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

NOTICE OF MOTION AND MOTION OF PLAINTIFF ALLCO RENEWABLE ENERGY LIMITED FOR SUMMARY JUDGMENT AND MEMORANDUM OF POINTS AND AUTHORITIES

[Fed. R. Civ. P. 56; April 20, 2016 Order]

LEAVE TO FILE GRANTED ON MAY 3, 2016

Hearing Date: July 15, 2016
Time: 9:30 am
Courtroom: 19, 7th Floor
Judge: Hon. Patti B. Saris

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

TABLE OF ACRONYMS vi

NOTICE OF MOTION AND MOTION TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD 1

POINTS AND AUTHORITIES IN SUPPORT OF THE MOTION 1

INTRODUCTION 1

STATEMENT OF ISSUES TO BE DECIDED 4

STATEMENT OF FACTS 5

A. Federal Statutory and Regulatory Background. 5

B. State Implementation of PURPA 9

C. Massachusetts' Implementation of PURPA 10

D. Allco's Offer to National Grid. 12

STANDARD OF REVIEW 13

ARGUMENT 13

I. The MDPU Rule is Illegal and Pre-empted (Compl. Count II). 13

A. The MDPU Rule is Pre-empted and Illegal Because It Prohibits the Long-Term Avoided Cost Rate Under 18 C.F.R. § 292.304(d)(2)(ii) 14

1. The MDPU Rule Permits Only As-Available Rate 14

2. The MDPU Rule Conflicts with 18 C.F.R. § 292.304(d)(2)(ii). 16

3. The FERC Has Invalidated Similar State Rules 16

B. The MDPU Rule is Pre-empted Because It Regulates Wholesale Sales But Does Not Foster QF Generation. 18

C. The MDPU Rule is pre-empted Because It Prohibits Passing Costs Mandated by Federal Law to Ratepayers Through Retail Rates 19

II. National Grid has a Direct Obligation to Purchase That is Not Contingent on State Implementation (Compl. Count III). 21

A. The Plain Language of Section 210 and FERC's Regulations Creates a Direct Obligation on National Grid 21

1. Section 210(a) and 18 C.F.R. § 292.303(a) Place the Must-Buy Obligation on National Grid 21

2. The Example of the State That Opts to Resolve Disputes 21

3. The Example of the Recalcitrant State 22

4. Section 210(m)(7) of PURPA 23

B. State Jurisdiction Under Section 210(g) is Simply Irrelevant 24

1. Section 210(g) Would Not Apply Because Allco Does Not Make a Claim Under a State Program 24

2. Section 210(g) Does Not Extend to QF Wholesale Sales 24

3. The Judicial Review Provisions of Titles I and III Do Not Apply to Section 210 25

C. National Grid is Obligated to Purchase at its Long-Term Forecasted Rate Over the Term Committed to by Allco, not the Rate set by the MDPU 28

III. Further Proceedings. 30

CONCLUSION 31

TABLE OF AUTHORITIES

CASES

Allco Finance Limited v. Klee, 805 F.3d 89 (2d Cir. 2015) 9, 18

Amer. Paper Inst., Inc. v. Am. Elec. Power Serv. Corp., 461 U.S. 402 (1983) 7, 8, 9, 15, 19

City of New York v. FCC, 486 U.S. 57 (1988)....................13

Connecticut Nat'l Bank v. Germain, 503 U.S. 249 (1992) 21

Crosby v. National Foreign Trade Council, 530 U.S. 363 (2000) 13, 18

FERC v. Mississippi, 456 U.S. 742 (1982)....................16, 21, 25

FPC v. Florida Power & Light Co., 404 U.S. 453 (1972) 5

FPC v. Southern California Edison Co., 376 U.S. 205 (1964) 6, 18

Freehold Cogeneration Assoc. L.P. v. Bd. Regulatory Comm'rs, 44 F.3d 1183 (3d Cir. 1995) 24, 25

Global NAPs, Inc. v. Verizon New Eng., Inc., 444 F.3d 59 (1st Cir. 2006) 13

Hughes v. Talen Energy Marketing, LLC, Nos. 14-614, 14-623, ___ U.S. ___ (April 19, 2016) 18, 20

Indep. Energy Producers Ass'n v. California Pub. Utils. Comm'n, 36 F.3d 848 (9th Cir. 1994) 10, 16, 25, 26

Mississippi Power & Light Co. v. Mississippi ex rel. Moore, 487 U.S. 354 (1988) 19

Nantahala Power & Light Co. v. Thornburg, 476 U.S. 953 (1986)....................14, 18, 19, 20, 31

Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566 (2012) 9, 31

New England Power Co. v. New Hampshire, 455 U.S. 331 (1982) 6

New York v. FERC, 535 U.S. 1 (2002) 5, 6

New York v. United States, 505 U.S. 144 (1992) 9, 31

Pac. Gas & Elec. Co. v. State Energy Resources Conserv.& Dev. Comm'n, 461 U.S. 190 (1983)....................13

Power Resource Group, Inc. v. Pub. Utils. Comm'n of Texas, 422 F.3d 231 (5th Cir. 2005) 7

PPL Energy Plus LLC v. Nazarian, 753 F.3d 467 (4th Cir. 2014) *aff'd sub nom. Hughes v. Talen Energy Marketing, LLC*, Nos. 14-614, ___ U.S. ___ (April 19, 2016) 18

Pub. Utils. Comm'n v. Attleboro Steam & Elec. Co., 273 U.S. 83 (1927) 5

United States v. Locke, 529 U.S. 89 (2000) 6

Wheelabrator Lisbon, Inc. v. Conn. DPUC, 53 F.3d 183 (2d Cir. 2008) 16, 23

STATUTES

15 U.S.C. § 3207....................27

16 U.S.C. § 796(17)(C)....................6

16 U.S.C. § 796(17)(D)....................12

16 U.S.C. § 824(b)....................5, 18

16 U.S.C. § 824(d)....................6

16 U.S.C. § 824a-3(a)....................7, 9

16 U.S.C. § 824a-3(b)....................7

16 U.S.C. § 824a-3(f)(1)....................9

16 U.S.C. § 824a-3(g)....................24, 25, 27, 28

16 U.S.C. § 824a-3(h)....................13, 24, 25, 27, 28

16 U.S.C. § 824d....................6, 18, 25

16 U.S.C. § 824e....................18, 25

16 U.S.C. § 825p....................23, 25

16 U.S.C. § 2633(a)....................26

Energy Policy Act of 2005, Pub. L. No. 109-58, §1253, 119 Stat. 594 20

Public Utility Regulatory Policies Act of 1978, Pub. L. No. 95-617, 92 Stat. 3117 ....*passim*

LEGISLATIVE MATERIALS

H.R. Rep. No. 95-496(IV) (1977), *reprinted in* 1978 U.S.C.C.A.N. 8454....................6

ADMINISTRATIVE DECISIONS

Investigation by the Department of Telecommunications and Energy upon its own motion, pursuant to Sections 201 and 210 of Title II of the Public Utility Regulatory Policies Act of 1978; G.L. c. 25, § 5; G.L. c 164, §§ 76C; and 220 C.M.R. §§ 2.00 et seq., commencing a rulemaking to modify 220 C.M.R. §§ 8.00 et seq; Docket 99-38, Order Dated as of December 27, 1999....................10

Allco Renewable Energy Limited, 148 FERC ¶ 61,233 (2014) 13

Cedar Creek Wind, LLC, 1237 FERC ¶61,006 (2011) 29

Hydrodynamics, Inc., 146 FERC ¶ 61,193 (2014)....................15, 16, 17, 29

JD Wind 1 LLC, 130 FERC ¶ 61,127 (2010) 7, 9, 15, 17, 29, 30

Murphy Flat Power, LLC, 141 FERC ¶ 61,145 (2012) 29

OTHER AUTHORITIES

18 C.F.R. § 292.203 .... 2, 6

18 C.F.R. § 292.303(a)(1) 7, 16, 21

18 C.F.R. § 292.304(b)(2) 7

18 C.F.R. § 292.304(d)(2) .... *passim*

18 C.F.R. § 292.304(d)(2)(i) .... *passim*

18 C.F.R. § 292.304(d)(2)(ii) .... *passim*

18 C.F.R. § 292.304(e) 23

18 C.F.R. § 292.601 .... 22, 23, 25

220 CMR § 8.01 1

220 CMR § 8.03 .... 4, 11, 12

220 CMR § 8.04 .... 4, 11

220 CMR § 8.05 .... 4, 11, 12

Fed. R. Civ. P. 53 31

Fed. R. Civ. P. 56(a) 1, 13

Fed. R. Civ. P. 702 1

Henry J. Friendly, *Mr. Justice Frankfurter and the Reading of Statutes, in* BENCHMARKS 196, 202 (1967) 21

