January 1, 2008; (2) be qualified by the department of energy resources as eligible to participate in the RPS program, under said section 11F of chapter 25A, and to sell RECs under the program; and (3) be determined by the department of public utilities to: (i) provide enhanced electricity reliability within the commonwealth; (ii) contribute to moderating system peak load requirements; (iii) be cost effective to Massachusetts electric ratepayers over the term of the contract; and (iv) where feasible, create additional employment in the commonwealth. As part of its approval process, the department of public utilities shall consider the attorney general's recommendations, which shall be submitted to the department of public utilities within 45 days following the filing of such contracts with the department of public utilities. The department of public utilities shall take into consideration both the potential costs and benefits of such contracts, and shall approve a contract only upon a finding that it is a cost effective mechanism for procuring renewable energy on a long-term basis.

Distribution companies shall not be obligated to enter into long-term contracts under this section that would, in the aggregate, exceed 3 per cent of the total energy demand from all distribution customers in the service territory of the distribution company. As long as the electric distribution company has entered into long term contracts in compliance with this section, it shall not be required by regulation or order to enter into contracts with terms of more than 3 years in meeting its applicable annual RPS requirements set forth in said section 11F of said chapter 25A, unless the department of public utilities finds that such contracts are in the best interest of customers; provided, however, that the electric distribution company may execute such contracts voluntarily, subject to the department of public utilities' approval.

An electric distribution company may elect to use any energy purchased under such contracts for resale to its customers, and may elect to retain RECs for the purpose of meeting the applicable annual RPS requirements set forth in said section 11F of said chapter 25A. If the energy and RECs are not so used, such companies shall sell such purchased energy into the wholesale spot market and shall sell such purchased RECs through a competitive bid process.

Notwithstanding the foregoing, the department of energy resources shall conduct periodic reviews to determine the impact on the energy and REC markets of the disposition of energy and RECs hereunder, and may issue reports recommending legislative changes if it determines that actions are being taken that will adversely affect the energy and REC markets.

If the distribution company sells the purchased energy into the wholesale spot market and auctions the RECs as described in the fifth paragraph, the distribution company shall net the cost of payments made to projects under the long-term contracts against the proceeds obtained from the sale of energy and RECs, and the difference shall be credited or charged to all distribution customers through a uniform fully reconciling annual factor in distribution rates, subject to review and approval of the department of public utilities. The reconciliation process shall be designed so that the distribution company recovers all costs incurred under such contracts.

If the RPS requirements of said section 11F of said chapter 25A should ever terminate, the obligation to continue periodic solicitations to enter into long term contracts shall cease, but contracts already executed and approved by the department of public utilities shall remain in full force and effect.

On or before July 1, 2010, and annually until the long-term contracting requirement expires, the department of energy resources shall assess whether the long-term contracting requirements set forth in this section reasonably support the renewable energy goals of the commonwealth as set forth in said section 11F of said chapter 25A, and whether the alternative compliance rate established under said section 11F should be adjusted accordingly.

The provisions of this section shall not limit consideration of other contracts for RECs or power submitted by a distribution company for review and approval by the department of public utilities.

If any provision of this section is subject to a judicial challenge, the department of public utilities may suspend the applicability of the challenged provision during the pendency of the judicial action until final resolution of the challenge and any appeals, and shall issue such orders and take such other actions as are necessary to ensure that the provisions that are not challenged are implemented expeditiously to achieve the public purposes of this provision.