UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

ALLCO RENEWABLE ENERGY LIMITED, Plaintiff, v. MASSACHUSETTS ELECTRIC CO. D/B/A NATIONAL GRID; ANGELA M. O'CONNOR; JOLETTE A. WESTBROOK; and ROBERT HAYDEN, in their individual capacities and in their official capacities as Commissioners of the Massachusetts Department of Public Utilities; and JUDITH JUDSON, in her individual capacity and her official capacity as Commissioner of the Massachusetts Department of Energy Resources, Defendants.	No. 1:15-cv-13515-PBS

BRIEF OF AMICUS CURIAE
FEDERAL ENERGY REGULATORY COMMISSION

Max Minzner
General Counsel

Robert H. Solomon
Solicitor

Elizabeth E. Rylander
S. L. Higginbottom
Joshua A. Kirstein
Attorneys

For *Amicus Curiae*
Federal Energy Regulatory Commission
Washington, D.C. 20426

June 24, 2016

TABLE OF CONTENTS

PAGE

STATEMENT OF FACTS 4

I. Statutory and Regulatory Background 4

A. Public Utility Regulatory Policies Act of 1978 4

1. FERC's PURPA Regulations 8

2. Massachusetts's Implementation of PURPA 9

B. FERC's Consideration of PURPA Implementation in Light of Energy Market Developments 11

C. History of Dispute 12

1. Negotiations Between Allco and National Grid 12

2. Allco's Complaints Against National Grid, Petition for Enforcement Against the Department, and Petition for Review of the Department's Orders 13

3. The Instant Litigation 15

DISCUSSION…… 17

I. Federal Preemption of the Department Regulations 18

II. Length of PURPA Contract Term 23

III. Purchase Obligation Under Federal Law and Private Rights of Action Under PURPA 25

TABLE OF AUTHORITIES

COURT CASES: **PAGE**

Allco Finance Ltd. v. Klee,
805 F.3d 89 (2d Cir. 2015) 18

Am. Elec. Power Serv. Corp. v. FERC,
675 F.2d 1226 (D.C. Cir. 1982)...6

Am. Paper Inst., Inc. v. Am. Elec. Power Serv. Corp.,
461 U.S. 402 (1983).. 4, 6, 9, 25

Exelon Wind 1, LLC v. Nelson,
766 F.3d 380 (5th Cir. 2014) 5, 7, 19

FERC v. Mississippi,
456 U.S. 742 (1982).. 4, 5, 6, 25

Hughes v. Talen Energy Mktg., LLC,
136 S. Ct. 1288 (2016)... 18

Ill. Commerce Comm'n v. FERC,
721 F.3d 764 (7th Cir. 2013) 11

Indep. Energy Producers Ass'n v. Cal. Pub. Utils. Comm'n,
36 F.3d 848 (9th Cir. 1994) 5-6, 9, 20, 21

Indus. Cogenerators v. FERC,
47 F.3d 1231 (D.C. Cir. 1995)... 7, 8, 26

La. Pub. Serv. Comm'n v. FCC,
476 U.S. 355 (1986).. 18

Mass. Inst. of Tech. v. Mass. Dep't of Pub. Utils.,
941 F. Supp. 223 (D. Mass. 1996)...7

Midwest ISO Transmission Owners v. FERC,
373 F.3d 1361 (D.C. Cir. 2004)... 11

TABLE OF AUTHORITIES

COURT CASES: **PAGE**

Morgan Stanley Capital Grp. v. Pub. Util. Dist. No. 1,
554 U.S. 527 (2008).. 11

Portland Gen. Elec. Co., et al. v. FERC,
D.C. Cir. Nos. 15-1237, *et al*.. 27

Power Res. Grp., Inc. v. Pub. Util. Comm'n of Tex.,
422 F.3d 231 (5th Cir. 2005) 7

