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. 14-10148-RGS

MEMORANDUM OF LAW IN SUPPORT OF STATE DEFENDANTS' MOTION TO DISMISS

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Defendants—Ann G. Berwick, in her official capacity as Chair of the Massachusetts Department of Public Utilities ("DPU"); Jolette A. Westbrook, in her official capacity as a Commissioner of DPU; David W. Cash, in his official capacity as a Commissioner of DPU; and Mark Sylvia, in his official capacity as Commissioner of the Massachusetts Department of Energy Resources ("DOER") (collectively, the "State Defendants")—request dismissal of Plaintiffs' Complaint for Declaratory and Injunctive Relief ("Complaint", cited as "Compl.").

INTRODUCTION

Plaintiffs—the Alliance to Protect Nantucket Sound ("Alliance"), the Town of Barnstable ("Barnstable"), and several individuals and businesses located on Cape Cod—seek to invalidate a private contract between NStar Electric Company ("NStar") and Cape Wind Associates, LLC ("Cape Wind"), by which NStar will purchase approximately 129 megawatts ("MW") of electric power from Cape Wind, a wind-powered electric generation facility located in federal waters in Nantucket Sound. Plaintiffs complain that the State Defendants' involvement with the contract—DOER as a party to separate proceedings involving a merger between NStar and Northeast Utilities, DPU as the adjudicatory body that approved the merger as well as the NStar-Cape Wind contract—(a) constituted discrimination against out-of-state businesses, in violation of the dormant Commerce Clause, and (b) had the effect of setting wholesale electricity rates, usurping the role of the Federal Energy Regulatory Commission ("FERC") under the Federal Power Act ("FPA"), in violation of the Supremacy Clause.

The Complaint is subject to dismissal on several grounds. *First*, Plaintiffs' claims are barred by the Commonwealth's sovereign immunity from suit, because they seek declaratory and injunctive relief with respect to actions by the State Defendants that took place entirely in the past and are now complete. *Second*, the central claim made by the Plaintiffs here is *identical* to one made by the Alliance during the DPU contract-approval proceedings—*i.e.*, that DOER's role in the NStar merger proceedings rendered the subsequent NStar-Cape Wind contract involuntary and therefore invalid. DPU rejected that argument, and the Alliance chose not to appeal DPU's decision to the state courts, where the Alliance could have raised constitutional claims. Having chosen not to appeal DPU's decision rejecting their central claim, principles of comity and

preclusion should bar the Alliance from re-litigating in this Court simply by naming additional Plaintiffs and re-casting their claim as violations of the Commerce and Supremacy Clauses. *Third*, Plaintiffs fail to state a plausible claim for relief under either the Supremacy Clause or the Commerce Clause. Their Supremacy Clause claim fails because the State Defendants in no way "set" the rate for a wholesale electricity sale; instead, DPU merely approved NStar's decision to execute a contract with Cape Wind—a contract that *by its terms* requires Cape Wind to obtain the requisite FERC authorization to sell the power at issue. Indeed, FERC itself has held, in a virtually-identical case, that DPU's actions in approving a utility's decision to enter into such a contract do not interfere with FERC's authority over wholesale electricity rates. As in that case, here Cape Wind will seek the requisite authorization from FERC later on. Similarly, Plaintiffs' Commerce Clause claim should be dismissed, because Plaintiffs lack standing to raise such a claim—they are the not out-of-state competitors whom the Commerce Clause is meant to protect—and because there was in fact no discrimination against out-of-state commerce here. Plaintiffs' Complaint should therefore be dismissed, with prejudice.

BACKGROUND

Legal Framework. In 2008, the Massachusetts Legislature enacted the Green Communities Act ("GCA"), Mass. St. 2008, c. 169. Section 83 of the GCA ("Section 83"), requires utilities such as NStar (also referred to as "electric distribution companies") to solicit proposals from renewable energy generators for long-term contracts (10 to 15 years) and, provided "reasonable proposals have been received" and are "cost-effective," to enter into such contracts with the renewable energy generators for their power. Section 83, ¶¶ 1-2.[1] The utility may select the manner of soliciting such proposals, including public solicitations ("RFPs"), individual negotiations, or "other methods", but must consult with DOER regarding its solicitation and contracting method. *Id.* ¶ 2. Ultimately, any proposed contract is subject to

[1] Renewable energy generating sources include solar photovoltaic energy, wind energy, hydroelectric power, ocean wave or tidal energy, and certain biomass energies, among others. Mass. G.L. c. 25A, § 11F(b); *accord* 220 Code Mass. Regs. § 17.02 (adopting definition of "renewable resources" found in c. 25A, § 11F, for the purpose of DPU's regulations related to long-term contracts for renewable energy).

review and approval by DPU, *id.*, and DPU may approve any such contract only after considering the potential costs and benefits of the contract, and "only upon a finding that it is a cost effective mechanism for procuring renewable energy on a long-term basis." *Id.* ¶ 3. Utilities are required to enter into such long-term contracts to meet at least three percent of their total energy demand from their customers, *id.* ¶ 4, though they are free to meet more in this manner, *id.* ¶ 9; *see also Alliance to Protect Nantucket Sound, Inc. v. Department of Pub. Utils.*, 461 Mass. 166, 168-70, 185-86 (2011) ("*Alliance*") (summarizing Section 83).

As originally enacted by the State Legislature, the GCA contained a provision limiting the renewable generators eligible for such long-term contracts to those located within the Commonwealth, its waters, and adjacent federal waters. Section 83, ¶ 1. After an out-of-state competitor—TransCanada Power Marketing Ltd. ("TransCanada")—filed suit in federal court challenging the geographical limitation in the GCA, DPU enacted emergency regulations suspending the application of the geographical limitation and requiring utilities to demonstrate that the long-term contracts they proposed to enter into were not affected by the suspended geographic limitation. *See generally Alliance*, 461 Mass. at 169-71, 173-74; Compl. ¶¶ 50, 52. In 2012, the Legislature amended the GCA to eliminate any geographical limitation in the statute. Mass. St. 2012, c. 209, §§ 35-36; Compl. ¶ 52.[2]

The National Grid-Cape Wind Contract. A separate contract between another utility, National Grid, and Cape Wind, that was privately negotiated by the parties and approved by DPU under the GCA, is relevant to this dispute. *See* Compl. ¶¶ 46-48. In December 2009, National Grid requested DPU's approval to enter into bilateral negotiations with Cape Wind for the purchase of its wind-based power; DPU approved this method of solicitation later that month. *Alliance*, 461 Mass. at 170; Compl. ¶ 46; *see also* Section 83, ¶ 2 (permitting utilities to engage in "individual negotiations" with renewable energy generators); 220 Code Mass. Regs. § 17.04(4) (requiring utility to submit its timetable and method of solicitation to DPU for review

[2] Relevant excerpts from the GCA, including the 2012 amendment eliminating the geographical limitation, are attached to this memorandum as **Exhibit 1**.

and approval prior to initiating the solicitation). In May 2010, after conducting individual negotiations with Cape Wind, National Grid submitted for DPU approval two contracts for the purchase of all of Cape Wind's energy, the first for 50% of Cape Wind's energy to be used by National Grid, the second for the remaining 50% of Cape Wind's energy, to be assigned to another purchaser. *Alliance*, 461 Mass. at 170. But because DPU had suspended the geographical limitation in the GCA in response to the TransCanada lawsuit, DPU directed National Grid to demonstrate that its contracts with Cape Wind were not the product of discrimination against out-of-state competitors, and were not influenced by the since-suspended geographical limitation. *Alliance*, 461 Mass. at 173-74. National Grid responded with submissions demonstrating that it had not based its decision to enter into negotiations with Cape Wind on the now-suspended geographic limitation. *Id.* In November 2010, after thirteen days of evidentiary hearings involving National Grid and 19 intervening parties (including the Alliance, TransCanada, Cape Wind, and the Massachusetts Attorney General's Office), DPU approved the first National Grid-Cape Wind contract, but rejected the second. *Alliance*, 461 Mass. at 171.

