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 her 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

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Defendants-Appellees

(Continued on inside cover)

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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August 25, 2014

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Plaintiff-Appellant Hyannis Marina Inc. states that it has no parent company and is privately held. No publicly traded company owns 10% or more of Hyannis Marina, Inc.'s stock.

The other Plaintiff-Appellants in these cases are not corporate parties.

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REASONS WHY ORAL ARGUMENT SHOULD BE HEARD

Pursuant to Local Rule 34.0, Appellants submit that this Court should hear oral argument in this case because it presents several complex questions, including issues related to the Eleventh Amendment, field preemption under the Federal Power Act, and standing under the Dormant Commerce Clause. Appellants believe that oral argument would assist the Court in resolving these complex issues.

JURISDICTIONAL STATEMENT

This is an appeal from a final judgment by the U.S. District Court for the District of Massachusetts, dated May 5, 2014, dismissing Plaintiffs'[1] complaint with prejudice. Add. 1-24[2] (order granting motion to dismiss); Add. 25 (judgment). The District Court had jurisdiction under 28 U.S.C. § 1331. This Court has jurisdiction under 28 U.S.C. § 1291. Plaintiffs filed their timely notices of appeal on June 2, 2014.

INTRODUCTION

This appeal turns on whether certain Massachusetts officials enjoy Eleventh Amendment immunity from prospective injunctive and declaratory relief in a suit challenging action by the Massachusetts Department of Energy Resources ("DOER") and Department of Public Utilities ("DPU"). Plaintiffs do not seek any monetary relief from the Commonwealth or any other party. Rather, they seek a declaration that Massachusetts officials violated federal law in bringing about a wholesale power contract and an injunction that would prospectively block the DPU's order approving the contract and thereby making it effective. In the absence of such relief, the Commonwealth's actions will result in continuing impermissible state

[1] Throughout this brief, we will refer to the Plaintiffs-Appellants collectively as "Plaintiffs."

[2] "Add. __" refers to the Addendum attached to this brief. "App. __" refers to the Joint Appendix.

interference in the interstate, federally regulated wholesale electricity market for the next fifteen years.

The District Court's holding that this suit was barred by the Eleventh Amendment was gravely flawed. It is hornbook law that suits against state officials for *prospective* relief are not barred by the Eleventh Amendment. *See Ex parte Young*, 209 U.S. 123 (1908). Under a straightforward application of that principle, the District Court should have permitted Plaintiffs' lawsuit to proceed.

The parties' dispute arises out of a controversial plan to build an offshore wind-powered electric generation facility, known as Cape Wind, in the waters surrounded by Cape Cod, Martha's Vineyard, and Nantucket. For many years, the administration of Governor Patrick has promoted Cape Wind as a cornerstone of its energy policy. Because placing wind turbines in an ocean is an expensive way to generate power, Cape Wind has had difficulty finding willing buyers for its electricity.

There are many avenues open to Massachusetts to assist Cape Wind if it chooses to do so. The Commonwealth could subsidize Cape Wind from its general revenues. It could provide tax incentives. And it could require the state's utilities to purchase renewable energy, allowing Cape Wind to

compete solely against other renewable energy sources rather than against conventional power plants.

There are, however, two key limits on what Massachusetts can do to assist Cape Wind. First, the state may not require the state's utilities to enter into any particular wholesale electricity transaction with Cape Wind or dictate the price or terms on which such a transaction may take place. Under the Federal Power Act, states are forbidden to regulate wholesale sales of electricity; that regulatory field is reserved exclusively to the Federal Energy Regulatory Commission ("FERC"), in order to ensure a uniform and comprehensive approach to regulating what is inescapably an interstate market. Second, under the Dormant Commerce Clause, the state may not use its regulatory power to insulate Cape Wind, an in-state producer, from out-of-state competition. Without congressional authorization, states may not erect barriers to interstate commerce or lock up part of a local market for local producers.

In supporting Cape Wind, Massachusetts transgressed both of those limits. As the Complaint explains, NSTAR Electric Company ("NSTAR"), one of the state's two largest electric utilities, sought to merge with the Connecticut-based Northeast Utilities ("Northeast"). DOER, the state agency tasked with implementing the Governor's energy policy, improperly

used its influence over the merger review process to strong-arm NSTAR into a settlement agreement under which NSTAR would enter into a wholesale power contract with Cape Wind at the above-market price that Cape Wind required. As an express *quid pro quo* for that commitment, DOER agreed to drop its opposition to the merger – opposition that otherwise would have delayed the merger proceedings long enough that the deal would have unraveled. DPU then issued an order, Order 12-30, ratifying DOER's role in bringing about the Cape Wind-NSTAR contract and approving that contract, thereby making it effective. Under Order 12-30, the above-market costs – nearly $1 billion in total – will be passed along, in full, to Plaintiffs and other NSTAR customers over the course of the contract's fifteen-year term.

Plaintiffs sued, alleging two ongoing violations of federal law resulting from the Commonwealth's actions. First, Plaintiffs alleged a violation of the Supremacy Clause, because the Commonwealth used its regulatory control over NSTAR's merger to coerce NSTAR into entering a wholesale power purchase agreement with Cape Wind. The Commonwealth's unlawful intrusion into the exclusively federal field of wholesale electricity regulation will continue for the fifteen-year duration of the contract. Second, Plaintiffs alleged a violation of the Dormant Commerce Clause, because the Commonwealth used its regulatory power

over NSTAR to lock up, for the next fifteen years, a portion of the interstate market for renewable energy for a favored in-state producer at above-market rates. These continuing violations of federal law, set in motion by DOER's coercion and DPU's order, will cause injury to rate-payers, including Plaintiffs, in the form of inflated electricity prices for the next fifteen years.

To redress these ongoing violations of federal law and the resulting injury-in-fact, Plaintiffs sought purely prospective relief: a declaration that DOER's strong-arming NSTAR into a sweetheart wholesale electricity contract with an in-state company was illegal; a declaration that DPU's Order 12-30, which approved the NSTAR-Cape Wind contract and made it effective, was illegal; and an injunction preventing DPU officials, on a prospective basis, from enforcing Order 12-30. The requested relief would render the contract invalid on a prospective basis, nullifying for all future purposes the coercive acts of state officials in illegally forcing NSTAR into the Cape Wind contract, and remedying the continuing interference with the federally regulated and interstate wholesale electricity market that will result from the state's action.

The District Court dismissed Plaintiffs' Complaint on the ground of sovereign immunity, holding that Plaintiffs sought purely retrospective relief that would somehow "bleed[] the treasury." Add. 19. The Court expressly

declined to reach the merits of Plaintiffs' Complaint, but it included three footnotes noting that it would have dismissed Plaintiffs' Complaint on the merits as well. Add. 22 nn.25-27.

As explained below, the District Court's sovereign immunity ruling violated *Ex parte Young* and bedrock principles authorizing suits for declaratory and injunctive relief against state officials in federal court. The District Court mistakenly held that Plaintiffs' suit was barred because it supposedly would lead the court to pass on the legality of past state action. But the Supreme Court has authoritatively established that "a declaration of the past … ineffectiveness" of state action poses no sovereign immunity concern when the plaintiff seeks prospective injunctive relief. *Verizon Md., Inc. v. Pub. Serv. Comm'n of Md.*, 535 U.S. 635, 646 (2002). Accordingly, the District Court's judgment should be reversed and the case should be remanded for further proceedings. There is no reason to reach alternative, merits-based grounds for affirmance, and the Court may lack jurisdiction to do so in any event because no Defendant filed a cross-appeal. But if the Court were to reach the merits, then it should reject the District Court's alternative grounds for dismissal. Plaintiffs' Complaint states claims under the Supremacy Clause and Dormant Commerce Clause and should be permitted to proceed.

ISSUES PRESENTED FOR REVIEW

The issues presented for review are:

1. Whether the District Court erred in concluding that Plaintiffs' action for prospective injunctive and declaratory relief under *Ex parte Young* was barred by sovereign immunity.

2. Whether the Court should consider alternative, merits-based grounds for affirmance, in light of Defendants' failure to file a cross-appeal.

3. Whether Plaintiffs have stated a claim under the Supremacy Clause.

4. Whether Plaintiffs have standing to pursue their claim under the Dormant Commerce Clause.

STATEMENT OF FACTS

The facts set forth below are taken from the Complaint. Because this case was decided on a motion to dismiss, the Court must "accep[t] the plaintiff's factual allegations and dra[w] all reasonable inferences in the plaintiff's favor." *Maloy v. Ballori-Lage*, 744 F.3d 250, 252 (1st Cir. 2014).

A. Massachusetts' Efforts to Promote Cape Wind.

Cape Wind Associates, LLC ("Cape Wind") is developing an off-shore wind-powered electric generation facility located in Nantucket Sound

between Cape Cod, Martha's Vineyard, and Nantucket. Complaint ¶37.[3] The Administration of Governor Patrick has strongly favored Cape Wind for many years, viewing its development as a cornerstone of the Commonwealth's energy policy. *Id.* ¶¶38-40.

In 2008, in an effort to facilitate Cape Wind's development, the Massachusetts Legislature enacted the Green Communities Act. *Id.* ¶43; *see* 2008 Mass. Legis. Serv. Ch. 169 (S.B. 2768) § 83. As originally enacted, the Green Communities Act required each of the Commonwealth's electric utilities, including NSTAR and National Grid, to purchase up to three percent of its electricity from renewable generators physically located within Massachusetts or adjacent federal waters. Complaint ¶43. Thus, the statute discriminated on its face in favor of in-state generation facilities, insulating those facilities from competition from the interstate market.

In order to fulfill its obligations under the Green Communities Act, National Grid sought and received regulatory approval to enter into no-bid negotiations with Cape Wind, and Massachusetts officials brokered an agreement-in-principle for National Grid to purchase electricity from Cape Wind. Complaint ¶¶46-47. The electricity prices set forth in this agreement

[3] The Complaint can be found at pages 15-51 of the Joint Appendix.

were significantly above the price of other available renewable energy. *Id.* ¶48.

Following National Grid's entry into its agreement with Cape Wind, a Canadian entity sued the DPU, alleging that the Green Communities Act facially discriminated against interstate and foreign commerce in violation of the Constitution. *Id.* ¶50. In response, Commonwealth officials stated publicly that they were "frustrated" by the lawsuit and that other states had favored in-state energy facilities. *Id.* ¶51. In order to settle the litigation, the DPU suspended the Act's geographical limitations, and the Legislature eventually repealed them. *Id.* ¶52; *see* 2012 Mass. Legis. Serv., ch. 209 (S.B. 2395), §35. However, National Grid's above-market contract was left undisturbed: the DPU approved the agreement-in-principle without requiring National Grid to consider less expensive, out-of-state alternatives to Cape Wind or to reopen negotiations with Cape Wind over price. It did so even though the terms and conditions of the National Grid contract were agreed upon under the shadow of a discriminatory statute that illegally insulated Cape Wind from out-of-state competition. Complaint ¶55.

B. NSTAR's Opposition to Cape Wind.

In contrast to National Grid, NSTAR sought to fulfill its mandate under the Green Communities Act by buying electricity from renewable

energy producers that were less costly than Cape Wind – including those located outside of Massachusetts. Thus, instead of entering into no-bid negotiations with Cape Wind, NSTAR solicited bids from 44 individual developers and ultimately contracted with three land-based wind generators – one in New Hampshire, one in Maine, and one in Massachusetts. *Id.* ¶54; DPU Order Nos. 11-05, 11-06, 11-07, at 3-4.[4] The price of renewable energy in these contracts was approximately one-half the price paid to Cape Wind by National Grid. Complaint ¶55.

In explaining NSTAR's decision not to contract with Cape Wind, NSTAR spokesperson Caroline Allen cited the necessity of "being mindful of costs for our customers." *Id.* ¶56. NSTAR's chief executive, Thomas May, stated: "When you go offshore, it's very very expensive to build. So when you stick stuff where land is cheap and the wind is blowing more frequently, you have lower-cost sources of power." *Id.*

NSTAR's refusal to purchase power voluntarily from Cape Wind threatened the Cape Wind project. National Grid had only agreed to purchase 50% of Cape Wind's power, and that power purchase agreement by itself was insufficient for Cape Wind to obtain financing for its massive

[4] This DPU Order is available at http://pbadupws.nrc.gov/docs/ML1124/ML112490527.pdf.

construction costs. *Id.* ¶58. And Cape Wind had no success in attracting other willing purchasers for its overpriced power.

C. NSTAR's Merger With Northeast Utilities.

In November 2010, NSTAR filed an application with DPU for regulatory approval of its proposed merger with Northeast. *Id.* ¶60. At the time of the application, neither NSTAR nor Northeast had any interest in obtaining power from Cape Wind. *Id.* ¶¶61-63. To the contrary, NSTAR had chosen to invest in a hydropower project which, according to NSTAR's CEO, would "reduce the cost of energy in the region, but yet will remove five times the carbon of the infamous Cape Wind project." *Id.* ¶63. Likewise, Northeast's spokesperson expressly stated that it had no need for Cape Wind's power. *Id.* ¶62.

DOER, however, saw NSTAR's merger application as an opportunity to accomplish through backroom strong-arming what Massachusetts was not lawfully permitted to do openly and directly: to *compel* NSTAR to enter a contract procuring electricity from Cape Wind at a price high enough to allow Cape Wind to build. *Id.* ¶64. First, DOER successfully persuaded DPU to change its standard of review for approving mergers. Previously, a utility needed to establish only that its proposed merger would cause *no net harm* to the public interest. Complaint ¶ 59. Under the revised standard, a

utility needed to demonstrate that a proposed merger would *affirmatively benefit* the public interest, "including the advancement of clean energy goals established by the Green Communities Act and the Global Warming Solutions Act." *Id.* ¶66-67. Second, DOER moved DPU for a stay of the merger, which – as both Northeast and NSTAR publicly acknowledged – would have jeopardized the transaction. *Id.* ¶68. The purpose of the requested stay was to gain leverage over NSTAR in Massachusetts' effort to engineer a contract between NSTAR and Cape Wind. *Id.* ¶69. Third, DOER and Cape Wind filed comments in the DPU proceeding requesting, in substance, that NSTAR be forced to purchase energy from Cape Wind in order for DPU to approve the merger. *Id.* ¶¶71-72. NSTAR objected, arguing that it would be illegal to force NSTAR to purchase power from Cape Wind as a precondition of merger approval. *Id.* ¶73.

