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

ALLCO RENEWABLE ENERGY LIMITED'S MOTION FOR LEAVE TO FILE REPLY MEMORANDUM IN SUPPORT OF ITS MOTION FOR RECONSIDERATION

Pursuant to Local Rule 7.1(b)(3), Plaintiff Allco Renewable Energy Limited ("Allco"), by and through its counsel, respectfully moves this Court for leave to file a reply memorandum in support of its motion for reconsideration. A copy of the proposed reply memorandum is attached hereto as Exhibit A.

Allco seeks leave to file a reply memorandum to respond to arguments offered by Defendant National Grid in its opposition memorandum filed on November 1, 2016 [Dkt. 80], which in part relies on Third Circuit case law that the Third Circuit has acknowledged has been implicitly overruled. The fundamental problem with National Grid's argument is that it conflates two issues. The issue of *where* the cause of action lies is completely different from *whether* one exists. The Supreme Court's decisions in *Alexander* v. *Sandoval*, 532 U.S. 275 (2001) and *Armstrong v. Exceptional Child Center, Inc.*, 135 S. Ct. 1378 (2015) compel the conclusion that a cause of action exists.

This Court would be the first court to declare that some QFs have no cause of action to enforce the contract-type obligation imposed by Congress on electric utilities for the sole benefit of qualifying facilities ("QFs"). Nothing in FERC's amicus brief supports the proposition that there is a class of QFs that have no private cause of action. Allco used to example of the no man's lands created for certain QFs to illustrate that it is not reasonable to conclude that Congress intended a private cause of action for only certain QFs against an electric utility, i.e., those that fit with section 210(g)(2).

National Grid appears to agree that a private cause of action exists—it disagrees with where it lies. By suggesting that Allco could file a complaint against National Grid at FERC, with an appeal to the Circuit Courts of Appeal, National Grid has conceded that Congress intended a private cause of action beyond just the "as-applied" and "implementation" challenges.

Other assertions by National Grid, such as the absence of a private action to enforce the Federal Power Act ("FPA"), are clearly wrong. *See, Hughes v. Talen Energy Marketing, LLC*, 136 S. Ct. 1288 (2016) ("*Hughes*") directly affirming the Fourth Circuit's decision in *PPL EnergyPlus LLC v. Nazarian*, 753 F.3d 467 (4th Cir. 2014) ("*Nazarian*") and indirectly affirming the Third Circuit's decision in *PPL EnergyPlus LLC v. Solomon*, 766 F.3d 241 (3d Cir. 2014) ("*Solomon*"), *cert. den.* 136 S. Ct. 1728 (2016). In *Hughes* electric generators were permitted to bring suit to enforce the FPA's provision providing exclusive jurisdiction over wholesale sales to the FERC. The Supremacy Clause is not the source of independent rights. *Armstrong v. Exceptional Child Center, Inc.*, 135 S. Ct. 1378, 1384 (2015). The source of rights in *Hughes*, *Nazarian* and *Solomon* came from the FPA. Similarly, in Allco's PURPA and FPA challenge to Connecticut, which is on appeal from a dismissal by the district court for lack of standing, the Second Circuit issued an emergency injunction earlier this month enjoining the State of Connecticut from further activity in connection with the multi-state clean energy solicitation. *Allco Finance Ltd., v. Klee*, Nos. 16-2946 and 16-2949 (2d. Cir. November 2, 2016) (order granting emergency injunction). If National Grid's proposition were correct, then the *Hughes*', *Nazarian* and *Solomon* decisions, and the Second Circuit's order in *Klee,* are all wrong.

National Grid also relies on Third Circuit case law that the Third Circuit has

acknowledged has been implicitly overruled. *See, Wisniewski v. Rodale, Inc.* 510 F.3d 294, 299-300 (3d Cir. 2007) ("Although *Cort* has never been formally overruled, subsequent decisions have altered it virtually beyond recognition.") *see also, id*. at 299-300 ("The Supreme Court's decision in [*Sandova*l] strongly suggests that the Court has abandoned the *Cort v. Ash* test.")

The PURPA and FPA regulatory scheme has been referred to as "murky waters" and "nested eggs". *Winding Creek Solar LLC v. Peevey*, 2015 U.S. Dist. LEXIS 18887 (N.D. Cal. February 17, 2015) (reconsidering and reversing earlier decision of the district court in the case). Allco believes that the further briefing of Allco's reply memorandum would assist the Court in navigating those murky waters.

Allco's counsel has conferred with counsel for National Grid, who takes no position on this motion.

WHEREFORE, Plaintiff Allco requests that this Court grant its Motion for Leave to File a Reply Memorandum in Support of Its Motion for Reconsideration.

Dated: November 15, 2016

/s/ Thomas Melone
Thomas Melone (admitted *pro hac vice*)
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LOCAL RULE 7.1(A)(2) CERTIFICATE OF COMPLIANCE

I hereby certify that on November 7, 2016, I conferred with Anthony J. Marchetta, counsel for Defendant National Grid, who stated that National Grid takes no position with respect to this motion.

/s/ Thomas Melone
Thomas Melone

CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of November 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