17-1296

THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

ALLCO RENEWABLE ENERGY LIMITED,
Plaintiff-Appellant
v.

MASSACHUSETTS ELECTRIC COMPANY D/B/A NATIONAL GRID,
Defendant-Appellee

and

ANGELA O'CONNOR, JOLETTE WESTBROOK and ROBERT HAYDEN, in their 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-Appellees,

Appeal from the United States District Court for the District of Massachusetts
No. 1:15-cv-13515
Hon. Patti B. Saris

BRIEF AND ADDENDUM OF APPELLANT
ALLCO RENEWABLE ENERGY LIMITED

May 16, 2017

Thomas Melone, Esq.
Allco Renewable Energy Limited
14 Wall Street, 20th floor
New York, New York 10005
(212) 681-1120
Thomas.Melone@AllcoUS.com

CORPORATE DISCLOSURE STATEMENT

Allco Renewable Energy Limited is a privately held company in the business of developing solar energy projects. It has no parent companies, and no publicly held company owns 10 percent or more of its stock.

/s/ Thomas Melone

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JURISDICTIONAL STATEMENT

This case involves two actions: *first*, an enforcement action against the Commissioners of the Massachusetts Department of Public Utilities (the "MDPU") and the Commissioner of the Massachusetts Department of Energy Resources (collectively, the "State Defendants") under 16 U.S.C. §824a-3(h)(2) and *second*, a declaratory judgment action and an action for damages and injunctive relief against the Massachusetts Electric Company d/b/a National Grid ("National Grid") for breach of its obligations to Allco Renewable Energy Limited ("Allco") under section 210(a) of the Public Utility Regulatory Policies Act, Pub. L. No. 95-617, 92 Stat. 3117 ("PURPA"), and the Federal Power Act ("FPA"), 16 U.S.C. §791a *et seq*., to purchase energy and capacity from Allco's renewable energy generating facilities.

The District Court had jurisdiction (i) under 16 U.S.C. §824a-3(h)(2), which empowers the District Court to issue injunctive or other relief upon complaint of a "qualifying small power producer," which Allco is, (ii) under 28 U.S.C. §1331 because claims arise under federal law, (iii) under 16 U.S.C. §825p, which vests district courts with jurisdiction of violations of the FPA or the rules, regulations, and orders thereunder and "all suits" "to enforce any liability or duty" under the FPA, and (iv) under 28 U.S.C. § 1332 on the grounds of diversity of citizenship as the amount in controversy exceeds $75,000.

The District Court granted summary judgment for Allco against the State Defendants but dismissed the case against National Grid for failure to state a claim. AD40.[1] Final judgment was entered on February 21, 2017. Allco timely filed a notice of appeal on March 23, 2017. AX62. This Court has jurisdiction over the appeal under 28 U.S.C. §1291.

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[1] AD__ refers to the Addendum to this brief. AX__ refers to the Joint Appendix.

STATEMENT OF ISSUES

1. Whether Allco has the right to maintain a direct action against National Grid, and if, so in what venue?

2. Whether the District Court erred by limiting the relief granted Allco to invalidating the MDPU's regulation.

STATEMENT OF THE CASE

The landmark Paris Agreement to combat climate change officially took effect last November. "We remain in a race against time," UN Secretary General Ban Ki-moon said. When signed, the Paris Agreement was expected to hopefully limit the rise in average world temperatures to "well below" 2.0 C above pre-industrial times. But the day before the Paris Agreement took effect, the United Nations Environment Programme published its annual emissions report concluding that without an additional 25% reduction by 2030 on top of the Paris Agreement, the world is on a path of 2.9-3.4 C of warming.

With that new urgent call to action, and the aggressive anti-climate change stance of the current US Administration, section 210 of PURPA is our best weapon against climate change. It is a law that is on the books now. But without a direct cause of action by qualifying generators against electric utilities to enforce the utilities' obligations, section 210 of PURPA is an empty shell. This Court may be PURPA's last stand, and the last clear chance to meaningfully combat climate change before it is too late.

In 1978 Congress enacted PURPA to address the adverse effects that the Nation would suffer through its dependence on oil and coal generating resources. As relevant here, Congress imposed on each electric utility an obligation to purchase any and all electric energy offered by a special class of generators, called qualifying facilities or "QFs."[2] In *Godfather* lingo, a QF's offer is one that the utility "can't refuse." A QF establishes its right to sell to a utility through a legally enforceable obligation, which is created when *"the qualifying facility has agreed to obligate itself to deliver at a future date energy and capacity to the electric utility."* PURPA Rulemaking at 57.[3] (Emphasis added.)

The District Court agreed that National Grid has an obligation to purchase all energy offered by Allco, but erroneously held that Allco had no remedy for National Grid's breach of that obligation. The District Court's judgment deals a major setback to fighting climate change, and sabotages Congress' preference for QF generation. Under the District Court's ruling, States and nonregulated utilities can unilaterally remake regional interstate wholesale energy markets, retroactively abrogate the federal government's policy of promoting renewable energy QF generation, and upset settled, investment-backed expectations *after* private industry has already committed to its investments.

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[2] 16 U.S.C. §824a-3; "[Q]ualifying 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).

[3] *See Order 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) ("PURPA Rulemaking"). Available at http://www.ferc.gov/industries/electric/gen-info/qual-fac/orders/order-69-and-erratum.pdf.

The District Court's reasoning:

- provides a pathway for States and nonregulated electric utilities to nullify an electric utility's must-buy obligation under section 210(a) of PURPA, leaving a federal right dependent on the political whims of State regulators and nonregulated utilities.
- is contrary to the Supreme Court's opinion in *FERC v. Mississippi*, 456 U.S. 742 (1982), which implicitly concluded that QFs have a direct cause of action against electric utilities;
- ignores the plain language of the statute;
- is contrary to Supreme Court precedent explaining that when Congress addresses contract-like rights and issues in a statute, it intends the customary legal incidents attendant to those rights to be available, including suit.

Allco filed declaratory judgment action and an action for damages and injunctive relief against National Grid and an enforcement action against the State Defendants' for their role in prohibiting National Grid from honoring its obligations under PURPA. The District Court granted summary judgment for Allco against the State Defendants but dismissed the case against National Grid for failure to state a claim. This timely appeal followed.

A. Federal Statutory and Regulatory Background.

Initially, interstate sales of electricity were unregulated. States were powerless to regulate such sales under the Commerce Clause, no matter what their local intra-state interest was. *see, Pub. Utils. Comm'n v. Attleboro Steam & Elec. Co.*, 273 U.S. 83, 89-90 (1927) ("*Attleboro*"), resulting in what became known as "the *Attleboro* gap." *Id*. 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.") *See also*, *New York v. FERC*, 535 U.S. 1, 5-6 (2002).

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 the Federal Energy Regulatory Commission (the "FERC") – exclusive authority to regulate "the sale of electric energy at wholesale in interstate commerce." 16 U.S.C. § 824(b)(1).[4] "[W]holesale," in this context, means any "sale of electric energy to any person for resale." *Id.* § 824(d). Thus, any sale of electricity

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[4] 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 would be the case here.

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."). 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 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). 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); *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." PURPA Rulemaking, 45 Fed. Reg. at 12,216.[5] 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 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

[5] "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.

avoided costs calculated at the time the obligation is incurred." 18 C.F.R. § 292.304(d)(2) (emphasis added).