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 .. 21, 22, 26, 27

New PURPA Section 210(m) Regulations Applicable to Small Power Production and Cogeneration Facilities, Docket No. RM06-10-000, Notice of Proposed Rulemaking (January 19, 2006) 20

Order No. 69, Small Power Production and Cogeneration Facilities; Regulations Implementing Section 210 of the Public Utility Regulatory Policies Act of 1978, 45 Fed. Reg. 12,214 (Feb. 25, 1980) .... *passim*

Policy Statement Regarding the Commission's Enforcement Role Under Section 210 of the Public Utility Regulatory Policies Act of 1978, 23 FERC P61,304 (1983) 25

Vermont Public Service Board Rule 4.100 13

TABLE OF ACRONYMS

CMR	Code of Massachusetts Regulations
DOER	Massachusetts Department of Energy Resources
FPA	Federal Power Act
FERC	Federal Energy Regulatory Commission
ISO-NE	ISO New England, Inc.
LSE	Load-Serving Entity
MDPU	Massachusetts Department of Public Utilities
MW	megawatt
MWh	megawatt-hour
PURPA	Public Utility Regulatory Policies Act of 1978
QF	Qualifying Facility

NOTICE OF MOTION AND MOTION

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that pursuant to Local Civ. R. 7-1 and Fed. R. Civ. P. 56, Plaintiff Allco Renewable Energy Limited ("Plaintiff' or "Allco") hereby notices its Motion for Summary Judgment, scheduled for hearing at 9:30 am on July 15, 2016, per the Court's April 20, 2016 Order (ECF No. 46).

In this motion, Plaintiff seeks summary judgment on Counts II and III of its First Amended Complaint, ECF No. 25, and the entry of final judgment in its favor. The grounds for this motion brought are that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. This motion is based on: (1) this Notice, (2) the supporting Memorandum of Points and Authorities, (3) the expert declaration of Dr. Jonathan A. Lesser ("Lesser Decl.")[1] and the declaration of Thomas Melone ("Melone Decl."), (4) the supporting Statement of Undisputed Facts, (5) the records and pleadings on file in this case, and (6) such other evidence as may be presented at the hearing, if any. The declarations and other relevant material are included in the attached Appendix ("App.") including the statute, regulations, and the handful of Federal Energy Regulatory Commission ("FERC") decisions on which Allco primarily relies.

POINTS AND AUTHORITIES IN SUPPORT OF THE MOTION

INTRODUCTION

The costs of constructing solar energy facilities have been dramatically reduced during the past few years. Prices for the various components of solar facilities such as modules,

[1] Dr. Lesser plainly satisfies the qualifications for an expert under Fed. R. Evid. 702. *See generally* Ex. 1 to Lesser Decl. (curriculum vitae of Dr. Lesser). He has a Ph.D. in economics and over 30 years of experience in the energy industry. Lesser Decl. ¶¶ 2-3. He has written two textbooks on public utility regulation, portions of which address the determination of avoided costs. *Id.* ¶ 5. He has published dozens of papers on public utility regulation, *see* Ex. 1 to Lesser Decl. at 5-11, and two of these, both in peer-reviewed journals, addressed issues related to avoided cost rules. In his consulting practice and his prior employment, Dr. Lesser has evaluated avoided cost methodologies and long-term price forecasts. He understands the economic principles that lay behind those methodologies. Prior to becoming a consultant, Dr. Lesser was Director of Planning at the Vermont Department of Public Service, where he evaluated utility costs; served as Manager of Economic Analysis at Green Mountain Power Corporation, where he negotiated contracts that required determination of avoided costs; and served as an energy policy specialist at the Washington State Energy Office, where he evaluated utility integrated resource plans, which included purchases at avoided cost rates. Lesser Decl. ¶ 3 & Ex. 1 to Lesser Decl. at 2-3. His expert report applies principles of economics and his expert knowledge of the energy industry in assessing how 220 CMR 8.01 *et seq*. conflicts with the regulatory framework established by PURPA.

racking, and inverters have fallen due to technological improvements. In the Northeast, solar facilities now have the ability to replace significant amounts of fossil fuel generation if they receive the price for electricity that they are entitled to receive under Section 210 of the Public Utility Regulatory Policies Act, Pub. L. No. 95-617, 92 Stat. 3117 ("PURPA"). That price is the long-term forecasted rate set forth in 18 C.F.R. § 292.304(d)(2)(ii) over the period of time that the solar generator commits to provide its electricity to the utility.

What is a forecasted rate and why is it needed? The answer is simple. Banks and other financing parties require a relatively fixed stream of income so they know they will be paid back. *See*, Statement of Undisputed Facts ("SUF") 22-23. The generation output of a solar facility fluctuates from minute to minute and day to day based upon the sun, but over an extended period—a year, ten years, twenty-five years—the production of electricity from a solar facility is predictable and stable to a 95% degree of certainty. A financier knows that the periodic ups and downs in production will balance out over the long term, thus resulting in a reliable electricity production profile. But in order to be repaid, that reliable production stream must be accompanied by a predictable price at which the electricity would be sold. SUF 22-23. Without a predictable price, a lender would not have the predictability of repayment, and thus will not finance the project. SUF 22-23. The FERC realized that commercial reality, and for that reason gave the generator the option to have the rate it would receive based upon a forecast of the expected market prices over the term to which the generator commits. The FERC realized that it was almost certain that those future forecasted prices would, in fact, differ from the spot market rate (i.e., the as-available rate) when the electricity is actually produced and delivered, but the FERC concluded that those ups and downs would likely balance out in the end, leaving ratepayers no worse off.

Qualifying Facilities or QFs[2] are the generators that Congress singled out for special treatment in the Nation's energy markets by giving QFs the right to force a utility to purchase their electricity at a long-term forecasted fixed price. Non-QFs are expected to compete in the

[2] "[Q]ualifying small power production facilit[ies]" under the statute and "Qualifying Facilities" or "QFs" under regulations of the FERC, *see* 16 U.S.C. § 796(17)(C); 18 C.F.R. § 292.203.

FERC regional energy markets, such as ISO-New England.[3] Yet Congress' vision has yet to be realized. The must-buy obligation was imposed in part to avoid the traditional reluctance of electric utilities, such as National Grid, to purchase from independent power producers. That reluctance is vividly on display in this case. Despite the urgency of climate change, utilities, such as National Grid, fight the requirement to purchase from renewable energy QFs at every turn, even when, as here, their own forecasts of long-term avoided market costs show that buying from those renewable QFs would be ratepayer neutral in terms of price per kilowatt-hour.

But keeping ratepayers neutral on a per kilowatt-hour basis is only part of the story, and does not tell the full benefits ratepayers would realize. A solar facility generates its kilowatt-hour of electricity without any emissions. On the other hand, the fossil fuel generation that the solar facility would displace spews mercury and other toxic air pollutants into our air.[4] The buyers from such fossil fuel generators, such as National Grid, facilitate that environmental harm by their generation choices.[5] Similarly the environmental damage from obtaining natural gas through fracking is something that utilities, such as National Grid, economically support through their generation supply choices. So even when purchasing electricity from a solar QF is ratepayer neutral, a solar QF provides many other social, environmental and health benefits as well, which do not show up on a ratepayer's monthly utility bill.[6]

As the Court heard at the hearing on April 20, 2016, the interpretation of the law that the Defendants urge would result in continued inaction. National Grid agrees it has an obligation to purchase, but notwithstanding what the FERC rules require, it claims State of Massachusetts' rules prohibit it from paying a long-term forecasted rate. Defendants O'Conner, Westbrook, Hayden and Judson (the "State Defendants") say that they do not know how to calculate a long-term forecasted rate[7] (even though they regularly use such forecasts to evaluate bids for power

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[3] ISO-New England (or ISO-NE) is the FERC approved independent transmission system operator for the electricity grid that includes Massachusetts, Connecticut, Rhode Island, New Hampshire, Vermont and most of Maine.

