EXHIBIT A

UNITED STATES DISTRICT COURT

DISTRICT OF MASSACHUSETTS

ALLCO RENEWABLE ENERGY LIMITED, Plaintiff, v. MASSACHUSETTS ELECTRIC COMPANY D/B/A NATIONAL GRID, and ANGELA O'CONNOR, JOLETTE WESTBROOK and ROBERT HAYDEN, in official capacity as Commissioners of the Massachusetts Department of Public Utilities, and JUDITH JUDSON, in her official capacity as Commissioner of the Massachusetts Department of Energy Resources, Defendants.	Case No. 1:15-cv-13515-PBS **PLAINTIFF'S REPLY MEMORANDUM IN SUPPORT OF ITS MOTION FOR RECONSIDERATION** **Leave to file granted on _____**

The PURPA[1] and Federal Power Act ("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). If the order of September 23, 2016 (the "Order") is not reconsidered, this Court would be the first court to declare that some qualifying facilities ("QFs") have no cause of action to enforce the contract-type obligation imposed by Congress on electric utilities for the sole benefit of QFs.

As Allco Renewable Energy Limited ("Allco") has argued, to interpret the statute as not creating a private cause of action "interprets the Act as creating a strange remedial patchwork full of holes." *Ind. Prot. & Advocacy Servs. v. Ind. Family & Soc. Servs. Admin.*, 603 F.3d 365, 381 (7th Cir. 2010) (en banc) (finding a private cause of action under the federal Protection and Advocacy for Individuals with Mental Illness Act of 1986.) Of course, "Congress would have been free to enact such an inconsistent and even arbitrary remedial patchwork, … Yet the language of the statute does not give any signal that Congress intended such an odd result. We

will not readily attribute to Congress the intent to do so when the more straightforward alternative is available: recognizing that [plaintiff has] a right to sue directly under the [] Act for injunctive and declaratory relief to enforce the right [] granted by the Act itself." *Id.* at 382. So too here. The Order results in a remedial patchwork, yet it is clear that Congress did not intend such a result. Allco used the example of the no man's lands created for certain QFs to illustrate that Congress did not intend a private cause of action for only certain QFs against an electric utility, i.e., those that fit within section 210(g)(2), because such a conclusion results in "an inconsistent and even arbitrary remedial patchwork."

National Grid's assertion that "Allco never claimed or argued that it has the right to bring a federal claim against National Grid" is preposterous. That is exactly what Count III is all about—a direct claim against National Grid to enforce National Grid's obligations under section 210(a) of PURPA and the FERC's regulations.

National Grid's blanket assertion that there is no private right of action to enforce obligations and rights under the FPA is a distraction from the real issue and is simply not true. Just last term, the United States Supreme Court invalidated the State of Maryland's actions attempting to regulate wholesale sales of electricity. *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). The case was brought by generators to enforce the FPA's prohibition on States regulating wholesale electricity sales. As the Supreme Court has stated, the Supremacy Clause is not a source of substantive rights. *Armstrong v. Exceptional Child Center, Inc.*, 135 S. Ct. 1378, 1384 (2015) ("*Armstrong*"). The rights of those generators in *Hughes* derived 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 enjoining the State of Connecticut from further

[1] The Public Utility Regulatory Policies Act, Pub. L. No. 95-617, 92 Stat. 3117 ("PURPA").

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) ("*Klee*"). If National Grid's proposition were correct, then the *Hughes*', *Nazarian* and *Solomon* decisions, and the Second Circuit order in *Klee,* are all wrong. Further, in determining who may seek review of FERC orders in violation of the FPA, the Second Circuit has taken an extremely expansive view going as far as to hold that plaintiffs pursuing *non-economic* interests may bring suit to enforce the FPA. *Scenic Hudson Preservation Conference v. FPC*, 354 F.2d 608, 615-16 (2d Cir. 1965) ("We hold that the Federal Power Act gives petitioners a legal right to protect their special interests.") In *Barnstable v. O'Connor*, 786 F.3d 130 (1st Cir. 2015), the First Circuit upheld the rights of groups of ratepayers to a private cause of action to enforce the FPA's ban on state regulation of wholesale sales, and even went so far as to hold that the fact that a challenged wholesale power contract had been approved in the past would not prevent the district court from enjoining future action related to other aspects of the contract, including future cost recovery, and any other actions or approvals that might be related to the contract.

