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

No. 14-1598

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Plaintiffs-Appellants

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

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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

REPLY BRIEF OF APPELLANTS HYANNIS MARINA, INC., JAMIE REGAN, AND ALLIANCE TO PROTECT NANTUCKET SOUND

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November 6, 2014

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I. Sovereign Immunity Does Not Bar This Suit.

A. Plaintiffs Have Satisfied *Ex Parte Young.*

Plaintiffs have asserted a straightforward claim for relief under *Ex Parte Young*, 209 U.S. 123 (1908), because they have "allege[d] an ongoing violation of federal law" and "seek[] relief properly characterized as prospective." *Verizon Md., Inc. v. Pub. Serv. Comm'n of Md.*, 535 U.S. 635, 645 (2002).

In arguing otherwise, Defendants never grapple with Plaintiffs' core argument: as long as the DPU's approval of the Cape Wind contract (also called the "Power Purchase Agreement" or "PPA") remains in place, NSTAR will be purchasing wholesale power under a contract brought about by state coercion rather than a voluntary market transaction, and cheaper, out-of-state renewable energy sources will be locked out of the Massachusetts market. Order 12-30 is not merely historical; it will carry the force of law for the full fifteen-year length of the contract and cause these violations to persist.

To be sure, the actions that set these violations in motion occurred in the past – but the violations themselves, which are the gravamen of the Complaint, are plainly ongoing. *See, e.g.*, Joint Appendix ("JA") 40 ¶86 (describing 15-year contract), JA46-47 ¶¶103-108 (describing State's intrusion on the wholesale electricity market), JA48-49 ¶¶115-18 (describing State's discrimination against

out-of-state renewable energy producers). Moreover, the relief sought by Plaintiffs is purely prospective: an order that would nullify, going forward, the DPU's authorization of the contract, which is necessary for the contract to remain effective for the next fifteen years. Thus, Plaintiffs' suit is easily distinguishable from suits seeking retrospective relief.

According to Defendants, all this is irrelevant, because Plaintiffs must allege "*future actions* the State Defendants must take with respect to the contract." State Br. 22. That is not the law, as demonstrated by this Court's decision in *Negron-Almeda v. Santiago*, 579 F.3d 45 (1st Cir. 2009). There, this Court held that a former government employee's wrongful termination suit was not barred by sovereign immunity, even though the suit required a determination of whether past state conduct was lawful. No further state action was at issue – the plaintiff had already been fired, and there was nothing else for the State to do. *Negron-Almeda* establishes that a federal court may issue an order that remedies, on a prospective basis, an ongoing violation set in motion by a past order.

Amazingly, State Defendants do not acknowledge this case, even though Plaintiffs devoted four pages of their opening brief to it (at 35-38). Cape Wind rationalizes *Negron-Almeda* on the ground that, although the State employer had no further steps to take, it nonetheless was excluding the plaintiff from his position on an ongoing basis, which was a continuing violation of federal law. Cape Wind

Br. 38-39. But the same argument applies here: Order 12-30 is an ongoing authorization of the PPA, and the PPA involves sales of electricity for the next fifteen years that will result from state compulsion rather than the voluntary negotiation that is required under the Federal Power Act and the Commerce Clause.[1]

Defendants likewise fail to grapple with *Vaqueria Tres Monjitas, Inc. v. Irizarry*, 587 F.3d 464 (1st Cir. 2009). There, the district court had required Puerto Rico to ensure that all milk producers regulated by the Commonwealth had received a fair rate of return, going back to 2003 (a year before the suit was brought). *See id.* at 478. Even though this relief amounted to a retrospective monetary award, this Court held that sovereign immunity posed no bar: any monetary award, it held, would be paid by milk consumers, and not by the Commonwealth's Treasury. The Court elaborated that "both the Supreme Court and this Circuit have consistently considered the source of relief as being of paramount importance to Eleventh Amendment considerations." *Id.* at 479. It

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[1] Cape Wind contends that Plaintiffs seek the "rescission and nullification of a bilateral PPA, negotiated and entered into freely by two private parties." Br. 37. That is incorrect. If the PPA were truly "negotiated and entered into freely by two private parties," *id.*, there would not be any violation of federal law. The crux of Plaintiffs' complaint is that the PPA would not have been entered into but for the State's compulsion. *See infra* at Part IV.A. Likewise, Cape Wind's assertion that it must still obtain FERC authorization to sell power, and that there cannot be any violation of federal law until after FERC gives its authorization, *see* Br. 35-36, is a merits argument irrelevant to sovereign immunity. *See infra* Part IV.B.1.

concluded that, "because no state funds are implicated by the district court's order, … the Eleventh Amendment's prohibition against retrospective relief does not apply." *Id.*

State Defendants, again, do not even cite this case, which was highlighted in Plaintiffs' opening brief (at 38-39). Cape Wind claims that *Irizarry* is inapposite because the Court did not rule on whether the relief sought by the plaintiffs in that case was prospective or retrospective, *see* Cape Wind Br. 39 – but that entirely misses the significance of the case. This Court held in *Irizarry* that *even retrospective relief* does not violate the Eleventh Amendment, so long as it does not mandate the payment of funds from the State Treasury.

