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 MEMORANDUM IN SUPPORT OF MOTION FOR RECONSIDERATION** [Fed. R. Civ. P. 59(e)] **Judge:** Hon. Patti B. Saris

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

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF THE MOTION FOR RECONSIDERATION

INTRODUCTION

Allco Renewable Energy Limited ("Allco") respectfully asks the Court to reconsider certain aspects of its memorandum and order dated September 23, 2016 (the "Order"). *Allco Renewable Energy Limited v. Massachusetts Electric Company*, 1:15-cv-13515 (D. Mass. September 23, 2016). Allco appreciates the Court's thorough analysis and the speed and efficiency in which it has handled this case. But parts of the Order, if unchanged, would be a major setback for fighting climate change. Because of what is at stake, Allco respectfully asks the Court to take another look at how section 210 fits into the statutory scheme of the Federal Power Act ("FPA"). The Court's Order coupled with a State's right under the Constitution not to do anything, provides a roadmap for States to make section 210 of PURPA[1] an optional law, effectively allowing States to let their utilities opt-out. That cannot be the law. The Order also conflicts with decisions of the Supreme Court (*e.g.*, *Alexander* v. *Sandoval*, 532 U.S. 275 (2001) ("*Sandoval*"), *Armstrong v. Exceptional Child Center, Inc.*, 135 S. Ct. 1378 (2015) ("*Armstrong*"), and *FERC v. Mississippi*, 456 U.S. 742 (1982)), and the First Circuit (*e.g.*, *Concilio De Salud Integral De Loiza, Inc. v. Perez-Perdomo*, 551 F.3d 10 (1st Cir. 2008)).

The Court's Order concludes that the only remedies, or private causes of action, available to a QF[2] are those specified in either section 210(g) or (h)(2) of PURPA. *See*, Order at 13. ("What Allco is seeking [] does not fit the mold of" section 210(g) or (h)(2).) The result is that Allco must take its chances that the MDPU promulgates a new compliant regulation (even though the MDPU is not required to do anything, *see Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2602 (2012)).[3]

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

[2] "[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] On the day the Order was issued, Judge J. Garvan Murtha of the District of Vermont issued an order in a similar case brought by Allco's affiliate against Green Mountain Power Corporation, a Vermont utility. *Otter Creek Solar, LLC v. Green Mountain Power Corp.,* 1:16-cv-00013, 2016 U.S. Dist. LEXIS 133751 (D. Vt. September 23, 2016) *appeal docketed*, No. 16-3496 (2d Cir.

I. The Order Conflicts With The Supreme Court's Decisions In *Sandoval* And *Armstrong*.

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, which for purposes of this section of the memorandum is assumed to be the case with the text of section 210(a) of PURPA. *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 it seems as if the Court agrees that the language of the statute has sufficient rights-creating language, but concludes 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 Order's conclusion is demonstrably incorrect. Under *Sandoval* and *Armstrong*, the presence of

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October 17, 2016) (the "Vermont Order"). The Vermont Order held that the plaintiff first needed to exhaust administrative remedies at the FERC under 16 U.S.C. §824a-3(h)(2), which Allco has already done in this case. The Vermont Order also seems to imply that the plaintiff would first need to try to avail itself of the existing state program. Allco has appealed.

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.

A. Section 210 of PURPA Contains *Sandoval's* Classic Rights-Creating Language, Presumptively Establishing A Private Cause of Action Against A Utility.

"[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 §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.) *See also*, *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[4] (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.

B. A Private Cause of Action Against The Utility Is Not Excluded By The Existence of Unrelated Remedies.

Consistent with the rights-creating language in the statute and regulations, the Court has agreed that section 210 of PURPA imposes a direct federal obligation on electric utilities to purchase from a QF. Order at 10. ("Allco is correct that FERC's implementing regulations obligate electric utilities like National Grid to purchase electric energy from QFs.") The Court, however, concluded that the direct obligation is not "enforceable through a private cause of action against the electric utility," Order at 11, 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 Order misapprehends Congressional intention. *First*, the Order creates a no man's land for all renewable QFs 30MW+, and, absent proper implementation by a State or non-regulated utility, all QFs. Leaving any QF without any remedy for rights just created undermines the conclusion that Congress intended to enact a right for a carefully crafted class, but also *intended* for that class to be unable to enforce such right. *Second*, the Order fails to apply the two-part analysis of *Armstrong* to determine whether Congress intended to limit remedies to those expressly created in the statute. *Third*, it ignores section 210(h)(1), which is the glue that binds section 210 to the FPA. *Fourth*, it ignores the FPA itself. *Fifth*, once it is shown that rights-creating language is present, the burden to show that a statute's remedies are comprehensive rests on National Grid, not on Allco. *Golden State Transit Corp. v. City of Los*

[4] *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

Angeles, 493 U.S. 103, 106 (1989). National Grid has not met that burden.

1. The Order Creates A No-Man's Land Contrary to Congress' Express Intention.

The most straight-forward reason why the Order misapprehends the statute's intention is that the Order creates a no man's land—a world where certain QFs have no remedy at all. The Order holds 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.

Allco explained in its motion papers the two-door conclusion leaves the 30MW+ solar generator out in the cold. 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[5]; *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.")[6]

Report" or "Conf. R.").

[5]*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.")

[6] *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

But under the Order, the 30MW+ solar generator does not fit into either the so-called Door #1 ("as-applied") or Door #2 ("implementation") category. So if the reasoning of the Order 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,[7] 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 Order's conclusion.