[4] *See, e.g.*, http://thinkprogress.org/climate/2016/02/17/3750256/in-defense-of-the-mercury-rule/.

[5] *See, e.g.*, http://www.theatlantic.com/business/archive/2015/08/coals-externalities-medical-air-quality-financial-environmental/401075/.

[6] *See, e.g.*, http://time.com/3910341/air-pollution-coal-smog-smoke-research-harvard/.

[7] *See*, Melone Decl. Exh. H, App. 208. ("The MA DPU is aware of no other established or reliable way to calculate National Grid's long-run avoided cost over a 25-year period" other than the short-run spot rate.)

purchase agreements). Under the Defendants' "who's on first" routine, a QF would simply be in a never ending hamster wheel seeking federal court declarations that State rules were pre-empted, watching the State revise its rules improperly and/or refuse to re-issue rules, then back to federal court for another declaration and so on, all in a never-ending QF chasing-its-tail scenario because there would be no ability to make a claim in federal court against an electric utility. And because there is no ability to compel a State to take any action, including hearing disputes or issuing amended rules, under the Defendants' reading of the statute a QF will always come up empty handed. The Defendants' view of the law ignores the plain language of the statute, makes no sense, results in an unworkable system, and would allow States and utilities to nullify federal law.

The approach to the decision is this case is straight-forward. Does the Court rely on the plain language of the law to declare the State Defendants' rule pre-empted, and impose a direct obligation to buy on National Grid (regardless of State action or inaction), and in doing so make one giant leap in the effort to combat climate change? Or does the Court adopt the Defendants' view which fails to engage the plain language of federal law and will continue to sabotage renewable energy QF generation.

STATEMENT OF ISSUES TO BE DECIDED

1. Whether the Massachusetts Department of Public Utilities' ("MDPU's") regulation, 220 CMR §§ 8.03-8.05 (and National Grid's related P-Tariff) (the "MDPU Rule"), which prohibit the payment by National Grid of the long-term forecasted rate required by 18 C.F.R. § 292.304(d)(2)(ii), violate PURPA and federal regulations because they eliminate the right of a QF to choose to have the utility's purchase rate determined at the beginning of the contract based upon forecasted avoided costs.

2. Whether National Grid has a direct obligation to purchase from Allco's QFs which is not dependent on any state implementation of PURPA.

3. If the answer to Issue #2 is yes, then does Allco have the absolute right to select a long-run forecasted avoided cost rate as opposed to an as-available short-run rate?

4. If the answer to Issue #3 is yes, is the term over which the forecasted avoided cost rate is determined equal to the term to which the Allco QFs commit to supply their electricity to National Grid?

STATEMENT OF FACTS

This case concerns the MDPU Rule, which purports to implement PURPA, and National Grid's refusal to purchase electricity from Allco's QFs at the long-term forecasted rate specified in 18 C.F.R. § 292.304(d)(2)(ii). Allco contends that the MDPU Rule violates the Federal Power Act ("FPA")[8] and PURPA, and FERC's regulations implementing PURPA, by prohibiting the payment of the long-term forecasted avoided cost rate specified in 18 C.F.R. § 292.304(d)(2)(ii),[9] and that National Grid has an obligation to purchase from the Allco QFs regardless of any State rules.

A. Federal Statutory and Regulatory Background.

Initially, interstate sales of electricity were unregulated. The United States Supreme Court held that States were powerless to regulate such sales under the Commerce Clause, *see, Pub. Utils. Comm'n v. Attleboro Steam & Elec. Co.*, 273 U.S. 83, 89 (1927) ("*Attleboro*"), resulting in what became known as "the *Attleboro* gap." *New York v. FERC*, 535 U.S. 1, 5-6 (2002). The States were simply powerless to regulate such sales, no matter what their local intra-state interest was. *See, Attleboro*, 273 U.S. at 90. (Such sales are "not subject to regulation by either of the two States in the guise of protection to their respective local interests.")

It was against the backdrop of a State's absence of power to regulate wholesale electricity transactions that in 1935, Congress enacted the FPA to fill that gap, as well as to "extend[] federal coverage to some areas that previously had been state regulated." *Id.* at 6. Specifically, Congress gave the Federal Power Commission – now FERC – exclusive authority to regulate "the sale of electric energy at wholesale in interstate commerce." 16 U.S.C. § 824(b)(1).[10]

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[8] 16 U.S.C., Ch. 12.

[9] The MDPU regulation at issue 220 CMR 8.01 *et seq*. *See*, App. 15.

[10] 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.

"[W]holesale," in this context, means any "sale of electric energy to any person for resale." *Id.* § 824(d). Thus, any sale of electricity in interstate commerce (with the exception of a State's limited role related to qualifying sales under PURPA, and another exception not relevant here for certain hydroelectric energy) falls within FERC's exclusive regulatory authority, unless it is a "retail" sale to the factory, business or home that will actually consume the electricity. *See, 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."). *S. Cal. Edison*, 376 U.S. at 215-16 ("Congress meant to draw a bright line, easily ascertained, between state and federal jurisdiction…. This was done … by making [FERC] jurisdiction plenary and extending it to all wholesale sales in interstate commerce except those which Congress has made explicitly subject to regulation by the States."); *New England Power Co. v. New Hampshire*, 455 U.S. 331, 340 (1982) (the FPA "delegated to [FERC] exclusive authority to regulate the transmission and sale at wholesale of electric energy in interstate commerce, without regard to the source of production.")[11] The FERC's exclusive authority extends not only to all "rates and charges made, demanded, or received … in connection with the transmission or sale of electric energy subject to the jurisdiction of the Commission," but also to "all rules and regulations affecting or pertaining to such rates or charges." 16 U.S.C. § 824d(a).

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

[11] With respect to the FPA, even the ordinary presumption against preemption of traditional state authority has no application here. Wholesale electricity sales in interstate commerce were never subject to state regulation, *see New York*, 535 U.S. at 6, and thus the FPA does not displace the state's traditional police powers. What is more, the presumption "is not triggered when the State regulates in an area where there has been a history of significant federal presence," *United States v. Locke*, 529 U.S. 89, 108 (2000), which is true of wholesale electricity regulation.

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).[12] 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, at ¶ 7 (2010).

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."

[12] 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 Order No. 69, 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"). The Defendants have never suggested that the prohibition on the long-term forecasted rate is due to the utility's inability to use QF-generated electricity. 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 MW in

PURPA Rulemaking, 45 Fed. Reg. at 12,216.[13] 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 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 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*

Massachusetts.

[13] "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.

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.* (emphasis added.); *see also JD Wind*, 130 FERC ¶ 61,127, at ¶ 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."). Thus, 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.

B. State Implementation of PURPA.

PURPA directed state regulatory agencies, such as the MDPU, to implement the 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, *Allco Finance Limited v. Klee*, 805 F.3d 89, 91-92 (2d Cir. 2015), any state rule that conflicts with PURPA is necessarily preempted.

But States have the ability to do nothing and stay out of PURPA altogether because the federal government cannot require States to regulate or to adopt a federal regulatory scheme as its own.[14] But what States may not do is issue rules that *contradict* or *conflict with* PURPA. *Allco Finance Limited v. Klee*, 805 F.3d at 97 ("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

[14] "[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

eliminate a QF's ability to select one of the 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. Lesser Decl. ¶ 14; *Indep. Energy Prods. Ass'n v. Cal. Pub. Utils. Comm'n*, 36 F.3d 848, 852 (9th Cir. 1994) ("In projecting future avoided costs at the time the contracts were executed, the [state regulatory authority] had considered the anticipated cost to the utility of its own fuel sources."). *See*, D.T.E. 99-38, Order at 2, December 27, 1999, App. 208 (the "MDPU Restructuring Order") ("Prior to the Restructuring Act, one method of calculating avoided costs was based on electric generation and construction costs that the electric utility would incur but for purchase from a QF.") 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 1992, competitive wholesale power markets began to emerge, in which power producers independent of utilities compete to sell their electricity to utilities. Lesser Decl. ¶ 17. 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. Lesser Decl. ¶ 18. In 1999, the MDPU Restructuring Order eliminated the old way of calculating avoided costs and replaced it with "avoided costs based on the competitive wholesale electricity market price," *See,* MDPU Restructuring Order at 3 (App. 209), but limited the avoided cost calculation to only the spot rate from time-to-time. As Dr.

