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; DAVID W. CASH, 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 BRANSTABLE,
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; DAVID W. CASH, 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

Appeal from a Judgment in the
United States District Court for the District of Massachusetts

Case No. 14-cv-10148-RGS
The Honorable Richard Stearns

BRIEF OF DEFENDANT-APPELLEE NSTAR ELECTRIC COMPANY PURSUANT TO THE COURT'S JANUARY 20, 2015 ORDER

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March 20, 2015

CORPORATE DICLOSURE STATEMENT

Defendant-Appellee NSTAR Electric Company states that it is a wholly owned subsidiary of Northeast Utilities, doing business as Eversource Energy, a Massachusetts voluntary association whose shares are publicly traded and listed on the New York Stock Exchange under the symbol “ES.”

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ARGUMENT

Defendant-Appellee NSTAR Electric Company ("NSTAR") respectfully submits this memorandum pursuant to the Court's January 20, 2015 Order requesting short briefs addressing: "(1) What further steps, and when will those steps be taken, in order for the effectiveness of NSTAR's attempt to terminate the PPA be determined? (2) Is the appeal moot or are the claims unripe? (3) If the appeal is moot or the claims are unripe, how should the court dispose of the appeal?"

The plaintiffs in this action seek "a declaration that Massachusetts officials violated federal law in bringing about a wholesale power contract" – a power purchase agreement ("PPA") – between NSTAR and Defendant-Appellee Cape Wind Associates, LLC ("Cape Wind"). Plaintiffs-Appellants' Brief (filed Sept. 17, 2014) at 1. The plaintiffs claim the PPA will require NSTAR to pay Cape Wind an "above-market price" for wholesale power that "will be passed along, in full, to [them] and other NSTAR customers over the course of the contract's fifteen-year term." *Id.* at 4. And they contend that the Department of Public Utilities ("DPU") order requiring the agreement violated the Dormant Commerce Clause and Supremacy Clause of the United States Constitution. *Id.* at 4-5. The plaintiffs accordingly seek "an injunction that would prospectively block the DPU's order approving the contract and thereby making [that contract] effective." *Id.* at 1.

The result the plaintiffs seek has come to pass because the contract is no longer effective. On December 31, 2014, Cape Wind notified NSTAR that it had not achieved certain Critical Milestones defined in the PPA by that date. Addendum ("Add.") 1;[1] Joint Appendix ("App.") 292-93, PPA § 3.1.[2] NSTAR then terminated the PPA in accordance with its terms on January 6, 2015. Add. 4. That termination was effective immediately. As a result, NSTAR will not buy power from Cape Wind, and the allegedly "above-market" costs set forth in the PPA will not be passed along to the plaintiffs. Whether or not the State Parties acted consistently with the Supremacy Clause or the Dormant Commerce Clause, resolution of those legal questions will do nothing to revive the terminated contract, which is the only source of the injury the plaintiffs claim.

This appeal is accordingly moot. There is no live "case or controversy" to decide. There is no relief this Court can provide the plaintiffs. And in the absence of proceedings to invalidate NSTAR's termination of the contract, there is no warrant for this Court to delay dismissal of the appeal.

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[1] The letters exchanged between Cape Wind and NSTAR concerning termination are submitted herewith as an Addendum to this brief.

[2] Capitalized terms defined in the PPA are used here with the meanings so defined. Although Section 3.1(a) identifies a deadline of December 31, 2013 for meeting Critical Milestones, Section 3.1(c) authorized Cape Wind to extend that deadline by one year without making an additional payment. Any further extension beyond December 31, 2014 would have required a payment of $645,000 that was not made. App. 293, PPA § 3.1(c).

I. THE POWER PURCHASE AGREEMENT WAS VALIDLY TERMINATED IN ACCORDANCE WITH ITS TERMS; NO PROCEEDING CHALLENGING THAT TERMINATION IS PENDING

NSTAR terminated the contract in accordance with its terms on January 6, 2015 because Cape Wind's December 31, 2014 notice acknowledged it did not "achiev[e] . . . Critical Milestone dates in the PPA." Add. 2. Under Section 9 of the PPA, the failure of Cape Wind to meet any Critical Milestone constitutes an Event of Default that permits NSTAR to "terminate this Agreement at its sole discretion." App. 321, PPA §§ 9.2(d), 9.3(b).

