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 their individual capacity and in their official capacity as Commissioners of the Massachusetts Department of Public Utilities, and JUDITH JUDSON, in her individual capacity and in her official capacity as Commissioner of the Massachusetts Department of Energy Resources, *Defendants*.	)	Civil Action No. 1:15-cv-13515-PBS

MEMORANDUM IN SUPPORT OF MASSACHUSETTS ELECTRIC COMPANY D/B/A NATIONAL GRID'S MOTION TO DISMISS THE FIRST AMENDED COMPLAINT

Pursuant to Federal Rule of Civil Procedure 12(b)(6), defendant Massachusetts Electric Company d/b/a National Grid ("National Grid") submits this Memorandum of Law in support of its Motion to Dismiss the claim for damages that plaintiff Allco Renewable Energy Limited ("Allco") asserts against National Grid in its First Amended Complaint [Dkt. 26].

Allco's sole claim against National Grid is a claim for damages predicated on the unsupported legal contention that National Grid's refusal to purchase the energy and capacity from Allco's electric generating facilities at the rate offered by Allco, rather than the rate available under the applicable federal and Massachusetts regulations, violated National Grid's obligations under federal law and caused Allco financial harm. Specifically, Allco contends that

National Grid's refusal to purchase the electric energy from Allco's generation facilities at the rate offered by Allco violates the Public Utility Regulatory Policies Act of 1978 ("PURPA"), Pub. L. No. 95-617, 92 Stat. 3117 (codified as amended in scattered sections of U.S.C.). In fact, PURPA and the federal and state regulations implementing PURPA obligate National Grid to purchase the electric energy from Allco's generating facilities at a substantially different rate than that demanded by Allco, a rate which National Grid offered to pay Allco. National Grid fully complied with its obligations under PURPA and all applicable federal and state regulations in its dealing with Allco and has done nothing that would entitle Allco to the damages it seeks. The Massachusetts Department of Public Utilities ("MDPU") so found when it dismissed Allco's Petition before it based on the same facts Allco alleges in support of its Complaint.

Even if there were a viable claim for damages, which National Grid denies, this Court should abstain from hearing the claim based on the *Colorado River* doctrine due to the pending state court case appealing the same claims and MDPU Final Order.

FACTS AND PROCEDURAL HISTORY[1]

A. National Grid

National Grid is a Massachusetts electric distribution company subject to the regulatory jurisdiction of the MDPU and the Federal Energy Regulatory Commission ("FERC"). (*See* Complaint at ¶ 10.) All Massachusetts consumers (residential, commercial, and industrial) can choose to buy electricity from competitive retail suppliers, while National Grid is obligated to provide service to those electric customers in its territory who do not elect to take service from a competitive supplier. Electric Restructuring Act, St. 1997, c. 164. National Grid satisfies this obligation through the competitive procurement of electric generation service from wholesale suppliers as it owns virtually no electric generation facilities. (Comments of Massachusetts Electric Company d/b/a National Grid to the Petition for Enforcement filed by Allco against the MDPU ("National Grid's Comments to FERC") at 6-7 (Decl. of Sarah Sakson Langstedt ("Langstedt Decl."), Ex. N).)

The MDPU has directed distribution companies such as National Grid to procure energy to supply their residential and commercial customer groups taking "basic service" on a staggered basis (securing 50% of the needed energy supply to meet their "basic service" obligation for a twelve-month period every six months). (Investigation by the Department of Telecommunications and Energy on its own Motion into the Provision of Default Service, D.T.E.

[1] The Court can take judicial notice of documents incorporated by reference into the complaint, matters of public record, and facts subject to judicial notice. *Wilson v. HSBC Mortg. Servs.*, 744 F.3d 1, 7 (1st Cir. 2014). The documents filed with the MDPU, under MDPU Dockets 10-54, 11-57, and 11-59, are referenced in the complaint and are matters of public record; therefore, they are subject to judicial notice. The state court case brought by Allco appealing the MDPU Final Order, Docket SJ-2014-0337, is likewise subject to judicial notice as a matter of public record.