The Alliance (and other parties, including TransCanada) appealed DPU's approval of the National Grid-Cape Wind contract to the Massachusetts Supreme Judicial Court ("SJC"). *Alliance*, 461 Mass. at 167; *see* Mass. G.L. c. 25, § 5 (providing for review by SJC of final DPU orders). Among other arguments in objection to DPU's approval of that contract, the Alliance argued (as it does here) that DPU's approval of the contract violated the dormant Commerce Clause in that it was "tainted" by the geographical limitation in the GCA that DPU had suspended prior to approving the contract. *Alliance*, 461 Mass. at 172-73; *see* Compl. ¶ 116. The SJC noted that the Alliance likely did not have standing to raise the dormant Commerce Clause claim, since it had not alleged "that it or any of its members have been harmed in their ability to compete for § 83 contracts by the claimed infringement of the commerce clause"; but the court considered the claim because it had also been raised by TransCanada, an out-of-state competitor. *Alliance*, 461 Mass. at 172 n.13. The court then rejected the claim on the merits, concluding that "National Grid entered into [the contract] for reasons unrelated to the geographic

limitation provision, and therefore [DPU's] approval of [the contract] did not violate the commerce clause." *Id.* at 173-74. The court rejected the other objections to the contract and affirmed DPU's decision approving it. *Id.* at 175-89.

Separately, a different group of plaintiffs filed with FERC a challenge to DPU's approval of the National Grid-Cape Wind contract, arguing (as the Alliance does here) that DPU's actions in approving the contract were preempted by FERC's role under the FPA in setting wholesale electricity rates. *Californians for Renewable Energy, Inc. v. National Grid*, 137 FERC 61,113 (2011) ("*CARE*"). There, the plaintiffs argued that DPU violated the FPA in approving the National Grid-Cape Wind contract, by "usurp[ing] [FERC]'s exclusive jurisdiction to determine the rates for wholesale sales of electricity under its jurisdiction." *Id.* ¶ 1. FERC rejected the plaintiffs' argument and dismissed their complaint, concluding as follows:

> The contract[] [between National Grid and Cape Wind] approved by the [DPU] indicate[s] that the wind facilities must . . . file rates with this Commission [*i.e.*, FERC] pursuant to section 205 of the FPA. Cape Wind indicates that its rates will be filed with this Commission. Complainants will have the opportunity to intervene in any proceeding seeking Commission approval of those rates. To comply with the prior notice and filing requirements of the FPA, and the Commission'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 before a retail filing, such as the Massachusetts filing that resulted in the Massachusetts [DPU] decision that is the subject of CARE's and Ms. Durkin's complaint.* Accordingly we find complainant's argument that Cape Wind needed to submit the proposed power purchase agreement to the Commission prior to its filing with the Massachusetts [DPU] without merit.

Id. ¶ 33 (emphasis added).[3]

The NStar-Northeast Utilities Merger Proceedings. In November 2010, NStar filed an application with DPU to approve a merger between it and Northeast Utilities. Compl. ¶ 60. Under state law, DPU is required to approve all merger proposals by utilities subject to its jurisdiction such as NStar. Mass. G.L. c. 164, § 96 ("Section 96"). DPU may approve a merger

[3] FERC's decision in *CARE* is attached to this memorandum as **Exhibit 2**. This Court may take judicial notice of FERC's decision on a motion to dismiss. *E.g.*, *Town of Norwood v. New England Power Co.*, 202 F.3d 408, 412 n.1 (1st Cir. 2000) (taking judicial notice of related FERC proceedings in reviewing district court's dismissal under Fed. R. Civ. P. 12(b)(6)).

only after finding that it is "consistent with the public interest", which requires considering, "at a minimum", factors such as the "potential rate changes, if any; the long term strategies that will assure a reliable, cost effective energy delivery system; any anticipated interruptions in service; or other factors which may negatively impact customer service." *Id.* § 96(b).

DOER, a state agency charged with advancing the state's renewable energy priorities (among other responsibilities), *see* Mass. G.L. 25A, § 6, intervened in the merger proceedings. *See* Interlocutory Order on Standard of Review, D.P.U. 10-170 ("Interlocutory Order"), at 1.[4] DOER has no authority to approve or reject utility mergers. *See* Mass. G.L. c. 25A, § 6. Only DPU has such authority. Mass. G.L. c. 164, § 96. As the Alliance itself subsequently asserted, "DOER was acting not in a sovereign capacity, but as a mere party to the proceeding before DPU in D.P.U. 10-170 on the proposed merger between NStar and Northeast Utilities." Comments of the Alliance to Protect Nantucket Sound and Its Individual Supporters, D.P.U. 12-19 ("Alliance Comments"), at 9-10.[5] In its role as a party, DOER proposed that DPU modify its standard of review for proposed utility mergers from its long-standing "no net harm" standard to a "substantial net benefits" standard, in light of the new requirements of the GCA and the Global Warming Solutions Act ("GWSA"), Mass. G.L. c. 21N, added by Mass. St. 2008, c. 298.[6] Compl. ¶ 66; *see* Interlocutory Order at 7-9 (summarizing DOER's position regarding the

[4] The Interlocutory Order, which is described and relied upon in the Complaint, *see* Compl. ¶ 66, is attached to this memorandum as **Exhibit 3**. In ruling on a motion to dismiss, this Court "may properly consider the relevant entirety of a document integral to or explicitly relied upon in the complaint, even though not attached to the complaint." *Clorox Co. P.R. v. Proctor & Gamble Comm. Co.*, 228 F.3d 24, 32 (1st Cir. 2000); *accord Trans-Spec Truck Serv., Inc. v. Caterpillar Inc.*, 524 F.3d 315, 321 (1st Cir. 2008) ("[W]hen . . . a complaint's factual allegations are expressly linked to—and admittedly dependent upon—a document . . . , that document effectively merges into the pleadings and the trial court can review it in deciding a motion to dismiss under Rule 12(b)(6)."). This Court may also take judicial notice of the relevant DPU proceedings, which are matters of public record. *E.g.*, *Norwood*, 202 F.3d at 412 n.1; *Watterson v. Page*, 987 F.2d 1, 3-4 (1st Cir. 1993).

[5] The Alliance Comments in D.P.U. 12-19 are attached to this memorandum as **Exhibit 4**. Relevant filings that are described in the Complaint from the DPU proceedings at issue in this case—the NStar-Northeast Utilities merger proceedings (D.P.U. 10-170), the NStar-DOER-Cape Wind MOU (D.P.U. 12-19), and the NStar-Cape Wind contract approval proceedings (D.P.U. 12-30)—are attached to this memorandum. Other filings in those DPU proceedings, which are matters of public record, are available at http://www.env.state.ma.us/DPU_FileRoom/frmDocketListSP.aspx (last visited Mar. 21, 2014).

[6] The GWSA establishes requirements for reducing greenhouse gas emissions in the Commonwealth, including a mandate to reduce greenhouse gas emissions by at least 80 percent of 1990 levels by 2050. G.L. c. 21N, § 3(b).

standard of review for utility mergers). In response to DOER's proposal, DPU solicited comments from the parties, intervenors, and a host of entities that would potentially be affected by any change in DPU's standard of review for merger proceedings under Section 96. Interlocutory Order at 1-2 & n.1. Only after receiving and reviewing the comments submitted by the interested parties did DPU issue the Interlocutory Order. *See id.*

Contrary to the allegations in the Complaint, *see* Compl. ¶ 66, DPU *did not adopt* DOER's proposed standard of review, though it acknowledged that the GCA and GWSA required it to reconsider its standard of review; DPU ultimately adopted a "net benefits" standard, though it observed that, in application, the new standard might not differ significantly from the previous "no net harm" standard, in light of DPU's consistent and long-standing focus on the benefits to ratepayers of any proposed utility merger. Interlocutory Order at 21-22, 24-27. DPU stated that it "sees no need to require a 'substantial net benefit' test. A showing of net benefits should suffice to protect ratepayers interest and to comply with [DPU's] other statutory mandates. Adopting a net benefit standard leaves [DPU] with an appropriate level of flexibility in reviewing a wide range of § 96 transactions." Interlocutory Order at 27.

NStar and DOER subsequently settled their differences over NStar's proposed merger, on the condition (among many others) that NStar demonstrate its commitment to meeting the requirements of the GCA and the GWSA by pursuing a contract with Cape Wind for the purchase of Cape Wind's power on terms that were "substantially the same" as the separate National Grid-Cape Wind contract. NStar-DOER Settlement Agreement, D.P.U. 10-170 ("Settlement Agreement"), ¶ 2.2.[7] As the Alliance itself acknowledged, DOER had no authority to approve the merger: "[I]f DOER were acting in a sovereign capacity—as opposed to merely a party—it would have agreed to take some form of sovereign action in the Settlement Agreement. It did not. Instead, DOER merely offered its agreement that 'the merger proposed by the Joint Petitioners in this proceeding is consistent with the public interest.'" Alliance Comments at 10

[7] The Settlement Agreement is attached to this memorandum as **Exhibit 5**.