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).

Lesser explains, in a competitive market, the avoided cost at any given moment is the market price of electricity at that moment. *See*, SUF 10. 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)(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, in a deregulated market, such as ISO-New England, utilities would generally rely on computer models that forecast future prices in the competitive wholesale market. *See*, SUF 11.[15]

Today, under 220 CMR 8.03-8.05, the only rate available for QFs pays an avoided cost rate based on the actual price that the electric utility receives from the ISO-New England market from time to time. *See*, SUF 12. Crucially, the rate cannot be determined in advance of the actual delivery of electricity, which the MDPU concedes. *See*, SUF 14. 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); SUF 13. 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)(2)(i); SUF 15. Long-term contracts provide renewable energy developers with an opportunity to obtain a predictable amount of revenue assuming that their plants will perform as projected. SUF 21. Developers of, and investors in, new solar renewable generation projects require long-term contracts before they will finance and build new grid-scale wholesale power plants. SUF 22. Developers and investors use project financing to raise debt and/or tax equity (equity investment primarily oriented to utilizing the federal investment tax credit.) SUF 23. Lenders and tax equity providers require long-term contracts at rates set at the inception of the contract with creditworthy buyers as a condition to making such project investments. SUF 23-24. The elimination of a rate is based on avoided costs "calculated at the time the obligation is incurred,"

[15] 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. *See*, Melone Decl., Exh. K. App. 239. Those forecasts are based upon the ISO-NE market and take into account the fact that National Grid is a load-serving entity. 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 forecasted avoided costs. *See,* https://cleanenergyrfp.com/.

does not promote QF generation, but rather would hinder it. SUF 25. The National Grid P-Rate Tariff, which is based upon the MDPU Rule, provides for a contractual commitment equal to a rolling period of 30-days. SUF 28. In the ISO-New England system, capacity commitments are made three years in advance. SUF 29. With only a rolling 30-day term, the P-Rate Tariff eliminates all payments for capacity by National Grid to the generator. SUF 29.[16]

D. Allco's Offer to National Grid.

National Grid is the load-serving entity ("LSE") for its territory. As an LSE, it has an obligation to procure energy as well as capacity. Allco is a developer of solar generating facilities. Allco is a "qualifying small power producer" within the meaning of 16 U.S.C. §796(17)(D). SUF 1. On March 28, 2011, Allco submitted an offer to sell the entire generation output from various solar renewable energy QFs sized between 6.87 MWs and 16.67 MWs to National Grid for a term of 25 years at the forecasted avoided cost rate under 18 C.F.R. §292.304(d)(2)(ii). SUF 2. National Grid conceded that a legally enforceable obligation existed as of March 28, 2011, between Allco and National Grid, but despite that agreement, National Grid argued that it was prohibited by the MDPU Rule from paying anything other than the spot market ISO-New England rate as such rate is determined from time to time. SUF 3. On August 3, 2011, Allco filed a petition with the MDPU under 220 CMR §8.03(1)(c) against National Grid requesting that the MDPU investigate the reasonableness of National Grid's actions. SUF 4. On July 22, 2014, nearly three years after filing of the MDPU petition (during which time the MDPU just sat on it), the MDPU issued an order dismissing the petition. SUF 5. The MDPU's order confirmed that a legally enforceable obligation exists between Allco and National Grid in respect of each QF but held that under 220 C.M.R. §§ 8.03, 8.05(2)(a) purchases from QFs can only be at the short-run as-available rate, and not calculated at the time the obligation is incurred over the specified term offered by the QF. SUF 6.

While National Grid's 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

[16]Although the MDPU claims that it does not know how to calculate forecasted avoided costs, *see* App. 208, other state regulatory authorities in ISO-New England do not have the same difficulty. For example, Vermont, which uses forecasts of long-term market prices in ISO-New England to establish a long-term rate that QFs can select over

costs. The MDPU has also conceded that it can and does determine forecasted avoided costs. *See*, Melone Decl. Exh. I (MDPU FERC Answer) at 5, fn.8. (App. 226) (conceding that it can and does calculate the forecasted avoided costs for "energy, capacity, and RECs".) *See also*, SUF 16.

On July 28, 2014, Allco petitioned FERC to bring an enforcement action against the MDPU Rule pursuant to 16 U.S.C. § 824a-3(h)(2)(A), contending that the MDPU Rule was inconsistent with PURPA and pre-empted. SUF 8. On September 26, 2014, FERC gave notice that it would not initiate an enforcement action. *Allco Renewable Energy Limited*, 148 FERC ¶ 61,233 (2014); SUF 9.

STANDARD OF REVIEW

Summary judgment is proper where there is "no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a).

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. *Global NAPs, Inc. v. Verizon New Eng., Inc.*, 444 F.3d 59, 71 (1st Cir. 2006); *City of N.Y. v. FCC*, 486 U.S. 57, 63-64 (1988).

I. THE MDPU RULE IS ILLEGAL AND PRE-EMPTED (COMPL. COUNT II).

The MDPU Rule has hit the pre-emption trifecta. *First*, under the MDPU Rule a long-term forecasted avoided cost rate is prohibited. That conflicts with federal law, which provides that a QF has the option to select a long-term avoided cost rate under 18 C.F.R. § 292.304(d)(2)(ii). *Second*, the MDPU Rule regulates wholesale sales of electricity but does not

terms as long as 30 years. *See*, Vermont Public Service Board, Rule 4.100.

foster QF generation. Federal law prohibits States from regulating in the field of wholesale sales of electricity unless such regulation promotes QF generation. *Third*, by prohibiting a long-term avoided cost rate, the MDPU also prohibits National Grid from passing through in retail rates its payments to QFs based upon such a rate. But federal law requires that costs incurred by utilities under federal law be allowed to be passed through in retail rates. *See, Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953, 956-962 (1986). *See also*, Section 210(m)(7) of PURPA.

A. The MDPU Rule is Pre-empted and Illegal Because It Prohibits the long-term avoided cost rate under 18 C.F.R. § 292.304(d)(2)(ii).

1. *The MDPU Rule Permits Only an As-Available Rate*.

Allco agrees with the Defendants that because National Grid does not own generation, avoided costs should be based upon the ISO-New England market. The difference between Allco and the Defendants is that the Defendants only want to pay actual costs from time to time, i.e., an as-available rate. The State Defendants have conceded that the MDPU Rule only provides an as-available rate and not a forecasted rate. *See*, Melone Decl. Exh. H (MDPU FERC Protest) at 3 (App. 200) ("If a QF chooses to sell to a distribution company pursuant to the standard contract over a long period of time, it knows at the time it incurs the obligation to sell that the rate will be the market price in the ISO-NE market at the time of delivery.") Dr. Lesser confirms the MDPU's admission that the only rate allowed by the MDPU Rule is not a forecasted avoided cost rate. *See*, SUF 14.

Remarkably, the MDPU asserts that the "MA DPU is aware of no other established or reliable way to calculate National Grid's long-run avoided cost over a 25-year period," *see*, App. 208, while at the same time acknowledging that the MDPU can and does determine forecasted avoided costs. *See*, App. 226 (conceding that the MDPU can and does calculate the forecasted avoided costs for "energy, capacity, and RECs".) *See also*, SUF 16. Worse, the MDPU attempts to justify its position in this case by a rationale that has been explicitly rejected by the FERC and the United States Supreme Court: "To require National Grid to determine a 25-year long-run avoided cost in a fully restructured wholesale market where it has divested all of its generation assets is to subject National Grid customers to 100 percent of the risk from the inevitable errors

in a cost projection of that duration." App. 210. That rationale has been explicitly rejected by the FERC and the United States Supreme Court. *See*, PURPA Rulemaking, 45 Fed. Reg. at 12,224 ("in the long run, 'overestimations' and 'underestimations' of avoided costs will balance out"); *Am. Paper Inst.*, 461 U.S. at 417.

