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 Utilities; Jolette A. WESTBROOK, in her official capacity as Commissioner of the Massachusetts Department of Utilities; David W. CASH, in his official capacity as Commissioner of the Massachusetts Department of 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. 14-cv-10148-RGS

MEMORANDUM OF LAW IN SUPPORT OF CAPE WIND ASSOCIATES, LLC'S MOTION TO DISMISS

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List of Acronyms

Comp.	Plaintiffs' Complaint for Declaratory and Injunctive Relief
CWA	Cape Wind Associates, LLC
DOER	Massachusetts Department of Energy Resources
DPU	Massachusetts Department of Public Utilities
FERC	Federal Energy Regulatory Commission
FPA	Federal Power Act
Global Warming Solutions Act	St. 2008, c. 298, *An Act Establishing the Global Warming Solutions Act*
Green Communities Act or GCA	St. 2008, c. 169, *An Act Relative to Green Communities*
MOU	Memorandum of Understanding
NG-CWA PPA	National Grid-Cape Wind Associates Power Purchase Agreement
NSTAR	NSTAR Electric Company
NSTAR-CWA PPA	NSTAR- Cape Wind Associates Power Purchase Agreement
PPA	Power Purchase Agreement
Project	Cape Wind Project
Settlement Agreement or SA	DOER – NSTAR Settlement Agreement in DPU 10-170
SJC	Supreme Judicial Court of Massachusetts

INTRODUCTION

This action is the most recent maneuver in Plaintiffs' decade-long opposition campaign to use the courts to run out the clock on the development of the Nation's first offshore wind project ("Project"). In a rare moment of candor, Plaintiffs' principal financing source – William Koch – acknowledged that the relentless litigation by Plaintiff Alliance to Protect Nantucket Sound ("Alliance") and its cohorts is nothing more than a strategy of "delay, delay, delay."[1] Plaintiffs have brought more than 20 administrative and court challenges against the Project. None of those challenges have been successful in stopping the Project.[2] Thus, it is not surprising that after more than a decade Plaintiffs have nothing left in pursuit of their delay strategy but the reassertion of meritless claims that they have already made and rightfully lost.

Plaintiffs' premise – that the Massachusetts Department of Energy Resources ("DOER"), acting solely as a party-advocate in settlement negotiations, improperly used its "influence over NSTAR's merger request to bring about" NSTAR Electric Company's purchase of electricity from the Cape Wind Project, Comp. ¶4 – was previously litigated by Plaintiff Alliance in an adjudicatory proceeding before the Massachusetts Department of Public Utilities ("DPU") and rejected in a final order issued on November 26, 2012. Based solely on this very same rejected premise, Plaintiffs now, 14 months later, assert violations of the Supremacy Clause (that negotiation of a settlement agreement with NSTAR invaded the Federal Energy Regulatory

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[1] William Koch is the Chairman of Plaintiff Alliance and the owner of a grand waterfront estate on Nantucket Sound, who asserted, in his own words, that the Alliance's strategy for blocking the Cape Wind project is "to just *delay, delay, delay*, which we're doing." *See* Declaration of David S. Rosenzweig ("Rosenzweig Decl."), Exh. A. Pursuant to Fed. R. Evid. 201, CWA requests that the Court take judicial notice of this news article, which is self-authenticating pursuant to Fed. R. Evid. 902(6)). For the reasons set forth in the accompanying Motion to Expedite the Court's consideration of this Motion, CWA urges the Court to issue a speedy ruling on this matter.

[2] In the most recent decision, on March 14, 2014, the U.S. District Court for the District of Columbia entered summary judgment against Plaintiff Alliance and others in four consolidated cases, soundly rejecting their claims that sought to invalidate Cape Wind's federal lease and approvals. *PEER v. Beaudreau*, ___ F. Supp. 2d ___, No. 10-1067 et al., 2014 WL 985394 (D.D.C. Mar. 14, 2014). Of the more than 30 issues litigated, the court remanded two narrow issues to the U.S. Fish and Wildlife Service and the National Marine Fisheries Service, neither of which are expected to affect the Project schedule. *See id.* at *42.

Commission's ("FERC") jurisdiction over wholesale electric prices), and the Dormant Commerce Clause (that DOER's "action as a party-advocate" discriminated against out-of-state providers). Plaintiffs' Complaint should be dismissed pursuant to Fed. R. Civ. P. 12(b)(1) and 12(b)(6) because this Court lacks subject matter jurisdiction and because Plaintiffs' complaint fails to state a claim upon which relief can be granted.

First, Plaintiffs' claims are barred by Massachusetts' sovereign immunity. The Commonwealth officials acted within the scope of their statutory authority, and Plaintiffs seek only retrospective relief. Second, Plaintiffs fail to state a claim under the Supremacy Clause because the alleged actions do not constitute an invasion of FERC's jurisdiction, as the alleged actions of DOER and DPU fall squarely within the traditional regulatory power to oversee utility purchase decisions, as reserved to the states under the terms of the Federal Power Act ("FPA"). Third, Plaintiffs fail to allege the causation necessary to sustain a § 1983 claim because the settlement agreement negotiated between DOER and NSTAR whereby NSTAR agreed, among other things, to pursue a potential purchase of power from Cape Wind Associates, LLC ("CWA"), was contingent upon multiple and uncertain future events beyond the control of those parties, and DOER had no legal authority to require, approve, or disapprove the proposed merger or the proposed purchase. Further, Plaintiffs' claim lacks the requisite "state action" because, as Plaintiff Alliance vigorously argued during a prior DPU proceeding, "DOER was not acting in a sovereign capacity but as a mere party before the DPU." Finally, Plaintiffs' Commerce Clause challenge fails to state a claim because Plaintiffs fail to identify any state law or regulation that caused their alleged injury or any alleged impediment to interstate transactions, and because Plaintiffs as rate payers are not "within the zone of interests" to be protected by the Commerce

Clause and lack standing. Accordingly, Plaintiffs' Complaint should be dismissed in its entirety with prejudice.