(quoting Settlement Agreement, ¶ 4.2). NStar's Settlement Agreement with DOER made clear that it was subject to subsequent approval by DPU, *id.* ¶ 2.2.4, that any such approval did not constitute review or approval of any future contract between NStar and Cape Wind, and that any such future contract would be subject to separate review and approval by DPU under Section 83. *Id.* ¶ 2.2.5.

On April 4, 2012, after 10 days of evidentiary hearings, submissions from the parties and 16 intervenors, and consideration of 1,115 exhibits and other discovery responses, DPU approved the merger as being consistent with the public interest. DPU Final Order Approving Merger, D.P.U. 10-170 ("Merger Order"), at 2-6, 107-08.[8] With respect to the Settlement Agreement, DPU noted that it was not yet reviewing or approving any contract between NStar and Cape Wind, and that DPU would review any such future contract in a separate proceeding (D.P.U. 12-30) to make sure the contract complies with Section 83 of the GCA and is consistent with the public interest. Merger Order at 85-87. DPU also made clear that while it considered the Settlement Agreement, it also conducted its own evaluation to ensure that the merger resulted in net benefits for Massachusetts ratepayers and was consistent with the public interest under Section 96. Merger Order at 2.

DPU viewed the significance of the Settlement Agreement's long-term procurement provisions as demonstrating NSTAR's commitment to advance the goals of the GCA and the GWSA: At the time of the Settlement Agreement, NStar had met only 1.6% of its total energy demand from renewable sources; a contract with Cape Wind of the kind suggested by the Settlement Agreement would result in NStar meeting approximately 3.5% of its total energy demand from renewable sources, 0.5 percent more than the three-percent floor set by Section 83. Merger Order at 86-87. The Settlement Agreement also provided that, in the event NStar and Cape Wind were unable to reach an agreement, NStar would procure 2% of its energy demand from other renewable sources through a new RFP process. Settlement Agreement, ¶ 2.2. The

[8] The Merger Order is attached to this memorandum as **Exhibit 6**.

Settlement Agreement was thus significant to DPU during the merger proceedings insofar as it committed NStar to meeting at least 3.5% of its total energy demand from renewable sources, whether through an individual contract with Cape Wind or an RFP process. Merger Order at 86-87. DPU concluded that this and other benefits of the merger—including but not limited to an immediate customer rate rebate of $21 million, a commitment to freeze base distribution rates to customers for four years, and other efficiency gains from the merger resulting in a total net economic benefit to ratepayers of between $88 million to $206 million over ten years—meant that the merger would result in net benefits to ratepayers, and thus was in the public interest. Merger Order at 2-3, 35, 39-41, 68-69, 107-08. No party or intervenor appealed DPU's decision approving the merger.

The Memorandum of Understanding. NStar, DOER, and Cape Wind entered into a memorandum of understanding ("MOU"), by which NStar and Cape Wind agreed to commence contract negotiations with the objective of executing a contract (also referred to as a "Power Purchase Agreement", or "PPA"), as contemplated by the Settlement Agreement. Compl. ¶ 82. *See generally* MOU.[9] The MOU provided that NStar and Cape Wind would immediately commence negotiations for the purchase by NStar of 129MW of Cape Wind's power, with pricing, duration, and other key terms being "substantially the same" as those found in the National Grid-Cape Wind contract approved by DPU. MOU, ¶ 1. The MOU stated expressly, however, that it "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.* ¶ 4.

On February 24, 2012, NStar submitted the MOU to DPU for approval of the timetable and method of solicitation by which NStar would solicit a proposal from Cape Wind and potentially execute a long-term contract. Compl. ¶ 82; Section 83, ¶¶ 1-2; *see also* 220 Code Mass. Regs. § 17.04(1), (4). DPU opened up a separate proceeding to consider the timetable and

[9] The MOU is attached to this memorandum as **Exhibit 7**.

method of NStar's contract solicitation (D.P.U. 12-19), and invited comments from interested persons. Order, D.P.U. 12-19 ("MOU Order"), at 3.[10] The Alliance submitted comments in opposition to the MOU, arguing there (as here) that DOER had coerced NStar to enter into a contract with Cape Wind, and had violated the dormant Commerce Clause in doing so. *See generally* Alliance Comments at 1-15.[11]

On March 22, 2012, DPU issued its order in D.P.U. 12-19, concluding that the individual negotiations between NStar and Cape Wind proposed by the MOU were expressly permitted by Section 83. MOU Order at 10-11. With respect to the Alliance's comments, DPU stated that the appropriate time to raise and consider constitutional and other challenges would be in a future proceeding to review and approve any contract between NStar and Cape Wind under Section 83. MOU Order at 11-12. The Alliance initially appealed DPU's order to the SJC, but subsequently dropped its appeal. *See Alliance to Protect Nantucket Sound v. Department of Pub. Utils.*, No. SJ-2012-0171 (filed Apr. 23, 2012; dismissed Jan. 8, 2013).

The NStar-Cape Wind Contract. After DPU issued its order in D.P.U. 12-19, NStar and Cape Wind executed a Power Purchase Agreement, Compl. ¶ 83; NStar-Cape Wind PPA,[12] and NStar submitted the contract to DPU for approval under Section 83. *See* DPU Order Approving NStar-Cape Wind PPA, D.P.U. 12-30 ("PPA Order"), at 1-2.[13] Under the contract, NStar will purchase energy, capacity, and renewable energy certificates from Cape Wind for 15 years; NStar will purchase 27.5% of the output of Cape Wind's facility, up to a maximum of 129MW. Compl. ¶ 86; PPA Order at 1-2, 8. The contract requires Cape Wind to comply with "all applicable rules, procedures, operating policies, criteria, guidelines and requirements imposed by

[10] The MOU Order is attached to this memorandum as **Exhibit 8**.

[11] The Alliance's petition to intervene in the MOU proceedings listed Plaintiffs Sandra Taylor and Barnstable (Compl. ¶¶ 16, 21) as individual intervenors whose claims it was asserting in the proceedings. Petition to Intervene of the Alliance to Protect Nantucket Sound and Its Individual Supporters, D.P.U. 12-19, at 2-3 (filed Mar. 16, 2012).

[12] The NStar-Cape Wind PPA is attached to this memorandum as **Exhibit 9**.

[13] The PPA Order is attached to this memorandum as **Exhibit 10**.

FERC and any other Government entity", NStar-Cape Wind PPA, ¶ 3.4(k), and to "obtain and maintain any requisite authority [from FERC] to sell the output, including Capacity, of the Facility at market-based rates or an exemption from the requirement that it have such authority", *id.* ¶ 3.4(*l*). It also states that Cape Wind shall "obtain[] all necessary authorizations from FERC to sell Capacity from the Facility at market-based rates" and "be[] in compliance with such authorization" as conditions precedent to the facility's commercial operation. *Id.*¶ 3.3(b)(xi).

As part of the contract-approval proceedings, DPU granted full intervenor status to the Alliance[14] and others, held three public hearings and two evidentiary hearings, and considered witness testimony from NStar and Cape Wind, 210 exhibits, and briefs from the parties and intervenors, including the Alliance. PPA Order at 2-3 & n.5. The Alliance argued that the PPA should not be approved because DOER allegedly coerced NStar to enter into the PPA through DOER's involvement in the merger proceedings, and therefore NStar's decision to enter into the contract was not a voluntary one. PPA Order at 23-25. In its November 26, 2012, final decision approving the PPA, DPU rejected this argument, concluding as follows:

> The Company [*i.e.*, 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.

Id. at 34-35 (record citations and internal quotation marks omitted). DPU elaborated that "[i]t is understandable that the price and certain other substantive terms of the PPA did not change

[14] The Alliance's petition to intervene in the PPA proceedings listed Plaintiff Sandra Taylor (Compl. ¶ 21) as a petitioner and Alliance supporter on whose behalf the Alliance sought to intervene. Petition to Intervene of the Alliance to Protect Nantucket Sound and Its Individual Supporters, D.P.U. 12-30, at 3 (filed May 15, 2012).

[from the National Grid-Cape Wind PPA] given that the parties were aware that such terms had been approved by the Department in D.P.U. 10-54, and subsequently upheld by the Supreme Judicial Court." *Id.* at 35-36. DPU also noted that NStar and Cape Wind "engaged in significant negotiations on a range of issues, and that those negotiations led to several important departures from the terms of the National Grid PPA." *Id.* at 36 (record citations omitted).

DPU also found nothing improper about DOER's involvement in the contract, concluding as follows:

> 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. *See*, *e.g.*, St. 2008, c. 169, §§ 1-3, 7, 12-44, 55, 83, 90, 93, 94, 100, 101, 102, 100, 105, 108. 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. St. 2008, c. 169, § 83; *see also* 220 C.M.R. § 17.04. 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 D.P.U. 10-170 and the development of the NSTAR Electric-Cape Wind MOU was appropriate and in no way invalidates the PPA.

