IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

TOWN OF BARNSTABLE, MASSACHUSETTS, *et al.*, Plaintiffs, v. Ann G. BERWICK, *et al.*, Defendants.	Civil Action No. 14-cv-10148-RGS Leave to File Reply Granted On March 24, 2014

CAPE WIND ASSOCIATES, LLC'S REPLY TO PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO THE MOTIONS TO DISMISS

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INTRODUCTION

Defendant Cape Wind Associates, LLC ("CWA") hereby submits this Reply to Plaintiffs' Memorandum of Law in Opposition to the Motions to Dismiss (ECF No. 48) ("Pls. Opp.").

Unlike their Complaint, in which the central focus is on a series of allegations concerning DOER's "coercive" role in inter-party settlement negotiations (*see generally* Comp.), in their Opposition Plaintiffs dramatically shift their focus to various claims that DOER's settlement negotiations with NSTAR somehow *caused DPU* to approve the NSTAR-CWA power purchase agreement ("PPA") in a manner that violates Federal law (*see, e.g.*, Pls. Opp. at 24-28).[1]

Plaintiffs do not state, however, how DOER's allegedly coercive negotiations *forced* DPU to approve the PPA. Instead, Plaintiffs muddle the issue by making vague references to "state regulators" and "regulatory authority," clouding and confusing the question of whose actions and/or authority is being challenged. *Compare* Pls. Opp. at 6, 20, 39, 40, 41, 47. To further obfuscate their claims, Plaintiffs make interchangeable references to the "Patrick Administration" (Pls. Opp. at 5, 36) and the "Commonwealth" (Pls. Opp. at 2, 6-10, 18 n.17, 24) in an attempt to blur the distinct and statutorily defined roles of DOER, as party-advocate, and DPU, as the independent adjudicatory body. Plaintiffs' claims also appear to rest largely on the allegation that DOER's actions and DPU's Order improperly set a wholesale rate. Pls. Opp. at 18, 36. The allegations made in both the Complaint and the Opposition are contrary to law and fall far short of well-pled facts that the Court must accept as true.

The fundamental issues before the Court are questions of law, not fact. First, contrary to Plaintiffs' allegation, DOER does not have any "regulatory authority" over NSTAR with regard

[1] This change in strategy is most evident in Plaintiffs' attempt to stave off dismissal on sovereign immunity grounds, where they broadly state that "Plaintiffs are not contending that *DOER* is causing a continuing violation of federal law. Plaintiffs contend that the *DPU*, through Order 12-30, is engaging in a continuing violation of federal law, because that Order ratifies a power contract, on a prospective basis, that was illegally coerced by DOER." Pls. Opp. at 26 (emphasis in original).

to the Merger, the NSTAR-CWA PPA, or DPU's Section 83 proceedings. Without such authority, DOER's alleged coercion is of no legal effect. Second, Plaintiffs' Complaint contains no allegations that DPU engaged in any illegal conduct; without any basis, Plaintiffs make only the unsubstantiated allegation that the DPU Order was the product of DOER's alleged actions. Because DOER did not have authority to "force" NSTAR to enter the contract, Plaintiffs therefore have no legal grounds to challenge DPU's Order. Third, neither DOER's actions nor DPU's Order established the wholesale price at which CWA will sell its power. DPU reviewed only NSTAR's *buyer*-side decision to purchase power under the PPA, a matter within the regulatory authority clearly reserved to the states and recognized under long-standing judicial precedent. Finally, Plaintiffs have failed to establish that they have either Article III or prudential standing under the Commerce Clause to bring their claims. Their alleged injury of paying higher electricity bills is purely speculative, as they may actually benefit from the Cape Wind contract, and as NSTAR customers seeking to avoid potential passed-through costs, they are not within the zone of interests the Commerce Clause protects.

ARGUMENT

I. The Court Does Not Have To Accept Plaintiffs' Allegations That Offer Only Legal Labels and Conclusions

CWA adopts and incorporates by reference the Commonwealth Defendants' argument that Plaintiffs misapply the *Twombly/Iqbal* standard for resolving a motion to dismiss. The Court should ignore the fundamental premise of the Complaint: that DOER acted in the capacity of a "regulator" that possessed and exercised "regulatory authority" over NSTAR in its inter-party settlement negotiations leading to the Settlement Agreement, when, as discussed below, DOER had no "regulatory authority" over NSTAR with regard to the Merger, the NSTAR-CWA PPA, or DPU's Section 83 proceedings.

