UNITED STATES DISTRICT COURT

DISTRICT OF MASSACHUSETTS

ALLCO RENEWABLE ENERGY LIMITED, Plaintiff, v. MASSACHUSETTS ELECTRIC COMPANY D/B/A NATIONAL GRID, and ANGELA O'CONNOR, JOLETTE WESTBROOK and ROBERT HAYDEN, in official capacity as Commissioners of the Massachusetts Department of Public Utilities, and JUDITH JUDSON, in her official capacity as Commissioner of the Massachusetts Department of Energy Resources, Defendants.	Case No. 1:15-cv-13515-PBS **PLAINTIFF'S MEMORANDUM IN OPPOSITION TO NATIONAL GRID'S MOTION TO DISMISS THE FIRST AMENDED COMPLAINT**

SUMMARY

National Grid's motion to dismiss makes it clear that the only issue in dispute in this case between National Grid and Allco Renewable Energy Limited ("Allco") is the *rate* at which National Grid is obligated to purchase electricity from Allco's solar electric generating facilities. National Grid argues that the rate must be the rate specified in regulations of the Massachusetts Department of Public Utilities ("MDPU"), which is the short-run rate. Allco asserts that the rate must be the long-run rate required by federal law in 18 C.F.R. § 292.304(d)(2)(ii).

National Grid's motion to dismiss is easily dispatched. Federal law is the supreme law of the land and federal law makes it clear that Allco, not the utility or a state commission, has the option to select whether avoided cost pricing is based upon a short-run rate (i.e., 18 C.F.R. §292.304(d)(1) and 18 C.F.R. §292.304(d)(2)(i)), or a long-run rate (i.e, 18 C.F.R. §292.304(d)(2)(ii)). Because it is Allco's option, and

Allco has selected the long-run rate, federal law makes it clear which rate applies, and that is the long-run rate required by 18 C.F.R. §292.304(d)(2)(ii). Thus, National Grid's motion to dismiss must be denied.

Once that legal issue is decided, this case must focus on discovery related to the factual issue of what that long-run rate actually is. On that factual issue, National Grid's *Cape Wind* proceeding and the MDPU's findings therein are relevant, as will be other long-term forecasts possessed by National Grid and the MDPU, and expert opinions from the parties.

INTRODUCTION

This case involves a threshold issue of federal law: does a State have the power to relieve National Grid of direct obligations imposed upon National Grid under federal law. Plaintiff contends that the answer is obvious: federal law is the supreme law of the land, and a State has no authority to alter, amend or repeal federal laws. Any such State law or rule is pre-empted.

This case was brought to enforce National Grid's obligations under the Public Utility Regulatory Policies Act ("PURPA") to purchase power from Allco's small solar renewable generators (known as "qualifying small power production facilit[ies]" under the statute and "Qualifying Facilities" or "QFs" under regulations of the Federal Energy Regulatory Commission (the "FERC"), *see* 16 U.S.C. § 796(17)(C); 18 C.F.R. § 292.203). We are all faced with the environmental challenge of climate change. Solar electric generating projects, such as those involved here, are at the forefront of changing the way we receive and generate electricity. For every day that such projects are delayed, more carbon dioxide and other pollutants are pumped into our environment by utilities and the fossil fuel generators from which they buy power.

Allco looks to combat climate change by seeking to enforce rights of the Federal Power Act's special class of QF electric generators. By enforcing laws that benefit renewable energy QFs on a broad scale, Allco's goal is to open up markets broadly to QFs by overcoming both the reluctance of utilities to purchase from QFs, and the reluctance of State commissions to enforce the rights of QFs conferred by Congress under the Federal Power Act and PURPA.[1]

President Barack Obama has rightly called climate change the greatest threat to national security. We now regularly see reports of collapsing glaciers in Antarctica caused by the continued inaction on climate change.[2] Since 2001 the planet has experienced 15 of the hottest years on record[3], and recently scientists at the US National Oceanographic and Atmospheric Administration have debunked the notion that climate change has slowed down.[4] Last June researchers at Stanford, Princeton and Berkeley issued a report that the effects of climate change, pollution and deforestation have caused the Earth to enter the beginning of a new extinction phase where humans could be among the first casualties.[5] The evidence that dramatic and immediate action is required continues every day.

National Grid's refusal to purchase energy from the Plaintiff's solar energy generation facilities violates federal law and also stands as an obstacle to efforts to combat climate change. Allco contends that National Grid's obligations are imposed under federal law and that it is no defense to claim that it can ignore those obligations based upon a State of Massachusetts' rule.