Id. at 37-38; Compl. ¶ 92.

DPU went on to approve the PPA, after considering the potential costs and benefits of the contract, as well as potential renewable alternatives, and finding that the PPA was a cost-effective mechanism for procuring renewable energy on a long-term basis and was consistent with the public interest. PPA Order at 17-19, 45-51, 129-38, 144-54, 180-81, 189-90; Compl. ¶ 91. DPU made clear that its

> approval pursuant to Section 83 does not encompass a determination of the rate at which the power would be sold, which is subject to the jurisdiction of the Federal Energy Regulatory Commission pursuant to sections 205 and 206 of the Federal Power Act, 16 U.S.C. §§ 824d, 824e. Instead, Department 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.

PPA Order at 17 n.25 (citations omitted). Neither the Alliance nor any other party to the NStar-Cape Wind PPA proceedings appealed DPU's final decision to the SJC.

Instead, the Alliance, along with affiliated individuals and businesses, and Barnstable (which the Alliance represented in the MOU proceedings, *see* note 11, above), filed suit in this Court on January 21, 2014, over 14 months after DPU's final decision. They claim that, as NStar ratepayers, they will pay $1.8 million more in electricity rates over the life of the NStar-Cape Wind contract than they would have had NStar contracted with unspecified "cheaper land-based wind alternatives." Compl. ¶ 96. They also claim that they will suffer "negative impacts to the environment, regional economy, historic and cultural resources, public safety, and recreational opportunities, resulting from the Cape Wind contract." *Id.* ¶ 98. Therefore, they seek declarations that "the NStar-Cape Wind contract . . . [is] null and void and without legal force or effect" because it was the "product of illegal state action" by the Commonwealth, and an injunction barring "DPU from enforcing its order approving the PPA." *Id.*, Demand for Relief, ¶¶ a-d.

ARGUMENT

I. Plaintiffs' Claims Are Barred by the Commonwealth's Sovereign Immunity.

Plaintiffs' Complaint alleges that certain actions taken in the past by the State Defendants—DOER's involvement in the NStar-Northeast Utilities merger proceedings, DPU's approval of the NStar-Cape Wind contract—were unconstitutional. *See generally* Compl. They ask this Court to nullify the NStar-Cape Wind contract on the ground that that past action with respect to the contract was unlawful. *Id.*, Demand for Relief, ¶¶ a-c. But the Commonwealth's sovereign immunity from suit bars such relief because it is completely retrospective in nature. While Plaintiffs also seek an order "[e]njoining the DPU from enforcing its order approving the PPA," *id.* ¶ d, such relief is also barred because there is no state action left to enjoin: DOER and DPU have no further action to take on the contract at issue here. As this Court has recently explained, because the challenged state action is now "an historical fact", sovereign immunity bars the claim even if there are alleged ongoing effects. *Tyler v. Massachusetts*, ___ F. Supp. 2d ___, 2013 WL 5948092, at *2 (D. Mass. Nov. 7, 2013).

As a general matter, the doctrine of sovereign immunity—confirmed by, but not limited to the terms of, the Eleventh Amendment to the U.S. Constitution—bars suits in federal court against unconsenting states. *Rosie D. v. Swift*, 310 F.3d 230, 234 (1st Cir. 2002). It also bars official-capacity suits against state officials because "a suit against a state official in his or her official capacity . . . is no different from a suit against the State itself." *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 71 (1989). The one exception to this rule, announced in *Ex parte Young*, 209 U.S. 123 (1908), "allows federal courts . . . [to] enjoin state officials to conform future conduct to the requirements of federal law." *Rosie D.*, 310 F.3d at 234.

But the *Ex parte Young* exception is a "narrow" one. *Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 146 (1993). It permits suits against state officials in their official capacities for "*prospective* injunctive relief" only. *Rosie D.*, 310 F.3d at 234 (emphasis added); *Green v. Mansour*, 474 U.S. 64, 68 (1985) (*Ex parte Young* exception permits only "injunctive relief to prevent a continuing violation of federal law"); *Edelman v. Jordan*, 415 U.S. 651, 677 (1974) ("[A] federal court's remedial power, consistent with the Eleventh Amendment, is necessarily limited to prospective injunctive relief"). The exception "does not permit judgments against state officers declaring that they violated federal law in the past." *Metcalf & Eddy*, 506 U.S. at 146. Nor does it extend to any other "claims for retrospective relief." *Green*, 474 U.S. at 68; *see also Whalen v. Massachusetts Trial Court*, 397 F.3d 19, 28-30 (1st Cir. 2005) (holding that state employee's claim for restoration of retirement credit was not prospective relief; despite the fact that the relief sought "would have only future impact on the state," and "despite the forward-looking nature of Whalen's request for service credit," it was barred because there was no "ongoing violation" of federal law).

"In determining whether the doctrine of *Ex parte Young* avoids an Eleventh Amendment bar to suit, a court need only conduct a straightforward inquiry into whether the complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective." *Virginia Office for Prot. & Advocacy v. Stewart*, 131 S. Ct. 1632, 1639 (2011) (quotation marks and alterations omitted). Plaintiffs satisfy neither aspect of this analysis. As to

the first element, nowhere in the Complaint do Plaintiffs allege an ongoing violation of federal law by the State Defendants. To the contrary, the Complaint is based entirely on actions by the State Defendants that took place in the past and are now complete—DOER's involvement in the NStar-Northeast Utilities merger proceedings and DPU's approval of the NStar-Cape Wind PPA. *E.g.*, Compl. ¶¶ 4, 12-14, 64-92.

As to the second element of this inquiry, the relief sought by Plaintiffs cannot "properly [be] characterized as prospective." *Stewart*, 131 S. Ct. 1632, 1639. Plaintiffs seek declarations that DOER's role in the merger proceedings, DPU's approval of the NStar-Cape Wind contract, and the contract itself, entailed "illegal state action" and are thus "null and void and without legal force or effect." Compl., Demand for Relief, ¶¶ a-c. Plaintiffs are thus requesting declarations that the State Defendants "violated federal law in the past", which is prohibited. *Metcalf & Eddy*, 506 U.S. at 146; *see also National R.R. Passenger Corp. v. McDonald*, ___ F. Supp. 2d ___, 2013 WL 5434618, at *13 (S.D.N.Y. Sept. 26, 2013) ("[A] declaration that something that happened [months] ago is null and void, and so really did not happen at all . . . is not 'prospective' relief.").

It makes no difference that Plaintiffs also seek an order "[e]njoining the DPU from enforcing its order approving the PPA", and "any other necessary injunctive relief to remedy the violation of the dormant Commerce Clause and Supremacy Clause alleged herein". Compl., Demand for Relief, ¶ d. What matters is that Plaintiffs have not alleged any ongoing or future conduct by DPU or DOER with respect to the contract that is left to enjoin—not a single allegation of the Complaint identifies or alludes to any future actions the State Defendants must take with respect to the contract. *See generally* Compl. That is because there is no such ongoing or future action left to enjoin: neither DOER nor DPU will take any future action on the PPA itself. The relief requested cannot properly be characterized as prospective, but is instead retrospective, and therefore it is barred by sovereign immunity. *McDonald*, 2013 WL 5434618, at *11 ("Though a plaintiff may frame the relief it seeks in prospective terms, if the effect of the

relief sought is entirely retrospective, the suit does not fall within the *Ex parte Young* exception and is barred by the Eleventh Amendment.").

This Court's recent decision in *Tyler* is squarely on point. There, the plaintiff—a victim of statutory rape—challenged a state-court judge's imposition of a condition of probation that the convicted rapist acknowledge paternity of the plaintiff's child and abide by any child support orders resulting from such acknowledgement. 2013 WL 5948092, at *1. Plaintiff alleged that the condition of probation imposed by the state-court judge violated her substantive due process rights by effectively mandating that the convicted rapist remain involved in plaintiff's life. *Id.* The plaintiff thus alleged that there was an unconstitutional ongoing effect of the state-court judge's order. *See id.* But this Court held that sovereign immunity barred plaintiff's claim: "The relief sought here, however, is not prospective. The sentence complained of has been imposed and is now an historical fact." *Id.* at *2. The same is true here: DOER's actions during the merger proceedings, and DPU's approval of the NStar-Cape Wind contract, are now historical facts. There is no future or ongoing conduct by the State Defendants left to enjoin. Therefore, Plaintiffs are seeking only retrospective relief, which is barred by sovereign immunity. *Id.* at *2.