II. DOER Had No Regulatory Authority To Compel NSTAR To Enter into the Settlement Agreement or DPU To Approve the Cape Wind Contract

The essence of Plaintiffs' case, as repeated throughout their argument, is the assertion that DOER acted in the capacity of a "regulator" that possessed and exercised "regulatory authority" over NSTAR in its inter-party settlement negotiations.[2] Pls. Opp. at 5, 6, 18, 36-39, 40, 47. However, Plaintiffs' assertions are contrary to the underlying law, pursuant to which DOER had no "regulatory authority" over NSTAR with regard to the Merger, the NSTAR-CWA PPA, or DPU's Section 83 proceedings. Specifically, as only a party-advocate, with no regulatory authority over NSTAR, DOER could not coerce NSTAR into taking any action against its will because DOER had no power to approve or disapprove either the Merger or the NSTAR-CWA PPA. As a party-advocate acting solely pursuant to G.L. c. 25A, § 6, and the Green Communities Act, DOER could take various positions in either DPU proceeding, just as any other party could, but those advocacy positions do not constitute either "regulatory authority" over the matters in question or the causation of ultimate action by DPU, whose adjudicatory proceedings in approving the Merger, the Memorandum of Understanding ("MOU"), and the PPA were fully consistent with its independent and exclusive statutory authority under G.L. c. 164, § 96 and Section 83.[3] *See Student Pub. Interest Research Grp. of N.J., Inc. v. Fritzsche, Dodge & Olcott, Inc.*, 759 F.2d 1131, 1137-38 (3d Cir. 1985) (determining scope of "coercive powers that [an] administrative agency possesses" by examining agency's statutory authority). Plaintiffs' response–that DPU's Order "leave[s] no doubt that

[2] *See, e.g.*, Pls. Opp. at 6 ("state regulators used their regulatory leverage"), 20 ("actions that state regulators took in forcing NSTAR into the [PPA]"), 36 (DOER "used its regulatory authority over NSTAR's merger request to force NSTAR to enter [the PPA]"), 39 ("Massachusetts regulators forced NSTAR into a [PPA]"), 40 ("Massachusetts used its regulatory authority to force CWA into a [PPA]"), 41 ("Massachusetts used its regulatory authority to force the utility to enter into a[] [PPA]".). As discussed herein, as a matter of law, DOER had no such regulatory authority over NSTAR or the transactions in question.

[3] Plaintiffs' argument that DOER cannot do indirectly what it cannot do directly is irrelevant because DOER had no regulatory authority to approve or disapprove either the Merger or the NSTAR-CWA PPA. *See* Pls. Opp. at 37-38.

DOER was exercising sovereign authority in compelling NSTAR to contract with Cape Wind" (Pls. Opp. at 25)–is nonsensical. The Order states clearly that DOER is charged with "consulting" with utilities and with "developing energy policy" (DPU Order 12-30, at 37-38), neither of which can be read as authorizing DOER to compel NSTAR or any other utility to act.

Thus, as a matter of law, DOER could not "force" NSTAR into the Cape Wind contract. Nor have Plaintiffs alleged any coercive or other wrongful act by DPU in the Complaint. The Complaint offers only the conclusory legal labels that DPU's Order approving the contract was "illegal" (Comp. ¶97), or that it was "the product of illegal state action" (Demand for Relief b). But Plaintiffs' Complaint only alleges "illegal" state action by DOER. However, as explained above, Plaintiffs' allegations that DOER illegally coerced NSTAR are wrong as a matter of law because DOER lacks any legal power over NSTAR related to the approval of the Settlement Agreement, MOU, or the PPA.[4]

III. As a Matter of Law, Neither DOER Nor DPU Set a Wholesale Price of Power

As CWA explained in its Motion papers, the Federal Power Act ("FPA") creates a system of harmonious and comprehensive energy regulation with "interlocking" jurisdictions of FERC and the States, which respects the differing regulatory authority of each jurisdiction. CWA Motion at 9-12. And, as Plaintiffs do not and cannot dispute, FERC's jurisdiction over wholesale rates does not deprive the states of their traditional authority to review the buyer-side decisions of utilities to agree to make *purchases* under such arrangements. *See Pike Cnty. Light*