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[1] *See, e.g., Winding Creek Solar, LLC v. Florio*, 3:13-cv-04934 (N.D. Cal. filed October 24, 2013); *Allco Finance Ltd. v. Klee,* No. 15-20 (2d Cir. filed January 2, 2015); *Allco Finance Ltd. v. Klee*, No. 3:15-CV-00608 (D. Conn. filed April 26, 2015). Allco's recent efforts in that regard include this case and participating as *amicus curiae* before the United States Supreme Court in *Hughes v. Talen Energy Marketing, LLC*, Docket Nos. 14-614 and 14-623.

[2]http://www.nytimes.com/2014/11/23/us/climate-change-threatens-to-strip-the-identity-of-glacier-national-park.html?_r=0, http://www.nytimes.com/aponline/2015/02/27/world/ap-aa-antarctica-glacial-melting.html, http://www.nytimes.com/2015/06/02/science/mount-everest-glaciers-melt-disappear-nepal.html.

[3]https://www.whitehouse.gov/blog/2016/01/25/chart-week-2015-was-earths-hottest-year-record.

[4]http://m.smh.com.au/environment/us-meteorological-body-finds-global-warming-slow-down-did-not-happen-20150605-ghgvhn.html.

[5] http://www.bbc.com/news/science-environment-33209548.

National Grid and Allco agree on two important points, however. *First*, there exists a legally enforceable obligation for National Grid to purchase all energy and capacity from Allco's QFs. *Second*, the appropriate purchase price or rate is equal to National Grid's "avoided costs."

Allco and National Grid diverge on the remaining two issues—the methodology that must be used to calculate avoided costs, which is a question of law, and the result of the appropriate methodology, which is a question of fact. FERC's regulations provide for three methodologies for the calculation of avoided costs: (1) a short-term as-delivered rate for energy only, *see* 18 C.F.R. § 292.304(d)(1); (2) a short-term as-delivered rate for energy and capacity during the term committed to by the QF, *see* 18 C.F.R. § 292.304(d)(2)(i); and (3) a long-term forecasted rate over the term committed to by the QF for energy and capacity, *see* 18 C.F.R. § 292.304(d)(2)(ii).[6]

The answer as to which one applies here is simple. FERC's regulations provide that the QF gets to select which of the three methodologies to use, not the electric utility and not the State of Massachusetts. Allco selected the third option—the long-term forecasted rate over a specified term of 25 years. In its brief, National Grid does not engage that central legal issue. Allco was entitled to, and did, select the long-term forecasted rate under 18 C.F.R. § 292.304(d)(2)(ii). National Grid's failure to engage the point is not surprising because there is no winning response. The law is crystal clear on that point.

Section 210(f) of PURPA gives States a choice to issue rules, or not issue

[6] "Energy costs are the variable costs associated with the production of electric energy," *e.g.*, "the cost of fuel, and some operating and maintenance expenses. Capacity costs are … associated with providing the capability to deliver energy," *e.g.*, "the capital costs of facilities." PURPA Rulemaking, 45 Fed. Reg. at 12,216.

rules. States have the ability to do nothing and stay out of PURPA altogether.[7] But what States may not do is issue rules that *contradict* or *conflict with* PURPA. *Allco Finance Limited v. Klee*, 805 F.3d 89, 97 (2d Cir. 2015) ("A state's ongoing obligation under § 824a-3(f) to 'implement' PURPA regulations can be accomplished in a variety of ways, but, at a minimum, § 824a-3(f) undoubtedly prevents states from violating § 824a-3(a).") And, because states' *only* authority to regulate wholesale electricity sales is derived from PURPA, *see* 16 U.S.C. § 824(b) (giving FERC exclusive jurisdiction over wholesale sales of electricity in interstate commerce); *Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953, 966 (1986),[8] any state rule that conflicts with PURPA is necessarily preempted.

The foundation of National Grid's motion to dismiss is its reliance on an MDPU rule purporting to eliminate a QF's option to select the long-term forecasted rate under 18 C.F.R. § 292.304(d)(2)(ii). Once that defense is stripped away, which it must be, National Grid's liability is self-evident, leaving the factual issue to be resolved—the long-term forecasted rates as they existed in 2011. It is on the issue of the correct long-term forecasted rates that the MDPU proceeding on the Cape Wind project is relevant. National Grid's discussion of its basic service obligations and its short-term purchases are simply irrelevant. One of the central pieces, if not the central piece, of evidence introduced in the *Cape Wind* proceeding to support National Grid's approval request were *forecasts* of National Grid's long-term costs

[7] "[T]he Constitution has never been understood to confer upon Congress the ability to require the States to govern according to Congress' instructions." *New York v. United States*, 505 U.S. 144, 162 (1992). "'[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. v. Sebelius*, 132 S. Ct. 2566, 2602 (2012).

