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 SUMMARY JUDGMENT AS TO COUNTS II AND 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 Summary Judgment with regard to Count III of the Amended Complaint, which is a claim for damages that plaintiff Allco Renewable Energy Limited ("Allco") asserts against National Grid. National Grid respectfully urges the Court to deny summary judgment on Count III of the Amended Complaint. Further, although Count II of the Amended Complaint is not directed against National Grid, National Grid believes that Allco's Motion for summary judgment on Count II is without merit and urges the Court to deny summary judgment on Count II as well.

I. ARGUMENT

Rule 56(c) of the Federal Rules of Civil Procedure provides that summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(a). In addressing a motion for summary judgment, the Court must "view the facts in the light most favorable to the non-moving party, drawing all reasonable inferences in that party's favor." *Willhauch v. Town of Mansfield,* 164 F. Supp. 127, 132 (D. Mass. 2001), *quoting Barbour v. Dynamics Research Corp.* 63 F. 3d 32, 36 (1st Cir. 1995). Allco's motion for summary judgment as to Counts II and III of its Amended Complaint rests on a fatally flawed reading of applicable law and regulations, and should be denied.

A. Allco's Motion for Summary Judgment as to Count III of its Amended Complaint Must be Denied

Count III of Allco's Amended Complaint alleges that "[f]ederal law imposes on National Grid an obligation to purchase any and all energy and capacity offered to it by Plaintiff's QFs" and that "National Grid's refusal to purchase the energy and capacity at the long-term forecasted rate required by federal law from Plaintiff's QFs violates its obligations imposed under federal law." (ECF Doc. 26 (*Amended Complaint*) at ¶¶ 76, 78). Allco's motion for summary judgment as to Count III rests on two erroneous contentions: (1) that under Section 210 of Public Utility Regulatory Policies Act of 1978 ("PURPA") and regulations of the Federal Energy Regulatory Commission ("FERC"), National Grid has a "direct obligation" to purchase energy and capacity from its generating facilities "regardless of how a State elects to implement PURPA," (ECF Doc. 50 (*Allco Memorandum in Support of Summary Judgment* ("*Allco Memorandum*")) at 21-22); and (2) that National Grid is obligated to purchase energy and capacity from Allco's QFs over a 25-year contract term and at a forecasted rate selected by Allco, not the term and avoided cost rate set by the State regulatory authority. (*Id. at* 28-30). Allco is wrong in both instances.

1. <u>Section 210 of PURPA and FERC's Regulations do Not Establish a "Direct Obligation" to Purchase Independent of State PURPA Regulations</u>

Allco contends that "[t]he plain language of federal law places the obligation to purchase from QFs directly on electric utilities [and that t]he direct obligation is not qualified by the requirement of any further state implementation by a State regulatory authority." (*Allco Memorandum* at 21). The *only* support Allco cites for this contention is limited language from FERC's PURPA rules, specifically that of 18 C.F.R. § 292.303(a)(1). Section 292.303(a)(1) provides that "[e]ach electric utility shall purchase, in accordance with § 292.304, unless exempted by § 202.309 and § 292.310, any energy and capacity which is made available from a qualifying facility." Allco argues that the language of this provision alone imposes a "direct obligation" on National Grid to purchase the electric power of Allco's QF independent of PURPA's regulation of the Massachusetts regulatory authority. Allco's argument simply ignores the statutory genesis of Section 210 of PURPA and the explicit regulatory construct that Congress created between FERC and State regulatory authorities to effectuate PURPA's objective of encouraging the development of cogeneration and small power production facilities.

The "direct obligation" that Allco contends 18 C.F.R. § 292.303(a) imposes on National Grid does not exist because the authorizing statute, PURPA, does not provide for or create such an obligation. *See INS v. Chadha,* 462 U.S. 919, 953, n.16 (1983) ("Administrative activity cannot reach beyond the limits of the statute that created it"); *Alexander v. Trustees of Boston University,* 766 F.2d 630 (1st Cir. 1985) (regulations may not exceed the authority conferred by their enabling statutes).