To be sure, Cape Wind's notice contended that its failure to meet Critical Milestones was the result of an event of "Force Majeure" under the agreement. Cape Wind took the position that "relentless litigation," including a statutory appeal of a permitting decision by the Energy Facilities Siting Board, "slowed the development of Cape Wind's project and interfered with the timely financing of the project," preventing the achievement of the Critical Milestones. Add. 2. Cape Wind asserted that these circumstances amounted to a "Force Majeure" event that "excused and suspended" its performance obligation. Add. 2. But that contention was certainly wrong: the PPA by its terms declares that Cape Wind's "failure to timely obtain and maintain all necessary Permits . . . , a failure to satisfy contractual conditions or commitments, or lack of or deficiency in funding or other

resources shall each *not* constitute a Force Majeure." *See* App. 325, PPA § 10.1(a) (emphasis added).

Presumably for that reason, Cape Wind has not challenged NSTAR's termination of the PPA. It has not brought an action in a court of competent jurisdiction[3] seeking to declare the termination invalid or otherwise impermissible under the agreement. And no other remedy exists. The PPA by its terms is not specifically enforceable, and Cape Wind has no cognizable damage that is recoverable under the PPA. *See* App. 321, 324, PPA §§ 9.3(b) and (e).

II. THE APPEAL IS NOT JUSTICIABLE BECAUSE THE CONTRACT IT SEEKS TO INVALIDATE HAS BEEN TERMINATED

Article III of the United States Constitution confines this Court's jurisdiction to claims that involve actual "cases" or "controversies." U.S. CONST. art. III, § 2, cl. 1; *Redfern v. Napolitano*, 727 F.3d 77, 83 (1st Cir. 2013). That precludes this Court from deciding cases that have become "moot" or that are not yet "ripe" for

[3] Neither this Court nor the District Court has jurisdiction to decide any such issue. By its terms, the PPA provides that the parties may seek to resolve disputes "in the courts of the Commonwealth of Massachusetts." App. 326, PPA § 11. And although the parties also agreed "to the exclusive jurisdiction of the state and federal courts located in the Commonwealth of Massachusetts for any legal proceedings" arising out of or in connection with the PPA, *id.*, that agreement cannot confer jurisdiction on a federal court if it does not exist as a matter of law. *See Fafel v. Dipaola*, 399 F.3d 403, 410 (1st Cir. 2005) ("A court without subject-matter jurisdiction may not acquire it by consent of the parties."). As a result, in the absence of diversity of citizenship or a federal question that appears on the face of the agreement – neither of which exists – a claim that NSTAR's termination was invalid could only be brought in the Massachusetts Superior Court.

disposition. *See Overseas Military Sales Corp. v. Giralt-Armada*, 503 F.3d 12, 17 & n.5 (1st Cir. 2007) (explaining that "'[j]usticiability concerns not only the standing of litigants to assert particular claims, but also the appropriate timing of judicial intervention,' requiring an inquiry into both mootness and ripeness" (quoting *Renne v. Geary*, 501 U.S. 312, 320-21 (1991))). The doctrines of mootness and ripeness have their roots in Article III's "case or controversy" requirement, but also stem from prudential considerations. Their "basic rationale" is to "prevent the courts . . . from entangling themselves in abstract disagreements." *Mangual v. Rotger-Sabat*, 317 F.3d 45, 59 (1st Cir. 2003) (quoting *Abbott Labs. v. Gardner*, 387 U.S. 136, 148 (1967)) (applying rationale to "ripeness" issue).

A. This Appeal Is Moot

"A case generally becomes moot when the controversy is no longer live or the parties lack a legally cognizable interest in the outcome." *Ford v. Bender*, 768 F.3d 15, 29 (1st Cir. 2014) (internal quotation marks omitted). Even if a live controversy existed at the outset of a case, that case can become moot on appeal. "The doctrine of mootness enforces the mandate that an actual controversy must be extant at all stages of the review, not merely at the time the complaint is filed." *Davidson v. Howe*, 749 F.3d 21, 26 (1st Cir. 2014) (internal quotation marks omitted).

