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 OF LAW OF MASSACHUSETTS ELECTRIC COMPANY D/B/A NATIONAL GRID IN OPPOSITION TO PLAINTIFF'S MOTION FOR RECONSIDERATION AS TO COUNT III OF THE AMENDED COMPLAINT

Pursuant to Local Rule 7.1(b)(3), defendant Massachusetts Electric Company d/b/a National Grid ("National Grid") submits this Memorandum of Law in Opposition to Plaintiff's Motion for Reconsideration of this Court's September 23, 2016 Order (ECF Doc. 74) (hereinafter, the "Order") dismissing with prejudice Count III of the Amended Complaint, which is a claim that plaintiff Allco Renewable Energy Limited ("Allco") asserted against National Grid. (ECF Doc. 74). National Grid respectfully urges the Court to deny Allco's motion to reconsider the Order because Allco has set forth no legitimate basis for reconsideration.

I. INTRODUCTION

This is Allco's third attempt to defend its baseless claim that federal law provides it with a private right of action to enforce the Public Utility Regulatory Policies Act ("PURPA"), 16 U.S.C. 2601, *et seq.*, against National Grid. Allco's sole claim against National Grid is predicated on the unsupported legal contention that National Grid's refusal to purchase the energy and capacity from Allco's electric generating facilities at Allco's own contract term and rate, rather than the rate available under the applicable federal and Massachusetts regulations, violated National Grid's obligations under federal law. Allco first defended its claim against National Grid in opposition to National Grid's February 18, 2016 Fed. R. Civ. P. 12(b)(6) motion to dismiss (ECF Doc. 33 (Allco's opposition papers), 40 (Allco's sur-reply)). That motion was held in abeyance while the Court allowed Allco to move for summary judgment. (ECF Doc. 39). In support of its summary judgment motion, Allco then made the same arguments that it made in opposition to National Grid's motion to dismiss (ECF Doc. 50, 65). That motion was extensively briefed by all parties and with an amicus brief filed by the Federal Energy Regulatory Commission ("FERC"). (ECF Doc. 58). After carefully considering all of the briefs and holding oral argument on July 14, 2016, this Court issued the Order, which, in pertinent part, dismissed Allco's claim against National Grid with prejudice.

In support of this motion for reconsideration, Allco does not contend that there has been any newly discovered evidence or intervening changes in applicable law that would warrant reconsideration of this Court's Order. (*See generally* ECF Doc. 781). Instead, Allco simply reasserts arguments that have already been rejected by this Court and, for the first time, raises new arguments. Not only are these procedurally improper bases for reconsideration under First Circuit law, but Allco's substantive arguments also fail as a matter of law.

II. ARGUMENT

"While the Federal Rules do not provide for a motion to reconsider, a district court has the inherent power to reconsider its interlocutory orders . . . ." *Fernández–Vargas v. Pfizer*, 522 F.3d 55, 61 n.2 (1st Cir. 2008) (internal quotation marks omitted). However, motions for reconsideration are not to be used as "a vehicle for a party to undo its own procedural failures [or] allow a party to advance arguments that could and should have been presented to the district court prior to judgment." *U.S. v. Allen,* 573 F.3d 42, 53 (1st Cir. 2009) (quoting *Iverson v. City of Boston*, 452 F.3d 94, 104 (1st Cir. 2006)). The presentation of a previously unpled and undeveloped argument in a motion for reconsideration neither cures the original omission nor preserves the argument as a matter of right for appellate review. *Iverson* at 104 (citing *Tell v. Trs. of Dartmouth Coll.*, 145 F.3d 417, 420 (1st Cir. 1998)).

The First Circuit has emphatically rejected motions for reconsideration that seek to raise arguments for the first time on appeal. *See e.g., Boston Redevelopment Auth. v. Nat'l Park Serv.,* 2016 U.S. App. LEXIS 17420, *16 (1st Cir.) ("We have held, 'with echolalic regularity,' that arguments not timely raised in the district court cannot be raised for the first time on appeal."); *Teamsters, Chauffeurs, Warehousemen & Helpers Union v. Superline Transp. Co.*, 953 F.2d 17, 21 (1st Cir. 1992) ("If any principle is settled in this circuit, it is that, absent the most extraordinary circumstances, legal theories not raised squarely in the lower court cannot be broached for the first time on appeal.").