[4] Plaintiffs do not refute CWA's argument that for preemption to apply the state acts in question must have the force and effect of law. Instead, they argue that *American Trucking Associations, Inc. v. City of Los Angeles*, 133 S. Ct. 2096 (2013), supports their argument that a state agency's order approving a contract between two private parties can be preempted by federal law. Pls. Opp. at 31 n.22. But *American Trucking* proves CWA's point. In that case the contract in question was preempted because it bore the "force and effect of law," constituting an "exercise[] [of] classic regulatory authority–complete with the use of criminal penalties." 133 S. Ct. at 2103. Here, NSTAR and CWA voluntarily entered into the PPA, not due to any state compulsion that had the force and effect of law, and without any state-mandated provisions that institute criminal penalties.

& Power Co. v. Pa. Pub. Util. Comm'n, 465 A.2d 735, 738 (Pa. Commw. Ct. 1983); *see also New York v. FERC*, 535 U.S. 1, 24 (2002).

Under this framework, Plaintiffs ignore the critically different roles of DOER and DPU as part of the statutorily defined state processes. It is DPU that has the general regulatory authority over the electric distribution industry, including the sole and *exclusive* authority, as an independent adjudicatory agency, to approve utility mergers, as well as to review and approve utility decisions to enter into long-term contracts pursuant to Section 83. *See, e.g.*, G.L. c. 164, §§ 76, 94; St. 2008, c. 164, § 83. In stark contrast, DOER is a policy and advocacy agency charged with developing and promoting energy initiatives (G.L. c. 25A, § 6) with the additional role under the Green Communities Act of *consulting* with utilities regarding long-term contracts. St. 2008, c. 164, § 83. Despite Plaintiffs' assertions to the contrary, DOER has no regulatory authority over proposed mergers, the approval of Section 83 contracts, or the setting of rates; instead, DOER's participation in DPU's adjudicatory proceedings was solely as a policy advocate for its positions, with no greater rights before DPU than any other party.[5]

Plaintiffs' allegations that DOER utilized its "regulatory authority" to dictate pricing to NSTAR is thus based upon a legally false premise. Pls. Opp. at 37. Further, as NSTAR testified and DPU found, the price terms in the NSTAR-CWA PPA were negotiated freely, at arm's length, and voluntarily.[6] DPU Order 12-30, at 21, 34-35. Indeed, in no way did DOER act

[5] Although Plaintiff Alliance may regret taking an opposing position in prior, now abandoned litigation, such is the risk one runs when presenting multiple, contradicting legal theories in differing forums in an attempt to impose delay. Specifically, Plaintiff Alliance previously took the position 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." Rosenzweig Decl., Exhibit H at 9 (emphasis added). Plaintiffs now try to distance themselves from that characterization as "out-of-context" (Pls. Opp. at 25 n.19), but the fact remains that, in this instance at least, the Alliance was both factually and legally correct.

[6] In their pleading, Plaintiffs make various inconsistent contentions regarding the significance of whether NSTAR entered into the PPA with CWA voluntarily. *Compare* Pls. Opp. at 4, 18-19, 23, 41, 49. They can't have it both ways. As presented in testimony and found by DPU, NSTAR's actions in entering the Settlement Agreement

unilaterally to set a rate of any kind–wholesale, retail or otherwise. NSTAR presented extensive evidence with regard to its reasons for agreeing and entering into the contract on pricing terms it found attractive, including: (1) its review of the National Grid-CWA PPA; (2) the subsequent Massachusetts Supreme Judicial Court decision upholding that PPA; (3) the unique environmental, employment, and reliability benefits of Cape Wind; (4) the need to utilize offshore wind (of which Cape Wind was the sole source at the time) to meet statutory objectives; and (5) its comparative review of market pricing of other offshore wind projects. DPU Order 12-30, at 20, 35-36. Further, NSTAR was clear that a range of issues relative to terms of the PPA were negotiated between NSTAR and CWA and that the language of the Settlement Agreement generally describing the terms as "substantially" the same as those in the National Grid PPA did not affect the voluntariness of the NSTAR PPA. DPU Order 12-30, at 21. Moreover, DOER was not a signatory to the NSTAR-CWA PPA that established the actual pricing terms that NSTAR filed with DPU for its independent review and approval. Thus, there is no substance to Plaintiffs' bare assertion that, by acting as a party-advocate in settlement discussions in a DPU adjudicatory proceeding, DOER infringed upon FERC's wholesale rate authority.[7]

Similarly, Plaintiffs' conclusory allegation that DPU somehow set a wholesale rate in approving the NSTAR-CWA PPA is wrong as a matter of law, because the actions of DPU dealt exclusively with reviewing NSTAR's *buyer*-side decision to *purchase* under the PPA, a matter

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and the NSTAR-CWA PPA were voluntary and made for various and articulated reasons, consistent with Section 83. *See, e.g.*, DPU Order 12-30, at 21, 34-35.