In actions involving a contract, a case becomes moot when that contract is no longer effective. *See Am. Civil Liberties Union of Mass. v. U.S. Conference of Catholic Bishops*, 705 F.3d 44, 53 (1st Cir. 2013) ("It is ordinarily true that a challenge to a contract becomes moot upon the contract's expiration."). The reason is obvious: "Once a contract has expired, and the obligations between its signatories have ended, and if no damages are sought, the parties usually do not have a legally cognizable interest in the case's outcome." *Id.* In such circumstances, a plaintiff's request that enforcement of a contract be enjoined is rendered hollow. The absence of an enforceable contract prevents the Court from providing any "meaningful relief," as "there is no ongoing conduct left for the court to enjoin." *Id.*

These principles apply with full force here. The only harm identified by the plaintiffs is the "pocketbook injury" they will incur if NSTAR pays Cape Wind the "above-market" costs for power allegedly set forth in the PPA, and then passes those costs on to its customers. Plaintiffs-Appellants' Brief at 51. But self-evidently, that "pocketbook injury" cannot occur if the contract that ostensibly provokes the higher charge is inoperative. Because the PPA is no longer in effect, NSTAR will not purchase power at the costs set forth in the PPA, and will not pass on those costs to the plaintiffs or other customers. There is thus no "live case or

controversy" for this Court to resolve, and no "meaningful relief to provide." *See Ford*, 768 F.3d at 29.

The "controversy" about the legitimacy of the conduct of the DPU and the Department of Energy Resources that the plaintiffs sought to resolve by this litigation is accordingly sterile. Deciding whether or not the State Parties acted consistently with the Constitution will not revive the terminated contract. The dispute that the plaintiffs claimed justified the intervention of a federal court no longer exists. And there is nothing that a federal court can do to resurrect the vitality of those constitutional issues.[4]

[4] This appeal does not involve an issue that is capable of repetition but evades review. That exception to the mootness doctrine is "construed narrowly." *Redfern v. Napolitano*, 727 F.3d 77, 84 (1st Cir. 2013). It requires a showing that "(1) the challenged action is in its duration too short to be fully litigated prior to cessation or expiration; and (2) there is a reasonable expectation or a demonstrated probability that the same complaining party will be subject to the same action again." *Id.* (quoting *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 462 (2007)).

Neither requirement is satisfied here. First, there is nothing about the nature of the challenged action – either the DPU's order or the PPA – that is of too short duration to be fully litigated. Cape Wind is not built and may never be built; and even if it is, the plaintiffs remain years away from paying the "above-market" costs they challenge. More important, there is no "reasonable expectation" that the plaintiffs will ever be subject to the "above-market" costs set forth in the PPA. At a minimum, Cape Wind would have to obtain a declaration from a court of competent jurisdiction that NSTAR's notice of termination was invalid and that the PPA remains in force, and *then* proceed to build Cape Wind and sell wind energy to NSTAR. This array of contingencies is "entirely speculative" and "insufficient to prevent this case from becoming moot." *See id.* at 85.

B. The Contingent Controversy the Plaintiffs and Cape Wind Appear to Invoke Is Not Ripe for Federal Adjudication

The plaintiffs-appellants appear to claim that this appeal is not moot because they continue to have a "concrete interest . . . in the outcome of the litigation." Jan. 8, 2015 Letter from M. Price (quoting *Knox v. SEIU, Local 1000*, 132 S. Ct. 2277, 2287 (2012)). They say the DPU's order approving the PPA "remains in force," and "*[i]f* Cape Wind successfully reinstates the contract," then the DPU's order "would allow NSTAR to impose above-market rates on [them]." *Id.* (emphasis added).

But that is hypothetical harm. As the plaintiffs admit, any injury they may suffer in the future is contingent upon a valid and enforceable PPA that does not presently exist. Accordingly, any injury is entirely "speculative," and turns on "reinstat[ement]" of the PPA. *Id.*; *see also Ernst & Young v. Depositors Econ. Prot. Corp.*, 45 F.3d 530, 537 (1st Cir. 1995) (claim is not justiciable if it "depends upon future events that may never come to pass, or that may not occur in the form forecasted"). The constitutional questions this appeal raises therefore have no *present* vitality. And they may never be resurrected as live issues.