National Grid's reliance of the four-part test in *Clark v. Gulf Oil Corp*., 570 F.2d 1138 (3d Cir. 1983), which in turn was based upon the same-four part test of the *Cort v. Ash*, 422 U.S. 66 (1975), is misplaced. The *Clark/Cort* analysis is no longer the law. *See, Wisniewski v. Rodale, Inc.* 510 F.3d 294, 299 (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 [*Sandoval*] strongly suggests that the Court has abandoned the *Cort v. Ash* test.")

Even if the four part test in *Clark v. Gulf Oil Corp*., 570 F.2d 1138 (3d Cir. 1983) were the appropriate test, Allco's claim against National Grid satisfies it. *First*, Allco is one of the class for whose special benefit the statute was enacted. *Second*, there is a clear legislative intent to create a private cause of action, the only question is where it lies. *Third*, the implication for a private remedy is consistent with the purpose of the legislation. *Fourth*, Allco's cause of action is not relegated to state law for two reasons—Congress specified what state law causes of action there would be under section 210(g) and Allco's does not fit there, and National Grid's

obligation to purchase is imposed by federal law, not state law. Thus, it is appropriate to infer that the cause of action is based on federal law.

In *Rodale*, the Third Circuit observed that "[i]n the generation since the Supreme Court declared [in *Alexander* v. *Sandoval*, 532 U.S. 275 (2001)] that legislative intent to create an implied private right of action is the sole touchstone of our inquiry, the Court has not provided a test for discerning this intent." *Rodale,* 510 F.3d at 303. *Armstrong* provides that further guidance as Allco argued in its motion. Notably one of the factors called out by the Third Circuit as being relied upon by the Supreme Court is the "customary legal incidents" that flow from a contract-type statutory provision, which a cause of action to enforce such an obligation is.

As for National Grid's reliance on *Montana-Dakota Utilities Co. v. Northwestern Public Service Co*., 341 U.S. 246 (1951), the seminal case applying the filed rate doctrine in the context of electric utility rates, it is unavailing as that case is easily distinguishable. The dispute in *Montana-Dakota Utilities* arose from a series of contracts entered into between the parties, both of whom were electric utilities companies. The contracts established rates that each paid to the other for electric power. The rates established were filed with and accepted by the Federal Power Commission. The plaintiff alleged that the defendant's fraud in connection with the setting of those rates deprived it of its right under the FPA to have reasonable rates and charges for electric power. It sought as damages the difference between the filed rates and the rates that would have been set absent the defendant's alleged fraud. The Supreme Court affirmed the dismissal of the claim, ruling that the plaintiff had not established a cause of action under the FPA because it had no right under the FPA to pay any rates other than the rates already *approved* by the Federal Power Commission. *Id*. at 251-55 ("It is not the disembodied 'reasonableness' but that standard when embodied in a rate which the Commission accepts or determines that governs the rights of buyer and seller.") That is not our case. This Court is not being asked to second guess a rate that the FERC has already determined as "reasonable."

Tellingly, National Grid's reply memorandum concedes that Allco's argument is correct. National Grid has conceded that the PURPA world of remedies is greater than the Door #1—as-applied (section 210(g) of PURPA)—and Door #2—implementation (section 210(h)(2)), and that

it is really the utility as buyer and the QF as seller that is regulated. That concession should be enough for the Court to re-examine the issues in this case. National Grid, however, argues that 30MW+ generators can pursue their remedies at the FERC with judicial review in the Courts of Appeal. Assuming, *arguendo,* that National Grid is correct that 30MW+ renewable generators have a remedy at FERC with judicial review in the Courts of Appeal, where in the statute does that remedy appear? The answer, as Allco has argued, must be in at least one of three places advanced by Allco as the source for a cause of action. *First*, such a remedy is either implied in the statute through the contractual duty imposed on electric utilities under the statute which brings with it the "normal legal incidents" associated with contractual obligations. *Second*, section 210(h)(1). *Third*, the FPA itself. If a 30MW+ renewable generator has a federal cause of action, either in the district courts or at the FERC, then so too does Allco because post the FERC's 2006 amendments to its rules, all wholesale sales of QFs are "operations" subject to part II of the FPA.

I. SECTION 210 OF PURPA CREATES A CONTRACT-TYPE OBLIGATION ON ELECTRIC UTILITIES WITH THE CUSTOMARY LEGAL INCIDENTS OF BINDING OBLIGATIONS.