02-40-C at 18-25 (2003) (Langstedt Decl., Ex. A).) The MDPU also has directed that distribution companies procure their energy supply to service industrial customers taking "basic service" supply on a quarterly basis. (*Id.*)

Thus, in order to comply with the various MDPU orders and regulations, National Grid issues a competitive Request for Proposal for energy supply to meet its "basic service" obligations on a quarterly basis – that is, every three months. (National Grid's Comments to FERC at 7 (Langstedt Decl., Ex. N).) In each solicitation, suppliers are required to offer National Grid a monthly fixed price for energy bi-annually for 6-month blocks and a monthly fixed price for energy quarterly for 3-month blocks to enable National Grid to serve its residential and commercial customers and industrial customers taking provider of last resort service, respectively. (*Id.*)

B. PURPA

PURPA was enacted to promote long-term economic growth by reducing the nation's reliance on oil and gas and to promote the development of alternative energy sources, and to do so in a manner that did not adversely affect retail rates for other electric consumers. PURPA directs FERC, in consultation with state regulatory authorities, to promulgate rules requiring electric utilities to offer to sell electricity to, and purchase electricity from, qualifying small power production and cogeneration facilities ("QFs"), and then obligates state regulatory agencies such as the MDPU to implement the rules promulgated by FERC through their own rulemaking. 16 U.S.C. § 824a-3.

As required by PURPA, FERC has prescribed rules imposing on electric utilities the obligation to offer to purchase electric energy from QFs. 18 C.F.R. § 292.303(a). In doing so, FERC has made clear that its regulations do not require any electric utility to pay more than its

"avoided costs" for such purchases – that is, no more than "the incremental costs to an electric utility of electric energy or capacity or both which, *but for the purchase from the qualifying facility or qualifying facilities, such utility would generate itself or purchase from another source*." *Id.* at §§ 292.304(a)(2), 292.101(b)(6) (emphasis added). In this regard, FERC has noted that

> '*states are allowed a wide degree of latitude in establishing an implementation plan for section 210 of PURPA*' . . . [and] the determinations that a state commission makes to implement the rate provisions of section 210 of PURPA are by their nature fact-specific and include the consideration of many factors, and *we [FERC] are reluctant to second guess the state commission's determinations*; our regulations thus provide state commissions with guidelines on factors to be taken into account, 'to the extent practicable' in determining a utility's avoided cost of acquiring the next unit of generation.

Cal. Pub. Utils. Comm'n, 133 FERC ¶ 61,059, at 61,226 (FERC 2010) (quoting first *Am. REF-FUEL Co. of Hempstead*, 47 FERC ¶ 61,161, at 61,533 (1989) then 18 C.F.R. § 292.304(e)) (emphasis added).

FERC's regulations provide QFs with the option to sell to electric utilities on an "as available" basis or pursuant to a "legally enforceable obligations." 18 C.F.R. § 292.304(d). With regard to the "legally enforceable obligation" option, QFs also have the option to have the avoided costs applicable to purchases pursuant to a "legally enforceable obligation" be calculated at the time of delivery or when the obligation is incurred. *Id.* FERC's regulations do not require any particular duration for any such legally enforceable obligation or related termination provisions.

C. Massachusetts' QF Regulations

As required by Section 210(f)(1) of PURPA, Massachusetts implements PURPA through regulations found at 220 C.M.R. ch. 8.00, which establish the rates, terms and conditions of sales of electricity by QFs to electric utilities regulated by the MDPU, such as National Grid. In 1999,

the MDPU initiated rulemaking to revise its QF regulations to conform with changes to the electric industry brought about by Massachusetts law allowing consumers to purchase electricity from competitive energy providers rather than from the local regulated utility, such as National Grid, and by FERC's approval of the creation of ISO New England, Inc. to provide non-discriminatory transmission service on a New England-wide basis. After public comment, the MDPU found that as a result of these two market developments, electric distribution companies such as National Grid were now required to purchase their electricity needs from a competitive wholesale market and therefore their "avoided costs" were to be based on the "competitive wholesale electricity market price." (Order, D.T.E. Docket No. 99-38 (December 27, 1999) at 3 (Langstedt Decl., Ex. O).) Accordingly, the MDPU revised its QF regulations to provide that