II. Principles of Comity and Preclusion Warrant Dismissal of Plaintiffs' Complaint.

A. *Burford* Abstention Is Warranted Here.

This Court should exercise its discretion to dismiss this case pursuant to the *Burford* abstention doctrine. *See Burford v. Sun Oil Co.*, 319 U.S. 315, 333-34 (1943); *Tyler*, 2013 WL 5948092, at *3 (dismissing case on *Burford* abstention as well as sovereign immunity grounds). This doctrine "derives from the discretion historically enjoyed by courts of equity", *Manson v. GMAC Mortg., LLC*, 2010 WL 3001203, at *2 (D. Mass. July 28, 2010) (quoting Laurence H. Tribe, *American Constitutional Law* § 3-29, at 583 (3d ed. 2000)), and may be warranted in cases (as here) where plaintiffs seek injunctive or declaratory relief, *see Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 718-19 (1996). Under this doctrine, when timely and adequate state-court review is available, federal courts "must decline to interfere with the proceedings or orders of state administrative agencies" where: (1) there are difficult questions of state law bearing on

policy problems of a substantial public import whose importance transcends the result in the case then at bar; or (2) the court's exercise of jurisdiction would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern. *New Orleans Public Serv., Inc. v. Council of the City of New Orleans*, 491 U.S. 350, 361 (1989) ("*NOPSI*").[15]

To begin, there can be no question that Plaintiffs had an adequate avenue for state-court review of DPU's decision approving the NStar-Cape Wind contract under Mass. G.L. c. 25, § 5. That statute allows for direct review of a final DPU order by the SJC—starting with a Single Justice of that court, who often reports the case directly to the full court. *See id.* Plaintiffs could have raised before the SJC any of the claims they raise here, as the Alliance well knows, since it raised before the SJC a dormant Commerce Clause challenge to the National Grid-Cape Wind contract, a challenge the SJC found meritless. *Alliance*, 461 Mass. at 173-74. The Alliance, however, declined to seek judicial review in the state courts, opting instead to come here *over 14 months* after DPU's final decision. This is not a case where Plaintiffs "may be unable to press their federal claims in a state forum." *Chico Service Station, Inc. v. Sol Puerto Rico Ltd.*, 633 F.3d 20, 31 (1st Cir. 2011). Here, they simply chose not to. *See Allstate Ins. Co. v. Sabbagh*, 603 F.2d 228, 234 (1st Cir. 1979) (affirming district court's exercise of *Burford* abstention in case challenging state insurance commissioner's decision regarding automobile insurance rates, where statute similar to Mass. G.L. c. 25, § 5, provided for direct review by the SJC, and where plaintiff "made the tactical decision to try to pursue its action in federal court rather than take the case directly to the SJC where it could be assured of a speedy adjudication of its rights.").

[15] In *NOPSI*, the Supreme Court rejected *Burford* abstention in a case involving a preemption challenge to a city council's decision that arguably interfered with an *existing* FERC order. *See id.* at 356-57. But as the First Circuit later observed, the Supreme Court in *NOPSI* was "quite possibly concerned with a threat to the supremacy of the federal regulatory scheme if the meaning of the FERC order were left to state court interpretation on review of the city council order." *Sevigny v. Employers Ins. of Wausau*, 411 F.3d 24, 27 (1st Cir. 2005). As explained above and below, here there is no existing FERC order that would be jeopardized by state-court review of DPU's decision approving the PPA. To the contrary, FERC itself has recognized that there is nothing problematic about DPU reviewing a "retail filing" such as the PPA before Cape Wind seeks the requisite approval from FERC. *CARE*, 137 FERC 61,113, at ¶ 33.

Plaintiffs, in effect, seek to create a separate and independent form of federal-district-court review of DPU's orders. But "when a federal court's interference would effectively create a dual review structure for adjudicating a state's specific regulatory actions, abstention under *Burford* may be appropriate." *Vaqueria Tres Monjitas, Inc. v. Irizarry*, 587 F.3d 464, 474 (1st Cir. 2009). "The fundamental concern in *Burford* is to prevent federal courts from bypassing a state administrative scheme and resolving issues of state law and policy that are committed in the first instance to expert administrative resolution." *Sevigny v. Employers Ins. of Wausau*, 411 F.3d 24, 27 (1st Cir. 2005) (citation omitted). Bypassing the Commonwealth's administrative scheme is precisely what Plaintiffs seek here, as evidenced by their decision to forego state-court review under Mass. G.L. c. 25, § 5. *Sabbagh*, 603 F.2d 234 (applying *Burford* in part because of plaintiff's "tactical decision to try to pursue its action in federal court" rather than pursuing state-court review of state agency decision). This Court should abstain under *Burford* because "federal review risks having the district court become the regulatory decision-making center." *Chico Service Station*, 633 F.3d at 30; *Sevigny*, 411 F.3d at 27 (same).

Notably, Plaintiffs do not challenge the constitutionality of the state regulatory framework for review and approval of the PPA—they do not allege that Section 83 or any other provision of state law is unconstitutional—but instead seek to create a new, parallel avenue of review of DPU's decisions. Because this case rests threatens "the proper administration of a *constitutional* state regulatory system", it falls squarely within the concerns that gave rise to the *Burford* abstention doctrine, "that the federal court might, in the context of the state regulatory scheme, create a parallel, additional federal, 'regulatory review' mechanism, the existence of which would significantly increase the difficulty of administering the state regulatory system." *Bath Memorial Hosp. v. Maine Health Care Fin. Comm'n*, 853 F.2d 1007, 1013 (1st Cir. 1988) (Breyer, J.) (emphasis in original).[16]

[16] This case is materially different from other cases where the First Circuit determined *Burford* abstention to be unwarranted. *See Chico Service Station*, 633 F.3d at 30 (rejecting *Burford* abstention where federal statute invoked by plaintiffs expressly provided for civil action in federal district courts); *Vaqueria*, 587 F.3d at 474-75 (declining abstention where "the heart of the plaintiffs' action lies in the constitutional challenge to [the state agency]'s

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While Plaintiffs may claim that they require a federal forum to assert putative federal claims, that interest is diminished here, where FERC will have an opportunity to review Cape Wind's request for authorization to sell the power at issue. *See CARE*, 137 FERC 61,113, at ¶ 33. And a party with standing who is aggrieved by any resulting FERC order would be able to seek review of that decision, through the First Circuit or the D.C. Circuit. 16 U.S.C. § 825*l*(b). Viewed in this light, abstention—which balances the federal interest in having the federal court adjudicate a federal claim against the state's interest in the development of a coherent regulatory scheme on matters of substantial public import—is clearly appropriate here. This Court should therefore abstain and dismiss this case. *See Quackenbush*, 517 U.S. at 721 (noting that dismissal on abstention grounds is appropriate "in cases where the relief being sought is equitable in nature or otherwise discretionary").

B. Preclusion Is Also Appropriate.

Preclusion is also appropriate here. *At a minimum*, in this case the Plaintiffs Alliance, Taylor, and Barnstable (*see* notes 11 & 14, above) should be precluded from re-litigating the issues they raised before DPU during the contract-approval proceedings and then did not appeal, *i.e.*, the voluntariness of the NStar-Cape Wind contract, and the role of DOER during the merger and MOU proceedings.[17] The Alliance argued during the PPA proceedings, as they do here, that NStar's entry into the contract with Cape Wind was not voluntary, and that DOER had coerced NStar into contracting with Cape Wind. *Compare* PPA Order at 23-25 (summarizing Alliance's

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decision-making process as a whole, and not to the reasonableness of their particular determinations"); *Sevigny*, 411 F.3d at 27-29 (rejecting abstention where there was no state administrative decision at issue and where state-law issues were "conventional"); *Public Serv. Co. of N.H. v. Patch*, 167 F.3d 15, 24 (1st Cir. 1998) (rejecting abstention where plaintiffs challenged general state-agency plan de-regulating utility industry, not any particular adjudicatory decision by state agency).