As the deadline for closing the deal loomed, NSTAR entered into secret negotiations with DOER and ultimately capitulated. NSTAR and DOER executed a Settlement Agreement under which NSTAR would enter into a long-term wholesale electricity contract with Cape Wind at precisely the same rate that National Grid had agreed to pay – exactly the kind of contract that NSTAR had refused when it issued a request for proposals and contracted with less expensive renewable energy projects rather than with

Cape Wind. *Id.* ¶75. In particular, the Settlement Agreement required that NSTAR purchase 27.5% of Cape Wind's power, and required that the "terms of the Cape Wind Contract, including but not limited to the purchase price for the power and the purchase of RECs, shall be substantially the same as those terms approved by the Department in National Grid, DPU 10-54 (2010)." *Id.* ¶77.

In exchange, DOER agreed that it would withdraw its stay motion and its opposition to the merger. *Id.* DOER agreed that "execution and filing of this Settlement Agreement is a demonstration by NSTAR … of its commitment to advance the goals of the … [Green Communities Act], consistent with the standard of review required by the [DPU] in the [merger] proceeding." *Id.* ¶78. DOER also agreed that "the merger … is consistent with the public interest" pursuant to state law. *Id.*

Significantly, the Settlement Agreement made clear that, but for DOER's exertion of pressure on NSTAR through its influence over the merger process, NSTAR *would not have entered* into any contract with Cape Wind on the terms called for by the Settlement Agreement. The Settlement Agreement was expressly conditioned on the merger's success, so that if the merger had failed to go through for any reason, NSTAR would have been under no obligation to buy power from Cape Wind. *Id.* ¶¶79-81.

Pursuant to the Settlement Agreement, DOER withdrew its motion to stay and declared its support for the merger, which DPU quickly approved. *Id.* ¶¶75, 86.

D. NSTAR's Power Purchase Agreement with Cape Wind.

NSTAR fulfilled its obligations under the Settlement Agreement and entered into a Power Purchase Agreement (PPA) with Cape Wind on the terms called for in the Settlement Agreement. Indeed, the PPA specifically recited that NSTAR entered into the PPA pursuant to the terms of the Settlement Agreement it had negotiated with DOER. *Id.* ¶85. Accordingly, NSTAR did not engage in any price negotiations whatsoever with Cape Wind; instead, consistent with the terms of the Settlement Agreement with DOER, NSTAR simply adopted the price and other key terms of Cape Wind's contract with National Grid. *Id.* ¶83. NSTAR did not negotiate for a lower price even though the market price for electricity had dropped significantly between the time of the National Grid deal and the NSTAR deal. *Id.* ¶94.

Following DPU's approval of the merger, NSTAR Chief Executive May – now Chief Executive of the merged corporation – explained NSTAR's entry into the power contract by citing the "fear" that Massachusetts regulators might otherwise block the company's planned

merger with Northeast Utilities. *Id.* ¶88. He reportedly was concerned that if NSTAR had ended negotiations with DOER, state regulators might have imposed onerous conditions as prerequisites of its approval of the merger. *Id.* "What the conditions would have been would have been the issue," May said. "It's the fear of the unknown that we avoided." *Id.* He characterized the power contract as an effort to "take that uncertainty off the table." *Id.* He declined to discuss private settlement negotiations, stating: "How you make the sausages is not what we talk about. It's the final product." *Id.*

May acknowledged that Cape Wind charges more than traditional power producers and refused to say whether he believed power from Cape Wind represented a good deal for ratepayers, stating only that "[w]e don't feel any different today than we did beforehand." *Id.* State legislators were less reserved than May, characterizing the state's actions as "legalized extortion," a "great administration shakedown," and a decision to "h[o]ld the NSTAR merger hostage to the Cape Wind power purchase." *Id.* ¶89.

E. DPU's Approval of the Cape Wind PPA.

On November 26, 2012, DPU issued Order 12-30, approving the PPA between NSTAR and Cape Wind and thereby making the PPA effective. Complaint ¶91; App. 367-68, 555; *see also* App. 287, 319-20 (provision of

PPA stating that its effectiveness was conditioned upon the DPU's approval.)

Order 12-30 directed NSTAR to revise its tariff to conform to the PPA. Under the revised tariff, NSTAR would pass along to customers every penny of the costs it incurred in buying power from Cape Wind. Complaint ¶96; App. 554 ("[C]harging all distribution customers the above- or below-market costs is appropriate and in the public interest").

Order 12-30 made clear that DPU would exercise continuing regulatory authority over NSTAR with regard to the PPA: "the Department will review NSTAR Electric's recovery of above-market costs in its annual reconciliation filings and our review there will be sufficient to ensure that the Company recovers such costs appropriately." App. 555. In other words, Order 12-30 provides that DPU will have an ongoing role in reviewing these above-market costs to ensure their sufficiency for NSTAR's cost recovery, thereby guaranteeing that Massachusetts consumers will suffer above-market costs on an ongoing basis.

DPU acknowledged in Order 12-30 that "the [power contract] is more expensive than certain Section 83-eligible alternatives." Complaint ¶91; App. 533. Indeed, at the time of the NSTAR-Cape Wind contract, Cape Wind's price was 137% higher than the price of conventional power.

Complaint ¶94. Moreover, as of September 2013, the price of renewable energy from land-based wind generators was about 40% of the cost of Cape Wind. *Id.* ¶95. Nevertheless, the DPU found that "the price is reasonable in light of the type of resource that it is and the benefits it offers and, further, that the price does not include excessive profits for the developers." *Id.*

Order 12-30 expressly ratified DOER's extensive involvement in brokering the PPA, noting that "DOER is an executive agency with substantial responsibility for establishing and implementing the Commonwealth's energy policies." *Id.* ¶ 92. Order 12-30 declared that DOER did not literally "require" NSTAR to purchase power from Cape Wind, relying on a provision in a Memorandum of Understanding between Cape Wind and DOER reciting that NSTAR had no "legal obligation … to enter into a PPA." App. 401. However, DPU stated that it had no obligation to "inquire into a company's motives … in entering into a contract." *Id.*

F. This Lawsuit.

Plaintiffs filed suit in the District of Massachusetts against state officials from DPU and DOER, contending that those officials had violated the Federal Power Act and the Dormant Commerce Clause by coercing NSTAR to purchase power from Cape Wind at the National Grid rates and by discriminating against out-of-state power generation facilities. Plaintiffs

sought an injunction against the prospective application of Order 12-30, as well as declaratory relief; they sought no money damages. Plaintiffs also joined NSTAR and Cape Wind as necessary parties.

The defendant state officials, Cape Wind, and NSTAR each filed motions to dismiss, and the District Court dismissed the case. Add. 23. The Court concluded that Plaintiffs' suit was barred by sovereign immunity because it "would inevitably lead to restitutionary claims against the Commonwealth by NSTAR and Cape Wind," and because Plaintiffs "seek relief from the ongoing 'effects' of past state action." Add. 19-20. The Court expressly stated that "[b]ecause the Eleventh Amendment requires that this case be dismissed, there is no reason to consider the additional grounds for dismissal advocated by defendants," but it nonetheless went out of its way to "note that the result would be no different were the court to rule on the substance of the claims." *Id.* at 22.

In three footnotes, the District Court conjectured that, *if* it had reached the merits, it *would have concluded* that Plaintiffs lacked a claim under 42 U.S.C. § 1983; that Plaintiffs could not establish preemption; and that Plaintiffs lacked standing under the Dormant Commerce Clause. *Id.* at 22-23 nn.25-27.

The District Court's opinion also included a number of gratuitous comments critical of Plaintiffs. The Court characterized Plaintiffs as "an obdurate band of aggrieved residents of Cape Cod and the Islands" who "have doffed their green garb and draped themselves in the banner of free-market economics." Add. 1. In so characterizing Plaintiffs, the District Court cited other lawsuits related to Cape Wind, including some by parties completely unrelated to any of the Plaintiffs. Add. 3-5.[5] The District Court also overlooked the fact 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. And while the Alliance to Protect Nantucket Sound and the Town of Barnstable have previously participated in several lawsuits and administrative proceedings regarding Cape Wind, that is simply a byproduct of the fact that regulatory responsibility over Cape Wind has been fragmented across numerous federal and state agencies.[6]

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[5] For example, the District Court cited cases brought by the Ten Taxpayer Citizen Group and CARE. *See* Add. 3. The Plaintiffs have no relationship to these organizations. Thus, the District Court erred when it asserted that "Plaintiffs have essayed" their argument in a previous FERC proceeding and cited a case brought by CARE. Add. 22 n.26. Plaintiffs had no involvement whatsoever in that FERC proceeding.

[6] At the federal level, Cape Wind required permits from the Bureau of Ocean Energy Management, the United States Fish and Wildlife Service, the National Marine and Fisheries Service, the Army Corps of Engineers, the Coast Guard, the FAA, the EPA, and the FERC. At the state level, Cape

Plaintiffs did not create this complicated regulatory scheme and can hardly be faulted for exercising their statutory right to participate in the approval process for several different agencies and to seek judicial review of those agencies' decisions. On the contrary, Plaintiffs should be commended for seeking to vindicate their rights in federal court so as to save themselves, and all other ratepayers, from the exorbitant charges that would be imposed upon them as a result of the contract at issue.

No court or agency has ever found any argument by the Alliance or the Town of Barnstable to be frivolous. On two occasions, Plaintiffs' contentions have been expressly found meritorious. *See Pub. Emps. For Envtl. Responsibility v. Beaudreu*, -- F. Supp. 2d --, 2014 WL 985394, at *24-26, 29-30 (D.D.C. Mar. 14, 2014) (holding that National Marine and Fisheries Service's approval of Cape Wind violated Environmental Species Act in two respects); *Town of Barnstable v. FAA*, 659 F.3d 28 (D.C. Cir.

Wind required permits from the Department of Public Utilities, the Energy Facilities Siting Board, the Department of Environmental Protection, the Executive Office of Energy and Environmental Affairs, the Executive Office of Transportation and Public Works, the Highway Department, the Division of Fisheries and Wildlife, and several local entities. There was little overlap among these agencies' review; rather, each agency has considered discrete aspects of the Cape Wind project. For instance, some agencies have considered safety issues, such as threats to aviation safety caused by the presence of wind turbines, and threats to navigational safety caused by the placement of wind towers virtually tangent to the only navigable channel in Nantucket. Others have considered cost concerns; still others have considered environmental impacts.

2011) (vacating and remanding FAA's approval of Cape Wind project);[7] *see also Alliance to Protect Nantucket Sound, Inc. v. Energy Facilities Siting Board*, 457 Mass. 663, 701, 932 N.E.2d 787, 815 (2010) (Marshall, C.J., joined by Spina, J., dissenting in part) (arguing that regulatory approval of Cape Wind "is contrary to existing law and seriously undermines" state law).

The District Court also asserted that "the Governor, the Legislature, the relevant public agencies, and 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." Add. 23-24 n.28. But the PPA with NSTAR has in fact *never* been reviewed by the Governor, the Legislature, or, most importantly for present purposes, by any court prior to the District Court in this case. It has been reviewed solely by the interested state agency – the DPU – and it is the resulting DPU Order that is at issue in this case. Plaintiffs indisputably have the right to challenge the state agency's determination in federal court. *See, e.g., Sprint Commc'ns, Inc. v. Jacobs*, 134 S. Ct. 584, 590-91 (2013). And the District

[7] On remand, the FAA gave new justifications for approving Cape Wind, and the D.C. Circuit denied the petition for review. *Town of Barnstable v. FAA*, 740 F.3d 681 (D.C. Cir. 2014).

Court's implication that Plaintiffs have repetitiously pressed the same argument in one proceeding after another is utterly baseless. In each regulatory proceeding, Plaintiffs have advanced the distinct arguments appropriate to the context and issues presented. Nor did the District Court have any basis for characterizing one of Plaintiffs' prior lawsuits as an "onslaught." Add. 5. Accordingly, if this Court reverses the District Court's judgment, it should reassign the case to a different District Court judge.

SUMMARY OF ARGUMENT

The District Court erred in concluding that this suit was barred by sovereign immunity. "In determining whether the doctrine of *Ex parte Young* avoids an Eleventh Amendment bar to suit, a court need only conduct a straightforward inquiry into whether [the] complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective." *Verizon*, 535 U.S. at 645 (internal quotation marks omitted; alteration in original). Plaintiffs satisfy both elements of that test.

Plaintiffs have clearly established an ongoing violation of federal law. They allege that DOER coerced NSTAR into entering into a wholesale power contract at above-market rates, in violation of the Supremacy Clause and that, in so doing, DOER locked up part of the Massachusetts market for a favored in-state power generator, in violation of the Dormant Commerce

Clause. DPU ratified and effectuated those illegal acts by issuing Order 12-30, which made the power contract effective for the next fifteen years. Thus, for the next decade and a half, Order 12-30 ensures the existence of a state-imposed wholesale power contract in violation of the Federal Power Act and will skew the interstate electricity market in favor of an in-state energy producer in violation of the Dormant Commerce Clause.

Next, it is indisputable that Plaintiffs seek purely prospective remedies: forward-looking injunctive relief and declaratory relief that would block the effectiveness of Order 12-30 going forward. Plaintiffs do not seek damages or any other form of retrospective relief, and Massachusetts will never make *any* payment at *any* time pursuant to Plaintiffs' requested remedy.

Contrary to the District Court's view, the speculative possibility that *other* parties might bring lawsuits seeking damages against the Commonwealth does not mean that *this* lawsuit is barred by sovereign immunity. To be sure, Plaintiffs' prospective request depends on a determination that Massachusetts entities acted illegally in the past. But the District Court manifestly erred in holding that sovereign immunity bars any suit in which the plaintiff challenges the legality of past events. The Supreme Court has made clear that a prayer for relief seeking "a declaration

of the past, as well as the future, ineffectiveness" of state action triggers no sovereign immunity concerns when it does not impose upon a state any monetary loss. *Verizon*, 535 U.S. at 646; *accord Porter v. Jones*, 319 F.3d 483, 491 (9th Cir. 2003) ("Although Plaintiffs' allegations are rooted in events that occurred in the past, the injunctive and declaratory relief that they seek would prevent future and ongoing illegality. The Eleventh Amendment poses no bar to Plaintiffs' claims for prospective relief." (footnote omitted)). As this Court held in *Negron-Almeda v. Santiago*, 579 F.3d 45 (1st Cir. 2009), sovereign immunity turns on whether the plaintiff seeks retrospective *relief*. Plaintiffs in this case do not.

