JS 44 (Rev. 12/12)

CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. *(SEE INSTRUCTIONS ON NEXT PAGE OF THIS FORM.)*

I. (a) PLAINTIFFS

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

(b) County of Residence of First Listed Plaintiff Barnstable
(EXCEPT IN U.S. PLAINTIFF CASES)

(c) Attorneys *(Firm Name, Address, and Telephone Number)*
Ira H. Zaleznik, Lawson & Weitzen LLP, 88 Black Falcon Ave. Suite 345,Boston, MA 02210 (617) 439-4990 (for Town of Barnstable)
(continued on separate sheet)

DEFENDANTS

Ann G. Berwick, Chair of Mass. Dep't of Public Utilities; Jolette A. Westbrook, Comm'r of Mass. Dep't of Public Utilities; (continued on separate sheet)

County of Residence of First Listed Defendant Suffolk
(IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED.

Attorneys *(If Known)*

II. BASIS OF JURISDICTION *(Place an "X" in One Box Only)*

- ❒ 1 U.S. Government Plaintiff
- ☒ 3 Federal Question *(U.S. Government Not a Party)*
- ❒ 2 U.S. Government Defendant
- ❒ 4 Diversity *(Indicate Citizenship of Parties in Item III)*

III. CITIZENSHIP OF PRINCIPAL PARTIES *(Place an "X" in One Box for Plaintiff and One Box for Defendant)*

(For Diversity Cases Only)

	PTF	DEF		PTF	DEF
Citizen of This State	❒ 1	❒ 1	Incorporated *or* Principal Place of Business In This State	❒ 4	❒ 4
Citizen of Another State	❒ 2	❒ 2	Incorporated *and* Principal Place of Business In Another State	❒ 5	❒ 5
Citizen or Subject of a Foreign Country	❒ 3	❒ 3	Foreign Nation	❒ 6	❒ 6

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V. ORIGIN *(Place an "X" in One Box Only)*

☒ 1 Original Proceeding ❒ 2 Removed from State Court ❒ 3 Remanded from Appellate Court ❒ 4 Reinstated or Reopened ❒ 5 Transferred from Another District *(specify)* ❒ 6 Multidistrict Litigation

VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing ***(Do not cite jurisdictional statutes unless diversity)***:
42 U.S.C. 1983; 28 U.S.C. 2201-2202; ex Parte Young, 209 U.S. 123; Supremacy Clause of U.S Constitution

Brief description of cause:
Order by Mass. Dep't of Public Utilities violates Commerce Clause and Supremacy Clause of U.S. Constitution

VII. REQUESTED IN COMPLAINT:

❒ CHECK IF THIS IS A **CLASS ACTION** UNDER RULE 23, F.R.Cv.P.

DEMAND $

CHECK YES only if demanded in complaint:
JURY DEMAND: ❒ Yes ❒ No

VIII. RELATED CASE(S) IF ANY

(See instructions): JUDGE _____ DOCKET NUMBER _____

DATE
01/21/2014

SIGNATURE OF ATTORNEY OF RECORD
/s/ Ira H. Zaleznik for Town of Barnstable /s/ Robert A. Bianchi for other plaintiffs

FOR OFFICE USE ONLY

RECEIPT # _____ AMOUNT _____ APPLYING IFP _____ JUDGE _____ MAG. JUDGE _____

CIVIL COVER SHEET – CONTINUATION PAGE

I.C: Additional counsel for plaintiffs: Robert A. Bianchi, Robert A. Bianchi & Associates, 55 Sea St. Extension, P.O. Box 128, Hyannis, MA 02601, 508-775-0785 (counsel for all Plaintiffs except the Town of Barnstable); Matthew E. Price, Adam G. Unikowsky, and Matthew S. McKenzie, Jenner & Block LLP, 1099 New York Ave. NW Suite 900, Washington, DC 20001, 202-639-6000 (counsel for all Plaintiffs except the Town of Barnstable; applications for admission pro hac vice are pending).

Defendants: Additional defendants: David W. Cash, Comm'r for the Mass. Dep't of Public Utilities; Mark Sylvia, Comm'r of Mass. Dep't of Energy Resources; Cape Wind Associates LLC; NSTAR Electric Company.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

TOWN OF BARNSTABLE, MASSACHUSETTS; HYANNIS MARINA, INC.; MARJON PRINT AND FRAME SHOP LTD.; THE KELLER COMPANY, INC.; THE ALLIANCE TO PROTECT NANTUCKET SOUND; Sandra P. TAYLOR; and Jamie REGAN, Plaintiffs, v. Ann G. BERWICK, in her official capacity as Chair of the Massachusetts Department of Public Utilities; Jolette A. WESTBROOK, in her official capacity as Commissioner of the Massachusetts Department of Public Utilities; David W. CASH, in his official capacity as Commissioner of the Massachusetts Department of Public Utilities; Mark SYLVIA, in his official capacity as Commissioner of the Massachusetts Department of Energy Resources; CAPE WIND ASSOCIATES, LLC; and NSTAR ELECTRIC COMPANY, Defendants.	**Civil Action No. _____**

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

NATURE OF THE ACTION

1. Promoting renewable resources unquestionably is a laudable goal, and States have many tools to encourage the development of renewable power. But a State's efforts to promote renewable power must comply with federal law. In this case, Massachusetts regulators used their influence over a merger request by NSTAR Electric Company ("NSTAR"), a Massachusetts electric utility, to bring about NSTAR's purchase of electricity from Cape Wind Associates, LLC ("Cape Wind"), an in-state renewable energy project, on particular terms. This state action was illegal for two independent reasons. First, it constituted illegal discrimination in favor of an in-state business, in violation of the dormant Commerce Clause of the U.S. Constitution. Second, it constituted illegal regulation of wholesale electricity sales, in violation of the Federal Power Act and the Supremacy Clause of the U.S. Constitution.

2. It is well-established that the dormant Commerce Clause prohibits a State from using its regulatory power to discriminate against out-of-state businesses. State action violates the dormant Commerce Clause either if the State acts with discriminatory purpose or if the State action has a discriminatory effect. State action need not facially discriminate against out-of-state businesses in order to violate the dormant Commerce Clause: even facially neutral state action is considered discriminatory in effect when, in practice, it insulates in-state entities from out-of-state competition.

3. It is equally well-established that States may not promote renewable resources by regulating wholesale electricity sales, because any such regulation is preempted by federal law. When Congress passed the Federal Power Act in 1935, Congress "occupied the field" of wholesale electricity sales and gave the Federal Energy Regulatory Commission ("FERC") exclusive jurisdiction over all wholesale electricity rates, charges, and terms. In so doing, the Federal Power Act preempted any State regulation within the field of wholesale electricity sales.

Thus, while States ordinarily may promote renewable energy by providing tax incentives, easing environmental regulations, fast-tracking permits and zoning approval, and providing myriad other incentives, States may not subsidize renewable power by dictating that such projects receive favorable rates and terms for their wholesale electricity sales. Any such action by a State would be preempted by the Federal Power Act and thus would violate the Supremacy Clause of the U.S. Constitution.

4. This action seeks a declaration that the Commonwealth of 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. This action also seeks appropriate injunctive relief to remedy the constitutional violation and invalidate the contract that Massachusetts compelled NSTAR to enter. In so doing, the action seeks 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.

SUMMARY OF THE CLAIM

5. Cape Wind seeks to build 130 large wind turbines in a twenty-five-square-mile area in Nantucket Sound. The project has long been promoted by Massachusetts Governor Deval Patrick, who made his support of Cape Wind a central aspect of his campaigns for governor in 2006 and 2010.