For its part, Cape Wind apparently contends that there is still a "live case or controversy" to be decided because it "contests the lawfulness of NSTAR's attempted PPA termination in all respects and . . . it maintains that the PPA is still in effect." Jan. 8, 2015 Letter from G. Edens. But that is not an issue in *this*

appeal. And Cape Wind has taken no concrete steps to challenge the effectiveness of NSTAR's termination. Of course, on the face of the contract, obtaining a judicial declaration that NSTAR's termination was not valid is a highly unlikely prospect.

More importantly, even if Cape Wind *did* pursue such a remedy from a competent court, obtaining a declaratory judgment and surviving inevitable appeals would take years. Cape Wind should not be permitted to use the slim prospect of hypothetical relief that might be granted years from now to transform a moribund constitutional debate into a live and present controversy ripe for disposition by this Court. In the meantime, Cape Wind's "dispute" about the validity of NSTAR's notice of termination is utterly inoperative. Its empty, unacted-upon contention corroborates that no "ripe" controversy exists today. Cape Wind's idle assertion that NSTAR's termination was not valid will not make *this* appeal ripe until such time (if ever) that Cape Wind obtains a final declaratory judgment to that effect.

The contentions that the plaintiffs and Cape Wind each advance thus confirm that the appeal is not ripe for disposition. "There are two factors to consider in determining ripeness: 'the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration.'" *Roman Catholic Bishop of Springfield v. City of Springfield*, 724 F.3d 78, 89 (1st Cir. 2013)

(quoting *Abbott Labs.*, 387 U.S. at 149). Both factors confirm that the present matter is not ripe for review.

First, this appeal is not currently fit for judicial decision because the agreement the plaintiffs challenge is no longer in effect. The idle prospect that the agreement *might* be revived at some *future* date through a legal action that has not been launched is hollow speculation and turns on events that may never occur. [5] Likewise, the plaintiffs' claim of injury by its terms depends upon "reinstatement" of the PPA. But the fact remains that, at present, there is no PPA in effect. Because the crucial "element[] of the case," namely the continuing existence of a legally binding contract, is "uncertain, delay may see the dissipation of the legal dispute without need for decision." *Id.* (quoting *Mangual*, 317 F.3d at 59).

Second, the parties will not suffer any hardship by dismissal of the present appeal. Unless and until there is a final judgment declaring the PPA to be valid and effective (at the earliest), the plaintiffs' harm, as they admit, is speculative and hypothetical. "Generally, a mere possibility of future injury, unless it is the cause of some present detriment, does not constitute hardship." *Id.* at 90 (internal

[5] This Court's decision in *Lincoln House, Inc. v. Dupre*, 903 F.2d 845, 847 (1st Cir. 1990), is instructive. There, a plaintiff's civil RICO claim was not justiciable under ripeness principles because the only alleged injury was the plaintiff's "hypothetical inability to recover" from the defendants if it prevailed in a separate *pending* lawsuit. *Id.* Because the plaintiff's injury was "clearly contingent on events that may not occur as anticipated or may not occur at all," the case was not ripe for review. *Id.* Here, *a fortiori*, there is not even a *pending* lawsuit that that might hypothetically resurrect the PPA.

quotation marks omitted). And Cape Wind's desire to have the Court reject the plaintiffs' hypothetical arguments is not the sort of hardship that merits review. Simply stated, this is not the sort of "direct and immediate dilemma" that requires resolution now. *McInnis-Misenor v. Me. Med. Ctr.*, 319 F.3d 63, 70 (1st Cir. 2003) (internal quotation marks omitted); *see also Ernst & Young*, 45 F.3d at 539 (uncertainty alone does not establish hardship).

* * *

Ultimately, application of the doctrines of mootness and ripeness implicate elementary principles of constitutional avoidance.[6] Here, whether the appeal is labeled "moot" or "not ripe," the circumstances justify the prudential conclusion that this appeal is not justiciable. There simply is no reason to decide the constitutional questions the parties presented under the Dormant Commerce Clause, the Supremacy Clause, and the Eleventh Amendment while the contract that is challenged under those provisions remains terminated, or before its vitality is judicially restored.

