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 SUR-REPLY MEMORANDUM IN OPPOSITION TO NATIONAL GRID'S MOTION TO DISMISS THE FIRST AMENDED COMPLAINT** **LEAVE TO FILE GRANTED ON APRIL 4, 2016**

National Grid's reply memorandum filed on March 25, 2016, exhibits a basic misunderstanding of the Federal Power Act and the Public Utility Regulatory Policies Act ("PURPA").

I. SECTION 210 OF PURPA CREATES A DIRECT OBLIGATION ON ELECTRIC UTILITIES.

The plain language of federal law places the obligation to purchase from QFs[1] directly on electric utilities. Under PURPA, *electric utilities* must purchase any electricity produced by QFs. "*Each electric utility shall purchase* . . . *any energy and capacity* which is made available from a qualifying facility . . . [d]irectly to the electric utility." 18 C.F.R. § 292.303(a)(1) (emphasis added). The direct obligation to purchase is not qualified by the requirement of any further implementation by a

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

State regulatory authority. *See also*, Conf. R. at 7831[2] (Section 210(a) "require[s] electric utilities to [] offer to purchase electric energy from these [qualifying small power production] facilities.") Congress did not say that utilities were only required to follow rules that States might issue.

Despite the plain language of federal law, National Grid posits that the only circumstance under which an electric utility has an obligation to purchase from a QF is if the State has implemented PURPA under its authority under Section 210(f), and then only to the extent of such implementation.[3] Compounding its misunderstanding, National Grid then points to the judicial review provisions of Section 210(g) as alleged proof that there is no direct obligation imposed on electric utilities. National Grid is simply confusing Titles I and III of PURPA (in which retail policies did not take effect without subsequent state action) with Title II of PURPA (where no further state action is required). *See*, *Indep. Energy Producers Ass'n v. California Pub. Utils. Comm'n,* 36 F.3d 848, 857 (9th Cir. 1994) (discussed *infra,* stating the States only have the primary regulatory role under Titles I and III of PURPA, not Title II—"By contrast, Title II of PURPA, the statutory section in question in this case, establishes a distinctly different federal-state relationship from those established in Titles I & III.")

As Allco stated in its opening brief, a State is not required to take any affirmative action implement PURPA. The FERC's regulations under Section 210(a) are self-executing. Section 210(f) of PURPA gives States a choice to issue rules, or not issue rules. But if a State issues rules those rules must "foster" QF generation. *Allco Finance Limited v. Klee*, 805 F.3d 89, 91-92 (2d Cir. 2015) ("PURPA [] permits states to foster electric generation by certain power production

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[2] *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.").

[3] 16 U.S.C. § 824a-3(f).

facilities.") States have the ability to do nothing and stay out of PURPA altogether,[4] and, of course, States cannot issue rules that contradict or conflict with PURPA. *Allco Finance Limited v. Klee*, 805 F.3d 89, 97 (2d Cir. 2015) ("A state's ongoing obligation under § 824a-3(f) to 'implement' PURPA regulations can be accomplished in a variety of ways, but, at a minimum, § 824a-3(f) undoubtedly prevents states from violating § 824a-3(a).")

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

The folly of National Grid's interpretation is further illustrated by Congress' specific limits on State jurisdiction for certain renewable energy QFs. A State has no authority (even under Section 210(f) of PURPA) to act with respect to most renewable energy QFs larger than 30 MWs. *See*, Section 210(e)(2); 18 C.F.R. § 292.601. Section 210(e)(2) expressly prohibits the States having any jurisdiction

[4] "[T]he Constitution has never been understood to confer upon Congress the ability to require the States to govern according to Congress' instructions." *New York v. United States*, 505 U.S. 144, 162 (1992). "'[T]he Constitution simply does not give Congress the authority to require the States to regulate.' *New York*, 505 U.S., at 178, 112 S. Ct. 2408, 120 L. Ed. 2d 120. That is true whether Congress directly commands a State to regulate or indirectly coerces a State to adopt a federal regulatory system as its own." *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2602 (2012). *See also, FERC v. Mississippi*, 456 U.S. 742, 751, 760-761 (1982).