In other words, a QF can elect to have the utility's avoided costs (and thus its rate) determined on an ongoing basis, calculated when electricity is physically delivered to the utility; *or* the QF can instead elect to have the utility's avoided costs calculated when the contract is entered, so that it can "establish a fixed contract price for its energy and capacity at the outset of its obligation." PURPA Rulemaking, 45 Fed. Reg. at 12,224. FERC understood that "in order to be able to evaluate the financial feasibility of a [QF], an investor needs to be able to estimate, with reasonable certainty, the expected return on a potential investment before construction of a facility." *Id.* at 12,218. Ensuring that a QF can elect to have "avoided costs calculated at the time the obligation is incurred," 18 C.F.R. § 292.304(d)(2)(ii), provides this reasonable certainty. FERC recognized that the utility's avoided costs calculated at the time the obligation is incurred may turn out to be quite different than the utility's avoided costs at the time the power is actually delivered. PURPA Rulemaking, 45 Fed. Reg. at 12,224. But FERC believed that "in the long run, 'overestimations' and 'underestimations' of avoided costs will balance out," and it emphasized "the need for certainty with regard to return on investment in new technologies." *Id.* (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 governing sales to QFs (a retail transaction—section 210(a)(1)) and purchases from QFs (a wholesale transaction—section 210(a)(2)). *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.”).

Under PURPA, the FERC still maintains the ultimate authority to regulate wholesale rates. *See* FPA §§205, 206*, 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.") But States have the authority, subject to FERC's review under the FPA, to implement the FERC's rules requiring utilities to purchase from QFs, 16 U.S.C. §824a-3(f)(1), including compelling the entry into long-term contracts. In these respects, PURPA reflects a limited exception to FERC's otherwise exclusive authority over wholesale electricity sales.[6]

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. *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

[6] 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. "'[T]he Constitution simply does not give Congress the authority to require the States to regulate.' That is true whether Congress directly commands a State to regulate or indirectly coerces a State to adopt a federal regulatory system as its own." *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2602 (2012) (internal citations omitted.)

considered the anticipated cost to the utility of its own fuel sources."). *See*, D.T.E. 99-38, Order at 2, December 27, 1999 (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.")

Beginning in 1992, competitive wholesale power markets began to emerge, in which power producers independent of utilities compete to sell their electricity to utilities. The development of competitive wholesale power markets—and, in particular, the development of a real-time spot market for electricity—changed the way utilities determined their avoided costs. In 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, but limited the avoided cost calculation to only the spot rate from time-to-time. In a competitive market, the avoided cost at any given moment is the market price of electricity at that moment. Such real-time calculation of avoided costs is appropriate for a QF that has chosen to have its rate based on the utility's avoided costs "calculated at the time of delivery." 18 C.F.R. § 292.304(d)(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.

The District Court properly invalidated 220 C.M.R. §§8.03-8.05 (the “MDPU Rule”) because it prohibited a rate based on avoided costs “calculated at the time the obligation is incurred.” 18 C.F.R. § 292.304(d)(2)(ii).

D. Allco’s Offer to National Grid.

Allco is a “qualifying small power producer” within the meaning of 16 U.S.C. §796(17)(D). On March 28, 2011, Allco submitted an offer to sell the entire generation output from various solar renewable energy QFs sized between 6.87 megawatts (“MWs”) and 16.67MWs 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). 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. Now that the District Court invalidated that prohibition, National Grid is still refusing to pay anything other than an “as-available” rate.

On August 3, 2011, Allco filed a petition with the MDPU against National Grid. 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. The MDPU's order confirmed that a legally enforceable obligation existed 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.

On July 28, 2014, Allco petitioned the 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. On September 26, 2014, FERC gave notice that it would not initiate an enforcement action. *Allco Renewable Energy Ltd.*, 148 FERC ¶ 61,233 (2014).

SUMMARY OF THE ARGUMENT

The FPA gives the FERC exclusive jurisdiction over all terms and conditions of interstate wholesale energy sales. But the FERC's FPA jurisdiction does not extend to States (including State and local entities) or most other nonregulated electric utilities[7] The FERC's FPA jurisdiction also does not extend to retail practices, such as the requirement under section 210(a)(1) of PURPA to sell electric energy to QFs, or to the selection of generation resources that local regulated utilities could build to service retail load. Thus when Congress imposed an obligation on all electric utilities (including State-owned utilities and other nonregulated electric utilities) to agree to purchase energy from QFs (and in doing so superseded traditional State regulatory authority to select the generation its regulated utilities would use to service retail load), it needed to bring both State regulatory authorities and all nonregulated utilities under the regulatory umbrella. It did that by requiring each state regulatory authority and nonregulated utility to implement the FERC's rules under Section 210(a) of PURPA (*see* section 210(f)), and by creating a right for the FERC and QFs to bring suit against State regulatory authorities and nonregulated utilities to enforce that obligation.

At the same time, Congress was mindful that the FERC should only surrender

[7] *See*, FPA §201(f) which excludes electric cooperatives that receive financing from the Rural Utilities Service, and States and political subdivisions (including State and municipal utilities), which comprise the bulk of nonregulated utilities.

jurisdiction in the area of wholesale sales of QFs only to the extent that the FERC so determined. Thus section 210(e) of PURPA authorized the FERC to exempt QFs and their transactions from the FPA to the extent so designated by the FERC. Absent the FERC implementing exemptions, State regulatory authorities would have no authority to set any terms, rates or conditions of wholesale sales by QFs. But once exemptions were implemented, then State regulatory authorities and nonregulated utilities would have the authority to fill the void created by the absence of FERC jurisdiction. Congress, however, prohibited the FERC from exempting most renewable energy generators larger than 30MWs in size, and instead required the FERC to retain its FPA jurisdiction over such QF transactions.

As Allco argued before the District Court, the example of the 30MW+ renewable energy generator is one of the reasons why the District Court's dismissal of Allco's claims against National Grid was in error. The creation of specific remedies in section 210(g) and (h) of PURPA was needed to cover entities that would not otherwise be covered by FPA jurisdiction. Although section 210(a) of PURPA has been on the books for nearly forty years, it was only last month that a court finally recognized the importance of the example of the 30MW+ generator to the overall interpretation of the statute. *See, Portland General Elec. Co. v. FERC*, __ F.3d. __, 2017 U.S. App. LEXIS 7222 (D.C. Cir. 2017) ("*Portland General*"), slip op. at 13-14. The DC Circuit's recognition undermines the District Court's pigeon-holing of all claims under section 210 as either an "implementation" or an "as-applied claim." AD51.

In 2006 FERC's regulations were amended eliminating the exemption from FPA jurisdiction for smaller renewable energy QFs. AD15, AD39. In its place, FERC provided for a deferential standard of review of State regulatory authority determinations of avoided costs if a State has properly implemented section 210(a) of PURPA. AD15.

As Allco argued before the District Court, the District Court's holding leaves the 30MW+ renewable QF and Allco's smaller QFs out in the cold *without any judicial remedy*. That certainly cannot be what Congress intended, especially when the Conference Report[8] specifically called out the 30MW+ renewable QF, and expressly excluded from state jurisdiction operations of a QF subject to FPA part II jurisdiction, which Allco's QF sales to National Grid would be.

To make matters worse, the District Court's holding gives States and nonregulated utilities a veto over Congress' preference for QF generation. This case illustrates how such a veto would work. The District Court invalidated the MDPU's current rule but then leaves to the MDPU what, if anything, to do. The MDPU could simply do nothing and the QF—Allco in this case—would be left with no remedy to

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[8] *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.").

enforce the must buy obligation.