6. Like all electric generators, Cape Wind, if built, will earn revenue by selling its electricity at wholesale to companies, like utilities, that supply electricity to homes, businesses, and municipalities.

7. The Federal Power Act gives FERC exclusive jurisdiction to regulate all wholesale sales of electricity. Thus, FERC has exclusive jurisdiction to regulate any wholesale electricity sale made by Cape Wind. Conversely, Massachusetts may *not* regulate Cape Wind's wholesale electricity sales; any such regulation by Massachusetts is preempted by the Federal Power Act.

8. Exercising its jurisdiction under the Federal Power Act, FERC has determined that a multistate, market-based system of setting wholesale electricity prices will lead to the most efficient allocation of generating resources by favoring efficient generators and disfavoring inefficient ones. In New England, FERC has implemented that policy by authorizing wholesale electricity sales through a multistate market operated by an entity called ISO New England. FERC has also authorized certain voluntary bilateral wholesale electricity sales.

9. The problem faced by Governor Patrick and proponents of Cape Wind is that Cape Wind will likely fare poorly in FERC's multistate, market-based system. Cape Wind's power is far more expensive than power generated by non-renewable resources. Moreover, even comparing Cape Wind to other renewable generators, generating electricity with wind turbines in the middle of Nantucket Sound is more expensive than generating electricity with wind turbines (or other renewable sources) on land. Furthermore, the market for electricity is interstate. Renewable energy projects in States such as Maine and New Hampshire are able to generate energy more efficiently than Cape Wind, and thus can supply Massachusetts consumers more inexpensively.

10. Because Cape Wind's costs are significantly higher than those of its competitors, Cape Wind will be unable to compete with cheaper and more efficient sources of renewable

power on land and out of state. Left to its own, Cape Wind will be unable to earn sufficient revenue from wholesale sales to recoup the project's high costs.

11. Under the Massachusetts Green Communities Act, all Massachusetts electric utilities are required to purchase a certain amount of power from renewable resources. Initially, NSTAR complied with this law by issuing an open "request for proposals" for a renewable electricity contract, and it received dozens of bids. NSTAR selected three generators, two of which were located outside of Massachusetts, which offered their renewable electricity at prices well below the going rate for Cape Wind's power. Indeed, NSTAR representatives stated publicly that Cape Wind was not competitive and that NSTAR had no intention of purchasing Cape Wind power.

12. To promote Cape Wind despite its inability to compete with other sources of renewable energy, Massachusetts acted to ensure that Cape Wind would obtain a favorable, above-market wholesale electricity contract with NSTAR. But in so doing, Massachusetts encroached on FERC's exclusive jurisdiction over wholesale electricity sales and illegally discriminated against out-of-state wind generators.

13. After NSTAR rejected Cape Wind's high-price bids and entered into wholesale electricity contracts with cheaper, more efficient out-of-state generators, NSTAR sought to merge with a Connecticut-based utility. The Commonwealth used the merger process to gain leverage over NSTAR. The Commonwealth's Department of Energy Resources ("DOER") threatened to erect various regulatory roadblocks to the merger unless NSTAR executed a contract to buy electricity from Cape Wind on substantially the same terms and conditions that another of the Commonwealth's utilities, National Grid, had agreed to several years earlier. That State action was preempted by the Federal Power Act, which prohibits States from regulating the

rates and terms of wholesale electricity sales. Plainly, Massachusetts could not directly order NSTAR to contract with Cape Wind at a State-ordered price. And the Federal Power Act and the Supremacy Clause would be meaningless if States could achieve through regulatory machinations what they are prohibited from doing directly. Thus, in threatening to obstruct NSTAR's merger unless NSTAR entered into a wholesale electricity contract with particular rates and terms, Massachusetts regulated in a field occupied by federal law and engaged in state action in conflict with federal law and policy in violation of the Supremacy Clause of the U.S. Constitution.

14. The Commonwealth's action also violated the dormant Commerce Clause. The Commonwealth used its regulatory power over NSTAR to direct business to a favored in-state entity, Cape Wind, at the expense of competing out-of-state wind generators which could have generated the same electricity for a lower price. The Commerce Clause does not permit a State to use its regulatory power to insulate favored in-state producers from out-of-state competition.

15. Plaintiffs include the Town of Barnstable, businesses, a non-profit environmental organization, and individuals – all of whom are within NSTAR's service territory and will be forced to bear the cost of the above-market contract between NSTAR and Cape Wind that the Commonwealth unconstitutionally engineered. According to NSTAR's own estimates, the contract will increase the electricity bills of NSTAR customers by nearly one billion dollars over the life of the contract. Plaintiffs will also experience the adverse environmental, cultural, historic, recreational, and economic impacts caused by the proposed project.

PARTIES

16. Plaintiff Town of Barnstable is a municipal government under the laws of the Commonwealth of Massachusetts and is the largest community, in both land area and population, on Cape Cod.

17. Plaintiff Hyannis Marina, Inc., is a business located at 1 Willow Street, Hyannis, Massachusetts, 02601.

18. Plaintiff Marjon Print and Frame Shop Ltd. is a business located at 51 Barnstable Road, Hyannis, Massachusetts, 02601.

19. Plaintiff The Keller Company, Inc. is a real estate development business located at 1436 Iyannough Road, Hyannis, Massachusetts, 02601..

20. Plaintiff The Alliance to Protect Nantucket Sound is a not-for-profit environmental organization located at 4 Barnstable Road, Hyannis, Massachusetts, 02601.

21. Plaintiff Sandra P. Taylor is an individual residing at 41 Randolph Road, Yarmouth Port, Massachusetts, 02675.

22. Plaintiff Jamie Regan is an individual residing at 16 Brookside Circle, Mashpee, Massachusetts, 02649.

23. Defendant Ann G. Berwick is the Chair of the Massachusetts Department of Public Utilities ("DPU"), and is sued in her official capacity for declaratory and injunctive relief only.

24. Defendant Jolette A. Westbrook is a Commissioner of the Massachusetts Department of Public Utilities, and is sued in her official capacity for declaratory and injunctive relief only.

25. Defendant David W. Cash is a Commissioner of the Massachusetts Department of Public Utilities, and is sued in his official capacity for declaratory and injunctive relief only.

26. Defendant Mark Sylvia is the Commissioner of the Massachusetts Department of Energy Resources, and is sued in his official capacity for declaratory and injunctive relief only.

27. Defendants Berwick, Westbrook, Cash, and Sylvia have been, are presently, and will be acting under color of authority and law of the Commonwealth of Massachusetts.

28. Defendant Cape Wind Associates, LLC, is a Delaware limited liability company that is developing a wind-powered electric generation facility located in Nantucket Sound. Defendant Cape Wind Associates, LLC is a required party pursuant to Federal Rule of Civl Procedure 19(a).

29. Defendant NSTAR Electric Company is a Massachusetts electric utility. Defendant NSTAR Electric Company is a required party pursuant to Federal Rule of Civil Procedure 19(a).

JURISDICTION AND VENUE

30. This Court has jurisdiction over this action pursuant to 28 U.S.C. § 1331 because the action brings a claim under the United States Constitution and federal law.

31. The Court is empowered to grant declaratory relief by 28 U.S.C. §§ 2201 and 2202 and Rule 57 of the Federal Rules of Civil Procedure.

32. The Court is empowered to grant preliminary and permanent injunctive relief by, *inter alia*, 28 U.S.C. § 2202, Rule 65 of the Federal Rules of Civil Procedure, and *Ex Parte Young*, 209 U.S. 123 (1908).