BACKGROUND AND ALLEGATIONS

CWA has received all of the major federal, state, and local permits and licenses needed to construct and operate a 468 megawatt wind-generating facility located off the coast of Massachusetts, in the federal waters of Nantucket Sound. Comp. ¶37. Plaintiffs' Complaint refers extensively to three proceedings of DPU, an independent state agency whose comprehensive regulatory jurisdiction over electric utilities extends to, *inter alia*, the authority to approve utility mergers and to approve long-term energy procurement and purchase decisions of electric utilities. In contrast, DOER, as an energy planning and advocacy agency, participated in these proceedings before DPU solely in the capacity of a party-advocate, with no decisional authority over any such matters. Each proceeding is discussed below.[3]

DPU's Approval of the NSTAR Merger: On November 24, 2010, NSTAR, an electric utility regulated by DPU, filed a joint petition with DPU seeking approval, pursuant to G.L. c. 164, § 96, to merge NSTAR with Northeast Utilities. Comp. ¶60. DPU granted DOER intervenor status to participate in the DPU proceeding as a party-advocate. DOER and NSTAR, as parties to the proceeding, negotiated a voluntary settlement agreement dated February 15, 2012, covering a broad array of matters, including support of the merger, reductions in rate impacts, energy efficiency, solar investment, electric vehicles, service quality, and post-merger employment and facility closings (the "Settlement Agreement" or "SA").[4] Order, No. 10-170, at 17-18, 22, 24-26 (DPU Apr. 4, 2012) ("DPU 10-170"); Comp. ¶75.

[3] For the Court's convenience, CWA is providing copies of each of the three DPU Orders cited in Plaintiffs' Complaint. *See* Rosenzweig Decl., Exh. B (DPU 10-170); Exh. C (DPU 12-19); and Exh. D (DPU 12-30).

[4] Rosenzweig Decl., Exh. E at 1 (the Settlement Agreement).

With regard to renewable energy procurement, the Settlement Agreement included a provision pursuant to which NSTAR would *potentially* purchase 27.5% of the Project's output under "substantially the same" terms as a contract between CWA and a different utility, National Grid (the "NG-CWA PPA"), which had been previously approved by DPU and upheld by the Massachusetts Supreme Judicial Court ("SJC") in a challenge brought by, *inter alios*, Plaintiff Alliance. *Id.* at 24; Comp. ¶¶77-78; *Alliance to Protect Nantucket Sound, Inc. v. Dep't of Pub. Utils.*, 959 N.E.2d 413 (Mass. 2011). NSTAR and DOER agreed that a Memorandum of Understanding ("MOU") among NSTAR, DOER, and CWA would be filed with DPU to authorize the commencement of contract negotiations between NSTAR and CWA. SA at ¶2.2.2; Comp. ¶79. Importantly, neither NSTAR nor DOER could implement the Settlement Agreement without DPU approval pursuant to DPU's exclusive jurisdiction to approve utility mergers. G.L. c. 164, § 96; DPU 10-170, at 24; Comp. ¶¶80-81.

DPU's consideration of the Settlement Agreement noted "the importance of the long-term renewable procurement provision of the [Settlement Agreement] . . . to demonstrate NSTAR Electric's 'commitment to advance the goals of the [Global Warming Solutions Act] and the [Green Communities Act].'" DPU 10-170, at 85 (quoting SA at ¶2.2.5). DPU also noted that the Settlement Agreement "specifically states that the [DPU]'s review of the Settlement does not constitute any form of review of the Cape Wind contract or approval or endorsement that the Cape Wind contract is in the best interests of ratepayers[.]" *Id*. On April 4, 2012, DPU issued a final order approving the NSTAR merger and the Settlement Agreement. *Id*. at 107; Comp. ¶87. No parties sought appellate review of the DPU order and the merger was consummated in 2012.

DPU Approval of the NSTAR-Cape Wind MOU: Pursuant to the Green Communities Act, St. 2008, c. 169, § 83 ("GCA" or "Section 83"), the timetable and method for solicitation

and execution of contracts from renewable energy developers are proposed by electric utilities in consultation with DOER, but must be considered and approved by DPU. The discretion to enter into a contract rests solely with the utility. *Id.*

Thus, on February 24, 2012, NSTAR filed a petition seeking DPU approval of the MOU it negotiated with CWA and DOER (Comp. ¶82), providing a timetable and method by which NSTAR would voluntarily enter into negotiations for a power contract with CWA.[5] Importantly, the MOU did not obligate NSTAR or CWA to enter into a PPA and, in the event an agreement was reached, DPU would consider the PPA in a separate adjudicatory proceeding pursuant to Section 83.[6] Order, No. 12-19, at 4 (DPU Mar. 22, 2012) ("DPU 12-19").

In the MOU proceeding before DPU, Plaintiff Alliance asserted some of the same objections it alleges here; namely, that the MOU: (1) violated the Commerce Clause of the U.S. Constitution; and (2) was not voluntary because the terms had been part of NSTAR's merger settlement with DOER. *Id.* at 6. DPU rejected the Alliance's objections, ruling that DPU's review of the MOU was limited to authorizing NSTAR to enter into bilateral negotiations with CWA pursuant to Section 83 of the GCA, and that a substantive review of any resulting contract would be the subject of a subsequent adjudicatory proceeding. *Id.* at 11-12. On March 22, 2012, DPU issued a final order approving the MOU. *Id.* at 13; Comp. ¶85. Plaintiff Alliance sought judicial review of DPU's approval, alleging, *inter alia*, that the decision violated Section 83 and the Commerce Clause, but later dismissed its own appeal. *See* Order, No. 12-30, at 33 n.32 (DPU Nov. 26, 2012) ("DPU 12-30").