[17] The State Defendants reserve the right to augment their preclusion argument at a later time, should it be learned, for example, that the other Plaintiffs are Alliance members, or that the Alliance was sufficiently closely related to the other Plaintiffs for issue preclusion to apply, including through privity or by the Alliance's choice to use distinct Plaintiffs as proxies here to avoid the preclusive effect of DPU's rulings. *See, e.g., Crane v. Commissioner of the Dep't of Agriculture, Food & Rural Resources*, 602 F. Supp. 280, 285-90 (D. Me. 1985) (precluding non-party to state action from subsequently raising similar claims in federal court, based in part on the "close nonlitigating relationships" with a party to the state-court proceeding, and "perhaps deliberate maneuvering to avoid the effects of the first action").

arguments during PPA proceedings), *with, e.g.*, Compl. ¶¶ 4, 13-14, 67, 75, 83, 99-122. DPU considered and rejected these arguments as part of the essential "threshold requirements" of its review of the PPA, concluding instead that NStar voluntarily entered into the contract in light of the unique benefits offered by Cape Wind, and that DOER's role was proper in light of its responsibilities under the GCA. PPA Order at 19-20, 23-25, 32-38. The Alliance then chose not to pursue its right of judicial review in state court under Mass. G.L. c. 25, § 5.

Issue preclusion (or collateral estoppel) applies when "(1) the issue sought to be precluded in the later action is the same as that involved in the earlier action; (2) the issue was actually litigated; (3) the issue was determined by a valid and binding final judgment; and (4) the determination of the issue was essential to the judgment." *Rodriguez-Garcia v. Miranda-Marin*, 610 F.3d 756, 770 (1st Cir. 2010). A state-agency determination is entitled to preclusive effect in federal court as a matter of federal common law if the determination would be given preclusive effect in the state's court, and if preclusion is not inconsistent with the applicable federal statute. *Kosereis v. Rhode Island*, 331 F.3d 207, 212 (1st Cir. 2003). DPU's decision would undeniably be entitled to preclusive effect in the courts of Massachusetts. *E.g.*, *Alba v. Raytheon Co.*, 441 Mass. 836, 840-45 & n.8 (2004). And application of issue preclusion is not inconsistent with the federal statute invoked by Plaintiffs here, 42 U.S.C. § 1983. *E.g.*, *Johnson v. Mahoney*, 424 F.3d 83, 93 (1st Cir. 2005) ("It is well established that the doctrine of collateral estoppel applies in civil rights actions brought pursuant to 42 U.S.C. § 1983").

Therefore, the Alliance, Taylor, and Barnstable should be precluded from re-litigating the issues they actually raised before DPU, *i.e.*, that NStar did not voluntarily solicit and enter into to the contract with Cape Wind, and that DOER played an improper role during the merger and MOU proceedings in bringing about the NStar-Cape Wind contract. PPA Order at 23-25, 33-38. These happen to be the *central* contentions in this case, though they are portrayed here as violations of the Commerce and Supremacy Clauses of the U.S. Constitution. *See generally* Compl. If NStar voluntarily entered into the contract with Cape Wind, and if DOER's role in the proceedings leading up to the contract was entirely proper—as DPU conclusively decided in the

PPA Order—then Plaintiffs cannot prevail on the merits of their claims in this case, since the viability of those claims depends on this Court agreeing with Plaintiffs that the NStar-Cape Wind contract was not a voluntary, private contract, but was instead the product of unlawful state action. Plaintiffs should not be permitted to re-litigate these issues here.

III. Plaintiffs Fail to State A Plausible Claim for Relief Under Either the Commerce Clause or the Supremacy Clause.

A. Plaintiffs' Preemption Claim Fails Because the State Defendants In No Way "Set" the Rate for Wholesale Electricity Sales.

Plaintiffs' Supremacy Clause claim is predicated on the argument that the State Defendants effectively set the rate at which wholesale electricity would be sold by Cape Wind, a function within the exclusive province of FERC under the FPA. *See* Compl. ¶¶ 3, 12-13, 41, 99-112. This argument is without merit because the State Defendants did not "set" the rate at which electricity would be sold at wholesale; instead, DPU merely approved NStar's decision to enter into the contract with Cape Wind, a matter clearly within the scope of DPU's state regulatory authority. NStar and Cape Wind privately negotiated the contract rate and FERC, not the DPU or DOER, will authorize Cape Wind to sell at that rate. Indeed, *by its terms*, the PPA requires Cape Wind to obtain the requisite authorization from FERC to sell the electric power at issue to NStar. NStar-Cape Wind PPA, ¶¶ 3.3(b)(xi), 3.4(k), (*l*). FERC itself has held—in rejecting a challenge to DPU's approval of the substantially-similar National Grid-Cape Wind contract—that there is nothing problematic about DPU approving a "retail filing" such as the National Grid (or NStar) submission under Section 83 of the GCA, since the PPA itself requires Cape Wind to obtain FERC authorization at a later time. *CARE*, 137 FERC 61,113, at ¶ 33.

Under the Supremacy Clause, Congress may preempt contrary state law,[18] either through an express preemption provision in a federal enactment, or impliedly, "where Congress has

[18] "[T]he Supremacy Clause's exclusive function is to disable state laws that are substantively inconsistent with federal law". *Haywood v. Drown*, 556 U.S. 729, 752 (2009). It "is 'not a source of any federal rights'; rather, it '"secure[s]' federal rights by according them priority whenever they come in conflict with state law."' *Dennis v. Higgins*, 498 U.S. 439, 450 (1991) (quoting *Chapman v. Houston Welfare Rights Org.*, 441 U.S. 600, 613 (1979)). Accordingly, in order for Plaintiffs to proceed on a Supremacy Clause claim, they should be required to demonstrate that the federal statute they invoke—here, the FPA—itself gives rise to privately-enforceable rights. *See Douglas v.*

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legislated so comprehensively as to occupy an entire field of regulation, leaving no room for the States to supplement federal law" (referred to as "field preemption"), "or where the state law at issue conflicts with federal law, either because it is impossible to comply with both, or because the state law stands as an obstacle to the accomplishment and execution of congressional objectives" (referred to as "conflict preemption"). *Northwest Central Pipeline Corp. v. State Corp. Comm'n of Kan.*, 489 U.S. 493, 509 (1989). Plaintiffs do not argue that the FPA expressly preempts the State Defendants' actions, *see generally* Compl. ¶¶ 99, 103-04, 107-08, nor could they. Far from displacing state involvement in the regulation of electricity, Congress through the FPA expressly *preserved* traditional state authority over utility regulation, extending federal power "only to those matters which are not subject to regulation by the states", 16 U.S.C. § 824(a). The FPA's history reveals a "constant purpose to protect rather than to supervise the authority of the states", and "to apportion federal and state jurisdiction over the [electric] industry." *Connecticut Power & Light Co. v. Federal Power Comm'n*, 324 U.S. 515, 525, 531 (1945). Under the FPA, "States retain their traditional responsibility in the field of regulating electrical utilities for determining questions of need, reliability, cost and other related state concerns." *Pacific Gas & Elec. Co. v. State Energy Resources Conserv. & Develop. Corp.*, 461 U.S. 190, 205 (1983). Indeed, the Supreme Court has long recognized that "the regulation of utilities is one of the most important of the functions traditionally associated with the police power of the States." *Arkansas Elec. Co-op Corp. v. Arkansas Pub. Serv. Comm'n*, 461 U.S. 375, 377 (1983) (citing *Munn v. Illinois*, 94 U.S. 113 (1877)). Federal and state regulation of electricity is thus often described as a system of "interlocking" jurisdiction, one where

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Independent Living Ctr. of S. Cal., Inc., 132 S. Ct. 1204, 1213 (2012) (Roberts, C.J., dissenting) ("[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."); *Boston Med. Ctr. Corp. v. Secretary of the Exec. Office of Health & Human Servs.*, 463 Mass. 447, 460-63 (2012) (agreeing with Chief Justice Roberts's dissenting opinion in *Douglas*). The FPA clearly creates no such privately-enforceable rights. The "just and reasonable" standard of the FPA, discussed below, "is a standard for [FERC] to apply and, independently of [FERC] action, creates no right which courts may enforce. . . . [Plaintiff] cannot litigate in a judicial forum its general right to a reasonable rate". *Montana-Dakota Utils. Co. v. Northwestern Pub. Serv. Co.*, 341 U.S. 246, 251 (1951).

"accommodation", rather than preemption, is the norm. *See Northwest Central Pipeline Corp.*, 489 U.S. at 506, 517-518; *Public Utils. Comm'n of the State of Cal. v. FERC*, 900 F.2d 269, 274-75 (D.C. Cir. 1990).[19]

Plaintiffs instead argue that this case implicates "field" or "conflict" preemption. Compl. ¶¶ 99, 103-04, 107-08. There are two "cornerstones" of any preemption analysis. First, "the purpose of Congress is the ultimate touchstone in every pre-emption case." Second, "in all pre-emption cases, and particularly those in which Congress has legislated in a field which the States have traditionally occupied, we start with the assumption that the historic police powers of the States were not to be superseded unless that was the clear and manifest purpose of Congress." *Wyeth v. Levine*, 555 U.S. 555, 565 (2009); *see also New York v. FERC*, 535 U.S. 1, 17-18 (2002) ("The Court has most often stated a 'presumption against pre-emption' when a controversy concerned . . . whether a given state authority conflicts with, and thus has been displaced by, the existence of Federal Government authority.")