> Qualifying Facilities that have a design capacity of one MW or greater shall have their output metered and purchased at rates equal to the payments received by the Distribution Company from the ISO power exchange for such output for the hours in which the Qualifying Facility generated electricity in excess of its requirements.

220 C.M.R. § 8.05(2)(a). Also, consistent with FERC's PURPA regulations, the MDPU regulations provide a standardized contract that a QF may use to sell its output to an electric utility at the specified "avoided cost" rate or pursuant to a negotiated contract. *See* 220 C.M.R. § 8.03(1).

D. The Negotiation Between National Grid and Allco for the Purchase and Sale of Electricity from Allco's QFs

In a letter to National Grid dated March 28, 2011, Allco invoked the MDPU QF regulations and sought to negotiate "an agreement pursuant to 220 C.M.R. § 8.03(1)(b)2 to sell to National Grid all production, capacity and Massachusetts Class I RECs" of its Massachusetts QF generation projects. (Pet. by Allco to the MDPU, MDPU Docket 11-59 ("Allco Pet."), Ex. A at 1 (Langstedt Decl., Ex. B).) Allco represented that each of its QF projects had a design

capacity of 1 MW or greater. (*Id.* at 5.) Allco, however, departed from the MDPU regulations and instead contended that the MDPU's "current regulations no longer reflect the avoided costs realized by National Grid from the interconnection of renewable energy QFs." (*Id.* at 2.) Allco then took it upon itself to propose two pricing options; each option was derived from the bundled pricing terms of the power purchase agreement to purchase energy, capacity and renewable energy credits derived from rates approved by the MDPU for a wholly different, non-QF offshore wind powered generation facility. (*Id.* at 3.)

By letter dated April 18, 2011 in compliance with the 30 day requirement of 220 C.M.R. § 8.03(1)(c), National Grid responded to Allco explaining that the avoided cost rate available to QFs as approved by the MDPU was set forth in its P-Rate Tariff and advised Allco that National Grid would execute the Standard Power Purchase Agreement attached at Schedule A to the P-Rate Tariff, which is available to all QFs for sales of electricity at the rate established by the MDPU. (Allco Pet., Ex. B at 1 (Langstedt Decl., Ex. B).) Allco never responded to National Grid's offer to purchase the electricity from the Allco QFs at the rates and on the terms and conditions established by the MDPU QF regulations.

E. Allco's Enforcement Actions

On August 1, 2011, Allco filed a petition with the MDPU asking it to amend the provisions of its QF regulations found at 220 C.M.R. ch. 8 "with respect to sales of electricity by a renewable energy qualifying facility . . . to create separate new long-run rates (over 20 years in the case of onshore and offshore wind facilities, and 25 years in the case of solar facilities) payable to renewable energy QFs . . . based upon an avoided cost structure that accurately reflects the likely costs avoided by Massachusetts distribution utility from interconnection of renewable energy QF." (Pet. for Am. to 220 CMR § 8.01 et seq. Sales of Electricity by

Qualifying Facilities, D.P.U. 11-57 at 1 (Langstedt Decl., Ex. C).) By letter dated December 23, 2011, the MDPU Commissioners advised Allco that its current QF regulations were consistent with applicable federal and state law and related regulatory requirements and therefore declined to exercise its regulatory authority to open a rulemaking to revise its QF regulations as requested by Allco and closed the matter. (MDPU December 23, 2011 Letter (Langstedt Decl., Ex. D).)