To support its laissez-faire approach, the District Court relied on language from *FERC v. Mississippi*, 456 U.S. 742, 751 (1982) that stated States could fulfill their section 210(f) implementation obligations by either "new rulemaking, a case-by-case adjudication, or other reasonable method." AD62. That language from the Supreme Court's opinion in *FERC v. Mississippi*, however, only makes sense if a QF has a cause of action against a utility. If it did not, then there would be no basis on which a State regulatory authority could entertain a dispute because by definition it could only seek to resolve a dispute based upon a QF's rights against a utility. Those rights must be found in section 210 and the FERC's regulations.

The sole source of a role for the States are the exemptions from the FPA. 18 C.F.R. §292.601. If the relationship *between the utility and the QF* were not covered by the FPA in the first place, then there would not be any need to provide exemptions. The relationship between the utility and the QF is the focus of section 210 and the FPA, *see Staff Paper* at 38865, fn. 5[9], and that is what Allco's action seeks to enforce. The Supreme Court's opinion in *FERC v. Mississippi,* 456 U.S.

[9] *Staff Paper Discussing Commission Responsibilities To Establish Rules Regarding Rates And Exemptions For Qualifying Cogeneration And Small Power Production Facilities Pursuant To Section 210 Of The Public Utility Regulatory Policies Act of 1978*, 44 Fed. Reg. 129, 38863 (1979) ("*Staff Paper*"). Available at http://www.ferc.gov/industries/electric/gen-info/qual-fac/orders/staff-paper.pdf.

742 (1982) implicitly recognized that QFs have a direct cause of action against electric utilities, which is also consistent with the plain language of the statute and Supreme Court precedent explaining that when Congress addresses contract-like rights and issues in a statute, it intends the customary legal incidents attendant to those rights to be available, including suit, in this case directly against National Grid.

Finally, the District Court erred by only invalidating the MDPU's regulation and refusing to otherwise address the ongoing irreparable harm being suffered by Allco.

ARGUMENT

I. Standard Of Review.

This Court reviews *de novo* orders granting motions to dismiss under Rule 12(b)(6), applying the same criteria as the district court. *Schatz v. Republican State Leadership Comm.*, 669 F.3d 50, 55 (1st Cir. 2012). Our "sole inquiry . . . is whether, construing the well-pleaded facts of the complaint in the light most favorable to the plaintiff[], the complaint states a claim for which relief can be granted." *Ocasio-Hernández v. Fortuño-Burset*, 640 F.3d 1, 7 (1st Cir. 2011).

II. The District Court Wrongly Held That National Grid's Must-Buy Obligation Was Not Enforceable Through A Private Cause of Action Against National Grid.

Under the FPA and section 210 of PURPA, "it is really the utility as buyer and the seller that is regulated." *Staff Paper* at 38865, fn. 5. Electric utilities are required to purchase all energy and capacity *offered to them by a QF*. A QF establishes its right to sell to a utility through a legally enforceable obligation. A legally enforceable obligation is created when *"the qualifying facility has agreed to obligate itself to deliver at a future date energy and capacity to the electric utility."* PURPA Rulemaking at 57. (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 (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.

The mandatory purchase obligation is a simple concept—each utility must buy the energy and capacity a QF offers over the term to which the QF commits. The statutory language creates a standing offer from utilities to purchase any and all energy and capacity offered by QFs. It is a compelled bi-lateral power purchase agreement. Under every State's Uniform Commercial Code, the utility is a merchant that has a standing firm offer to buy.

The District Court agreed that the must-buy obligation is imposed directly on National Grid. AD50. Despite that recognition, the District Court held that the legally enforceable obligation imposed under federal law was not enforceable at all.

AD50.[10]

A. A QF's Right To A Private Cause of Action Against The Utility Was Implicitly Recognized by the Supreme Court in *FERC v. Mississippi.*

In *FERC v. Mississippi*, the Supreme Court stated that a State regulatory authority can satisfy its obligations under section 210(f) of PURPA merely by resolving disputes. *See*, 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."[11]) If a State regulatory authority is acting just as a forum for 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, and there must be a direct cause of action in the first place against the utility. Otherwise, there would be nothing for such a State regulatory authority to resolve. The Supreme

[10] Not all utilities share the District Court's and National Grid's position. For example, Eversource, the other major utility in Massachusetts has told the Second Circuit Court of Appeals that QFs do indeed have a direct cause of action against utilities for damages if the utility fails to honor its must-buy obligation. *See*, *Allco Finance Limited v. Klee*, Nos. 16-2946, 16-2949 (2d Cir. argued December 9, 2016), Amicus Curiae Brief of The Connecticut Light And Power Company DBA Eversource Energy (November 21, 2016) at 6 ("Allco's alleged injury is capable of being fully remedied by monetary damages" in a direct action against Eversource). Available at: https://statepowerproject.files.wordpress.com/2014/03/ct-2nd-conn-light-and-power-amicus-112216.pdf.

[11] These options comprise the "great latitude" of state regulatory authorities. *See*, PURPA Rulemaking at 12230.

Court's recognition that a State regulatory authority could simply satisfy its obligations under section 210(f) by simply resolving disputes recognizes that a cause of action against the utility exists in the first place.

B. The Must-Buy Obligation Is A Contractual-Type Obligation Which Brings With It Typical Contractual Remedies.

The Supreme Court has held that when Congress addresses contract-like rights and issues in a statute, it intends the customary legal incidents attendant to those rights to be available including suit. *See, Cox v. Castillo*, 625 Fed. Appx. 453 (11th Cir. 2015) ("The Supreme Court has held that 'when Congress declare[s] in [a statute] that certain contracts are void, it intend[s] that the customary legal incidents of voidness [] follow, including the availability of a suit for rescission or for an injunction against continued operation of the contract, and for restitution,'" citing *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, 19 (1979)). That is the case here. Section 210(a) imposes a contractual-type obligation on an electric utility to accept the offer made by the QF at the legally-mandated price of avoided costs. The QF is the master of its offer and there is nothing that would require a QF to deliver energy and capacity within 90 days of its offer, as opposed to a year, two years or twenty years from its offer. The legally enforceable obligation imposed by PURPA is the imposition of a contract. In the case of Allco's QFs, it is a long-term contract that is simply a series of individual contractual commitments to deliver energy and capacity at various points in time. The "customary legal incidents" of a legally imposed contractual obligation, including the right to bring suit against the counterparty, should accompany such an obligation.

C. The District Court Misapplied *Sandoval*.

Relying on the Supreme Court decision in *Alexander* v. *Sandoval*, 532 U.S. 275 (2001) ("*Sandoval*"), the District Court concluded that the only remedies, or private causes of action, available to a QF are those specified in either section 210(g) or (h)(2) of PURPA. AD52. ("What Allco is seeking [] does not fit the mold of" section 210(g) or (h)(2).)

Supreme Court precedent sets forth a two-prong inquiry to determine if a private cause of action exists where one is not explicitly stated in the statutory text. *First*, does the statute contain "'rights-creating' language" benefitting a specific class. *Sandoval,* 532 U.S. at 289. If so, it presumptively creates a private right of action. *See*, *Bonano v. E. Caribbean Airline Corp*., 365 F.3d 81, 85 (1st Cir. 2004) ("for a statute to create private rights of action, 'its text must be phrased' in terms of the class protected."); *Int'l Union v. Faye,* 828 F.3d 969 (D.C. Cir. 2016) (Tatel, J., concurring). *Second*, even if a statute contains "rights-creating language," did Congress nevertheless intend to foreclose a private right of action by providing specific remedies with respect to *other* rights and obligations created by the statute. *See*, *Bonano,* 365 F.3d at 85-86 ("When Congress has established a detailed enforcement scheme, which expressly provides a private right of action for violations of specific provisions, that is a strong indication that Congress did not intend to provide private litigants with a means of redressing violations of other sections of the Act.") (internal citations and quotations omitted.); *United States v. Monzel*, 641 F.3d 528, 542 (D.C. Cir. 2011) ("carefully crafted and detailed enforcement scheme provides strong evidence that Congress did not intend to authorize other remedies that it simply forgot to incorporate expressly.") (internal citations and quotations omitted.).