The FPA gives FERC 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). States retain their traditional authority over *retail* sales of electricity. *See id.* (stating that the FPA "shall not apply to any other sale of electricity"); *New York*, 535 U.S. at 23, 27-28 ("[T]he FPA does not give [FERC] jurisdiction over sales of electric energy at retail."); *Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953, 970 (1986) (noting states' "undoubted jurisdiction over retail sales"). With respect to wholesale rates, FERC is charged with ensuring that they are "just and reasonable." *Id.* § 824d(a). *See generally New York*, 535 U.S. at 5-8 (describing the history of utility regulation and the FPA). But FERC does not set wholesale electricity rates *ex nihilo*; rather, it reviews specific rates and contracts that are submitted to it by wholesalers and approves them, provided they are "just and reasonable." 16

[19] These cases both involved federal and state jurisdiction under the Natural Gas Act. But because the FPA and the Natural Gas Act are "in all material respects substantially identical", there is an "established practice of citing interchangeably decisions interpreting the pertinent sections of the two statutes." *Arkansas La. Gas Co. v. Hall*, 453 U.S. 571, 577 n.7 (1981) (citations omitted).

U.S.C. § 824d(a). These provisions of the FPA are part of a "single statutory scheme under which all rates are *established initially* by the public utilities, *by contract or otherwise*, and all rates are subject to being modified by [FERC] upon a finding that they are unlawful. Thus, FERC plays an essentially *passive and reactive* role under section 205 [of the FPA, 16 U.S.C. § 824d]." *Atlantic City Elec. Co. v. FERC*, 295 F.3d 1, 10 (D.C. Cir. 2002) (emphasis added) (citations and internal quotation marks omitted).

To be sure, DPU could not, consistent with the FPA, reduce or reject a FERC-approved rate. Nor could it prohibit a utility from recouping from its customers the amounts dictated by a FERC-approved rate. In such instances, there would be a clear conflict between FERC's authority and the state's, and it would be impossible for the utility to comply with both the federal and state directives, thus warranting preemption. *See, e.g.*, *Mississippi Power & Light Co. v. Mississippi ex rel. Moore*, 487 U.S. 354, 369-72 (1988); *Nantahala Power & Light Co.*, 476 U.S. at 966-73 (1986).[20] But even in this context, FERC and the courts have recognized that state regulators may decide whether a utility acted "prudently" in buying a *certain quantity* of power at FERC-approved rates, in light of available alternatives, a principle sometimes referred to as the "*Pike County*" exception to the filed-rate doctrine. *Central Vt. Pub. Serv. Corp.*, 84 FERC ¶ 61,194, at pp. 61,974-95 (1998); *Public Serv. Co. of N.H. v. Patch*, 167 F.3d 15, 27 & n.11 (1st Cir. 1998) (citing *Pike County Light & Power Co. v. Pennsylvania Pub. Util. Comm'n*, 465 A.2d 735, 737-38 (Pa. Commw. Ct. 1983)); *Commonwealth Elec. Co. v. Dep't of Pub. Utils.*, 397 Mass. 361, 378-79 (1986); *see also Public Serv. Co. of N.H. v. Patch*, 167 F.3d 29, 35-36 (1st Cir. 1998) (vacating district-court injunction against state commission's order disallowing utility's proposed rate increases, where utility had "not shown likelihood of success on the merits, or even of fair ground for further litigation", in arguing that the state commission's order was preempted by the FPA or FERC's authority, because state commission had not disallowed rates as unjust or

[20] These cases represent application of the "filed-rate" doctrine, under which state regulators (and also state and federal courts) are prohibited from interfering with a wholesale rate that has been filed with, or approved by, FERC. *See, e.g.*, *Mississippi Power & Light Co.*, 487 U.S. at 371-72; *Nantahala Power & Light Co.*, 476 U.S. at 962-63 (citing *Montana-Dakota Utils. Co. v. Northwestern Pub. Serv. Co.*, 341 U.S. 246, 251-52 (1951)).

unreasonable, but had merely decided that utility acted imprudently in continuing to purchase electricity at certain rates "since lower cost sources of energy are allegedly available").

Here, however, there was no FERC-approved or FERC-filed rate with which DPU's PPA Order could interfere, and FERC has ruled that DPU's review of the utility's buy-side decision to enter into the PPA does not encroach upon FERC's authority over the wholesale rate, since the seller (Cape Wind) will seek the requisite authorization from FERC later. *CARE*, 137 FERC 61,113, at ¶ 33. DPU made clear that its review of the NStar-Cape Wind contract "pursuant to Section 83 does not encompass a determination of the rate at which the power would be sold, which is subject to the jurisdiction of the Federal Energy Regulatory Commission pursuant to sections 205 and 206 of the Federal Power Act, 16 U.S.C. §§ 824d, 824e." PPA Order at 17 n.25. Instead, DPU's approval of the PPA constituted approval of the decision by NStar—an electricity retailer—"to enter into a long-term contract with a renewable energy developer and the attendant cost recovery in light of the alternatives." *Id.* (citing, *e.g.*, *Pike County*, 465 A.2d at 738). DPU's approval was absolutely consistent with, and not preempted by, the FPA or FERC's authority thereunder. "FERC has recognized that the States retain significant control over local matters" 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*". *New York*, 535 U.S. at 24 (emphasis added).

Perhaps the strongest evidence that there is no preemption problem here is that *FERC itself has said that DPU's approval of the PPA does not usurp its authority*. As noted above, FERC rejected an identical challenge to DPU's decision with respect to the National Grid-Cape Wind contract, stating that nothing in the FPA or FERC's rules required Cape Wind to submit its wholesale rates for approval before the "retail filing" by National Grid that DPU approved as part of its traditional regulatory authority, as well as its new responsibilities under Section 83. *CARE*, 137 FERC 61,113, at ¶¶ 1, 33. And FERC's interpretation of its own statutory jurisdiction is entitled to deference. *Sacramento Mun. Util. Dist. v. FERC*, 616 F.3d 520, 536 (D.C. Cir. 2010) (applying *Chevron* deference to FERC's interpretation of its own jurisdiction

under the FPA). Therefore, this Court should reject Plaintiffs' claim, as FERC has, that DPU's actions in reviewing and approving the PPA invaded FERC's authority.

To the extent Plaintiffs claim that it is *DOER*, not DPU, that "set" wholesale electricity rates by entering into the Settlement Agreement with NStar during its merger proceedings, *see* Compl. ¶¶ 107-08, this argument suffers from several fatal defects. First, Plaintiffs cannot deny that DOER had no legal authority to reject or approve the merger, the MOU, or the PPA; only DPU had such authority. *See* Section 83; Mass. G.L. c. 164, § 96; *see also* Mass. G.L. c. 25A, § 6. Indeed, as the Alliance itself acknowledged during the MOU proceedings, "DOER was acting not in a sovereign capacity, but as a mere party to the proceeding before DPU in D.P.U. 10-170 on the proposed merger between NStar and Northeast Utilities." Alliance Comments at 9-10. Second, the Alliance, Taylor, and Barnstable have already litigated the issues of the voluntariness of the PPA and DOER's role in the merger and MOU proceedings, and they should not be permitted to re-litigate these issues after DPU conclusively decided that the PPA was a voluntary contract and that DOER's role was in the proceedings was proper, and Plaintiffs chose not to appeal DPU's final decision. *See* pages 19-21, above. Third, even if DOER played an improper role in the merger or MOU proceedings—an assertion the State Defendants reject—that would not change the fact that FERC retains the authority to consider and approve or reject Cape Wind's wholesale electricity rates. There is thus no plausible claim that the State Defendants "set" the rate for wholesale electricity and thereby usurped FERC's role.[21]

[21] To the extent Plaintiffs intend to rely on two recent district court cases addressing FERC preemption, *PPL Energyplus, LLC v. Hanna*, ___ F. Supp. 2d ___, 2013 WL 5603896 (D.N.J. Oct. 11, 2013); and *PPL Energyplus, LLC v. Nazarian*, ___ F. Supp. 2d ___, 2013 WL 5432346 (D. Md. Sept. 30, 2013), those cases—which are on appeal in the Third and Fourth Circuits, respectively—are clearly distinguishable from this one. In those cases, state regulatory commissions required utilities to enter into "contracts for differences" ("CfDs") with a generator to purchase power at prices determined by the state. Under the CfDs, generators were guaranteed to receive the contract price regardless of future FERC-supervised wholesale market prices. The courts in those cases ruled that the state commissions' actions encroached upon FERC's authority over wholesale rates, and were thus preempted. *Hanna*, 2013 WL 5603896, at *31-*36; *Nazarian*, 2013 WL 5432346, at *27-*42. Here, in contrast, private parties negotiated the terms and prices of a power purchase agreement, and the DPU approved NSTAR's decision to do so in accordance with Section 83; neither that approval nor any action by DOER was intended to address any perceived inadequacy in the FERC-supervised wholesale market. Indeed, DPU was invited by the State Legislature to consider an approach similar to that in New Jersey and Maryland, but rejected it in a separate proceeding, finding

(footnote continued on following page)

B. Plaintiffs' Dormant Commerce Clause Claim Also Fails, Because Plaintiffs Lack Standing to Prosecute Such a Claim, and Because the State Defendants Did Not Discriminate Against Out-of-State Commercial Interests Here.