To comply with PURPA, a state commission must allow a QF to elect either of the two types of rates—as-available or forecasted—in this case forecasted based upon the ISO-NE market. 18 C.F.R. § 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, at ¶ 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 rate under the MDPU Rule cannot be "calculated at the time the obligation is incurred," 18 C.F.R. § 292.304(d)(2)(ii), it conflicts with federal law and is pre-empted. Under the MDPU Rule, the only option for a QF is the short-run rate, which offers an agreement with "variable, market based rates." *Hydrodynamics*, 146 FERC ¶ 61,193, at ¶ 34. Thus, solar QFs like Allco's "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." *Id.*[17]

2. *The MDPU Rule Conflicts with 18 C.F.R. § 292.304(d)(2)(ii).*

The MDPU Rule flatly violates the mandatory purchase obligation set forth in FERC's regulations, *see* 18 C.F.R. § 292.303(a)(1), and a QF's option to select a long-term forecasted avoided cost rate under 18 C.F.R. § 292.304(d)(2)(ii). FERC's regulations could not be clearer: "[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). FERC's regulation effectuates the basic purpose of PURPA, which is "to encourage the development of … small power production facilities" in the face of "reluctan[ce]" by "traditional electricity utilities to purchase power from" such facilities. *FERC v. Mississippi*, 456 U.S. 742, 750 (1982). That statutory goal would be thwarted if a state commission could impose limits on a utility's purchase obligation under PURPA, such eliminating the ability of a QF to select the long-term forecasted rate, or even putting a cap on the availability of such a rate. Simply put, "[t]he regulations contain no provision that would permit a utility to decline to purchase energy from a [self-certified] QF…" *Indep. Energy Prods.*, 36 F.3d at 855.

3. *The FERC Has Invalidated Similar State Rules*.

The FERC has declared state programs preempted when those state programs limited the amount of QF capacity that utilities are required to purchase under the long-term forecasted rate. For example, the Montana state commission had issued an order requiring a utility to purchase no more than 50 MWs from wind-powered QFs of a certain size. *Hydrodynamics, Inc.*, 146 FERC ¶ 61,193, at ¶ 7 (2014). FERC declared that this cap on the utility's purchase obligation was "inconsistent with PURPA and the Commission's regulations." *Id.* at ¶ 34. It explained

[17] In its earlier briefing in this case, National Grid sounded the theme that state commissions enjoy great latitude in determining a utility's avoided costs. 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." *FERC v. Mississippi*, 456 U.S. 742, 751 (1982). 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 long-term forecasted avoided costs over the term committed to by the QF. Thus, FERC explained in the PURPA Rulemaking that "[t]hese 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). And as the Second Circuit observed in *Wheelabrator Lisbon, Inc. v. Conn. DPUC*, 53 F.3d 183, 188 (2d Cir. 2008), "under the PURPA regulatory regime, FERC—and not state agencies—[are] responsible for regulating the rates charged by qualifying facilities in power purchase agreements."

that "the 50 MWs installed capacity limit is inconsistent with PURPA's goal of promoting QF development and fails to implement the Commission's regulations requiring an electric utility to purchase *any* capacity which is made available from a QF, <u>*and at a rate that, at the QF's option, is a forecasted avoided cost rate*</u>." *Id.* at ¶ 35. (Emphasis added.)

The MDPU Rule is worse than the Montana rule because the MDPU Rule caps the availability of a forecasted avoided cost rate at 0MWs. Standing alone, the MDPU is plainly illegal. 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, at ¶ 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, at ¶ 23. The MDPU Rule does *not* allow a QF to choose a rate based on "[t]he avoided costs calculated at the time the obligation is incurred." 18 C.F.R. § 292.304(d)(2)(ii); SUF 14. As Dr. Lesser explains, the rate under the MDPU is based on a *formula* that is set when the obligation is incurred, but the variable included within the formula will fluctuate over time depending on the market conditions when electricity is actually delivered. *See*, SUF 15. 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); SUF 13-15. Indeed, as the MDPU concedes, 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. SUF 17. 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).

B. The MDPU Rule is Pre-empted Because It Regulates Wholesale Sales of Electricity But Does Not Foster QF Generation.

Even if the MDPU Rule was issued to purportedly implement PURPA, the MDPU Rule would still be preempted to the extent it conflicts with PURPA. A State has no authority to regulate wholesale sales of electricity except though its limited authority *to encourage* wholesale sales by QFs. *See*, *Allco Finance Limited v. Klee*, 805 F.3d 89, 91-92. ("The Federal Power Act gives the [FERC] exclusive authority to regulate sales of electricity at wholesale in interstate commerce. *See* 16 U.S.C. § 824(b)(1). States may not act in this area unless Congress creates an exception. *Id.* § 824(b). PURPA contains one such exception that permits states to *foster* electric generation by certain power production facilities.") (Emphasis added). *See*, 16 U.S.C. §§ 824d, 824e. 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), any state rule that does not *foster* electric generation by QFs conflicts with PURPA and is necessarily preempted.[18], *see also*, *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) *aff'd sub nom. Hughes v. Talen Energy Marketing, LLC*, Nos. 14-614, 14-623, ___ U.S. ___ (April 19, 2016) ("A wealth of case law confirms FERC's exclusive power to regulate wholesale sales of energy in interstate commerce….") Thus, unless a state's regulation of wholesale sales is consistent with PURPA and promotes QF generation, it falls within the field that Congress has occupied for exclusive federal regulation.

The MDPU Rule clearly regulates wholesale sales of electricity because it is specifying terms and rates that can, and cannot, be part of a wholesale transaction. *See*, SUF 35. The MDPU Rule does not foster QF generation because the rule prohibits the very long-term pricing mechanism that FERC has recognized is necessary for the construction of facilities. *See*, SUF

[18] 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

21-25. 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 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 foster QF generation and comply with PURPA. Because the MDPU Rule attempts to regulate wholesale sales, and it does not qualify as fostering QF generation, it is pre-empted.

C. The MDPU Rule Is Pre-empted Because It Prohibits Passing Costs Mandated by Federal Law to Ratepayers Through Retail Rates.

National Grid's concern as expressed at the April 20, 2016, hearing is that it not act contrary to State law. If it does, then the MDPU will not allow it to recover payments to Allco's QFs in its retail rates. By prohibiting a long-term avoided cost rate, the MDPU also prohibits National Grid from passing through in retail rates payments to QFs based upon such a rate. But federal law requires that costs incurred by utilities under federal law be allowed to be passed through in retail rates. In *Mississippi Power & Light* and *Nantahala Power & Light Co. v. Thornburg*, 476 U. S. 953 (1986), a State prevented a utility from recovering—through retail rates—the full cost of wholesale purchases because, in the State's view, the FERC rate failed to ensure the reasonableness of a wholesale rate. *See Mississippi Power & Light v. Mississippi ex rel. Moore,* 487 U.S. 354, 360–364 (1988); *Nantahala*, 476 U.S. at 956–962. That is exactly what Massachusetts has done here. Massachusetts has decided that a long-term forecasted avoided cost rate is unreasonable because of the potential variations that will inevitably exist in the future from the forecasted rate and the actual as-delivered rate. Yet as the FERC and the Supreme Court have made clear, the forecasted rate furthers the purposes of the statute and "*in the long run, 'overestimations' and 'underestimations' of avoided costs will balance out*". PURPA Rulemaking, 45 Fed. Reg. at 12,224; *Am. Paper Inst*., 461 U.S. at 415, 417. The Supreme Court has invalidated States' attempts to second-guess the reasonableness of interstate wholesale rates.

preempted to the extent that it actually conflicts with federal law.")

> Once FERC sets such a rate, … a State may not conclude in setting retail rates that the FERC-approved wholesale rates are unreasonable. A State must rather give effect to Congress' desire to give FERC plenary authority over interstate wholesale rates, and to ensure that the States do not interfere with this authority[.] *Mississippi Power & Light* and *Nantahala* make clear that States interfere with FERC's authority by disregarding interstate wholesale rates FERC has deemed just and reasonable, even when States exercise their traditional authority over retail rates.

Hughes v. Talen Energy Marketing, LLC, Nos. 14-614, 14-623, ___ U.S. ___ (April 19, 2016), Slip Op. at 14 (internal quotations and citations omitted).

Moreover, in the case of PURPA, Congress gave the FERC explicit authorization to by-pass State commissions entirely.[19] Section 210(m)(7) of PURPA provides:

> The Commission shall issue and enforce such regulations as are necessary to ensure that an electric utility that purchases electric energy or capacity from a qualifying cogeneration facility or qualifying small power production facility in accordance with any legally enforceable obligation entered into or imposed under this section recovers all prudently incurred costs associated with the purchase.