[7] Plaintiffs speciously argue that "[t]he mere fact that DOER was a party to the DPU proceedings does not preclude it from being a state actor; if it did, then a prosecutor would be considered a non-state actor merely because the *prosecutor is a litigant in court* . . . ." Pls. Opp. at 24 (emphasis added). When a prosecutor exercises peremptory challenges in a racially discriminatory manner–as discussed in Plaintiffs' authority, *Georgia v. McCollum*, 505 U.S. 42 (1992)–the prosecutor is a "quintessential state actor" whose discriminatory act itself violates a defendant's rights. But when a state agency, as here, merely negotiates a settlement in connection with the proceedings of an independent panel, that negotiation is not "state action." To allow § 1983 liability to arise from steps in the decisional process by which a state agency exercises its statutory responsibilities, where those steps are mere non-dispositive recommendations, would go well beyond the limited carve-out of immunity afforded under that statute and *Ex parte Young*.

within the regulatory authority clearly reserved to the states and recognized under long-standing judicial precedent, including the *Pike County* doctrine, and DPU did not purport to authorize CWA to *sell* on such terms (a distinct matter of seller-side authorization expressly reserved to FERC jurisdiction). *See Pike Cnty.*, 465 A.2d at 738. Consistent with precedent, DPU made plain in its Order that its approval "[did] not encompass a determination of the rate at which the power would be *sold* [by CWA], which is within the jurisdiction of [FERC] pursuant to sections 205 and 206 of the Federal Power Act, 16 U.S.C. §§ 824d, 824e." DPU Order 12-30, at 17 n.25 (emphasis added). 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. v. Dep't of Pub. Utils.*, 491 N.E.2d 1035, 1045 (Mass. 1986), *cert. denied*, 481 U.S. 1036 (1987)). In approving the PPA, DPU thus clearly acted consistently with the long-standing and distinct roles of the state and Federal governments.

Plaintiffs are also wrong that FERC has never considered the specific issue of whether state approval of the decision of a Massachusetts distribution company to enter a contract with CWA pursuant to Section 83 violates the FPA. In *CARE v. Nat'l Grid, Cape Wind & DPU*, Californians for Renewable Energy, Inc. ("CARE") and Barbara Durkin (a member of Plaintiff Alliance) filed a complaint specifically alleging that DPU's approval of the National Grid-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." Order Dismissing Complaint, 137 FERC ¶61,113, at ¶1 (2011),[8] *reh'g denied*, 139 FERC ¶61,117 (2012). On this precise issue, FERC acknowledged the distinct state

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

role of DPU in approving National Grid's purchase decision under Section 83, noting that the PPA required subsequent review by FERC and there is "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." *Id.* at ¶33 (emphasis added). Accordingly, FERC has specifically ruled on DPU's buyer-side review of a Section 83 contract between a distribution company in Massachusetts and CWA, as well as FERC's concurrent authority under the FPA, and found that the two review processes are not in conflict.

Plaintiffs also imply that the actions of DOER or DPU are somehow analogous to two recent Federal district court decisions finding that states had trespassed into FERC's wholesale rate jurisdiction under the FPA.[9] Those cases found preemption only where, unlike here, a state legislature or an agency with 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 *19-21 (D.N.J. Oct. 11, 2013), *appeal docketed*, No. 13-4501 (3d Cir. Nov. 21, 2013), a New Jersey state statute required local distribution companies to enter into contracts with generators selected unilaterally by the New Jersey Board of Public Utilities, which expressly established the price to be received by those generators, which would cover "actual development costs approved by the [state] Board." 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 (the "PSC") issued an order that *compelled* utilities to enter a contract at pricing determined unilaterally by the PSC that required those utilities to reimburse the generators' costs

