IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

TOWN OF BARNSTABLE, MASSACHUSETTS; HYANNIS MARINA, INC.; MARJON PRINT AND FRAME SHOP LTD.; THE KELLER COMPANY, INC.; THE ALLIANCE TO PROTECT NANTUCKET SOUND; Sandra P. TAYLOR; and Jamie REGAN, Plaintiff, 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, Defendant.	Civil Action No. 1:14-CV-10148

MEMORANDUM OF LAW IN SUPPORT OF
NSTAR ELECTRIC COMPANY'S MOTION TO DISMISS

Preliminary Statement

This suit challenges alleged actions by Massachusetts regulators that ostensibly obliged NSTAR Electric Company ("NSTAR") to execute a Power Purchase Agreement ("PPA") with Cape Wind Associates, LLC ("Cape Wind") as a condition to regulatory approval of the merger of NSTAR's parent with and into Northeast Utilities. The plaintiffs claim that the regulators' conduct violated the "dormant" Commerce Clause and the Supremacy Clause of the United States Constitution, and that the PPA the regulators insisted be executed "will . . . force[]" the plaintiffs "to bear the cost of above-market" electricity rates. Compl. ¶ 15.

NSTAR is self-evidently not a state actor and cannot have violated the Constitution. It is named here only as a "required party" under FED. R. CIV. P. 19(a). Compl. ¶ 29.

Whatever the merits of the plaintiffs' constitutional contentions, this case is not justiciable and should be dismissed. The plaintiffs' alleged "injury" is wholly speculative, and dependent upon an extensive array of contingencies that may never come to pass. The plaintiffs "will" pay above-market energy costs at some point in 2016 at the earliest, only *if* Cape Wind is actually built, *if* NSTAR actually purchases power from Cape Wind, and *if* that rate (after reduction by a host of variables) is then "above-market."

Since none of those events imposes any present injury on any plaintiff, and because no injury is inevitable, there is no live Article III "case or controversy" for this Court to resolve. Hypothetical hardship is not justiciable – either as a matter of constitutional standing or prudential considerations. To the contrary, the principle that constitutional questions should be avoided when issues are not ripe for adjudication compels dismissal of this premature action.

BACKGROUND

As recounted in Cape Wind's motion to dismiss, *see* Dkt. 28 at 1, this lawsuit is the latest in a series of challenges by the plaintiffs to Cape Wind. The Alliance to Protect Nantucket Sound and the Town of Barnstable are, for example, plaintiffs in pending litigation in the U.S. District Court for the District of Columbia raising various challenges to the administrative review and approval of Cape Wind itself. *See, e.g., Pub. Emps. for Envtl. Responsibility v. Beaudreu*, No. 10-1067, 2014 WL 985394 (D.D.C. Mar. 14, 2014); Compl. ¶ 37 & n.1. In contrast to these other challenges, this lawsuit does not challenge the construction of Cape Wind itself. Instead, it only contests the electricity rates that certain alleged NSTAR customers *may* pay *if* Cape Wind is constructed.

The plaintiffs' claims center on a proceeding before the Massachusetts Department of Public Utilities ("DPU") involving the proposed merger of NSTAR's parent and Northeast Utilities. According to the plaintiffs, in order to resolve an objection to that merger by the Massachusetts Department of Energy Resources ("DOER"), NSTAR and DOER entered into a settlement agreement on February 15, 2012. Compl. ¶ 75. Among other things, that agreement provided that NSTAR would (i) pursue a long-term renewable energy contract with Cape Wind, (ii) provide an immediate $15 million rate credit to NSTAR customers in the next monthly billing cycle, and (iii) not raise base rates to customers until after January 1, 2016 at the earliest. *See* Compl. ¶¶ 76-81; *see also* Ex. 1 (Settlement Agreement, dated Feb. 15, 2012).[1] On March 23, 2012, NSTAR and Cape Wind executed the PPA. Compl. ¶ 84. The DPU approved the merger shortly thereafter. Compl. ¶ 87.

[1] Documents that form the basis of allegations in a complaint and that are incorporated by reference therein may, of course, be considered on a motion to dismiss. *Beddall v. State St. Bank & Trust Co.*, 137 F.3d 12, 17 (1st Cir. 1998); *see also Giragosian v. Bettencourt*, 614 F.3d 25, 27-28 (1st Cir. 2010).

