No. 15-20

THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

ALLCO FINANCE LIMITED,
Plaintiff-Appellant

v.

ROBERT KLEE, in his Official Capacity as Commissioner of the Connecticut Department of Energy and Environmental Protection,
Defendant-Appellee

and

NUMBER NINE WIND FARM LLC, FUSION SOLAR CENTER LLC, and the CONNECTICUT OFFICE OF CONSUMER COUNSEL,
Intervenors-Appellees,

Appeal from the United States District Court for the District of Connecticut
No. 3:13-cv-01874
Hon. Janet Bond Arterton

SUPPLEMENTAL BRIEF OF APPELLANT

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APPELLANT'S SUPPLEMENTAL BRIEF

Plaintiff-Appellant Allco Finance Limited submits this supplemental brief addressing the issues requested by the Court's order dated June 24, 2015.

Introduction

Allco's claim is straightforward and does not rely on the private right of action under Section 210(h)(2)(B) of the Public Utility Regulatory Policies Act ("PURPA"). Rather it is based on the Federal Power Act ("FPA"), and the grant of jurisdiction to the Federal district courts in 16 U.S.C. § 825p and 28 U.S.C. § 1331. Recent examples of similar claims invalidating State action under the FPA for crossing the bright line regulating wholesale energy transactions are *Nazarian* and *Solomo*n, which have been discussed in the briefing.[1]

I. Does the private right of action contained in 16 U.S.C. § 824a-3(h)(2)(B) provide Allco with a right of action to bring some or all of its claims?

Section 210(h)(2)(B) of PURPA (16 U.S.C. § 824a-3(h)(2)(B)) is not the basis on which Allco brings its two claims, nor would it provide a

[1] *PPL EnergyPlus LLC v. Nazarian,* 753 F.3d 467 (4th Cir. 2014), *petitions for cert. filed,* Nos. 14-614, 14-623 ("*Nazarian*") and *PPL EnergyPlus LLC v. Solomon*, 766 F.3d 241 (3d Cir. 2014), *petitions for cert. filed*, Nos. 14-634, 14-694 ("*Solomon*").

basis to bring such claims. Count I is a straightforward pre-emption claim for regulating wholesale sales, which could be brought regardless of Allco's status as a small power producer. Allco's status as a small power producer, however, as discussed in the briefing, is relevant to Allco's Article III standing and to explain why Allco's injury is redressable. Count II is a claim under 42 U.S.C. § 1983, which is wholly outside Section 210(h)(2)(B).

II. Did Allco petition the FERC to enforce the requirements of 16 U.S.C. § 824a-3(f)?

No, Allco has not petitioned the Federal Energy Regulatory Commission (the "FERC") to enforce the requirements of 16 U.S.C. § 824a-3(f) against the Appellee-Defendant.

III. Does a failure to comply with the administrative exhaustion provision of 16 U.S.C. § 824a-3(f) strip the Court of subject matter jurisdiction to consider claims brought under 16 U.S.C. § 824a-3(h)(2)(B)?

No, for six straightforward reasons. First, Allco's claims are not brought under Section 210(h)(2)(B) of PURPA and, as such, the administrative exhaustion requirement is irrelevant. Second, a Section 210(h)(2) action is an action commandeering a State to implement federal law, which is unconstitutional. Third, actions related to the

operations of a Qualifying Facility ("QF") subject to part II of the FPA (which would be at issue) are outside the scope of Section 210(h)(2) and would fall under Section 210(h)(1). Fourth, there is nothing in the statute that prevents direct declaratory action or other action based upon the rules issued by the FERC under Section 210(a). Fifth, the action in Section 210(h)(2) is narrowly drawn and by its plain language would not apply here. Sixth, even if relevant, the administrative exhaustion requirement in Section 210(h)(2)(B) is not jurisdictional.

A. Allco's claims are not brought under Section 210(h)(2)(B) of PURPA and as such the administrative exhaustion requirement is irrelevant.