Here the District Court agreed that the language of the statute has sufficient rights-creating language, but concluded that Congress intended to limit private rights of action to those specified in section 210(g) and (h)(2), creating a no man's land for all renewable QFs 30MWs and greater, and all QFs absent proper implementation by a State or non-regulated utility. The District Court holding is demonstrably incorrect.

Under *Sandoval* and *Armstrong v. Exceptional Child Center, Inc.*, 135 S. Ct. 1378 (2015) ("*Armstrong*"), the presence of express remedies to enforce other parts of a statute is not sufficient *by itself* to support the conclusion that Congress intended to limit a statute's remedies to those expressly stated. There is rights-creating language in section 210 of PURPA, and there is nothing in sections 210(g) or (h)(2) that evidences Congressional intent to eliminate a private action to vindicate the rights in federal court that Congress had just created.

"[P]rivate rights of action to enforce federal law must be created by Congress. [] The judicial task is to interpret the statute Congress has passed to determine whether it displays an intent to create not just a private right but also a private remedy. [] *Statutory intent on this latter point is determinative*." *Sandoval,* 532 U.S. at 286 (emphasis added; internal citations omitted.) *Sandoval* involved the question of whether there was a private right of action to enforce section 602 of Title VI of the Civil Rights Act of 1964. The Supreme Court had already held that section 601 of Title VI had sufficient "rights-creating language" to be enforceable through a private cause of action, even though Congress did not expressly authorize a private right of action. But section 601 prohibited only intentional discrimination. Section 602 authorized the Department of Justice to issue regulations to enforce section 601, which it did. Those regulations, which the Court assumed were valid, prohibited grant recipients from engaging in conduct that had a discriminatory effect, even though the discrimination was not intentional. *See, Sandoval,* 532 U.S. at 281 ("we must assume [] that regulations promulgated under § 602 of Title VI may validly proscribe activities that have a disparate impact on racial groups, even though such activities are permissible under § 601.") The plaintiffs sued to enforce the regulation.

The Supreme Court focused on section 602 itself, *see Sandoval,* 532 U.S. at 286 (the "right must come, if at all, from the independent force of § 602.") The

Court did not let the fact that section 601 created a private right of action detract from section 602's ability to create one as well. But the Supreme Court stated that section 602 only intended to allow agencies the ability to write regulations to effectuate rights created elsewhere in the statute. *Id*. at 289 ("Far from displaying congressional intent to create new rights, § 602 limits agencies to 'effectuating' rights already created by § 601.") *See also, id*. at 285 ("It is clear now that the disparate-impact regulations do not simply apply § 601 -- since they indeed forbid conduct that § 601 permits -- and therefore clear that the private right of action to enforce § 601 does not include a private right to enforce these regulations.")

In stark comparison to section 602 in *Sandoval*, PURPA section 210 contains classic rights-creating language. The statute shows "an intent to confer rights on a particular class of persons." *Sandoval,* 532 U.S. at 289. The statute "display[s] congressional intent to create new rights." *Id*. "[I]t focuses … on the individuals protected." *Id*. Unlike section 602 in *Sandavol*, the Supreme Court is already on the record stating that the statute contains rights-creating language. *See*, *FERC v. Mississippi*, 456 U.S. at 759-760 ("[t]he *statute's substantive* provisions require electricity utilities to purchase electricity from [] qualifying cogenerator and small power production facilities. § 824a-3(a).") (emphasis added.) Section 210(a) required the FERC to issue rules that "require electric utilities to offer to—[] (2) purchase electric energy from [QFs.]" FERC did so. *Sandoval,* 532 U.S. at 284 ("A

Congress that intends the statute to be enforced through a private cause of action intends the authoritative interpretation of the statute to be so enforced as well.") Section 210 of PURPA specifically obligates electric utilities to purchase energy from a specific class—QFs. It "focus[es] on a benefited class." *See, Bonano,* 365 F.3d at 85. QFs are intended beneficiaries of PURPA and the FPA. *See*, *Freehold Cogeneration Assoc. L.P. v. Bd. Regulatory Comm'rs,* 44 F.3d 1183, 1191 (3d Cir. 1995) ("Section 210 of PURPA sets forth the benefit to which QFs are entitled. It creates a market for their energy."); *S. Cal. Edison Co. v. FERC*, 195 F.3d 17, 23 (D.C. Cir. 1999) ("in deciding to confer substantial benefits on 'small power production facilities' Congress took care to define the class of potential beneficiaries.")

Section 210(a) and 18 C.F.R. §292.303 contain "rights-creating language because it is mandatory and has a clear focus on the benefitted" entities, *i.e*., QFs. *Concilio De Salud Integral De Loiza, Inc. v. Perez-Perdomo*, 551 F.3d 10, 17 (1st Cir. 2008) (internal citations and quotations omitted.) (emphasis added.) *See also*, Conf. R. at 7831 (section 210(a) imposes a federal obligation that "require[s] electric utilities to [] offer to purchase electric energy from these [qualifying small power production] facilities.") The rights-creating language in section 210(a) and 18 C.F.R. §292.303 is clear, and the Supreme Court has already acknowledged it. *FERC v. Mississippi*, 456 U.S. at 759-760.

Consistent with the rights-creating language in the statute and regulations, the District Court agreed that section 210 of PURPA imposes a direct federal obligation on electric utilities to purchase from a QF. AD49. ("Allco is correct that FERC's implementing regulations obligate electric utilities like National Grid to purchase electric energy from QFs.") The District Court, however, concluded that the direct obligation is not "enforceable through a private cause of action against the electric utility," AD50, reasoning that Congress intended to exclude a private cause of action by providing other remedies under a statute—specifically those in sections 210(g) and (h)(2).

The most straight-forward reason why the District Court misapprehended the statute's intention is that the District Court's holding creates a no man's land—a world where certain QFs have no remedy at all. The District Court held that the world of PURPA remedies is limited to Door #1—state court "as-applied" challenges—and Door #2—federal court "implementation" challenges. That is demonstrably not so, as the DC Circuit recognized last month in *Portland General*. True, the generators here are not 30MW, but that is irrelevant to the question of whether Congress intended to *exclude* remedies other than those that fall within sections 210(g) and (h)(2) of PURPA. Congress clearly intended all QFs to have the right to force a sale of its energy to an electric utility at avoided costs. *FERC v. Mississippi*, 456 U.S. at 759-760 ("[t]he *statute's substantive* provisions require electricity utilities to purchase electricity from [] qualifying cogenerator and small power production facilities. § 824a-3(a).") (emphasis added.); *see also*, Conf. R. at 7831 (section 210(a) imposes a federal obligation that "require[s] electric utilities to [] offer to purchase electric energy from these [qualifying small power production] facilities."). Congress permitted FERC to allow state regulatory authorities a role for QFs except for almost all renewable 30MW+ generators. *See*, PURPA section 210(e)(2); 18 C.F.R. § 292.601[12]; *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.")[13]

But under the District Court's holding, the 30MW+ solar generator does not

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[12] *See also*, Conf. R. at 7833 ("In providing that the 30-80 megawatt class of small power production facilities may not be exempt from the Federal Power Act under subsection (e), the conferees intended that where such facilities are subject to Federal Power Act jurisdiction, the Commission must set the rates for the sale of power by such facilities in accordance with the requirements of this section.")