The FERC has not yet issued regulations under Section 210(m)(7) because in the FERC's view it has not been faced with a recalcitrant State commission, and as noted above, the authority already exists to force the recovery of QFs payments in retail rates.[20] But section 210(m)(7) is a good lead-in to the next issue—whether National Grid's obligation to purchase is imposed by federal law directly or is, as National Grid argues, contingent and dependent upon State implementation. The plain language of Section 210(m)(7) states otherwise by referring to recovery of costs related to "any legally enforceable obligation entered into or imposed *under this section*," and making it crystal clear that no State action is necessary to activate a utility's must-buy obligation. Indeed, section 210(m)(7) clearly is meant to address the recalcitrant State commission who, like the MDPU, not only acts contrary to PURPA through regulating wholesale transactions, but also tries to block PURPA through its authority over retail rates. All such State action is illegal and pre-empted.

[19] *See*, Energy Policy Act of 2005, Pub. L. No. 109-58, § 1253, 119 Stat. 594 (2005).

[20] "The Commission does not believe that regulations are necessary at this time; this is a matter that the Commission can address on a case-by-case basis. However, the Commission will consider a regulation under this section in the future if a need becomes apparent." New PURPA Section 210(m) Regulations Applicable to Small Power Production and Cogeneration Facilities, Docket No. RM06-10-000, Notice of Proposed Rulemaking at ¶ 51 (January 19, 2006).

II. NATIONAL GRID HAS A DIRECT OBLIGATION TO PURCHASE THAT IS NOT CONTINGENT ON STATE IMPLEMENTATION (COMPL. COUNT III).

A. The Plain Language of Section 210 and the FERC's Regulations creates a Direct Obligation on National Grid.

Justice Felix Frankfurter had three rules of administrative law: "(1) Read the statute; (2) read the statute; (3) read the statute!"[21] "[I]n interpreting a statute a court should always turn first to one, cardinal canon before all others. . . . [C]ourts must presume that a legislature says in a statute what it means and means in a statute what it says there. When the words of a statute are unambiguous, then, this first canon is also the last: 'judicial inquiry is complete.'" *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992) (citations omitted).

1. *Section 210(a) and 18 C.F.R. § 292.303(a) Place the Must-Buy Obligation on National Grid*.

The plain language of federal law places the obligation to purchase from QFs directly on electric utilities. Under PURPA, *electric utilities* must purchase any electricity produced by QFs. "*Each 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). The direct obligation to purchase is not qualified by the requirement of any further implementation by a State regulatory authority. *See also*, Conf. R. at 7831[22] (Section 210(a) "require[s] electric utilities to [] offer to purchase electric energy from these [qualifying small power production] facilities.") Congress, could have, but did not, say that utilities were only required to follow rules that States might issue.

2. *The Example of the State that Opts to Resolve Disputes.*

Take the example of a State that opts to resolve disputes. *See*, *FERC v. Mississippi*, 456 U.S. at 751 ("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."[23]) If a State is acting just as a forum for

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[21] Henry J. Friendly, *Mr. Justice Frankfurter and the Reading of Statutes, in* BENCHMARKS 196, 202 (1967).

[22] *See*, 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.").

[23] It are these options that comprise the "great latitude" of state regulatory authorities. *See*, PURPA Rulemaking at 12230. *See also*, fn, 17, *supra*.

disputes, then how is it supposed to reach a decision? The answer is obvious. It must be adjudicating federal rights imposed directly by Section 210 of PURPA. Otherwise, there would be nothing for such a State to resolve. In other words, National Grid has an obligation to purchase regardless of how a State elects to implement PURPA (e.g., by resolving disputes or not participating at all) because it is only then that a State would have the framework to resolve disputes.

3. *The Example of the Recalcitrant State.*

Now take the straightforward case of a State that has chosen not to do anything. Under National Grid's view of the world, a QF would be simply left without any remedy, effectively allowing States to block the application of the must-buy obligation in their jurisdiction. In other words, National Grid is essentially arguing that PURPA is an optional law that requires a State to make an affirmative choice to have it apply in its jurisdiction, and absent that choice, National Grid would have no obligation to purchase electricity from QFs. That logic applies to Titles I and III of PURPA but not Title II. There is simply no basis to support National Grid's position, and it would render PURPA meaningless.

The folly of National Grid's interpretation is further illustrated by Congress' specific limits on State jurisdiction for certain renewable energy QFs. A State has no authority (even under Section 210(f) of PURPA) to act with respect to most renewable energy QFs larger than 30 MWs. *See*, Section 210(e)(2); 18 C.F.R. § 292.601. Section 210(e)(2) expressly prohibits the States having any jurisdiction over small power production facilities between 30MW and 80MW.[24] If PURPA created no direct obligation on electric utilities as National Grid urges, and a State has no authority over avoided costs for renewable QFs larger than 30MWs as Congress made clear in Section 210(e)(2), then Section 210 would be a nullity or non-existent for those renewable QFs larger than 30MW in size under the statutory theory posited by National Grid. Clearly that is not the case, and National Grid's theory simply cannot be squared with that

[24] *See also*, *Conf. R*. at 7833 ("the [FERC] must set the rates for the sale of power by such facilities in accordance with the requirements of this section.")

absolute restriction on State authority.[25] Rather as the statute plainly says Section 210(a) and the FERC's regulations create the direct binding obligation for all QFs regardless of size, but in the case of renewable energy QFs less than 30MW, sections 210(e) and 210(f) allow States to create supplementary rules to foster QF development. But the source of the direct obligation for all cases is from Section 210(a) and the FERC's regulations, as Section 210(e) demonstrably confirms.[26] *See also*, *Wheelabrator Lisbon, Inc. v. Conn. DPUC*, 53 F.3d 183, 188 (2d Cir. 2008), "under the PURPA regulatory regime, FERC—and not state agencies—[are] responsible for regulating the rates charged by qualifying facilities in power purchase agreements."

4. *Section 210(m)(7) of PURPA.*

Section 210(m)(7) enacted in 2005 provides further confirmation that National Grid has a direct obligation to purchase regardless of State implementation. The plain language of Section 210(m)(7) refers to recovery of costs related to "any legally enforceable obligation entered into or imposed *under this section.*" That language does not impose any contingency related to State implementation. Indeed, section 210(m)(7) would, like the remainder of Section 210, be rendered meaningless if State implementation was a pre-condition to a utility's must-buy obligation. Section 210(m)(7), by definition, contemplates the scenario of an uncooperative State. The 2005 statutory amendments to PURPA re-confirm that it is Section 210(a) and the FERC's regulations that create a direct obligation on electric utilities, which obligation is not conditioned upon any implementation by a State regulatory authority.

Similarly, Section 210(m)(1) provides rules for an electric utility to be relieved of its obligation to purchase "under this section." Under National Grid's view, Section 210(m)(1) should instead be read to refer only to an electric utility's obligation under a State

[25] Similarly, National Grid's citation in earlier briefing to 18 CFR §292.304(e) does not aid its case. Section 18 CFR §292.304(e) enumerates the factors that apply to the determination of avoided costs generally and has no reference or limitation to State proceedings. Moreover, the fact that the FERC may, as a matter of administrative convenience, not take enforcement action against, or "second-guess", a State's determination of avoided costs is irrelevant to this Court's jurisdiction, and National Grid's direct obligation to purchase.

[26] Even with respect to smaller QFs, the rules, rates and terms of sales pursuant to a utility's PURPA must-buy obligation and a State's ability to compel wholesale transactions are subject to federal jurisdiction under Title II of FPA, *see*, 16 U.S.C. §§ 205, 206, 18 C.F.R. §292.601, disputes over which fall squarely within a district court's jurisdiction under 16 U.S.C. § 825p. *See also, PURPA Rulemaking*, 45 Fed. Reg. 12,214, 12,231, in which the FERC explained that federal jurisdiction covered not only review and enforcement of State implementation but direct case-by-case review and enforcement. ("[R]eview and enforcement [] can consist not only of review and enforcement as to [] implementation []. It can also consist of review and enforcement of the application [] on a case-

implementation of PURPA. Similarly, Section 210(m)(4) provides for a path for certain entities to "apply to the Commission for an order reinstating the electric utility's obligation to purchase electric energy *under this section*." Under National Grid's view, Section 210(m)(4) should instead be read to refer only to reinstating an electric utility's obligation under a State implementation of PURPA, which in most States would be difficult because there are no rules implementing PURPA.