As Allco has argued, under the FPA and section 210 of PURPA (and the FERC's rules under section 210(a)), "it is really the utility as buyer and the seller that is regulated." *Staff Paper* at 38865, fn. 5.[2] Electric utilities, such as National Grid, 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 what in PURPA lingo is referred to as 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. [3] (Emphasis added.)

[2] *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.

[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.

Crucially, "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*.") *See also*, *Cedar Creek*, 137 FERC P 61,006 at P 32A (emphasis added.)

Under no reasonable interpretation of the statute can it be concluded that Congress intended to not allow a private cause of action for the contract-type obligation imposed on electric utilities. Even the FERC's amicus brief does not claim that there are any class of QFs that have no private cause of action. The issue of *where* the cause of action lies is completely different from *whether* one exists. National Grid conflates the two issues.

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 the right to file 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). In *Rodale*, the Third Circuit also recognized the "customary legal incidents" touchstone for finding a cause of action.

The *Sandoval* court found no private cause of action because it found that section 602 Title VI of the Civil Rights Act of 1964 only intended to allow agencies the ability to write regulations *to effectuate rights created elsewhere* in the statute. *Sandoval*, 532 U.S. at 289. That is nothing like section 210 of PURPA which the Supreme Court has already stated imposes a contractual-type duty on electric utilities to purchase all energy from QFs. *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.) *Armstrong* further refined the *Sandoval* test, and Allco's rights under section 210 of PURPA satisfies that test. Moreover, unlike Spending Clause statutes where the Supreme Court has tended to not find private causes of action, section 210 of

PURPA is a Commerce Clause statute. Courts have been more readily willing to find private causes of action in non-Spending Clause statutes. *See*, *Colón-Marrero v. Vélez*, 813 F.3d 1, 19 (1st Cir. 2016)

National Grid also misreads *Int'l Union v. Faye,* 828 F.3d 969 (D.C. Cir. 2016), which *did* hold that the union had a private cause of action in its own behalf even though the statute did not authorize it, and expressly authorized an action by only members. *Id*. at 974. ("although Weaver did not squarely address the precise question of a union's right to bring a section 501 suit in the first instance, the reasoning necessary to that decision compels the conclusion that a union may indeed do so.") The rationale for finding a private cause of action in a statute for a union when the statute expressly provided a cause of action for only the members of the union is equally applicable here. In looking to the duty-creating language of the statute, the Eleventh Circuit said that "[i]t would make no sense to impose federal duties and simultaneously deny the unions the right to enforce those duties." *International Union of Electronic, Electrical, Salaried, Machine & Furniture Workers, AFL-CIO v. Statham*, 97 F.3d 1416, 1420 (11th Cir. 1996). The court stated that "[i]f Congress had only enacted section 501(a) without section 501(b), no one would suggest that Congress meant to deny the union the right to enforce 501(a)." *Id*. The court saw no reason that subsection (b)'s mere existence should detract from what it viewed as the obvious import of subsection (a). *See id*. at 1421 ("We should not infer from the mention of individual suits that Congress did not intend to give unions a cause of action."). Soo too here. If sections 210(g) and (h) were not in the statute, no one would suggest that the obligation of an electric utility to both buy electricity from a QF and to sell electricity to a QF would not be enforceable through a cause of action. Similarly even with sections 210(g) and (h), "[i]t would make no sense to impose federal duties [on electric utilities] and simultaneously deny the [the QF beneficiaries of those duties] the right to enforce those duties." *Id*. at 1420.

II. SECTION 210(H)(1).

The language of section 210(h)(1) must be accorded its plain meaning that the FERC's section 210(a) rules related to FPA part II operations of a QF "shall be treated as a rule under the Federal Power Act." Section 317 of the FPA provides this Court with exclusive jurisdiction of

"all suits in equity and actions at law" to "enforce any liability or duty created by [the FPA] or any rule, regulation, or order thereunder." *Vote Solar Initiative*, 157 FERC ¶61,080 (November 1, 2016) at para. 10 ("section 210(h) of PURPA provides that, for purposes of enforcement of PURPA, the rules adopted by the Commission pursuant to PURPA are treated as rules enforceable under the Federal Power Act, and enforcement of the Federal Power Act is a matter within the jurisdiction of, as relevant here, United States district courts.")