Section 210(a) of PURPA gives FERC the responsibility and authority to "prescribe, and from time to time thereafter revise, such rules as it determines necessary to encourage cogeneration and small power production . . . which rules require electric utilities to offer to . . . purchase electric energy from such facilities." 16 U.S.C. § 824a-3(a). FERC's responsibility and authority granted by this statutory provision is limited to *prescribing the rules* pursuant to which electric utilities are required to offer to purchase electric energy from QFs. Once those rules are prescribed by FERC, the statute is explicit that those rules are to be implemented by State regulatory authorities:

> (f) IMPLEMENTATION OF RULES FOR QUALIFYING COGENERATION AND QUALIFYING SMALL POWER PRODUCTION FACILITIES. – (1) Beginning on or before the date one year after any rule is prescribed by the Commission under subsection (a) or revised under such subsection, each State regulatory authority shall, after notice and opportunity for public hearing, implement such rule (or revised rule) for each electric utility for which it has ratemaking authority.

16 U.S.C. § 824a-3(f). There is no parallel provision in the statute providing for FERC's implementation of its PURPA rules. As the Court in *Greenwood v. New Hampshire Public Utilities Commission,* 527 F.3d 8 (1st Cir. 2008) explained,

> Section 210 of PURPA sought to "encourage the development of cogeneration and small power production facilities." [Citations omitted.] . . . The Act required the Federal Energy Regulatory Commission . . . to promulgate rules implementing the statute, in particular, rules requiring

> utilities to enter into purchase and sale agreements with qualifying cogeneration and small power production facilities ("QFs"). 16 U.S.C. § 824a-3(a); *see id.* § 796(17)-(18) (defining QFs). These rules, which regulate the rates of purchase and sale, are to be implemented by state utilities commissions. *Id.* § 824a-3(f)(1); *see FERC*, 456 U.S. at 751, 102 S.Ct. 2126.

527 F.3d at 10. FERC itself confirmed this interpretation when it first issued the rules required by Section 210 of PURPA, explaining in its summary of the rules that the "implementation of these rules is reserved to the State regulatory authorities and nonregulated electric utilities." *Small Power Production and Cogeneration Facilities; Regulations Implementing Section 210 of the Public Utility Regulatory Policies Act of 1978,* FERC Docket No. RM79-55 (March 20, 1980) (Order No. 69), 45 Fed. Reg. 12218 (1980) (Plaintiff App. 28).

The explicit regulatory structure and the allocation of authority between FERC and State regulatory authorities established by Section 210 of PURPA, is wholly inconsistent with Allco's contention that 18 C.F.R. § 292.303(a) creates a "direct obligation" for National Grid to purchase from Allco's QFs without regard to a State's authority to implement FERC's PURPA rules. The regulation cited by Allco creates no such "direct obligation." Rather, 18 C.F.R. § 292.303(a) is the "rule" that Section 210(a) of PURPA mandated that FERC prescribe to require electric utilities to offer to purchase electric power from QFs. As FERC and the courts have recognized, Section 210(f) of PURPA mandates that State regulatory authorities implement this "rule", not FERC.