B. State Jurisdiction under Section 210(g) is Simply Irrelevant.

In earlier briefing, National Grid has cited section 210(g) of PURPA as purported proof that there is no direct obligation of electric utilities under section 210 because, in National Grid's view of the world, only State courts have jurisdiction over QF claims against electric utilities. National Grid simply disregards Justice Frankfurter's three rules of administrative law.

1. *Section 210(g) would not apply because Allco does not make a claim under a State program*.

None of Allco's claims fall within Section 210(g). Section 210(g)(1) does not apply for, among other reasons, that no review is sought of a state proceeding. This case is not an appeal from a proceeding of the MDPU. National Grid does not claim otherwise. Neither does section 210(g)(2) apply because by its express terms it is limited to actions by a QF "*to enforce* any requirement established by a State regulatory authority or nonregulated electric utility pursuant to subsection (f)." (Emphasis added.) Here Allco is not seeking *to enforce* any requirement under any MDPU rules against National Grid. To the contrary, Allco seeks to strike down MDPU's rules. Thus under the express terms of the statute, National Grid's argument fails.

2. *Section 210(g) does not extend to QF Wholesale Sales*.

Even if Allco's claims could be considered under some theory to be covered by Section 210(g), State court review applies to disputes specifically described in either Section 210(g)(1) or (g)(2), and not excluded by Section 210(h)(1). *See, e.g.*, *Freehold Cogeneration Assoc. L.P. v. Bd. Regulatory Comm'rs,* 44 F.3d 1183, 1185 (3d Cir. 1995) (stating that the jurisdictional provisions of section 210(g)(1) of PURPA "are not relevant" to claims that do fit expressly

by-case basis.")

within its provisions); *Indep. Energy Producers Ass'n v. California Pub. Utils. Comm'n*, 36 F.3d 848, 856 fn. 13 (9th Cir. 1994) (the specific state court 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.)

Section 210(h)(1) plainly and clearly states that nothing in Section 210(g) shall apply to the operations of a QF as are subject to the jurisdiction of the FERC under part II of the FPA. Operations of a QF include the right to sell at avoided costs. *See*, 16 U.S.C. §§ 824d, 824e; 18 C.F.R. § 292.601; *see also*, FERC Policy Statement at 61,646 ("The sales of power in interstate commerce [are] an 'operation' which is subject to this Commission's jurisdiction under Part II of the Federal Power Act.")[27] That right is at issue here.

Section 210(h)(1) expressly removes any possible inference that Section 210(g) was intended to provide an exclusive state approach for matters covered under part II of the FPA. Whatever role State commissions play in setting rates for sales by QFs, all terms and conditions of such wholesale sales are still subject to FERC's jurisdiction under Part II of the FPA, with respect to which this Court has exclusive jurisdiction. *See*, 16 U.S.C. §§ 824d, 824e, 825p; 18 C.F.R. § 292.601. Thus National Grid's reliance of Section 210(g) is simply without merit.[28]

3. *The Judicial Review Provisions of Titles I and III Do Not Apply to Section 210.*

What National Grid seems to want this Court to do is impose the judicial review provisions contained in Titles I and III of PURPA, onto Section 210 of PURPA. As the Ninth Circuit of Court of Appeals stated in *Indep. Energy Producers Ass'n v. California Pub. Utils. Comm'n,* 36 F.3d 848, 857, fn. 14 (9th Cir. 1994), such an attempt must be soundly rejected:

> As a final matter, we note that the CPUC and the Utilities cite to *FERC v. Mississippi*, 456 U.S. 742, 72 L. Ed. 2d 532, 102 S. Ct. 2126

[27] *Policy Statement Regarding the Commission's Enforcement Role Under Section 210 of the Public Utility Regulatory Policies Act of 1978*, 23 FERC ¶ 61,304 (1983) ("FERC Policy Statement"). Operations of a qualifying facility that would not be subject to part II of the FPA would include, *inter alia*, a sale by a QF directly to a retail customer or the retail sale by an electric utility to a QF. Both such sales would be retail sales and thus not "wholesale" sales subject to part II of the FPA.

[28] The FERC has concluded that the judicial review provisions of the FPA apply to Section 210 of PURPA. *See, Order No. 69, Small Power Production and Cogeneration Facilities; Regulations Implementing Section 210 of the Public Utility Regulatory Policies Act of 1978,* FERC Stats. & Regs. [1977-1981 Regulations Preambles] P30,128, *order on reh'g,* FERC Stats. & Regs., [Regulations Preambles 1977-1981] P 30,160, at 31,107 n.2 (1980) ("Congress, in incorporating by reference the enforcement provision of the Federal Power Act (Section 210h of PURPA), intended also to incorporate by reference the rehearing and judicial review provision of the Federal Power Act.")

> (1982), for the proposition that in enacting PURPA, Congress expressed its preference to let the States retain the primary regulatory role. *Id*. at 765 & n.29 (internal quotations omitted). This passage does not support appellees' position, however, because it is taken from a section of the opinion discussing Titles I & III of PURPA, and not Title II. Titles I & III seek to encourage states to adopt certain regulatory practices for electric and gas utilities by directing state agencies to "consider" adopting and implementing specified standards. *Id*. at 746. By contrast, Title II of PURPA, the statutory section in question in this case, establishes a distinctly different federal-state relationship from those established in Titles I & III.

The Ninth Circuit correctly stated Section 210 of PURPA is contained in Title II of PURPA, which does not contain the preference for States to maintain the primary regulatory role applicable under Titles I and III. The Ninth Circuit's conclusion is directly supported by the plain statutory language as well as the Conference Report. Each of Titles I, II and III had their own separate judicial review provision. The first was in Title I, Section 123 of PURPA, as part of the amendments to Title 16, Ch. 46 (relating to public utility regulatory retail policies). The second was in Section 210 of PURPA (at issue here). The third was in Title III, Section 307, which became part of title 15, Ch. 59 (relating to retail policies for natural gas utilities). But of great significance, it is only the Title I and III judicial review provisions that used express language limiting the jurisdiction of the federal courts. The reason for that is obvious. Titles I and III of PURPA involved retail issues under the jurisdiction of the States, not issues under federal jurisdiction such as wholesale sales.

Section 123(a) of PURPA (now codified in 16 U.S.C. §2633(a)) expressly limits federal jurisdiction: "*Notwithstanding any other provision of law*, no court of the United States shall have jurisdiction over . . . "). (Emphasis added)." Similarly, the Conference Report's discussion of Section 123 states: "the jurisdiction of the Federal courts is limited by this section; review and enforcement is primarily in the State courts." The Conference Report however was quick to note that the specific language in Section 123 was *not* intended to be broadly interpreted as restricting jurisdiction in other rate related cases.[29] Because Title I of PURPA addressed "retail" policies,

[29] *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."

the limitation on federal jurisdiction was consistent with Congress' general approach of leaving most retail matters to the States.

Section 307 of PURPA (now codified at 15 U.S.C §3207) used almost identical *express* language as Section 123. As it had done with respect to Section 123, the Conference Report's discussion of Section 307 specifically referred to the express "notwithstanding" language of Section 307 as limiting federal court jurisdiction.[30]

The plain language of Section 123 and 307 (both of which relate only to retail policies) illustrate that when Congress intended to restrict jurisdiction of state or federal courts in PURPA it expressly so stated. It did so under Section 123 and 307 of PURPA; it did not under Section 210 of PURPA. Significantly, the "notwithstanding" clause of Section 123 and 307 is not present in Section 210 of PURPA or anywhere else in Title II. Nor is there a discussion in the Conference Report stating Congress' intention to limit federal court jurisdiction in the case of Title II. When Congress intended a discussion in one section of the Conference Report to apply equally to another, it knew how to do that as well.[31]

In contrast, PURPA Sections 210(g) and (h) do not contain express limiting jurisdictional language. Nor are they written to broadly encompass all "the requirements" of Title II or Section 210, as were Sections 123 and 307 with respect to Titles I and III of PURPA, respectively, with respect to all "the requirements" of those Titles.[32] The absence of that express limiting language from Section 210 provides further confirmation that Congress did not intend to hand FPA jurisdiction over to State courts.