[13] *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) ("*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. The *FERC Policy Statement* contains the following caveat: "The Commission does not intend for this statement to have any effect other than to further inform the public of our views and the course we intend to follow in future proceedings. This statement has no legal effect, is not a rule or a binding norm, and imposes no rights or obligations. Therefore, as these issues arise in future proceedings the validity and application of the policies enunciated herein may be subject to further consideration."

fit into either the so-called Door #1 ("as-applied") or Door #2 ("implementation") category, as the DC Circuit recognized last month. So if the reasoning of the District Court were correct, then a 30MW+ solar generator would be in a no-man's land, with no remedy at all—anywhere. While Congress has the power to create such a legal no man's land, the inquiry here is *whether it intended to do so*. *See, United States v. Idaho*, 508 U.S. 1, 7 (1993) (rejecting a statutory interpretation that would create a no man's land.) It is clear in the statute and the Conference Report that Congress *did not intend* to create such a no man's land, and abandon those renewable generators. *See*, PURPA section 210(e)(2); 18 C.F.R. § 292.601. *See also*, *Conf. R.* at 7833; *FERC Policy Statement* at 61,646; *Staff Paper* at 38865, discussed *infra*. The example of the 30MW+ renewable generator establishes that it was clearly *not* Congress' intention to limit a QF's remedies to those in sections 210(g) and (h)(2). If it were Congress' intention to abandon the 30MW+ renewable generator, Congress would have simply excluded those generators from the definition of a QF. It did not need to choose a round-about way to do it that results from the District Court's holding.

There are other difficulties with the District Court's theory. *First*, the District Court also creates a second no man's land for Allco's QFs that is only marginally better than that for 30MW+ generators. Allco must wait and hope that the MDPU takes some action that would be compliant with PURPA. That creates a no man's land in two respects. It leaves Allco's QFs without any remedy now, and potentially forever frustrating the statute's substantive requirements. And even if the MDPU did issue new compliant rules, Allco would have no right of judicial review of the "as-applied" case. Section 210(h)(1) of PURPA excludes from section 210(g) any operations of a QF as are subject to the FERC's jurisdiction under part II of the FPA. A QF's right to enforce the must-buy obligation is an operation of a QF (Allco), and an electric utility (National Grid), subject to part II of the FPA. *See*, FPA §§205, 206; 18 C.F.R. §292.601. Thus, neither section 210(g) nor 210(h)(2)(B) would apply, resulting in no judicial review for a State's determination of avoided costs or the terms and conditions of its legally enforceable obligation—which, *inter alia*, is flatly contradicted by 18 C.F.R. §292.601. *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.") *Second*, the District Court's reasoning would make section 214 of PURPA a nullity. Section 214 of PURPA specifically provides that nothing in section 210 limits federal jurisdiction over wholesale transactions under the FPA, except as specifically provided. By viewing the express remedies in section 210(g) and (h)(2) as comprehensive with respect to QF wholesale transactions, the District Court would render section 214 meaningless. *Third*, the District Court's holding implicitly concludes that Congress *delegated* authority to States and nonregulated utilities to decide whether or not the must-buy obligation would apply in its jurisdiction. That conclusion finds no support in the statute or FERC's regulations, is contradicted by the FERC's decision in *Grouse Creek*[14] stating involvement of a state regulatory authority (while potentially convenient) is unnecessary, and would be based upon an unconstitutional delegation.[15] *Fourth*, it was known at the time that PURPA was

[14] *Grouse Creek Wind Park, LLC*, 142 FERC P61,187 (2013) at P40) ("the tool of 'seek[ing] state regulatory authority assistance to enforce the PURPA-imposed obligation' does not mean that seeking such assistance is a necessary condition precedent to the existence of a legally enforceable obligation.")

[15] Congress gave the FERC the authority to craft the rules, it did not authorize a further delegation by the FERC to the States and nonregulated utilities. Rather Congress required those entities to implement *the FERC's rules,* not the FERC's rules as such entities might adjust or supplement them given their own self-interest. To conclude otherwise would mean that nonregulated utilities (some of which are among the largest utilities in the United States) were regulating themselves. A private entity such as a nonregulated utility cannot constitutionally be delegated regulatory power. *Ass'n of Am. R.R. v. DOT*, 721 F. 3d 666, 677 (D.C. Cir. 2013) *vacated on other grounds* 135 S. Ct. 1225 (2015) ("While often phrased in terms of an affirmative prohibition, Congress's inability to delegate government power to private entities is really just a function of its constitutional authority not extending that far in the first place. In other words, rather than proscribing what Congress cannot do, the doctrine defines the limits of what Congress can do.") To be sure, a State is not a private entity, but the language of the purported delegation would apply equally to States and nonregulated utilities. Because there "is not even a fig leaf of constitutional justification" for such a delegation to nonregulated utilities in the first place, *see DOT v. Ass'n of Am. R.R.*, 135 S. Ct. 1225, 1237 (2015) (Alito, J. concurring), the identical language in the statute should not be interpreted as providing a delegation to States either.

enacted that a state regulatory authority might not take any action, or that it might in fact be prohibited from taking action by state law, but that such possibilities would not affect the right of a QF to enforce the must-buy obligation because, as Allco has argued, "it is really the utility as buyer and the seller that is regulated." *Staff Paper* at 38865, fn. 5.

D. The District Court's Holding Conflicts With The Supreme Court's Two-Prong Analysis in *Armstrong*.

The District Court was correct that subsections (g) and (h) provide "an overlapping scheme of federal and state judicial review of *state regulatory action* taken pursuant to PURPA." AD50 citing *Greenwood v. N.H. Pub. Utils. Comm'n*, 527 F.3d 8, 10 n.1 (1st Cir. 2008) (emphasis added), but as the District Court also acknowledged, the claim against National Grid does not involve review of *state regulatory action*. Nor could there be state judicial review because section 210(h)(1) removes from state judicial review all operations of a QF and an electric utility subject to part II of the FPA, which Allco's legally enforceable obligation with National Grid unquestionably is. *See*, 18 C.F.R. §292.601.

The Supreme Court's recent pronouncement in this area is *Armstrong*, where the Supreme Court used a two-prong analysis to determine whether the statute at issue—Medicaid Act §30(A)—implicitly precluded private enforcement with respect to the rights and obligations under that subsection, thus limiting remedies to what was expressly stated in the statute. In *Armstrong*, Justice Scalia writing for the majority[16] concluded that two factors *taken together* indicated that Congress precluded forms of relief other than the specific remedies of the statute. *First*, "'the express provision of one method of enforcing a substantive rule suggests that Congress intended to preclude others.' *Alexander v. Sandoval*, 532 U.S. 275, 290 (2001)." *Second*, "the judicially unadministrable nature of §30(A)'s text" made it the type of provision suited for the expertise of an agency. Justice Scalia made it clear, however, that the first factor alone—the express provision of a remedy—"might not, *by itself* preclude the availability of" another remedy, but that *it was only when* that factor was combined with a statute imbued with the necessity for analyzing competing considerations such as maintaining "efficiency, economy, and quality of care" while *trying to create* a system that does not result in "unnecessary utilization of . . . care and services," that militated against another judicial remedy. In his concurring opinion in *Armstrong,* Justice Breyer—the fifth vote—emphasized that an extra-statutory judicial remedy would have involved not just an analysis of, and application of, an existing rule, but the creation of the regime itself to take into the competing factors and establish the relevant guideposts. An analogy would be if this Court were being asked to create the FERC's PURPA regulations. That is not our case. The regulatory system is in place.