Motions for reconsideration are granted sparingly and are appropriate only in a limited number of circumstances: (a) if the moving party presents newly discovered evidence; (b) if there has been an intervening change in the law; or (c) if the movant can demonstrate that the original decision was based on a manifest error of law or was clearly unjust. *Allen*, 573 F.3d at

53 (citing *Marie v. Allied Home Mortgage Corp.*, 402 F.3d 1, 7 n.2 (1st Cir. 2005)); *see also Biltcliffe v. CitiMortgage, Inc.*, 772 F. 3d 925, 930 (1st Cir. 2014) ("Rule 59(e) relief is granted sparingly . . . ."). Allco has not, and cannot argue that there has been any newly discovered evidence or that there has been an intervening change in the law. Allco simply restates the same arguments it has made twice before and improperly asserts new arguments that were available to it in opposition to National Grid's motion to dismiss and in support of Allco's motion for summary judgment. The First Circuit has rejected such arguments time and again, and this Court should do the same.

A. The Court Correctly Held that PURPA Provides Allco No Federal Right of Action Against National Grid.

Allco seeks reconsideration of the Court's determination that PURPA does not provide a private right of action to enforce PURPA and therefore does not allow Allco to bring a federal claim against National Grid to enforce PURPA regulations. (Order at 11, 14). In support of its Motion for Reconsideration, Allco seems to argue that its right to bring such a federal claim against National Grid should be "presumed" from the "private-rights" creating language that Allco finds in PURPA and its contention that a failure to do so will leave renewable QFs (or at least those larger than 30 MW) in a "no man's land – a world where certain QFs have no remedy at all." (Allco's Memorandum (ECF Doc. 78-1) (hereinafter, "Memorandum"), at 6). For the reasons discussed below, the Court should deny Allco's request that the Court reconsider its decision to dismiss Count III against National Grid of Allco's Complaint.

First, Allco has never claimed or argued that it has the right to bring a federal claim against National Grid to enforce PURPA regulations. Rather, Count III of the Complaint is predicated on the contention that "Federal Law imposes upon National Grid an obligation to purchase any and all energy and capacity offered to it by Plaintiff's" and that it is due damages

for its failure to fulfill that obligation. (Complaint (ECF Doc. 26), at ¶ 76; Prayer (4)). Having never raised the argument that it has a right to bring a federal claim against National Grid to enforce PURPA regulations prior to its current Motion for Reconsideration, Allco has no standing to seek reconsideration of the Court's determination that Allco cannot seek enforcement of PURPA's purchase obligations through a private cause of action against the electric utility. *See, e.g. Fabirca de Muelbles J.J. Alvarez Incorporado v. Inversiones Mendoze, Inc.*, 682 F3d. 26, 31 (1st Cir. 1985).

Second, as the Court noted in its Order, the Supreme Court made clear in *Alexander v. Sandoval*, 532 U.S. 275, 286, 290 (2001) ("*Sandoval*") that the Court's "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 action" and that the "express provision of one method of enforcing a substantive rule suggests that Congress intended to preclude others." (Order at 11, 14). Applying *Sandoval* and precedent interpreting *Sandoval* as well as differentiating between "implementation claims" and "as-applied" claims, the Court found that Congress created specific and extensive remedies for the enforcement of PURPA in sections 210(g) and 210(h) of the statute which did not include a federal private right of action against utilities option to enforce the PURPA purchase obligation. (Order at 11-13). Like the Supreme Court in *Sandoval*, which "found no evidence anywhere in the text [of the statute] that Congress intended to create a private right of action to enforce regulations promulgated under [section in question],", 532 U.S. at 291, this Court found that PURPA "does not provide Allco with an additional federal damages or declaratory relief remedy against National Grid." (Order at 14). Allco points to no language in PURPA which suggests otherwise. Accordingly, as the Court correctly concluded, Allco's Count III against National Grid cannot stand.