In *Niagara Mohawk Power Corp. v. FERC*, 306 F.3d 1264, 1269-1270 (2d Cir. 2002), the plaintiff alleged the state regulatory authority and its commissioners "violated PURPA and related implementing regulations" by determining a minimum 6 cents avoided cost rate. *See*, 306 F.3d at 1270. This Court held that because the plaintiff had not satisfied the administrative exhaustion requirement of Section 210(h)(2)(B), its claim should have been dismissed for lack of subject matter jurisdiction. *Id.* In so holding, however, this Court discussed *Freehold Cogeneration Assoc. L.P. v. Bd. Regulatory Comm'rs,* 44 F.3d

1183, 1191 (3d Cir. 1995) ("*Freehold*") and recognized that not all claims related to PURPA must satisfy the administrative exhaustion requirement. Specifically, this Court stated that the administrative exhaustion requirement of Section 210(h)(2)(B) was applicable because the issue involved "a state rate-setting regulation promulgated pursuant to § 210(f), the provision that § 210(h)(2)(B) petitions are intended to enforce." *Id.*

The claims here are different than in *Niagara*. Count I is a claim based upon the FPA and the Supremacy Clause. The references to PURPA in Count I are to explain Allco's standing, injuries and that the State's only authority to compel a specific wholesale energy transaction is under PURPA (of which Allco's QFs are intended beneficiaries). The Commissioner has freely admitted that he was not acting under PURPA, nor could he in the case of the Number Nine wind farm, which is not a QF. Thus the administrative exhaustion requirement does not apply to Count I.

Count II is based upon 42 U.S.C. § 1983 for a violation of Allco's right to compel the purchase of the energy and capacity from its Trumbull solar project. The administrative exhaustion requirement

does not apply to a claim under 42 U.S.C. § 1983 for two simple reasons. *First*, the plain language of the statute limits the administrative exhaustion requirement to actions to enforce the "implementation" requirements of Section 210(f)[2], which a claim under 42 U.S.C. § 1983 is not. *Second*, the FERC has no ability to bring claims under 42 U.S.C. § 1983 so it would be futile to require a complainant to bring a claim to FERC over which it was powerless to take action.

B. A Section 210(h)(2) action is an action commandeering a State to implement federal law, which is unconstitutional.

In *FERC v. Mississippi*, 456 U.S. 742, 751, 760-761 (1982), the Supreme Court did not strike down Section 210(f) because the FERC interpreted it as not requiring a State to do anything that it was not voluntarily doing already, i.e., being a forum for disputes. The Court did not address the constitutionality of Section 210(h)(2) as against a State. But a Section 210(h)(2) action is, by definition, an action that seeks to commandeer a State to adopt as its own a federal regulatory scheme. "[T]he Constitution has never been understood to confer upon

[2] Section 210(h)(2)(A)(i) and (ii) distinguish between actions to enforce Section 210(f) and actions involving "operations" of a QF or an electric utility under Section 210(h)(1). Thus an action under Section 210(h)(2) would not cover issues addressed in Section 210(h)(1). To conclude otherwise would render Section 210(h)(2)(A)(i) superfluous.

Congress the ability to require the States to govern according to Congress' instructions." *New York v. United States*, 505 U.S. 144, 162 (1992). Thus the Supreme Court has struck

> "down federal legislation that commandeers a State's legislative or administrative apparatus for federal purposes. *See, e.g., Printz*, 521 U.S., at 933, 117 S. Ct. 2365, 138 L. Ed. 2d 814 (striking down federal legislation compelling state law enforcement officers to perform federally mandated background checks on handgun purchasers); *New York, supra*, at 174-175, 112 S. Ct. 2408, 120 L. Ed. 2d 120 (invalidating provisions of an Act that would compel a State to either take title to nuclear waste or enact particular state waste regulations)."

Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2602 (2012).

"'[T]he Constitution simply does not give Congress the authority to require the States to regulate.' *New York*, 505 U.S., at 178, 112 S. Ct. 2408, 120 L. Ed. 2d 120. That is true whether Congress directly commands a State to regulate or indirectly coerces a State to adopt a federal regulatory system as its own." *Nat'l Fed'n of Indep. Bus.,* 132 S. Ct. at 2602.