None of Defendants' cases holds otherwise. In *Whalen v. Massachusetts Trial Court*, 397 F.3d 19, 28-30 (1st Cir. 2005), cited by both Defendants, the plaintiff was wrongfully terminated and sought restoration of pension and retirement credit for the time he was out of work. *Id.* at 28-29. The Court held that the requested relief was barred by sovereign immunity because it would "compensate him for past injury" and "give him back something he lost when he was terminated unlawfully." *Id.* at 30. Here, however, Plaintiffs have no *past injury*; they have not yet *lost anything*; and they do not ask the court to *give anything back*.

State Defendants also cite *S&M Brands, Inc. v. Cooper*, 527 F.3d 500 (6th Cir. 2008), State Br. 25, but that case is even less relevant. There, the plaintiff, a cigarette seller, claimed that the Attorney General's refusal to release certain escrow funds was tantamount to the retroactive application of a new state tax statute to previous taxable activity. *See id.* at 512. The plaintiff sued for the funds, and the Sixth Circuit held that the suit was barred by sovereign immunity. It reasoned that there was no ongoing violation of federal law stemming from a one-time retroactive application of a tax statute: "There is no constitutional defect that will be remedied by compliance with an order of the court other than the failure to make a one-time payment of money." *Id.* at 510. The present case could not be more different: Plaintiffs do not ask for the payment of money and are focused solely on future sales of electricity that will take place only because of the DOER's compulsion and the DPU's authorization.

B. The District Court's Reasoning Is Unsustainable.

The District Court erroneously characterized Plaintiffs' suit as somehow involving a money claim against the State Treasury. Add. 19. Cape Wind does not even attempt to defend that holding, and State Defendants defend it only tepidly, suggesting that the only function of Plaintiffs' requested relief would be as

"res judicata to seek money damages against the state in state court." State Br. 28.[2] But Plaintiffs do not seek any remedy for payments that already have been made (there have been no payments, anyway), and the Complaint expressly acknowledges that such a damages action would be foreclosed by state sovereign immunity. JA47 ¶¶110, JA49 ¶120. Indeed, there is no conceivable scenario in which Plaintiffs' suit would involve any claim on the State Treasury.

C. Plaintiffs Could Satisfy Defendants' Test.

Even if Plaintiffs were required to identify some particular actions by state officials that will take place in the future, they have done so. First, the DPU will "review NSTAR Electric's recovery of above-market costs in its annual reconciliation filings." Opening Br. 33 (quoting JA555). State Defendants respond (Br. 24) that such future review "is a function of DPU's traditional superintendence of NSTAR's retail relationship with its ratepayers, which will continue regardless of the outcome in this lawsuit." But Plaintiffs do not complain about the DPU's *general* power to review and approve retail rates; rather, Plaintiffs complain that the DPU will allow the collection of *these* above-market rates that result from a wholesale contract that the State compelled NSTAR to enter. That

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2 The State's position here is far weaker than in the pending case referenced by State Defendants (at Br. 30), *Caesars Mass. Development Co. v. Crosby*, No. 14-1681. There, the plaintiff threatened to use its federal suit as res judicata to seek damages in state court from the State for an alleged due process violation. No such threat exists here.

surely constitutes future conduct that would be restrained by the injunction. Second, the DPU will decide certain disputes between NSTAR and Cape Wind. Opening Br. 33. State Defendants respond (Br. 24) that "the parties cannot confer authority upon DPU by contract," ignoring that the *DPU itself approved the contract*, including the disputes provision. Indeed, without the DPU's approval, the contract could not have gone into effect. An injunction will restrain DPU from engaging in that future conduct.

In sum, Plaintiffs are not seeking retrospective monetary relief for a past legal wrong. Sovereign-immunity doctrine should not be warped to bar Plaintiffs from seeking forward-looking relief from a violation of federal law that will be ongoing for the next fifteen years.

II. Plaintiffs Have Article III Standing.

Plaintiffs have Article III standing because they have alleged a classic out-of-pocket economic injury: as a result of the federal-law violation they allege, they will pay higher electricity rates than they otherwise would. A favorable judicial decision would redress that injury-in-fact, because NSTAR would be required to source renewable electricity from alternative, less-expensive sources.

A. Plaintiffs Have Alleged an Injury-In-Fact.

Order 12-30 explicitly acknowledges that it is approving tariffs that will result in "above-market costs" for Plaintiffs. JA503. That is a paradigmatic

injury-in-fact. Cape Wind nevertheless argues that Plaintiffs' have alleged a "generalized" grievance because other NSTAR customers will also pay elevated rates. Cape Wind Br. 23-25. Not so. A "generalized" grievance is one where a taxpayer simply disagrees with a government policy and claims standing because he is a taxpaying citizen. The cases cited by Cape Wind illustrate the difference between this case and a "generalized grievance." In *Lance v. Coffman*, 549 U.S. 437 (2007), Colorado citizens sued to enjoin a redistricting plan that they did not like; but the plan did not impose any personal legal obligations on them. The Court held that the plaintiffs had "no particularized stake in the litigation" and thus lacked standing. *Id.* at 439-42. Similarly, in *DaimlerChrysler Crop. v. Cuno*, 547 U.S. 332, 344 (2006), DaimlerChrysler challenged a franchise tax credit. It did not challenge its *own* taxes; instead, it complained that the tax credit "deplete[d] the funds of the State of Ohio to which the Plaintiffs contribute through their tax payments." *Id.* at 343 (quotation marks omitted). The Court held that "state taxpayers have no standing under Article III to challenge state tax or spending decisions simply by virtue of their status as taxpayers." *Id.* at 346.