[9] Those decisions are on appeal and are thus not settled law.

of financing. *Id.* at *34 n.48 ("[F]ormer PSC Chairman Nazarian testified that the contract price accepted by the PSC in the Generation Order represented a unilateral decision by the PSC . . . ."). In contrast to *Hanna* and *Nazarian*, here there was no compulsion regarding a state-determined rate because: (1) there was no state law or regulatory order that set the wholesale rate; (2) DPU approved a contract with price terms negotiated independently by sophisticated parties; (3) in contrast to a compulsory or unilateral mandate, here DPU approved NSTAR's own petition requesting approval of its purchase proposal; and (4) DPU, in its review and approval of NSTAR's purchase under the NSTAR-CWA PPA, did not purport to authorize CWA's *sale* at such prices. Accordingly, the instant proceeding is both factually and legally distinguishable from the decisions in *Nazarian* and *Hanna*.

IV. *Ex Parte Young*'s Narrow Exception to the Commonwealth's Sovereign Immunity Does Not Apply

Plaintiffs argue that sovereign immunity does not bar their claims because the *Ex Parte Young* exception applies in order to prevent an ongoing violation of Federal law arising from DPU's Order. Pls. Opp. at 8-12. Plaintiffs' claimed ongoing violation is "DPU's continuing authorization for NSTAR to procure electricity at illegally-set rates–and pass on those rates to NSTAR's customers."[10] Pls. Opp. at 9. *Ex Parte Young*'s narrow exception to the Commonwealth's sovereign immunity, however, is inapplicable. *See Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 146 (1993).

The critical point is that DPU has no further authority under law to approve, disapprove, regulate, or "enforce" the purchase and sale transaction between CWA and NSTAR. DPU's limited role going forward is solely as a matter of retail ratemaking to effect, as it must,

[10] It is notable that Plaintiffs have abandoned any claim that DOER's alleged actions in inter-party settlement negotiations constitute ongoing violations of Federal law. Whatever is to be made of Plaintiffs' coercion allegations, they are indisputably a matter of history at this point and are not a basis for prospective relief.

NSTAR's pass-through of the actual PPA costs, *after* they are incurred by NSTAR, to retail customers. *See Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953, 970 (1986) (explaining that utilities are entitled to recovery of wholesale costs approved by FERC); DPU Order 12-30, at 185-89 (explaining that the only rate approved by DPU was the *retail* rate tariff authorizing NSTAR to recover PPA costs from its retail customers). Plaintiffs cannot seriously allege that DPU's exercise of its retail ratemaking function amounts to a continuing violation of Federal law. Because no further approval, review, or "enforcement" of the purchase and sale transaction will be performed by DPU, there is no future action or arguable ongoing violation of Federal law to be enjoined prospectively.

V. Plaintiffs Fail To Show That They Have Standing To Bring Their Commerce Clause Claim

Plaintiffs' attempt to show that they have Article III and prudential standing to bring their Commerce Clause claim fails. First, Plaintiffs' alleged injury–that "as end-use customers of NSTAR, they will directly bear the above-market cost of the Cape Wind contract" (Pls. Opp. at 43)–is neither concrete nor particularized. As NSTAR demonstrated in its Motion to Dismiss (ECF No. 42), Plaintiffs' alleged harm is premised on numerous future contingencies that may affect the ultimate costs NSTAR incurs under the Cape Wind contract and that NSTAR may pass along to its customers. *See* NSTAR Motion at 8-9. Indeed, the DPU observed that "it is possible . . . that the PPA will be below market, in which case NSTAR Electric will credit customers the difference." DPU Order 12-30, at 183 n.143.

Plaintiffs can hardly claim injury sufficient for Article III purposes if there is a possibility that they may actually benefit from the Cape Wind contract. Knowing their alleged injury is speculative at best, Plaintiffs argue instead that their injury must be measured against some hypothetical lower-cost contract NSTAR *could have entered into* in 2012. Pls. Opp. at 21. But

to satisfy Article III, Plaintiffs' injury must be "'actual or imminent, not conjectural or hypothetical.'" *Ariz. Christian Sch. Tuition Org. v. Winn*, 131 S. Ct. 1436, 1442 (2011) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992)). Plaintiffs' stark allegations that NSTAR could have contracted for lower-cost power are insufficient to establish a concrete injury.