over small power production facilities between 30MW and 80MW.[5] If PURPA created no direct obligation on electric utilities as National Grid urges, and a State has no authority over renewable QFs larger than 30MWs as Congress made clear in Section 210(e)(2), then Section 210 would be a nullity or non-existent for those renewable QFs larger than 30MW in size under the statutory theory posited by National Grid. Clearly that is not the case, and National Grid's theory simply cannot be squared with that absolute restriction on State authority.[6] Rather as the statute plainly says Section 210(a) and the FERC's regulations create the direct binding obligation for all QFs regardless of size, but in the case of renewable energy QFs less than 30MW, sections 210(e) and 210(f) allow States to create supplementary rules to foster QF development. But the source of the direct obligation for all cases is from Section 210(a) and the FERC's regulations, as Section 210(e) demonstrably confirms.

National Grid's theory of the limits of federal authority also ignores other parts of the statute. Under Section 210(h)(1) the rules promulgated by the FERC are enforceable as rules under the Federal Power Act. Additionally, all terms and conditions of any wholesale sale including under the must-buy obligation are subject to the Federal Power Act. *See*, 16 U.S.C. §§ 205, 206. This Court's jurisdiction to decide issues raised under the Federal Power Act is exclusive. 16

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

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

U.S.C. § 825p.[7]

II. STATE JURISDICTION UNDER SECTION 210(G) IS SIMPLY IRRELEVANT.

National Grid holds up Section 210(g) of PURPA as purported additional proof that there is no direct obligation of electric utilities under Section 210 because, in National Grid's view of the world, only State courts have jurisdiction over QF claims against electric utilities. National Grid simply misreads the statute.

A. SECTION 210(G) WOULD NOT APPLY BECAUSE ALLCO DOES NOT MAKE A CLAIM UNDER A STATE PROGRAM.

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

B. SECTION 210(G) DOES NOT EXTEND TO QF WHOLESALE SALES.

Even if Allco's claims could be considered under some theory to be covered by Section 210(g), State court review applies to disputes specifically described in either Section 210(g)(1) or (g)(2), and not excluded by Section 210(h)(1). *See, e.g.*, *Freehold Cogeneration Assoc. L.P. v. Bd. Regulatory Comm'rs,* 44 F.3d 1183, 1185 (3d Cir.

[7] *See also,* Small Power Production and Cogeneration Facilities; Regulations Implementing Section 210 of the Public Utility Regulatory Policies Act of 1978, 45 Fed. Reg. 12,214, 12,231 (Feb. 25, 1980) ("PURPA Rulemaking") in which the FERC explained that federal jurisdiction covered not only review and enforcement of State implementation but direct case-by-case review and enforcement. ("[R]eview and enforcement [] can consist not only of review and enforcement as to [] implementation []. It can also consist of review and enforcement of the application [] on a case-by-case basis.") This Court also has jurisdiction under 28 U.S.C. § 1331.

1995) (stating that the jurisdictional provisions of section 210(g)(1) of PURPA "are not relevant" to claims that do fit expressly within its provisions); *Indep. Energy Producers Ass'n v. California Pub. Utils. Comm'n*, 36 F.3d 848, 856 fn. 13 (9th Cir. 1994) (the specific state court jurisdictional limitation in Section 210(g) "says nothing about the state's authority to oversee QF status determinations, which is covered by section 201" of PURPA.)

Section 210(h)(1) plainly and clearly states that nothing in Section 210(g) shall apply to the operations of a QF as are subject to the jurisdiction of the FERC under part II of the FPA. Operations of a QF include the right to sell at avoided costs. *See*, 16 U.S.C. §§ 824d, 824e; 18 C.F.R. § 292.601; *see also*, FERC Policy Statement at 61,646 ("The sales of power in interstate commerce [are] an 'operation' which is subject to this Commission's jurisdiction under Part II of the Federal Power Act.")[8] That right is at issue here.