[16] In *Armstrong*, four justices joined Parts I, II, and III of Justice Scalia's majority opinion. Only three joined Part IV.

Neither *Armstrong* factor is satisfied here. The first *Armstrong* factor is not present for two reasons. *First*, as discussed above, the case of the 30MW+ solar generator shows that under the District Court's holding, there is no method of enforcing the substantive must-buy rule. But in order for the first factor to apply, there must be an "equivalent 'carefully crafted and intricate remedial scheme' for enforcement." *Armstrong*, 135 S. Ct. at 1393 (Sotomayor, J. dissenting). That does not exist for the 30MW+ generator. It is difficult to see how it can be concluded that *the absence* of any method of enforcement "suggests that Congress intended to preclude others." Such a conclusion would make superfluous the entire rights-creating line of cases resulting in a doctrine that permits only Congressionally created express causes of action. *Second*, even for Allco QFs, the District Court's holding concludes that a judicial remedy—equitable or statutory—does not exist *in any court*. Allco's claim sought both equitable and statutory relief. True, Allco might obtain some relief *if* the MDPU voluntarily decides to take PURPA-compliant action, but Allco would have no rights to judicial review even in State court of the MDPU's determination under the District Court's reasoning. Section 210(h)(1) excludes all operations of a QF subject to part II of the FPA from state judicial review. Post the FERC's 2006 amendments to its regulations, wholesale sales of renewable QFs less than 30MWs are also subject to the FERC's jurisdiction under part II of the FPA as operations of a QF (even though state regulatory authorities can recommend rates, which if PURPA-compliant would be subject to a deferential review standard in certain circumstances not present here.) 18 C.F.R. §292.601. So not only does the District Court's holding rest on the conclusion that Congress *intended* to create no man's lands, but it also effectively concludes that Congress *intended* to preclude judicial review related to the primary purpose of the law.

The second *Armstrong* factor is not present here either because the issue is not whether a court is capable of resolving a claim, but whether it is a state court under the "as-applied" world view, or a federal court as Allco has argued. The second factor is also not applicable here because the rules have been created by the FERC, and to the extent States choose to implement them, the States must implement the FERC's rules, not the FERC's rules as the States might decide to change them. Allco's claim does not present the concern that the Supreme Court had in *Armstrong* with respect to *creating the regulatory regime itself*.

The *Armstrong* analysis does not differentiate between whether the additional cause of action sought is equitable or statutory, and Allco sought both. The necessary question is the same—did Congress *intend* to foreclose causes of action by providing other remedies to address different factual circumstances. As *Armstrong* illustrates the "comprehensive" analysis relates to specific sections of a statute *and not to the statute as a whole*—in that case the Medicaid Act, exactly the same approach taken in *Sandoval*—there with respect to section 602 of title VI. [17]

At bottom, there is no "equivalent 'carefully crafted and intricate remedial scheme' for enforcement" of the must-buy obligation. *Armstrong*, 135 S. Ct. at 1393 (Sotomayor, J. dissenting). The conclusion that Congress *intended* to leave many QFs without any way to enforce the must-buy obligation, other QFs with no judicial review, and still others subject to the political whims of each State, simply cannot be squared with the rights-creating language in the statute, Congress' express intention in the statute that QFs have the right to force a utility to purchase its power, and the Supreme Court's acknowledgement that the statute creates the right of the QF to force a sale of its power to the utility.

III. Section 210(h)(1) Provides A Private Cause Of Action To Enforce The Must-Buy Right Under Section 210.

Section 210(h)(1) eliminates state court jurisdiction for operations covered by part II of the FPA, and provides that the FERC's section 210 rules are enforceable as rules under the FPA. Allco seeks to enforce the FERC's rules against National Grid. The plain language of (h)(1) does not restrict its provisions to FERC enforcement. *But see*, *Midland Power Coop. v. FERC*, 774 F.3d 1, 4-5 (D.C. Cir.

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[17] That analysis is consistent with PURPA decisions in *Indep. Energy Producers Ass'n v. California Pub. Utils. Comm'n*, 36 F.3d 848, 856, fn. 13 (9th Cir. 1994), and *Freehold Cogeneration Assoc. L.P. v. Bd. Regulatory Comm'rs,* 44 F.3d 1183 (3d Cir. 1995) that stand for the proposition that the remedies in Section 210(g) just do not apply, or limit claims, that do not fit expressly within its provisions.

2014) ("*Midland*") (suggesting the term "enforcement" in section 210(h)(1) means "commission enforcement.") *See also, Portland General*, slip op. at 13-14 (recognizing (h)(1) as a separate enforcement mechanism but stating that FERC must bring the action in Federal district court). Presumably the DC Circuit's suggestion is based upon the heading of section 210(h), which is "*Commission Enforcement*." Potentially supporting that conclusion is section 210(h)(2)(A)(ii), which identifies an action under section 210(h)(1) as a separate action from an action to enforce section 210(f), and the statement in *FERC's Policy Statement* that identifies (h)(1) as relating exclusively to Commission enforcement.[18] The District Court held that section 210(h)(1) is restricted to enforcement actions in district court brought by the FERC. AD64, 65.

Reading the term "enforcement" in section 210(h) to mean "Commission

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[18] *See FERC Policy Statement* at 61,646. But what *FERC's Policy Statement* is describing is not an action, but FERC acting as a forum for disputes related to operations of a QF that are subject to part II of the FPA. That is made clearer in the following paragraph in the *Policy Statement*:

> Under Part II of the Federal Power Act, the Commission regulates, *inter alia,* sales of electric power in interstate commerce. The Commission therefore has the authority under the Federal Power Act to establish the rate for sale by such a facility. [] Thus, the Commission may require that the rate for purchase by an electric utility from such a qualifying facility be consistent with the Commission-established rate.

enforcement," creates irrational results in the statute, whereas reading the term as it reads—*enforcement*—does not. The two sentences of (h)(1) have one common element—operations subject to, i.e., not exempted from, part II of the FPA. The plain language does not restrict them to FERC enforcement. They make clear that any rule issued by the FERC under section 210(a) related to operations within the FERC's part II FPA jurisdiction stays with the FERC's and the federal courts' jurisdiction under the FPA (because such rule is enforceable as a rule under the FPA.) And by its plain language, section 210(h)(2)(A)(ii) merely confirms that conclusion by eliminating the FERC's ability to bring an action that otherwise would have existed under section 210(g).

A. The Plain Language Of Section 210(h)(1) Is Unambiguous.

The Supreme Court has been clear that titles and captions should be used "[f]or interpretive purposes . . . when they shed light *on some ambiguous word or phrase*." *see Bhd. of R.R. Trainmen v. Balt. & Ohio R.R. Co.*, 331 U.S. 519, 529 (1947), but "the title of a statute and the heading of a section *cannot limit the plain meaning of the text*." *Id.* 331 U.S. at 528-29. (emphasis added.) There is no ambiguous word or phase in section 210(h)(1) that requires resort to using the section heading as an interpretative tool. The plain meaning of enforcement in section 210(h)(1) makes it applicable to enforcement brought by any person. The language of section 210(g)(2) confirms that Congress intended "enforcement" to apply more broadly. Section 210(g)(2) expressly provides that "[a]ny person (including the Secretary) [but not the FERC due to section (h)(1)] may bring an action against any electric utility… *to enforce* any requirement …." Section 210(h)(1) is simply *the mechanic* used by Congress to separate the retail and non-part II issues from the part II jurisdictional operations in order to make sure *the latter group stays under exclusive federal jurisdiction*. If state courts could issue binding determinations under part II of the FPA, regarding operations of an electric utility or QF under part II jurisdiction, the ability of FERC and the federal courts to effectuate a comprehensive regulatory scheme would be seriously undermined.