[8] Electricity in interstate commerce includes "in-state" electricity that is commingled with electricity transmitted out of state. *See FPC v. Fla. Power & Light Co.*, 404 U.S. 453, 462-63 (1972). Thus, a wholesale sale of electricity is under federal jurisdiction so long as the electricity is transmitted on lines interconnected with an interstate grid, as will be the case here.

for energy and capacity, and the costs that it would "avoid" by buying renewable energy. Allco did not create a long-run rate of its own making. National Grid simply does not like the fact that its own evidence is being used against it.

STATEMENT OF THE CASE

A. Federal Statutory and Regulatory Background.

In enacting PURPA in 1978, Congress sought to "accelerate the development of renewable and inexhaustible energy sources and convert the national economy to alternative fuel resources in order to protect this country from the problems that would otherwise occur." H.R. Rep. No. 95-496(IV), at 14 (1977), *reprinted in* 1978 U.S.C.C.A.N. 8454, 8466. Toward that end, Congress established a framework designed to make it easier for certain small renewable generators (known as "qualifying small power production facilit[ies]" under the statute and "Qualifying Facilities" or QFs under FERC's regulations, *see* 16 U.S.C. § 796(17)(C); 18 C.F.R. § 292.203) to sell their electricity to utilities, and to provide economic incentives for parties to develop such generation facilities. As relevant here, the federal regulatory framework has three key attributes.

First, under PURPA, electric utilities *must* purchase *any* electricity produced by QFs. Congress directed that "[FERC] shall prescribe . . . such rules as it determines necessary to encourage … small power production . . . which rules *require* electric utilities to offer to – … (2) *purchase electric energy from [qualifying] facilities*." 16 U.S.C. § 824a-3(a) (emphasis added). FERC subsequently adopted rules providing that "*[e]ach electric utility shall purchase* . . . *any energy and capacity* which is made available from a qualifying facility . . . [d]irectly to the electric utility." 18 C.F.R. § 292.303(a)(1) (emphasis added).[9] This regulation creates a "legally enforceable obligation" on the utility to purchase the electricity generated by a QF, typically through a contract. *See* 18 C.F.R. § 292.304(d)(2); *Power Res. Grp., Inc. v. Pub. Util. Comm'n of Tex.*, 422 F.3d 231, 233 (5th Cir. 2005); *JD Wind 1 LLC*, 130 FERC ¶ 61,127 (2010), at para. 7.

Second, Congress specified that the rate that utilities are required to pay QFs shall not "exceed[] the incremental cost to the electric utility of alternative electric energy." 16 U.S.C. § 824a-3(b). FERC subsequently adopted rules providing that, for facilities constructed after PURPA's passage, the required rate for purchases must "*equal[] the avoided costs*" of the utility. 18 C.F.R. § 292.304(b)(2) (emphasis added); *see also Am. Paper Inst., Inc. v. Am. Elec. Power Serv. Corp.*, 461 U.S. 402, 417 (1983) (upholding FERC regulation requiring utilities to purchase electricity from qualifying facilities at the "maximum rate authorized by PURPA," namely a utility's full avoided cost). As FERC explained in promulgating its rules, "'avoided costs [are] the costs to an electric utility of energy or capacity or both which, but for the purchase from a qualifying facility, the electric utility would generate or construct itself or purchase from another source." PURPA Rulemaking, 45 Fed. Reg. at 12,216. Recognizing that requiring a utility to pay its full avoided costs "would not directly provide any rate savings to electric utility consumers," FERC nevertheless "deemed it more important … [to] 'provide a significant incentive for a higher growth rate'" of QF power production, because "the nation as a whole will benefit from the decreased reliance on scarce fossil fuels … and the more efficient

[9] There are two limits to the mandatory purchase obligation, neither of which is relevant here. First, a utility has no obligation to purchase electricity in excess of what it needs to meet its load. *See* Small Power Production and Cogeneration Facilities; Regulations Implementing Section 210 of the Public Utility Regulatory Policies Act of 1978, 45 Fed. Reg. 12,214, 12,219 (Feb. 25, 1980) ("PURPA Rulemaking"). Second, a utility has no purchase obligation if FERC has made the findings described in 16 U.S.C. § 824a-3(m)(1). However, FERC has not made those findings regarding QFs of less than 20 megawatts ("MWs") in National Grid territory.

use of energy." *Am. Paper Inst.*, 461 U.S. at 415 (quoting 45 Fed. Reg. at 12,222).

Third, FERC adopted a rule allowing QFs to choose among several different ways of calculating a utility's avoided costs. *See* 18 C.F.R. § 292.304(d). As relevant here, when a QF is selling to a utility pursuant to a legally enforceable obligation (such as a contract) over a specified term, FERC provided that "the rates for such purchases shall, *at the option of the qualifying facility* exercised prior to the beginning of the specified term, be based on *either*: (i) The avoided costs calculated at the time of delivery; or (ii) The avoided costs calculated at the time the obligation is incurred." 18 C.F.R. § 292.304(d)(2) (emphasis added).