Here, by contrast, Plaintiffs object to utility rates *they* will be forced to pay. Their suit is the equivalent of the *Lance* plaintiffs alleging they personally were deprived of voting, or the *DaimlerChrysler* plaintiff alleging its own taxes were illegally inflated. A plaintiff has standing to bring such a suit, regardless of

whether many others have been similarly injured. *See, e.g.*, *United States v. Windsor*, 133 S. Ct. 2675, 2684-85 (2013) (plaintiff had standing to challenge tax assessment personally imposed on her even though it affected all legally married same-sex couples).[3]

Cape Wind (Br. 25-26) relies on *Public Service Company of New Hampshire v. Patch*, 136 F.3d 197 (1st Cir. 1998), but that case is inapposite, as it involved "intervention as of right," not Article III standing. *Id.* at 205. Intervention as of right requires analysis of several factors, *id.*, and this Court has never held that Article III standing is equivalent to the kind of interest that the intervention rule protects. *See Cotter v. Mass. Ass'n of Minority Law Enforcement Officers*, 219 F.3d 31, 34 (1st Cir. 2000) (cited by Cape Wind Br. 26) (stating that an applicant who satisfies the "interest" requirement of the intervention rule is also likely to have Article III standing, but not addressing the converse – whether a party with

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[3] Cape Wind cites two district court opinions declining to recognize "ratepayer standing." Cape Wind Br. 24. One held that "[t]he mere fact that a person is a taxpayer is an insufficient basis for standing," but nonetheless allowed all residents of a town to bring suit based on local environmental damage. *Citizens for an Orderly Energy Policy, Inc. v. Suffolk County*, 604 F. Supp. 1084, 1091-92 (E.D.N.Y. 1985). Plaintiffs here are not only ratepayers who will be charged higher costs, but, like the plaintiffs in *Citizens*, are also Cape Cod-based residents, businesses, and a town that will experience the adverse environmental, cultural, recreational, and economic impacts caused by Cape Wind. JA20 ¶15, JA45 ¶98. Thus, they have an interest that distinguishes them from ratepayers generally. In *United States v. Michigan*, Civ. A.77-71100, 2006 WL 1374471 (E.D. Mich. May 18, 2006), a decision devoid of analysis, a retail customer objected to a utility infrastructure project. *Id.* at *2. It is unclear whether the costs were passed down to the retail customer.

Article III standing will necessarily satisfy the more demanding "interest" requirement of the intervention rule).

What is more, *Patch* involved a challenge to a utility restructuring plan that did not directly impact electric rates. *Patch*, 136 F.3d at 205-06. Rather, the economic interest asserted by the would-be intervenors was dependent upon "numerous market variables" and thus "fatally contingent." *Id.* Here, there is no such contingency. We know that current market prices for renewable power are less than what NSTAR agreed to pay Cape Wind, *see* JA43-44 ¶¶93-96. If the Cape Wind contract were nullified, NSTAR would procure renewable power from these alternative, less-expensive sources. Thus, Cape Wind is wrong to argue (Br. 28) that one can only speculate what market prices will be when Cape Wind becomes operational in 2017. That is irrelevant. What matters are the alternatives open to NSTAR *now*, because NSTAR is under a *present* obligation to enter into *long-term* contracts. *See* State Br. 3.

Cape Wind also contends that Plaintiffs' injuries are "speculative" because Cape Wind might not be completed on time, or ever. Cape Wind Br. 27-28. That too is irrelevant. *DPU*'s decision is complete, and the hypothetical contingency suggested by Cape Wind does not deprive Plaintiffs of standing. *See Nulankeyutmonen Nkihtaqmikon v. Impson*, 503 F.3d 18, 33 (1st Cir. 2007) ("Plaintiffs' alleged injury is the BIA's failure to follow federal law before

approving the lease. The dispute before us is not over the hypothetical construction and operation of an LNG terminal, but the allegedly improper approval of the lease that is the prerequisite to the terminal…. [T]he approval of the lease is complete.").

Cape Wind also says Plaintiffs lack standing because FERC may not authorize Cape Wind to sell electricity, but this Court has rejected an indistinguishable argument. *See KG Urban Enters., LLC v. Patrick*, 693 F.3d 1, 16 (1st Cir. 2012) ("The fact that the case could be rendered moot – for example, if the state Commission determines that land will not be taken into trust – does not render the case unripe."). More generally, to deprive Plaintiffs of their day in court, Cape Wind "must demonstrate more than a theoretical possibility that harm may be averted." *Riva v. Massachusetts*, 61 F.3d 1003, 1011 (1st Cir. 1995). They have not done so.

B. Plaintiffs Have Established Causation.

Cape Wind next disputes whether the injury Plaintiffs allege – higher rates – is fairly traceable to DOER's alleged wrongdoing, because DPU made its own independent judgment regarding the merits of the PPA. Cape Wind Br. 29-31.