The "examples" offered by Allco, (*see Allco Memorandum* at 21 -23), provide no support for its contention that federal law and regulation create a "direct obligation" to purchase from Allco's QFs regardless of State PURPA regulations. First, Allco suggests that a State regulatory authority has options as to how to comply with the statutory requirements of PURPA, including by acting "just as a forum for disputes." *Id.* at 21-22. In support of this contention, Allco cites the Supreme Court's discussion of 18 C.F.R. § 292.401(a) in its 1982 decision in *FERC v. Mississippi,* 456 U.S. 742, 759-760 (1982). However, the provisions of 18 C.F.R. § 292.401(a) that the Supreme Court analyzed in *FERC v. Mississippi* and on which Allco's argument rest were removed from FERC's regulations ten (10) years later, in 1992. *See Deletions of Certain Outdated or Nonessential Regulations*, FERC Docket No. RM92-6-000 (Issued May 1, 1992) ("Order No. 541"); 57 Fed. Reg. 21,732 (1992). Allco's musings about the implications of such a discretionary circumstance are based on regulatory language that was deleted from FERC's regulations 25-years ago. Contrary to Allco's contention, Section 210(f) of PURPA expressly provides that each State regulatory authority "*shall* . . . implement" FERC's PURPA rules. 16 U.S.C. § 824a-3(f) (emphasis supplied). There are no options. Allco's suggestion to the contrary has no basis in law and must be rejected.

Second, Allco asks the Court to "take the straightforward case of a State that has chosen not to do anything" and contends that "[u]nder National Grid's view of the world, a QF would be simply left without any remedy, effectively allowing States to block the application of the must-buy obligation in their jurisdiction." (*Allco Memorandum* at 22). Allco is wrong once again. PURPA expressly provides both FERC and any QF a remedy should any State regulatory authority choose not to implement FERC's PURPA rules. As to FERC, Section 210(h)(2)(A) of PURPA provides that:

> The Commission may enforce the requirements of subsection (f) [those requiring State regulatory authorities to implement FERC's PURPA rules] against any State regulatory authority . . . . For purposes of any such enforcement, the requirements of subsection (f)(1) shall be treated as a rule enforceable under the Federal Power Act. For purposes of any such

94968675.1

> action, a State regulatory authority . . . shall be treated as a person within the meaning of the Federal Power Act.

16 U.S.C. § 824a-3(h)(2)(B). Section 210(h)(2)(B) extends precisely the same enforcement authority to QFs (and electric utilities):

> Any electric utility [and QF] may petition the Commission to enforce the requirements of subsection (f) as provided in subparagraph (A) of this paragraph. If the Commission does not initiate an enforcement action under subparagraph (A) against a State regulatory authority . . . the petitioner may bring an action in the appropriate United States district court to require such State regulatory authority . . . to comply with such requirements . . ..[1]

16 U.S.C. § 824a-3(h)(2)(B). Allco's contentions in this regard are wholly unsupported by the applicable law.

Allco's contention that States have "no authority . . . to act with respect to most renewable energy QFs larger than 30 MWs" is also wrong and otherwise irrelevant. Section 210(e)(2) of PURPA expressly contradicts Allco's contention. Section 210(e)(2) provides that a qualifying small power production facility that is an eligible solar, wind, waste, or geothermal facility exceeding 30MWs "*may be exempted from* . . . State laws and regulations respecting the rates, or respecting the financial or organizational regulation of electric utilities." *See* 16 U.S.C. § 824a-3(e) (emphasis supplied). This section makes no provision for an exemption for facilities smaller than 30MW. *Id.* This same exemption provision is found in FERC's PURPA rules at 18 C.F.R. § 292.602 (2015). Contrary to Allco's contention, PURPA and FERC's PURPA rules provide *no* limitation to a State's authority over renewable energy QFs smaller than 30MWs, and for

[1] This is precisely the statutory provision which brings this matter before this Court.

those larger than 30MW, *only* limit the State's authority with regard to rates[2] and financial/organizational regulation. Except for these limited exemptions, QFs larger than 30MW are otherwise subject to State regulation. Again, Allco is simply wrong on the law.