The plaintiffs claim that the actions of state regulators (the "State Defendants") in connection with the merger proceeding and PPA violated the "dormant" Commerce Clause because they "constituted illegal discrimination in favor of an in-state business." Compl. ¶ 1. And they claim that the same actions also violated the Supremacy Clause because they usurped the jurisdiction of the Federal Energy Regulatory Commission ("FERC") to regulate wholesale energy rates. Compl. ¶ 3. These constitutional violations, according to the plaintiffs, "will force[]"them to pay "above-market" electricity rates to NSTAR once Cape Wind is built. Compl. ¶ 4.

Whether rates paid by NSTAR customers under the PPA will in fact be "above-market" is uncertain. Under the PPA, NSTAR is only obligated to purchase power from Cape Wind if Cape Wind commences physical construction before December 31, 2015. If construction does not begin by that time, the PPA is terminated. Compl. ¶ 84; Ex. 2 (PPA) § 2.2(g). If Cape Wind is timely built, the PPA provides that NSTAR will purchase 27.5% of its output, up to a total 129 megawatts. Compl. ¶ 86; Ex. 2 (PPA) §§ 1, 4.1. If Cape Wind does not operate at its full capacity of 468 megawatts, however, the total energy that must be purchased by NSTAR is reduced proportionally. Ex. 2 (PPA) §§ 1, 4.10.

The plaintiffs, customers of NSTAR on Cape Cod, claim that they will be harmed by the PPA because of the energy rates they will pay "due to increased energy costs" paid by NSTAR under the PPA as compared with available renewable energy alternatives. Compl. ¶¶ 93, 95, 110-111, 120-121. In particular, the plaintiffs claim that NSTAR "was able" to purchase renewable energy from land-based generators in September 2010 for 10.5 cents per kilowatt hour, as compared to the base price of 18.7 cents per kilowatt hour contemplated by the NSTAR

-Cape Wind PPA. *Id.* ¶¶ 57, 93. According to the plaintiffs, this disparity is especially unfair "[i]n light of falling gas prices." *Id.* ¶ 94.

But the PPA makes clear that 18.7 cents per kilowatt hour is not, in fact, the final price to be paid by NSTAR for Cape Wind power. As set out in the PPA, NSTAR will purchase energy at the *lesser* of: (i) 18.7 cents per kilowatt hour, *minus* certain amounts based on Cape Wind's eligibility for tax credits and savings from favorable debt financing; and (ii) the price that would yield the net revenue stream required for Cape Wind to realize a 10.75% rate of return. Ex. 2 (PPA) Ex. E App. X at 1-4. The lesser of these two alternatives will then be reduced by any payments received by Cape Wind for the sale of energy in the New England's Forward Capacity Market. *Id.* § 5.1(a), Ex. E at 1.[2] And it will be further reduced if Cape Wind's production exceeds its target in any given year, in which case Cape Wind will credit 50% of the production surplus to NSTAR in the next billing cycle without charge. *Id.* Ex. E, App. Y at 1.

The PPA identifies numerous other contingencies that will affect the rate that NSTAR will pay Cape Wind for energy. Perhaps most important, the PPA requires Cape Wind to maintain its status as a qualifying facility before FERC and to "obtain and maintain any requisite authority" from FERC to sell electricity at market-based rates or otherwise obtain an exemption from FERC. *Id.* § 3.4(l). In other words, Cape Wind must obtain approval from FERC to sell electricity at market rates. And as even the DPU recognized when it approved the PPA, its approval did "not encompass a determination of the rate at which the power would be sold, which is subject to the jurisdiction of [FERC]." Ex. 3 (excerpt of DPU Order Approving NSTAR-Cape Wind PPA, D.P.U. 12-30) at 17 n.25.

[2] The Forward Capacity Market is a regional energy market operated by ISO New England that is designed to ensure sufficient energy capacity for the region in future years at competitive prices. *See* http://iso-ne.com/markets/othrmkts_data/fcm/index.html.

ARGUMENT

The plaintiffs' claims are not justiciable and should be dismissed. The plaintiffs' alleged harm – namely, the increased energy costs they claim they will be forced to pay if the Cape Wind Facility is built and if Cape Wind charges an above-market rate to NSTAR that NSTAR then passes on to its customers – depends on uncertain events in the future. Because these injuries are neither impending nor inevitable, there is no "live grievance" for the Court to resolve. *See McInnis-Misenor v. Me. Med. Ctr.*, 319 F.3d 63, 67 (1st Cir. 2003) (dismissing complaint for lack of standing at the pleadings stage).