This Court should not consider any alternative, merits-based grounds for affirmance that Defendants may offer. The District Court dismissed this case on the ground of sovereign immunity, and it is hornbook law that a judgment based on sovereign immunity is distinct from a judgment on the merits. Defendants did not file a cross-appeal and should not be permitted to enlarge the judgment in the absence of a cross-appeal.

Even if the Court were to consider the merits, however, the District Court's judgment should be reversed. Under well settled law, Plaintiffs have properly stated causes of action under both the Dormant Commerce Clause and the Supremacy Clause.

Plaintiffs have stated a claim under the Supremacy Clause by alleging that the DOER coerced NSTAR into buying power from Cape Wind at the rates in the National Grid contract. As recently confirmed by *PPL EnergyPlus, LLC v. Nazarian*, 753 F.3d 467, 476-77 (4th Cir. 2014), state efforts to coerce electric utilities into purchasing power at particular rates are field-preempted by the Federal Power Act. Accordingly, DOER's use of its leverage over NSTAR's merger application to coerce NSTAR into a wholesale electricity contract at a particular price, and DPU's Order 12-30, which ratified the State's illegal intrusion into an exclusively federal field and makes the resulting power contract effective for the next fifteen years, are illegal under federal law.

Finally, Plaintiffs have standing to pursue their Dormant Commerce Clause claim. Plaintiffs plainly have Article III standing, as they directly bear the cost of Cape Wind's above-market rates. Further, to the extent that Plaintiffs are required to make a separate showing of prudential standing, Plaintiffs can make that showing: NSTAR neither has the incentive nor the willingness to challenge the Commonwealth's illegal acts, so Plaintiffs are entitled to their day in court.

The judgment should be reversed and the case remanded for further proceedings.

ARGUMENT

This Court reviews the dismissal of a complaint *de novo*. *Maloy v. Ballori-Lage*, 744 F.3d 250, 252 (1st Cir. 2014).

I. Sovereign Immunity Does Not Bar This Suit.

A. Plaintiffs May Maintain This Suit Under *Ex Parte Young*.

Plaintiffs' claims fall squarely within those authorized by *Ex parte Young*, 209 U.S. 123 (1908). Plaintiffs do not seek a single penny from the state treasury. Rather, they seek purely prospective injunctive relief to correct an ongoing violation of federal law. That is the classic type of suit that may be brought under *Ex parte Young*.

"In determining whether the doctrine of *Ex parte Young* avoids an Eleventh Amendment bar to suit, a court need only conduct a straightforward inquiry into whether [the] complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective." *Verizon*, 535 U.S. at 645 (internal quotation marks omitted; alteration in original). Plaintiffs satisfy both elements of that test.

First, Plaintiffs have alleged an "ongoing violation of federal law." *Id*. (quotation marks omitted). As discussed further below, *see infra* at 45-56, the Federal Power Act prohibits states from intruding into the exclusively federal field of regulating wholesale sales of electricity, and the

Dormant Commerce Clause prohibits states from discriminating against out-of-state commerce. But as long as Order 12-30 is in effect, NSTAR will continue to be forced to purchase power pursuant to a wholesale contract that the state coerced it to enter in violation of the Supremacy Clause, and will continue to be forced to purchase power from an in-state entity that was illegally favored by state officials in violation of the Commerce Clause.

Order 12-30 approved the PPA between NSTAR and Cape Wind and thereby made, and continues to make, the PPA effective. Complaint ¶91; App. 555. This manifestly constitutes an ongoing violation of federal law. *E.g.*, *Nazarian*, 753 F.3d at 474 (hearing suit by plaintiffs challenging state agency's order requiring utilities to enter into wholesale power contract at rates brought about by the state); *cf. TRWS, Inc. v. Schaefer*, 242 F.3d 198, 204 (4th Cir. 2001) (challenge to state law controlling liquor prices alleges an ongoing violation of federal law). Indeed, DPU's approval was a necessary prerequisite for the PPA to become effective: the PPA itself provides that it is conditioned on DPU's approval, and the transaction would be illegal as a matter of state law without DPU's approval. *See* 220 C.M.R. §17.03(2).

Further, in addition to approving the PPA and making it effective, Order 12-30 provides that *DPU will ensure the pass-through of above-*

market costs for the next fifteen years: "the Department will review NSTAR Electric's recovery of above-market costs in its annual reconciliation filings and our review there will be sufficient to ensure that the Company recovers such costs appropriately." App. 555. Further, Order 12-30 directs NSTAR to *revise its tariff* going forward so as to conform to the PPA, ensuring that NSTAR will pass through to Massachusetts customers all of the costs it incurs in buying power from Cape Wind. App. 552, 555; Complaint ¶96.

Second, Plaintiffs request "relief properly characterized as prospective," *Verizon*, 535 U.S. at 646, because their requested remedy is limited to prospective declaratory and injunctive relief. Plaintiffs do not seek damages or any other form of retrospective relief with respect to rates already paid. Indeed, no rates have yet been paid, because Cape Wind is not yet constructed. Rather, Plaintiffs merely seek prospectively to block the legal effect of Order 12-30, which ratified the state's coercive influence in bringing the PPA into existence, and approved the PPA thereby making it effective.

B. The Speculative Possibility Of Hypothetical Restitutionary Claims By Other Plaintiffs Does Not Bar This Suit.

The District Court's primary reason for holding that the suit was barred by sovereign immunity was that Plaintiffs' request for declaratory relief would have "much the same effect as a full-fledged award of damages

or restitution." Add. 19. The District Court opined that "the effect of a declaration that Massachusetts had illegally compelled NSTAR and Cape Wind to enter an above-market price contract for wind energy would inevitably lead to restitutionary claims against the Commonwealth by NSTAR and Cape Wind." *Id.* The District Court's analysis is clearly wrong, for several reasons.

First, sovereign immunity must be determined by reference to "[the] complaint" brought by the plaintiff itself, *Verizon*, 535 U.S. at 645 (quotation marks omitted), not by reference to hypothetical future complaints that may or may not be brought by other plaintiffs. Plaintiffs are unaware of any case holding that a suit can be barred by sovereign immunity on the basis of hypothetical lawsuits that third parties *might* bring in the future. Indeed, the District Court's reasoning could have been invoked in *Verizon* itself, which similarly involved a state-approved tariff allegedly invalid under federal law. Instead, the Supreme Court explained that a prayer for declaratory relief seeking "a declaration of the past, as well as the future, ineffectiveness of the Commission's action" did not trigger sovereign immunity concerns, because the requested relief did not directly "impose upon the State 'a monetary loss.'" *Id.* at 646 (citation omitted).

Second, neither NSTAR nor Cape Wind ever suggested they would bring "restitutionary claims." Accordingly, it is difficult to understand why the District Court believed that such claims were "inevitabl[e]."

Third, even if NSTAR or Cape Wind could identify some plausible claim for damages against the state and were thereupon to file suit, *that* suit could then be dismissed on grounds of sovereign immunity, and the State's treasury would be undisturbed. There is no conceivable justification for dismissing *this* suit as some kind of prophylactic measure. *See Virginia Office for Protection & Advocacy v. Stewart*, 131 S. Ct. 1632, 1641 (2011) (limitations on federal jurisdiction "cannot be smuggled in under the Eleventh Amendment by barring a suit in federal court that does not violate the State's sovereign immunity.").

Fourth, even if NSTAR or Cape Wind *did* bring "restitutionary claims" against Massachusetts, they would fail on the merits. "Restitution is a remedy associated with the concept of unjust enrichment. The remedy of restitution is available only when equitable considerations demand that a party disgorge an undeserved benefit or gain." *Goodwin v. C.N.J., Inc.*, 436 F.3d 44, 50 (1st Cir. 2006) (citation omitted). Here, however, neither NSTAR nor Cape Wind conferred any discernible financial benefit on Massachusetts, and thus they could not bring a claim for restitution.

The District Court also asserted that "an injunction ordering DPU to cease enforcement of the PPA and to take remedial measures for the alleged constitutional harms would restrain the State from acting by frustrating its efforts to implement the policies enunciated in the GCA and the GWSA, while further bleeding the treasury." Add. 19. This reasoning is perplexing. Plaintiffs did not request an injunction ordering the DPU to take *any* "remedial measures for the alleged constitutional harms" nor did they seek to restrain the Commonwealth from applying the GCA and GWSA in a matter consistent with federal law;[8] Plaintiffs simply requested an injunction against the prospective application of Order 12-30 and its approval of the NSTAR-Cape Wind contract. Moreover, even if Plaintiffs' requested injunction might "frustrate [the State's] efforts to implement the policies enunciated in the GCA and the GWSA," that would not justify sovereign immunity. *All* injunctions issued in Supremacy and Commerce Clause cases have the potential to "frustrat[e] ... efforts to implement the policies

[8] In fact, Plaintiffs' suit would not frustrate the state's policy. The Green Communities Act simply requires the state's utilities to procure a certain amount of energy from renewable power generators, and provides no special preference to offshore wind generation, let alone to Cape Wind specifically. *See* 2008 Mass. Legis. Serv. Ch. 169 (S.B. 2768) § 83 (making eligible any generator qualified under Mass. Gen. Laws ch. 25A, § 11F); Mass. Gen. Laws ch. 25A, § 11F(b)-(c) (listing as eligible a wide range of renewable generation technology).

enunciated in" state law, but that is nothing more than the result compelled by the supremacy of federal law.

Finally, the District Court's reference to "further bleeding the treasury" simply makes no sense. No Defendant ever suggested that Plaintiffs' requested injunction would "bleed[] the treasury." To the extent the District Court's statement was a reference to the hypothetical suits by NSTAR and Cape Wind, that reasoning lacks merit for the multiple reasons set forth above.

C. The District Court's "Ongoing Effects" Analysis Is Incorrect.

The District Court next stated that Plaintiffs' suit was barred because Plaintiffs only "seek relief from the ongoing 'effects' of past state action." Add. 20. It opined in a footnote that the suit must be barred because "there is nothing further for DPU (or DOER) to do – the PPA is an historical fact and neither agency has any further action to take, whether of an approval or enforcement nature." Add. 19 n.23. This analysis is seriously flawed as well.

1. The Order Represents Ongoing Illegal State Action.

First, the District Court erred in asserting that Plaintiffs merely "seek relief from the ongoing 'effects' of past state action" and that "there is nothing further for DPU … to do." In fact, there is plenty for the DPU to do

in the future. Order 12-30 states that the DPU will exercise its ongoing regulatory authority to monitor compliance with the Order's terms over the next fifteen years. *See, e.g.*, App. 555 (stating that the DPU "will review NSTAR Electric's recovery of above-market costs in its annual reconciliation filings" to "ensure that the Company recovers such costs appropriately"). Also, DPU Order 12-30 puts the DPU in the position of being the arbiter in any disputes between NSTAR and Cape Wind. For example, the PPA will become effective only if Cape Wind begins physical construction prior to December 31, 2015. The determination as to whether construction has commenced rests with the DPU. App. 292. Enjoining Order 12-30 would restrain state officials from engaging in any such review.

Further, even setting aside state officials' ongoing regulatory review, it is undeniable that Order 12-30 *itself* has an ongoing legal effect: the PPA is not effective absent the DPU's ratification via the Order. App. 367-68. Thus, Order 12-30 was necessary in order for the Commonwealth to carry out its promised intrusion into the wholesale power market – an intrusion that will continue for the fifteen-year term of the contract. And Order 12-30 was necessary in order for the Commonwealth to lock up a portion of Massachusetts' market for electricity for an in-state energy producer at an above-market price – discrimination in an interstate market that would

continue for the next fifteen years as well. Contrary to the District Court's reasoning, an Order with these ongoing legal consequences certainly is *not* a mere "historical fact."

To be sure, DPU *issued* Order 12-30 in the past. In this sense, the Court would necessarily be passing judgment on the legality of an event that took place in the past. But that is irrelevant to sovereign immunity: a suit is not barred by sovereign immunity merely because the requested relief would entail, as an ancillary matter, opining as to the legality of state action that occurred in the past. Strictly speaking, that is *always* the case when a court is asked to prevent the ongoing enforcement of a federally forbidden regime: the state action instituting the regime will always have taken place in the past. As noted *supra*, the declaratory relief requested in *Verizon*, 535 U.S. at 645-46, had precisely the same character. As the Ninth Circuit has explained, "[t]his argument confuses liability with remedy. Although Plaintiffs' allegations are rooted in events that occurred in the past, the injunctive and declaratory relief that they seek would prevent future and ongoing illegality. The Eleventh Amendment poses no bar to Plaintiffs' claims for prospective relief." *Porter*, 319 F.3d at 491 (footnote omitted).[9]

[9] To the extent the District Court might have viewed the PPA as a purely private contract with no federal law implications, such a view cannot be squared with the allegations of the complaint, which the District Court was

2. The Order Has Continuing Practical and Legal Effects.

For the reasons just explained, Plaintiffs have alleged the existence of ongoing illegal state action. But even if Plaintiffs had not made such an allegation, this suit would *still* not be barred by sovereign immunity: Plaintiffs have plainly alleged past illegal state action with ongoing *effects* and have sought a forward-looking injunction to prevent those ongoing effects from coming about, and such an allegation suffices to bring a claim under *Ex parte Young*.