B. A Private Right of Action Against National Grid Cannot be Presumed.

Unable to point to any text in PURPA that suggests that Congress intended to create a private right of action against utilities such as National Grid, Allco contends that the fact that PURPA arguably creates a private benefit creates a presumption of a private right of action, citing *Bonano v East. Caribbean Airline Corp.*, 365 F.3d 81, 85 (1st Cir. 2004) and *International Union v. Faye*, 828 F.3d 969 (D.C. Cir. 2016) (Tatel, concurring). Neither *Bonano* or *International Union* support this contention. *Bonano*, which found *no* private cause of action, ruled *only* that the phrasing of a right in terms of the class protected was a *condition precedent* to the existence of a private right of action, not a condition sufficient for such a right. *Bonano,* 365 F.3d at 86 ("[I]t is abundantly clear that Congress, in crafting the Act, intended public, not private, enforcement. Consequently, we join a long list of other courts that have concluded that neither the Act nor the regulations create implied private rights of action."). Similarly, contrary to Allco's assertion, *International Union* did not turn on the existence of a private right of action—which was not questioned—but whether the union could exercise that right on behalf of its members. 828 F.3d at 974-75. Thus, there is no basis for Allco's contention that a private right of action against National Grid must be presumed.

Allco also argues that *Sandoval* and *Armstrong v. Exceptional Child Center, Inc.*, 135 S.Ct. 1378 (2015), stand for the proposition that a law's provision of express remedies to enforce other parts of a statute is not sufficient to support the conclusion that Congress intended to limit remedies to those stated. (Memorandum at 2-3). Notably, both of these decisions found no private cause of action and neither of those decisions addressed under what circumstances the existence of certain remedies precluded the inference of others. Rather, each relied upon the proposition that the "express provision on one method of enforcing a substantive rule suggests

that Congress precluded others." *Sandoval* at 290; *Armstrong* at 1385. Contrary to Allco's contention, (Memorandum at 9-11), *Armstrong* did not create a "two-prong" test, under which a court must always review the justiciability of the statutory rights in question in order to rule out a private right of action. While the *Armstrong* Court did state that "[t]he provision for the Secretary's enforcement by withholding funds *might* not, *by itself*, preclude the availability of equitable relief," it did not suggest that the existence of a statutory remedy could never suffice to determine that others do not exist. *Armstrong* at 1385 (first emphasis added, second in original). Indeed, the *Sandoval* Court explicitly rejected such a proposition, noting that "[s]ometimes the suggestion is so strong that it precludes a finding of congressional intent to create a private right of action, even though other aspects of the statue (*such as language making the would-be plaintiff a 'member of the class for whose benefit the statute was enacted*') suggest the contrary." *Sandoval* at 290 (emphasis added). The *Armstrong* Court concluded, citing its decision in *Sandoval*, that "again, the explicitly conferred means of enforcing compliance with § 30(A) by the Secretary's withholding funds . . . suggests that other means of enforcement is precluded." *Armstrong* at 1387.

This Court has carefully analyzed PURPA's enforcement scheme. Unlike the laws examined in *Sandoval* and *Armstrong*, where the alternative remedies were under the control of the government, PURPA does create, as this Court has recognized, certain private causes of action, but actually strictly limits them. (Order at 12-14). As the Supreme Court determined in *Middlesex County Sewage Authority v. Clammers*, 453 U.S. 1, 13-14 (1981), where the act in question contains an "unusually elaborate enforcement provision . . . it cannot be assumed that Congress intended to authorize by implication additional judicial remedies for private citizens."

As this Court has found, such is the case with PURPA. The precedent cited by Allco leads to precisely the same conclusion.