The standing inquiry asks "whether the plaintiff has alleged such a personal stake in the outcome of the controversy as to warrant invocation of federal-court jurisdiction." *Id.* (quoting *Warth v. Seldin*, 422 U.S. 490, 498-99 (1975)) (internal quotation marks and alterations omitted). The plaintiffs bear the burden of showing that they have "suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant, and that the injury fairly can be traced to the challenged action and is likely to be redressed by a favorable decision." *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 472 (1982) (internal quotation marks and citations omitted).

Moreover, because the plaintiffs here allege a threat of *future* injury, they "must show that the threatened injury is impending and concrete, sufficient to constitute 'injury in fact.' There must be some immediacy or imminence to the threatened injury." *McInnis-Misenor*, 319 F.3d at 68 (internal citations omitted); *see also Lake Carriers Ass'n v. MacMullan*, 406 U.S. 498, 506 (1972) (a declaratory judgment action presents a justiciable controversy only when "there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment"). As applied here, that means the

"asserted harm [must have] matured sufficiently to warrant judicial intervention." *McInnis-Misenor*, 319 F.3d at 69 (quoting *Warth*, 422 U.S. at 499 n. 10).

To establish the justiciability of a case or controversy based on the prospect of *future* harm, the plaintiffs must show "both the fitness of the issues for judicial decision and the hardship . . . of withholding court consideration." *Abbott Labs. v. Gardner*, 387 U.S. 136, 149 (1967). "Fitness" typically turns on "finality, definiteness, and the extent to which resolution of the challenge depends upon facts that may not yet be sufficiently developed." *Ernst & Young v. Depositors Econ. Prot. Corp.*, 45 F.3d 530, 535 (1st Cir. 1995). The "critical question" in the "fitness" inquiry is whether the claim involves "uncertain and contingent events that may not occur as anticipated or may not occur at all." *Id*. at 536 (quoting *Mass. Ass'n of Afro-Am. Police, Inc. v. Boston Police Dep't*, 973 F.2d 18, 20 (1st Cir. 1992)). The "hardship" inquiry, in turn, asks whether "the challenged action creates a direct and immediate dilemma for the parties." *Id.* at 535 (internal quotation marks omitted). "[B]oth prongs of the test ordinarily must be satisfied in order to establish ripeness." *Id.*

The plaintiffs' claims in this case fail to satisfy either prong of this dual inquiry. The "critical questions" posed by this lawsuit all involve "uncertain and contingent events" that may never come to pass. And the hardship the plaintiffs claim is anything but "direct and immediate." Any "dilemma" posed by rates to be set with reference to multiple variables – and subject to FERC jurisdiction in all events – is both hypothetical and will not arise at the earliest until 2016. The Court should therefore dismiss the Complaint in its entirety.

I. Plaintiffs' Claims Are Not Fit for Judicial Review.

The plaintiffs' claims in this case are not "fit" for judicial review because they depend on "uncertain and contingent events that may not occur as anticipated or may not occur at all." *Ernst & Young*, 45 F.3d at 536. To be fit for review, the "factual and legal dimensions" of a

plaintiff's claims must be "developed enough to permit adjudication." *Gun Owners' Action League v. Swift*, 284 F.3d 198, 207-08 (1st Cir. 2002). Even if the legal questions presented by a particular claim may not be affected by future factual development, the claim is not justiciable "if the anticipated events and injury are simply too remote to justify contemporaneous adjudication." *Ernst & Young*, 45 F.3d at 537.

If an alleged injury is "contingent on events that may not occur as anticipated," the claim is not fit for review. *Lincoln House, Inc. v. Dupre*, 903 F.2d 845, 847 (1st Cir. 1990) (plaintiff's civil RICO claim was not justiciable because the only injury alleged was its "hypothetical inability to recover" from the defendants if plaintiff was successful in a separate pending lawsuit); *see also McInnis-Misenor*, 319 F.3d at 72-73 (ADA claim against Maine Medical Center based on a non-wheelchair accessible delivery recovery area was not justiciable because the plaintiff was not, and might not become, pregnant; there was no way of knowing if she did become pregnant, whether the recovery area would be accessible at that time; and she may not need the recovery area if and when she did give birth). A claim is likewise unfit for review if the alleged injury depends on future events "that may not occur in the form forecasted." *Ernst & Young*, 45 F.3d at 537-38 ("[E]ven though the legal question presented by E&Y's facial challenge to the Depco Act is not likely to be placed in sharper focus by further factual development, the claim is unripe because any application of the challenged statute to E&Y depends on serendipitous events that many not occur as anticipated – or may not occur at all.").