This Court's decision in *Negron-Almeda v. Santiago*, 579 F.3d 45 (1st Cir. 2009), is illustrative. In that case, Negron-Almeda persuaded a jury that he was fired from his position as a Puerto Rican government employee as a result of his political beliefs, and the District Court ordered him reinstated to his prior position. *Id.* at 48. On appeal, this Court held that Negron-Almeda's suit was not barred by sovereign immunity, even though it

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required to treat as true for purposes of the motion to dismiss. As those allegations recount, the state strong-armed NSTAR into accepting a contract that NSTAR had long resisted, by linking its approval of NSTAR's merger to NSTAR's capitulation with respect to the Cape Wind contract. The "conduct allegedly causing the deprivation of a federal right" – the Commonwealth's action in not merely allowing PPA to remain in force but also in using its coercive power to bring it into existence and according it continuing legal effect – is without doubt "fairly attributable to the State," *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 937 (1982). Massachusetts cannot claim to be a passive spectator in this case.

required a determination of whether Negron-Almeda's termination – a past event – was lawful. The Court explained that "consistent with the Eleventh Amendment[,] federal courts may, notwithstanding the absence of consent, waiver or evidence of congressional assertion of national hegemony, enjoin state officials to conform future conduct to the requirements of federal law.… This rule includes ordering reinstatement." *Id.* at 53-54 (internal quotation marks omitted). Thus, Negron-Almeda alleged a past illegal action (his firing) that had ongoing effects (his continuing unemployment), and sought a forward-looking remedy (reinstatement). This Court held that his suit was not barred by the Eleventh Amendment. For the same reason, Plaintiffs' suit should be permitted to proceed.

Critically, if the District Court's reasoning in this case were correct, then Negron-Almeda's suit would certainly have been barred by sovereign immunity. Applying the District Court's reasoning, Negron-Almeda's suit would have been barred because he was merely "seek[ing] relief from the ongoing 'effects' of past state action" (i.e., his ongoing unemployment); and, because the Commonwealth had already fired him, "there is nothing further for [it] to do." Add. 19-20 & n.23. But this Court in *Negron-Almeda* conspicuously did *not* adopt that reasoning. Instead, this Court held that, as long as a federal court's *remedy* (*i.e.*, reinstatement) was prospective, the

suit was not barred by sovereign immunity. For the same reason, Plaintiffs' request that DPU Order 12-30 be enjoined *in the future* is not barred by sovereign immunity.

The District Court's attempt to distinguish *Negron-Almeda* missed the mark. According to the District Court, Negron-Almeda sought a "remedy [which] did not address monetary damages … [and] where the intent of the order was to conform the future conduct of the state officials involved to the requirements of federal law," whereas plaintiffs here are seeking to "undo a contract already in force by way of a declaration that state officials violated federal law in the past." Add. 20-21 n.24. But these distinctions are illusory, given that Negron-Almeda himself was seeking to undo a state decision "already in force by way of a declaration that state officials violated federal law in the past" – *i.e.*, he sought to undo his firing by way of a declaration that state officials violated federal law by firing him. Moreover, Plaintiffs are seeking exactly what Negron-Almeda sought: a remedy which "did not address monetary damages" (Add. 20 n.24), but which is instead forward-looking notwithstanding the ancillary need to resolve the lawfulness of an existing state order issued in the past.

Indeed, *Negron-Almeda* presented a far *stronger* case for sovereign immunity than does this case. Here, DPU will exercise continuing

regulatory authority over NSTAR in its regular review of NSTAR Electric's recovery of above-market costs, App. 555, whereas in *Negron-Almeda*, the unlawful state actions had occurred *entirely* in the past, and the state agency had no prospective role whatsoever. And whereas in *Negron-Almeda*, the District Court's remedy resulted in the plaintiff obtaining (future) payments from the state treasury, here Massachusetts will never make *any* payment at *any* time pursuant to Plaintiffs' requested injunction. In sum, the District Court's decision here is inconsistent with *Negron-Almeda*.

The District Court's decision is also inconsistent with this Court's opinion in *Vaqueria Tres Monjitas, Inc. v. Irizarry*, 587 F.3d 464 (1st Cir. 2009). In *Vaqueria*, the District Court issued a decision in 2007 holding that the plaintiffs had suffered due process and equal protection violations between 2003 and 2007, and imposed an injunction which would allow the plaintiffs to recover a fair rate of return from the year 2003 onward. *Id.* at 472 & n.11. This Court held that such an injunction was not barred by sovereign immunity. It reasoned that, because "the money in question would come directly from consumers of milk in Puerto Rico," and because "no state funds are implicated by the district court's order, … the Eleventh Amendment's prohibition against retrospective relief does not apply." *Id.* at 479.

Like *Negron-Almeda*, *Vaqueria* presents a considerably stronger case for sovereign immunity than this case does. In *Vaqueria*, not only did the District Court adjudicate the legality of past state action (i.e., the due process and equal protection violations between 2003 and 2007), but it also imposed retrospective monetary relief. *Id.* at 478. Nonetheless, this Court held that the District Court's remedy was permissible because sovereign immunity applied only when the state paid retrospective monetary relief *from the state treasury*. *Id.* at 478-79. Here, the relief requested by Plaintiffs is *neither* retrospective *nor* monetary and entails no award running against the state treasury – rather, Plaintiffs seek a purely forward-looking injunction against Order 12-30. Accordingly, sovereign immunity clearly does not bar this suit.[10]

[10] Although the District Court did not cite any appellate authority for its view that the adjudication of past illegality is barred by sovereign immunity, it did cite its own decision in *Tyler v. Massachusetts*, 981 F. Supp. 2d 92 (D. Mass. 2013). Add. 20. Even assuming that *Tyler* was correctly decided, it is readily distinguishable. In *Tyler*, the plaintiff had been raped and given birth to a child, and a state court judge ordered the rapist to acknowledge paternity of the child as a condition of probation. The plaintiff brought suit in federal court claiming the state court's imposition of the paternity condition was unconstitutional, and the District Court held that it lacked authority to award the relief sought because, among other things, that relief was "not prospective." 981 F. Supp. 2d at 95-96. However, in *Tyler*, there was no future legal effect of the acknowledgement of paternity. In contrast, Order 12-30 has prospective legal effect – it constitutes an ongoing legal entitlement for NSTAR to pass down high rates to consumers – and contemplates an ongoing enforcement role for DPU. Indeed, in *Tyler*, the

II. The Court Should Not Consider Any Alternative Grounds For Dismissal Advocated By Defendants.

The District Court made clear that it was dismissing this lawsuit on sovereign immunity grounds, rather than on the merits. It stated that, "[b]ecause the Eleventh Amendment requires that this case be dismissed, there is no reason to consider the additional grounds for dismissal advocated by the defendants, other than to note that the result would be no different were the court to rule on the substance of the claims…." Add. 22. The Court nonetheless proceeded to include three footnotes not only "consider[ing]," but summarily (albeit hypothetically) expressing its agreement with, the alternative grounds "for dismissal advocated by [the] defendants." Add. 22. These footnotes were merely speculation about what the District Court might have done; its *actual* disposition was based solely on sovereign immunity. *Id.*

Defendants' brief may attempt to propose those grounds as alternative grounds for affirmance. This Court should reject any such invitation. Indeed, because defendants failed to file a cross-appeal, there is serious

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court observed that the state court had not awarded visitation rights to the rapist, and it implied that it might well have had jurisdiction if the acknowledgment of paternity had resulted in such rights. *Id.* at 95 n.3. If there is any analogy to be drawn to *Tyler*, Plaintiffs are in the position in which the *Tyler* plaintiff would have been had the state court awarded visitation rights.

question as to whether this Court even possesses *jurisdiction* to consider any alternative grounds for affirmance.[11]

A dismissal based on sovereign immunity is a wholly different type of judgment from a dismissal on the merits. Although "the Supreme Court has declined to state definitively whether the Eleventh Amendment is a doctrine of subject matter jurisdiction, the Court has stated that the Amendment is *jurisdictional* in the sense that it is a limitation on the federal court's judicial power." *Brait Builders Corp. v. Mass. Div. of Capital Asset Mgm't*, 644 F.3d 5, 10 (1st Cir. 2011) (internal quotation marks omitted). Because a dismissal on grounds of sovereign immunity is a jurisdictional dismissal, it has a narrower preclusive effect than a dismissal on the merits.[12] *See Darlak*

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[11] With one exception: The Court may consider whether Plaintiffs have Article III standing to bring their Dormant Commerce Clause claim, as that is a jurisdictional issue that a court may raise on appeal for the first time, *sua sponte*, even without a cross-appeal. *Larson v. United States*, 274 F.3d 643, 648 (1st Cir. 2001). But the Court should not consider non-jurisdictional issues, such as the merits of Plaintiffs' preemption claim or prudential standing. *See Latin Am. Music Co. v. Archdiocese of San Juan of Roman Catholic & Apostolic Church*, 499 F.3d 32, 46 (1st Cir. 2007) (noting that prudential standing is a non-jurisdictional issue).

[12] As noted above, the District Court made clear that it was dismissing on the basis of sovereign immunity, not on the merits. *Supra*, at 40. To be sure, the District Court's order states "the defendants' motion to dismiss [is] ALLOWED with prejudice." Add. 23. But in the context of a dismissal on grounds of sovereign immunity, the mere inclusion of the words "with prejudice" do not result in an adjudication on the merits for claim preclusion purposes. *See Mills v. Harmon Law Offices, P.C.*, 344 F.3d 42, 46 n.3 (1st Cir. 2003) (noting that "a dismissal … 'with prejudice,' is not intrinsically a

v. Bobear, 814 F.2d 1055, 1064 (5th Cir. 1987). For example, if the Commonwealth were to waive sovereign immunity in the future, a dismissal of this case on sovereign immunity grounds would not preclude Plaintiffs from bringing suit at that time, but a dismissal of this case on the merits would.

Accordingly, to the extent Defendants wished to enlarge the District Court's judgment from a jurisdictional dismissal to a judgment on the merits, they were required to file a cross-appeal. *See Haley v. City of Boston*, 657 F.3d 39, 53 (1st Cir. 2011) ("It is black-letter law that even though an appellee can argue in support of a lower court's ruling in his favor on any ground made manifest in the record (including grounds not relied on by the lower court), he cannot, without a cross-appeal, argue against a judgment in his favor in an endeavor either to expand his rights or to diminish the Plaintiff's rights."). Because no Defendant filed a cross-appeal, this Court appears to lack jurisdiction to modify the District Court's judgment to a judgment on the merits.

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disposition on the merits"); *Miller v. Nationwide Life Ins. Co.*, No. 06-31178, 2008 WL 3086783, at *5 (5th Cir. Aug. 6, 2008) (collecting numerous cases). Indeed, in a similar context, the Sixth Circuit has held that a dismissal on the grounds of sovereign immunity that included the words "with prejudice" did not have claim-preclusive effect. *Ernst v. Rising*, 427 F.3d 351, 357, 366-67 (6th Cir. 2005).

Plaintiffs acknowledge this Court's prior holding that when a dismissal is on the merits, a cross-appeal is unnecessary to raise the issue of sovereign immunity. *Larson v. United States*, 274 F.3d 643, 648 (1st Cir. 2001). But that is so because "[s]overeign immunity … *is a jurisdictional defense* that may be raised for the first time in the court of appeals … so the fact that the government has not cross-appealed … is of no consequence." *Id.* (emphasis added). Here, the reverse situation is present: Defendants failed to file a cross-appeal on non-jurisdictional merits issues. Accordingly, consideration of those issues is barred. But even if this Court should conclude that it has jurisdiction, this Court should decline as a matter of discretion to consider whatever alternative grounds Defendants may offer. If the Court concludes that the District Court's sovereign immunity analysis was incorrect, it should simply reverse and remand. Nevertheless, in the three sections below, Plaintiffs will address the three footnotes in which the District Court suggested that it would have dismissed the suit on alternative grounds had they been before it.

III. Plaintiffs Have Stated A Cause Of Action.

Footnote 25 of the District Court's order stated that Plaintiffs "fail to identify any right privately enforceable under section 1983." That is incorrect.

First, it is well-established that a plaintiff may bring a Dormant Commerce Clause suit under 42 U.S.C. §1983. *See, e.g.*, *Walgreen Co. v. Rullan*, 405 F.3d 50, 52 (1st Cir. 2005).

Second, the Court need not decide whether a plaintiff may bring a preemption claim under §1983,[13] because this Court has squarely held that such claims may be brought directly under the Supremacy Clause: "[I]n suits against state officials for declaratory and injunctive relief, a plaintiff may invoke the jurisdiction of the federal courts by asserting a claim of preemption, even absent an explicit statutory cause of action." *Local Union No. 12004, United Steelworkers of Am. v. Massachusetts*, 377 F.3d 64, 75 (1st Cir. 2004); *accord Pharm. Research & Mfrs. of Am. v. Concannon*, 249 F.3d 66, 73 (1st Cir. 2001) ("[A] state or territorial law can be unenforceable as preempted by federal law even when the federal law secures no individual substantive rights for the party arguing preemption" (quotation marks omitted)), *aff'd*, 538 U.S. 644 (2008); *P.R. Tel. Co. v. Municipality of Guayanilla*, 450 F.3d 9, 15 (1st Cir. 2006) ("A party may bring a claim under the Supremacy Clause that a local enactment is preempted even if the

[13] This appears to be an open question: in a recent Supreme Court case, for instance, the Court ruled in favor of a plaintiff's preemption claim brought under §1983, but it did not expressly address whether §1983 was the appropriate cause of action for bringing such claims. *Wos v. E.M.A. ex rel. Johnson*, 133 S. Ct. 1391, 1395-96 (2013).

federal law at issue does not create a private right of action" (quotation marks omitted)). Accordingly, Plaintiffs have stated a cause of action enabling them to pursue both their claims.

IV. Plaintiffs May Pursue Their Preemption Claim.

Plaintiffs have stated a claim for preemption under the Federal Power Act. Footnote 26 of the District Court's order, which presented a variety of grounds for rejecting this claim, is incorrect.

A. Plaintiffs Have Stated a Preemption Claim.

Plaintiffs have stated a straightforward preemption claim. It is well-established that the Federal Power Act left "no power in the states to regulate … sales for resale in interstate commerce." *FPC v. S. Cal. Edison Co.*, 376 U.S. 205, 215 (1964) (quotation marks omitted). "Congress meant to draw a bright line easily ascertained, between state and federal jurisdiction.… This was done in the [FPA] by making [FERC] jurisdiction plenary and extending it to all wholesale sales in interstate commerce except those which Congress has made explicitly subject to regulation by the States." *Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953, 966 (1986) (quoting *S. Cal. Edison Co.*, 376 U.S. at 215–16) (internal quotation marks omitted).