Section 210(h)(1) expressly removes any possible inference that Section 210(g) was intended to provide an exclusive state approach for matters covered under part II of the Federal Power Act. Whatever role State commissions play in setting rates for sales by qualifying facilities, all terms and conditions of such wholesale sales are still subject to FERC's jurisdiction under Part II of the Federal Power Act, with respect to which this Court has exclusive jurisdiction. *See*, 16

[8] *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 Federal Power Act 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 Federal Power Act.

U.S.C. §§ 824d, 824e, 825p; 18 C.F.R. § 292.601. Thus National Grid's reliance of Section 210(g) is simply without merit.[9]

C. THE JUDICIAL REVIEW PROVISIONS OF TITLES I AND III DO NOT APPLY TO SECTION 210.

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

> As a final matter, we note that the CPUC and the Utilities cite to *FERC v. Mississippi*, 456 U.S. 742, 72 L. Ed. 2d 532, 102 S. Ct. 2126 (1982), for the proposition that in enacting PURPA, Congress expressed its preference to let the States retain the primary regulatory role. *Id.* at 765 & n.29 (internal quotations omitted). This passage does not support appellees' position, however, because it is taken from a section of the opinion discussing Titles I & III of PURPA, and not Title II. Titles I & III seek to encourage states to adopt certain regulatory practices for electric and gas utilities by directing state agencies to "consider" adopting and implementing specified standards. *Id.* at 746. By contrast, Title II of PURPA, the statutory section in question in this case, establishes a distinctly different federal-state relationship from those established in Titles I & III.

The Ninth Circuit correctly stated Section 210 of PURPA is contained in Title II of PURPA, which does not contain the preference for States to maintain the primary regulatory role applicable under Titles I and III. The Ninth Circuit's conclusion is directly supported by the plain statutory language as well as the Conference Report. Each of Titles I, II and III had their own separate judicial review provision. The first was in Title I, Section 123 of PURPA, as part of the

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

amendments to Title 16, Ch. 46 (relating to public utility regulatory retail policies). The second was in Section 210 of PURPA (at issue here). The third was in Title III, Section 307, which became part of title 15, Ch. 59 (relating to retail policies for natural gas utilities). But of great significance, it is only the Title I and III judicial review provisions that used express language limiting the jurisdiction of the federal courts. The reason for that is obvious. Titles I and III of PURPA involved retail issues under the jurisdiction of the States, not issues under federal jurisdiction such as wholesale sales.

Section 123(a) of PURPA (now codified in 16 U.S.C. §2633(a)) expressly limits federal jurisdiction: "*Notwithstanding any other provision of law*, no court of the United States shall have jurisdiction over . . . "). (Emphasis added)." Similarly, the Conference Report's discussion of Section 123 states: "the jurisdiction of the Federal courts is limited by this section; review and enforcement is primarily in the State courts." The Conference Report however was quick to note that the specific language in Section 123 was *not* intended to be broadly interpreted as restricting jurisdiction in other rate related cases.[10] Because Title I of PURPA addressed "retail" policies, the limitation on federal jurisdiction was consistent with Congress' general approach of leaving most retail matters to the States.

Section 307 of PURPA (now codified at 15 U.S.C §3207) used almost identical *express* language as Section 123. As it had done with respect to Section 123, the Conference Report's discussion of Section 307 specifically referred to the express "notwithstanding" language of Section 307 as limiting federal court jurisdiction.[11]

The plain language of Section 123 and 307 (both of which relate only to retail policies) illustrate that when Congress intended to restrict jurisdiction of state or

[10] *See*, *Conf. R.* at 7818: "With regard to this section, the conferees do not intend to foreclose Federal courts from jurisdiction to review cases involving electric utility rates which do not involve actions arising under subtitle A, B, or C."