33. The Court has personal jurisdiction over Defendants Berwick, Westbrook, Cash, and Sylvia because each conducts a substantial portion of his or her duties as officers of the DPU or DOER in the District of Massachusetts. The offices of the DPU and DOER are located in Boston, Massachusetts.

34. The Court has personal jurisdiction over NSTAR Electric Company because it maintains its principal place of business in the District of Massachusetts, at 800 Boylston Street, Boston, MA 02199. Additionally, Plaintiffs' claims arise from business transacted by NSTAR in this District.

35. This Court has personal jurisdiction over Cape Wind Associates, LLC, because it maintains its principal place of business in the District of Massachusetts, at 20 Park Plaza, Suite 320, Boston, MA 02116. Additionally, Plaintiffs' claims arise from business transacted by Cape Wind in this District and from its contract to supply electricity in this District.

36. Venue is proper in this District under 28 U.S.C. § 1391(b)(1) and (b)(2) because all Defendants reside in the District of Massachusetts and a substantial part of the events giving rise to this action occurred in the District of Massachusetts.

FACTS COMMON TO ALL COUNTS

A. Cape Wind

37. Cape Wind is seeking to develop an off-shore wind facility located in Nantucket Sound between Cape Cod, Martha's Vineyard, and Nantucket. The facility would involve 130 wind turbines spread across 25 square miles of Nantucket Sound and result in significant adverse impacts to the environment, cultural and historic resources, recreational activities, public safety, and the regional economy.[1]

38. For many years, the administration of Governor Patrick has strongly favored Cape Wind. Governor Patrick made his support for Cape Wind a centerpiece of both his 2006 and 2010 campaigns for governor. He has touted Cape Wind as "good for us from an environmental point of view, from an energy point of view, from an economic point of view and from a

[1] These negative impacts are being addressed in six lawsuits now pending in the Federal District Court for the District of Columbia and the D.C. Circuit Court of Appeals.

symbolic point of view" and has stated that Cape Wind is a way "to get serious about climate change." He declared that "[t]he United States is 20 years behind Europe on offshore wind, and China is pulling out ahead on offshore wind as well. America now has a chance to turn that around, and we in Massachusetts have a chance to show our leadership."[2]

39. Governor Patrick has specifically promoted Cape Wind by stressing the increased economic activity that he believes it would bring to Massachusetts. For instance, when the Cape Wind project was approved by the Department of the Interior, Governor Patrick thanked the Secretary of the Interior "on behalf of the hundreds of men and women who will build this project" and stated that "Siemens has already said it intends to locate its U.S. offshore wind operation here in Massachusetts because of the Cape Wind project."[3] When the project was approved by a Massachusetts state agency, Governor Patrick noted his belief that off-shore wind "will create 43,000 new jobs by 2030," and he declared: "States with Democratic, Republican and Independent Governors are working with the Obama Administration on a collaborative process to responsibly site future offshore wind projects. But let me be clear: they are all racing for second place, because Massachusetts will be first."[4]

40. Similarly, in December 2010, Ian Bowles, then the Secretary of Energy and Environmental Affairs for the Commonwealth, declared in a speech that had been cleared with Governor Patrick and "reflect[ed] the policies and priorities of the Governor as he moves into his second term" that the Governor sought to promote Cape Wind because of the benefits that he

[2] Statement of Governor Deval Patrick on Approval of Cape Wind Project, http://www.mass.gov/governor/pressoffice/pressreleases/2010/gov-on-approval-of-cape-wind-project.html.
[3] *Id.*
[4] Deval Patrick, Shaping Our Energy Future, http://www.mass.gov/governor/pressoffice/speeches/20120530-shaping-our-energy-future.html.

believed Massachusetts would "stand to gain from having the first offshore wind farm in the U.S. built here." Secretary Bowles elaborated:

> The bottom line is offshore wind is coming and we have much to gain from it. But only one state can reap the particular economic benefits of being the first mover – and with Cape Wind going forward, it will be Massachusetts. Siemens has opened its North American offshore wind headquarters in Boston, because of its contract to supply turbines for Cape Wind. In New Bedford, we have the first port facility in the U.S. designed with the capabilities to support offshore wind installation, and it will host up to 1,000 jobs as Cape Wind is constructed. Mass Tank, a Middleboro-based steel pipe manufacturer, has joined forces with a leading European firm to supply Cape Wind with foundations and other structural steel components made in Massachusetts.[5]

And when Cape Wind claimed to have finalized a contract to purchase turbines in December 2013, Governor Patrick expressed his hope that "Massachusetts will be a pioneer in the emerging offshore wind industry, which brings with it both clean energy and good jobs."[6]

41. Of course, there is nothing inherently wrong with a State seeking to promote job growth. But under the Supremacy Clause and the Federal Power Act, a State may not promote job growth by regulating wholesale electricity sales. And under the Commerce Clause, a State may not promote in-state economic development by using its regulatory power to shelter in-state industry from out-of-state competition.

[5] Ian Bowles, "A Second Restructuring," Dec. 17, 2010, http://www.mass.gov/eea/docs/eea/restructuring-roundtable-2010.pdf.

[6] "Cape Wind and Siemens Sign Major Offshore Wind Turbine Supply Agreement," Dec. 23, 2013, http://www.businesswire.com/news/home/20131223005129/en/Cape-Wind-Siemens-Sign-Major-Offshore-Wind#.UtWFk3KSjTc.

B. Green Communities Act

42. NSTAR and National Grid are utilities (often called "electric distribution companies") that deliver electricity to Massachusetts customers located within their service areas.

43. In 2008, the Massachusetts Legislature enacted the Green Communities Act. Acts of 2008 ch. 169. Section 83 of 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 located within Massachusetts or adjacent federal waters. The utilities were permitted to solicit proposals through a public solicitation, individual negotiations, or other methods. Because Section 83, as originally enacted, was limited to generators located within Massachusetts and adjacent federal waters, Section 83 facially discriminated against out-of-state generation facilities.

44. DOER strongly favored the Green Communities Act. For example, in a September 4, 2008 presentation on the Green Communities Act, DOER's Commissioner stated that DOER would "[c]oordinate closely with DPU" to ensure "[a] new greener world order."[7]

45. Cape Wind sought to capitalize on the Green Communities Act by entering into long-term wholesale contracts with Massachusetts utilities. Such contracts, often called "Power Purchase Agreements," would pave the way for Cape Wind to receive financing for its massive construction costs.

C. National Grid Contract

46. On December 7, 2009, National Grid requested approval from the Department of Public Utilities ("DPU") to conduct confidential, no-bid negotiations with Cape Wind for the

[7] DOER, "2008 Green Communities Act," Sept. 4, 2008, http://www.iso-ne.com/trans/rsp/2008/doer-giudice.pdf.

long-term contracts required by the Green Communities Act. The DPU approved that process. *See* DPU Docket No. 09-138. After engaging in negotiations that were essentially brokered by Secretary Bowles, National Grid and Cape Wind agreed in principle as to price and other terms, which were memorialized in a letter on February 19, 2010. In the course of those negotiations, National Grid did not solicit or consider proposals from any out-of-state renewable energy developers, which would have been ineligible under the Green Communities Act as it existed at that time.