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[5] Rosenzweig Decl., Exh. F at 1 (the MOU).

[6] The MOU provided that "[n]otwithstanding any other provisions of this MOU, this MOU does not create a legal obligation on the part of any Party to enter into a PPA. A PPA will be executed only if the terms are mutually agreeable to NSTAR Electric and Cape Wind." *Id.*; MOU at ¶ 4.

DPU Approval of the NSTAR-Cape Wind PPA: After bilateral negotiations, NSTAR and CWA reached agreement on March 23, 2012 on a proposed contract and NSTAR filed a petition with DPU seeking approval of its proposed purchase (the "NSTAR-CWA PPA").[7] DPU 12-30; Comp. ¶90. Plaintiff Alliance, on behalf of its members and supporters, was granted full intervenor status to participate in DPU's adjudicatory proceeding. DPU 12-30, at 2. DPU held three public comment hearings and two evidentiary hearings. *Id*. at 2-3; Comp. ¶91. The evidentiary record consisted of over 200 exhibits, including direct and cross examination testimony and discovery responses. DPU 12-30, at 3 n.5.

Importantly, Plaintiff Alliance vigorously argued before DPU the identical premise underlying all of its claims here: that DOER, acting as a party-advocate in settlement negotiations, had illegally coerced NSTAR to contract with CWA in order to have its merger approved. *Id.* at 23-25. After considering the evidence presented by all parties, on November 26, 2012, DPU issued a decision approving the PPA and rejecting the Alliance's arguments, finding that NSTAR acted voluntarily:

> [NSTAR] testified that it voluntarily agreed to purchase output from the Cape Wind facility as part of the settlement agreement in D.P.U. 10-170 in order to effect a demonstration of net benefits, pursuant to G.L. c. 164, § 96. . . . The Company further testified that it considered the terms of the PPA between National Grid and Cape Wind to represent the best alternative for customers in terms of diversifying the Company's renewable portfolio and complying with renewable energy and environmental requirements. . . . The Company testified that it entered into the proposed PPA in order to capitalize on the Cape Wind facility's unique and significant benefits. . . . Further, with respect to the execution of the contract, the MOU expressly states that it "does not create a legal obligation on the part of [NSTAR Electric or Cape Wind] to enter into a PPA." . . . The MOU provides that a "PPA will be executed only if the terms are mutually agreeable to NSTAR Electric and Cape Wind." . . . For these reasons, we conclude that NSTAR Electric was not required to enter into the PPA.

[7] Rosenzweig Dec., Exh. G. (the NSTAR-CWA PPA).

Id. at 34-35.[8] DPU also rejected the Alliance's argument that the Settlement Agreement precluded meaningful negotiations between NSTAR and CWA, *id*. at 35-36, and that DOER had acted beyond its authority, thereby invalidating the NSTAR-CWA PPA. *Id.* at 37-38. DPU concluded that the PPA was "cost effective" and approved it as being in the public interest. *Id.* at 137, 181. Although Plaintiff Alliance had unsuccessfully appealed DPU's prior approval of the NG-CWA PPA,[9] it did not seek judicial review of DPU's final order approving the NSTAR-CWA PPA. Instead, Plaintiffs waited 14 months to file this action in federal court.

The Respective Regulatory Roles of FERC, DPU, and DOER: The FPA provides FERC authority over "the *sale* of electric energy at wholesale in interstate commerce." 16 U.S.C. § 824(a), (b)(1) (emphasis supplied). In this regard, CWA must and will in the future seek market-based rate authorization from FERC before it commences sales under the negotiated rates of its power contracts. The FPA, however, also preserves traditional state regulation of electric utilities by limiting FERC's authority "only to those matters which are not [as of 1935] subject to regulation by the States." FPA, § 824(a). Such traditional roles thereby reserved to the states include the oversight of utility decisions to enter into agreements such as the PPA to *purchase* electricity at wholesale under statutory provisions such as Section 83.

Chapter 164 of the Massachusetts General Laws establishes DPU as the agency empowered to exercise traditional state powers of utility regulation, including the "general

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[8] In an obvious attempt to avoid collateral estoppel and re-litigate settled issues, the Alliance has recruited plaintiffs to join this suit who were not named parties to the DPU proceedings. Nevertheless, all Plaintiffs are barred by collateral estoppel because all plaintiffs have "close non-litigating relationships" with the Alliance. "Close non-litigating relationships" and "deliberate maneuvering to avoid the effects of the first action" are the hallmarks of a "virtual representation" that binds non-parties to the first action. 18A Wright, Miller & Cooper, Federal Practice and Procedure: Jurisdiction, § 4457 at 502 (2d ed.). Plaintiff Alliance virtually represented all plaintiff "non-parties" in the DPU proceedings: Plaintiff Taylor is an Alliance employee; Town of Barnstable has been identified as being represented by the Alliance in DPU proceedings; Plaintiff Hyannis Marina is owned by Wayne Kurker, a member of the Alliance Board; Plaintiff Keller Company, Inc.'s sole owner Joseph Keller is an Alliance fundraiser; Plaintiff Marjon Print and Frame Shop Ltd. is owned by Chris Atsalis, who is a long-time Alliance supporter, as is Plaintiff Regan.