On August 4, 2011, Allco petitioned the MDPU to investigate the reasonableness of National Grid's failure to agree to or to negotiate regarding the terms on which Allco offered to sell the output of its QFs to National Grid. (Allco Pet. (Langstedt Decl., Ex. B).) On July 22, 2014, the MDPU issued a Final Order declining to investigate the reasonableness of National Grid's failure to agree to or negotiate the terms for its purchase of electric energy from Allco's QFs because it found that National Grid's actions in offering Allco a QF rate that was consistent with the MDPU's QF regulations and National Grid's P-Rate Tariff was reasonable. (MDPU Final Order (Langstedt Decl., Ex. F).) On August 11, 2014, Allco filed with the MDPU a petition for judicial review and filed a complaint in the Massachusetts Supreme Judicial Court for Suffolk County, Docket SJ-2014-0337, appealing the MDPU Final Order dismissing Allco's petition seeking a MPDU investigation of National Grid's conduct. (Petition for Judicial Review (Langstedt Decl., Ex. G); St. Ct. Compl. (Langstedt Decl., Ex. H).) That case is still pending (Public Case Information for Docket SJ-2014-0337 (Langstedt Decl., Ex. I).)

On July 28, 2014, Allco filed a petition with FERC to initiate an enforcement action under PURPA against the MDPU to invalidate the MDPU's current QF regulations. (Allco Renewable Energy Limited; Notice of Petition of Enforcement, 79 Fed. Reg. 44766 (Aug. 1, 2014) (Langstedt Decl., Ex. J).) On September 26, 2014 FERC issued a notice stating that it

declined to initiate an enforcement action against the MDPU pursuant to PURPA. (FERC Notice of Intent Not to Act (Langstedt Decl., Ex. K).)

ARGUMENT

I. Allco's claim against National Grid should be dismissed because it fails to state a claim under Federal Rule of Civil Procedure 12(b)(6).

A. Standard

On a motion to dismiss, the "focal point" of the Court's analysis is "the requirement that a complaint contain 'a short and plain statement of the claim showing that the pleader is entitled to relief.'" *A.G. ex. rel. Maddox v. Elsevier*, 732 F.3d 77, 80 (1st Cir. 2011) (quoting Fed. R. Civ. P. 8(a)(2)). The plaintiff must plead "enough facts to state a claim to relief that is plausible on its face." *Id.* (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). To meet this standard, the plaintiff "must show 'more than a sheer possibility' of liability." *Id.* (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)).

The First Circuit has described a two-step process for determining whether a complaint alleges a plausible claim for relief. *See id.* First, the Court "must separate the complaint's factual allegations (which must be accepted as true) from its conclusory legal allegations (*which need not be credited*)." *Id.* (emphasis added) (quoting *Morales-Cruz v. Univ. of P.R.*, 676 F.3d 220, 224 (1st Cir. 2012)). Second, the Court "must determine whether the remaining factual content allows 'a reasonable inference that the defendant is liable for the misconduct alleged.'" *Id.* (quoting *Morales-Cruz*, 676 F.3d at 224)).

B. Allco has no viable claim for damages against National Grid because National Grid abided by all relevant regulations.

National Grid has complied with Massachusetts and federal regulations implementing PURPA. National Grid offered to purchase the output of the Allco QFs at the "avoided cost"

rate specified by the MDPU QF regulations, which is reflected in National Grid's MDPU approved P-Rate Tariff. (Allco Pet., Ex. B at 1 (Langstedt Decl., Ex. B).) National Grid has never disputed its obligation to purchase electric energy from Allco's Massachusetts QFs using those avoided cost rates. In addition, National Grid offered to make the purchases from the Allco QFs pursuant to a legally enforceable obligation in the form of its standard QF contract as approved by the MDPU. *See* 220 CMR 8.05(2)(a); P-Rate Tariff (Langstedt Decl., Ex. L). Based on the foregoing, when asked by Allco to investigate National Grid's conduct regarding Allco's efforts to sell the output of its QFs to National Grid, the MDPU found that National Grid's offers to Allco complied with Massachusetts regulations implementing PURPA. (MDPU Final Order (Langstedt Decl., Ex. F).)