C. PURPA Section 210(h) Does Not Create a Private Right of Action.

Allco claims that PURPA section 210(h)(1) provides a private cause of action because it provides that section 210 rules are enforceable as rules under the Federal Power Act ("FPA"). (Memorandum at 11-17). Allco contends that the enforcement to which PURPA section 210(h)(1) refers includes enforcement by any person, not just FERC. The fundamental problem with Allco's reasoning is that the language of PURPA section 210(h)(1) does not bestow enforcement authority on any entity. It merely equates PURPA rules and FPA rules for the purpose of enforcement. Thus, an entity that has authority to enforce FPA rules, such as FERC, *see* 16 U.S.C. §§ 825m-825p (2012), can enforce section 210 rules because FERC already has the authority to enforce rules under the FPA. Section 210(h) does not provide a federal judicial cause of action to any other entity unless that person has a federal judicial cause of action under the FPA. And, as *Allco* acknowledges, precedent establishes that the reference to enforcement under section 210(h) means enforcement by FERC. *Midland Power Corp. v. FERC*, 774 F.3d 1 (D.C. Cir. 2014).[1] Notably, as discussed below, there is no private federal judicial cause of action to enforce provisions of the FPA or rules promulgated thereunder. Thus, even if Allco's

[1] Allco suggests that *Midland* was wrongly decided because the *Midland* Court relied for its conclusion on the title of PURPA section 210. Allco contends that the title cannot limit the plain language of the section and argues that there is nothing ambiguous about section 210(h) that would require resort to interpretative tools. (Memorandum at 12-13). The *Midland* Court, however, made no such reference. Allco's suggestion is therefore mere speculation. Further undercutting its argument, Allco cites a proceeding in which the Supreme Court reached a legal conclusion different than that proffered by Allco. In *Immigration & Nationality Serv. v. Nat'l Ctr. for Immigrants' Rights, Inc.*, the Court analyzed the text of a statute and concluded that the modifier in the title should be read into the text. 502 U.S. 183 (1991).

proposed interpretations of section 210(h)(1) were considered, they would not give rise to a private cause of action.

D. There Is No Private Federal Judicial Right of Action under the FPA.

Allco contends that it has a private right of action to enforce the FPA judicially. In support of its contention, Allco first notes that sections 205 and 206, 16 U.S.C. §§ 824d, 824e (2012), contain no limitations on remedies and that when Congress wanted to exclude private rights of action, it specifically so stated, citing section 221 of the FPA, 16 U.S.C. § 824v (2012). (Memorandum at 17). Section 221, however, can provide no guidance on Congress's intention regarding judicial actions under the FPA. Section 221 was enacted in 2005 as part of the Energy Policy Act, Pub. L. 109-58, 119 Stat. 979 (2005). Part II of the FPA was enacted in 1935. Actions of a later Congress do not serve to determine the intent of an earlier Congress.

Allco cites no precedent establishing a private cause of action under the FPA, and National Grid is aware of none. There is, however, precedent establishing that there is no private cause of action under the Natural Gas Act, which is interpreted in parallel with the FPA. *Ark. La. Gas Co. v. Hall*, 453 U.S. 571, 577 n.8 (1981). In *Clark v. Gulf Oil Corp.* 570 F.2d 1138 (3d Cir. 1983), the Court applied the four part test enunciated by the Supreme Court in *Cort v. Ash,* 422 U.S. 66 (1975), which remains controlling:

> First, is the plaintiff one of the class for whose especial benefit the statute was enacted? Second, is there any indication of legislative intent, either to create a private cause of action or to deny one? Third, is the implication for a private remedy consistent with the underlying purpose of the legislative scheme? Fourth, is the cause of action traditionally relegated to state law, thereby rendering it inappropriate to infer a cause of action solely on federal law?

570 F.2d at 1145, *citing* 422 U.S. at 78.

The *Clark* court concluded that the plaintiff was among the class for whose benefit the statute was enacted. The court noted, however, that there was not an express provision of a private right of action and went on to explain:

> [T]he Commission is charged under the Act with the power of oversight and regulation: It carries the responsibility for determining whether rates to be charged are fair and reasonable and whether the proposed service to localities and persons and the proposed classes of service are impartial and non-discriminatory. The Commission has the power after conducting a hearing to grant certificates of public convenience and necessity, to fix just and reasonable rates and practices, and to order a decrease in rates when they are unjust, preferential, unduly discriminatory, otherwise unlawful, or are not the lowest reasonable rates… . .
>
> Finally, the enforcement provisions of the Act give the Commission broad administrative powers, the power to prescribe and issue orders and regulations, and to bring actions to enforce the public interest whenever there are violations of the Act. The Commission has extensive powers to investigate complaints or violations, including complaints of any state, municipality, or State commission, to conduct hearings, compel attendance of witnesses and production of records from any place in the United States or to order testimony by deposition. When it appears to the Commission that any person is engaged in or is about to engage in activity which may violate the Act or any rule, regulation, or order thereunder, the Commission may bring an action to enjoin the same in any United States District Court.