[9] *See Alliance to Protect Nantucket Sound*, 959 N.E.2d at 417.

supervision" of all electric companies. *See* G.L. c. 164, § 76; *Commonwealth Elec. Co. v. Dep't of Pub. Utils.*, 491 N.E.2d 1035, 1040 (Mass. 1986) ("The DPU stands as the agency charged with the responsibility for protecting the interests of the ratepayers."); *Alliance to Protect Nantucket Sound*, 959 N.E.2d at 431 ("G.L. c. 164, § 94, gives [DPU] broad power to enter orders concerning the 'rates, prices, charges and practices' in contracts for the sale of electricity by electric companies 'as the public interest requires.'"). In particular, Section 96(c) of Chapter 164 provides DPU with the exclusive decisional authority to approve proposed utility mergers, and Section 83 of the GCA grants DPU the exclusive decisional authority to review and approve proposed long-term purchases of renewable energy by electric utilities.

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

ARGUMENT

THE COMPLAINT AGAINST ALL DEFENDANTS MUST BE DISMISSED FOR LACK OF SUBJECT MATTER JURISDICTION AND FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED

A. Standard of Review

This Court set forth the standard of review for evaluating the sufficiency of a claim:

> To survive a motion to dismiss, a complaint must allege a plausible entitlement to relief. . . . Dismissal for failure to state a claim will be appropriate if the pleadings fail to set forth factual allegations, either direct or inferential, respecting each material element necessary to sustain recovery under some actionable legal theory. . . . In ruling on a motion to dismiss, the court may look to matters of public record such as documents from prior state court adjudications.

Ishaq v. Wachovia Mortg., FSB, No. 09-11422, 2010 WL 1380386, at *1 (D. Mass. Apr. 2, 2010) (citations and internal quotation marks omitted). "In assessing a rule 12(b)(6) motion to dismiss, [a court] may [also] consider, in addition to the complaint itself, a limited array of additional documents such as any that are attached to the complaint and documents sufficiently referred to in the complaint." *Giragosian v. Bettencourt*, 614 F.3d 25, 27-28 (1st Cir. 2010) (internal quotations omitted).[10]

B. All of Plaintiffs' Claims Are Barred by the Commonwealth's Sovereign Immunity

CWA adopts, and incorporates by reference, the Commonwealth Defendants' arguments that all of Plaintiffs' claims are barred by Massachusetts' sovereign immunity, including the argument that Plaintiffs' lawsuit is barred by the Eleventh Amendment to the United States Constitution as an improper request for retroactive remedial relief against the Commonwealth.[11,12]

C. Plaintiffs Fail To State a Claim for Preemption

Plaintiffs' premise that the State's activity "constituted illegal regulation of wholesale electricity sales" (Comp. ¶¶ 1, 3, 12-13, 41, 99-112) is mistaken as a matter of law because the actions of both DOER and DPU dealt exclusively with NSTAR's buyer-side decision to purchase under the PPA, a matter within the scope of regulatory authority clearly reserved to the states and recognized under long-standing judicial precedent, including the *Pike County* doctrine, and neither DOER nor DPU purported to authorize CWA to *sell* on such terms (a distinct matter

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[10] The Complaint refers extensively to the Settlement Agreement, the MOU, the PPA, and the DPU proceedings and, therefore, the contents of those documents and orders are appropriate for the Court to consider on a motion to dismiss. *Ishaq*, 2010 WL 1380386, at *1; *Giragosian*, 614 F.3d at 27-28.

[11] The Complaint contains no allegations directly against CWA or NSTAR. *See generally* Comp.

[12] CWA also adopts and incorporates by reference that portion of the Commonwealth's Memorandum arguing that Plaintiffs' lawsuit should be barred by the application of the *Burford* abstention doctrine.

of seller-side authorization expressly reserved to FERC jurisdiction). *See Pike Cnty. Light & Power Co. v. Pa. Pub. Util. Comm'n*, 465 A.2d 735, 738 (Pa. Commw. Ct. 1983).[13]

In enacting the FPA, Congress intended to establish a system of harmonious and comprehensive energy regulation with "interlocking" jurisdictions of FERC and the States, *Pub. Utils. Comm'n of Cal. v. FERC*, 900 F.2d 269, 274-75 (D.C. Cir. 1990), with the FPA's legislative history demonstrating a "constant purpose" to preserve the pre-existing regulatory authority of the States and to "apportion federal and state jurisdiction over the industry." *Conn. Light & Power Co. v. Fed. Power Comm'n*, 324 U.S. 515, 525-531 (1945). The terms of the FPA thus expressly preserve traditional state authority over electric utilities by extending FERC's authority "only to those matters which are not subject to regulation by the States." 16 U.S.C. § 824(a).

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[13] This case is easily distinguishable from *PPL EnergyPlus, LLC v. Hanna ("Hanna")* and *PPL EnergyPlus, LLC v. Nazarian* ("*Nazarian*"). Those cases find preemption only where, unlike here, a state legislature or agency with explicit regulatory authority compelled a utility to make a purchase at a state-mandated price.

In *PPL EnergyPlus, LLC v. Hanna*, ___ F. Supp. 2d ___, No. 11-745, 2013 WL 5603896, at *19 (D.N.J. Oct. 11, 2013), *appeal docketed*, No. 13-4501 (3d Cir. Nov. 21, 2013), a state statute [the New Jersey Long-Term Capacity Pilot Project Act] "*require[d]* New Jersey's four electric distribution companies ('EDCs') to enter into . . . contracts with eligible generators" such that the statute thus "intrude[d] upon the exclusive jurisdiction of [FERC] *by establishing the price* that . . . generators will receive for their sales of capacity" (*Id.* at *35 (emphasis added) resulting in the "imposition of a [state] *government imposed* price," *id.* at *36 (emphasis added).

Similarly, in *PPL EnergyPlus, LLC v. Nazarian*, ___ F. Supp. 2d ___, No. 12-1286, 2013 WL 5432346, at *1, 25 (D. Md. Sept. 30, 2013), *appeal docketed*, No. 13-2419 (4th Cir. Nov. 25, 2013), the Maryland Public Service Commission issued an order that *compelled* utilities to enter a contract at a state-determined pricing that effectively required those utilities to reimburse the PSC's selected generators' costs of financing. *Id.* at *47, with the court finding that "*state action that regulates* within this field is void under the doctrine of field preemption," *id.* at *31 (emphasis added).