Allco's contention that Section 210(g) of PURPA is irrelevant is also wrong. As discussed above, the enforcement provisions of Section 210 are integral to the statutory mandate that FERC's PURPA rules, "which regulate the rates of purchase and sale, are to be implemented by state utilities commissions." *Greenwood*, 527 F.3d at 10; *see also* FERC Order No. 69 ("[T]he implementation of these [PURPA] rules is reserved to the State regulatory authorities" (Plaintiff App. 28)). The enforcement provisions of Section 210(g) explicitly grant state courts authority to review state commission proceedings that implement FERC's PURPA rules, thereby buttressing the allocation of responsibly between FERC and State regulatory authorities established by Section 210 of PURPA – namely, FERC promulgates rules, State regulatory authorities implement those rules. By making it clear that the State's implementation of those federal rules can be challenged in state court, Section 210(g) strengthens and helps effectuate the statutory mandate that implementation of PURPA is a state responsibility.

Allco's contention that the plain language of Section 210 and FERC's PURPA rules create a "direct obligation" on National Grid to purchase electric power from Allco's QFs without regard to any PURPA regulations enacted by a State regulatory authority is based on a grossly flawed reading of Section 210 of PURPA and FERC's

[2] States only have jurisdiction over the rate at which a QF would sell to a retail customer, not a sale for resale to an electric utility which would be subject to FERC's avoided cost rules.

94968675.1

PURPA rules. PURPA and FERC's PURPA rules impose no such "direct obligation" on National Grid. The compulsory purchase obligation set forth in 18 C.F.R. § 292.303(a) establishes the rule that Section 210(a) of PURPA directed FERC to prescribe. As recognized by FERC and federal courts, implementation of that rule is effectuated through State regulation, not by FERC. The "direct obligation" Allco finds in 18 C.F.R. § 292.303(a) simply does not exist.

2. <u>National Grid is Not Obligated to Purchase at a Long-term Forecasted Rate Selected by Allco over the Term Committed to by Allco Rather than the Rate and Term Set by the MDPU.</u>

Allco contends that National Grid is obligated to purchase from Allco's QFs at a "long-term forecasted rate" over the term committed to by Allco, not the avoided cost rate set by the State regulatory authority – in this case the Massachusetts Department of Public Utilities ("MDPU"). Again, Allco is wrong.

Allco does not have the right under PURPA or FERC's implementing rules to select a "long-term forecasted rate" as the avoided cost rate applicable to Allco's QFs. As discussed above, the statutory mandate of PURPA is that State regulatory authorities implement FERC's PURPA rules and FERC has made clear that "[i]t is the state's responsibility in the first instance to determine an avoided cost rate consistent with the Commission's regulations." *See Council of the City of New Orleans* 145 FERC ¶ 61,057 at P 30 (2013). In determining the rates at which an electric utility must offer to purchase from a QF, Section 210(b) of PURPA requires that "the rates for such purchase . . . shall be just and reasonable to the electric consumers of the electric utility and in the public interest, . . . [and that n]o such rule prescribed under subsection (a) shall provide for a rate which exceeds the incremental cost to the electric utility of alternative electric energy." 16 U.S.C. § 824a-3(b). As required by PURPA, in prescribing rules imposing an obligation on electric utilities to offer to purchase electric energy from QFs, FERC has been explicit 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*." 18 C.F.R. §§ 292.304(a)(2), 292.101(b)(6) (emphasis added).

FERC has also 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). In this context, FERC has also cautioned that:

> As the electric utility industry becomes increasingly competitive, the need to ensure that the States are using procedures which ensure that QF rates do not exceed avoided costs becomes more critical. This is because QF rates that exceed avoided cost will, by definition, give QFs an unfair advantage over other market participants (non-QFs). This, in turn, will hinder the development of competitive markets and hurt ratepayers, a result clearly at odds with ensuring the just and reasonable rates required by PURPA section 210(b).