[30] *See*, *Conf. R*. at 7836: "Subsection (a) expressly limits Federal jurisdiction regarding any action arising under this title, to only two situations."

[31] *See*, *Conf. R*. at 7837. "Section 311. Relationship to other authority
This Section parallels section 134. The conferees intend the explanation in this statement concerning section 124 is to apply as well to this section."

[32] Section 307 provides that "[a]ny person may bring an action to enforce *the requirements of this chapter* in the appropriate State court. Such action in a State court shall be pursuant to applicable State procedures." (emphasis added.) Similarly Section 123 provides that "[a]ny person … may bring an action to enforce *the requirements of this chapter* in the appropriate State court . . . . Such review or action in a State court shall be pursuant to any applicable State procedures." (emphasis added.)

But regardless of what might be the universe of a State's jurisdiction, the simple fact is that the claims here are not State law PURPA claims under Section 210(g), and even if they were, Section 210(h)(1) would exclude them from the State jurisdictional grant in any event.

C. National Grid is Obligated to Purchase at Its Long-term Forecasted Rate over the Term Committed to by Allco, Not the Rate Set by the MDPU.

National Grid is correct about one thing. The FERC's regulations do not use the term "long-term avoided cost". Neither do they use what the Massachusetts rule refers to as the "Short-Run Rate". Both of those phrases are electricity lingo shorthand for the definitions in the FERC's regulations. There are two rates provided in FERC's regulations: (1) a short-run rate (or as-available rate) (i.e., the avoided costs calculated at the time of delivery), which can be selected under 18 C.F.R. §292.304(d)(1) and 18 C.F.R. §292.304(d)(2)(i)), or (ii) a long-run rate, the avoided costs calculated at the time the obligation is incurred over the specified term, which is what is described under 18 C.F.R. §292.304(d)(2)(ii). The term long-run or long-term rate is used to describe the rate in (d)(2)(ii) because the rate is a forecasted or projected rate over a future term.

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.

As discussed above, the 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 ¶ 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.").

As FERC's regulations make plain, the selection of which rate is to be used is made by the QF, not the electric utility or a State regulatory agency. 18 C.F.R. § 292.304(d)(2); *see also Hydrodynamics*, 146 FERC ¶ 61,193 (2014) at ¶ 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 ¶ 23.

The term over which the forecasted avoided costs are to be determined is a crucial element of a forecasted avoided cost rate. Lesser Decl. at ¶ 56, App. 97. The FERC's regulations in (d)(2) make it clear that the avoided costs calculated at the time the obligation are calculated over the specified term and that the term is the time period for which the QF is committing itself: "Each qualifying facility shall have the option [] To provide energy or capacity pursuant to a legally enforceable obligation for the delivery of energy or capacity over a specified term, in which case 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 [] (ii) [t]he avoided costs calculated at the time the obligation is incurred." *See*, *e.g*., *JD Wind 1, LLC*, 129 FERC ¶ 61,148, at ¶ 25 (2009) ("Under our regulations, [the QF] has the right to choose to sell pursuant to a legally enforceable obligation . . . ."); *see also Murphy Flat Power, LLC,* 141 FERC ¶61,145 (2012) at ¶ 24 ("*a QF, by committing itself to sell to an electric utility, also commits the electric utility to buy from the QF*; these commitments result either in contracts or in non-contractual, but binding, legally enforceable obligations") (emphasis added); *Cedar Creek Wind, LLC*, 137 FERC ¶ 61,006 at ¶ 32 (2011) ("The Commission's regulations under PURPA also include a requirement that QFs have the option to sell not only as available but pursuant to legally enforceable obligations over specified terms.") If a QF did not have the right to also specify the

term over which its commitment would be, then its right to lock-in a rate needed to finance construction of its facility would be illusory. Lesser Decl. ¶ 58, SUF 33-34.

In other words, under federal law National Grid is required to offer to purchase any and all electricity offered by Allco's QFs. The Allco QFs have offered their electricity for a committed term of 25 years. As a result National Grid is required to purchase it over that committed term, and the right to select a forecasted rate would be meaningless if it were not determined over that same committed term. Lesser Decl. ¶ 58, SUF 33-34.

National Grid's claim that the MDPU has the right to restrict the period a QF commits to, such as a rolling period of 30 days is preposterous because such a right would, as illustrated here, eviscerate the purpose of providing a forecasted rate in the first place. As discussed above, the FERC has stated that the long-term forecasted fixed rates that a QF has the option to choose are essential to fostering QF generation because "'an investor needs to be able to estimate, with reasonable certainty, the expected return on a potential investment before construction of a facility.'" *JD Wind 1 LLC*, 130 FERC ¶ 61,127, at ¶ 23 (2010) (quoting 45 Fed. Reg. at 12,218). Being "able to evaluate the financial feasibility" of a QF in this manner, *id.* (quoting 45 Fed. Reg. at 12,218), is a critical prerequisite for moving forward with a project. It is readily apparent how allowing the State or the utility to select and limit the specified term of the QF's pricing option would completely frustrate the ability of "'an investor [] to be able to estimate, with reasonable certainty, the expected return on a potential investment before construction of a facility.'" *Id*. With only a rolling 30-day term under the MDPU Rule, the only reasonably certain revenue stream is for the 30-day period, which makes it impossible to raise the necessary funding to construct the facility. (SUF 21-25.) Allco has offered its QF energy and capacity for a committed term of 25 years, and selected a forecasted avoided cost rate. As in *The Godfather*, it is an offer that National Grid can't refuse.

III. FURTHER PROCEEDINGS.

If the Court grants Allco's motion for summary judgment, the key factual issue to then be determined would be what the forecasted rate is over the specified term. As to that issue, Allco proposes that the parties be ordered to mediation so as to resolve the factual issue of what the

actual forecasted avoided costs would be, and failing settlement, that the Court appoint a master pursuant to Fed. R. Civ. P. 53 to hold trial proceedings and make or recommend the finding of fact of the proper avoided costs over the 25-year specified term. Allco further submits that this Court cannot require the MDPU to determine avoided costs, change its regulations or take any other action. *See, New York v. United States*, 505 U.S. 144, 162 (1992). ("[T]he Constitution has never been understood to confer upon Congress the ability to require the States to govern according to Congress' instructions.") 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).

An order from this Court remanding the factual issue of avoided costs to the MDPU would be vulnerable to constitutional challenge because it would be enlisting "a State's legislative or administrative apparatus for federal purposes", *id.*, further delaying and likely denying Allco relief.

CONCLUSION

In sum, the MDPU Rule is inconsistent with PURPA in three respects. First, under the MDPU Rule a long-term forecasted avoided cost rate is prohibited. That conflicts with federal law, which provides that a QF has the option to select a long-term avoided cost rate under 18 C.F.R. § 292.304(d)(2)(ii) over the term to which it commits. Second, the MDPU Rule regulates wholesale sales of electricity but does not foster QF generation. That violates the FPA's prohibition on State regulation of wholesale sales of electricity. Third, by prohibiting a long-term avoided cost rate, the MDPU also prohibits National Grid from passing through in retail rates its payments to QFs based upon such a rate. But federal law requires that costs incurred by utilities under federal law be allowed to be passed through in retail rates. *See, Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953, 956-962 (1986). *See also*, Section 210(m)(7) of PURPA.

For the foregoing reasons, the Court should enter summary judgment in favor of Allco; declare the MDPU Rule to be illegal, null, and void; enjoin the Defendants from continuing to apply the MDPU Rule and National Grid's related P-Tariff and from taking any future action purporting to implement PURPA in a manner inconsistent with federal law; declare that National Grid's obligation to purchase energy and capacity from Plaintiff's QFs is imposed directly by federal law, and no action or inaction of the State of Massachusetts or the State Defendants can detract from or impair that obligation; declare there exists a legally enforceable obligation between the Allco and National Grid pursuant to which National Grid is obligated to purchase all energy and capacity from the Allco QFs; declare the rate at which National Grid has an obligation to purchase energy and capacity from the Allco QFs is the forecasted avoided cost rate in 18 C.F.R. §292.304(d)(2)(ii) over the term committed to by Allco of 25 years, and appoint a master to determine the factual issue of actual avoided costs.

Dated: May 4, 2016

Respectfully submitted,

/s/ Thomas Melone

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CERTIFICATE OF SERVICE

I hereby certify that on this 4th day of May 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