47. National Grid and Cape Wind ultimately executed a power purchase agreement (PPA) on May 7, 2010 ("the National Grid contract") for half of Cape Wind's output. Under the PPA, Cape Wind provides approximately 234 MW per year of electric energy – 50% of Cape Wind's total output – and an equivalent amount of renewable energy certificates ("RECs") for a base price in year one of 18.7 cents per kWh. The price may be adjusted upward if Cape Wind reduces the size of its project or cannot obtain federal tax credits, and the price may be adjusted downward based on the ultimate cost of the project. The base price under the PPA, and the amount to be paid by ratepayers, increases by a factor of 3.5% each year for the first 15-year primary term of the National Grid contracts, leading to a price of 30.3 cents per kWh in the final year of the contract. Further, the contract states that if operations begin after 2013, the starting price will increase by 3.5%, resulting in an even higher final year price.

48. The National Grid contract prices were significantly above the market price for electricity and above the price of other renewable energy generation in 2010.

D. Commerce Clause Litigation

49. Cape Wind could not persuade NSTAR to enter into a no-bid power purchase agreement at Cape Wind's inflated rates, as National Grid had done. Rather, to fulfill its

requirements under the Green Communities Act, NSTAR, along with other electric utilities, issued a Request for Proposals ("RFP") for Long-Term Contracts for Renewable Energy Projects, dated January 15, 2010. The RFP specified that "Pursuant to Section 83 of the GCA, the generation facility must be located within the jurisdictional boundaries of the Commonwealth, including state waters, or in adjacent federal waters."[8] In so doing, NSTAR hoped to obtain the lowest rate for its customers, subject to the geographical constraints of Section 83.

50. On April 16, 2010, TransCanada, a Canadian renewable energy generator, brought suit against DPU officials in this Court, alleging that the Green Communities Act's geographical limitation – requiring electric distribution companies to enter into contracts with renewable energy developers located *within Massachusetts* or adjacent federal waters – violated the Commerce Clause of the United States Constitution, because it facially discriminated in favor of in-state enterprise and against out-of-state enterprise. *See TransCanada Power Marketing Ltd. v. Bowles*, No. 4:10-cv-40070-TSH.

51. In response to the *Transcanada* lawsuit, the Energy Undersecretary for the Commonwealth's Executive Office of Energy and Environmental Affairs made public statements specifically defending the Act's in-state favoritism. He noted that other states had enacted similar law favoring in-state energy facilities, and he said that he was "frustrated" that Section 83 was being challenged in court as illegally discriminatory.[9]

[8] Request For Proposals For Long-Term Contracts For Renewable Energy Projects, http://www.env.state.ma.us/dpu/docs/electric/10-71/7210nstptn.pdf, Exhibit NSTAR-JGD-3.
[9] Brandon Butler, "Major Headwinds: Lawsuit leaves renewable energy developers at a standstill," WBJournal.com, March 25, 2012, http://www.wbjournal.com/article/20110425/PRINTEDITION/304259974.

52. In order to settle the *Transcanada* lawsuit, the DPU eventually promulgated Emergency Regulations to suspend the applicability of the Green Communities Act's geographical limitation, and thereby settled the TransCanada suit. The DPU later made those Emergency Regulations permanent, 220 Code Mass. Regs. § 17.00 *et seq.*, and the Legislature amended the Green Communities Act to remove the geographical limitation. *See* S. 2395, An Act Relative to Competitively Priced Electricity in the Commonwealth.

E. NSTAR's Contracts

53. Pursuant to the new Emergency Regulations, the DPU directed NSTAR and other utilities to reopen their RFPs to allow bids from out-of-state generators. The DPU also refused to approve contracts that had been executed under the geographically restricted RFP.

54. In response to the expanded RFP open to out-of-state enterprises, NSTAR "received 74 bid responses, from 44 individual developers, for evaluation pursuant to the terms of the [DPU]-approved amended RFP." NSTAR "ranked these bids from . . . lowest to highest net cost" and "entered into contracts with the three highest scoring, highest ranked bid projects." NSTAR explained to the DPU that "the entire solicitation process – from collaborative design of the amended RFP, through bid scoring and evaluation, and final contract execution – has been both crafted and executed to ensure, with high confidence, that the awarded contracts are cost-effective to the Company's ratepayers."[10] NSTAR contracted with three land-based wind generators – Groton Wind, LLC, New England Wind, LLC, and Blue Sky East, LLC. The DPU approved those contracts in DPU Docket Nos. 11-05, 11-06, and 11-07.

55. The bids that NSTAR and other utilities received in response to their revised RFPs were substantially lower than the rates that National Grid had agreed to in its contract with

[10] Initial Brief of NSTAR Electric Company, D.P.U. 11-05, 11-06, 11-07, at 15-16 (June 30, 2011).

Cape Wind. Yet the DPU did not require National Grid to reopen negotiations to consider these alternatives or negotiate a better deal with Cape Wind, 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. Instead, the DPU approved the National Grid–Cape Wind power purchase agreement in DPU Docket No. 10-54.

56. 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."[11] NSTAR's chief executive, Thomas J. 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. It's balancing that environmental desire with that economic desire to keep prices reasonable."[12]

57. The price of renewable energy from NSTAR's contracts with the three land-based generators was approximately one-half of the initial price paid to Cape Wind by National Grid. For example, in comparison with Cape Wind's first-year contract price of 18.7 cents per kWh, NSTAR reportedly was able to purchase land-based wind power for 10.5 cents per kWh.[13] Furthermore, the land based wind contracts were fixed over the duration of the contracts while the Cape Wind contract contained a 3.5% annual escalator leading to an even greater price premium over the duration of the contracts.

58. NSTAR's refusal to purchase power from Cape Wind threatened the Cape Wind project. National Grid agreed to purchase only 50% of Cape Wind's power, and this power

[11] Jay Lindsay, "Wanted: Buyer for controversial Cape Wind energy," *Boston Globe*, Dec. 19, 2010, http://www.boston.com/news/local/maine/articles/2010/12/19/wanted_buyer_for_controversial_cape_wind_energy/?page=2.
[12] Erin Ailworth, "NStar, Northeast Utilities to merge," *Boston Globe*, Oct. 19, 2010.
[13] Lindsay, *supra* note 11.

purchase agreement, standing alone, was insufficient for Cape Wind to obtain financing for its massive construction costs.

F. The NSTAR and Northeast Utilities Merger Proceeding

59. Massachusetts law requires the DPU to approve all mergers of utilities. For decades, the DPU had evaluated mergers on a "no net harm" standard – that is, the merger would be approved so long as the public interest would be at least as well served by approval of a proposal as by its denial. *Boston Edison Company*, D.P.U. 850, at 7-8 (1983).

60. On November 24, 2010, NSTAR Electric Company, NSTAR Gas Company, Western Massachusetts Electric Company (WMECO), and Northeast Utilities filed an application in the DPU to approve a proposed merger. Cape Wind successfully moved to intervene in the merger proceeding.

61. Before NSTAR's merger filing, NSTAR was not involved in significant negotiations with Cape Wind to purchase power.

62. Likewise, Northeast Utilities had no interest in purchasing power from Cape Wind. Al Lara, a Northeast Utilities spokesperson, expressly stated that Northeast had no need for Cape Wind's power.[14]

63. Indeed, Northeast Utilities and NSTAR were working together on a transmission line from Quebec to Southern New England that would allow the utilities to import cheap, renewable hydropower from Canada. As NSTAR chief executive May described the

[14] Brad Kane, "NU/NStar merger may be slowed, but not stopped," *Hartford Business.com*, Aug. 1, 2011, http://www.hartfordbusiness.com/article/20110801/PRINTEDITION/308019995.

hydropower project, "here is a project that will reduce the cost of energy in the region, but yet will remove five times the carbon of the infamous Cape Wind project."[15]

64. Despite the availability of inexpensive, out-of-state power, the DOER, an arm of the Patrick administration, decided to use the NSTAR merger in order to obtain the leverage needed to bring about a contract between NSTAR and Cape Wind (in addition to the contracts that NSTAR had already entered with land-based wind generators through the September 2010 request for proposals).

