

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

**LEAVE TO FILE GRANTED ON
MARCH 25, 2016**

**REPLY BRIEF IN FURTHER SUPPORT OF MASSACHUSETTS
ELECTRIC COMPANY D/B/A NATIONAL GRID’S MOTION TO DISMISS THE
FIRST AMENDED COMPLAINT**

Defendant Massachusetts Electric Company d/b/a National Grid (“National Grid”) submits this Reply Brief in further 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].

In its Memorandum in Opposition to National Grid’s Motion to Dismiss [Dkt. 33], Allco raises several new contentions in support of its damage claim against National Grid: (1) that National Grid has a “direct obligation” under the Public Utility Regulatory Policies Act of 1978 (“PURPA”) to purchase electric power from Allco’s “Qualifying Facilities” (“QFs”) notwithstanding any implementing federal or state regulation; (2) that under PURPA and the

Federal Energy Regulatory Commission's ("FERC") implementing regulations National Grid must offer Allco's QFs a 25-year contract with a "long run avoided cost" rate; and (3) that National Grid's compliance with the Massachusetts Department of Public Utilities ("MDPU") QF regulations is irrelevant because those regulations are preempted by federal law, namely PURPA. As discussed below, these contentions are without merit.

First, the federal law at issue here, PURPA, creates no "direct obligation" for any utility to purchase the electric power of a QF. Rather, PURPA directs FERC to prescribe rules to require electric utilities to offer to purchase electric energy from QFs. 16 U.S.C. § 824a-3(a). Then, after FERC has prescribed such rules, PURPA requires that each state regulatory authority implement those rules for each electric utility for which it has ratemaking authority. *Id.* at § 824a-3(f). Thus, PURPA establishes a process for implementing regulations at the state level to effectuate an electric utility's obligation to offer to purchase the electric power of a QF. But, contrary to Allco's contention, there is no direct, separate obligation under the federal law to do so. The obligation of an electric utility to comply with the state regulatory authority's implementation of FERC's rule regarding purchases from QFs and the absence of any separate "direct obligation" under PURPA is made clear by the "Judicial Review and Enforcement" provisions of PURPA (*see id.* at § 824a-3(g)) which provide that "[a]ny person . . . may bring an action against any electric utility . . . to enforce any requirement established by a *State regulatory authority.*" *Id.* at § 824a-3(g)(2) (emphasis added). Significantly, PURPA has no such provision for enforcement of any such requirement of PURPA directly or to enforce directly FERC's implementing regulations. Indeed, FERC itself has no authority under PURPA to enforce its PURPA regulations directly against an electric utility. Rather, its enforcement authority is limited to bringing an action against the state regulatory authority to enforce PURPA's

requirement (*id.* at § 824a-3(f)) that the *state regulatory authority* implement the PURPA rules prescribed by FERC. *See id.* at § 824a-3(h) (2). Allco's contention that PURPA creates a "direct obligation" for National Grid to purchase the electric power of Allco's QFs notwithstanding the implementing regulations of the MDPU is without merit and provides no basis for Allco's damage claim against National Grid.

Second, Allco contends that National Grid is obligated to offer Allco's QFs the option of a "long term avoided cost" rate calculated at the time that a legally enforceable obligation (which Allco claims must be a 25-year contract) is incurred and that Allco has been economically harmed as a result of National Grid's failure to do so. The simple fact is that neither PURPA nor FERC's implementing regulations require any such thing. The term "long term avoided cost" is found nowhere in PURPA or in FERC's or the MDPU's regulations. PURPA itself requires *only* that FERC prescribe rules to "require electric utilities to offer to . . . purchase electric energy from such facilities [QFs]." 16 U.S.C. § 824a-3(a). The federal law has no specific requirements regarding the terms under which those purchase are to be made – certainly no requirement that such purchases be made at something called "long term avoided costs" or pursuant to a 25-year contract, or any contract for that matter.