Section 210(f)(1) commands States to implement federal law. In light of *Printz* and its progeny it is questionable whether the *FERC v. Mississippi* holding regarding Section 210(f)(1) is still good law. Even if it is, an action under Section 210(h)(2) is, by definition, an action to

commandeer a State to implement requirements of federal law. Such an action is unconstitutional under the precedent cited above. "[T]he Constitution simply does not give Congress the authority to require the States to . . . adopt a federal regulatory system as its own." *Nat'l Fed'n of Indep. Bus.,* 132 S. Ct. at 2602. (internal citations and quotations omitted.) As such, it is not a remedy at all, and cannot form the basis for an exhaustion requirement.

C. Actions related to the operations of a QF subject to part II of the FPA (which would be at issue) are outside the scope of Section 210(h)(2).

Section 210(h)(1) provides for a separate action for "any operations of an electric utility, a qualifying cogeneration facility or a qualifying small power production facility which are subject to the jurisdiction of the Commission under part II of the Federal Power Act." Operations of a QF include the QF's put right at the long-term rate under 18 C.F.R. §292.304(d)(2)(ii), i.e., an electric utility's must-buy obligation, as well as any wholesale sale to an electric utility. *See*, FPA §§ 205, 206; 18 C.F.R. § 292.601; *Joint Explanatory Statement of the Committee of Conference,* H.R. Conf. Rep. 95-1750, H.R. Conf. Rep. No. 1750, 95th Cong., 2nd Sess. 1978, 1978 U.S.C.C.A.N. 7797 *("Conference Report"* or

"Conf. R.") at 7833; *See also*, *Policy Statement Regarding the Commission's Enforcement Role Under Section 210 of the Public Utility Regulatory Policies Act of 1978*, 23 FERC P61,304, 61,646 (1983) ("*FERC Policy Statement*").

Section 210(h)(1) expressly provides that the rules that the FERC has prescribed under Section 210(a) are rules under the FPA to the extent they relate to such operations. This aspect is crucial. This provision specifically throws suits related to the operations of a QF back into the general rule of Section 825p of the FPA giving broad and exclusive jurisdiction to the federal courts. It also plainly shows that by including actions related to operations of a QF (which is what would be at issue) in Section 210(h)(1), those actions cannot also be included in Section 210(h)(2).[3]

[3] Section 210(h)(1) does not limit its enforcement to being brought by any specific person or against any particular person. Although Section 210(h) is titled "Commission enforcement," the private right of action in Section 210(h)(2)(B) demonstrates that more than Commission enforcement is contemplated. In addition, the plain language of Section 210(h)(1) speaks in terms of "enforcement" but does not limit its applicability to enforcement by the Commission. The specific expression of the words "Commission may enforce" are within Section 210(h)(2), but their absence in Section 210(h)(1) means that the plain language of the statute does not restrict a Section 210(h)(1) enforcement action to just the Commission. Moreover, it is easy to understand why

D. There is nothing in Section 210 of PURPA that prevents direct declaratory action or other action based upon the rules issued by the FERC under Section 210(a).

Federal district courts have jurisdiction under 16 U.S.C. § 825p to hear cases under the FPA (and rules enforceable under the FPA) and under federal law generally under 28 U.S.C. § 1331, including cases involving federal rules issued under Section 210(a) of PURPA.[4] Consider the situation where a QF seeks to sell its energy to an electric utility in a State that chose the Section 210(f) implementation option of resolving disputes on a case-by-case basis applying the FERC's rules, or completely refuses to be commandeered into implementing federal law. Thus there would be no "requirements" established by a State regulatory authority under Section 210(g)(2) that a QF could seek to

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Section 210(h) would include words related to Commission enforcement because unlike any other person, the powers of the Commission (and its ability to take action) is constrained to only those powers granted by Congress. A person such as Allco is not so organically constrained. *But see*, FERC Policy Statement at 61,646 (describing as exclusive to the FERC an action under Section 210(h)(1)).