S. Cal. Edison Co., 70 FERC ¶ 61,215 at 61,675-76 (1995) (footnotes omitted).

The manner in which the MDPU has determined avoided costs applicable to National Grid's legally enforceable obligation under PURPA takes full account of all of the requirements of PURPA noted above, including the implications of a restructured industry, the establishment of a competitive energy market, and the requirement of a just and reasonable rate that protects the interests of ratepayers. Based on such considerations, the MDPU explained that it revised its PURPA regulations to "establish a distribution company's [such as National Grid's] avoided costs based on the competitive wholesale electricity market price." *Protest of the Massachusetts Department of Public Utilities* (Plaintiff App. 207). The MDPU PURPA regulations do not provide for the determination of avoided costs pursuant to some long-term forecast, nor is it required to do so according to FERC's commentary. Rather, the MDPU determination of avoided costs reflects the reality of the competitive energy market in New England as well as the requirements of the competitive procurement process in Massachusetts that National Grid also must comply with.[3] FERC has acknowledged that all of these factors are appropriate to consider. Given that National Grid's incremental cost of energy supply is set every three months and for each month in that period, an avoided cost rate equal to the payments received by National Grid for energy power for the hours in which the QF provides it to National Grid is a reasonable proxy of the incremental cost of energy avoided by National Grid as a result of any purchases from a QF.

[3] The MDPU explained that National Grid, as a local distribution company, is required to provide basis service to retail customers who do not receive their electric distribution service from a competitive supplier. For larger customers, National Grid solicits and procures basis service supply four time a year, with each solicitation procuring 100 percent of the basic service load obligation for a three-month period. For these larger customers, basis service rates change every three months and are based on the prices of the winning bids in the applicable solicitation. In the bids, the suppliers provide monthly prices for each month. *See Protest of the Massachusetts Department of Public Utilities* (Plaintiff App. 214).

The MDPU has explained that in light of the restructured electric industry in Massachusetts and the establishment of a competitive market for electric energy in New England:

> National Grid's avoided cost cannot be determined on the basis of its owned resources where the capital costs of those resources may be reasonably ascertainable over the expected life of the investment, but rather *is reasonably determined by the cost of power purchased in a competitive wholesale market every three months over the term of the contract*. . . . To require National Grid to determine a 25-year long-run avoided cost in a fully restructured wholesale market where it has divested all of its generation assets is to subject National Grid's consumers to 100 percent risk from the inevitable errors in a cost projection of that duration. A determination of long-run avoided costs on the basis of mere projections of wholesale market costs is untenable and there is no justification for imposing such risks on Massachusetts retail customers.

Protest of the Massachusetts Department of Public Utilities (Plaintiff App. 215). Allco's contention that National Grid is obligated to purchase from Allco's QFs at a "long-term forecasted rate" devised by Allco for a 25-year term rather than the avoided cost rate and term set by the MDPU is wholly without legal support. As confirmed by FERC and the Court, PURPA mandates that the MDPU implements FERC's PURPA avoided cost and compulsory purchase rules, not QFs. The MDPU has fulfilled that obligation by setting an avoided costs rate that reflects the realities of the Massachusetts energy market. This is entirely consistent with all of the elements of PURPA's mandate. PURPA does not permit Allco to replace the avoided cost determination of the State regulatory authority with a rate of its preference. Allco's contention that National Grid must purchase from Allco's QFs at a "long-term forecasted rate" is meritless.

FERC has explained what Allco can do if it believes that the MPDU's avoided cost determination is inconsistent with the requirements of PURPA or FERC's PURPA rules:

> After a state regulatory authority has determined an avoided cost rate, an electric Utility, qualifying cogeneration facility or qualifying small power production (*sic*) may file a petition with this Commission pursuant to section 210(h)(2)(B), alleging that the state regulatory authority's decision is inconsistent with PURPA or the Commission's regulations and asking the Commission to initiate an enforcement action pursuant to section 210(h)(2)(A) of PURPA. *See* 16 U.S.C. § 824a-3(h) (2006).