Thus, as the Fourth Circuit recently held, a state may not use its regulatory authority over utilities to compel the utility to enter into a wholesale contract, let alone on state-dictated terms and conditions. Such state action intrudes into a field of regulation reserved exclusively for federal regulation, and is barred by the doctrine of field preemption. *Nazarian*, 753 F.3d at 476-77. Under that doctrine, "[a]ctual conflict between a challenged state enactment and relevant federal law is unnecessary to a finding of field preemption; instead, it is the mere fact of intrusion that offends the Supremacy Clause." *Id.* at 474. As applied to wholesale energy sales, any "scheme" that "effectively supplants the rate generated by [the market] with an alternative rate preferred by the state" is preempted. *Id.* at 476.

Here, there can be no question that the PPA is a contract for the wholesale sale of electricity in interstate commerce, and therefore is subject to exclusive federal regulatory authority under the Federal Power Act.[14] Further, Plaintiffs' Complaint alleges that NSTAR was coerced by state officials into purchasing wholesale power from Cape Wind at a particular

[14] Electricity in interstate commerce includes any energy "transmitted from a State and consumed at any point outside thereof." 16 U.S.C. § 824(c). That definition encompasses purely "in-state" electricity that is commingled with electricity transmitted out of state. *See FPC v. Fla. Power & Light Co.*, 404 U.S. 453, 463 (1972). Thus, a wholesale sale of electricity is subject to federal jurisdiction so long as the electricity is transmitted on lines that are interconnected with an interstate grid – and that includes all the electricity at issue in this case.

rate. In particular, Plaintiffs allege that NSTAR would not have entered into the NSTAR–Cape Wind contract had the Patrick Administration not made it a condition of approving NSTAR's requested merger, *see, e.g.*, Complaint ¶¶56-57, 68, 88. But for DOER's pressure, the contract never would have come into being. Moreover, NSTAR was not able to freely negotiate the price of the contract. *See* Complaint ¶¶77, 83, 85. Instead, the rates and terms of the contract were expressly dictated by the Commonwealth. *See id.* ¶¶68-89.

This is obviously sufficient to state a claim under the Supremacy Clause. A Massachusetts statute or order directly requiring NSTAR to enter into the NSTAR-Cape Wind contract and setting that contract's rates and terms would unquestionably be preempted under the FPA. States may not regulate in the field of wholesale electricity sales, and mandating a wholesale contract with a particular generator at a particular price plainly falls within the bounds of that field. *See, e.g.*, *Nazarian*, 753 F.3d at 477-78 ("Maryland has chosen to incentivize generation by setting interstate wholesale rates. This particular choice of means is impermissible."); *S. Cal. Edison Co.*, 376 U.S. at 215-16.

The Supremacy Clause does not permit Massachusetts to achieve indirectly, through the exercise of its regulatory leverage over mergers, what

it plainly would be barred from achieving directly – for "[w]hat a state cannot do directly, it also cannot do indirectly." *520 S. Mich. Ave. Assocs., Ltd. v. Shannon*, 549 F.3d 1119, 1129 (7th Cir. 2008). As the Supreme Court has held with respect to the Natural Gas Act, which is parallel in this respect to the Federal Power Act, "[t]he federal regulatory scheme leaves no room either for direct state regulation of the prices of interstate wholesales of natural gas or for state regulations which would indirectly achieve the same result." *N. Natural Gas Co. v. State Corp. Comm'n*, 372 U.S. 84, 91 (1963); *see also Nantahala*, 476 U.S. at 966-67 (holding that the state may not use its authority over retail rate-setting to indirectly regulate wholesale rates); *Cal. ex rel. Lockyer v. Dynegy, Inc.*, 375 F.3d 831, 850 & n.17 (9th Cir. 2004) (holding that California's enforcement of its state unfair competition law was preempted notwithstanding California's contention that "application of its unfair competition laws merely represents an indirect intrusion into FERC's exclusive authority"); *see generally N.H. Motor Transp. Ass'n v. Rowe*, 448 F.3d 66, 79 (1st Cir. 2006) (finding preemption and rejecting interpretation of statute that would "permit states to do indirectly what they cannot do directly"), *aff'd*, 552 U.S. 364 (2008); *New England Legal Found. v. Mass. Port Auth.*, 883 F.2d 157, 174 (1st Cir.

1989) (finding preemption and holding that the state "cannot do indirectly what it is forbidden to do directly").

Moreover, although the doctrine of field-preemption does not require a plaintiff to establish any "[a]ctual conflict between a challenged state enactment and relevant federal law," *Nazarian*, 753 F.3d at 474, such an actual conflict also exists in this case. FERC permits bilateral contracts between power generators and utilities, but only if the transaction is voluntary and freely negotiated. *See Morgan Stanley Capital Grp. Inc. v. Pub. Util. Dist. No. 1 of Snohomish Cnty.*, 554 U.S. 527, 537 (2008) (explaining that FERC permits "sellers of wholesale electricity to file 'market-based' tariffs" that allow "the seller [to] enter into freely negotiated contracts with purchasers"). The rationale for that policy is that the dynamics of the free and competitive marketplace will enable buyers to obtain electricity at the lowest prices. *See Pub. Util. Dist. No. 1 of Snohomish Cnty. v. Dynegy Power Mktg., Inc.*, 384 F.3d 756, 760 (9th Cir. 2004) (explaining that "a seller cannot raise its price above the competitive level without losing substantial business to rival sellers unless the seller has market power, and therefore … FERC's determination that a seller lacks market power provides a strong reason to believe that sellers will be able to charge only just and reasonable rates." (internal quotation and citation

omitted)). Massachusetts' insistence that NSTAR purchase power from Cape Wind at a particular above-market rate directly conflicts with the federal government's commitment to market-based, voluntary negotiations for wholesale energy contracts. As the Fourth Circuit recently explained in *Nazarian*, the conflict preemption doctrine precludes a state from dictating the terms and conditions of power contracts in a manner inconsistent with FERC's approved, market-based approach. 753 F.3d at 478-79.

Defendants may disagree with Plaintiffs' factual allegations on the merits, but at this stage in the litigation, the Court must accept Plaintiffs' allegations as true. And, as pleaded by Plaintiffs, these allegations establish state regulation of wholesale sales of electricity, which is preempted.

B. The District Court's Footnote Rejecting Plaintiffs' Preemption Claim Was Incorrect.

In Footnote 26, the District Court rejected Plaintiffs' contention that they could bring suit under the Supremacy Clause, offering a variety of rationales. Every assertion in Footnote 26, however, reflects a grave misunderstanding of Plaintiffs' Supremacy Clause claim and a complete misapprehension of the applicable legal principles.

First, the District Court found it "highly doubtful" that Plaintiffs have "standing … to act as a private Attorney General." Add. 22 n.26. But Plaintiffs do not seek to "act as a private Attorney General" in an attempt to

vindicate FERC's rights. Rather, Plaintiffs sue *in their own right* because they, personally, have been harmed. As explained below, Plaintiffs have classic Article III standing: Plaintiffs allege a pocketbook injury which will be redressed if the Court enjoins DPU Order 12-30. *Infra*, at 57. Furthermore, Plaintiffs are not required to make any further showing of "prudential" standing, given this Court's holding that "an entity does not need prudential standing to invoke the protection of the Supremacy Clause." *Pharm. Research*, 249 F.3d at 73.

To the extent the District Court's comments reflect its view that only the Attorney General, and not private litigants, may sue to enforce the Federal Power Act, that view is clearly wrong: Courts regularly entertain challenges brought by private litigants arguing that the Federal Power Act preempts state action. *See, e.g.*, *New Orleans Public Service, Inc. v. Council of City of New Orleans* ("*NOPSI*"), 491 U.S. 350, 358-59 (1989); *Nazarian*, 753 F.3d at 474. There is therefore no question that Plaintiffs have standing to maintain this suit. Indeed, this is but a corollary of the more general and foundational proposition, reaffirmed unanimously in *Bond v. United States*, 131 S. Ct. 2355 (2011), that a private individual or entity injured by a governmental violation of the Constitution's structural principles has standing to complain of that violation in an Article III court. *See id.* at 2364

("When government acts in excess of its lawful powers, … liberty is at stake").

Second, the District Court stated that "there is no federal right at stake, given that the DPU order requires NSTAR and Cape Wind to file their rates for approval by FERC." Add. 22 n.26. But this reasoning wholly misunderstands the nature of this lawsuit. It is true that FERC has the authority to determine whether rates are "just and reasonable," 16 U.S.C. §824d(a), but this action is not a challenge to the substantive reasonableness of the rate itself. Rather, it is a challenge to the illegality of Massachusetts' actions in forcing NSTAR to accept that rate. Even if FERC ultimately finds the rate to be substantively reasonable, the imposition of that rate through state coercion rather than market negotiations would still be preempted by federal law. Federal courts routinely exercise jurisdiction over allegations that state regulation of wholesale energy rates is preempted, regardless of whether FERC has the substantive power to review the reasonableness of those rates. *Nazarian*, for example, involved precisely such a situation. As the Maryland District Court observed in that case, when a plaintiff is "not asking that [the] Court determine a price or rate for … energy and capacity sales that would be fair," but instead argues that the imposition of the price or rate is preempted, the federal court has "jurisdiction to answer the

question of whether the … state action is unconstitutional." *PPL Energy Plus, LLC v. Nazarian*, 974 F. Supp. 2d 790, 839 (D. Md. 2013), *aff'd*, 753 F.3d 467 (4th Cir. 2014). This case is no different.

Third, the District Court stated that "Plaintiffs have essayed this argument before (that DPU violated the FPA by usurping FERC's exclusive jurisdiction to determine wholesale rates) in challenging the DPU's order approving the contract between Cape Wind and National Grid. FERC rejected the argument then, and there is no doubt that it would do so again." Add. 22 n.26.

This is wrong at every level. As an initial matter, Plaintiffs have *not* "essayed this argument before"; the FERC decision cited by the District Court, *CARE*, 137 FERC ¶61,113 (2011), rejected the claims of completely unrelated litigants.

Moreover, *CARE* addressed challenges to the *National Grid* contract, not the *NSTAR* contract. There was no question that the National Grid contract was negotiated voluntarily, and thus the *CARE* decision did not address any contention that the Federal Power Act preempts states from using their regulatory authority over utilities to compel those utilities into particular wholesale transactions on particular terms and conditions. Rather, FERC's decision in *CARE* reflected only the (ill-defined) contentions raised

by the litigants in that case, which did not include *any* of Plaintiffs' arguments here. Indeed, as FERC observed, the *CARE* complaint was "incomprehensible," "consist[ing] of a string of vague and unsupported allegations that the Massachusetts Commission's [approval of the National Grid/Cape Wind contract] violates the FPA, PURPA and previous Commission orders, allegations of fraudulent behavior and allegations of affiliation with international criminal organizations." 137 FERC at 61,591-92. Thus, FERC denied the complaint largely on the ground that it had "fail[ed] to meet the requirements of the Commission's Rules of Practice and Procedure to lay out a case before the Commission and with evidentiary support rather than bare allegations." *Id.* at 61,592. That reasoning casts no light on the merits of this suit.

In fact, FERC has repeatedly held that states have no power to regulate wholesale rates, regardless of whether those rates are just and reasonable. *Cal. Pub. Utils. Comm'n*, 132 FERC ¶61,047, P 64 (2010) (holding that, with the limited exception set forth in 16 U.S.C. §824a-3, states have no authority to set wholesale power rates); *Midwest Power Sys.*, 78 FERC ¶ 61,067, 61,247 (1997) (holding that "the orders of the Iowa Board implementing the Iowa statute are preempted by federal law to the

extent they set rates for wholesale sales by public utilities of electric energy in interstate commerce").

Fourth, the District Court stated: "while it may be a fine point, the FPA reserves to the utility, and not to FERC, the power to establish rates, by contract or otherwise…. Thus, what may have influenced a utility's choice in setting its initial rates does not encroach on the statutorily-granted power of FERC to review and approve those rates after the fact." Add. 23 n.26. Again, this is simply unresponsive to Plaintiffs' claims. As discussed above, *supra* at 52-53, FERC's subsequent review of the rates for reasonableness does not shield a State's wholesale rate regulation from a preemption challenge. Indeed, by the District Court's logic, a state would be free to pass a statute directly dictating the price of wholesale energy in the state, as long as FERC subsequently determined that statutory rate to be reasonable. That is directly contrary to precedent holding such state action to be field-preempted – including precedent by FERC itself. *See*, *e.g.*, *Nazarian*, 753 F.3d at 475 (describing the "wealth of case law" establishing FERC's "*exclusive* power to regulate wholesale sales of energy in interstate commerce" (emphasis added)); *Midwest Power Sys.*, 78 FERC ¶61,067, at 61,247 (1997) (FERC "cannot delegate [its] wholesale ratemaking authority to the states").

Fifth, the District Court stated: "to the extent that plaintiffs have an interest in FERC's future rate setting, as the FERC noted in the National Grid decision, '[c]omplainant will have the opportunity to intervene in any proceeding seeking Commission approval of those rates.'" Add. 23 n.26. Again, this reasoning is in error. This case has nothing to do with "FERC's future rate setting" or the reasonableness of the rates, but targets solely the illegality of *Massachusetts'* action in coercing NSTAR into a contract at those rates.

In sum, the District Court's reasoning rejecting Plaintiffs' preemption claim is untenable. Its decision should be reversed.

V. Plaintiffs Have Standing To Pursue Their Dormant Commerce Clause Claim.

In Footnote 27, the District Court opined that Plaintiffs also lacked standing to bring their Dormant Commerce Clause claim. Its reasoning was incorrect. Plaintiffs have both Article III standing and prudential standing to pursue this claim.