65. On December 17, 2010, Secretary Bowles delivered a speech arguing that "in the case of mergers . . . we need [a] new standard of review." According to Secretary Bowles, in deciding whether to approve a merger, the DPU should consider factors such as whether "a merger [will] help advance the development of the Commonwealth's solar and offshore wind resources."[16]

66. Consistent with Secretary Bowles' speech, the DOER requested that the DPU "modify its standard of review in this proceeding to determine whether the proposed merger will provide a substantial net benefit to the public interest, including the advancement of clean energy goals established by the Green Communities Act and the Global Warming Solutions Act."[17] Cape Wind filed comments supporting DOER's proposal and quoting Secretary Bowles' speech at length. The DPU granted DOER's request and adopted the new standard for the NSTAR merger. Interlocutory Order, DPU Docket No. 10-170 (Mar. 10, 2011).

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[15] Alexander Soule, "Northeast Utilities details Hydro-Quebec project," *Fairfield County Business Journal*, Nov. 22, 2010.
[16] Ian Bowles, A Second Restructuring, http://www.mass.gov/eea/docs/eea/restructuring-roundtable-2010.pdf, at 1, 9.
[17] Init. Comments of DOER on Standard of Review, DPU Docket No. 10-170 (Jan. 4, 2011), at 6-7.

67. Under this new standard for merger approvals, the DOER, as the Department responsible for overseeing the Green Communities Act and the Global Warming Solutions Act, gained significant influence over the merger process. DOER used this influence to maneuver NSTAR into entering an above-market contract with Cape Wind. As an NSTAR executive explained in testimony before the DPU, "clearly we were interested in filling our 3 percent [renewable energy requirement] under the Green Communities Act. The DOER was interested in further benefits, if you like, contributions to renewable energy to the environment. So they were interested in going further and pursuing offshore wind." Hearing Tr., DPU Docket No. 12-30, at 40.

68. In July 2011, the DOER moved the DPU for a stay of the merger in order to determine the effect on consumers' rates. Because such an analysis would be a time-consuming process, a stay might have caused the merger to fail; the parties' merger agreement required that all regulatory approvals be received by April 16, 2012, and DOER's requested stay threatened to prolong the DPU proceedings past that date. In response to DOER's request, the spokesperson for Northeast Utilities stated that if the parties did not receive regulatory approvals by April 16, 2012, "we would really have to start the whole process over again."[18] Northeast Utilities and NSTAR explained in a brief to the DPU that "DOER seeks to extend the schedule for the proceeding for an unreasonable time period," and that "the Proposed Merger will be jeopardized if it is not allowed to move forward to closing in a reasonable time period." The companies elaborated: "The deadlines set in the Merger Agreement recognize that financial circumstances involved in the valuation of the anticipated merger transaction do not stay constant and a substantial passage of time has the potential to affect the financial underpinnings of the

[18] Brad Kane, "NU/NStar merger may be slowed, but not stopped," *Hartford Business.com*, Aug. 1, 2011, http://www.hartfordbusiness.com/article/20110801/PRINTEDITION/308019995.

transaction. A decision by the Department to grant DOER's Motion would jeopardize the Proposed Merger because it could preclude a merger closing within a reasonable time frame."[19]

69. DOER moved for this stay in order to gain leverage over NSTAR in its effort to engineer a contract between NSTAR and Cape Wind. DOER stated publicly that "we'd drop our motion to stay, ultimately, if NSTAR could demonstrate how the proposed merger would result in a net benefit to ratepayers and the commonwealth's clean energy goals."[20]

70. Further, on September 28, 2011, the DOER submitted a filing to the DPU stating that, as a condition for approval of the merger, the DPU should require NSTAR to purchase wind energy. The message from the Patrick Administration to NSTAR was clear: Enter into a favorable, above-market contract with Cape Wind, or the DOER will delay the merger approval long enough effectively to prevent the merger.

71. That same day, Cape Wind submitted a letter making explicit what was implicit in the DOER's letter: that as a condition for the merger, NSTAR should be forced to purchase energy from Cape Wind. The letter stated that without contracting with Cape Wind, NSTAR would suffer from "substantial and long-term shortages of the otherwise available renewable energy," and that Cape Wind's request "should be considered in light" of the December 17, 2010 statement of the Patrick Administration's position.[21]

72. On October 4, 2011, DOER commissioner Mark Sylvia specifically endorsed the possibility of NSTAR purchasing energy from Cape Wind. He stated: "We have had discussions with officials of NSTAR regarding the possible purchase of Cape Wind power by the utility . . .

[19] Joint Petrs. Opp. to Mot. to Stay, DPU Docket No. 10-170 (July 21, 2011), at 2-3.
[20] Jay Lindsay, "Merger May Impact Cape Offshore Wind Farm," CBSBoston, Sept. 25, 2011, http://boston.cbslocal.com/2011/09/25/merger-may-impact-cape-offshore-wind-farm/.
[21] Joint Petition for Approval of Merger between NSTAR and Northeast Utilities; D.P.U. 10-170, Initial Post-Hearing Comments of Cape Wind, at 1, 2-3 (Sept. 28, 2011).

To the extent that purchasing power from Cape Wind would have a positive impact on the state's clean energy development and greenhouse gas reduction goals, it would be a welcome step."[22]

73. On October 13, 2011, NSTAR and Northeast Utilities submitted a brief contending that the DPU had no authority to require, as a condition of the merger, that it enter into a long-term contract for renewable power with Cape Wind. NSTAR and Northeast Utilities further contended that if the DPU were to impose a facially neutral requirement that NSTAR purchase offshore wind energy without explicitly identifying Cape Wind, such state action might nonetheless violate the dormant Commerce Clause. The companies explained: "Although Cape Wind is not the only off-shore wind developer in New England, it is certainly the furthest along in developing the largest off-shore wind farm in New England. If the 'Department-approved method and timetable for solicitation' led to Cape Wind being the only qualified off-shore wind developer of the merged company's solicitation, then the condition on the Proposed Merger, along with related solicitation requirements, which resulted in Cape Wind being the only qualified bidder, legal concerns would be raised. It matters not that the condition appears facially neutral with respect to in-state or out-of-state developers, because the courts weigh whether the purpose or effect of the state action is discriminatory."[23]

74. The DOER's use of its influence over the merger process to steer NSTAR into a contract with Cape Wind resulted in significant local and national criticism. For instance, on July 18, 2011, Robert Kennedy Jr. published a Wall Street Journal op-ed entitled "Nantucket's Wind Power Ripoff." The editorial stated that "In Massachusetts, the utility company NSTAR

[22] Erin Ailworth, "Cape Wind seeks utility deal tie-in: Merged firms would buy power," *Boston Globe*, Oct. 4, 2011, http://www.boston.com/business/articles/2011/10/04/cape_wind_wants_nstar_northeast_utilities_to_buy_its_power_as_part_of_merger/

[23] Joint Petition for Approval of Merger between NSTAR and Northeast Utilities; D.P.U. 10-170, Initial Brief of the Joint Petitioners, at 80-82.