Without DOER's compulsion, however, the PPA never would have come before DPU for approval. The fact that DPU hypothetically *could* have denied approval of the PPA for some other reason does not negate DOER's illegal conduct

in bringing the PPA into being in the first place. This is not a multiple independent-cause case, in which, even absent DOER's involvement, Plaintiffs still might have suffered the same injury due to the actions of some third party. The Settlement Agreement between NSTAR, DOER, and Cape Wind is crystal clear that NSTAR's only reason for entering into the PPA was to secure DOER's support for its merger, and if the merger fell through for some reason, NSTAR was relieved of any obligation to purchase electricity from Cape Wind. JA37-38 ¶¶79-81. Accordingly, Plaintiffs' injury is fairly traceable to DOER's illegal compulsion, and to DPU's approval in Order 12-30 of the resulting PPA.

C. Plaintiffs Have Established Redressability.

Plaintiffs' injury is plainly redressable. The effectiveness of the PPA is contingent upon a DPU order approving it. Thus, a judicial order nullifying Order 12-30 would have the effect of eliminating the PPA and preventing the above-market rates that will result from it.

Cape Wind nonetheless argues that Plaintiffs cannot show redressability because, if electricity costs increase, they may benefit from the PPA. *See* Cape Wind Br. 31. Like Cape Wind's argument on injury-in-fact, this contention misses the point. The question is not whether future electricity prices will be higher or lower than the amount in the PPA; the question is whether the prices of alternative

long-term contracts that NSTAR would enter *now*, but for the PPA, are higher or lower than the price in the PPA.

The answer to that question requires no speculation: in September 2013, Massachusetts utilities and land-based wind generators reportedly entered long-term PPAs at prices that were a fraction of the amount that NSTAR has agreed to pay Cape Wind.[4] The DPU's order approving those contracts estimated that these new PPAs would result in a total of $853 million in net below-market costs.[5] In contrast, Order 12-30 estimated that the Cape Wind contract would result in more than $400 million in *above*-market costs, in present value terms. JA496. That estimate took account of "uncertainty in projecting the actual contract costs, market value of the PPA products, and price suppression effects," and included a "moderate/low" projection of costs. *Id.* Thus, Plaintiffs' injury – and the Court's ability to redress that injury by invalidating Order 12-30 – is far from "conjectural." Cape Wind Br. 32.[6]

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4 *See* JA44 ¶95; Patrick Cassidy, *Wind Energy Deals With Utilities Raises Eyebrows*, Cape Cod Times (Sept. 25, 2013), *available at* http://www.capecodonline.com/apps/pbcs.dll/article?AID=/20130925/NEWS/309250334/-1/news0.

5 DPU Order 13-146 at 42 (Feb. 26, 2014), *available at* http://web1.env.state.ma.us/DPU/FileRoomAPI/api/Attachments/Get/?path=13-148%2f13-148-Order-9563.pdf.

6 *Northern Laramie Range Alliance v. FERC*, 733 F.3d 1030 (10th Cir. 2013) (cited by Cape Wind Br. 32) is inapposite. There, the plaintiffs tried to establish standing by relying on the conjecture that the generator's rates might result in

III. The Court Should Not Reach the Merits in the Absence of a Cross-Appeal.

Defendants do not dispute that a dismissal on sovereign immunity grounds has a distinct *res judicata* effect from a dismissal on the merits. See Opening Br. 41-42; *Darlak v. Bobear*, 814 F.2d 1055, 1064 (5th Cir. 1987). This necessarily establishes that Defendants are attempting to enlarge the effect of the judgment, which is impermissible without a cross-appeal. Defendants cite no case holding that an appellate court may alter the *res judicata* effect of a judgment without a cross-appeal.[7]

Defendants rely primarily on the words "with prejudice" in the District Court's decision. But as this Court has held, a dismissal with prejudice "is not intrinsically a disposition on the merits." *Mills v. Harmon Law Offices, P.C.*, 344 F.3d 42, 46 n.3 (1st Cir. 2003). The mere inclusion of those words cannot override the fact that the dismissal was on sovereign immunity grounds. Opening Br. 41-42 n.12. The District Court dismissed Plaintiffs' suit "with prejudice" in the sense

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higher electricity rates. But the wind generator had not yet found a buyer, so the plaintiffs couldn't establish what the rates would be. *Id.* at 1032. Here, Cape Wind has found a buyer; we know NSTAR is paying more than the alternatives available in the market; and we know those costs will be passed through to Plaintiffs.

7 State Defendants (Br. 32-33) cite two cases in which courts ruled on the merits despite a jurisdictional dismissal by the District Court. There was no suggestion in either case that a jurisdictional affirmance would expand the *res judicata* effect of the District Court's dismissal. Nor was the propriety of enlarging the judgment addressed in either case.

that they could not re-file in the District Court, but Defendants do not dispute that a dismissal on the merits would have a broader *res judicata* effect, and that is what matters for the cross-appeal issue.

State Defendants also rely on the District Court's statement that "were the court to rule" on the merits, the result "would be no different," but that is clearly conditional language. As the District Court made quite clear, the actual basis of the dismissal was sovereign immunity. Opening Br. 40.