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

federal courts in PURPA it expressly so stated. It did so under Section 123 and 307 of PURPA; it did not under Section 210 of PURPA.

Significantly, the "notwithstanding" clause of Section 123 and 307 is not present in Section 210 of PURPA or anywhere else in Title II. Nor is there a discussion in the Conference Report stating Congress' intention to limit federal court jurisdiction in the case of Title II. When Congress intended a discussion in one section of the Conference Report to apply equally to another, it knew how to do that as well.[12]

In stark contrast, PURPA Sections 210(g) and (h) do not contain express limiting jurisdictional language. Nor are they written to broadly encompass all "the requirements" of Title II or Section 210, as were Sections 123 and 307 with respect to Titles I and III of PURPA, respectively, with respect to all "the requirements" of those Titles.[13] The absence of that express limiting language from Section 210 provides further confirmation that Congress did not intend to hand Federal Power Act jurisdiction over to State courts.

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

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

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

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

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

In other words, a QF can elect to have the utility's avoided costs (and thus its rate) determined on an ongoing basis, calculated when electricity is physically delivered to the utility; *or* the QF can instead elect to have the utility's avoided costs calculated when the contract is entered, so that it can "establish a fixed contract price for its energy and capacity at the outset of its obligation." PURPA Rulemaking, 45 Fed. Reg. at 12,224.

FERC understood that "in order to be able to evaluate the financial feasibility of a [QF], an investor needs to be able to estimate, with reasonable certainty, the expected return on a potential investment before construction of a facility." *Id.* at 12,218. Ensuring that a QF can elect to have "avoided costs calculated at the time the obligation is incurred," 18 C.F.R. § 292.304(d)(2)(ii), provides this reasonable certainty. FERC recognized that the utility's avoided costs calculated at the time the obligation is incurred may turn out to be quite different than the utility's avoided costs at the time the power is actually delivered. PURPA Rulemaking, 45

Fed. Reg. at 12,224. But FERC believed that "in the long run, 'overestimations' and 'underestimations' of avoided costs will balance out," and it emphasized "the need for certainty with regard to return on investment in new technologies." *Id.*; *see also JD Wind*, 130 FERC ¶ 61,127 (2010), at para. 23 ("[FERC] has … consistently affirmed the right of QFs to long-term avoided cost contracts … with rates determined at the time the obligation is incurred, even if the avoided costs at the time of delivery ultimately differ from those calculated at the time the obligation is originally incurred.").

As FERC's regulations make plain, the selection of which rate is to be used is made by the QF, not the electric utility or a State regulatory agency. 18 C.F.R. § 292.304(d)(2); *see also Hydrodynamics*, 146 FERC ¶ 61,193 (2014) at para. 31 ("Under Section 292.304(d) of the Commission's regulations, a QF also has the unconditional right to choose whether to sell its power … at a forecasted avoided cost rate."); *JD Wind*, 130 FERC ¶ 61,127 (2010) at para. 23.

National Grid is also wrong when it states that the FERC's rules do not provide for the term over which the forecasted avoided costs are to be determined. The FERC's regulations in (d)(2) make it clear that the avoided costs calculated at the time the obligation are calculated over the specified term and that the term is the time period for which the QF is committing itself: "Each qualifying facility shall have the option [] To provide energy or capacity pursuant to a legally enforceable obligation for the delivery of energy or capacity over a specified term, in which case the rates for such purchases shall, at the option of the qualifying facility exercised prior to the beginning of the specified term, be based on [] (ii) [t]he avoided costs calculated at the time the obligation is incurred." *See*, *e.g.*, *JD Wind 1, LLC*, 129 FERC ¶ 61,148, at P 25 (2009) ("Under our regulations, [the QF] has the right to choose to sell pursuant to a legally enforceable obligation . . . ."); *see also Murphy Flat Power, LLC,* 141 FERC ¶61,145 (2012) at para. 24 ("a QF, by committing itself to sell to an electric utility, also commits the electric utility to buy from the QF;