has fought off intense political pressure to commit to buying Cape Wind's power when and if it becomes available. CEO Tom May has repeatedly said such a contract would impose far too large a burden on his ratepayers. . . . Despite this, there are ominous signs that NSTAR, after years of fighting off pressure by the state of Massachusetts to jam its customers with higher costs, is being told to accept the higher costs after all. The state's leverage? A proposed merger of NSTAR with Northeast Utilities. In only the latest example of how heavy-handed Cape Wind's backers are, Massachusetts has suddenly agreed to change the rules for utilities as they apply to mergers and the reduction of greenhouse-gas emissions. In effect, the state administration is trying to hold hostage the proposed NSTAR-Northeast Utilities merger unless the two electric companies agree to buy Cape Wind's power."[24]

75. Faced with DOER's implicit threat to scuttle the merger unless NSTAR entered into a contract with Cape Wind, NSTAR representatives entered into secret negotiations with the Patrick Administration. The Hobson's choice presented by the DOER – contract with Cape Wind or place the proposed merger in jeopardy – culminated in a February 15, 2012 Settlement Agreement between NSTAR and the DOER. The Settlement Agreement provided that NSTAR would enter into a long-term, above market wholesale electricity contract with Cape Wind – precisely the kind of contract that NSTAR had recently rejected when it issued a request for proposals and found Cape Wind's prices too high. In exchange, DOER agreed that it would withdraw its stay motion and support the merger. The DPU approved the merger shortly after the Settlement Agreement was signed.

76. In the Settlement Agreement, the DOER and NSTAR agreed that "NSTAR Electric will enter into a long-term renewable power contract with Cape Wind Associates, LLC

[24] Robert F. Kennedy Jr., "Nantucket's Wind Power Rip-off," *Wall Street Journal*, July 18, 2011, http://online.wsj.com/news/articles/SB10001424052702304521304576447541604359376

for a term of 15 years, which obligates NSTAR Electric to purchase the energy associated with 129 MW of Cape Wind capacity." That is approximately 27.5% of Cape Wind's total output.

77. The Settlement Agreement also expressly 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)." Settlement Agreement, D.P.U. 10-170, at 3 ¶ 2.2 (Feb. 15, 2012).

78. In return, the 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.* at 5 ¶ 2.2.5. DOER also agreed that "the merger . . . is consistent with the public interest" pursuant to state law. *Id.* at 8 ¶ 4.2.

79. The Settlement Agreement provides that NSTAR "shall file an executed Memorandum of Understanding" between NSTAR, the DOER, and Cape Wind, and that the parties "shall file an executed Cape Wind Contract" for Cape Wind's power for approval by the DPU by March 30, 2012. *Id.* at 4 ¶¶ 2.2.2, 2.2.3. The power contract would not be effective until five business days from the merger closing. *Id.* at 4 ¶ 2.2.3.

80. The Settlement Agreement states that NSTAR is not required to execute the power contract if the DPU rejects the Settlement Agreement with the DOER, renders a finding precluding consummating the proposed merger, denies approval of the proposed merger, or does not issue an order in DPU 10-170 consistent with the Settlement Agreement. *Id.* at 4-5 ¶ 2.2.4.

81. The Settlement Agreement further reiterates that it is "conditioned on its full approval by the Department without additional conditions or requirements," and that "If, for any reason, the Proposed Merger is not consummated, the terms of this Settlement Agreement shall

no longer apply even if already approved by the Department subject to the terms set forth herein." *Id.* at 8-9 ¶¶ 5.1, 5.2.

82. As required by the NSTAR-DOER Settlement Agreement, NSTAR, the DOER, and Cape Wind entered into a Memorandum of Understanding (MOU) on February 24, 2012. Like the Settlement Agreement, the MOU states that NSTAR and Cape Wind would "immediately commence contract negotiations with the objective of executing a PPA," and that "any resulting PPA will address, *inter alia*, the pricing of electricity and associated [renewable energy credits], contract duration, Project scheduling, power delivery, termination, liability, assignment and a variety of other typical contract provisions, *with such terms being substantially the same as those terms approved by the Department in National Grid, D.P.U. 10-54 (2010*)."[25] On February 24, 2012, the parties requested that the DPU approve the NSTAR MOU by March 23, 2012 and that once approved, they would file an executed power contract seven days later on March 30, 2012.

83. NSTAR did not engage in any significant negotiations with Cape Wind until after the February 24, 2012 Settlement Agreement was filed. In addition, NSTAR did not engage in negotiations with Cape Wind over the price of the power purchase agreement at any time. Instead, the price was identical to the National Grid contract, as dictated by the Settlement Agreement between NSTAR and DOER. An NSTAR executive later testified that "[t]he Settlement Agreement … contemplated that the 'purchase price … shall be substantially the same as those terms approved by the Department in National Grid, D.P.U. 10-54 (2010).' … [T]he [power contract] with Cape Wind is designed such that all of [its] material terms are the

[25] Memorandum of Understanding by and among the Massachusetts Department of Energy Resources, NSTAR Electric Company and Cape Wind Associates, LLC, D.P.U. 12-19, at 2 ¶ 1 (Feb. 24, 2012) (emphasis added).

same as those approved by the Department in D.P.U. 10-54."[26] The NSTAR executive further testified that "we regarded the terms on pricing as largely negotiated already." Hearing Tr., DPU Docket No. 12-30, at 61. He elaborated: "[O]ur understanding was that if we did renegotiate substantially price terms, that it could upset an existing contract in place; and therefore, our ability to deliver in addition to that contract would be jeopardized….We recognized the price had already been negotiated extensively, and that was not something that we were -- pursuant to the terms of the agreement with DOER, that we were substantially going to comply with what was in there in terms of price…" *Id.* at 47-48.

84. On March 22, 2012, the DPU approved the NSTAR MOU. As required by the Settlement Agreement, on March 23, 2012, NSTAR and Cape Wind executed a power purchase agreement with terms and conditions substantially the same as those in the National Grid-Cape Wind contract. The power contract contained one condition that was not in the original National Grid contract – that the PPA would terminate on December 31, 2015 if construction had not begun by then – but the National Grid contract was then reformed to mirror that requirement.

85. The recitals of the power contract specifically state that the basis for NSTAR's entry into the contract is the Settlement Agreement between NSTAR and DOER. The power contract states: "WHEREAS, … NSTAR has proposed to merge with Northeast Utilities … and NSTAR, … in conjunction with such proposed [merger], … has entered into a Settlement Agreeement with …. DOER," and "WHEREAS, pursuant to Section 2.2 of the Settlement Agreement, [NSTAR] has agreed to enter into a long-term renewable power contract with [Cape Wind], the terms of which are to be substantially the same as those terms approved by [the DPU]

[26] Prefiled Direct Testimony of James G. Daly, D.P.U. 12-30, p. 9:16-20.

in National Grid, D.P.U. 10-54 (2010) subject to and in accordance with the terms and conditions of that Settlement Agreement."[27]

86. The power contract commits NSTAR to purchase energy, capacity, and renewable energy certificates from Cape Wind for 15 years beginning on its partial commercial operation date. The power contract provides NSTAR with the obligation to purchase 27.5 percent of the output of the facility, up to a maximum amount of 129 MW. Consistent with the Settlement Agreement and the recitals, the price, terms, and conditions of the power contract are identical to the price, terms, and conditions of the National Grid contract as amended. In particular, NSTAR will pay a bundled price for the three products at a base price equal to 18.7 cents per kWh for energy delivered in the calendar year 2013, subject to the same price adjustments set forth in the National Grid-Cape Wind contract.