In other words, a QF can elect to have the utility's avoided costs (and thus its rate) determined on an ongoing basis, calculated when electricity is physically delivered to the utility; *or* the QF can instead elect to have the utility's avoided costs calculated when the contract is entered, so that it can "establish a fixed contract price for its energy and capacity at the outset of its obligation." PURPA Rulemaking, 45 Fed. Reg. at 12,224. FERC understood that "in order to be able to evaluate the financial feasibility of a [QF], an investor needs to be able to estimate, with reasonable certainty, the expected return on a potential investment before construction of a facility." *Id.* at 12,218. Ensuring that a QF can elect to have "avoided costs calculated at the time the obligation is incurred," 18 C.F.R. § 292.304(d)(2)(ii), provides this reasonable certainty. FERC recognized that the utility's avoided costs calculated at the time the obligation is incurred may turn out to be quite different than the utility's avoided costs at the time the power is actually delivered. PURPA Rulemaking, 45 Fed. Reg. at 12,224. But FERC believed that "in the long run, 'overestimations' and 'underestimations' of avoided costs will balance out," and it emphasized "the need for certainty with regard to return on investment in new technologies." *Id.*; *see also JD Wind*, 130 FERC ¶ 61,127 (2010), at para. 23 ("[FERC] has … consistently affirmed the right of QFs to long-term avoided cost contracts … with rates determined at the time the obligation is incurred, even if the avoided costs at the time of delivery ultimately differ from those calculated at the time the obligation is originally incurred.").

B. State Implementation of PURPA

PURPA directed state regulatory agencies, such as the MDPU, to adopt rules that comply with and implement FERC's regulations. *See* 16 U.S.C. § 824a-3(f)(1); *see also* PURPA Rulemaking, 45 Fed. Reg. at 12,216 ("each State regulatory authority … must implement these rules."). And, because states' *only* authority to regulate wholesale electricity sales is derived from PURPA, *see* 16 U.S.C. § 824(b) (generally giving FERC exclusive jurisdiction over wholesale sales of electricity in interstate commerce); *Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953, 966 (1986), any state rule that conflicts with PURPA is necessarily preempted.

A State, however, is not required to do anything by Section 210(f). *See*, fn. 6, *supra*. But what States may not do is issue rules that *contradict* or *conflict* with PURPA. *Allco Finance Limited v. Klee*, 805 F.3d 89, 97 (2d Cir. 2015) ("A state's ongoing obligation under § 824a-3(f) to 'implement' PURPA regulations can be accomplished in a variety of ways, but, at a minimum, § 824a-3(f) undoubtedly prevents states from violating § 824a-3(a)".) Thus a State may not eliminate a QF's ability to select one of the three options that a QF has for determining avoided costs.

C. Massachusetts' Implementation of PURPA.

When PURPA was enacted, utilities generally built and owned their own generating plants or procured power through contracts with other utilities. Thus, in determining an avoided cost rate to be fixed at the time a PURPA contract was signed, utilities developed long-term forecasting models that predicted the costs they would incur in building new generation plants or procuring electricity from another utility, but for the electricity provided by QFs. As FERC explained in the PURPA Rulemaking, 45 Fed. Reg. at 12,216:

If, by purchasing electric energy from a [QF], a utility can reduce its

> energy costs or can avoid purchasing energy from another utility, the rate for a purchase from a [QF] is to be based on those energy costs which the utility can thereby avoid. If a [QF] offers energy of sufficient reliability … to permit the purchasing electric utility to avoid the need to construct a generating unit, to build a smaller, less expensive plant, or to reduce firm power purchases from another utility, then the rates for such a purchase will be based on the avoided capacity and energy costs.

Beginning in the 1990s, competitive wholesale power markets began to emerge, in which power producers independent of utilities compete to sell their electricity to utilities. The development of competitive wholesale power markets—and, in particular, the development of a real-time spot market for electricity—changed the way utilities determined their avoided costs. In a competitive market, the avoided cost of energy at any given moment is the market price of electricity at that moment. Such real-time calculation of avoided costs is appropriate for a QF that has chosen to have its rate based on the utility's avoided costs "calculated at the time of delivery." 18 C.F.R. § 292.304(d)(1); 18 C.F.R. § 292.304(d)(2)(i). However, for a QF that chooses to have its rate based on the utility's avoided costs "calculated at the time the obligation is incurred," *id.* § 292.304(d)(2)(ii), it is necessary to forecast future market prices for electricity. To do so, utilities generally rely on published long-term forward prices for competitive wholesale markets, together with computer models that determine the break-even price point for a hypothetical new power plant.