these commitments result either in contracts or in non-contractual, but binding, legally enforceable obligations"); *Cedar Creek Wind, LLC*, 137 F.E.R.C. P61,006 at para. 32 (2011) ("The Commission's regulations under PURPA also include a requirement that QFs have the option to sell not only as available but pursuant to legally enforceable obligations over specified terms.") If a QF did not have the right to also specify the term over which its commitment would be, then its right to lock-in a rate needed to finance construction of its facility would be illusory.

Having the QF have the right to select the specified term is also consistent with other aspects of the statute. 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's regulations could not be clearer: "[e]ach electric utility shall purchase . . . *any energy and capacity* which is made available from a qualifying facility . . . [d]irectly to the electric utility." 18 C.F.R. § 292.303(a)(1) (emphasis added). FERC's regulation effectuates the basic purpose of PURPA, which is "to encourage the development of … small power production facilities" in the face of "reluctan[ce]" by "traditional electricity utilities to purchase power from" such facilities. *FERC v. Mississippi*, 456 U.S. 742, 750 (1982). That statutory goal would be thwarted if a state commission or the electric utility could impose limits on a utility's purchase obligation under PURPA. Simply put, "[t]he regulations contain no provision that would permit a utility to decline to purchase energy from a [self-certified] QF…" *Indep. Energy Prods.*, 36 F.3d at 855.

Accordingly, FERC has declared state programs preempted by its regulations under PURPA when those state programs limit the amount of QF capacity that utilities are required to purchase. For example, the Montana state commission had issued an order requiring a utility to purchase no more than 50 MW from wind-powered QFs of a certain size. *Hydrodynamics, Inc.*, 146 FERC ¶ 61,193, at para. 7

(2014). FERC declared that this cap on the utility's purchase obligation was "inconsistent with PURPA and the Commission's regulations." *Id.* at para. 34. It explained that "the 50 MW installed capacity limit is inconsistent with PURPA's goal of promoting QF development and fails to implement the Commission's regulations requiring an electric utility to purchase *any* capacity which is made available from a QF, and at a rate that, at the QF's option, is a forecasted avoided cost rate." *Id.* at para. 35.

National Grid is required to offer to purchase any and all electricity offered by Allco's QFs. The Allco QFs have offered their electricity for a committed term of 25 years. As a result National Grid is required to purchase it over that committed term.

National Grid's claim that the MDPU rule satisfies the requirements of PURPA because the rule provides for a legally enforceable obligation for a rolling period of 30 days, and thus can have the effect of curtailing the term committed to by the QF is unavailing. First, the statute and regulations are clear, and there is no ability of a State to amend or alter those specific requirements. Second, the FERC has stated that the long-term forecasted fixed rates that a QF has the option to choose are essential to fostering QF generation because "'an investor needs to be able to estimate, with reasonable certainty, the expected return on a potential investment before construction of a facility.'" *JD Wind 1 LLC*, 130 FERC ¶ 61,127, at para. 23 (2010) (quoting 45 Fed. Reg. at 12,218). Being "able to evaluate the financial feasibility" of a QF in this manner, *id.* (quoting 45 Fed. Reg. at 12,218), is a critical prerequisite for moving forward with a project. It is readily apparent how allowing the State or the utility to select and limit the specified term of the QF's pricing option would completely frustrate the ability of "'an investor [] to be able to estimate, with reasonable certainty, the expected return on a potential investment before construction of a facility.'" *Id.* With only a rolling 30-day term, the only reasonably certain revenue stream is for the 30-day period, which makes it impossible to raise the necessary funding to construct the facility.

National Grid's argument on this issue is perhaps most remarkable for what it does *not* argue. National Grid cannot defend its interpretation as fostering QF generation. And State action is restricted to rules that "foster" QF generation. *Allco Finance Limited v. Klee*, 805 F.3d at 91-92. National Grid's position would eviscerate what the FERC recognized when it promulgated the regulations: that a QF needs a committed rate to finance construction.