A. Plaintiffs Have Article III Standing.

"Constitutional standing requires an 'injury in fact,' a 'casual connection between the injury and the conduct complained of,' and a likelihood that 'the injury will be redressed by a favorable decision.'" *In re Auerhahn*, 724 F.3d 103, 116 (1st Cir. 2013). Plaintiffs have met all three

requirements. First, Plaintiffs have alleged a classic pocketbook injury: that as end-use customers of NSTAR, they will directly bear every penny of the above-market cost of the Cape Wind contract. Complaint ¶¶95-97; App. 551 (approving NSTAR's recovery of "above-market costs … from all distribution customers"). The Complaint alleges that if NSTAR had been permitted to obtain wholesale electricity from competing sources, including those out-of-state, it could have purchased at prices less than one-half of what Cape Wind charges. Complaint ¶95. That is sufficient to establish an injury-in-fact. Second, that injury-in-fact was caused by Massachusetts' actions, because the Commonwealth compelled NSTAR to contract with Cape Wind rather than with a less expensive alternative and then approved the contract which was imposed on NSTAR by compulsion. Complaint ¶¶64-92. Third, Plaintiffs' requested relief will redress their injury, because the forward-looking declaratory and injunctive relief sought by Plaintiffs would block the future effect of Order 12-30 approving the above-market power rates. Accordingly, NSTAR would no longer be authorized to charge Plaintiffs and other customers for the above-market costs of Cape Wind's electricity. Having shown injury, causation, and redressability, Plaintiffs have established Article III standing.

The District Court stated that Plaintiffs lacked standing because they "do not compete in the power generation market." Add. 23 n.27. But the Supreme Court has unambiguously held that this is not a requirement for standing:

> [C]ognizable injury from unconstitutional discrimination against interstate commerce does not stop at members of the class against whom a State ultimately discriminates, and customers of that class may also be injured, as in this case where the customer is liable for payment of the tax and as a result presumably pays more for the gas it gets from out-of-state producers and marketers. Consumers who suffer this sort of injury from regulation forbidden under the Commerce Clause satisfy the standing requirements of Article III.

General Motors Corp. v. Tracy, 519 U.S. 278, 286 (1997); *see also Alliance of Auto. Mfg. v. Gwadosky*, 430 F.3d 30, 37 (1st Cir. 2005) (manufacturer which "suffered concrete pecuniary injury" could bring dormant Commerce Clause challenge even though manufacturer "is not a member of the out-of-state class against whom the [state law] ostensibly discriminates").[15] Indeed,

[15] The District Court cited the statement in *Alliance to Protect Nantucket Sound, Inc. v. Department of Public Utilities*, 461 Mass. 166, 172 n.13, 959 N.E.2d 413, 421 n.13 (2011), that "[t]he Alliance has not alleged that it or any of its members have been harmed in their ability to compete for § 83 contracts by the claimed infringement of the commerce clause." Add. 9 n.16. The Supreme Judicial Court's statement, however, was pure dictum, given that the court considered the Dormant Commerce Clause claim nonetheless. Moreover, the Supreme Judicial Court cited no authority, so it is unclear whether its dictum was based on constitutional or prudential

in *Ben Oehrleins & Sons & Daughters, Inc. v. Hennepin County*, 115 F.3d 1372 (8th Cir. 1997) – a case cited by the District Court, Add. 23 n.27 – the Eighth Circuit held that customers had Article III standing to challenge regulation of waste haulers, where the customers would bear the ultimate legal burden. 115 F.3d at 1379-80.

The District Court cited *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 340-49 (2006), but that case is readily distinguishable. There, the plaintiff lacked Article III standing because its "alleged injury [was] based on the asserted effect of the allegedly illegal activity on public revenues, to which the [plaintiff as] taxpayer contributes." *Id.* at 344. But here Plaintiffs are not alleging any such "taxpayer standing." *Id.* at 345. Instead, Plaintiffs allege that they are paying more money for electricity as a direct result of the Cape Wind contract. As the Second Circuit explained in a similar context:

> Unlike the plaintiffs in *DaimlerChrysler*, who were taxpayers opposing a tax credit received by others in the hope that abolishing the tax credit would reduce their tax burden … plaintiffs in this case contend that they have been charged an inflated toll rate that, among other things, discriminates against interstate commerce. Inasmuch as plaintiffs alleged that they have paid higher tolls as a result of NYTA's policy, they have articulated a 'commercial, economic injury

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standing, or federal or state law. At any rate, to the extent the court's statement was based on federal law, it is inconsistent with *Tracy* and *Gwadosky*.

> that is concrete and specific to them,' and is caused by NYTA's alleged violation of the Commerce Clause.

Selevan v. New York Thruway Auth., 584 F.3d 82, 89 (2d Cir. 2009). The same reasoning applies here.

B. Plaintiffs Have Prudential Standing.

To the extent the District Court's footnote was intended to suggest that Plaintiffs lack prudential standing, it was incorrect. The District Court cited *Ben Oehrleins*, in which the Eighth Circuit held that customers of waste haulers had Article III standing, but did not have "prudential standing," to challenge regulation of those haulers. 115 F.3d at 1380-82. As explained below, however, *Ben Oehrleins* presents no barrier to adjudication of this case.

First, as the Supreme Court recently observed, the "prudential standing" doctrine is "in some tension" with the Court's "recent reaffirmation of the principle that a federal court's obligation to hear and decide cases within its jurisdiction is virtually unflagging." *Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2347 (2014) (quoting *Lexmark Int'l, Inc. v. Static Control Components*, 134 S. Ct. 1377, 1386 (2014)) (internal quotation marks omitted). Although the Court in *Driehaus* decided that it "need not resolve the continuing vitality of the prudential ripeness

doctrine in this case," *id.*, the Supreme Court's reasoning casts serious doubt as to whether the prudential standing doctrine should *ever* bar an otherwise justiciable claim.

Moreover, this Court has reserved judgment on whether *Ben Oerhleins* was correctly decided, *see Houlton Citizens' Coalition v. Town of Houlton*, 175 F.3d 178, 182-83 (1st Cir. 1999), and subsequently-decided case law suggests it does not accurately reflect this Circuit's law. For example, in *Gwadosky*, this Court held that an association of automobile manufacturers had standing to bring a Dormant Commerce Clause suit complaining of discrimination against out-of-state automobile dealers and in favor of in-state dealers. The Court reasoned that a manufacturer had "suffered concrete pecuniary injury" as a result of the challenged state law, and "[t]hat injury is enough to ground … standing to sue even though [the manufacturer] is not a member of the out-of-state class against whom the [state law] ostensibly discriminates." 430 F.3d at 37. The same logic applies here: Plaintiffs suffer a concrete pecuniary injury as a result of the state's discrimination, and that is enough to ground standing for a Commerce Clause claim.

The Court need not resolve these questions, however, because even if *Ben Oehrleins* were correct, Plaintiffs would still have prudential standing.

In *Ben Oerhleins*, the state imposed regulations on waste haulers, and both the waste haulers and their customers challenged those regulations under the Dormant Commerce Clause. Critically, unlike in this case, the waste haulers were not subject to a tariff under which all the excess costs were automatically passed on to customers. The customers did adduce economic evidence that some of the costs were passed on in the form of higher prices, 115 F.3d at 1379 n.5, but the waste haulers presumably ate some of the costs as well, as they were aggressively litigating the case in their own right. The Eighth Circuit held that the waste haulers, not the customers, were the entities with standing to pursue the Dormant Commerce Clause claim, reasoning that "there is no indication that allowing standing to the generators is necessary to insure protection of the rights asserted…. That the hauler plaintiffs brought suit more than a year before the [customer] plaintiffs (and indeed share the same counsel) and have aggressively litigated their own claims demonstrates that they are fully capable of asserting their own rights." 115 F.3d at 1381 (internal quotation marks omitted).

This case is different. NSTAR, unlike the waste haulers, lacks "the appropriate incentive to challenge (or not challenge) governmental action." *Kowalski v. Tesmer*, 543 U.S. 125, 129 (2004). That is so because NSTAR, by its tariff, automatically passes 100% of cost increases to its customers.

Given that Plaintiffs are bearing the *entire* economic burden of the above-market costs in the Cape Wind deal, they, not NSTAR, are the natural plaintiffs. What is more, NSTAR has not challenged the state action "with the necessary zeal and appropriate presentation," *id.*; to the contrary, it submitted to the Cape Wind contract in order to achieve its merger, and has even filed a motion to dismiss this suit. Given that NSTAR has neither the financial incentive nor the interest to challenge the illegal state action, Plaintiffs should be afforded their day in court.

CONCLUSION

For the foregoing reasons, this Court should reverse the District Court's dismissal of Plaintiffs' Complaint and remand for further proceedings. In light of the District Court's characterization of this lawsuit, *see supra* at 19-22, in remarks that Plaintiffs submit are incorrect and unfair, Plaintiffs respectfully request that, in the event of a remand, the Court direct that the case be reassigned to a different District Judge.

August 25, 2014

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 13,979 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 2007 in Times New Roman, 14-point font.

Dated: August 25, 2014

/s/ Matthew E. Price
Matthew E. Price

CERTIFICATE OF SERVICE

I hereby certify that on August 25, 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.

/s/ Matthew E. Price
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ADDENDUM

INDEX

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CIVIL ACTION NO. 14-10148-RGS

TOWN OF BARNSTABLE, MASSACHUSETTS, et al.

v.

ANN G. BERWICK, et al.

MEMORANDUM AND ORDER
ON STATE DEFENDANTS' MOTION TO DISMISS

May 2, 2014

STEARNS, J.

This Complaint is the latest chapter in a long-running saga involving the siting of a wind farm in Nantucket Sound. The dispute pits the Commonwealth of Massachusetts and the diversified energy policy espoused by Governor Deval Patrick against an obdurate band of aggrieved residents of Cape Cod and the Islands. Both sides in the dispute claim the mantle of environmentalism, although for present purposes, plaintiffs[1] have doffed their green garb and draped themselves in the banner of free-market economics. Plaintiffs filed the Complaint on January 21, 2014, seeking

[1] Town of Barnstable, Massachusetts; Hyannis Marina, Inc.; Marjon Print and Frame Shop Ltd.; The Keller Company, Inc.; The Alliance to Protect Nantucket Sound (Alliance); Sandra P. Taylor; and Jamie Regan.

declaratory and injunctive relief against various State Defendants,[2] while naming Cape Wind Associates, LLC (Cape Wind) and NSTAR Electric Company (NSTAR) as required parties, pursuant to Fed. R. Civ. P. 19(a). Plaintiffs allege violations of the "dormant" Commerce Clause and the Supremacy Clause of the United States Constitution and pray that the court abrogate an order of the DPU approving an energy-supply contract entered into between NSTAR and Cape Wind. All defendants have moved to dismiss (the State Defendants collectively, and Cape Wind and NSTAR separately).[3]

BACKGROUND

Cape Wind is a for-profit company with plans to develop a wind-powered renewable energy generation facility in federal waters in

[2] The State Defendants are Ann G. Berwick, in her official capacity as Chair of the Massachusetts Department of Public Utilities (DPU); Jolette A. Westbrook and David W. Cash, in their official capacities as Commissioners of the DPU; and Mark Sylvia, in his official capacity as Commissioner of the Massachusetts Department of Energy Resources (DOER).

[3] In the context of a motion to dismiss, plaintiff's plausible allegations of facts are assumed to be true. *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555-556 (2007). Additionally, "documents the authenticity of which are not disputed by the parties; [] official public records; [] documents central to plaintiffs' claim; or [] documents sufficiently referred to in the complaint" may also be considered on a motion to dismiss. *Alt. Energy Inc. v. St. Paul Fire & Marine Ins. Co.*, 267 F.3d 30, 33 (1st Cir. 2001) (citation omitted).

Nantucket Sound, a triangular-shaped 750 square-mile tract of the Atlantic Ocean bounded by Cape Cod and the Islands of Martha's Vineyard and Nantucket. The proposed wind facility is to consist of 130 horizontal-axis wind turbines dispersed over 24 square miles of open ocean, and is designed to generate 454 megawatts of electricity at peak operation.

In 2001, Cape Wind applied for a permit to build the wind facility on Horseshoe Shoals in the Sound, some five miles from the Cape Cod coastline and roughly 16 miles from the Town of Nantucket. In August of 2002, the U.S. Army Corps of Engineers granted Cape Wind a permit to build a meteorological tower to gather data in preparation for the project. As Judge Tauro presciently predicted in rejecting a suit against the Corps of Engineers' action, this was just "the first skirmish in an eventual battle." *Ten Taxpayer Citizen Grp. v. Cape Wind Assocs., LLC,* 278 F. Supp. 2d 98, 99 (D. Mass. 2003). The Alliance, the leading plaintiff in this action, filed a parallel (and equally unsuccessful) lawsuit also challenging the permitting authority of the Corps of Engineers. *See Alliance to Protect Nantucket Sound, Inc. v. U.S. Dep't of the Army,* 288 F. Supp. 2d 64 (D. Mass. 2003), *aff'd,* 398 F.3d 105 (1st Cir. 2005). [4]

[4] In affirming the district court's dismissal of this challenge, the First Circuit summarily held that "[i]n this case, however, we find it unnecessary

In 2005, the Massachusetts Energy Facilities Siting Board approved the construction of two undersea electric transmission cables to connect the proposed wind facility with the regional power grid. The Alliance promptly filed suit protesting the approval.[5] In 2007, the Secretary of the Executive Office of Energy and Environmental Affairs issued a certificate approving Cape Wind's Final Environmental Impact Report. The Ten Taxpayers Group filed a suit in response.[6] The Supreme Judicial Court (SJC) and the Superior Court ultimately dismissed the two lawsuits, separately holding that the Board and the Secretary had each exercised their approval authority appropriately by deferring where necessary to federal jurisdiction.[7] The Town of Barnstable, also a plaintiff in this case, meanwhile filed a lawsuit of its own against the Siting Board. *See Town of*

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to reach the question of *Chevron* deference [the principal ground invoked by the district court] because legislative history reveals, with exceptional clarity, Congress's intent that [the Corps' jurisdiction] not be restricted [in the manner the Alliance argued for]." *Alliance to Protect Nantucket Sound, Inc. v. U.S. Dep't of the Army*, 398 F.3d 105, 109 (1st Cir. 2005).

[5] *Alliance to Protect Nantucket Sound, Inc. v. Energy Facilities Sitting Bd.*, 448 Mass. 45 (2006).

[6] *Ten Taxpayer Citizens Grp. v. Sec'y Office of Envtl. Affairs*, 24 Mass. L. Rptr. 539 (2008).