Here, the plaintiffs' alleged injuries depend entirely on uncertain and contingent events, and facts that have not yet occurred. Whatever their true motives may be, the plaintiffs do not

plausibly claim harm from the construction of Cape Wind in this case.[3] Instead, they claim harm from the electricity rates they *may* pay *if* Cape Wind is built, *if* NSTAR purchases electricity from Cape Wind, *if* that purchase price is higher than what NSTAR could *then* pay for alternative sources, and *if* the plaintiffs then actually do pay an above-market electricity rate. *See* Compl. ¶¶ 6, 93, 95, 110-11, 120-21. That is not a harm the plaintiffs have suffered to date. It is not a harm that is "imminent." It is instead a harm that may never occur.

Both the Complaint and the PPA confirm the chain of contingencies on which the plaintiffs' harm is premised. Cape Wind first must begin construction by December 31, 2015. *See* Compl. ¶ 84; Ex. 2 (PPA) § 2.2(g).[4] If that occurs, the ultimate rate to be paid by NSTAR under the PPA must then be determined. This rate will depend on multiple contingencies, including Cape Wind's qualification for tax credits, reductions in debt financing costs, ability to realize a 10.75% rate of return, and sale of capacity in the Forward Capacity Market. *See* Ex. 2 (PPA) § 5.1(a), Ex. E at 1, Ex. E App. X at 1-4. The effective cost of power purchased by NSTAR from Cape Wind will also be affected by credits for wind outperformance, *see id.* Ex. E,

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[3] The plaintiffs' allegation that they will "experience negative impacts to the environment, regional economy, historic and cultural resources, public safety, and recreational opportunities, resulting from the Cape Wind project," Compl. ¶ 98, is entirely conclusory, unsupported by any factual allegations, and entitled to no weight. *See Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009). Nor is there any allegation that any "negative impacts" from the construction of Cape Wind are the result of the State Defendants' actions challenged in this case. In any case, the plaintiffs' claims of harm from the construction of Cape Wind are the subject of a separate pending lawsuit in the U.S. District Court for the District of Columbia. *See Beaudreu*, 2014 WL 985394.

[4] Quite apart from this lawsuit, whether Cape Wind can meet even the December 31, 2015 construction deadline is subject to an array of contingencies, including obstacles posed by the plaintiffs here. For example, a recent decision by the U.S. District Court for the District of Columbia directed the Fish and Wildlife Service and the National Marine and Fisheries Service to conduct additional reviews of the Cape Wind project in order to comply with the Endangered Species Act. *See Beaudreu*, 2014 WL 985394, at *42. Cape Wind must also secure more than $2 billion in financing, acquire key project components for construction (some of which take more than a year to manufacture and deliver), and complete pre-construction geological and geotechnical work at the site. *See* Ex. 2 (PPA) § 3.1; Dkt. #31 (Aff. of James S. Gordon) ¶¶ 4, 7.

App. Y at 1, and the total amount of kilowatt hours that NSTAR actually purchases from Cape Wind, *see id.* §§ 1, 4.10.

The authority of Cape Wind to sell electricity to NSTAR at market-based rates is also subject to review by FERC. *Id.* § 3.4(l); *see City of Fall River v. FERC*, 507 F.3d 1, 6-7 (1st Cir. 2007) (challenge to FERC's conditional approval of a liquefied natural gas terminal unripe because the approval was expressly conditioned on approval by the U.S. Coast Guard and the Department of the Interior). As both the State Defendants and Cape Wind itself acknowledge, the wholesale rate that Cape Wind ultimately charges NSTAR is subject to FERC's jurisdiction. Cape Wind "must and will in the future seek market-based rate authorization from FERC before it commences sales under the negotiated rate of its contract with NSTAR." Dkt. 28 (Cape Wind Mem. in Supp. of Mot. to Dismiss) at 7; *see also* Dkt. 38 (State Defendants' Mem. in Supp. of Mot. to Dismiss) at 10-11, 21.