III. THIS COURT SHOULD DISMISS THE APPEAL

Because this Court can "no longer issue any judicial remedy capable of affecting the parties' rights, the case no longer presents a live 'case or controversy'

[6] "Under this doctrine, federal courts are not to reach constitutional issues where alternative grounds for resolution are available." *Vaqueria Tres Monjitas, Inc. v. Pagan*, 748 F.3d 21, 26 (1st Cir. 2014) (internal quotation marks omitted).

under Article III, and [this Court] lack[s] jurisdiction to decide its merits." *Diffenderfer v. Gomez-Colon*, 587 F.3d 445, 451 (1st Cir. 2009) (citing *City of Erie v. Pap's A.M.*, 529 U.S. 277, 287 (2000)). In these circumstances, the Court has the authority to "direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances." 28 U.S.C. § 2106; *see Camreta v. Greene*, 131 S. Ct. 2020, 2034-35 (2011). "As a general rule, federal courts of appeals vacate the judgment below when a civil case becomes moot during the pendency of an appeal." *Diffenderfer*, 587 F.3d at 451. There is no reason to depart from the general rule. This Court should therefore vacate the judgment below and remand to the District Court with instructions to dismiss the action.

The plaintiffs' suggestion that this case is not yet ripe – but *could* become justiciable at some unascertainable point in the future – does not warrant a different disposition. Where a case presents claims that are not yet ripe, the proper course is to dismiss them without prejudice. *Roman Catholic Bishop*, 724 F.3d at 103. To the extent this Court considers the claims merely unripe – as opposed to moot – the Court should similarly vacate the judgment below and remand with instructions to dismiss the action without prejudice.

CONCLUSION

For all the foregoing reasons, this Court should vacate the judgment below and remand with instructions to dismiss.

Respectfully submitted,

/s/ John D. Donovan, Jr.
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Dated: March 20, 2015

CERTIFICATE OF COMPLIANCE WITH TYPEFACE REQUIREMENTS AND TYPE STYLE REQUIREMENTS

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

/s/ Matthew L. McGinnis
Matthew L. McGinnis

Dated: March 20, 2015

CERTIFICATE OF SERVICE

I hereby certify that on March 20, 2015, I electronically filed the foregoing document with the United States Court of Appeals for the First Circuit by using the CM/ECF system. Participants in the case are registered CM/ECF users and service will be accomplished by the Appellate CM/ECF system.

/s/ Matthew L. McGinnis
Matthew L. McGinnis

ADDENDUM

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December 31, 2014

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RE: Power Purchase Agreement ("PPA") dated as of March 23, 2012 between NSTAR Electric Company ("NSTAR") and Cape Wind Associates, LLC ("Cape Wind"); Notice of Force Majeure per PPA Section 10.1.

Dear Lady and Gentlemen:

After 14 years of concerted effort, Cape Wind has continued to make excellent progress toward achieving its financial closing, including obtaining Energy Facilities Siting Board approval in mid-November 2014 for its joint application with NSTAR for the proposed interconnection facilities in Barnstable. Unfortunately, however, this latest approval is now the subject of yet another appeal. I am now writing pursuant to Section 10 to provide notice of Force Majeure that has prevented Cape Wind from achieving Critical Milestones by this date. In the PPA, the term "Force Majeure" is defined as "an unusual, unexpected and significant event: (i) that was not within the control of the Party claiming its occurrence; (ii) that could not have been prevented or avoided by such Party through the exercise of reasonable diligence; and (iii) that directly prohibits or prevents such Party from performing its obligations under this Agreement."