145 FERC at n. 66. Neither PURPA nor FERC's PURPA rules allow Allco to demand to be paid an avoided cost rate calculated pursuant to some long-term forecast rate of its own choosing. Allco can rightfully argue and seek a determination from this Court as to whether PURPA or FERC's PURPA regulations permit the MDPU to determine the avoided costs in the manner which it has, *i.e.* based on the incremental cost of energy that National Grid would incur but for the purchase from QFs. Even if this Court were to agree with Allco, the authority to determine any necessary corrected avoided cost rate remains with the MDPU, and does not transfer to Allco.

Allco also claims it has a right to a contract with a 25-year term. As with all other elements of PURPA, FERC has made clear that any "legally enforceable obligation," whether a contract or some other form of "obligation," is established through a state's implementation of PURPA. *See* 145 FERC at P 31; *New PURPA Section 210(m) Regulations Applicable to Small Power Production and Cogeneration Facilities*, Order No. 688, October 20, 2006, Docket No. RM06-10-000, 18 CFR 292, 71 FR 64342, at P 14, (Oct. 20, 2006). Neither PURPA nor FERC's PURPA rules require (1) any particular duration for any such legally enforceable obligation, (2) any termination provision, or (3) any other particular provision. PURPA and FERC's PURPA rules also do not permit Allco to demand a contract for a 25-year term from National Grid that is not provided for through the MDPU's implementation of PURPA.

The legally enforceable obligation that the MDPU approved as part of its regulations implementing PURPA is a standardized contract that a QF may use to sell its output of an electric utility at the avoided rate specified in the MDPU PURPA regulations. This standardize contract has no specific term but can only be terminated on 30-days written notice. This is precisely what National Grid offered to Allco. While Allco may prefer a different term, such as a fixed 25-year term, the MDPU has not implemented such an obligation. Rather, the legally enforceable obligation approved by the MDPU fully implements all FERC PURPA rules regarding a “legally enforceable obligation” and also reflects the realities of the competitive energy market in New England – a market where National Grid must solicit and procure energy every three months for a three month period and its suppliers provide a monthly price for each month. Given that Allco was offered the option to sell its electric energy to National Grid pursuant to a legally enforceable obligation properly implemented by the MDPU, Allco cannot claim damages for being denied a legally enforceable obligation in a form that it had no right to demand.

For the reasons discussed above, PURPA and FERC’s PURPA rules simply do not support Allco’s contention that National Grid is obligated to purchase energy from Allco’s QFs at a “long-term forecasted rate” over the term (25-years) demanded by Allco, rather than the avoided cost rate and terms of the legally enforceable obligation as established by the MDPU.

B. Allco’s Motion for Summary Judgment as to Count II of its Amended Complaint Must be Denied

Allco makes three arguments in support of its motion for summary judgment as to Count II of its Amended Complaint: (1) that the MDPU’s PURPA regulations fail to properly implement PURPA because they do not provide a QF "the option to select a long-term avoided cost rate;" (2) that the MDPU's PURPA regulations are pre-empted by federal law because its regulations do "not foster QF generation;" and (3) that by prohibiting a long-term avoided costs rate, the MDPU prohibits National Grid from recovering its payments to QFs through retail rates, which is in conflict with federal law. (*Allco Memorandum* at 13-14). As is demonstrated below, Allco again misreads applicable law and regulation because the MDPU's PURPA regulations (1) properly implement the avoided cost requirements of PURPA in the context of a "legally enforceable obligation," (2) properly foster QF generation in the manner required by PURPA, and (3) do not prohibit National Grid from recovering its cost of purchases from QFs. Allco's motion for summary judgment as to Count II must be denied.

1. <u>There is No Provision in PURPA or FERC's PURPA Rules that Requires a State Regulatory Authority to Allow a QF to Elect a Long-Term Forecast Rate</u>

Allco contends that "[b]ecause the rate under the MDPU Rule cannot be calculated at the time the obligation is incurred[,] . . . it conflicts with federal law and is pre-empted." (*Id.* at 15). Allco is wrong. First, contrary to Allco's contention, the MPDU Rule does effectively provide Allco with the option to have the applicable avoided cost rate calculated at the time the "legally enforceable obligation is incurred." Second, there is nothing in PURPA or FERC's PURPA rules that requires that such a calculation reflect a "long-term forecast rate" as Allco demands.