[4] The rules issued by the FERC under 210(a) need no implementation by a State under Section 210(f) to be effective and binding. *See, e.g.*, Conf. R. at 7831 stating Section 210 requires the "States and utilities follow rules which the [FERC] is to prescribe." Section 210(m)(7) is also a recognition that a state regulatory authority need not be involved in the PURPA process at all, and that a QF's put right, or legally enforceable obligation, is imposed directly by Section 210.

enforce.[5] The dispute involves the operations of a QF because it involves the sale of the QF's energy. Because the dispute involves application of the FERC's rules it involves a federal question. Where does/must the QF bring the dispute? There is no provision in Section 210 that covers what is a most common scenario. On the other hand, there is nothing in the statute that restricts federal jurisdiction over such a claim either under 16 U.S.C. § 825p or 28 U.S.C. § 1331, and this Court should not invent one. Moreover, as explained herein in IV.D.2, Congress made it clear that the expression of specific remedies only applied in the specifically enumerated circumstances and did not restrict jurisdiction to other rate related claims. *See*, Conf. R. at 7818.

E. The plain language of Section 210(h)(2) is narrowly drawn and would not apply here.

The plain language of Section 210(h)(2) shows that it applies in a very narrow set of circumstances. By its plain terms it is an action to

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[5] Section 210(g)(2) only applies to actions that satisfy two requirements. First, there must be a requirement established by a State regulatory authority. Second, the action must be one that seeks to enforce that requirement. Those requirements can only be established pursuant to notice and comment proceedings under Section 210(f), but do not need to be established at all. *See*, *FERC v. Mississippi*, 456 U.S. at 751. If those two criteria are met then any such action shall be brought in the manner and under the requirements of an "action" under Section 123.

enforce the requirements of Section 210(f)(1). Section 210(f)(1) requires that a State "after notice and opportunity for public hearing, implement" the FERC's rules or revised rules issued under Section 210(a). Even if relevant and constitutional, what exactly would such an action look like under the circumstances of this case? Would it be that the Commissioner failed to provide notice and an opportunity for a public hearing before compelling the wholesale contract, or before violating Allco's rights with respect to the Trumbull solar project? Or would it be that the Commissioner's actions constituted proceedings implementing Section 210(a) and the Commissioner got it wrong? Even with doing various contortions, it is difficult to see how the facts of this case could be twisted into an action to commandeer a State to affirmatively implement FERC's rules under Section 210(a).

F. Even if relevant the administrative exhaustion requirement in Section 210(h)(2)(B) is not jurisdictional.

The administrative exhaustion requirement is not jurisdictional but rather a claims-processing rule, which reinforces why it makes little sense to bring an action under 42 U.S.C. § 1983 first to the FERC. Since *Niagara* was issued, the Supreme Court has adopted a "readily administrable bright line" for distinguishing statutory limitations that

are jurisdictional from those that are, instead, "claim-processing rules" that "seek to promote the orderly progress of litigation by requiring that the parties take certain procedural steps at certain specified times," *Arbaugh v. Y&H Corporation*, 546 U.S. 500, 516 (2006). The Supreme Court's bright line requires that, unless Congress has "'clearly state[d]'" that the statutory limitation is jurisdictional, "'courts should treat the restriction as nonjurisdictional in character.'" *Sebelius v. Auburn Reg'l Med. Ctr.*, 133 S. Ct. 817, 824 (2013) (quoting *Arbaugh*, 546 U.S. at 515-16). Though Congress need not "incant magic words in order to speak clearly," there must be clear contextual evidence that "Congress intended a particular provision to rank as jurisdictional." *See id.* (Citations omitted).

Here, when Congress intended a provision to be limiting in PURPA, it specifically used such language. *See*, *e.g.,* Section 123(a) of PURPA (now codified in 16 U.S.C. §2633(a)) which expressly limits federal jurisdiction: "*Notwithstanding any other provision of law*, no court of the United States shall have jurisdiction over . . ."). (Emphasis added); *see also*, the Conference Report's discussion of Section 123 (stating "the jurisdiction of the Federal courts is limited by this

section") and Section 210(g)(2) ("Any such action shall be brought *only* in the manner…") (Emphasis added). Congress did not use such limiting language in Section 210(h)(2)(B). Thus, a failure to comply with the administrative exhaustion provision of 16 U.S.C. § 824a-3(f), even if relevant, would not strip the Court of subject matter jurisdiction.