For example, when National Grid and the MDPU engaged in the cost-benefit analysis of the Cape Wind project, National Grid and the MDPU used three long-term market forecasts as the baseline to determine what costs National Grid would avoid if it entered into a power purchase agreement with Cape Wind. National Grid provided forecasts by Energy Security Analysis, Inc., and Levitan & Associates, Inc. Cape Wind submitted a forecast prepared by Charles River Associates. *See*, National Grid's Mot. To Dismiss, Exhibit M, at pp. 90-91.

Those forecasts are based upon the ISO-NE market and take into account the fact that National Grid is a load-serving entity. Plaintiff has little doubt that National Grid will produce various long-term market forecasts during discovery that project National Grid's long-term avoided costs. Even now, National Grid is gearing up to evaluate responses to its recent request for proposals, no doubt using updated forecasts of its long-term projects costs.

In order to purportedly implement PURPA, the MDPU has promulgated rules at 220 CMR 8.00 *et seq.* 220 CMR 8.03(1)(b)1 provides for only "the Short-run Rate," which is a spot rate price. 220 CMR 8.05(2) defines the Short-run Rate for facilities of 1 MW or greater as "the rates equal to the payments received by [National Grid] from [ISO-NE]." That rule does provide for an avoided cost rate, but it is an avoided cost rate whose values cannot be determined in advance of the actual delivery of electricity. Thus, the rate is not based on avoided costs "calculated at the time the obligation is incurred." 18 C.F.R. § 292.304(d)(2)(ii). Instead, the avoided costs will fluctuate over time with market conditions and can only be "calculated at the time of delivery." *Id.* § 292.304(d)(1).

ARGUMENT

Under the Supremacy Clause, state laws that conflict with federal law or that "stand as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 373 (2000), are preempted and invalid. *See Pac. Gas & Elec. Co. v. State Energy Res. Conserv. & Dev. Comm'n*, 461 U.S. 190, 204 (1983) ("Even where Congress has not entirely displaced state regulation in a specific area, state law is preempted to the extent that it actually conflicts with federal law."). Federal regulations with the force of law have the same preemptive power as a federal statute. *Reid v. Johnson & Johnson*, 780 F.3d 952, 964 (9th Cir. 2015); *City of N.Y. v. FCC*, 486 U.S. 57, 63-64 (1988).

I. NATIONAL GRID IS OBLIGATED TO PURCHASE AT ITS LONG-TERM FORECASTED RATE, NOT THE RATE SET BY THE MDPU.

Under PURPA, electric utilities must purchase any electricity produced by QFs. National Grid is an electric utility under PURPA. *See*, 16 U.S.C. § 2602(4). As FERC's regulations make plain, the rates at which a utility purchases under a legally enforceable obligation "shall, *at the option of the qualifying facility* exercised prior to the beginning of the specified term, be based on *either*: (i) The avoided costs calculated at the time of delivery; or (ii) *The avoided costs calculated at the time the obligation is incurred*." 18 C.F.R. § 292.304(d)(2) (emphasis added); *see also Hydrodynamics*, 146 FERC ¶ 61,193 (2014) at para. 31 ("Under Section 292.304(d) of the Commission's regulations, a QF also has the unconditional right to choose whether to sell its power … at a forecasted avoided cost rate."); *JD Wind*, 130 FERC ¶ 61,127 (2010) at para. 23. The MDPU Rule, standing alone, is plainly illegal under that rule.

The MDPU Rule allows only a rate that is "calculated at the time of delivery," 18 C.F.R. § 292.304(d)(1), § 292.304(d)(2)(i). As a result, the rate under the MDPU Rule is not a forecasted rate based on the utility's avoided costs "*calculated* at the time the obligation is incurred." 18 C.F.R. § 292.304(d)(2)(ii) (emphasis added). Indeed, a QF selling under the MDPU Rule will have no idea what rate it will receive for its sales until it actually delivers that electricity. In short, the formula contained in the MDPU Rule offers a rate based on avoided costs "calculated at the time of delivery," 18 C.F.R. § 292.304(d)(2)(i) — *not* a rate based on avoided costs "calculated at the time the obligation is incurred." *Id.* § 292.304(d)(2)(ii).