There are other difficulties with the theory of the Order. *Fir*st, the Order also creates a second no man's land for Allco's QFs that is only marginally better than that for 30MW+ generators. As the Order acknowledges 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. *FERC v. Mississippi*, 456 U.S. at 759-760 ("[t]he *statute's substantive*

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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."

[7] *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.

provisions require electricity utilities to purchase electricity from" QFs). 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—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 Order'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 Order renders section 214 meaningless. *Third*, the Order 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*[8] stating involvement of a state regulatory authority (while potentially convenient) is unnecessary, and is based upon an unconstitutional delegation, as Allco argued in its motion papers. *Fourth*, it was known 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 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. *Fifth*, as further discussed *infra*, the Order ignores section 210(h)(1) which

[8] *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

provides that the FERC's rules governing operations of a QF or an electric utility are enforceable under the FPA.

2. The Order Conflicts With The Supreme Court's Two-Prong Analysis in *Armstrong*.

The Court is correct that subsections (g) and (h) provide "an overlapping scheme of federal and state judicial review of *state regulatory action* taken pursuant to PURPA." Order at 11 citing *Greenwood v. N.H. Pub. Utils. Comm'n*, 527 F.3d 8, 10 n.1 (1st Cir. 2008) (emphasis added), but as the Order also acknowledges, 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. 18 C.F.R. §292.601.

The Supreme Court's most 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[9] 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

enforceable obligation.")

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

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.

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 Order, 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 Court's Order 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 Order'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 Order rest on the conclusion that Congress *intended* to create no man's lands, but it also effectively concludes that

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three joined Part IV.

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. [10]

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.

II. 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

[10] 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

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. 2014) ("*Midland*") (suggesting the term "enforcement" in section 210(h)(1) means "commission enforcement," as opposed to enforcement generally: "§ 210(h)(2)(A) provides for treatment of § 210(f)(1) requirements 'as a rule enforceable under the Federal Power Act' 'for purposes of enforcement.' (Section 210(h)(1) uses a parallel construction.) In this context, where FERC is not seeking 'enforcement' of the order, it appears irrelevant.") Although it is not clear from *Midland*, presumably that 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.[11]

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. Section 210(h)(1) is the glue that binds the PURPA and FPA regulatory scheme together.

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fit expressly within its provisions.

[11] *See FERC Policy Statement* at 61,646:

> Section 210(h)(1) of PURPA gives the Commission exclusive enforcement authority with regard to any rules prescribed by the Commission under section 210(a) of PURPA "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."

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.

That fact was recognized early on by FERC. It was recognized in connection with the judicial review provisions.[12] It was also recognized that without section 210(h)(1), there would be "two conflicting regulatory schemes covering [QFs]. Section 210 pricing, and traditional Federal Power Act regulation of the [QF] who becomes a Part II public utility by virtue of a wholesale sale into interstate commerce." *Staff Paper* at 38865. Section 210(h)(1) resolves that "by instructing the Commission to use Section 210 pricing for this group." *Id*.

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 Commission'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

[12] In its initial regulations under PURPA, the FERC concluded that the judicial review provisions of the FPA applied 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) ("[t]he Commission notes that, while there is no express statutory right to rehearing of rules issued under section 210 of PURPA, there is a statutory right to rehearing of rules issued under section 201 of PURPA, which amended the Federal Power Act (FPA) by adding section 3(17)-3(22). The Commission's view is that 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.") Available at http://www.ferc.gov/industries/electric/gen-info/qual-fac/orders/order-69-and-erratum.pdf.

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 Order. 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,[13] 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 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

[13] "(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."

> 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 theory 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? *Seventh*, in its initial regulations under PURPA, the FERC agreed that (h)(1) was the link that enabled a QF to access the judicial review provisions of the FPA for enforcement of the rules under section 210 of PURPA. *See,* fn. 12 *supra.*

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.

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

A private enforcement action against National Grid is thrice supported. 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*, 18 C.F.R. 292.601(1982) (exempting all QFs wholesale sales other than 30MW-80MW renewable QFs).[14] 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

[14] 292.601 (1982) Exemption to qualifying facilities from the Federal Power Act.
(a) Applicability. This section applies to:
(1) qualifying cogeneration facilities; and
(2) qualifying small power production facilities which have a power production capacity which does not exceed 30 megawatts.
(b) General rule. Any qualifying facility described in paragraph (a) shall be exempt from all sections of the Federal Power Act, except:
(1) Sections 1-30;
(2) Sections 202(c), 210, 211, and 212;
(3) Sections 305(c); and
(4) Any necessary enforcement provision of Part III with regard to the sections listed in paragraphs (b)(1), (2) and (3) of this section.

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. So there is simply no basis to conclude that Congress intended the so-called "as-applied" or "implementation" paths be exclusive means to enforce the section 210 must-buy obligation of utilities.

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.

It is difficult to see how National Grid has met its burden to establish that Congress *intended* to limit actions by renewable QFs against utilities to the narrow world of section 210(g) and (h)(2). 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.

IV. The Court Could Defer To FERC On The Fact Issue Of Avoided Costs.

Recognizing the Court's reluctance to get involved in determining a proper rate for Allco's energy and capacity, the 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 Court should do here, if it does not want to appoint a special master. It should have FERC address the terms between Allco and National Grid. While there is a basis on which for the Court to 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.

CONCLUSION

For the foregoing reasons, Allco respectfully requests the Court reconsider the Order (Docket No. 74), deny National Grid's motion to dismiss Count III of the complaint (Docket No. 27), and grant Allco's motion for summary judgment on Count III (Docket No. 50).

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Respectfully submitted,

/s/ Thomas Melone

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