87. On April 4, 2012, the DPU approved the merger.

88. Following the 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. He reportedly was concerned that if NSTAR had ended negotiations with the DOER, state regulators might have imposed onerous conditions to its approval of the merger. "What the conditions would have been would have been the issue," May said. "It's the fear of the unknown that we avoided."[28] He characterized the power contract as an effort to "take that uncertainty off the table." He declined to discuss private settlement

[27] Power Purchase Agreement Between NSTAR Electric Company, As Buyer And Cape Wind Associates, LLC, As Seller, Appendix to Prefiled Direct Testimony of James G. Daly, D.P.U. 12-30, p. 1.
[28] Stephen Singer, "Northeast Utilities, N Star close $5B deal," Brattleboro Reformer, April 11, 2012.

negotiations, stating: "How you make the sausages is not what we talk about. It's the final product." Mr. May acknowledged that Cape Wind charges more than traditional power producers do 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."[29]

89. The Commonwealth's actions were viewed for what they were: a transparent attempt by the Commonwealth to benefit Cape Wind by holding NSTAR's proposed merger hostage. State House minority leader Brad Jones referred to the State's actions as "legalized extortion" and a "great administration shakedown."[30] State Representative David Vieira stated: "This seems like extortion to me. . . . If NSTAR wanted to purchase Cape Wind power, NSTAR has always been free to make such a purchase. The fact the governor held the NSTAR merger hostage to the Cape Wind power purchase just doesn't pass the smell test."[31]

[29] Bruce Mohl, "May describes himself as Cape Wind agnostic; Says settlement avoided 'fear of unknown,'"*CommonWealth Magazine*, April 10, 2012, http://www.commonwealthmagazine.org/News-and-Features/Online-exclusives/2012/Spring/001-May-describes-himself-as-Cape-Wind-agnostic.aspx.
[30] Bob Salsberg & Jay Lindsay, "Utilities agree to buy Cape Wind power in merger," *South Coast Today*, Feb. 15, 2012, http://www.southcoasttoday.com/apps/pbcs.dll/article?AID=/20120215/NEWS/120219901 and Matt Murphy, "Massachusetts Senate rejects bid to slow down Northeast Utilities-Nstar merger," *Mass Live*, Feb. 16, 2012, http://www.masslive.com/business-news/index.ssf/2012/02/massachusetts_senate_rejects_bid_to_slow.html.
[31] Patrick Cassidy, "Nstar to buy Cape Wind power," *Cape Code Online*, Feb. 16, 2012, http://www.capecodonline.com/apps/pbcs.dll/article?AID=/20120216/NEWS/202160311/-1/special01.

G. The DPU's Approval of the NSTAR–Cape Wind Power Contract

90. On March 30, 2012, NSTAR filed a petition with the DPU seeking review and approval of the power contract with Cape Wind. Cape Wind and the DOER both intervened in the review proceeding and supported approval of the power contract.

91. On November 26, 2012, following evidentiary hearings, the DPU approved the power contract. D.P.U. 12-30, Order Granting Petition of NSTAR Electric Company for approval by the Department of Public Utilities of a long-term contract to purchase wind power and renewable energy certificates, pursuant to St. 2008, c., 169, § 83 and 220 C.M.R. § 17.00 *et seq.* The DPU acknowledged that "the [power contract] is more expensive than certain Section 83-eligible alternatives," but 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.* at 167.

92. The DPU endorsed DOER's extensive involvement in negotiating the Settlement Agreement that resulted in the PPA. It explained: "DOER is an executive agency with substantial responsibility for establishing and implementing the Commonwealth's energy policies pursuant to G.L. c. 25A, § 6, and with various statutory obligations with respect to implementation of the Green Communities Act. . . . With respect to Section 83 specifically, DOER is charged with consulting with the Commonwealth's electric distribution companies regarding their choice of contracting and solicitation methods for long-term contracts. . . . In light of DOER's role in developing energy policy in the Commonwealth and its specific responsibilities with respect to Section 83 contracts, the Department finds that DOER's involvement as a party to the settlement agreement in DPU 10-170 and the development of the

NSTAR Electric-Cape Wind MOU was appropriate and in no way invalidates the PPA." D.P.U. 12-30, Order Granting Petition, at 37-38.

H. Injuries Caused by Massachusetts's Unlawful Actions

93. The price of renewable energy pursuant to NSTAR's prior contracts with land-based wind generators, Groton Wind, LLC, New England Wind, LLC, and Blue Sky East, LLC, was approximately one-half of the price paid to Cape Wind. As noted above, in comparison with Cape Wind's first-year contract price of 18.7 cents per kWh, NSTAR reportedly was able to purchase land-based wind power for 10.5 cents per kWh through its September 2010 request for proposals.[32] Furthermore, NSTAR acknowledged that it had received conforming bids in response to the September 2010 request for proposals from 60 bidders representing 1,712 MW of renewable electricity that was less expensive than Cape Wind's electricity. According to NSTAR, the contract with Cape Wind will saddle customers with nearly $1 billion in above-market costs over the 15 year term.

94. The DPU's Order allows NSTAR to pass along the costs of the Cape Wind contract to its electric distribution customers, which include the Plaintiffs here. In light of falling gas prices, moreover, the market rates for electricity are now even lower than they were when National Grid contracted with Cape Wind. Thus, the NSTAR–Cape Wind contract represents an even worse deal for customers than the National Grid–Cape Wind contract was. At the time the National Grid contract was signed, Cape Wind's price was 82% higher than the price of conventional power.[33] But by the time the NSTAR-Cape Wind contract was signed, Cape

[32] Jay Lindsay, "Wanted: Buyer for controversial Cape Wind energy," *Associated Press Financial Wire*, Dec. 20, 2010.
[33] Jay Lindsay, "NStar's Cape Wind pact pays $940M over market," *SalemNews.com*, March 31, 2012, http://www.salemnews.com/region/x1451001876/NStars-Cape-Wind-pact-pays-940M-over-market/print;

Wind's price was 137% higher than the price of conventional power. And conventional power prices have continued to fall since then.

95. The price of renewable alternatives to Cape Wind – such as land-based wind power – have also fallen since the National Grid contract was executed. In September 2013, Massachusetts utilities conducted another Request For Proposals for renewable energy and executed contracts to purchase 565 MW of electricity from six land-based wind generators. The price for that land-based wind power was reported to be less than 8 cents per kWh on average – about 40% of the cost of Cape Wind.[34] Plaintiffs include Massachusetts residents, businesses, a non-profit environmental organization, and a municipality who are NSTAR customers and who will suffer substantial monetary harm as a result of the NSTAR-Cape Wind contract by having to pay more for electricity over the life of the contract.

96. Under the DPU's Order, NSTAR will pass the above-market cost of its power contract with Cape Wind on to Plaintiffs and other NSTAR customers in the form of higher electricity rates. Indeed, these Plaintiffs alone will spend approximately $1.8 million more as a result of the Cape Wind contract than if NSTAR had contracted with cheaper land-based wind alternatives.

97. As a result of the DOER's illegal action, and DPU's illegal approval of the NSTAR-Cape Wind power contract, Plaintiffs will suffer an injury-in-fact due to higher electricity rates.

[34] Sarah B. Tracy & William D. Hewitt, "United States: MA Utilities Submit Long-Term Contracts for the Purchase of Renewable Energy and RECs," http://www.mondaq.com/unitedstates/x/265082/Renewables/MA+Utilities+Submit+LongTerm+Contracts+for+the+Purchase+of+Renewable+Energy+and+RECs.

98. Plaintiffs also will experience negative impacts to the environment, regional economy, historic and cultural resources, public safety, and recreational opportunities, resulting from the Cape Wind project.