Finally, Defendants argue that a remand for a decision on the merits would be futile and would only prolong the litigation. Plaintiffs have no interest in needlessly prolonging this suit. But Defendants' briefs in this Court contain some 50 pages of argument addressing numerous complex legal issues that the District Court addressed, if at all, in cursory footnotes. This Court would benefit from a fuller treatment of those issues by the District Court. Thus, as a matter of jurisdiction – or, at a minimum, as a matter of discretion – the Court should not address the merits.

IV. Plaintiffs Have Stated A Preemption Claim.

Defendants do not seriously dispute that the Federal Power Act prohibits states from requiring utilities to enter into particular wholesale electricity contracts on specified terms and conditions. The Federal Power Act gives FERC exclusive jurisdiction to regulate wholesale sales of electricity. *See* 16 U.S.C. §824(b)(1);

Schneidewind v. ANR Pipeline Co., 485 U.S. 293, 300 (1988) ("The [Federal Power Act] long has been recognized as a comprehensive scheme of federal regulation of all wholesales of [energy] in interstate commerce.").[8] FERC has exercised that jurisdiction by "using market mechanisms to produce competitive rates for interstate sales and transmissions of energy." *PPL EnergyPlus, LLC v. Solomon*, 766 F.3d 241, 247 (3d Cir. 2014).

Thus, as the Third and Fourth Circuits have recently underscored, when a state "compels participants in a federally-regulated marketplace to transact [electricity] at prices other than the price fixed by the marketplace," it "intrude[s] into an area reserved exclusively for the federal government" and its actions are preempted. *Id.* at 255; *see also PPL EnergyPlus, LLC v. Nazarian*, 753 F.3d 467, 476-77 (4th Cir. 2014) (striking down state utility commission order that provided for a "contract price" that "supersede[d]" the "rates that [the generator] would otherwise earn … through a FERC-approved market mechanism").

Cape Wind expressly acknowledges as much; as it recognizes, "federal law expressly permits the execution of bilateral contracts … where … *the transaction is voluntary and freely negotiated*." Cape Wind Br. 19 (emphasis added). State Defendants also agree that "sellers are free to set wholesale rates through 'bilateral

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8 *Schneidewind* involved the Natural Gas Act, but as State Defendants note, Br. 39 n.11, cases involving the Federal Power Act and Natural Gas Act are cited interchangeably.

contracts' with buyers," Br. 41 – though they omit the key qualification that such contracts must be "freely negotiated" between the seller and purchaser. *Morgan Stanley Capital Grp. Inc. v. Pub. Util. Dist. No. 1 of Snohomish Cnty.*, 554 U.S. 527, 537 (2008).

A. Plaintiffs Have Adequately Alleged That the Cape Wind Contract Was Not Freely Negotiated.

Plaintiffs have alleged that the Cape Wind contract was *not* freely negotiated between the seller and the purchaser but instead was entered into under State compulsion, and that the resulting rate was much higher than the going rate in the marketplace for renewable energy (which is precisely why State compulsion was needed to consummate the deal). The bulk of Defendants' argument on preemption is to dispute these factual allegations. *See, e.g.*, State Br. 34 (calling the PPA "privately negotiated"); Cape Wind Br. 45 ("NSTAR acted of its own free will in entering into the PPA" (italics omitted)).

On a motion to dismiss, however, this Court must "accept[] as true all well-pleaded facts in the complaint and draw[] all reasonable inferences in the plaintiffs' favor." *Hostar Marine Transp. Sys., Inc. v. United States*, 592 F.3d 202, 207 (1st Cir. 2010). These allegations, if taken as true, would easily allow a fact-finder to infer that the Cape Wind PPA was not voluntary or freely negotiated by NSTAR. Specifically, the Complaint alleges:

- NSTAR had long resisted contracting with Cape Wind because it wanted to be "mindful of costs for our customers." JA29-30 ¶55-57. NSTAR's merger partner, Northeast Utilities, likewise had no use for Cape Wind's power. JA31 ¶¶61-62.
- The Patrick Administration and DOER were strongly committed to assisting Cape Wind and developing offshore wind generation. JA23-25 ¶¶38-40, JA32-33 ¶¶65-67.
- DOER moved to stay NSTAR's merger proceedings, causing a delay that DOER knew could crater the deal. JA33-34 ¶¶68-70. DOER expressly argued that NSTAR should be required to purchase wind energy as a condition for approval of the merger, and initiated discussions with NSTAR regarding the possible purchase of Cape Wind's power, which the DOER Commissioner said would be a "welcome step." JA34-35 ¶¶70-72
- NSTAR initially resisted the notion that it should need to purchase Cape Wind's power as a condition for its merger. JA35 ¶73.
- As the merger deadline loomed, however, NSTAR entered into secret negotiations with the Patrick Administration, culminating in a Settlement Agreement between NSTAR and DOER. The Settlement Agreement provided that NSTAR would enter into a long-term PPA with Cape Wind

– precisely the arrangement it had recently rejected as too expensive – and in exchange, DOER would withdraw its stay request and would support the merger. JA36 ¶75.