IV. National Grid's Pre-emption Argument is Without Merit.

National Grid's preemption argument starts from the wrong place. It assumes the State has some intrinsic authority to regulate the terms and conditions of wholesale sales of electricity. That has never been the case. Initially, interstate sales of electricity were unregulated. The United States Supreme Court held that States were powerless to regulate such sales under the Commerce Clause, *see, Pub. Utils. Comm'n v. Attleboro Steam & Elec. Co.*, 273 U.S. 83, 89 (1927) ("*Attleboro*"), resulting in what became known as "the *Attleboro* gap." *New York v. FERC*, 535 U.S. 1, 5-6 (2002). The States were simply powerless to regulate such sales, no matter what their local intra-state interest was. *See, Attleboro*, 273 U.S. at 90. (Such sales are "not subject to regulation by either of the two States in the guise of protection to their respective local interests.")

It was against the backdrop of a State's absence of power to regulate wholesale transactions that in 1935, Congress enacted the Federal Power Act to fill that gap, as well as to "extend[] federal coverage to some areas that previously had been state regulated." *Id.* at 6. Specifically, Congress gave the Federal Power Commission – now FERC – exclusive authority to regulate "the sale of electric energy at wholesale in interstate commerce." 16 U.S.C. § 824(b)(1).[14] "[W]holesale,"

[14] 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

in this context, means any "sale of electric energy to any person for resale." *Id.* § 824(d). Thus, any sale of electricity in interstate commerce (with the exception of qualifying sales under PURPA, and another exception not relevant here for certain hydroelectric energy) falls within FERC's exclusive regulatory authority, unless it is a "retail" sale to the factory, business or home that will actually consume the electricity. *See, FPC v. S. Cal. Edison Co.*, 376 U.S. 205, 215 (1964) (Congress left "no power in the states to regulate … sales for resale in interstate commerce."). *S. Cal. Edison*, 376 U.S. at 215-16 ("Congress meant to draw a bright line, easily ascertained, between state and federal jurisdiction…. This was done … by making [FERC] jurisdiction plenary and extending it to all wholesale sales in interstate commerce except those which Congress has made explicitly subject to regulation by the States."); *New England Power Co. v. New Hampshire*, 455 U.S. 331, 340 (1982) (the Federal Power Act "delegated to [FERC] exclusive authority to regulate the transmission and sale at wholesale of electric energy in interstate commerce, without regard to the source of production.")[15]

The Federal Power Act gives FERC exclusive authority not only to set 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 "all rules and regulations affecting or pertaining to such rates or charges." 16 U.S.C. § 824d(a).

In 1978, Congress enacted PURPA to "accelerate the development of renewable and inexhaustible energy sources", H.R. Rep. No. 95-496(IV), at 14

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electricity is transmitted on lines interconnected with an interstate grid, as will be the case here.

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

(1978), carving out a narrow exception to FERC's exclusive authority over wholesale sales in order to foster electric generation by QFs. 16 U.S.C. § 824a-3; *id.* §§ 796(17)(C), 796(18)(C). A State has no authority to regulate wholesale sales of electricity except though its limited authority to encourage wholesale sales by QFs. *See*, *Allco Finance Limited v. Klee*, 805 F.3d at 91-92. ("The Federal Power Act gives the [FERC] exclusive authority to regulate sales of electricity at wholesale in interstate commerce. *See* 16 U.S.C. § 824(b)(1). States may not act in this area unless Congress creates an exception. *Id.* § 824(b). PURPA contains one such exception that permits states to *foster* electric generation by certain power production facilities.") (Emphasis added). *See*, 16 U.S.C. 824d, 824e. And, because states' *only* authority to regulate wholesale electricity sales is derived from PURPA, *see* 16 U.S.C. § 824(b) (giving FERC exclusive jurisdiction over wholesale sales of electricity in interstate commerce); *Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953, 966 (1986), any state rule that does not *foster* electric generation by QFs conflicts with PURPA and is necessarily preempted.[16]

