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

LEAVE TO FILE GRANTED BY ORDER DATED MARCH 24, 2014

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

The plaintiffs' complaint alleges a single, future and utterly contingent injury: "the increased electricity costs that NSTAR customers such as Plaintiffs *will* be forced to pay as a result of the illegal, above-market contract [between NSTAR and Cape Wind]." Compl. ¶ 4 (emphasis added). That claim of injury is reiterated in their Opposition brief, which asserts that each plaintiff "*will* suffer a concrete and particularized injury in fact because, as end-use customers of NSTAR, they *will* directly bear the above-market cost of the Cape Wind contract," Opp. at 43 (emphases added) – or at least they will *if* it takes effect in 2016 and *if* its calculated rate is then above then prevailing "market" rates.

Those two unambiguous descriptions of the plaintiffs' damages are at war with the Opposition's new invention of an injury claimed to be "current." Internal inconsistency aside, the Opposition now *disclaims* injury defined as the difference between what customer *will* pay under the Cape Wind contract and then prevailing "market rates," in favor of harm described as the difference between what customers will pay and what they "could have" paid if NSTAR had agreed to a different deal with a different wholesale power supplier. Opp. at 21.

That just substitutes hypothetical damages for future, speculative harm. But neither is the sort of "actual" or "imminent" injury required to create a live "current" controversy.

The plaintiffs' separate claim that "hardship" justifies exercise of the Court's power is equally contrived. "Hardship" focuses on a "judgment's usefulness" for the purpose of resolving a "'direct and immediate dilemma' for the parties." But it does not reduce to mere "convenience." Here, the "dilemma" the plaintiffs posit is neither direct nor immediate. And they identify no "hardship" to *themselves*. They point only to ostensible "hardship" *Cape Wind* might suffer if adjudication is adjourned until a live dispute erupts. That usurps an argument they cannot personally advance, which just corroborates the "convenience" root of their claim.

The absence of either current injury or present hardship means the Court need not – and should not – resolve the constitutional questions raised in this action. These questions may never need to be resolved because the plaintiffs may never be harmed. Cape Wind may never be built. And even if it is, the electricity rate paid by NSTAR and its customers may not be "above-market" as the plaintiffs predict.

Simply stated, essential facts necessary to resolve this phantom dispute do not yet exist. There is no case or controversy for this Court to resolve today, and the Complaint should be dismissed.

ARGUMENT

The plaintiffs contend that their Complaint presents a "concrete controversy" because (i) their claims are "fit" for review and are not "abstract," Opp. at 19, and (ii) Cape Wind – not the plaintiffs – would suffer "hardship" if the Court were to dismiss their claims, Opp. at 22–23. Both arguments are meritless.

I. Plaintiffs Have Not Identified Any Actual or Imminent Injury, and Their Claims Are Not Fit for Judicial Review.

A claim is only "fit" for review if its "factual and legal dimensions . . . [are] developed enough to permit adjudication." *Gun Owners' Action League v. Swift*, 284 F.3d 198, 207–08 (1st Cir. 2002). Not so here. The cornerstone of the plaintiffs' claims are the "above-market" rates they "will" pay to NSTAR because of the Cape Wind contract – rates that will not be paid until 2016 at the earliest. Opp. at 43 ("The Complaint alleges that each Plaintiff will suffer a concrete and particularized injury in fact because, as end-use customers of NSTAR, they will directly bear the above-market cost of the Cape Wind contract."). But neither the Complaint nor the Opposition brief identifies any present injury, and the plaintiffs do not and cannot contend that "above-market" electricity rates are imminent. *See McInnis-Misenor v. Me. Med. Ctr.*, 319 F.3d

63, 67 (1st Cir. 2003) ("A litigant bears the burden of showing that he personally has 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." (citation and quotation omitted)).

The plaintiffs are thus left to manufacture a new alleged injury "based on the difference between the deal NSTAR *did* strike in 2012 and the deal NSTAR *could have* struck in 2012." Opp. at 21. But that is not a present injury to the plaintiffs either. It is a mere hypothesis. And it does not make their claims justiciable. Actual or imminent injury to the plaintiff – not hypothetical harm predicated on events that did *not* transpire – is the hallmark of a justiciable case or controversy. *McInnis-Misenor*, 319 F.3d at 68 (in order for a case to be ripe, "[t]here must be some immediacy or imminence to the [plaintiffs'] threatened injury" (citations omitted)). But the plaintiffs identify no looming threat. To the contrary, they do not even dispute the long chain of contingencies that must each occur before any plaintiff is handed an "above-market" bill. Among other things, Cape Wind must begin construction by December 31, 2015. Then the actual rate to be paid by "end-use customers" like the plaintiffs will be determined under a host of factors. Then Cape Wind must obtain FERC approval to sell electricity at market-based rates. Even then, the plaintiffs will only suffer calculable harm if the rate ultimately set matches their prediction of "above-market" tariffs in 2016 or beyond. *See generally* Mem. in Supp. at 8–9.