- Under the terms of the Settlement Agreement, NSTAR was to contract with Cape Wind on terms, including the purchase price for power, that were "substantially the same as those terms" agreed to by another utility, National Grid, several years earlier. JA37 ¶77.
- The Settlement Agreement was explicit that NSTAR would be relieved of any obligation to purchase power from Cape Wind if the DPU rejected the merger. JA38-38 ¶¶78-81.
- NSTAR entered into a PPA with Cape Wind along the lines set forth in the Settlement Agreement, including at the price set forth in the Settlement Agreement, which an NSTAR executive testified as "largely negotiated already." JA38-39 ¶83.
- The recitals of the PPA specifically state that the basis for NSTAR's entry into the contract is the Settlement Agreement between it and DOER. JA39-40 ¶85.
- Following DPU's approval of the merger, NSTAR's CEO explained his company's decision to contract with Cape Wind as resulting from "fear of the unknown" – that is, fear of "[w]hat the conditions would have

been" on the merger if NSTAR had not capitulated. JA40 ¶88. He stated, "How you make the sausages is not what we talk about," and that "[w]e don't feel any different today [about Cape Wind's value for ratepayers] than we did beforehand." JA41 ¶88.[9]

These allegations, and the inferences reasonably drawn from them, tell a straightforward story of a PPA that was *not* freely and voluntarily negotiated in the market, but instead was forced down NSTAR's throat by the state.

Cape Wind argues that recitals in the Memorandum of Understanding between NSTAR, DOER, and Cape Wind show that the contract was purportedly voluntary, Cape Wind Br. 45-47, but these self-serving statements – intended to secure merger approval – are not binding on Plaintiffs and cannot be squared with the factual record.[10] Indeed, the assertion that the PPA was "freely and voluntarily negotiated" is, even based on the undisputed record, entirely implausible. If NSTAR had made a business decision to buy power from Cape Wind, it would simply have negotiated a contract with Cape Wind. It would not have entered into a "Settlement Agreement" with DOER agreeing to purchase power at the *National*

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9 State Defendants note that NSTAR's CEO also said he was "confident" that the merger would have been approved "without the settlement agreement." State Br. 37 n.10. But there is no doubt that NSTAR would not have agreed to the PPA but for the need to satisfy DOER's demand. The Settlement Agreement itself makes that plain. JA37-38 ¶¶78-81.

10 Cape Wind also points to DPU's findings on voluntariness, Cape Wind Br. 46, but DPU's decision is not preclusive on Plaintiffs. *Infra*, Part VI.

Grid rates – which it did *not* negotiate – in exchange for DOER's support for the merger, subject to the disclaimer that if the merger were not approved, NSTAR could withdraw from its contract with Cape Wind. This "Settlement Agreement" bears no relationship to the ordinary market transaction hypothesized by Defendants.

Defendants contend in response that DOER *couldn't* have strong-armed NSTAR into entering the PPA, because DOER lacked any formal regulatory authority over NSTAR. State Br. 34-37, 44-46; Cape Wind Br. 47-50. But that cannot be dispositive. Practically speaking, DOER's status as "an executive agency with substantial responsibility for establishing and implementing the Commonwealth's energy policies," JA403, gave DOER significant leverage over NSTAR. Its support for, or opposition to, the merger mattered a great deal, as NSTAR and DOER both understood. At a minimum, DOER's ability to exercise coercive influence is a factual question inappropriate for resolution on a Motion to Dismiss.

To the extent Defendants contend that as a *legal* matter, DOER's lack of formal regulatory authority to approve the contract immunizes them from any charge of coercion, that too is incorrect. Defendants' argument reduces to the following reasoning: Because DOER coerced NSTAR to sign the contract (but did not ultimately approve it), and because DPU approved the contract (but did not

coerce NSTAR into signing it), *no one* from the state could have violated federal law. Thus, under their view, if a state apportions responsibility for violating federal law to multiple state actors, *all* of the state actors can shield themselves from federal jurisdiction. But this argument cannot possibly be correct. It is well accepted that an organizational defendant cannot evade legal liability simply by apportioning responsibility among multiple decision-makers and then claiming that no single decision-maker is responsible for every act that led to liability. *See, e.g.*, *Staub v. Proctor Hosp.*, 131 S. Ct. 1186, 1191-93 (2011) (organizational defendant cannot evade liability by apportioning responsibility among multiple agents); *United States v. Bank of New England, N.A.*, 821 F.2d 844, 855-56 (1st Cir. 1987) (knowledge of multiple corporate agents must be aggregated to establish corporation's responsibility); *United States v. Abbott*, 241 F.3d 29, 33 (1st Cir. 2001) (criminal defendant can challenge coercive plea bargain even though verdict and sentence is imposed by independent judicial decisionmaker).

B. Defendants' Remaining Arguments Are Without Merit.

Defendants offer a series of other arguments regarding preemption, but none has merit.