In contrast to *Hanna* and *Nazarian*, here there was no compulsion regarding a state-determined rate, as (i) there was no such statutory provision requiring any state-imposed rate, (ii) the DOER acting solely as a party-advocate had no regulatory authority to compel any actions by NSTAR or to approve or disapprove either the merger or the PPA, and (iii) the DPU approved only NSTAR's own petition for authorization to enter into the PPA on the economic terms proposed by the utility, rather than any state-mandated pricing. Lastly, unlike here, the plaintiffs in *Hanna* and *Nazarian* had standing because they were actual wholesale market participants who were directly affected by the state statute and directives.

Within this system of distinct but "interlocking" federal and state regulation, long-standing practice and precedent establish that FERC's authority over *sales* at wholesale does not deprive the states of their traditional authority to review the buyer-side decisions of utilities to make *purchases* under such arrangements, in this case pursuant to DPU's authority under Section 83. *Pike Cnty.*, 465 A.2d at 738 (while FERC retains exclusive jurisdiction over interstate sales of energy at wholesale and therefore the state utility commissions may not decide that a retail utility should have bought wholesale power from a given source at other than the Commission-approved wholesale rate, the state utility commissions *do* have jurisdiction to determine that a utility should not have bought power from that source); *Commonwealth Elec. Co. v. Dep't of Pub. Utils.*, 491 N.E.2d 1035, 1045 (Mass. 1986), *cert. denied*, 481 U.S. 1036 (1987) ("[W]hile the DPU cannot inquire into the reasonableness of wholesale rates fixed by FERC, the DPU may inquire whether a purchaser . . . is warranted in agreeing to purchase at such a rate considering its alternatives.") (citations omitted); *N.Y. v. FERC*, 535 U.S. 1, 24 (2002) ("'This Final Rule [FERC Order 888] will not affect or encroach upon state authority in such traditional areas as the authority over . . . *administration of integrated resource planning and utility buy-side and demand-side decisions*, . . . [and] authority over utility generation and resource portfolios. . . .'") (emphasis added) (quoting FERC Order 888).

Consistent with the established case law, DPU made clear in its Final Order that its approval "[did] not encompass a determination of the rate at which the power would be sold [by CWA], which is the jurisdiction of [FERC] pursuant to sections 205 and 206 of the Federal Power Act, 16 U.S.C. §§ 824d, 824e." DPU 12-30, at 17 n.25. Instead, DPU approval pursuant to Section 83 "is an approval of an electric distribution company's decision to enter into a long-term contract with a renewable energy developer and the attendant cost recovery in light of the

alternatives." *Id*., (citing *Pike Cnty.* and *Commonwealth Elec. Co., supra*). DPU thus clearly acknowledged the long-standing and distinct roles of the state and the Federal government through: (a) its review of NSTAR's buyer-side decision to enter into the PPA pursuant to Section 83; while in no way interfering with (b) FERC's exclusive jurisdiction under the FPA to authorize sales by CWA at such negotiated rates.

Indeed, FERC has confirmed that DPU's similar review of National Grid's buyer-side decision to enter the NG-CWA PPA did not infringe on FERC's exclusive authority over wholesale sales under the FPA. In 2010, Californians for Renewable Energy, Inc. ("CARE") and Barbara Durkin (a member of Plaintiff Alliance) filed a complaint with FERC alleging that DPU's approval of the NG-CWA PPA violated the FPA "by approving a contract for purchases of capacity and energy that . . . usurps [FERC's] exclusive jurisdiction to determine the rates for wholesale sales of electricity under its jurisdiction." *CARE v. Nat'l Grid, Cape Wind & DPU*, Order Dismissing Complaint, 137 FERC ¶61,113, at par. 1 (2011),[14] *reh'g denied*, 139 FERC ¶61,117. In dismissing the complaint, FERC recognized the distinct role of DPU's approval of National Grid's buyer-side purchase decision, and explained that there was no requirement that any FERC seller-side rate authorization must precede such state review:

> The contracts approved by the Massachusetts [DPU] indicate that the wind facilities must either have QF [Qualifying Facility] status or file rates with this Commission pursuant to section 205 of the FPA. Cape Wind indicates that its rates will be filed with this Commission . . . . To comply with the prior notice and filing requirements of the FPA, and [FERC]'s implementing regulations, such a rate filing must be made at least sixty days before the rates are to become effective. *There is, however, no requirement in the FPA or the Commission's regulations that the rates be filed [with FERC] before a retail filing, such as the Massachusetts filing that resulted in the Massachusetts [DPU] decision that it is the subject of [the] complaint*.

[14] Available at http://www.ferc.gov/EventCalendar/Files/20111107163843-EL11-9-000.pdf.