To comply with PURPA, however, a state commission must allow a QF to elect either of these two types of rates. *Id.* § 292.304(d)(2). As FERC has previously recognized, ensuring that a QF can choose a rate based on avoided costs "calculated at the time the obligation is incurred," *id.* § 292.304(d)(2)(ii), is critical to achieving Congress's objectives in enacting PURPA. That is because, "in order to be able to evaluate the financial feasibility of a [QF], an investor needs to be able to estimate, with reasonable certainty, the expected return on a potential investment before construction of a facility." PURPA Rulemaking, 45 Fed. Reg. at 12,218. FERC "recognized that avoided costs could change over time, and that the avoided costs and rates determined at the time a legally enforceable obligation was incurred could differ from the avoided costs at the time of delivery." *JD Wind*, 130 FERC ¶ 61,127 (2010), at para. 23. If a QF were forced to contract at a rate based on avoided costs calculated at the time of delivery, it would have no idea what rate it would receive for its sales until it actually delivers that electricity, and thus could not estimate with reasonable certainty the expected return on its investment. Thus, FERC "has … consistently affirmed the right of QFs to long-term avoided cost contracts or other legally enforceable obligations *with rates determined at the time the obligation is incurred*, even if the avoided costs at the time of delivery ultimately differ from those calculated at the time the obligation is originally incurred." *Id.* (emphasis added).

Because the MDPU Rule cannot be "calculated at the time the obligation is incurred," 18 C.F.R. § 292.304(d)(2)(ii), National Grid and the MDPU cannot point to the MDPU Rule in order to excuse National Grid's non-compliance with PURPA. Under the MDPU Rule solar QFs like Allco "cannot obtain forecasted avoided cost rates, which is inconsistent with the Commission's regulations, which entitle a QF with a legally enforceable obligation to rates that, at the QF's option, are forecasted avoided cost rates." *Hydrodynamics,* 146 FERC ¶ 61,193 (2014), at para. 34.

National Grid's only retort is its meritless assertion that "FERC's PURPA regulations expressly provide that National Grid has no obligation to purchase the output of the Allco QFs at a price other than the avoided cost rate determined by the MDPU."[10] In support of that baseless claim, National Grid cites 18 C.F.R. §

[10] *See*, National Grid Brief at 11.

292.304(a)(2). National Grid must be reading from a version of 18 C.F.R. § 292.304(a)(2) that no one else knows about because 18 C.F.R. § 292.304(a)(2) says nothing about, much less "expressly" about, the MDPU short-term rate being the only avoided cost rate.[11] National Grid obviously stopped reading 18 C.F.R. § 292.304 at subsection (a) because it is subsection (d)(2)(ii) that makes it clear that Allco is entitled to select the long-term forecasted rate. There is simply no basis for National Grid's contrary assertion, as the FERC has made clear on multiple occasions. *See, e.g.*, *Hydrodynamics,* 146 FERC ¶ 61,193, at para. 34 (inability to "obtain forecasted avoided cost rates [] is inconsistent with the [FERC's] regulations."); *JD Wind*, 130 FERC ¶ 61,127 (2010), at para. 23 ("[FERC] has … consistently affirmed the right of QFs to long-term avoided cost contracts … with rates determined at the time the obligation is incurred.")

II. THE MDPU'S RULE IS PRE-EMPTED BY THE FEDERAL POWER ACT.

Even if the MDPU Rule was issued to implement PURPA, the MDPU Rule would still be preempted to the extent it conflicts with PURPA. Through the Federal Power Act, Congress has occupied the field of wholesale sales of electricity. Thus, States may not enter that field of regulation. *FPC v. S. Cal. Edison Co.*, 376 U.S. 205, 215 (1964) (Congress left "no power in the states to regulate … sales for resale in interstate commerce."); *PPL Energy Plus LLC v. Nazarian*, 753 F.3d 467, 475 (4th Cir. 2014), *cert. granted* 136 S. Ct. 382 (2015) ("A wealth of case law confirms FERC's exclusive power to regulate wholesale sales of energy in interstate commerce…."). In PURPA, Congress subsequently carved out a limited role for states to engage in some regulation of wholesale sales in order to *encourage* sales by

[11] § 292.304(a)(2) provides:

> Rates for purchases.
> (a) *Rates for purchases.*
> * * *
> (2) Nothing in this subpart requires any electric utility to pay more than the avoided costs for purchases.

certain QFs. Thus, unless a state's regulation of wholesale sales is consistent with PURPA, it falls within the field that Congress has occupied for exclusive federal regulation. There is no room in the statutory scheme for state regulations of wholesale sales that do not comply with PURPA. The MDPU Rule conflicts with the requirement that a QF has the unconditional right to have the avoided cost rate based upon a forecast of future avoided costs.

III. THE MDPU'S RULE VIOLATES PURPA BECAUSE THE RATE OFFERED IS NOT BASED ON NATIONAL GRID'S LONG-TERM AVOIDED COSTS AS REQUIRED BY 18 C.F.R. § 292.304(D)(2)(II).

As discussed above, Congress's principal purpose in passing PURPA was to encourage the development of renewable sources of generation. To do so while also leaving consumers no worse off, FERC specified that for facilities constructed after PURPA's passage, utilities were required to purchase energy and capacity at a rate that "equals the avoided costs" of the utility. 18 C.F.R. § 292.304(b)(2). The Supreme Court approved FERC's decision to set the purchase price as the utility's avoided cost, finding it "reasonable for the Commission to prescribe the maximum rate authorized by Congress and thereby provide the maximum incentive for the development of cogeneration and small power production." *Am. Paper Inst.*, 461 U.S. at 418.