[7] Both approvals were conditioned on Cape Wind obtaining the necessary permits to begin construction of the wind farm, including all necessary federal licenses.

Barnstable v. Mass. Energy Facilities Siting Bd., 25 Mass. L. Rptr. 375 (2009). The Alliance, the Ten Taxpayer Group, and the Town of Barnstable then joined all of their grievances in another Superior Court lawsuit, *Town of Barnstable v. Cape Wind Assocs., LLC*, 27 Mass. L. Rptr. 1111 (2010), followed by another onslaught against the Facilities Siting Board. *See Alliance to Protect Nantucket Sound, Inc. v. Energy Facilities Siting Bd.*, 457 Mass. 663 (2010) (affirming the Siting Board's authority to issue the environmental certificate).[8]

In April of 2010, Kenneth Salazar, the United States Secretary of the Interior, issued a Record of Decision giving federal approval to the Cape

[8] Other legal challenges continued to plague Cape Wind. Plaintiffs here, and others, including the Wampanoag Native American Tribe, also repaired to the federal court in the District of Columbia where they filed a series of cases asserting violations of the Administrative Procedure Act, the Endangered Species Act, the Migratory Bird Treaty Act, the National Environmental Policy Act, the Outer Continental Shelf Lands Act, the Coast Guard and Maritime Transportation Act, the Energy Policy Act, the National Historic Preservation Act, and the Rivers and Harbors Act. The cases were consolidated by the district court. On March 14, 2014, Judge Walton issued a lengthy decision allowing summary judgment for all defendants on all issues with two relatively minor exceptions (the fisheries and wildlife services were directed to consider the reasonableness of mandated turbine feathering operational adjustments and the possible incidental take of North Atlantic right whales). *See PEER v. Beaudreau*, 2014 WL 985394 (D.D.C. Mar. 14, 2014).

Wind project.[9] The Secretary also issued a lease to Cape Wind to operate a wind energy facility on Horseshoe Shoals, effective November 1, 2010. Notwithstanding, as one academic observer has accurately stated, "[d]espite full federal and state approval of the project, CWA has continued to face vehement opposition from local groups."[10]

The Green Communities Act

In 2008, the Massachusetts Legislature passed the Green Communities Act (GCA), Mass. St. 2008, ch. 169.[11] Section 83 of the GCA

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[9] The Energy Policy Act of 2005 authorized the Department of the Interior to grant leases for energy transmissions from the Outer Continental Shelf for sources other than gas and oil.

[10] Timothy H. Powell, *Revisiting Federalism Concerns in the Offshore Wind Energy Industry in Light of Continued Local Opposition to the Cape Wind Project*, 92 B.U. L. Rev. 2023, 2037 (2012).

[11] The SJC in a related case summarized the mission and mandate of the GCA as follows: "The stated purpose of the GCA is to 'provide forthwith for renewable and alternative energy and energy efficiency in the [C]ommonwealth' . . . . [GCA section 83] requires electricity distribution companies to seek proposals from renewable energy developers twice in a five-year period beginning on July 1, 2009, and, if reasonable proposals are received, enter into long-term [Power Purchase Agreements (PPAs)] to facilitate the financing of renewable energy generation facilities. . . . In evaluating a PPA proposed under § 83, the [DPU] must consider its costs and benefits, and may only approve the contract on a finding that it is a 'cost effective mechanism for procuring renewable energy on a long-term basis.'" *Alliance to Protect Nantucket Sound, Inc. v. Dep't of Pub. Utils.*, 461 Mass. 166, 168-169 (2011).

requires Massachusetts electric utilities to solicit long term supply proposals from renewable energy generators. Among the favored suppliers are generators of wind energy like Cape Wind. The GCA requires DPU-regulated utilities to obtain at least three percent of their total energy supply from "green" sources.

As originally enacted, the GCA contained a provision requiring that all eligible alternative energy suppliers be located within Massachusetts or its adjacent state and federal waters. On June 9, 2010, the DPU suspended the territorial restriction[12] after TransCanada Power Marketing Ltd. challenged the limitation in federal court under the dormant Commerce Clause.[13] In 2012, the Legislature amended the GCA to eliminate the geographical restriction.

The National Grid – Cape Wind Contract

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[12] Section 83 of the GCA stated that if any provision of the section was subject to a judicial challenge, the DPU would be "'entitled to suspend the applicability of the challenged provision pending the outcome of the judicial proceeding, and to issue any necessary orders to ensure that the unchallenged sections of the Act remain in effect.'" *Alliance*, 461 Mass. at 170 (quoting Mass. St. 2008, ch. 169, § 83, tenth par.). The DPU issued an order removing the words "within the Commonwealth of Massachusetts" from section 83 and any associated regulations.

[13] *See TransCanada Power Mktg. Ltd. v. Bowles*, No. 4:10-cv-40070-TSH (D. Mass. filed April 16, 2010).

In December of 2009, National Grid, a competitor of defendant NSTAR, sought approval from the DPU to enter into negotiations with Cape Wind over a long-term energy-supply contract.[14] The parties signed a Power Purchase Agreement (PPA) on May 7, 2010. Plaintiffs allege that the contract prices that National Grid agreed to pay were significantly above the market price for electricity in general and well above the price being charged by other generators of renewable energy in 2010. Compl. ¶ 48. In May of 2010, National Grid submitted two Cape Wind contracts to DPU for approval. DPU approved the first contract (for 50% of Cape Wind's anticipated power supply to be distributed by National Grid), but rejected the second (for the remaining 50%, to be assigned to another purchaser for distribution).[15]

Two separate avenues of appeal were taken from DPU's approval of the National Grid contract. The Alliance (along with TransCanada)

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[14] GCA regulations required National Grid to submit a timetable and method of solicitation to DPU for review and approval prior to soliciting an offer.

[15] Because the PPAs were negotiated prior to the suspension of the geographical restriction in the GCA, DPU required National Grid to demonstrate that the contracts had not been influenced by the now-suspended limitation. DPU held thirteen days of evidentiary hearings involving National Grid and nineteen intervening parties (including the Alliance).

appealed directly to the SJC, asserting, among other claims, that DPU's approval of the contract violated the dormant Commerce Clause. The SJC rebuffed the objections and affirmed DPU's decision, specifically rejecting the dormant Commerce Clause claim. *See Alliance,* 461 Mass. at 174 (noting that "[t]he constitutional challenge advanced by the Alliance and TransCanada fails").[16] A second group of plaintiffs filed a challenge with the Federal Energy Regulatory Commission (FERC), alleging that the DPU had violated the Supremacy Clause by encroaching on FERC's exclusive prerogative under the Federal Power Act (FPA) to set national wholesale electricity prices. FERC rejected the argument for, among other reasons, the fact that the contract as approved by DPU explicitly required the parties to obtain wholesale rate clearances from FERC. *See Californians for Renewable Energy, Inc. (CARE) & Barbara Durkin v. Nat'l Grid, Cape Wind, & DPU*, Order Dismissing Complaint, 137 FERC ¶ 61,113 (2011).[17]

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[16] The SJC also acknowledged a potential standing deficiency with respect to plaintiff Alliance. *See Id*. at 173 n. 13 ("The Alliance has not alleged that it or any of its members have been harmed in their ability to compete for § 83 contracts by the claimed infringement of the commerce clause. However, because TransCanda has alleged such harm, we consider the claim.").

[17] "To the extent the complainants instead challenge rates as unjust and unreasonable under the FPA, they have not shown how they are unjust and unreasonable. The contracts approved by the Massachusetts Commission indicate that the wind facilities must either have QF status or file rates with this Commission pursuant to section 205 of the FPA. Cape

The NSTAR – Cape Wind Contract

After the suspension of the geographical limitation, DPU had directed NSTAR and other utilities to reopen their Requests for Proposals (RFPs) to take bids from out-of-state generators. Compl. ¶ 53. NSTAR did so and ultimately contracted with three land-based wind generators, Groton Wind, LLC, New England Wind, LLC, and Blue Sky East, LLC. *Id*. ¶ 54. Plaintiffs allege that the price of wind energy from NSTAR's contracts with the three land-based generators was approximately one-half the initial price agreed to by National Grid in its contract with Cape Wind. *Id*. ¶¶ 55-57. NSTAR chose not to enter a contract with Cape Wind. *Id*. ¶ 56. Plaintiffs allege that NSTAR's "refusal" to contract with Cape Wind threatened the very existence of the project because National Grid had secured DPU approval to distribute only half of the wind farm's output (the second National Grid contract, for the remaining 50% had been rejected by the DPU). *Id*. ¶ 58.

On November 24, 2010, NSTAR filed an application with DPU for approval of a merger between it and Northeast Utilities.[18] The Department

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Wind indicates that its rates will be filed with this Commission. Complainants will have the opportunity to intervene in any proceeding seeking Commission approval of those rates." *Id*.

[18] Under Mass. Gen. Laws ch. 164, § 96, DPU has the sole authority to approve mergers of utilities subject to its jurisdiction, including NSTAR.

of Energy Resources (DOER), the agency responsible for implementing the state's renewable energy priorities (*see* Mass. Gen. Laws ch. 25A, § 6), intervened in the merger proceedings. DOER had no power to veto the merger,[19] but requested that DPU modify its standard of review from "no net harm" to one that would "determine whether the proposed merger will provide a substantial net benefit to the public interest . . . ." Compl. ¶ 66. In response, DPU entered an Interlocutory Order acknowledging that the GCA (and the related Global Warming Solutions Act (GWSA)) required it to reconsider its standard of review, and adopted the "net benefits" standard.

In July of 2011, DOER asked the DPU to stay the merger pending an assessment of its potential impact on consumers. NSTAR and Northeast argued that a stay would derail the merger. Compl. ¶ 68. On September 28, 2011, DOER submitted a filing urging DPU to require NSTAR to purchase off-shore wind energy as a condition for approving the merger. *Id*. ¶ 70. NSTAR and Northeast opposed the request, arguing a potential

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Plaintiffs allege that, at the time of the merger application, neither NSTAR nor Northeast was involved in "significant negotiations" with Cape Wind to purchase power. Compl. ¶ 61.

[19] In their Complaint, plaintiffs take the position that DOER had the ultimate power to block the NSTAR-Northeast merger, although elsewhere they have acknowledged that the approval power is vested solely in the DPU (as the statute makes clear). *See* Dkt. #38 at 9 (State Defendants' brief, quoting the Alliance in other matters).

violation of the dormant Commerce Clause as Cape Wind appeared to be the only viable off-shore wind developer. Plaintiffs allege that NSTAR representatives subsequently entered into "secret negotiations with the Patrick Administration." *Id.* ¶ 75. On February 15, 2012, NSTAR and DOER entered into a settlement agreement, which included a condition that NSTAR pursue a PPA with Cape Wind on terms that were "substantially the same" as those of the National Grid-Cape Wind contract. The settlement agreement was subject to DPU approval.

On February 24, 2012, NSTAR submitted to DPU a Memorandum of Understanding (MOU) between NSTAR, DOER, and Cape Wind setting out a timetable and method of solicitation of GCA bid proposals. The DPU invited comment on the MOU, and the Alliance, among others, submitted statements in opposition (including allegations that DOER had violated the dormant Commerce Clause). On March 22, 2012, DPU approved the MOU. The Alliance appealed the DPU's order to the SJC, but subsequently withdrew the appeal. *See Alliance to Protect Nantucket Sound v. Dep't of Pub. Utils.*, No. SJC-2012-0171 (filed Apr. 23, 2012; dismissed Jan. 8, 2013). On April 4, 2012, DPU approved the merger between NSTAR and Northeast.

On March 23, 2012, NSTAR and Cape Wind executed a PPA under which NSTAR agreed to purchase energy, capacity, and renewable power certificates from Cape Wind over a 15-year period. Compl. ¶¶ 84 and 86. On March 30, 2012, NSTAR submitted the PPA to DPU for approval. *Id*. ¶¶ 84 and 90. The contract required Cape Wind to comply with the rules of FERC and other government entities, and required Cape Wind to obtain and maintain the requisite permits and approvals from FERC, including wholesale rates clearances. Alliance intervened in the proceedings, which included three public hearings and two evidentiary hearings. On November 26, 2012, DPU approved the PPA. Neither the Alliance nor any other party to the proceedings appealed DPU's final decision to the SJC. On January 14, 2014, over fourteen months after the DPU's decision, plaintiffs filed this case.

DISCUSSION

Plaintiffs seek a declaration that Massachusetts violated both the dormant Commerce Clause and the Supremacy Clause "when it used its influence over NSTAR's merger request to bring about NSTAR's entry into an above-market wholesale electricity contract with Cape Wind, a politically favored renewable energy project in Massachusetts, to buy electricity at a particular price." Compl. ¶ 4. Plaintiffs also seek injunctive relief to

"remedy the constitutional violation" by invalidating the Cape Wind contract that "Massachusetts compelled NSTAR to enter." *Id.* Plaintiffs allege that this is necessary to "alleviate the increased electricity costs that NSTAR customers such as Plaintiffs will be forced to pay as a result of the illegal, above-market contract." *Id.*

Plaintiffs' Complaint sets out two causes of action. In Count I, plaintiffs allege that DOER "intruded on FERC's exclusive jurisdiction to regulate wholesale electric energy prices" in violation of the Supremacy Clause and the Federal Civil Rights Act, 42 U.S.C. § 1983.[20] Compl. ¶ 107. In Count II, plaintiffs allege that "by conditioning its approval of the merger on the execution of a PPA between NSTAR and Cape Wind, DOER prevented out-of-state generation facilities from competing with Cape Wind," in violation of the dormant Commerce Clause and 42 U.S.C. § 1983. *Id.*¶ 115. Defendants seek dismissal of the Complaint on numerous grounds, including sovereign immunity, *Burford* abstention, comity, claim

[20] Section 1983 "does not, by its own terms, create substantive rights; it provides only remedies for deprivations of rights established elsewhere in the Constitution or federal laws." *Kneipp v. Tedder*, 95 F.3d 1199, 1204 (3d Cir. 1996); *see also Baker v. McCollan*, 443 U.S. 137, 144 n.3 (1979) (same). A violation of a "right" that is not "secured" by federal law is not actionable under section 1983. *Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103, 106 (1989). At the hearing on the motion to dismiss, plaintiffs' counsel conceded that section 1983 does not authorize a private right of action based on the Supremacy Clause and that plaintiffs were relying instead on a right of direct action.

preclusion, standing, and failure to state a claim. As the debate begins and ends with the Eleventh Amendment, I will devote the bulk of the discussion to the doctrine of sovereign immunity, and then briefly explain why neither the Supremacy Clause nor the dormant Commerce Clause give rise to a substantive right of action benefitting plaintiffs.