The plaintiffs offer no authority for the proposition that speculation about future economic harm poses a ripe case or controversy now. The cases they cite simply say that a case is justiciable so long as there is a *present* injury to the plaintiff that could be redressed now by a favorable court decision. *See Verizon New Eng., Inc. v. Int'l Brotherhood of Elec. Workers*, 651

F.3d 176, 189 (1st Cir. 2011) (present injury arose from four specific violations of collective bargaining agreement); *Gastronomical Workers Union Local 610 v. Dorado Beach Hotel Corp.*, 617 F.3d 54, 61 (1st Cir. 2010) (present injury from defendants' failure to have funded pension at adequate levels); *Nkihtaqmikon v. Impson*, 503 F.3d 18, 28, 32 (1st Cir. 2007) ("procedural injury" from BIA's failure to consider environmental and other considerations under three statutes "has already occurred"); *Riva v. Commonwealth of Massachusetts*, 61 F.3d 1003, 1012 (1st Cir. 1995) (plaintiffs' present injury was "the adoption of a discriminatory [retirement] plan" that violated the Age Discrimination in Employment Act as well as "the state's possible endorsement of age discrimination and the prejudice that underlies it").[1] The phrases from those cases they highlight – to the effect that the facts relevant to liability have already occurred – are throwaways as applied here: liability does not exist without actual injury, which is not adequately alleged. In every case they cite the court defined the injury as having *already* occurred.

In sharp contrast here, the plaintiffs' failure to identify a present, actual or imminent injury means their claims are not fit for review.

[1] Two cases cited by the plaintiffs involve well-established exceptions to the ripeness doctrine inapplicable here. The plaintiffs' First Amendment claim in *Sindicato Puertorriqueo de Trabajadores v. Fortuno* was justiciable because "when free speech is at issue, concerns over chilling effect call for a relaxation of ripeness requirements." 699 F.3d 1, 9 (1st Cir. 2012) (citation and quotation omitted). And the U.S. Attorney's claim in *Stern v. U.S. Dist. Court for the Dist. of Mass.* was justiciable because it concerned a "pre-enforcement challenge to a law carrying significant penalties," a recognized exception to the requirement of an actual injury. 214 F.3d 4, 11 (1st Cir. 2000); *see also* Erwin Chemerinsky, Federal Jurisdiction § 2.4.2 (6th ed. 2012)) ("[W]hen an individual is faced with a choice between forgoing allegedly lawful behavior and risking likely prosecution with substantial consequences, the federal courts will deem the case ripe rather than insist that an individual violate the law and risk the consequences.").

II. Plaintiffs Admit They Will Suffer No Direct and Immediate Hardship by Denial of Review Now.

The "hardship" inquiry of the First Circuit's "ripeness" jurisprudence is "wholly prudential." *Mangual v. Rotger-Sabat*, 317 F.3d 45, 59 (1st Cir. 2003). It turns on whether the challenged conduct "creates a 'direct and immediate' dilemma for the parties." *Verizon New Eng.*, 651 F.3d at 188 (1st Cir. 2011), *quoting Ernst & Young v. Depositors Econ. Prot. Corp*., 45 F.3d 530, 535 (1st Cir. 1995). Accordingly, "[t]he hardship analysis focuses on direct and immediate harm" to the plaintiffs. *McInnis-Misenor*, 319 F.3d at 73 (citation and quotation omitted); *see also Ohio Forestry Ass'n v. Sierra Club*, 523 U.S. 726, 733 (1998) (ripeness inquiry requires consideration of "whether delayed review would cause hardship to the plaintiffs"). Thus, while the inquiry also asks whether a judgment will be "useful" to the parties now – as opposed to exclusively considering whether "denying relief would impose hardship" – the required utility is in avoiding the "direct and immediate dilemma" posed by the challenged action. *Verizon New Eng*., 651 F.3d at 188. The plaintiffs' claim of "convenience" alone will not do.

Here, the plaintiffs will not suffer any hardship by denial of judicial review now. And there is nothing "useful" about deciding a case that poses no "direct and immediate dilemma" to any party. Indeed, the plaintiffs identify *neither* hardship *nor* utility to *them* from either failing to act or from exercising jurisdiction. They point only to the hardship *Cape Wind* might suffer if the contract is later declared invalid, and they highlight the related utility to *Cape Wind* from an early decision that avoids that risk. But the plaintiffs are in no position to arrogate those arguments to themselves. Subjunctive arguments hold little persuasive power; *a fortiori* they do not resonate when advanced under an assumed identity.

There is no reason to think that this Court will not be able hear and resolve the plaintiffs' constitutional claims *if* Cape Wind is built, *if* NSTAR purchases power from Cape Wind, *if* FERC authorizes Cape Wind to sell electricity at market rates, and *if* the ultimate rate paid by the plaintiffs is in fact "above-market" as they predict. But until that time (if ever), this Court may avoid a "gratuitous journey[] through forbidding constitutional terrain." *Ernst & Young*, 45 F.3d at 538 (1st Cir. 1995). The plaintiffs' claims should be dismissed.

CONCLUSION

For the reasons set forth above and in NSTAR's opening memorandum, the Court should dismiss the Complaint.

Respectfully submitted,

/s/ John D. Donovan, Jr.
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April 18, 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 18, 2014.

/s/ John D. Donovan, Jr.
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