FERC defined a utility's "avoided costs" as "the incremental costs to an electric utility of electric energy or capacity or both which, *but for the purchase from the qualifying facility or qualifying facilities*, such utility would generate itself or purchase from another source." 18 C.F.R. § 292.101(b)(6) (emphasis added). As FERC has explained, the costs that an electric utility can avoid by purchasing from a QF can generally be classified as "energy costs" (normally the variable costs associated with producing electric energy) and "capacity costs" (normally the fixed costs associated with delivering energy such as the capital costs of the facilities). PURPA Rulemaking, 45 Fed. Reg. at 12,216. Thus, a utility's avoided costs as defined in § 292.101(b)(6) are the energy and capacity costs a utility would incur by purchasing electricity from a facility other than a QF. An avoided cost is a *but for* price: *but for* purchasing electricity from QFs, an electric utility would be required to pay to obtain that electricity from another source. The avoided cost is the amount that the utility would have paid that other source. And because "utilities generally turn on last and turn off first their generating units with the highest running cost," the avoided cost rate that should be paid to a QF is the utility's *incremental* avoided cost and not the utility's "average system costs" for purchasing energy and capacity. PURPA Rulemaking, 45 Fed. Reg. at 12,216.[12]

In sum, under PURPA, the avoided cost rate is set based on the costs the utility would have incurred *but for* its purchase from QFs; and the utility must pay that rate to any QF willing to supply. National Grid sounds the refrain that state commissions enjoy great latitude in determining a utility's avoided costs.[13] But ultimately the rate still must be one based on the utility's avoided costs – what the utility would incur *but for* its purchases from QFs under PURPA – and allow for the selection by the QF of one of the three options required under federal law.

Remarkably National Grid wants this Court to believe that it does not have any "avoided costs" beyond its 6-month contracts to support its basic service. *See*, National Grid Brief at 11, fn.2. Such a notion is preposterous. National Grid is the

[12] If a QF is able to sell at a profit because its costs are less than the utility's avoided cost that furthers the purpose of the statute: it creates economic incentives for further investment in renewable energy, while leaving ratepayers no worse off. *See Am. Paper Inst.*, 461 U.S. at 417 (affirming FERC's decision to require utilities to pay a rate equal to their avoided costs, which provides the "maximum incentive for the development of cogeneration and small power production"); PURPA Rulemaking, 45 Fed. Reg. at 12,222.

[13] The reference to "great latitude" comes from the PURPA Rulemaking, 45 Fed. Reg. at 12,231. Thus, for example, "a state commission may comply with the statutory requirements by issuing regulations, by resolving disputes on a case-by-case basis, or by taking any other action reasonably designed to give effect to FERC's rules." *Mississippi*, 456 U.S. at 751. However, a state commission is *not* given latitude to re-write the requirement that a QF is entitled to be paid a rate equal to a utility's avoided costs or have the ability to choose among the three options. Thus, FERC explained in the PURPA Rulemaking that "These rules afford the State regulatory authorities … great latitude in determining the manner of implementation of the Commission's rules, *provided that* the manner chosen is reasonably designed to implement" FERC's rules. 45 Fed. Reg. at 12,231 (emphasis added).

load-serving entity for its territory. It has an obligation to procure energy as well as capacity. While its price for energy may be variable from day-to-day, month-to-month, or quarter-to-quarter, that variability is accounted for in long-term forecasts of avoided costs. It is disingenuous to assert that National Grid has no long-term forecasted avoided costs when it relies on such forecasts in seeking approval of every long-term power purchase agreement it signs, including the Cape Wind contract.[14]

In any case, the question of the long-term avoided costs is a question of fact, which is inappropriate to decide on a motion to dismiss.

IV. THERE IS NO BASIS FOR ABSTENTION.

National Grid has asked this Court to abstain from exercising jurisdiction. The MDPU does not.

Federal courts have a "virtually unflagging obligation" to exercise the jurisdiction vested in them by Congress. *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 813 (1976). "Abdication of the obligation to decide cases can be justified under this doctrine only in the exceptional circumstances where the order to the parties to repair to the State court would clearly serve an important countervailing interest." *County of Allegheny v. Frank Mashuda Co.*, 360 U.S. 185, 188-89 (1959).