Id. at 1147-48 (citations omitted). The *Clark* court concluded that in light of Congress's evident intent to create a comprehensive and effective regulatory scheme, Congress did not contemplate a private cause of action. *Id.* at 1148. It further concluded that for the same reasons, a private cause of action would not be consistent with the underlying legislative scheme. *Id.* at 1149. Based on its analysis of the second and third *Cort* factors, the Court decided it need not dwell on the fourth. *Id.*

Although the *Clark* Court was concerned with a private right of action of retail customers, the analysis applies equally to other beneficiaries of the Natural Gas Act and, as noted above, interpretations of the Natural Gas Act are precedential for the FPA. Even if they were not, the Court's reasoning is fully applicable to the FPA.

Particularly significant is the *Clark* Court's reliance on *Montana-Dakota Utility Co. v. Northwest Public Service Co.*, 341 U.S. 246 (1951). 570 F.2d at 1149. In *Montana-Dakota*, a plaintiff electric company sued in federal district court to recover losses suffered as a result of alleged unlawful rates by the defendant utility. The Supreme Court refused to imply a private cause of action for violation of the FPA, holding that "the right to a reasonable rate is the right to the rate which the Commission fixes, and that 'except for review of the Commission's orders, the courts can assume no right to a different one on the ground that, in its opinion, it is the only or the more reasonable one.'" *Montana-Dakota* is fatal to Allco's argument.

Allco devotes significant verbiage to arguments regarding the preservation of federal jurisdiction and the "no man's land" of renewable QFs greater than 30 megawatts, (Memorandum at 18-20), but these arguments are not cause to disregard *Clark* and *Montana-Dakota.* A private right of action is not necessary for the preservation of federal jurisdiction. FERC is responsible for the exercise of that jurisdiction. And renewable QFs greater than 30 megawatts are not without remedy as is discussed below.

E. Allco is Not Left in a No Man's Land.

Notwithstanding the precedent cited by the Court, and the absence of any precedent to the contrary, Allco contends that the Court must find that PURPA allows Allco to bring a federal claim against a utility such as National Grid to enforce PURPA because the absence of such a remedy would leave QFs in "no man's land," without a means to remedy a failure to properly implement PURPA.

Allco claims that as a result of Section 210(h) of PURPA and Section 601 of FERC's implementing regulations, 18 C.F.R. § 292.601, which exempt certain QFs from the provisions of the FPA and make others subject to FERC jurisdiction over the sale of electric power at

wholesale, QFs larger than 30 MW are left in no man's land and deprived of the ability to enforce PURPA and PURPA regulations. (*See* Memorandum at 5-7, 10, 14, 19). As an initial matter, all of Allco's QFs are sized less than 20MWs. (Memorandum at 6 ("True, the generators here are not 30MW . . . ."); Allco's Statement of Undisputed Facts (ECF Doc. 50-1) at ¶ 2). Section 292.601 of FERC's regulations, exempts all QFs sized 20MW or smaller from all sections of the FPA. 16 C.F.R. § 292.601(c)(1). Thus, there is no question that all Allco QFs have the full enforcement provisions of PURPA Section 201(h) available to them. Allco is not left in no man's land. Further, QFs larger than 20 MWs located in Massachusetts continue to be exempt from Sections 205 and 206 of the FPA because sales of energy or capacity of those entities are made "pursuant to a state regulatory authority's implementation of section 210 the Public Utility Regulatory Policies Act of 1978." *Id.* Accordingly, QFs larger than 20 MWs located in Massachusetts are not left in no man's land and have all of PURPA's enforcement provisions available to them.