If a renewable 30MW+ QF has the right to enforce the utility's must buy obligation as an operation of a QF, then so too must a QF under 30MW because there is nothing in the statute or the regulations, specifically 18 CFR §292.601(c) that excludes the smaller QF from part II jurisdiction. Even if a QF had the ability to file an action at FERC, the cause of action would still end up in district court. *Free Enter. Fund v. PCAOB*, 561 U.S. 477, 489 (2010) quoting *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 207, 212 (1994) ("Provisions for agency review do not restrict judicial review, unless the 'statutory scheme' displays a 'fairly discernible' intent to limit jurisdiction, and the claims at issue 'are of the type Congress intended to be reviewed within th[e] statutory structure.'") (alteration in original).

Section 317 of the FPA vests federal district courts with "exclusive jurisdiction of violations" of the FPA and related rules, and of "all" actions "to enforce any liability or duty created by" those same provisions. The word "exclusive" is unqualified: It means that only federal district courts—not FERC, state courts, or any other tribunal—may adjudicate FPA violations or "enforce" any "liability or duty" created by the FPA. The FERC's rules under section 210(a) of PURPA related to operations of a QF or an electric utility are such a liability or duty. The duty is imposed on the electric utility and there is nothing in section 210 or the FERC's rules that exempts an electric utility from that duty.

Section 210 must contemplate enforcement actions against a utility because it is only an (h)(2) action that a State is treated as a person under the FPA. And an (h)(2) action is only an action to enforce a State's obligation of implementation under section 210(f), not an action to enforce the requirements of section 210(a). A section 210(h)(2) action against a State is merely a form of a pre-emption action. *Allco Finance Limited v. Klee*, 805 F.3d 89, 97 (2d Cir. 2015)

("A state's ongoing obligation under § 824a-3(f) to 'implement' PURPA regulations can be accomplished in a variety of ways, but, at a minimum, § 824a-3(f) undoubtedly prevents states from violating § 824a-3(a).") An (h)(1) action does not bring along that same ability. Importantly, if (h)(1) did not contemplate direct enforcement in district court against a utility, then the first sentence of (h)(1) would be simply superfluous. It would add nothing in the case of an (h)(2) action.

III. NATIONAL GRID MISREADS 18 CFR §292.601.

National Grid reads into 18 CFR §292.601(c)(1) words that are not there. The plain language first states that there is no exemption from sections 205 and 206 of the FPA. "Any qualifying facility described in paragraph (a) of this section [which includes renewable QFs less than 30MW] shall be exempt from all sections of the Federal Power Act, except: (1) Sections 205 and 206." That lack of an exemption has a limited carve-back: — "however, sales of energy or capacity made by qualifying facilities 20 MW or smaller, or made pursuant to a contract executed on or before March 17, 2006 or made pursuant to a state regulatory authority's implementation of section 210 the Public Utility Regulatory Policies Act of 1978, 16 U.S.C. 824a-1, shall be exempt from scrutiny under sections 205 and 206." The language of that carve-back shows exactly why National Grid's arguments fail.

First, the type of QFs "described in paragraph (a)" exclude renewable QFs greater than 30MWs+. So National Grid's statement that "QFs larger than 20MWs located in Massachusetts continue to be exempt from Sections 205 and 206 of the FPA" is contradicted by the plain language of the regulation. *Second*, the carve-back only applies a deferential standard of review—exempt from scrutiny. It does not *exempt* QF sales from section 205 or 206 of the FPA. *Third*, the carve-back focuses on the QF side of the FPA regulatory regime under sections 205 and 206 of the FPA. It neither says nor implies anything about a State regulatory authority's rights. Nor does it detract from any cause of action. Indeed its language implies exactly the opposite. The language applies to "sales of energy or capacity made by qualifying facilities 20 MW or smaller" *or* "made pursuant to a state regulatory authority's implementation of section 210 the Public Utility Regulatory Policies Act of 1978, 16 U.S.C. 824a-1, shall be exempt from

scrutiny under sections 205 and 206." As a result, the language expressly contemplates a track for QFs outside of State regulatory action. If State regulatory action were required as the Order held, then the first part of the language would be superfluous. *Fourth*, 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.

CONCLUSION

For the foregoing reasons and the reasons in Allco's prior filings, the Court should reconsider the Order and deny National Grid's motion to dismiss.

Dated: November 15, 2016

/s/ Thomas Melone

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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