Allco's damage claim against National Grid is predicated on the unsupported legal contention that National Grid was obligated to purchase the output of the Allco QFs at a rate of Allco's own devising, based on the pricing found in the MDPU approved, and now-terminated, power purchase agreement with the Cape Wind Project. However, National Grid had no PURPA obligation to purchase the output of the Allco QFs at the rate sought by Allco. The pricing reflected in the contract with the Cape Wind Project, which was not a QF, was not a PURPA "avoided cost" rate. The MDPU has explicitly stated that the Cape Wind Project contract was not at "avoided cost" under PURPA, (MDPU Order at 10 (Langstedt Decl., Ex. F)); rather, it was at a negotiated rate under a wholly different state statute with a generator that would not necessarily be and, in fact, was not a QF. And, the MDPU has been clear that it did not determine PURPA avoided costs as part of the Cape Wind Project MDPU docket. (*See* Final Order in Cape Wind Project, MDPU Docket 10-54 (Langstedt Decl., Ex. M).)

National Grid has the obligation to offer to purchase the output of the Allco QFs at the avoided cost rate specified by the MDPU. National Grid has done so.[2] FERC's PURPA regulations expressly provide that National Grid has no obligation to purchase the output of the Allco QFs at a price other than the avoided cost rate determined by the MDPU. 18 C.F.R. § 292.304(a)(2). National Grid rightly declined to purchase the output of the Allco QFs at a rate which was more than the avoided cost rate determined by the MDPU.[3] Allco has the right sell its output to National Grid pursuant to a legally enforceable obligation. National Grid offered to purchase the output of the Allco QFs pursuant to the terms of the standard contract approved by the MDPU for such purchases. National Grid has honored all of its obligations to Allco under

[2] When considered in the context of the competitive energy market in Massachusetts, the MDPU's PURPA regulations are substantively consistent with and fairly implement the requirements of FERC's PURPA regulations that a QF have the option to have avoided costs determined at the time a legally enforceable obligations is incurred. National Grid has virtually no generation resources to support its "provider of last resort" obligation. (National Grid's Comments to FERC at 9 (Langstedt Decl., Ex. N).) The only incremental cost that National Grid would incur but for energy purchases from a QF is the cost of incremental energy supply set by the result of each of its quarterly competitive solicitations for energy supply to meet its "provider of last resort" obligation. (*Id.*) These solicitations set a cost for energy supply for no more than a six-month period and for each month of that period. (*Id.*) Thus, National Grid's PURPA-defined avoided costs are set for no more than six months at a time, and for each month of that period, and are set quarterly by the results of its MDPU regulated competitive solicitations.

In the case of QFs sized 1 MW or more, such as the Allco QFs, the MDPU regulations require that the QF pricing made available under a legally enforceable obligation (Standard Power Purchase Agreement, National Grid's P-Rate Tariff Schedule A (Langstedt Decl., Ex. L)) be set at rates equal to the payments received by the Distribution Company from the ISO power exchange for such output for the hours in which the QF generated electricity in excess of its own requirements. Considering the competitive procurement process in Massachusetts, the ISO's hourly clearing price substantively is a reasonable and fair proxy for the incremental cost of energy supply that National Grid would incur for any 30-day period as set by it's most recent competitive solicitation to meet its "provider of last resort" obligation.

[3] In implementing its PURPA regulations, FERC has noted that "Congress gave QFs certain benefits: the right to interconnect, to sell power to electric utilities at avoided cost and to purchase back-up power, etc. from electric utilities at non-discriminatory prices. However, Congress did not intend QFs to have any rate benefit above a market rate level." *S. Cal. Edison Co.*, 70 FERC ¶ 61,215, at 61,676 n.14 (FERC 1995).