The MDPU rule clearly regulates the terms of wholesale sales of electricity, a field exclusively reserved for the FERC. The only exception is a State rule that fosters QF sales to electric utilities, which the MDPU rule does not do for, *inter alia*, the simple reason that it prohibits the long-term forecasted revenue stream that FERC recognized was critical to fostering renewable energy QF development. The MDPU rule is also conflict pre-empted because as interpreted and as applied by the MDPU, it prevents the long-term rate under § 292.304(d)(2)(ii) and only allows a short-term rate.

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[16] State laws that conflict with federal law or that "stand as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 373 (2000), are preempted and invalid. *See Pac. Gas & Elec. Co. v. State Energy Res. Conserv. & Dev. Comm'n*, 461 U.S. 190, 204 (1983) ("Even where Congress has not entirely displaced state regulation in a specific area, state law is preempted to the extent that it actually conflicts with federal law.")

To be sure, the terms of the MDPU rule are not inconsistent with the as-available rates under PURPA, and as a non-exclusive State PURPA option, it would not be pre-empted because it would fulfill the options under § 292.304(d)(1) and § 292.304(d)(2)(i) (as to energy only, but not capacity)[17]. But the fact that the MDPU and National Grid apply the rule as permitting only a rolling 30-day obligation to the exclusion of all others, makes the rule conflict with the requirements of § 292.304(d)(2) and the requirements that any state rule foster QF generation.

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

[17] The fact that the contract could be terminated upon 30 days' notice eliminates payment for capacity because the ISO-New England market requires commitments 3 years in advance.

Despite the plain language of § 292.304(d)(2) referring to specified term as being the QF's option, National Grid's argues that a State controls the term and here the MPDU has defined a 30-day term. The logical extension of National Grid's view is that if a State chose not to specify any terms, then the QF would be out-of-luck and would only be able to get the Short-Run or as-available rate.

National Grid does not provide any justification for a 30-day contract, or any explanation for why a 30-day contract is consistent with the statutory purpose of PURPA. Even more strikingly, National Grid does not even attempt to defend the rate paid by the MDPU rule as one that is based on its long-term forecasted avoided costs. Indeed nowhere in its brief does National Grid dispute Allco's assertion that National Grid maintains long-term forecasts of its avoided costs. Nowhere does National Grid dispute that such long-term forecasts, including the specific ones offered as evidence by National Grid in the *Cape Wind* case fairly represent National Grid's avoided costs under § 292.304(d)(2)(ii). This glaring concession by omission speaks volumes, and reinforces the lack of merit in National Grid's arguments before this Court.

Finally, National Grid repeats its argument regarding abstention of Allco's damage claim, and recycles its prior assertion that the MDPU rule governs. Allco will not repeat the arguments from its opening brief except to note that National Grid has only sought the dismissal and abstention on Allco's damage claim, and not of Allco's claim for declaratory relief. By only challenging Allco's damage claim and not its requested declaratory relief, National Grid concedes that under 28 U.S.C. §§ 2201 and 2202 this Court has jurisdiction to grant declaratory relief and fashion a remedy.

CONCLUSION

In sum, the obligation to purchase is imposed directly on National Grid by federal law. National Grid is obligated to purchase from Plaintiff's QFs at a long-term forecasted rate over the specified term of 25 years. Moreover, as National

Grid has effectively conceded, National Grid maintains forecasts of its long-term avoided costs over the 25-year period specified by Allco demonstrating that National Grid's reference to a six-month basic service acquisition is simply a red herring.

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

Dated: April 1, 2016

/s/ Thomas Melone

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CERTIFICATE OF SERVICE

I hereby certify that on this 4th day of April 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