COUNT I

PREEMPTION BY FEDERAL POWER ACT; VIOLATION OF SUPREMACY CLAUSE OF THE UNITED STATES CONSTITUTION AND 42 U.S.C. § 1983

99. The Supremacy Clause of the United States Constitution renders federal law "the supreme Law of the Land." U.S. Const. art. VI, cl. 2. Under the Supremacy Clause of the United States Constitution, action by a state is preempted when Congress intends federal law to occupy the field or when state regulation stands as an obstacle to the accomplishment of Congress's goals.

100. Under 42 U.S.C. § 1983, "[e]very person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

101. Under the Federal Power Act, FERC has jurisdiction over "the transmission of electric energy in interstate commerce and ... the sale of electric energy at wholesale in interstate commerce." 16 U.S.C. § 824(b)(1). In contrast, states have jurisdiction over, *inter alia*, "facilities used for the generation of electric energy." *Id.*

102. The Federal Power Act further provides that "[a]ll rates and charges made, demanded, or received by any public utility for or in connection with the transmission or sale of electric energy subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges shall be just and reasonable, and any such rate or

charge that is not just and reasonable is hereby declared to be unlawful." *Id.* §824d(a). Pursuant to the Federal Power Act, FERC has adopted an elaborate regulatory framework to ensure that wholesale electric energy rates are just and reasonable under federal law.

103. By enacting the FPA, Congress intended to give FERC exclusive jurisdiction over setting wholesale electric energy and capacity rates or prices and thus intended this field to be occupied exclusively by federal regulation. Thus, state action that regulates within this field is void under the doctrine of field preemption.

104. In addition, under the federal regulatory framework, wholesale electric energy prices must be freely negotiated between electric generation facilities and distributors. Any attempt by a State to compel distributors to purchase energy from generation facilities at a particular price is void under the doctrine of conflict preemption.

105. Just as Massachusetts could not directly dictate the price of a wholesale electricity contract, neither can it use its authority over a merger application to engineer or influence the terms of a wholesale electricity contract.

106. In the Settlement Agreement between NSTAR and the DOER, DOER conditioned its support of the NSTAR-Northeast merger on NSTAR's entry into a wholesale power contract with Cape Wind at a price substantially identical to the price previously agreed to by National Grid.

107. By conditioning its approval of the merger on the execution of a wholesale power contract between NSTAR and Cape Wind at a particular price, DOER intruded on FERC's exclusive jurisdiction to regulate wholesale electric energy prices. Accordingly, the NSTAR-Cape Wind power contract is the product of state action that is illegal under the doctrine of field preemption.

108. In addition, by requiring the inclusion of a contractual term requiring that NSTAR purchase power from Cape Wind at the National Grid price, and therefore preventing NSTAR from freely negotiating with Cape Wind for a materially different contractual price, DOER violated federal law and policy which requires wholesale electric energy prices to be set pursuant to freely-negotiated market transactions. Accordingly, the NSTAR-Cape Wind power contract is the product of state action that is illegal under the doctrine of conflict preemption.

109. Plaintiffs have no adequate remedy at law and no opportunity for compensation for Massachusetts' violations of the Supremacy Clause.

110. Plaintiffs will suffer irreparable harm by the violation of the Supremacy Clause, and the balance of harms favors Plaintiffs, because Plaintiffs will suffer substantial economic losses due to increased energy costs, but Massachusetts is immune from suit for retrospective relief.

111. The public interest will be harmed by the violation of the Supremacy Clause, because as a result of Massachusetts' price-setting of wholesale energy prices, consumers will pay higher rates.

112. Because the Commonwealth illegally used its regulatory power to influence the price of the NSTAR-Cape Wind contract, the DPU's approval of that contract must be set aside as inconsistent with the Supremacy Clause.

COUNT II

VIOLATION OF DORMANT COMMERCE CLAUSE AND 42 U.S.C. § 1983

113. Under the dormant Commerce Clause, state action is illegal if it either has the purpose, or the effect, of discriminating against out-of-state businesses.

114. State action has the effect of discriminating against out-of-state businesses if, in practice, it imposes disproportionate burdens on out-of-state interests or protects in-state interests from the rigors of interstate competition.

115. 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 to satisfy NSTAR's need for renewable power. Therefore, DOER's actions had a discriminatory effect on out-of-state business and violated the dormant Commerce Clause.

116. Moreover, DOER was motivated by a discriminatory intent. In assessing whether state action is motivated by discriminatory purpose, a court must look to legislative text, context, and history, and consider whether state action was closely tailored to achieve the state's asserted purpose. Here, DOER's illegal state action came in the immediate wake of the Green Communities Act, which imposed a facially discriminatory requirement that Massachusetts electric distributors purchase energy from in-state generation facilities. After the facially discriminatory portion of the Green Communities Act was suspended in response to litigation, DOER accomplished indirectly precisely what the Green Communities Act sought to do directly: force Massachusetts distribution companies to purchase energy from in-state generation facilities.

117. In addition, contemporary statements from Governor Deval Patrick and DOER officials establish discriminatory purpose. They show that the Governor and DOER were motivated to favor Cape Wind, and protect it from out-of-state competition, because of the jobs and other economic benefits that Cape Wind would bring to Massachusetts.

118. Moreover, NSTAR's state action was not closely tailored to achieve any legitimate interest the Commonwealth may have in promoting renewable energy. NSTAR could

– and indeed, did – satisfy the Green Communities Act's requirements by purchasing renewable energy from out-of-state generators. DOER used its influence to bring about a contract between NSTAR and Cape Wind because Cape Wind was located in Massachusetts, not because of the Commonwealth's interest in promoting renewable energy.

119. Plaintiffs have no adequate remedy at law and no opportunity for compensation for Massachusetts' violations of the Commerce Clause.

120. Plaintiffs will suffer irreparable harm by the violation of the Commerce Clause, and the balance of harms favors Plaintiffs, because Plaintiffs will suffer substantial economic losses due to increased energy costs, but Massachusetts is immune from suit for retrospective relief.

121. The public interest will be harmed by the violation of the Commerce Clause, because as a result of Massachusetts' price-setting of wholesale energy prices, consumers will pay higher rates.

122. Because the NSTAR-Cape Wind contract is the result of the Commonwealth's use of its regulatory power to insulate Cape Wind from out-of-state competition, the DPU's approval of that contract must be set aside as inconsistent with the dormant Commerce Clause.

DEMAND FOR RELIEF

WHEREFORE, Plaintiffs request that the Court enter an order:

a. Declaring that Defendants' imposition of a condition that NSTAR procure power from Cape Wind at a specified price violated the the Supremacy Clause and the dormant Commerce Clause of the U.S. Constitution.

b. Declaring the DPU's order approving the NSTAR-Cape Wind power contract to be the product of illegal state action and therefore to be null and void and without legal force or effect.

c. Declaring the NSTAR–Cape Wind contract to be the product of illegal state action and therefore null and void and without legal force or effect.

d. Enjoining the DPU from enforcing its order approving the PPA, which was the product of illegal state action, and ordering any other necessary injunctive relief to remedy the violation of the dormant Commerce Clause and Supremacy Clause alleged herein and to enforce the requested declaratory relief.

e. Awarding Plaintiffs their reasonable attorney's fees under 42 U.S.C. §§ 1983 and 1988.

f. Awarding Plaintiffs such further relief as the Court may deem just and equitable.

Dated: January 21, 2014

/s/ Joshua M. D. Segal

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*Applications for admission *pro hac vice* pending.