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

LEAVE TO FILE REPLY
GRANTED ON MARCH 24, 2014

STATE DEFENDANTS' REPLY BRIEF

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April 18, 2014

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")—hereby submit this reply to Plaintiffs' Memorandum of Law in Opposition to the Motions to Dismiss ("Opp'n").

I. Plaintiffs Mis-Apply *Twombly* and *Iqbal* in Opposing Dismissal of the Complaint.

To begin, Plaintiffs mis-apply the *Twombly*/*Iqbal* standard in resisting dismissal of the Complaint. The central "allegation" of the Complaint is that DOER "forced" NStar to enter into a contract with Cape Wind at a certain price. *E.g.*, Compl. ¶¶ 1-4, 12-14, 41, 64-89, 104, 116. But when State Defendants point out that, as a matter of law, DOER had no legal authority to force NStar to enter into a contract with Cape Wind—*see, e.g.*, Mass. G.L. c. 25A, § 6 (powers of DOER); Mass. G.L. c. 164, § 96 (DPU merger-approval statute); Mass. St. 2008, c. 169, § 83 ("Section 83")—Plaintiffs argue that this is a factual dispute inappropriate for resolution on a motion to dismiss. Opp'n at 2, 27, 38-39. Plaintiffs are incorrect, because when their conclusory assertion of coercion is contradicted by the indisputable statutory limits on DOER's authority, and by the documents that they themselves describe in their Complaint, such an "allegation" is not a well-pled fact that this Court need accept as true on a motion to dismiss.

The First Circuit has summarized the *Twombly*/*Iqbal* standard for resolving a motion to dismiss:

> Step one: isolate and ignore statements in the complaint that simply offer *legal labels and conclusions* or merely rehash cause-of-action elements. Step two: take the complaint's well-pled (*i.e., non-conclusory, non-speculative*) facts as true, drawing all reasonable inferences in the pleader's favor, and see if they plausibly narrate a claim for relief. Plausible, of course, means something more than merely possible, and gauging a pleaded situation's plausibility is a context-specific job that compels us to draw on our judicial experience and common sense.

Schatz v. Republican State Leadership Comm., 669 F.3d 50, 55 (1st Cir. 2012) (emphasis added) (citations and internal quotation marks omitted). In performing this review, the Court may consider "implications from documents attached to or fairly incorporated into the complaint . . . knowing that the documents may trump the complaint's allegations if a conflict exists, *e.g.*,

where a [plaintiff] has excised an isolated statement from a document and imported it into the complaint." *Id.* at 55 & n.3 (citations and internal quotation marks omitted). The Court may also consider "facts susceptible to judicial notice" and "concessions in plaintiff's response to the motion to dismiss." *Id.* at 55-56 (citations and internal quotation marks omitted).

Thus, this Court need not accept as true Plaintiffs' conclusory assertion that DOER "forced" NStar into a contract with Cape Wind. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) ("We 'are not bound [in reviewing a motion to dismiss] to accept as true a legal conclusion couched as a factual assertion.'") (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007)); *id.* at 681 ("[A]llegations [that] are conclusory [are] not entitled to be assumed true."). Instead, the Court may assume, for the purpose of this motion to dismiss only, that the actual *facts* pled by Plaintiffs are true[1]—*e.g.*, that DOER asked DPU to adopt a more exacting standard of review for merger approvals in the wake of Green Communities Act and the Global Warming Solutions Act, Compl. ¶¶ 65-66;[2] that DOER asked DPU to stay the merger-approval proceedings to take additional evidence in light of the modified standard of review, *id.* ¶ 68; that certain administration officials had made statements at various points in support of Cape Wind, *id.* ¶¶ 38-40; and that "DOER conditioned its *support* of the merger on NStar's agreement to contract with Cape Wind", Opp'n at 26 (citing Compl. ¶¶ 75, 78, 106-07) (emphasis in original).[3, 4] The Court must then assess whether these facts plausibly state a claim that the State

[1] State Defendants reserve the right, of course, to contest any and all of these facts should the case proceed beyond the motions to dismiss.