Similarly, the rules FERC prescribed pursuant to PURPA make no reference to "long term avoided cost" rates or to any requirement to offer a 25-year contract. Rather, FERC's regulations only provide that QFs must have the option to have the avoided cost rate applicable to their sales to the utility calculated at the time a "legally enforceable obligation" is incurred. 18 C.F.R. § 292.304(d)(2)(ii). While FERC's regulations specify factors to be considered in determining a utility's avoided costs "to the extent practicable" (*see* 18 C.F.R. § 292.304(e)), FERC has noted that 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 consideration of many factors” *Cal. Pub. Utils. Comm’n*, 133 FERC ¶ 61,059, at ¶ 61,266 (2010). Further, FERC’s regulations do not define what constitutes a “legally enforceable obligation” nor do its regulations require any particular duration for a “legally enforceable obligation” or specify requirements regarding its termination provisions. Contrary to Allco’s assertion, neither PURPA nor FERC’s implementing regulations provide any support for Allco’s claim that it is entitled to a right to a 25-year contract with a “long term avoided cost” rate.

Rather, as required by FERC’s PURPA rules, the MDPU implementing regulations and National Grid’s P-Rate Tariff incorporating those regulations *do* provide a QF the option to sell its output to National Grid pursuant to a legally enforceable obligation. This legally enforceable obligation has no set expiration date but can be terminated on thirty (30) days written notice and thus has a minimum specified term of 30-days. Both the term of the legally enforceable obligation and its termination provisions are factors that FERC’s regulations provide “*shall*, to the extent practicable, be taken into account” in determining avoided costs. 18 C.F.R. § 292.304(e), (e)(2)(iii) (emphasis added). Thus, given the competitive energy procurement regime established by the MDPU for National Grid to meet its “provider of last resort” obligations – energy procurement costs being set for a six-month period and established for each month of that period – and the fact that the legally enforceable obligation established by the MDPU has a minimum specified term of 30 days, an avoided cost rate set at the ISO’s hourly clearing price is a reasonable and fair proxy for National Grid’s incremental cost of energy supply for any 30-day period.¹

¹ These MDPU QF regulations are fully consistent with the warning that FERC sounded nearly 20 years ago regarding the calculation of QF rates:

Thus, the MDPU regulations do implement FERC's PURPA rule that a QF be offered the option of a legally enforceable obligation and an avoided cost rate calculated at the time the legally enforceable obligation is incurred. National Grid has complied fully with those regulations in its dealing with Allco. Allco's claim that PURPA and FERC's PURPA rules require National Grid to offer the Allco QFs a 25-year contract reflecting something it calls a "long term avoided cost" rate is wholly without merit as is its claim for damages against National Grid based on this groundless contention.

Further, there is no merit to Allco's claim that the MDPU's QF regulations are preempted by PURPA. Federal law preempts state law in three circumstances: (1) when the federal law contains an express statement that it is intended to preempt state law; (2) when the federal law is so comprehensive that it occupies the entire field of law and bars state regulations ("field preemption"); and (3) when it is impossible to comply with state law and federal law simultaneously, or where the state law conflicts with federal objectives manifested in the federal law ("conflict preemption"). See *Philip Morris Inc. v. Harshbarger*, 122 F.3d 58, 67-68 & n.18 (1st Cir. 1997). None of these circumstances apply here. First, PURPA contains no express statement that it is intended to preempt state law. Second, PURPA expressly provides for and requires that state regulatory authorities, such as the MDPU, implement regulations implementing the rules prescribed by FERC. Thus, PURPA clearly does not intend to bar such MDPU regulations. Third, it is not impossible to comply with both state and federal law in this

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 cost 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).

instance. PURPA only requires that FERC prescribe rules to require utilities to purchase the electric energy of QFs and that state regulatory authorities implement those rules. Among the rules prescribed by FERC is that QFs have the option to sell their output pursuant to a legally enforceable obligation and to have the rate calculated at the time the legally enforceable obligation is incurred. As discussed above, the MDPU QF regulations implement this obligation and thus there is no impossibility to comply with federal law and no conflict between the federal law and the MDPU QF regulations. Allco's claims of preemption are without merit and provide no basis for its claim of damages under PURPA against National Grid.

Finally, 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. The claim against National Grid is for damages for National Grid's alleged failure to contract with Allco at Allco's desired rate. National Grid's obligations are governed by the MDPU regulations, which are state regulations, and Allco sought review of National Grid's actions by the MDPU, a state agency. Allco has now appealed the MDPU's determination in state court in a first-filed action. Allco's claims regarding PURPA pre-emption of the MDPU regulations and its other constitutional arguments are not against National Grid. This Court should abstain from hearing the claim against National Grid 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 entitles Allco 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,

By its attorneys,

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CERTIFICATE OF SERVICE

I, Sarah Sakson Langstedt, hereby certify that on this 25th day of March 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