And even assuming Cape Wind passes muster with FERC, the plaintiffs still will not have suffered any injury unless (i) the rate to be paid by NSTAR is higher than rates for energy from other sources when it is paid; and (ii) the difference between the rate paid by NSTAR under the PPA and the cost of alternative sources materially affects the prices actually paid by the plaintiffs in their NSTAR bills. Thus, regardless of whether gas prices are "falling" now, as the plaintiffs claim, it is quite simply impossible to tell whether the plaintiffs' NSTAR bills in 2016 and beyond are "above-market" until that time. *See Clapper v. Amnesty Int'l*, 133 S. Ct. 1138, 1148 (2013) ("[A] highly attenuated chain of possibilities . . . does not satisfy the requirement that threatened injury must be certainly impending.").[5]

[5] The plaintiffs' claim that gas prices are "falling" is demonstrably false. ISO New England reports that natural gas prices *increased* by 55% in 2013. ISO New England, *2013 Wholesale Electricity Prices in New England Rose on Higher Natural Gas Prices*, Mar. 18,

In these circumstances, it is impossible to predict now how each of these contingencies will be resolved, which means it is impossible to resolve whether (if at all) the plaintiffs will have been harmed by any of the State Defendants' actions that they seek to challenge. *See Lincoln House*, 903 F.2d at 847. NSTAR may never purchase power from Cape Wind. And even if it does, the rate it pays must be determined under the PPA and is subject to regulation by FERC. That rate may be competitive with other energy prices at the time, and it may not affect the plaintiffs' bills. The possibility that the future harm the plaintiffs identify may never come to pass thus "augurs against a finding of fitness." *McInnis-Misenor*, 319 F.3d at 72. The plaintiffs' claims are accordingly unfit for review.

II. Plaintiffs Will Suffer No Direct and Immediate Hardship.

The plaintiffs also will suffer no hardship by the denial of judicial review. The hardship analysis requires a showing of the "direct and immediate harm" that the plaintiffs will suffer if they are denied judicial review now. *Ernst &* Young, 45 F.3d at 536. If the alleged harm has not yet occurred, it must at a minimum be "inevitable," *id.*, because the hardship analysis is "unconcerned with wholly contingent harm," *McInnis–Misenor*, 319 F.3d at 73; *see also Lincoln House*, 903 F.2d at 848 ("[S]ince the only damages alleged by Lincoln cannot yet be proven, never having been incurred – and since they may never be incurred – Lincoln can hardly claim hardship if consideration of them is presently withheld.").

The harm alleged here falls squarely on the "contingent" side of the ledger. As discussed above, the plaintiffs' hypothetical alleged injuries have not occurred and may never occur. The higher energy costs that they claim they will pay in the future will only come to pass if a long

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2014, http://www.iso-ne.com/nwsiss/pr/2014/2013_price%20release_03182014_final.pdf. In any case, whatever the present trajectory of gas prices may be, the self-evident volatility of these prices simply confirms that the competitiveness of the plaintiffs' NSTAR bills in 2016 cannot be determined until 2016 at the earliest.

series of contingent events occur, and if the market ultimately determines that the rate paid by NSTAR to Cape Wind beginning in 2016 is above-market. And if, after Cape Wind is built, the plaintiffs can plausibly allege they there are paying above-market energy costs because of the State Defendants' conduct, there is no reason to believe that this Court could not resolve that claim at the time. *See McInnis-Misenor*, 319 F.3d at 73 ("There is every reason to think the district court could timely resolve a case if McInnis-Misenor becomes pregnant and effectuate a remedy."). The plaintiffs will accordingly suffer no hardship by denial of review now.

CONCLUSION

For the reasons set forth above, the plaintiffs' claims present no case or controversy requiring judicial review, and are therefore not justiciable. The Court should accordingly dismiss the Complaint with prejudice.

Respectfully submitted,

/s/ John D. Donovan, Jr.
John D. Donovan, Jr. (BBO #130950)
Matthew L. McGinnis (BBO #666120)
Kevin Budris (BBO #680075)
ROPES & GRAY LLP
800 Boylston Street
Boston, MA 02199
(617) 951-7000
john.donovan@ropesgray.com
matthew.mcginnis@ropesgray.com
kevin.budris@ropesgray.com

Duncan R. MacKay (BBO #556069)
Northeast Utilities Service Company
107 Selden Street
Berlin, CT 06037
(860) 665-3495
mackadr@nu.com

Counsel for NSTAR Electric Company

April 3, 2014

CERTIFICATE OF SERVICE

I hereby certify that this document(s) filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF) and paper copies will be sent to those indicated as non registered participants on April 3, 2014.

/s/ John D. Donovan, Jr.
John D. Donovan, Jr.