1. Whether or Not FERC Ultimately Finds the Contract's Rate to Be Just and Reasonable Is Irrelevant.

Defendants contend that FERC will ultimately review the rates in the PPA, and that any preemption claim is therefore premature. According to Defendants,

there cannot be preemption if FERC deems the rates to be just and reasonable. State Br. 45. The basis for preemption, however, is the State's intrusion into the exclusively federal field of regulating wholesale electricity transactions. States are not permitted to enter that field at all, even if FERC ultimately finds the resulting contract to be just and reasonable. *See Solomon*, 766 F.3d at 253 (rejecting argument that a state-mandated contract "would not be preempted because the reasonableness of the Agreement's rates would be within FERC's exclusive jurisdiction to review," because "this argument conflates [the state agency's] field of regulation with an inquiry into the reasonableness of the [rates]. Here, whether the [state action] picks 'just and reasonable' capacity prices is beside the point. What matters is that the [state actions] have set capacity prices in the first place"); *see also PPL Energy Plus, LLC v. Nazarian*, 974 F. Supp. 2d 790, 839 (D. Md. 2013) (recognizing the difference between a suit "asking that [the] Court determine a price or rate for … energy and capacity sales that would be fair" and a suit arguing state action in compelling a wholesale rate is preempted, and holding that the federal court has "jurisdiction to answer the question of whether the … state action is unconstitutional."), *aff'd*, 753 F.3d 467 (4th Cir. 2014). Critically, this analysis also refutes the District Court's rationale that FERC's just-and-reasonableness review barred Plaintiffs' claims. Add. 22-23 n.26.

2. The *CARE* Case Is Irrelevant.

Both Defendants argue that Plaintiffs' claim is barred by FERC's *CARE* decision, which they characterize as having rejected an "identical" challenge. State Br. 43-44; Cape Wind Br. 50-51. But as explained in the opening brief, *CARE* was a challenge by completely different litigants[11] to a completely different contract – the National Grid contract, which indisputably *was not the product of any DOER pressure whatsoever*. Thus, *CARE* could not possibly have resolved Plaintiffs' contentions. JA26-28 ¶¶46-49; Opening Br. 53-54.

3. *Pike County* Does Not Authorize States to Compel Wholesale Contracts.

State Defendants argue that state agencies like DPU have the legal authority to whether the buying decisions of utilities are "prudent" under the "*Pike County*"[12] doctrine. State Br. 38-44. Under *Pike County*, a state commission may "consider[] whether the purchasing utility chose wisely among alternative sources of energy supply in entering into the particular agreement." *Appalachian Power Co. v. Pub. Service Comm'n of W. Va.*, 812 F.2d 898, 903 (4th Cir. 1987). If the commission determines that the utility was imprudent, it may deny the utility the ability to

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11 Cape Wind argues that Barbara Durkin, a plaintiff in *CARE*, is "a leading member of the Alliance," Cape Wind Br. 8, 50-51. This assertion has no basis in the record. The Alliance is not a membership organization, and Barbara Durkin has no role in it.

12 *See Pike Cnty. Light & Power Co. v. Pa. Pub. Util. Comm'n*, 465 A.2d 735 (Pa. Commw. Ct. 1983).

recover the agreement's costs in rates. Thus, under *Pike County*, a state may deem "prudent" a utility's own decision to procure electricity from a relatively expensive source of power.

Here, however, the State did not merely determine that NSTAR acted "prudently" in contracting with Cape Wind. Instead, the State forced NSTAR into the contract and did not allow it to choose among alternatives at all. *Pike County* does not allow a State to compel a utility to enter into a particular wholesale contract on specified terms. Otherwise, *Pike County* would swallow the rule 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).

V. Plaintiffs Have Prudential Standing to Raise a Dormant Commerce Clause Claim.

Both Defendants contend that Plaintiffs lack prudential standing to raise a Commerce Clause claim.[13] The Supreme Court has held, however, that when the State discriminates against out-of-state commerce, the in-state entity bearing the actual economic burden has standing to sue, even if it is not the subject of the discrimination. *General Motors Corp. v. Tracy*, 519 U.S. 278, 286-87 (1997) (collecting cases). That characterizes Plaintiffs here.

Defendants distinguish *Tracy* by arguing that the plaintiffs in that case were directly subject to the discriminatory tax at issue, and here, any injury is indirect.

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13 Article III standing is addressed in Part II, above.

However, under NSTAR's tariff, NSTAR collects from its customers every penny that it pays to Cape Wind. From an economic perspective, the State has imposed a direct surcharge on ratepayers' power rates attributable to illegal discrimination. Ratepayers obviously should be able to challenge that surcharge. *See Oxford Assocs. v. Waste Sys. Auth. of E. Montgomery Cnty.*, 271 F.3d 140, 147 (3d Cir. 2001) (finding that consumers have standing to raise Commerce Clause challenge where "they are directly paying the costs of maintaining the preferred facility").

Defendants cite several out-of-circuit cases to argue that downstream consumers lack prudential standing to make a Commerce Clause claim when they do not suffer any discrimination themselves. But Defendants fail to grapple with *Alliance of Automobile Manufacturers v. Gwadosky*, 430 F.3d 30 (1st Cir. 2005), in which this Court held that a party has standing to bring a Commerce Clause claim, even when it is not a member of the class against which the state discriminated. Instead, they misstate *Gwadosky*'s facts. They contend that one of the members of the plaintiff trade group was an "out-of-state manufacturer directly subject to alleged discrimination." State Br. 50-51 n.14; *see also* Cape Wind Br. 56 n.23. That is simply incorrect. *Dealers*, not *manufacturers*, were subject to the discrimination in *Gwadosky*. Maine had outlawed the assessment by manufacturers of certain warranty surcharges on in-state dealers to improve their competitive position vis-à-vis out-of-state dealers. 430 F.3d at 36. This Court

rejected a prudential-standing challenge, holding that the manufacturers' "concrete pecuniary injury" was "enough to ground [their] standing to sue even though [they were] not a member of the out-of-state class against whom the [Maine law] ostensibly discriminates." *Id.* at 37.