IV. Does the existence of the private right of action contained in 16 U.S.C. § 824a-3(h)(2)(B) foreclose the availability of other rights of action, including an implied right of action under PURPA and rights of action under 42 U.S.C. §§1983 and 1988?

No. As discussed above, Allco is not relying on Section 210(h)(2)(B). As the *Nazarian* and *Solomon* cases demonstrate, status as a small power producer is not needed to bring a pre-emption claim. In addition, as discussed above, a Section 210(h)(2)(B) action is an action commandeering a State to "implement" federal law, which is unconstitutional. A right to enforce an unconstitutional provision is not a remedy at all and thus cannot foreclose the availability of other rights under federal law.

A. This Court has already recognized that an action under Section 210(h)(2) is neither an exclusive nor comprehensive PURPA remedy.

Even if the Section 210(h)(2)(B) action were constitutional, as this Court acknowledged in *Niagara*, certain actions lie under PURPA beyond the confines of Section 210(h)(2), such as actions to enforce the exemption from State laws contained in Section 210(e)(1), even though such actions are not expressly delineated under the statute. *See*, *Niagara*, 306 F. 3d at 1270 discussing *Freehold*. *See also, Indep. Energy Producers Ass'n v. California Pub. Utils. Comm'n*, 36 F.3d 848, 856, fn. 13 (9th Cir. 1994) ("*Indep. Energy*") (noting that the specific state jurisdictional limitation in Section 210(g) "says nothing about the state's authority to oversee QF status determinations, which is covered by section 201" of PURPA.)

B. Section 210(h)(1) provides for direct enforcement.

As discussed above, Section 210(h)(1) provides for a separate action for "any operations of an electric utility, a qualifying cogeneration facility or a qualifying small power production facility which are subject to the jurisdiction of the Commission under part II of the Federal Power Act." Operations of a QF include the QF's put right

at the long-term rate under 18 C.F.R. §292.304(d)(2)(ii), i.e., an electric utility's must-buy obligation, as well as any wholesale sale to an electric utility. Section 210(h)(1) expressly provides that the rules that the FERC has prescribed under Section 210(a) are rules under the FPA to the extent they relate to such operations, specifically placing such suits into the general rule of Section 825p of the FPA giving broad and exclusive jurisdiction to the federal courts. Section 210(h)(1) also plainly demonstrates that by including actions related to operations of a QF (which is what would be involved) in Section 210(h)(1), those actions cannot also be included in Section 210(h)(2).

C. Even if constitutional, Section 210(h)(2)(B) would not preclude other rights of action.

"Once a plaintiff demonstrates that a statute confers an individual right, the right is presumptively enforceable by §1983." *See Gonzaga University v. Doe*, 536 U.S. 273, 284 (2002). "The defendant may defeat this presumption by demonstrating that Congress did not intend that remedy for a newly created right . . . evidence of [which] may be found directly in the statute creating the right, or inferred from the statute's creation of a comprehensive enforcement scheme that is *incompatible* with individual enforcement under § 1983." *City of Rancho Palos Verdes*

v. Abrams, 544 U.S. 113, 120 (2005) (internal citations and quotations omitted; emphasis added.)[6] "The ordinary inference that the remedy provided in the statute is exclusive can surely be overcome by textual indication, express or implicit, that the remedy is to complement, rather than supplant, § 1983." *Id.* at 122. The burden to demonstrate that Congress has expressly withdrawn the remedy is on the defendant. *Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103, 106 (1989). "We do not lightly conclude that Congress intended to preclude reliance on § 1983 as a remedy for the deprivation of a federally secured right." *Id.* at 107. Moreover, the mere existence of a comprehensive enforcement does not preclude 1983 remedies. *Id.* at 108.