The first sentence in section 210(h)(1) uses the term "enforcement," the second does not. Neither sentence is ambiguous. Ambiguity is only introduced by reference to the heading itself, but to introduce ambiguity solely because of the heading turns the Supreme Court's approach on its head. Section 210(h)(1) is what links section 210 and the FPA in the case of operations of a QF subject to part II jurisdiction, such as the rights of the 30MW+ renewable generator. Section 210(h)(1) is the provision that eliminates the no man's land that would be created under the District Court's holding. But that is only the case if the language is afforded its plain meaning.

B. Irrationality Results If Section 210(h)(1) Applies Only To FERC Enforcement.

Even assuming *arguendo* that ambiguity is introduced into the first sentence of (h)(1) by something other than the heading itself, the Supreme Court's decision in *INS v. Nat'l Ctr. for Immigrants' Rights, Inc.,* 502 U.S. 183 (1991) ("*NCIR*") illustrates why it would be inappropriate to restrict enforcement to "Commission enforcement." At issue in *NCIR* was a regulation entitled "Condition against unauthorized employment," the text of which referred to "[a] condition barring employment." 8 C.F.R. § 103.6(a)(2)(ii) (1991). The parties disagreed whether the word "employment" in the text referred to employment generally or more narrowly to unauthorized employment. *NCIR*, 502 U.S. at 189. The Court decided that "[t]he text's generic reference to 'employment' should be read as a reference to the 'unauthorized employment' identified in the paragraph's title," for several different reasons not present here. *Id*. In *NCIR* if the term "unauthorized employment" were substituted for "employment," the regulation worked fine,[19] and was consistent with the regulation's construction and with allowing aliens to continue employment that had already been authorized. *See, NCIR* at 190 ("The critical sentence in the regulation states that the condition shall be included 'unless the District Director determines that employment is appropriate.' 8 CFR § 103.6(a)(2)(ii) (1991). This language places the burden on the alien of demonstrating that employment is

[19] "(ii) *Condition against unauthorized employment.* A condition barring [*unauthorized*] employment shall be included in an appearance and delivery bond in connection with a deportation proceeding or bond posted for the release of an alien in exclusion proceedings, unless the District Director determines that [*unauthorized*] employment is appropriate."

appropriate, *but it seems inconceivable* that the District Director could determine that employment that had already been authorized was not 'appropriate.'") (emphasis added.)

Here that is not the case. Reading the term "enforcement" in section 210(h) to mean "Commission enforcement," creates irrational results in the statute, whereas reading the term as it reads—enforcement—does not. If enforcement in (h) means "Commission enforcement," section 210(h) would be revised to read as follows:

> (h) Commission enforcement
> (1) For purposes of **[*Commission*]** enforcement of any rule prescribed by the Commission under subsection (a) of this section with respect to any operations of an electric utility, a qualifying cogeneration facility or a qualifying small power production facility which are subject to the jurisdiction of the Commission under part II of the Federal Power Act [16 U.S.C. 824 et seq.], such rule shall be treated as a rule under the Federal Power Act [16 U.S.C. 791a et seq.]. Nothing in subsection (g) of this section shall apply to so much of the operations of an electric utility, a qualifying cogeneration facility or a qualifying small power production facility as are subject to the jurisdiction of the Commission under part II of the Federal Power Act.
> (2) (A) The Commission may enforce the requirements of subsection (f) of this section against any State regulatory authority or nonregulated electric utility. For purposes of any such **[*Commission*]** enforcement, the requirements of subsection (f)(1) of this section shall be treated as a rule enforceable under the Federal Power Act [16 U.S.C. 791a et seq.]. For purposes of any such **[*Commission enforcement*]** action, a State regulatory authority or nonregulated electric utility shall be treated as a person within the meaning of the Federal Power Act. No **[*Commission*]** enforcement action may be brought by the Commission under this section other than—
> (i) an action against the State regulatory authority or nonregulated electric utility for failure to comply with the requirements of subsection (f) of this section [3] or
> (ii) an action under paragraph (1).

> (B) Any electric utility, qualifying cogenerator, or qualifying small power producer may petition the Commission to enforce the requirements of subsection (f) of this section as provided in subparagraph (A) of this paragraph. If the Commission does not initiate an **[*Commission*]** enforcement action under subparagraph (A) against a State regulatory authority or nonregulated electric utility within 60 days following the date on which a petition is filed under this subparagraph with respect to such authority, the petitioner may bring an action in the appropriate United States district court to require such State regulatory authority or nonregulated electric utility to comply with such requirements, and such court may issue such injunctive or other relief as may be appropriate. The Commission may intervene as a matter of right in any such action.

There are several difficulties with the District Court's holding that the language in (h)(1) would only apply to "Commission enforcement." *First*, the language in (h)(2) says "the petitioner may bring an action in the appropriate United States district court to require such State regulatory authority … to comply with such requirements." If the provisions of section 210(h)(2)(A) — (*i.e*., a state regulatory authority is a person under the FPA, and the FERC's PURPA rules are to be treated as rules under the FPA) — *only apply* to "Commission enforcement," i.e., an action under 210(h)(2)(A), then an action by a QF under section 210(h)(2)(B) must be read as proceeding without them. It would seem irrational for Congress to have authorized a QF to step in the shoes of the FERC but yet to do so on a different basis. *Second*, if an action by a QF under section 210(h)(2)(B) can proceed without the two special rules in (h)(1)(A), then are those rules simply superfluous or essential? Either way irrationality results. Why would a FERC enforcement action need those rules if a QF enforcement action does not. *Third*, (h)(1) does not expressly mention the FERC taking any enforcement action. It is only through reading section 210(h)(2)(A)(ii) to mean more than it says that it can be argued that (h)(1) relates to only the FERC. *Fourth*, the second sentence of (h)(1) has no reference to enforcement, and no ambiguity in the text. The heading simply adds nothing. The second sentence is a straight-forward carve-out from section 210(g) covering anything related to operations of a QF that are subject to the FERC's jurisdiction under part II of the FPA, which at least after the 2006 amendments to the FERC's regulations, all QF wholesale sales in interstate commerce are.

Fifth, it would make no sense for Congress to have decided to hand State courts jurisdiction over issues subject to FERC's part II jurisdiction if someone other than FERC were seeking to enforce a State requirement. If state courts could issue binding determinations under part II of the FPA regarding operations of an electric utility or QF under part II jurisdiction, the ability of FERC and the federal courts to effectuate a comprehensive regulatory scheme would be seriously undermined. *Sixth*, the parenthetical in (g)(2) referring to the Secretary would also not make sense because why would the Secretary be able to enforce in state court a provision that section (h)(1) would prevent the FERC from enforcing in state court?

Reading section 210(h)(1) in accordance with its plain language establishes the right of a QF to enforce the must-buy obligation against the utility in federal court, and does not result in any irrationality. It also results in what Congress intended—that all QFs would have a federal right to force a utility to purchase its energy when such sales were subject to the FERC's jurisdiction under part II of the FPA.

IV. A Private Cause Of Action Exists Under The FPA.

A private enforcement action against National Grid is also supported by the FPA itself. Sections 205 and 206 of the FPA outlaw all unjust and unreasonable rules, practices and regulations of utilities, such as National Grid, affecting or pertaining to rates or charges involving wholesale electricity transactions. National Grid's obligation to purchase from Allco is enforceable as a rule under the FPA. 16 U.S.C. §824a-3(h)(1). The wholesale energy transactions are operations of a QF (Allco) and an electric utility (National Grid) under the FERC's FPA part II jurisdiction. FPA §§205, 206; 18 CFR §292.601. Sections 205 and 206 of the FPA contain no limitations on remedies. When Congress wanted to exclude private right of actions in part II of the FPA it specifically so stated. *See, e.g.,* 16 U.S.C. §824v: "(b) NO PRIVATE RIGHT OF ACTION.—Nothing in this section shall be construed to create a private right of action."