Finally, Defendants make a conclusory merits argument, contending that there is no discrimination because NSTAR has entered into long-term contracts with several out-of-state renewable generators. Cape Wind Br. 57-58; State Br. 51-52. However, the fact that the State has allowed out-of-state entities to compete for *part* of the State's electricity market cannot justify a discriminatory policy that closes off *another* part of that market from interstate competition.

VI. Plaintiffs Are Not Precluded From Bringing Their Claims.

State Defendants argue for the first time on appeal that *claim preclusion* bars Plaintiffs' claims.

First, that argument can apply at most to one plaintiff – the Alliance – and cannot support dismissal of the remaining plaintiffs. In a footnote, State Defendants assert that preclusion would "likely" apply to the remaining plaintiffs because they are in privity with one another. State Br. 54 n.15. However, privity is a fact-intensive inquiry requiring the demonstration of control and direction, *see Bourque v. Cape Southport Assocs., LLC*, 60 Mass. App. Ct. 271, 275-76, 800 N.E.2d 1077, 1081-82 (2004), and there is no record to support any such finding in

this case. Moreover, it would be improper for this Court to make such a finding in the first instance. While State Defendants assert that members of an organization may be deemed in privity with the organization, State Br. 53, in fact the Alliance is not a membership organization.

Second, even as to the Alliance, the argument fails. State Defendants' notion – that a participant in a state administrative proceeding must raise all arguments in that proceeding and must pursue any appeal in state court – would nullify decades of Supreme Court precedents recognizing that plaintiffs have a right to bring federal-law challenges to state agency orders in federal court. *E.g.*, *Sprint Commc'ns, Inc. v. Jacobs*, 134 S. Ct. 584, 590-91 (2013) (noting "unflagging obligation" of federal courts to hear such challenges); *Verizon*, 535 U.S. at 645-46 (collecting numerous challenges against state regulatory commissioners). According to State Defendants, states could thwart any such review simply by asserting that state agency decisions are claim-preclusive.

Unsurprisingly, no authority supports this extravagant proposition. Claim preclusion requires "sufficient identicality '*between the parties*' in the two suits." *Pure Distribs., Inc. v. Baker*, 285 F.3d 150, 156 (1st Cir. 2002) (emphasis added); *DaLuz v. Dep't of Corrections*, 434 Mass. 40, 45, 746 N.E.2d 501, 505 (2001) ("A successful assertion of claim preclusion requires … the identity or privity of the parties to the present and prior actions"); *see also Heacock v. Heacock*, 402 Mass.

21, 25, 520 N.E.2d 151, 153 (1988) (issue preclusion requires that the issue have been "litigated and determined in a prior action *between the parties*" (emphasis added)). For example, in *Alba v. Raytheon Co.*, 441 Mass. 836, 809 N.E.2d 516 (2004) (cited by State Br. 53-54), an employee lost a claim against his employer before a Worker's Compensation Board judge, and thus lost the chance to sue his employer on the same claim in court.

Here, there have never been *any* claims "between the parties." In issuing Order 12-30, DPU acted in its capacity as *adjudicator*, not as litigant. DPU cannot declare its own decision to be "preclusive" of a lawsuit *against itself.* And although DOER acted as a party in the DPU proceedings, the Alliance never brought any adversarial claims *against* DOER; rather, DOER, the Alliance, and numerous other parties each independently set forth their positions to DPU, and DPU then made a decision. Indeed, the Alliance was not entitled to bring *any* "legal claims" of the sort a plaintiff can bring in court; it was allowed only to set forth its position on the PPA under Massachusetts' legal standards for approving PPAs. State Defendants identify no case applying claim preclusion in remotely analogous circumstances.

State Defendants' cursory footnote on issue preclusion (State Br. 54-55 n.16) fares no better. "[A]rguments raised only in a footnote or in a perfunctory manner are waived." *FTC v. Direct Mktg. Concepts, Inc.*, 624 F.3d 1, 19 n.18 (1st

Cir. 2010). Moreover, the argument fails on its merits. To have issue preclusive effect, a determination must be "essential to the judgment." *Alba*, 441 Mass. at 841, 809 N.E.2d at 521. Yet the DPU stated in order 12-30 that "nothing in [state law] suggests that the [DPU] should inquire into a company's motives … in entering into a contract." JA401. Thus, any determination by DPU that NSTAR entered into the PPA voluntarily could not have preclusive effect, even on the Alliance. *See also* Brief in Opp. to Mot. to Dismiss at 16-19 (ECF No. 48) (addressing issue preclusion in detail).

CONCLUSION

The District Court's judgment should be reversed.

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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 6,998 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii) and Local Rule 34.0(a).

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Dated: November 6, 2014

/s/ Matthew E. Price
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CERTIFICATE OF SERVICE

I hereby certify that on November 6, 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 Reply Brief. Participants in the case are registered CM/ECF users and service will be accomplished by the Appellate CM/ECF system.

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