FERC's PURPA rules provide QFs with the option to sell to electric utilities on an "as available" basis or pursuant to a "legally enforceable obligation." 18 C.F.R. § 292.304(d). With regard to the "legally enforceable obligation" option, QFs also may elect to have the avoided costs of a "legally enforceable obligation" calculated at the time of delivery or when the obligation is incurred. *Id.* As is discussed above, *supra* at 11, the MDPU has approved as part of its PURPA regulations a standardized contract – clearly a "legally enforceable obligation" – that a QF may use to sell its output to providers like National Grid. This "legally enforceable obligation" provides for an avoided cost rate established at the time the obligation is incurred. Although this rate is not a "long-term forecasted rate" as Allco desires, it is an avoided cost rate that is consistent with all the factors FERC has established as relevant to the determination of avoided costs. The avoided cost rate also reflects the reality of the competitive energy market in New England and the requirements that the competitive procurement process in Massachusetts places on National Grid. *See supra* at 9-12.

Given these circumstances, in Massachusetts, there is virtually no difference between an avoided cost determined at the time of delivery and one determined at the time a "legally enforceable obligation" is incurred because the legally enforceable obligation has a minimum term of 30 days and the price of energy that National Grid must purchase from alternative sources is fixed only for each month of a three month period and then reset for each month. Thus, the MDPU PURPA rules do implement the requirements of 18 C.F.R. § 292.304(d)(2)(ii), but do so in a manner that takes into account the implications of the competitive energy market in Massachusetts. Based on the foregoing, the MDPU has properly implemented the provisions of FERC's PURPA rules, and Allco has failed to show otherwise.[4]

---

[4] Allco suggests that the QF regulations which the Commission addressed in *Hydrodynamics, Inc.* 146 FERC ¶ 61,193 (2014) are somehow analogous to the MDPU

2. The MDPU PURPA Rule Does Not Conflict with PURPA and is Not Pre-empted

Allco argues that PURPA mandates that the MDPU PURPA Rule must promote QF generation and that it fails to do so because it does not provide for a "long-term pricing mechanism." (*Allco Memorandum* at 18). As a result of this purported failure, Allco contends that the MDPU Rule is pre-empted because it regulates the market for wholesale electricity, which is a the field that is exclusively regulated by Congress. *Id.* Once again, Allco is wrong.

Allco is correct that PURPA sought to "encourage the development of cogeneration and small power production facilities" and to do so by having FERC promulgate rules to require electric utility to purchase the electric power of such facilities. 16 U.S.C. § 824a-3(a). However, in Section 210(b) of PURPA, Congress imposed several important qualifications on the rules it directed FERC to promulgate, namely: that "the rates for such purchases shall be just and reasonable to the electric customers of the electric utility and in the public interest" and that "[n]o such rule prescribed under subsection (a) shall provide for a rate which exceeds the incremental cost to the electric utility of alternative electric energy." *Id.* at § 824a-3(b).

PURPA regulations at issue in this case. (*Allco Memorandum* at 16-17). They are not. In that matter, the Montana state commission had issued an order limiting the volume of electric power the electric utility could purchase from a QF of a certain size and FERC found that such a limitation on the utility's compulsory purchase obligation was inconsistent with PURPA and the Commission's regulations. Here, the MDPU PURPA regulations set no such limit on National Grid's compulsory purchase obligation. The MDPU PURPA regulations implement both the "legally enforceable obligation" requirement of FERC's PURPA rules as well as giving the QF the option to have the applicable avoided cost determined at the time of delivery or at the time the legally enforceable obligation is incurred. Contrary to Allco's assertion, FERC has not invalidated State PURPA rules similar to those of the MDPU.