[2] As is clear from DPU's Interlocutory Order on the merger standard of review [Doc. No. 20-3], DPU *rejected* DOER's proposed standard, instead adopting an intermediate standard between what DOER wanted and DPU's previous standard. Interlocutory Order at 21-22, 24-27. Thus, to the extent Plaintiffs allege that DPU adopted DOER's proposed standard of review, *see* Compl. ¶ 66; Opp'n at 26, such an allegation is contradicted by DPU's Interlocutory Order, and thus need not be treated as true by this Court. *Schatz*, 669 F.3d at 55 & n.3.

[3] There were many other elements of the NStar-DOER Settlement Agreement that had nothing to do with Cape Wind, including NStar's commitment to provide rate relief to its customers, Settlement Agreement [Doc. No. 20-5], Art. 1, and to play a leadership role on climate change in the Commonwealth in other ways, *id.* Arts. 2.3, 2.4, 2.6.

[4] Plaintiffs also "allege" that NStar believed it to be necessary to contract with Cape Wind in order to obtain approval of their proposed merger. *See, e.g.*, Compl. ¶¶ 56-57, 68, 88. But this is another example of a "fact" that need not be accepted as true on a motion to dismiss, both because it is pure speculation, *Schatz*, 669 F.3d at 55 (stating that a speculative fact is not a well-pled one), and because, to the extent this allegation relies upon an

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Defendants either "set" the rate for a wholesale electricity sale or discriminated against out-of-state commerce. Given the express statutory limits on DOER's power, and the separate statutory role played by DPU with respect to the contract, the inescapable answer to this question is No. And it is not necessary to conduct discovery or hold a trial to reach this conclusion. *See Schatz*, 669 F.3d at 56 ("[T]o access discovery mechanisms, a plaintiff must *first* produce a complaint that passes the plausibility test—a test that helps keep defendants from wasting time and money in discovery on 'largely groundless' claims. . . . [A] claim must have some degree of plausibility before the parties are put through their discovery paces.") (emphasis in original).

Plaintiffs' Complaint also depends heavily on blurring the lines between DOER and DPU, and suggesting that these two state agencies, despite having very different roles and functions, acted monolithically as "the state". *See, e.g.*, Compl. ¶¶ 1-4, 13-14, 89, 112, 122. In their opposition, Plaintiffs object to the State Defendants highlighting the very different and separate roles the two agencies played with respect to the contract, and try to analogize to corporate-law cases holding that corporations may not immunize themselves from liability by divvying up functions among various departments or employees. Opp'n at 27. This attempted analogy is completely inapposite. In those cases, the organizations had opportunistically divided responsibility in an attempt to avoid collective knowledge or responsibility.[5] There was no such

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interview with Tom May—the former CEO of NStar who is now the CEO of Northeast Utilities—*see* Compl. ¶ 88 & n.29, *in that same interview* May stated that "he was confident Northeast and NStar would have won approval for the merger from regulators [*i.e.*, DPU] . . . *without the settlement agreement*." Bruce Mohl, *May Describes Himself As Cape Wind Agnostic*, Commonwealth Magazine (Apr. 10, 2012), *available at* http://www.commonwealthmagazine.org/News-and-Features/Online-exclusives/2012/Spring/001-May-describes-himself-as-Cape-Wind-agnostic.aspx (emphasis added). This allegation is thus contradicted by the very document relied upon by Plaintiffs, and therefore may be disregarded by the Court. *Schatz*, 669 F.3d at 55 & n.3.

[5] *See, e.g.*, *Straub v. Proctor Hosp.*, 131 S. Ct. 1186, 1193 (2011) ("Proctor's view would have the improbable consequence that if an employer isolates a personnel official from an employee's supervisors, vests the decision to take adverse employment actions in that official, and asks that official to review the employee's personnel file before taking the adverse action, then the employer will be effectively shielded from discriminatory acts and recommendations of supervisors that were *designed and intended* to produce the adverse action.") (emphasis in original); *United States v. Bank of New England, N.A.*, 821 F.2d 844, 856 (1st Cir. 1987) ("[A] corporation cannot plead innocence by asserting that the information obtained by several employees was not acquired by any one individual who then would have comprehended its full import. Rather the corporation is considered to have acquired the collective knowledge of its employees and is held responsible for their failure to act accordingly.") (citation omitted).