Congress enacted PURPA to address the conditions in the electricity market that evolved since the passage of title II of the FPA in 1935. *See, New York v. FERC*, 535 U.S. 1, 9 (2002). QFs are intended beneficiaries of PURPA, and the FPA as amended by PURPA. *See*, *Freehold,* 44 F.3d at 1191 ("Section 210 of PURPA sets forth the benefit

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[6] For example, the Supreme Court foreclosed a § 1983 action in *Smith v. Robinson*, 468 U.S. 992, 1012 (1984) because a § 1983 action "would . . . render superfluous most of the detailed procedural protections outlined in the statute"). *See, Smith*, 468 U.S. at 1011-1012. That is not the case here. Nothing in Section 210(h)(2)(B) would be superfluous if a cause of action under Section 1983 or a pre-emption claim were allowed.

to which QFs are entitled. It creates a market for their energy."); *S. Cal. Edison Co. v. FERC*, 195 F.3d 17, 23 (D.C. Cir. 1999) ("in deciding to confer substantial benefits on 'small power production facilities' Congress took care to define the class of potential beneficiaries.")

The Supreme Court has observed that "in all of the cases in which we have held that § 1983 is available for violation of a federal statute, we have emphasized that the statute at issue . . . did not provide a private judicial remedy (or, in most of the cases, even a private administrative remedy) for the rights violated." *City of Rancho Palos Verdes v. Abrams*, 544 U.S. at 121. That is the case here. While Section 210(h)(2) of PURPA provides for a remedy, that remedy only covers a very narrow circumstance, and does not address many of the rights of QFs under the FPA or Section 210 of PURPA as this Court recognized in *Niagara*, the Ninth Circuit recognized in *Indep. Energy* and the Third Circuit recognized in *Freehold*.

Far from supplanting other rights of action, Section 210(h)(2), if constitutional, would provide a complementary process in a narrow set of specifically defined circumstances in order to force a State to "implement" FERC's rules through a public notice and hearing process.

D. There are other signposts in the FPA and PURPA that support the conclusion that the expression of the Section 210(h)(2)(B) action did not preclude others.

1. *Section 824v*.

When Congress wanted to exclude private right of actions in Part II of the FPA it specifically so stated. *See*, 16 U.S.C. 824v. In FPA Section 824v Congress gave authority to the FERC to prescribe rules prohibiting market manipulation, which rules then would have the force of law. Congress did the same thing here with respect to prescribing rules to encourage small power production. In FPA Section 824v(b), however, Congress expressly stated that no private action could be maintained under FPA Section 824v. Congress make no such statement when it came to Section 210.

2. *Section 123 and the Conference Report*.

Similarly, when Congress intended to impose limits on actions under PURPA, it used such express language.[7] However, the most telling indicator that Congress did not intend for its specifically stated judicial review provisions to be exclusive is Congress' statement to that

[7] *See*, Section 123(a) of PURPA discussed above. *See also*, Section 307 of PURPA (now codified at 15 U.S.C §3207) which used almost identical *express* language as Section 123.

effect in the Conference Report. Section 210 of PURPA contains two express provisions regarding judicial review. Those are contained in Section 210(g) and (h). The Conference Report, however, contains no discussion specifically on Sections 210(g) or (h). But the text of Section 210(g) cross-references itself to the judicial review provisions of Section 123 in which Congress outlined specific judicial review provisions for specific circumstances. In the section of the Conference Report dealing with Section 123's judicial review provisions, Congress made it clear that the express judicial review provisions were neither comprehensive nor exclusive. Rather Congress made it clear that the expression of those specific provisions only applied in the specifically enumerated circumstances and did not restrict jurisdiction to other rate related claims. *See*, Conf. R. at 7818 ("With regard to this section, the conferees do not intend to foreclose Federal courts from jurisdiction to review cases involving electric utility rates which do not involve actions arising under subtitle A, B, or C.") That statement from the Conference Report eliminates any doubt that the expression of specific enforcement provisions in PURPA displaced other actions.

CONCLUSION

For the foregoing reasons and the reasons stated in Allco's opening and reply briefs, this Court should reverse the judgment of the District Court.

Respectfully submitted this 17th day of July 2015.

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ATTORNEY FOR APPELLANT

CERTIFICATE OF SERVICE

I hereby certify that on the 17th day of July, 2015, I caused to be served, using the Court's CM/ECF system, a copy of the foregoing Supplemental Brief of Appellant to all counsel of record.

/s/ Thomas Melone