Second, it is undisputed that Plaintiffs are merely a handful of NSTAR's 1.1 million customers that are located throughout eastern, central and southeastern Massachusetts. Comp. ¶95. Plaintiffs are not out-of-state power generators or any entity in- or out-of state that participates in the interstate power market.[11] As the Eighth Circuit observed in 1997, and as is still true today, there is "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." *Ben Oehrleins & Sons & Daughter, Inc. v. Hennepin Cnty.*, 115 F.3d 1372, 1380 (8th Cir. 1997). The Third and Ninth Circuits have similarly held that consumer-type plaintiffs that do not engage directly in interstate commerce, like Plaintiffs here, do not vindicate the interests protected by the Commerce Clause. *See Individuals for Responsible Gov't, Inc. v. Washoe Cnty.*, 110 F.3d 699, 703 (9th Cir. 1997) (garbage collection customers lack standing because their interests "are, at best, marginally related to" clause's purposes) (internal quotation marks omitted); *Freeman v. Corzine*, 629 F.3d 146, 157 (3d Cir. 2010) (plaintiffs alleging "passed-on fee[s] or cost[s]" fall outside clause's zone of interests). *See also Roedler v. Dep't of Energy*, 255 F.3d 1347, 1355-56 (Fed. Cir. 2001) (following *Ben Oehrleins*' reasoning to hold ratepayers lack standing to sue government for alleged breach of

[11] Plaintiffs are also incorrect that, because NSTAR participates in the interstate market on their behalf and because NSTAR is not likely to raise a Commerce Clause claim itself, Plaintiffs have standing under the Commerce Clause. Pls. Opp. at 46 & n. 27. The prudential standing rule "bars litigants from asserting the rights or legal interests of others in order to obtain relief from injury to themselves." *Warth v. Seldin*, 422 U.S. 490, 509 (1975).

contract between government and utility); *Houlton Citizens' Coal. v. Town of Houlton*, 175 F.3d. 178, 182 (1st Cir. 1999) (noting that the *Ben Oehrleins* and *Washoe County* opinions are "heavy artillery").[12] The Court should decline Plaintiffs' invitation to depart from the prevailing law and dismiss Count II of Plaintiffs' complaint.

Finally, Plaintiffs ignore completely CWA's argument that the Supreme Judicial Court of Massachusetts held that the nearly identical CWA contract with National Grid, 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 an alleged offending geographic limitation in the statute. *See* CWA Motion at 18; *Alliance to Protect Nantucket Sound*, 959 N.E.2d 413, 422 (Mass. 2011). Here too the record shows, and Plaintiffs begrudingly concede as they must (Pls. Opp. at 18), that NSTAR voluntarily entered into the Settlement Agreement with DOER because NSTAR considered it the best alternative for its customers, as the price reflected the high value of the benefits received. To establish a dormant Commerce Clause claim, DOER must have had and exercised regulatory authority to *compel* NSTAR to do so. As demonstrated by the governing statutes, and as clearly shown by the public documents relied on in the Complaint, DOER did not have that authority as a matter of law.

CONCLUSION

For the foregoing reasons, Plaintiffs' Complaint should be dismissed in its entirety.

[12] Plaintiffs rely on *General Motors Corp. v. Tracy*, 519 U.S. 278 (1997), but that opinion teaches only that customers "of the class against whom a State ultimately discriminates," *id.* at 286, may in some cases suffer injury cognizable under Article III–for example, where a "customer is liable for payment of [a discriminatory] tax," *id*. Similarly, *Alliance of Auto. Mfrs. v. Gwadosky* held only that an association had standing because one of its members was an out-of-state manufacturer who had "suffered concrete pecuniary injury" from the challenged statute. 430 F.3d 30, 37 (1st Cir. 2005). Here, Plaintiffs allege that Massachusetts has discriminated against out-of-state generators, *see* Opp. at 47, Comp. ¶115. Plaintiffs are not customers of those out-of-state generators, but rather end-line ratepayers of NSTAR, an in-state utility. Because they are not "burdened directly" by the alleged discrimination, *Lane v. Holder*, 703 F.3d 668, 672 (4th Cir. 2012) (distinguishing *Tracy*), *cert. denied*, 134 S. Ct. 1273 (2014), they have not alleged an injury sufficient to confer standing.

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Respectfully submitted,

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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 April 18, 2014.

/s/Geraldine E. Edens