The Eleventh Amendment states that "[t]he judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another State, or by citizens or subjects of any foreign state." U.S. Const. amend. XI. "The Supreme Court . . . has expanded the doctrine of sovereign immunity beyond the literal words of the Eleventh Amendment, holding that state governments, absent their consent, are not only immune from suit by citizens of another state, but by their own citizens as well." *Guillemard-Ginorio v. Contreras-Gomez*, 585 F.3d 508, 529 n.23 (1st Cir. 2009) (citing *Alden v. Maine*, 527 U.S. 706, 728-729 (1999)).[21] "The Eleventh Amendment largely shields States from suit in federal court without their consent, leaving parties with claims against a State to present them, if the State permits, in the State's own tribunals." *Pastrana-Torres v.*

[21] The Commonwealth has not consented to being sued for money damages in either the federal courts or in its own courts under section 1983. *Woodbridge v. Worcester State Hosp.*, 384 Mass. 38, 44-45 (1981).

Corporacion de Puerto Rico Para La Difusion Publica, 460 F.3d 124, 126 (1st Cir. 2006) (quoting *Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 39 (1994)). A state entity is similarly immune from suit if it functions as an "arm of the state." *Coggeshall v. Mass. Bd. of Registration of Psychologists*, 604 F.3d 658, 662 (1st Cir. 2010).

A suit against a government official in his or her official capacity is the same as a suit "against [the] entity of which [the] officer is an agent." *Monell v. New York City Dep't of Soc. Servs.*, 436 U.S. 658, 690 n.55 (1978). Thus, a plaintiff may not resort to the expedient of naming a state official as a defendant as a means of circumventing the Eleventh Amendment. *Muirhead v. Meacham*, 427 F.3d 14, 18 (1st Cir. 2005) (quoting *Dugan v. Rank*, 372 U.S. 609, 620 (1963)). A narrow exception to the rule has been carved out by *Ex parte Young*, 209 U.S. 123, 159-160 (1908), and *Home Tel. & Tel. Co. v. City of Los Angeles*, 227 U.S. 278, 293-294 (1913). The Eleventh Amendment does not bar a suit against a State officer in his or her official capacity where the complaining party seeks *prospective* equitable relief from a continuing violation of federal law. *Green v. Mansour*, 474 U.S. 64, 68 (1985). A classic example is *Georgia R.R. & Banking Co. v. Redwine*, 342 U.S. 299 (1952), in which the plaintiff railroad sought to enjoin the Georgia State Revenue Commissioner from

assessing or collecting *ad volarem* taxes in violation of the Article I prohibition against the enactment by any State of a law impairing the obligation of contracts. U.S. Const., Art. I, § 10, cl. 1. The Supreme Court affirmed the jurisdiction of the district court to grant the relief requested. "This Court has long held that a suit to restrain unconstitutional action threatened by an individual who is a state officer is not a suit against the State." *Id*. at 304. *See also Edelman v. Jordan*, 415 U.S. 651, 664 (1974) ("[T]he relief awarded in *Ex parte Young* was prospective only; the Attorney General of Minnesota was enjoined to conform his *future* conduct of that office to the requirement of the Fourteenth Amendment.") (emphasis added); *Rosie D. v. Swift*, 310 F.3d 230, 234 (1st Cir. 2002) (observing that the *Ex parte Young* exception allows a federal court to "enjoin state officials to conform *future conduct* to the requirements of federal law.") (emphasis added).

The rule is different where the relief sought is retroactive in nature. "[A] suit, although nominally aimed at an official, will be considered one against the sovereign 'if the judgment sought would expend itself on the public treasury or domain, or interfere with the public administration, or if the effect of the judgment would be to restrain the Government from acting, or to compel it to act.'" *Muirhead*, 427 F.3d at 18 (quoting *Dugan*,

372 U.S. at 620). As summarized by Professor Tribe, "[a]ctions for retroactive relief, even when styled as requests for an injunction and even if nominally directed against state officers and not the state itself, will ordinarily be barred by the Eleventh Amendment if the effect of the judgment is to burden the state treasury." Laurence H. Tribe, *American Constitutional Law* § 3-25 at 535 n.99 (3d ed. 2000).

That the relief being sought here is retroactive and thus barred by the Eleventh Amendment is easily ascertained by turning to the specific demands set out in plaintiffs' Complaint for Declaratory and Injunctive Relief. Prayers (a), (b), and (c) seek a declaration that (1) the DPU acted illegally in "forcing" NSTAR to enter a contract with Cape Wind at a specified price,[22] (2) that the DPU's order approving the contract is therefore null and void, and (3) that the contract is thus "null and void and without legal force or effect." Prayer (d) is a variant on (a) through (c) that seeks an injunction preventing DPU from taking any steps to enforce its order approving the contract and to do whatever is necessary to remedy the

[22] While ordinarily the court will accept plausible facts set out in the Complaint as true, this is not the case where, as here, documents referenced in the Complaint (specifically the DPU order) contradict on their face a supposed fact as plead. The allegation that DPU dictated that NSTAR procure power from Cape Wind at a specified price is misleading and ultimately untrue.

constitutional harms caused by its allowing the contract to take effect. An award of prospective declaratory relief that has "much the same effect as a full-fledged award of damages or restitution by the federal court" is a form of relief distinctly barred by the Eleventh Amendment. *Mills v. State of Maine*, 118 F.3d 37, 54-55 (1st Cir. 1997). Here the effect of a declaration that Massachusetts had illegally compelled NSAR and Cape Wind to enter an above-market price contract for wind energy would inevitably lead to restitutionary claims against the Commonwealth by NSTAR and Cape Wind, while an injunction ordering DPU to cease enforcement of the PPA and to take remedial measures for the alleged constitutional harms[23] would restrain the State from acting by frustrating its efforts to implement the policies enunciated in the GCA and the GWSA, while further bleeding the treasury.

Plaintiffs attempt unsuccessfully to distinguish the cases in which sovereign immunity was found to compel dismissal of an action against

[23] The retrospective nature of plaintiffs' injunctive request is underscored by the demand that DPU take remedial steps to return the relationship between NSTAR and Cape Wind to the *status quo ante*. However, with respect to the PPA itself, there is nothing further for DPU (or DOER) to do – the PPA is an historical fact and neither agency has any further action to take, whether of an approval or enforcement nature. As defendants accurately state in their Memorandum, "not a single allegation of the Complaint identifies or alludes to any future actions the State Defendants must take with respect to the contract." Def's Mem. at 15.

state officials, including a recent decision by this court, *Tyler v. Massachusetts*, 2013 WL 5948092 (D. Mass. Nov. 7, 2013). Plaintiffs state that, "DPU Order 12-30 constitutes an ongoing legal entitlement for NSTAR to pay certain rates to Cape Wind and pass them down to consumers, whereas the [probation condition in *Tyler* requiring that the rapist acknowledge paternity of the child and abide by any child support orders issued by the Probate and Family Court] did not constitute an ongoing legal entitlement in any way." Pl.'s Opp'n Mem., Dkt. #48 at 20. However, what plaintiffs seek here is precisely analogous to *Tyler* (although much less sympathetic), in that they seek relief from the ongoing "effects" of past state action "in the form of elevated electricity rates over fifteen years," just as Tyler unsuccessfully sought relief from the enduring effects of a state court order.[24] In rejecting the "ongoing effects" doctrine as a means of

[24] *Negron-Almeda v. Santiago*, 579 F.3d 45, 53-54 (1st Cir. 2009), offered by plaintiffs' counsel at the hearing, is no more persuasive. In that case, the court found that the Eleventh Amendment did not bar an order of *prospective* relief, that is, the reinstatement of an unjustly fired public employee, where the remedy did not address monetary damages for a past wrongful termination and where the intent of the order was to conform the future conduct of the state officials involved to the requirements of federal law. *See Papasan v. Allain*, 478 U.S. 265, 278 (1986) ("Relief that in essence serves to compensate a party injured in the past by an action of a state official in his official capacity that was illegal under federal law is barred even when the state official is the named defendant. . . . On the other hand, relief that serves directly to bring an end to a present violation of federal law is not barred . . . ."). Here, by contrast, plaintiffs are not seeking

circumventing the Eleventh Amendment, the law is not cruel, but pragmatic in its understanding 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. *See, e.g.*, *Green*, 474 U.S. at 68 ("Both prospective and retrospective relief implicate Eleventh Amendment concerns, but the availability of prospective relief of the sort awarded in *Ex parte Young* gives life to the Supremacy Clause. Remedies designed to end a continuing *violation* of federal law are necessary to vindicate the federal interest in assuring the supremacy of that law. But compensatory or deterrence interests are insufficient to overcome the dictates of the Eleventh Amendment.") (emphasis added) (internal citations omitted); *Edelman v. Jordan*, 415 U.S. at 668 (noting the *remedy* must be a "consequence of [state] compliance in the future with a substantive federal-question determination" otherwise it "is in practical effect indistinguishable in many aspects from an award of damages against

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to prevent DPU from approving future contracts between NSTAR and Cape Wind, but to undo a contract already in force by way of a declaration that state officials violated federal law in the past. *See Nat'l R.R. Passenger Corp. v. McDonald*, 2013 WL 5434618, at *13 (S.D.N.Y. Sept. 26, 2013) (quoting *Green*, 474 U.S. at 68) ("Since the [alleged state violation] was complete in 2008, there is no 'ongoing violation of federal law' or 'threat of state officials violating the law in the future.'").

the State . . . resulting from a past breach of a legal duty on the part of the defendant state officials").

Because the Eleventh Amendment requires that this case be dismissed, there is no reason to consider the 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,[25] or directly under the Supremacy Clause,[26] or under the dormant Commerce Clause.[27]

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[25] "42 U.S.C. § 1983 is properly invoked to redress violations of a federal statute . . . if the statute creates enforceable 'rights, privileges, or immunities,' and if Congress has not foreclosed such enforcement in the statutory enactment itself." *Eric L. By and Through Schreiber v. Bird*, 848 F. Supp. 303, 308 (D.N.H. 1994) (citing *Maine v. Thiboutot*, 448 U.S. 1 (1980) and *Wright v. Roanoke Redev. and Hous. Auth.*, 479 U.S. 418 (1987)). Plaintiffs fail to identify any right privately enforceable under section 1983. *See, e.g., Golden State Transit*, 493 U.S. at 107 (noting that "[t]he Supremacy Clause, of its own force, does not create rights enforceable under § 1983" and further that "[the] Clause is not a source of any federal rights" but rather "*secures* federal rights by according them priority whenever they come in conflict with state law") (internal quotations and citations omitted).

[26] Even assuming that a private citizen has standing (which is to say the least, highly doubtful) to act as a private Attorney General in seeking to secure FERC's Supremacy Clause authority in approving wholesale electricity rates, there is no federal right at stake, given that the DPU order requires NSTAR and Cape Wind to file their rates for approval by FERC. Plaintiffs have essayed this argument before (that DPU violated the FPA by usurping FERC's exclusive jurisdiction to determine wholesale rates) in challenging the DPU's order approving the contract between Cape Wind

ORDER

For the foregoing reasons, the defendants' motions to dismiss are ALLOWED with prejudice. The Clerk will enter judgment for defendants and close the case.[28]

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and National Grid. FERC rejected the argument then, and there is no doubt that it would do so again. *See CARE*, 137 FERC ¶ 61113. Moreover, while it may be a fine point, the FPA reserves to the utility, and not to FERC, the power to establish rates, by contract or otherwise. *See Atl. City Elec. Co. v. F.E.R.C.*, 295 F.3d 1, 10 (D.D.C. 2002). FERC's power to modify wholesale rates only arises after rates have been filed with FERC and found to be unlawful. Thus, what may have influenced a utility's choice in setting its initial rates does not encroach on the statutorily-granted power of FERC to review and approve those rates after the fact. And finally, to the extent that plaintiffs have an interest in FERC's future rate setting, as the FERC noted in the National Grid decision, "[c]omplainants will have the opportunity to intervene in any proceeding seeking Commission approval of those rates." *CARE*, 137 FERC ¶ 61113.

[27] Plaintiffs lack standing to bring suit under the dormant Commerce Clause as they do not compete in the power generation market, as noted by the SJC previously in the National Grid case. *Alliance*, 461 Mass. at 172 n.13. Nor can they claim standing as taxpayers or end-use consumers. *See DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 340-349 (2006); *Ben Oehrleins & Sons & Daughter, Inc. v. Hennepin Cnty.*, 115 F.3d 1372, 1381 (8th Cir. 1997).

[28] A final note. In entering this decision, the court takes no position on the underlying merits of siting a wind farm in Nantucket Sound or the wisdom of a state policy that encourages utilities to purchase renewable forms of energy at above-market prices. If instead of a judicial robe, I were to wear the hat of John Muir or Milton Friedman, I might well conclude that the Cape Wind project should have been built elsewhere (or not built at all), or that the NSTAR-Cape Wind contract should never have been approved. But in this case, the Governor, the Legislature, the relevant

SO ORDERED.

/s/ Richard G. Stearns

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UNITED STATES DISTRICT JUDGE

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public agencies, and 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. For that reason, I have dealt with this matter as expeditiously as possible.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Town of Barnstable, Massachusetts, et al., Plaintiff(s),	)	
v.	)	CIVIL ACTION NO.: 1:14cv10148 RGS
Ann G. Berwick, et al, Defendant(s).	)	

JUDGMENT

STEARNS, District Judge May 5, 2014

In accordance with this Court's Memorandum and Order entered on May 2, 2014 on State Defendants' Motions to Dismiss:

Judgment hereby entered in favor of Defendants. Case closed.

BY THE COURT,

/s/ Terri Seelye
Deputy Clerk