Finally, Allco's arguments as to other QFs are simply wrong. Those QFs larger than 20MW, located in some jurisdiction that has not implemented section 210(h) of PURPA, have federal remedies to enforce PURPA and FERC's regulations thereunder. Under PURPA section 210(h), FERC's PURPA regulations are enforceable in the same manner as FPA regulations. Under Rule 206 of FERC's Rule of Practice and Procedures, "any person" may file a complaint against "any other person" alleging a violation of regulations administered by the Commission. 18 C.F.R. § 385.206 (2016). *See, e.g.*, *PaTu Wind Farm LLC v. Portland Gen. Elec. Co.*, 150

FERC ¶ 61,032 (2015). FERC's decisions are subject to judicial review.[2] There is, accordingly, no "no man's land" for QFs subject to FERC jurisdiction.

Allco also claims that as a result of the provisions of Section 601 of FERC's regulations, 18 C.F.R. § 292.601, it does not have recourse to state remedies because PURPA section 201(h) excludes from section 210(g) "operations" subject to Part II of the FPA, which includes sales of energy and capacity at wholesale which are subject to FERC jurisdiction pursuant to sections 205 and 206 of the FPA. (Memorandum at 8-10). In fact, as discussed above, all of Allco's QFs, which are sized 20 MWs or less, are exempt from all sections of the FPA, including sections 205 and 206, and any sales to National Grid in Massachusetts by QFs larger than 20MW would be "made pursuant to a state regulatory authority's implementation of section 210 the Public Utility Regulatory Policies Act of 1978," 18 C.F.R. § 601(c)(1) (2016), and thus also exempt from sections 205 and 206 of the FPA. As also noted, QFs subject to FERC jurisdiction can seek enforcement of FERC regulations at FERC. Allco's arguments regarding being placed in no man's land because of the treatment of "operations" under Section 210(g) of PURPA are baseless.[3] As a result, the Court properly observed that Allco's remedy for the MDPU's

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[2] FERC's decisions under the FPA are appealable to the U.S. Circuit Courts of Appeal. 16 U.S.C. § 313*l* (2012). Other decisions are subject to judicial review under the Administrative Procedures Act. 5 U.S.C. § 702 (2012).

[3] Allco's remaining "no man's land" arguments, (*see* Memorandum at 8-9), are unrelated to a "no man's land" and are similarly unavailing. This Court's Order does not render PURPA section 214 a nullity. Section 214 provides that nothing in section 210 limits federal jurisdiction over wholesale transactions under the FPA *except as specifically provided.* The Order simply interprets the specific provisions. The Order nowhere implicitly concludes that Congress delegated to states and nonregulated utilities the decision whether must-buy obligations apply. FERC Staff papers are not authoritative, so even if a statement that the must-buy obligation is between the buyers and the regulated seller could be read to imply a private right of action—which it cannot—it does nothing to advance Allco's position. Finally, that FERC's rules governing operations of a QF or electric utility are enforceable as rules under the FPA does not create a private cause of action under those rules.

allegedly improper implementation of the FERC regulations is an implementation claim against the MDPU and then an as-applied claim against the utility to enforce the state regulations once implemented. (Order at 13-14).

III. CONCLUSION

There can be no dispute that: (1) there has been no newly discovered evidence; (2) no intervening changes in law; or (3) that all of the arguments Allco makes in support of this motion have been carefully considered and rejected by this Court or are being raised by Allco for the first time. Accordingly, there is no procedural basis to consider Allco's motion for reconsideration. Even if there were, each of Allco's arguments substantively fails as a matter of law. Based on the foregoing, this Court should uphold its Order and deny Allco's motion for reconsideration as to Count III of the Amended Complaint.

Dated: November 2, 2016

Respectfully submitted,

MASSACHUSETTS ELECTRIC COMPANY
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CERTIFICATE OF SERVICE

I, Anthony Marchetta, hereby certify that on this 2nd day of November 2016, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which will send notification of the filing to all counsel of record.

/s/ Anthony J. Marchetta
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