tactical maneuvering here. To the contrary, each state agency merely carried out the powers and duties delegated to it by the State Legislature. DOER had no authority to approve the merger, the MOU, or the contract. *See generally* Mass. G.L. c. 25A, § 6. Indeed, it did not even have the power to impose a heightened standard of review for mergers, or to stay the merger proceedings; it merely could ask DPU to do these things as a party to the merger proceedings. DPU, for its part, similarly had no power to force NStar to enter into a contract with Cape Wind, or to set the rate at which NStar would buy energy from Cape Wind. It could only review NStar's merger request to ensure that it was "consistent with the public interest", Mass. G.L. c. 164, § 96, and review a contract submitted to it by NStar under Section 83 to ensure, after considering the potential costs and benefits, that it was a "cost effective mechanism for procuring renewable energy on a long-term basis." Section 83, ¶ 3. Neither State Defendant acting alone had the legal authority to "force" NStar to enter into a contract with Cape Wind, and Plaintiffs do not (and cannot) plausibly allege that the State Defendants acted in concert. Plaintiffs instead merely assert that DPU "ratified and propagated DOER's illegal conduct", Opp'n at 24, another conclusory assertion that this Court may disregard.[6]

In short, once the Court strips away the "labels and conclusions" and confines itself to the well-pled "factual matter" in the Complaint, what remains fails to state a plausible claim that the State Defendants either "set" the rate for a wholesale electricity sale or discriminated against out-of-state commerce. *Iqbal*, 556 U.S. at 678.

[6] Plaintiffs suggest that DOER and DPU's actions were not independent of one another, because "the Settlement Agreement expressly made the DPU's approval of the anticipated Cape Wind contract a condition of the contract's effectiveness". Opp'n at 28. This unremarkable fact in no way suggests any coordinated action between DOER and DPU. With or without the Settlement Agreement, NStar would have been required by Section 83 to submit to DPU for approval *any* long-term contract for renewal energy, with Cape Wind or any other generator. Section 83, ¶¶ 1-3.

II. Sovereign Immunity Bars Plaintiffs' Claims Because the Relevant Actions By the State Defendants Are Historical Facts.

Nothing in Plaintiffs' Opposition changes the fact that the actions taken by the State Defendants that are the basis for this lawsuit are matters of "historical fact", and therefore the relief Plaintiffs seek is "not prospective", and thus barred by the Commonwealth's sovereign immunity. *Tyler v. Massachusetts*, 2013 WL 5948092, at *2 (D. Mass. Nov. 7, 2013).

With respect to DOER, Plaintiffs *concede* that its actions are entirely complete, and that it will take no further action with respect to the contract or any other matter relevant to the Complaint: "Plaintiffs are not contending that *DOER* is causing a continuing violation of federal law." Opp'n at 26 (emphasis in original). Thus, any relief with respect to DOER would be entirely retrospective, and therefore prohibited. *Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 146 (1993) (*Ex parte Young* exception "does not permit judgments against state officers declaring that they violated federal law in the past"); *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") (emphasis added); *see also Schatz*, 669 F.3d at 55-56 (Court may consider "concessions in plaintiff's response to the motion to dismiss" in resolving motion).

With respect to DPU, Plaintiffs acknowledge that the PPA Order *already* permitted NStar to pass along to its customers the costs of the Cape Wind contract. Opp'n at 6, 8 (citing PPA Order at 185-87, 189). And DPU has already approved a tariff submitted by NStar that sets forth the formula by which NStar will recover from its customers the costs of *all* its long-term renewable energy contracts under Section 83. *See* Approval of Compliance Tariff M.D.P.U. No. 164A, D.P.U. 12-30 (Dec. 19, 2012), *available at* http://www.env.state.ma.us/DPU_FileRoom/frmDocketListSP.aspx. In the future, DPU will not be revisiting whether or how NStar can recover from its customers the costs of the Cape Wind contract, nor will it take any further action with respect to any other aspect of the NStar-Cape Wind contract.[7] Thus, DPU's approval of the NStar-Cape Wind contract is undeniably a "an

[7] All that DPU will do in the future is review annual "reconciliation" filings by NStar to make sure it is calculating its rates to customers in accordance with Tariff M.D.P.U. No. 164A, which includes the costs of *all* its long-term

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historical fact", and there is nothing left to enjoin or declare invalid with respect to its actions without granting retrospective relief, which is prohibited. *Tyler*, 2013 WL 5948092, at *2.