Id. at ¶33 (emphasis added) (footnote omitted). In this regard, the PPA anticipates and expressly provides that, prior to commencing commercial operation, CWA will seek from FERC "any requisite authority to sell the output . . . of the Facility at market based rates." NSTAR-CWA PPA at 3.4(*l*) (Rosenzweig Dec., Exh. G). No actions taken by DOER or DPU intrude upon FERC's independent authority to act upon such a request at the time it is made. In sum, there is no constitutional conflict under the alleged facts.[15]

D. Plaintiffs Fail To State a Claim Under 42 U.S.C. § 1983

Plaintiffs bring both of their claims pursuant to 42 U.S.C. § 1983, which allows a federal remedy for an alleged "deprivation of any rights, privileges, or immunities secured by the Constitution and laws." *Golden State Transit Corp. v. City of L.A.*, 493 U.S. 103, 105 (1989). To state a claim under § 1983, Plaintiffs must make two showings: "the existence of a federal or statutory right; and a deprivation of that right by a person acting under color of state law." *Barrios-Velazquez v. Asociacion de Empleados del Estado Libre Asociado de Puerto Rico*, 84 F.3d 487, 491 (1st Cir. 1996); s*ee, e.g.*, *Albino v. Municipality of Guayanilla*, 925 F. Supp. 2d

[15] Plaintiffs' preemption claim fails for two additional reasons: *First*, by its express terms, the Supremacy Clause voids "any Thing *in the Constitution or Laws* of any State" that contradicts federal law, constitution, or treaty. U.S. Const., Art. VI, cl. 2 (emphasis added). Federal law, therefore, can preempt state legislative or regulatory action—but only where that state action has the force and effect of law, *i.e.*, where it sets generally applicable, compulsory rules of conduct. *See, e.g.*, *Am. Airlines, Inc. v. Wolens*, 513 U.S. 219, 233 (1995) (recognizing "distinction between what the State dictates and what [a party] itself undertakes" in preemption analysis); *Mason & Dixon Lines, Inc. v. Steudle*, 761 F. Supp. 2d 611, 621 (E.D. Mich. 2011) ("[A contract between the state and a private company] does not constitute a law, rule, pronouncement, regulation, or prescription. It is a memorialization of the mutual promises and undertakings of the subscribing parties, no more no less.") (rejecting preemption argument). Plaintiffs' complaint fails to challenge any state statute or regulation, and the Settlement Agreement has no legal force or effect because it is expressly conditioned on subsequent negotiations between CWA and NSTAR and approvals by DPU. *Second*, the Supremacy Clause does not provide a basis for Plaintiffs to seek to void a state-approved PPA between two private parties, where Plaintiffs are not threatened with enforcement of, or otherwise subject to, any challenged state statute, regulation, constitutional provision, tax, fee, or generally applicable administrative policy. As in *Ex parte Young*, 209 U.S. 123 (1908), a preemption claim may be raised (a) as a defense in a state enforcement proceeding; or (b) preemptively as a defense when a person is threatened with an enforcement proceeding. But where a Supremacy Clause claim "clearly appears to be immaterial and made solely for the purpose of obtaining jurisdiction or where such a claim is wholly insubstantial and frivolous," as here, mere invocation of the Clause does not provide jurisdiction. *Verizon Md., Inc. v. Pub. Serv. Comm'n of Md.*, 535 U.S. 635, 643 (2002) (internal quotation marks and citations omitted).

186, 192 (D.P.R. 2013) ("[A] plaintiff must plausibly plead (1) that he or she was deprived of a constitutional right; (2) that a causal connection exists between [defendants' conduct] and the [constitutional deprivation]; and (3) that the challenged conduct was attributable to a person acting under color of state law.") (second and third alterations in original) (internal quotation marks omitted). Plaintiffs cannot show that they have cognizable rights under either the Supremacy Clause or Commerce Clause or that DOER's actions caused Plaintiffs to be deprived of any such rights. Further, the negotiation between adverse party-advocates of a settlement agreement is not state action subject to challenge under § 1983.

1. Count I Must Be Dismissed Because Plaintiffs Do Not Plead a Violation of Any Cognizable Constitutional or Statutory Right.

Count I of the Complaint relies only upon the Supremacy Clause and the FPA to state a cause of action. However, the Supremacy Clause "is not a source of any federal rights," but secures rights established under other federal law by "according them priority whenever they come in conflict with state law." *Golden State*, 493 U.S. at 107 (internal quotation marks omitted); *see also O'Connell Mgmt. Co., Inc. v. Mass. Port Auth.*, 744 F. Supp. 368, 376 n.9 (D. Mass. 1990) (disregarding Supremacy Clause claim and analyzing only due process claim in § 1983 action). The purpose of the Supremacy Clause is instead to ensure that, in a conflict with state law, federal law prevails: "[T]o say that there is a federal statutory right enforceable under the Supremacy Clause, when there is no such right under the pertinent statute itself, would effect a complete end-run around this Court's implied right of action and 42 U.S.C. § 1983 jurisprudence." *Douglas v. Indep. Living Ctr. of S. Cal.*, 132 S. Ct. 1204, 1213 (2012) (Roberts,

C.J., dissenting, joined by Scalia, Thomas & Alito, JJ.).[16] "'[W]here the text and structure of a statute provide no indication that Congress intends to create new individual rights, there is no basis for a private suit, whether under § 1983 or under an implied right of action.'" *Id.* (quoting *Gonzaga Univ. v. Doe*, 536 U.S. 273, 286 (2002)). In sum, Plaintiffs' allegations of an incompatibility "between federal and state statutes and regulations [*i.e.*, the FPA and DOER's alleged actions] does not, in itself, give rise to a claim secured by the Constitution[.]" *Chapman v. Houston Welfare Rights Org.*, 441 U.S. 600, 615 (1979). "The pre-emptive federal statute, instead, must secure a right, privilege, or immunity in order for § 1983 to provide a remedy." *Golden State*, 493 U.S. at 116.

Thus, in order to maintain their claim under § 1983, Plaintiffs must show that they have cognizable rights under the FPA to bring a claim in federal court prior to any action by FERC authorizing wholesale rates. *See Consejo de Salud de la Comunidad de la Playa de Ponce, Inc. v. Gonzalez-Feliciano*, 695 F.3d 83, 102 (1st Cir. 2012) ("[W]e look to the provision that a plaintiff seeks to enforce to determine whether it creates such a right."). They do not. Plaintiffs' Complaint relies only on 16 U.S.C. §§ 824(b), 824d(a), (Comp. ¶¶101-102), provisions of the FPA that establish that FERC has jurisdiction over wholesale electricity sales and that rates that are not "just and reasonable" are unlawful. But a party "cannot litigate in a judicial forum its general right to a reasonable rate." *Montana-Dakota Utils. Co. v. Nw. Pub. Serv. Co.*, 341 U.S. 246, 251 (1951). That is for FERC alone to consider after the request is made of FERC by CWA prior to its operation. Accordingly, "there is no private right of action under the [FPA] to seek a 'just and reasonable' rate" from the courts. *Hendricks v. Dynegy Power Mktg., Inc.*, 160 F.