While the "long-term pricing mechanism" Allco desires may well encourage the development of QFs, the MDPU has explained that such a pricing mechanism is inconsistent with the requirements of Section 210(b) of PURPA as it would not be just and reasonable to Massachusetts retail customers and would not be in the public interest. *Protest of Massachusetts Department of Public Utilities* (Plaintiff App. 215); *see* discussion *supra* at 11. The MDPU Rule encourages the development of QFs by implementing the compulsory purchase obligation and determining avoided costs consistent with PURPA and FERC's PURPA Rules. In contrast to Allco's proposed pricing mechanism, the MDPU accomplished this in a manner that considers all of Section 210, including the qualifications imposed by subsection (b). Allco's contention fails to consider the qualifications imposed by Section 210(b) of PURPA and, as a result, its argument fails.

Allco's argument that the MDPU PURPA Rules are pre-empted by federal law is also without merit.[5] As National Grid has previously shown,[6] none of the three circumstances under which federal law will pre-empt state law is applicable here: (1) PURPA does not contain an express statement that it is intended to pre-empt state law; (2) PURPA is not so comprehensive that it occupies the entire field of law and bars state regulations – to the contrary PURPA expressly provides for and requires States to implement the rule promulgated by FERC; and (3) it is not impossible to comply with

[5] Allco suggests that the MDPU Rule prohibits National Grid from passing through to ratepayers the costs associated with its purchase of electric power from QFs. (*Allco Memorandum* at 19). The MDPU regulations do not prohibit National Grid from collecting those costs and, accordingly, National Grid has not addressed this baseless contention in this memorandum.

[6] *See* ECF. Doc. #36 (*Reply Brief in Further Support of Massachusetts Electric Company D/B/A National Grid Motion to Dismiss the First Amended Complaint*).

both state law and federal law simultaneously as PURPA clearly delineates federal and state responsibilities – FERC prescribes PURPA rules and State regulatory authorities implement those rules. *See Philip Morris Inc. v. Harshbarger,* 122 F.3d 58, 67-68 & n.18 (1st Cir. 1997). The system that Congress has created for PURPA has been described by the Supreme Court as "cooperative federalism," a system that "leaves to the States the primary responsibility for developing and executing . . . programs [but] imposes significant requirements to be followed in the discharge of that responsibility." *Schaffer v. Weast,* 546 U.S. 49, 52 (2005); *see also New York v. United States,* 505 U.S. 144, 167 (1992) (Cooperative federalism best describes those instances in which a federal statute provides for state regulation or implementation to achieve federally prescribed policy goals). In the case of PURPA, Congress provided the means to address any mistake in a State's implementation of the federally prescribed policy goals – an enforcement action against the State regulatory authority. *See* 16 U.S.C. § 824a-3(h). Pre-emption simply is not a result of any State regulatory authorities' failure to correctly implement PURPA or FERC's PURPA rules. Allco's contention that the MDPU's PURPA regulations are pre-empted has no basis in law and must be rejected.

III. CONCLUSION

Based on the foregoing, the Court should deny Plaintiffs' Motion for Summary Judgment as to Counts II and III of the Amended Complaint.

Respectfully submitted,

MASSACHUSETTS ELECTRIC COMPANY
D/B/A NATIONAL GRID,

By its attorneys,

/s/ Anthony Marchetta
Anthony J. Marchetta (Admitted *pro hac vice*)
amarchetta@daypitney.com
DAY PITNEY LLP
One Jefferson Road
Parsippany, NJ 07054
T: (973) 966-6300
F: (973) 206-6659
-and-
Jonathan I. Handler (BBO #561475)
jihandler@daypitney.com
DAY PITNEY LLP
One International Place
Boston, MA 02110
T: (617) 345-4600
F: (617) 345-4745

Dated: June 24, 2016

CERTIFICATE OF SERVICE

I, Anthony Marchetta, hereby certify that on this 24th day of June 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. Marchettta
Anthony J. Marchetta