Plaintiffs seem to believe it is significant that the contract will last for 15 years, and that this somehow renders DPU's actions ongoing, and therefore subject to the narrow *Ex parte Young* exception to sovereign immunity. *See* Opp'n at 8-9. But in *Tyler*, the condition of probation challenged by the plaintiff was to last for *16 years*. *Tyler*, 2013 WL 5948092, at *1. That fact did not alter this Court's conclusion that the state action under review was "an historical fact", that plaintiff's requested relief was therefore "not prospective", and that the claim was thus barred by sovereign immunity. *Id.* at *2.[8]

Notably, Plaintiffs argue elsewhere in their Opposition—in opposing NStar's ripeness argument—that "all of the factual events that are necessary to determine the legality of Order 12-30 *have already occurred*." Opp'n at 20 (emphasis added). Plaintiffs acknowledge that they "are challenging the actions that state regulators *took* in forcing NStar into the Cape Wind contract and permitting NStar to pass on the costs of that contract to Plaintiffs. Each of those actions – including the DPU's passage of Order 12-30 – *has already occurred*." *Id.* (emphasis added). And they assert that "All of the events giving the existence of [liability] are *matters of historical fact*." *Id.* (quoting *Gastronomical Workers Union Local 610 v. Dorado Beach Hotel Corp.*, 617 F.3d 54, 61 (1st Cir. 2010)) (emphasis added) (alteration in original).

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renewable energy contracts. *See, e.g.*, Order, D.P.U. 13-172 (Dec. 30, 2013), *available at* http://www.env.state.ma.us/DPU_FileRoom/frmDocketListSP.aspx.

[8] State Defendants respectfully assert that Plaintiffs have completely misconstrued this Court's decision in *Tyler* by suggesting that this Court ruled the way it did "only because the state court had not yet reached a decision on the rapist's visitation rights." Opp'n at 11. That is incorrect. This Court merely observed that there was no existing case or controversy regarding a challenge to any order from the Probate Court regarding visitation, because no such order had yet been entered. *Tyler*, 2013 WL 5948092, at *2 n.3. This Court did *not* hold (or even imply) that once a visitation order entered "the plaintiff could bring suit in federal court to enjoin the ongoing application of the award of visitation rights." Opp'n at 11. Indeed, to the extent the plaintiff there would be permitted to challenge a visitation order from the Probate Court, it would be through the state-court appellate process, and resort to the federal district court would be improper—a point this Court recognized in dismissing the complaint on the alternative ground of *Burford* abstention. *Tyler*, 2013 WL 5948092, at *3. Contrary to Plaintiffs' assertion otherwise, they are in *exactly* the same position as the plaintiff in *Tyler*, alleging that they will suffer ongoing effects from state action that is entirely complete and is now "an historical fact". *Tyler*, 2013 WL 5948092, at *2.

Compare id., with *Tyler*, 2013 WL 5948092, at *2 (applying sovereign immunity because challenged state action was now "an historical fact"). Plaintiffs should not be permitted to have their cake and eat it too: they should be held to their concession that the state action they challenge here is now a matter of historical fact, and thus their claims should be barred by the Commonwealth's sovereign immunity. *See Schatz*, 669 F.3d at 55-56 (Court may consider "concessions in plaintiff's response to the motion to dismiss" in resolving motion).

CONCLUSION

For the reasons set forth above and in the Memorandum of Law in Support of State Defendants' Motion to Dismiss [Doc. No. 38],[9] the Complaint should be dismissed, with prejudice.

Respectfully submitted,

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[9] The State Defendants also join in the arguments made by Defendants Cape Wind and NStar in their memoranda in support of their motions to dismiss [Doc. Nos. 28, 42], and join in any arguments made by them in any reply briefs they may file.

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 April 18, 2014.

/s/ Timothy J. Casey
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