[16] In *Independent Living*, the majority remanded the case for further proceedings before the Ninth Circuit because after the filing of the suit the federal agency had declared that the challenged state law did not conflict with the federal statute (the Medicaid Act). *Id.* at 1211. The dissent argued that a remand was not necessary because the Supremacy Clause does not provide a cause of action independent from the statute at issue. *Id.* at 1214-15.

Supp. 2d 1155, 1160 (S.D. Cal. 2001); *accord*, *City of Gainesville v. Fla. Power & Light Co.*, 488 F. Supp. 1258, 1267 (S.D. Fla. 1980); *see also Montana-Dakota*, 341 U.S. at 251 ("[T]he prescription [that the seller's rates be 'just and reasonable'] . . . is a standard for [FERC] to apply and, independently of [FERC] action, creates no right which courts may enforce."). Therefore, Plaintiffs have no cognizable rights supporting their § 1983 claims.

2. Count II Must Be Dismissed Because Plaintiffs Are Not Within the Class of Persons Protected by the Dormant Commerce Clause.

Whether characterized as a lack of a cognizable right or cognizable injury for purposes of standing, Plaintiffs, who are merely individual ratepayers who speculate that their utility costs will increase, are not within the zone of interests the Commerce Clause protects. The Clause protects the right "to engage in interstate trade free from restrictive state regulation." *Starlight Sugar, Inc. v. Soto*, 253 F.3d 137, 142 (1st Cir. 2001) (internal quotation marks omitted). While "cognizable injury from unconstitutional discrimination against interstate commerce does not stop at members of the class against whom a State ultimately discriminates, and customers of that class may also be injured," *Gen. Motors Corp. v. Tracy*, 519 U.S. 278, 286 (1997), those customers only have rights or injuries if they are "burdened directly, as [where] the government required them to pay a tax upon buying products from out-of-state sellers." *Lane v. Holder*, 703 F.3d 668, 672 (4th Cir. 2012) (distinguishing *Tracy*), *cert. denied*, 2014 WL 684051 (S. Ct. Feb. 24, 2014); *see also Exxon Corp. v. Md.*, 437 U.S. 117, 128 (1978) ("T]he consuming public [may] be injured . . ., but . . . that argument relates to the wisdom of the statute, not to its burden on [interstate] commerce."). "[I]f the ultimate cost of economic regulation to consumers were within the zone of interests of the Commerce Clause, then every consumer could properly challenge such regulations. We decline to expand the scope of claims cognizable under the Commerce Clause this far." *Ben Oehrleins & Sons & Daughter, Inc. v. Hennepin Cnty.*, 115

F.3d 1372, 1380, 1382 (8th Cir. 1997) (further stating that "[w]e are aware of no Commerce Clause case in which the [Supreme Court] has granted standing to a plaintiff who was a consumer whose alleged harm was the passed-on cost incurred by the directly regulated party.").

Here, Plaintiffs' alleged future economic injury is remote and purely speculative. Further, DPU, after exhaustive adjudicatory review, rejected such arguments, finding that "the expected benefits of the PPA to NSTAR Electric customers exceed the expected cost to NSTAR Electric customers" and that "the PPA is both a cost-effective mechanism for procuring renewable energy on a long-term basis, and cost-effective to NSTAR customers over the term of the PPA[.]" DPU 12-30, at 137. The Commerce Clause does not extend its protections to Plaintiffs' unsupported allegations of indirect, remote, and speculative harms. Moreover, Plaintiffs have not alleged any impediment to interstate commerce in favor of in-state commerce. Rather, there is only the approval of a proposed purchase by NSTAR from a unique and particular seller (located in federal waters outside of Massachusetts), with no prohibition or impediment against NSTAR entering into additional transactions with other entities, whether from in-state or out-of-state sources. Plaintiffs' argument would essentially find a constitutional violation in the approval of any voluntary, bilateral purchase from an in-state source. Further, Plaintiffs fail to identify any state law or regulation that operated so as to *cause* their alleged injury. As the First Circuit has repeatedly explained, "'the Dormant Commerce Clause [is] a self-executing limitation on state authority *to enact laws* imposing substantial burdens on interstate commerce.'" *N.Y. State Dairy Foods, Inc. v. Ne. Dairy Compact Comm'n*, 198 F.3d 1, 8 (1st Cir. 1999) (emphasis added) (quoting *United Egg Producers v. Dep't of Agric.*, 77 F.3d 567, 569-70 (1st Cir. 1996)). There is no Commerce Clause violation under Plaintiffs' alleged facts.

In *Alliance to Protect Nantucket Sound,* the SJC held that the nearly identical NG-CWA PPA, and its subsequent approval by DPU, did not violate the Commerce Clause where the record showed that the utility entered into the contract for reasons independent of geographic considerations:

> Our independent review of [DPU's] ultimate findings leads us to conclude that National Grid entered into PPA-1 for reasons unrelated to the geographic limitation provision, and therefore the department's approval of PPA-1 did not violate the commerce clause. The record contains testimony from National Grid officials . . . concerning the reasons for entering the contract, none of which was related to the geographic limitation of § 83. . . . [T]he record indicates that National Grid continued to advocate for approval of its privately negotiated contract with Cape Wind, which it perceived to be the best option available either in-State or out-of-State. The constitutional challenge advanced by the Alliance and TransCanada fails.