As you are aware, Cape Wind has been the subject of extended, unprecedented and relentless litigation by the Alliance to Protect Nantucket Sound, Inc. (the "Alliance") that prevents Cape Wind from achieving the remaining Critical Milestones under the PPA as of this date. Over more than a decade, the Alliance has systematically engaged in a pattern of behavior calculated to delay the development and financing of Cape Wind's offshore wind facility. Over the past decade, they have filed over 20 administrative and judicial challenges. Just six months ago, the U.S. Federal District Court recognized the substantial adverse effects of the Alliance's litigation strategy as follows: "… numerous courts have reviewed and approved the project and the PPA with NSTAR and have done so according to and within the confines of the law. There comes a point at which the right to litigate can become a vexatious abuse of the democratic process." Town of Barnstable v. Berwick, 17 F. Supp. 3d 113, 124 n.28 (D. Mass. 2014).

Under Section 10(a) of the PPA, this exceptional level of litigation against Cape Wind for the purpose of delay is extraordinarily unusual, unexpected and significant. It has been completely beyond Cape Wind's control and could not have been prevented or avoided. In fact, Cape Wind has undertaken herculean efforts to negate the impact of such litigation and, at every turn, has been successful. Despite this, the relentless litigation has undeniably slowed the development of Cape Wind's project and interfered with the timely financing of the project, thereby prohibiting and preventing Cape Wind from achieving remaining Critical Milestone dates in the PPA.

Cape Wind fully expects that it will promptly and successfully overcome the remaining litigation hurdles caused by the Alliance's litigation strategy and its effect of blocking Cape Wind's ability to achieve remaining Critical Milestones; Cape Wind expects to be able to bring the Force Majeure to a close and to complete its Critical Milestones of closing of Financing pursuant to Section 3.1(a)(iii) and issuance of its full notice to proceed pursuant to Section 3.1(a)(iv) in 2015. Cape Wind will continue its efforts to promptly exercise all due diligence to effect remedial measures to overcome the Force Majeure, including efforts to expedite all remaining challenges. Pursuant to Section 10.1(b), Cape Wind's performance of its obligations is thus "excused and suspended so long as the circumstances exist, but for no longer period".

Accordingly, Cape Wind (i) respectfully requests that NSTAR forbear on any rights it may believe it has to terminate the PPA; and (ii) notifies NSTAR that any current milestone-related non-performance by Cape Wind is directly a function of the above-described Force Majeure. I look forward to our continued discussions as soon as possible when we can discuss possible measures of mutual benefit regarding this project, which has been repeatedly recognized by the both Commonwealth of Massachusetts and the Federal agencies to be both "cost-effective" and in the public interest.

Very truly yours,

CAPE WIND ASSOCIATES, LLC

By: James S. Gordon

Name: James S. Gordon

Title: President

NSTAR ELECTRIC GAS

One NSTAR Way, NE 210
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781-441-8258

January 6, 2015

Delivered in Hand, and By Overnight Mail, Electronic Mail and Fax (617) 904-3109

Christopher Smith, Chief Financial Officer
Cape Wind Associates, LLC
20 Park Plaza
Suite 320
Boston, MA 02116

re: Notice of Termination of Power Purchase Agreement Dated as of March 23, 2012 between NSTAR Electric Company and Cape Wind Associates, LLC

Dear Mr. Smith:

Notice is hereby given of the termination of the Power Purchase Agreement dated as of March 23, 2012 (the "Agreement") between NSTAR Electric Company ("NSTAR Electric") and Cape Wind Associates, LLC ("Cape Wind"). This notice is issued in accordance with the rights reserved to NSTAR Electric pursuant to Section 9.3 of the Agreement, on account of the failure of Cape Wind to satisfy the Critical Milestones for (i) the closing of Financing and (ii) the issuance of notice to proceed and commencement of construction, in each case by December 31, 2014, as required pursuant to Agreement Sections 3.1(a)(iii) and 3.1(a)(iv), respectively. Please note that this termination is with a full reservation of NSTAR Electric's rights, claims and remedies, including, without limitation, the right to collect any Termination Payment due pursuant to Section 9.3 of the Agreement.

Sincerely,

James G. Daly
Vice President, Energy Supply

cc: Dennis J. Duffy, Esq., Vice President of Regulatory Affairs, Cape Wind Associates, LLC
James S. Gordon, President, Cape Wind Associates, LLC
Mark Sylvia, Undersecretary of Energy, EEA
Anna Blumkin, Acting General Counsel, DOER
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