PURPA, FERC's implementing regulations, and the MDPU's QF regulations. Allco has made no showing to the contrary. Allco's claim against National Grid for damages must be dismissed.

C. In the Alternative, the Court should abstain from hearing Allco's claim for damages based on *Colorado River.*

The *Colorado River* doctrine allows a federal court to stay or dismiss a case in circumstances where the traditional categories of abstention do not apply. *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800 (1976); *Villa Marina Yacht Sales, Inc. v. Hatteras Yachts*, 915 F.2d 7, 11-12 (1st Cir. 1990). Under the *Colorado River* doctrine, a federal court may surrender jurisdiction "in favor of parallel state proceedings … in 'exceptional' circumstances." *Villa Marina*, 915 F.2d at 12 (quoting *Colo. River*, 424 at 818). The decision as to whether to surrender jurisdiction is left to the district court's discretion, based on its analysis of eight factors:

> (1) whether either court has assumed jurisdiction over a res; (2) the geographical inconvenience of the federal forum; (3) the desirability of avoiding piecemeal litigation; (4) the order in which the forums obtained jurisdiction; (5) whether state or federal law controls; (6) the adequacy of the state forum to protect the parties' interests; (7) the vexatious or contrived nature of the federal claim; and (8) respect for the principles underlying removal jurisdiction.

Nazario-Lugo v. Caribevision Holdings, Inc., 670 F.3d 109, 115 (1st Cir. 2012) (quoting *Jimenez v. Rodriguez-Pagan*, 597 F.3d 18, 27-28 (1st Cir. 2010)). The weight to be accorded these factors varies by case and none "is necessarily determinative." *Villa Marina*, 915 F.2d at 12 (quoting *Colo. River*, 424 U.S. at 818-19).

In determining whether the *Colorado River* doctrine should apply, a district court is required to "approach its decision 'with the balance heavily weighted in favor of the exercise of jurisdiction.'" *Id.* (quoting *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1,

16 (1983)). However, there are appropriate circumstances for declining jurisdiction under the *Colorado River* doctrine. *Jimenez*, 597 F.3d at 28 (citing cases). For example, under this doctrine the First Circuit has affirmed the dismissal of a declaratory judgment action filed in response to an adverse state court ruling. *Fuller Co. v. Ramon I. Gill, Inc.*, 782 F.2d 306, 309-10 (1st Cir. 1986) ("In our view, it would be unthinkable that every time a state (here, commonwealth) court defendant became dissatisfied with that court's provisional resolution of some issue and there was diversity of citizenship, it could rush over to the federal courthouse in the hope of obtaining a more favorable determination.").

If this Court decides that Allco has stated a claim, which National Grid denies, the Court should abstain from entertaining Allco's claim for damages. Allco is appealing the MDPU Final Order and seeking the same relief in a parallel state court action, Docket No. SJ-2014-0337, which was filed in August 2014. As the state court action was filed first, it should be allowed to proceed. Although PURPA is federal law, Massachusetts regulations and the MDPU, a state agency, are heavily involved and the state court forum is adequate to decide Allco's claims. Further, if both this Court and the state court hear and rule on the same claims, it runs the risk of rendering inconsistent verdicts. *See Liberty Mut. Ins. Co. v. Foremost-McKesson, Inc.*, 751 F.2d 475, 477 (1st Cir. 1985). Therefore, in the event that this Court finds Allco has stated a claim for damages, this Court should abstain from hearing this case in favor of allowing the state court claims to be adjudicated.

CONCLUSION

As a matter of law, Allco has failed to state any claim against National Grid that that entitles it to relief. National Grid, therefore, requests that this Court dismiss the claim against National Grid in its entirety.

Respectfully submitted,

MASSACHUSETTS ELECTRIC COMPANY
D/B/A NATIONAL GRID,

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Dated: February 18, 2016

CERTIFICATE OF SERVICE

I, Sarah Sakson Langstedt, hereby certify that on this 18th day of February 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/ Sarah Langstedt
Sarah Sakson Langstedt