959 N.E. 2d at 422. Here, the record before DPU included NSTAR's testimony that its decision to contract with CWA was not based upon the Project's location in-state (indeed, it is out-of-state), as "[NSTAR] considered the terms of the PPA . . . to represent the best alternative for customers" and "it entered into the proposed PPA in order to capitalize on the Cape Wind facility's unique and significant benefits." DPU 12-30, at 35.

Accordingly, Count II of Plaintiffs' complaint must be dismissed because they have no cognizable right and lack standing under the Commerce Clause.

3. Plaintiffs Cannot Establish a Causal Nexus Between DOER's Alleged Actions and a Deprivation of Their Constitutional Rights

Plaintiffs also cannot show under § 1983, that the specific conduct complained of – DOER's negotiations as a party-advocate in the merger proceeding – is the cause of the alleged deprivation of their rights, *i.e.*, alleged future payment of higher electricity rates. This is so because the Settlement Agreement expressly conditions NSTAR's obligation to execute a contract with CWA on numerous and uncertain contingencies beyond the control of the parties to the Agreement, including, *inter alia*, DPU approval of the Settlement Agreement and the

merger.[17] As Plaintiffs concede, only DPU, a third-party state agency, had the authority to approve the merger, the MOU, and the PPA. Comp. ¶¶87, 91.

The MOU similarly provides that it "does not create a legal obligation on the part of any Party to enter into a PPA"; that a "PPA will be executed only if the terms are mutually agreeable to NSTAR Electric and Cape Wind"; and that "this MOU shall be rendered null and void" if DPU does not approve the Settlement Agreement. MOU at ¶4 (Rosenzweig Decl., Exh. F). Finally, DPU conducted a full adjudicatory hearing on the PPA and ruled that "NSTAR Electric was not required to enter the PPA," crediting NSTAR's testimony that it did so "voluntarily" to "capitalize on the Cape Wind facility's unique and significant benefits." DPU 12-30, at 34-35.

Thus, the Settlement Agreement was indisputably contingent upon intervening and uncontrollable events; most importantly, whether DPU would, after multiple contested adjudicatory proceedings, find that the merger should be approved and that both the MOU and PPA would be in accordance with Massachusetts law (§ 83) and in the public interest. *See Burke v. McDonald*, 572 F.3d 51, 60 (1st Cir. 2009) (courts employ "traditional tort principles for making intervening cause determinations in the § 1983 milieu.") (internal quotation marks omitted). The requisite causal nexus is absent from the Complaint.[18]

4. The Settlement Agreement Is Not State Action

Plaintiffs ask this Court to construe the negotiation of the Settlement Agreement as state action. *See* Comp. ¶¶ 106; 115; 118. It is not. Settlement negotiations by a state entity acting

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[17] *See* SA at ¶¶ 2.2.4, 4.2, 5.1, 5.2 (DPU "is not obligated to approve this settlement agreement and its ruling will be based upon a finding that the terms contained herein are consistent with the public interest.") (Rosenzweig Decl., Exh. E); *see* also Comp. ¶¶80-81 ("The Settlement Agreement states that NSTAR is not required to execute the power contract if the DPU rejects the Settlement Agreement . . . .").

[18] For these same reasons, Plaintiffs do not have standing to bring either of their Supremacy Clause or Commerce Clause claims. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992) (under Article III of the United States Constitution, "there must be a causal connection between the injury and the conduct complained of – the injury has to be fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party . . . .") (alterations in original) (internal quotation marks omitted).

solely in its role as party-advocate in a contested adjudicatory proceeding before an independent body do not constitute state action within the meaning of Section 1983. *See Grossman v. Axelrod*, 646 F.2d 768, 770 & n.1 (2d Cir. 1981) (affirming district court's dismissal of equal protection claim based on argument that "state settled [another] suit on terms favorable to the plaintiffs there, and then refused the same terms to Grossman. . . . [W]e affirm on the ground that *no state action was present in the settlement of* the" other suit) (emphasis added). Indeed, Plaintiff Alliance itself vigorously argued before DPU that in entering the Settlement Agreement, "*DOER was not acting in a sovereign capacity*, but as a mere party to the proceeding before the DPU in DPU 10-170 on the proposed merger." Comments of the Alliance and its Individual Supporters, No. 12-19, at 9 (DPU filed Mar. 12, 2012) (emphasis added).[19] The Alliance's arguments that DOER's activities were not state action apply with equal force here. Further, where, as here, "[t]he complaint makes clear," in conjunction with the documents it relies on, that a private party "acted at least in part for its own reasons . . . . [its] choice . . . cannot be deemed to be that of the State." *Mead v. Independence Ass'n*, 684 F.3d 226, 231 (1st Cir. 2012) (internal quotation marks omitted). Without state action, Plaintiffs' claims must fail.

CONCLUSION

For the reasons set forth above, CWA respectfully requests that the Court dismiss with prejudice Counts I and II of Plaintiffs' Complaint against all defendants.

[19] Rosenzweig Decl., Exhibit H at 9. The Alliance argued that DOER was not acting in its sovereign capacity because: (1) the third Whereas clause of the SA states that the parties were resolving competing and disputed issues, not that NSTAR required approval from DOER; (2) if DOER were acting in its sovereign capacity in entering the SA, the SA would not require DPU approval to be effective; and (3) if DOER were acting in its sovereign capacity it would have agreed in the SA to take some form of sovereign action, but did not.

Dated: March 21, 2014

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*Applications for admission *pro hac vice* pending.

CERTIFICATE OF SERVICE

I hereby certify that this document filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF) and that paper copies will be sent to those indicated as non-registered participants by first-class mail on March 21, 2014.

David S. Rosenzweig