Here, there is no basis to decline jurisdiction. *First,* the action under PURPA to declare the MDPU Rule invalid is exclusively within the jurisdiction of the Federal courts. *See*, 16 U.S.C. 824a-3(h)(2)(B). *Second*, the action against National Grid involves two federal statutes, PURPA and the Federal Power Act. *Third*, this

[14] Similar long-term avoided cost studies are regularly used by utilities in the New England market. For example, in 2015 the State of Vermont used a long-term market forecast study by LaCapra Associates LLC to set long-term 20-year and 30-year avoided cost rates under PURPA for utilities in Vermont, which, like National Grid, purchase energy from the ISO-NE market to support their marginal requirements. *See, Investigation into Establishing Rates for Power Sold to the Purchasing Agent Pursuant to Public Service Board Rule 4.100, 16 U.S.C. § 824a-3 and 30 V.S.A. § 209(a)(8)*, Docket 8010, Order (February 9, 2015).

Court's jurisdiction under the Federal Power Act is exclusive, 16 U.S.C. § 825p, and the FERC's rules issued under PURPA Section 210(a) are enforceable under the Federal Power Act. *See*, 16 U.S.C. § 824a-3(h)(1). A State court has no jurisdiction to decide issues under the Federal Power Act. *Fourth*, even if jurisdiction were not exclusive over all issues, all factors weigh against abstention. *Colorado River* abstention in the context of PURPA and the Federal Power Act was addressed and rejected in *Public Serv. Co. of N.H. v. Patch*, 962 F. Supp. 222, 242 (D. N.H. 1997) *aff'd* 167 F.3d 15 (1st Cir. 1998) *cert. den.* 526 U.S. 1066 (1999). There the New Hampshire District Court stated:

> in balancing the *Colorado River factors* the Court concludes that they would not weigh in favor of abstention in this case. Without running down these factors in a checklist manner, it is sufficient to note that this case presents exclusively federal claims that are in no way contrived, that federal law will control the outcome, and that this Court will be able to serve as a single forum for the adjudication of all of plaintiffs' claims.

That is the case here as well. This case presents exclusively federal claims that are in no way contrived. Federal law will control the outcome, and this Court will be able to serve as a single forum for the adjudication of all of Plaintiff's claims. Moreover, National Grid "has not pointed to any Congressional legislation like the McCarran Amendment in *Colorado River* that evinces a tempering of the policy of enforcing the plaintiff's choice of a federal forum in favor of a policy of avoiding duplicative or inconvenient litigation." *Kentucky West Virginia Gas Co. v. Pennsylvania Public Utility Com.* 791 F.2d 1111, 1118 (3d Cir. 1986) (internal citations and quotations omitted.)

Furthermore, as the Third Circuit stressed in *Kentucky West Virginia Gas* "federal, rather than state, substantive law will govern the present case, a factor that the Supreme Court has stated 'must always be a major consideration weighing against [the] surrender [of federal jurisdiction],'" citing *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 26 (1983). This case does not present the "'exceptional' circumstances, the 'clearest of justifications' [required] under *Colorado River* to justify the surrender of [federal] jurisdiction." *Id.*

Despite the clear precedent indicating abstention would be improper in this case, National Grid urges this Court to abstain based upon the First Circuit's decision in *Fuller Co. v. Ramon I. Gill, Inc.*, 782 F.2d 306 (1st Cir. 1986). That case was a diversity case that involved *no federal* issue. Indeed the text quoted by National Grid in its brief makes it abundantly clear that the First Circuit was concerned with diversity parties running to federal court to essentially review state court rulings on issues of state law, not federal law. That is not the case here. National Grid's other citation is also unavailing. *Liberty Mut. Ins. Co. v. Foremost-McKesson, Inc.*, 751 F.2d 475 (1st Cir. 1985) was also a diversity action presenting no federal issues. ("It is significant that no federal issues are raised in the instant declaratory judgment action and that no federal interest would be served by retaining jurisdiction over the case.") *Id.* at 477.

Finally, in this case nothing substantive has occurred in the State proceeding. It is dormant. *See*, National Grid's Mot. To Dismiss, Exhibit I.

CONCLUSION

In sum, the obligation to purchase is imposed directly on National Grid by federal law as National Grid concedes. National Grid is obligated to purchase from Plaintiff's QFs at a long-term forecasted rate over the specified term of 25 years. Any State law or rule that interferes with such obligation is pre-empted. The MDPU Rule does not allow QFs to choose a rate based on the utility's avoided costs "calculated at the time the obligation is incurred," 18 C.F.R. § 292.304(d)(2)(ii), and PURPA requires that QFs have the option to elect such a rate. National Grid cannot excuse its failure to comply with its obligations under federal law by pointing to its compliance with a State rule.

For the foregoing reasons, the Court should deny National Grid's motion to dismiss.

Dated: March 2, 2016

/s/ Thomas Melone
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CERTIFICATE OF SERVICE

I hereby certify that on this 2nd day of March 2016, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which will send notification of the filing to all counsel of record.

/s/ Thomas Melone
Thomas Melone