"It is common ground that if FERC has jurisdiction over a subject, the States cannot have jurisdiction over the same subject." *Miss. Power & Light Co. v. Miss. ex rel. Moore*, 487 U.S. 354, 377 (1988) (Scalia, J., concurring). The mechanism through which a State regulatory authority obtains any authority under PURPA comes through *exemptions* granted by FERC under section 210(e) of PURPA. PURPA builds on the framework of the FPA. It does not work outside the FPA. The statutory framework is (1) FERC has exclusive jurisdiction over wholesale sales, (2) PURPA covers retail and wholesale practices, and (3) PURPA contemplates the FERC allow exemptions from the FPA, which if and when implemented gives States a limited role with respect to wholesale sales to promote QF generation for certain QFs.

When the FERC issued its final rules in 1980, it provided a complete exemption from FPA sections 201, 205 and 206, among others, for the QF side of wholesale sales. *See*, AD39, 18 C.F.R. §292.601(1982) (exempting all QFs wholesale sales other than 30MW-80MW renewable QFs). That exemption removed certain aspects of QFs from FERC's jurisdiction under part II of the FPA for their side of the wholesale transaction, thus permitting States to have a role. The exemption did not apply to non-QF electric utilities, such as National Grid. This *delegation-by-exemption* was first described in the FERC *Staff Paper* at 38864. ("[T]he requirement that the States and nonregulated utilities implement the FERC's rules, together with the FERC's authority to exempt QFs from some or all of Parts II and III of the FPA and from State law could (and almost certainly will) result in the delegation-by-exemption to the States of both old and new FERC regulatory responsibilities.")

It is the authority of the FERC to grant exemptions from the FPA that empowers the States to have a role. *Id.* at 38864 ("the authority to grant exemptions is the device which Congress has given the Commission not only to avoid such regulation on its own part, but also to ensure that once the Federal preemption of such regulation is removed, the States do not begin to regulate QFs as utilities".) Once the exemptions were in place, "the states, which have not had jurisdiction over sales for resale in interstate commerce, will in all likelihood carry out the day-to-day regulation of such sales where they involve qualifying facilities (QFs)." *Id.* But the FERC still retains jurisdiction. *See*, FPA §§205, 206, 18 C.F.R. §292.601; *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.") Nothing in section 210 (including section 210(f) which applies to retail and wholesale rules), gives the States jurisdiction over wholesale energy transactions that the FERC retains jurisdiction under part II of the FPA.

As discussed above, there is one clear carve-out from the FERC's exemption authority—30MW+ renewable energy generators, thus, in Congress' view, leaving FERC's exclusive authority intact regarding those generators. That demonstrates there is not just a door #1 (as-applied) and a door #2 (implementation). There is, and always was, a door #3, yet unless section 210(h)(1) were applied in accordance with its plain language, there would be no specific remedy provided in section 210. But it is absolutely clear that Congress intended those generators to be able to force a utility to buy its power.

How the 30MW+ renewable generator gets out of the no man's land earlier discussed also shows how Allco's QFs do as well. It is either through section (h)(1) or the FPA. Either way a QF has a direct action and remedy against the utility. The sole source of a role for the States are the exemptions from the FPA. 18 C.F.R. §292.601. If the relationship *between the utility and the QF* were not covered by the FPA in the first place, then there would not be any need to provide exemptions. The relationship between the utility and the QF is the focus of section 210 and the FPA, *see Staff Paper* at 38865, fn. 5, and that is what Allco's action seeks to enforce.

V. The District Court Erred By Limiting Its Relief To Only Invalidating The MDPU Regulation.

It is understandable that the District Court was reluctant to get involved in determining a proper rate for Allco's energy and capacity, but calculating that rate is no different than a calculation of damages that require forecasts, which is something courts regularly do. Here, the District Court could either appoint a special master or temporarily defer to the FERC based upon the primary jurisdiction doctrine. Under that doctrine, "a district court with subject matter jurisdiction may, under appropriate circumstances, defer to another forum, such as an administrative agency, which also has non-exclusive jurisdiction, based on its determination that the benefits of obtaining aid from that other forum outweigh the need for expeditious litigation." *Occidental Chemical Corp. v. Louisiana Pub. Serv. Comm'n*, 810 F.3d 299, 301 (5th Cir. 2016). The court must retain jurisdiction of "nonenforcement regulatory issues" which are "legal and not factual in nature." *Id*. (internal quotations and citations omitted.) But may refer a "fact-intensive enforcement issue [] to FERC." *Id*. That is what the District Court should have done here, if it did not want to appoint a special master. It should have asked the FERC to address the terms between Allco and National Grid. While there is a basis on which the District Court could ask for FERC's input, there is not in the case of the MDPU. The MDPU has no plans to revisit Allco's specific claim against National Grid. Rather it intends to ignore it and conduct a further generic rulemaking.

The District Court also erred by not acting to limit the ongoing irreparable harm suffered by Allco. Under 16 U.S.C. § 824a-3(h)(2)(B) Congress authorized the District Court to "issue such injunctive or other relief as may be appropriate," when faced with the circumstances of this case. More than eight months after the District Court's order invalidating the State Defendants' rule denying Allco its rights under federal law, the State Defendants have taken no action to address *Allco's* rights under federal law. The only action the State Defendants have taken is to open a proceeding to evaluate what if any action the State Defendants should take with respect to PURPA. Thus, Allco continues to suffer irreparable harm.

"[W]hen there is proof of present irreparable harm, the court [should] act promptly rather than rely on the possibility of future prophylactic measures." *Semancik v. United Mine Workers*, 466 F.2d 144, 156-7 (3d Cir. 1972). "Federal courts too often have been cautious and overly deferential in the arena of environmental law, and the world has suffered for it." *Juliana v. United States*, No. 6:15-cv-01517-TC, 2016 U.S. Dist. LEXIS 156014, Slip Op. at 52 (D. Ore. November 10, 2016). When FERC stated that "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), FERC was not intending to permit state commissions to deny generators their rights under federal law while the state commission took no action. A contrary conclusion would nullify the effect of every relevant FERC pronouncement. *See, e.g., Grouse Creek Wind Park, LLC*, 142 FERC P61,187 (2013) at ¶40 ("'seek[ing] state regulatory authority assistance to enforce the PURPA-imposed obligation' does not mean that seeking such assistance is a necessary condition precedent to the existence of a legally enforceable obligation.")

While Allco cannot be put back in the position it would have been in but for the State Defendants unlawful conduct, under the District Court's express authority under 16 U.S.C. § 824a-3(h)(2)(B), some of the ongoing irreparable harm could be alleviated. The District Court's refusal to take action limiting the irreparable harm to Allco was error and hindered, rather than furthered, the purposes of the statute.

CONCLUSION

For the foregoing reasons, this Court should reverse the judgment of the District Court dismissing Allco's claims against National Grid, and order the District Court to act to limit the ongoing irreparable harm to Allco.

Respectfully submitted this 16th day of May 2017.

/s/ Thomas Melone
Thomas Melone, Esq.
Allco Renewable Energy Limited
14 Wall Street, 20th floor
New York, New York 10005
(212) 681-1120
Thomas.Melone@AllcoUS.com

ATTORNEY FOR APPELLANT