Plaintiffs' dormant Commerce Clause claim is also subject to dismissal, both because Plaintiffs—in-state ratepayers who claim that their utility rates will go up as a result of the NStar-Cape Wind contract, *see* Compl. ¶¶ 15, 96, 113-22—lack standing to make a claim of discrimination against out-of-state commercial interests, and because the State Defendants did not discriminate against out-of-state interests here in any event.

First, Plaintiffs lack standing to raise a dormant Commerce Clause claim here. Plaintiffs are not competitors for long-term renewable energy contracts who claim to have lost out on an opportunity to compete in Massachusetts by virtue of out-of-state discrimination, but are instead in-state ratepayers who claim that their rates will go up as a result of a private contract between NStar and Cape Wind. This is insufficient to confer standing to raise a dormant Commerce Clause claim. *Alliance*, 461 Mass. at 172 n.13 (noting that neither the Alliance nor "any of its members have been harmed in their ability to compete for § 83 contracts by the claimed infringement of the commerce clause", but considering dormant Commerce Clause claim only because it was also raised by TransCanada, an out-of-state competitor); *see also DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 340-49 (2006) (finding that taxpayers lacked standing to raise dormant Commerce Clause challenge to state and local tax breaks to company in exchange for company expanding its operations in the state, because taxpayers' claim that the tax breaks would deplete public treasury and impose higher tax burden on them was insufficient to establish Article III or prudential standing).[22]

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that it would "unnecessarily and unduly disrupt the wholesale marketplace". *See* Order, D.P.U. 12-77, at 32 (Mar. 15, 2013).

[22] There are two components of standing to bring suit in federal court: Article III standing and prudential standing. With respect to Article III standing—which requires that a plaintiff "allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief", *DaimlerChrysler Corp.*, 547 U.S. at 342 (citation omitted)—"when the plaintiff is not himself the object of the government action or inaction he challenges, standing is not precluded, but it is ordinarily 'substantially more difficult' to establish," because "causation and redressability ordinarily hinge on the response of the regulated (or regulable) third party to the government action or inaction"—here, NStar and Cape Wind—"and perhaps on the response of others as well."
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To be sure, "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." *General Motors Corp. v. Tracy*, 519 U.S. 278, 286 (1997). But *Tracy* does not stand for the proposition that "consumers paying the end-line cost of an economic regulation have standing to challenge the regulation under the Commerce Clause." *Ben Oehrleins & Sons & Daughter, Inc. v. Hennepin County*, 115 F.3d 1372, 1381 (8th Cir. 1997). Rather, in *Tracy* the plaintiffs had standing because they were "directly subject to discrimination: they were liable for taxes based on where they purchased goods"; therefore they "sought to protect their own rights to purchase goods or do business across state borders, without being subject to a discriminatory tax." *Ben Oehrleins*, 115 F.3d at 1381.

Indeed, in *Ben Oehrleins*, a case decided after the Supreme Court's decision in *Tracy*, the Eighth Circuit noted 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." *Id.* at 1380. That is precisely the harm claimed by Plaintiffs here: an allegation that they will be subject to a passed-along cost by NStar as a result of the PPA approved by DPU. Compl. ¶¶ 94, 96-97. The Eighth Circuit further noted that the plaintiffs "cannot claim any personal right under the Commerce Clause to lower garbage bills." *Id.* at 1382. So too here: Plaintiffs cannot claim a personal right under the Commerce Clause to lower electric bills. And "if 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." *Id.* at 1382. Like the Eighth Circuit, this Court should "decline to

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Lujan v. Defenders of Wildlife, 504 U.S. 555, 561-62 (1992) (citations omitted). With respect to prudential limits on standing, because Plaintiffs are essentially raising the claims of out-of-state competitors, because their claims are "generalized grievances" that could be raised by virtually any ratepayer in Massachusetts, and because their Complaint does not fall within the "zone of interests" protected by the dormant Commerce Clause, they lack standing. *Allen v. Wright*, 468 U.S. 737, 751 (1984).

expand the scope of claims cognizable under the Commerce Clause this far." *Id.*; *accord Individuals for Responsible Gov't v. Washoe County*, 110 F.3d 699, 702-04 (9th Cir. 1997).[23]

Second, even if Plaintiffs had standing to raise a dormant Commerce Clause claim, the claim is without merit. Plaintiffs are not challenging the GCA, the GWSA, or DPU's regulations as facially discriminatory, *see generally* Compl., nor could they: Section 83 is neutral on its face regarding in-state vs. out-of-state competitors. As Plaintiffs acknowledge, under that statute NStar has in fact entered into long-term contracts with several renewable generators from out of state. Compl. ¶ 12. *See also* page 3, above (describing suspension of geographic limitation in Section 83 by DPU, and subsequent amendment of statute by Mass. St. 2012, c. 209, § 35). Out-of-state competitors remain free to compete for the contracts contemplated by Section 83 in future RFPs and other solicitations by NStar and other utilities.

To the extent Plaintiffs argue that the State Defendants' actions should be considered against the backdrop of the geographic limitation that was previously part of Section 83, *see* Compl. ¶ 116, the SJC considered and rejected the Alliance's argument that the prior geographic limitation in Section 83 (which DPU suspended) rendered DPU's approval of the substantially-similar National Grid-Cape Wind contract the product of unlawful discrimination. *Alliance*, 461 Mass. at 172-75. Instead, the SJC concluded through its independent review of DPU's decision that "National Grid entered into PPA–1 for reasons unrelated to the geographic limitation provision, and therefore the [DPU]'s approval of PPA–1 did not violate the commerce clause." *Id.* at 174. DPU reached the same conclusion with respect to the NStar-Cape Wind contract, rejecting the Alliance's argument that NStar's decision to enter into the contract was not

[23] The First Circuit has discussed standing to raise dormant Commerce Clause claims in two cases, but neither is directly on point. In *Houlton Citizens' Coalition v. Town of Houlton*, 175 F.3d 178 (1st Cir. 1999), the court found it unnecessary to decide whether a third-party citizens' group had standing to make a dormant Commerce Clause challenge to a town ordinance limiting town waste removal to one designated local company, where another plaintiff was a local competitor who (unlike Plaintiffs here) lost out on business as a result of the ordinance. *Id.* at 182-83. More recently, in *Wine & Spirits Retailers, Inc. v. Rhode Island*, 481 F.3d 1 (1st Cir. 2007), the court held that in-state liquor store owners lacked standing to challenge a state law limiting liquor licenses to state residents, because "plaintiffs have failed to show *any* cognizable harm, direct or indirect, attributable to the residency requirements", where "the plaintiffs are all Rhode Island residents and, if favoritism exists, none of them could conceivably have suffered any cognizable harm as a result of it." *Id.* at 11-12 (emphasis in original).

voluntary because of DOER's allegedly improper role. PPA Order at 23-25, 34-38. According to DPU, NStar "voluntarily agreed to purchase output from the Cape Wind facility"; it "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"; and "it entered into the proposed PPA in order to capitalize on the Cape Wind facility's unique and significant benefits." PPA Order at 34-35. The Alliance and the other Plaintiffs chose not to appeal DPU's PPA Order, and thus they should not be permitted to re-litigate these issues here. Because Plaintiffs cannot demonstrate that the State Defendants engaged in any discrimination against out-of-state commercial interests, their dormant Commerce Clause claim fails.

CONCLUSION

For the reasons set forth above, the Complaint should be dismissed, with prejudice.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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

/s/ Timothy J. Casey
Timothy J. Casey
Assistant Attorney General