S. Cal. Edison Co. v. FERC,
443 F.3d 94 (D.C. Cir. 2006).. 4, 5, 20

Whitehall Wind, LLC v. Mont. Pub. Serv. Comm'n,
379 Mont. 119 (2015) 19

ADMINISTRATIVE CASES:

Allco Renewable Energy Ltd.,
148 FERC ¶ 61,233 (2014)... 15, 17

Allco Renewable Energy Ltd. v. Mass. Elec. Co.,
146 FERC ¶ 61,107 (2014)... 14, 17

Am. REF-FUEL Co. of Hempstead,
47 FERC ¶ 61,161 (1989)...6

Cal. Pub. Utils. Comm'n,
133 FERC ¶ 61,059 (2010)... 20

Cedar Creek Wind, LLC,
137 FERC ¶ 61,006 (2011)... 20

Entergy Servs., Inc.,
137 FERC ¶ 61,199 (2011), *order on reh'g*,
143 FERC ¶ 61,143 (2013), *order on reh'g*,
148 FERC ¶ 61,209 (2014)... 21

TABLE OF AUTHORITIES

ADMINISTRATIVE CASES: **PAGE**

Hydrodynamics Inc.,
146 FERC ¶ 61,193 (2014) 19

Idaho Wind Partners 1, LLC,
143 FERC ¶ 61,248 (2013) 6, 22

JD Wind 1, LLC,
130 FERC ¶ 61,127 (2010) 19, 24

Kawaihae Cogeneration Partners,
84 FERC ¶ 61,325 (1998) 26

Mass. Inst. of Tech.,
74 FERC ¶ 61,221 (1996) 26

N. Hartland, LLC v. Cent. Vt. Pub. Serv. Corp.,
105 FERC ¶ 61,037 (2003) 26

PáTu Wind Farm, LLC v. Portland Gen. Elec. Co.,
150 FERC ¶ 61,032 (2015), *reh'g denied*,
151 FERC ¶ 61,223 (2015) 27

Policy Statement Regarding the Commission's Enforcement Role Under Section 210 of the Public Utility Regulatory Policies Act of 1978,
23 FERC ¶ 61,304 (1983) 7, 8, 26

Petition of Allco Renewable Energy Ltd. pursuant to 220 C.M.R. § 8.08(2) for an investigation by the Dep't of Pub. Utils. into Allco's offer to sell to Mass. Elec. Co. d/b/a National Grid,
Docket No. 11-59, Order (Mass. D.P.U. July 22, 2014) 14

Petition of Mass. Elec. Co. and Nantucket Elec. Co., each d/b/a National Grid, for Approval of Long-Term Contracts for Renewable Energy with Cape Wind Assocs., LLC,
Docket No. 10-54, Order (Mass. D.P.U. Nov. 22, 2010) 13

TABLE OF AUTHORITIES

ADMINISTRATIVE CASES: **PAGE**

Small Power Production and Cogeneration Facilities; Regulations Implementing Section 210 of the Pub. Util. Regulatory Policies Act of 1978,
Order No. 69, FERC Stats. & Regs. ¶ 30,128, *order on reh'g*,
Order No. 69-A, FERC Stats. & Regs. ¶ 30,160 (1980)
.... 6, 8, 20, 22, 23, 24

W. Penn Power Co.,
71 FERC ¶ 61,153 (1995).......... 22, 23

STATUTES:

Federal Power Act

Section 3(17)(A)(i)-(ii), 16 U.S.C. § 796(17)(A)(i)-(ii)..........4

Public Utility Regulatory Policies Act of 1978

Section 210, 16 U.S.C. § 824a-3 .... 2, 3, 4, 7, 18

Section 210(a), 16 U.S.C. § 824a-3(a) 4, 8, 25

Section 210(b), 16 U.S.C. § 824a-3(b).......... 5, 8, 9

Section 210(d), 16 U.S.C. § 824a-3(d).......... 5, 8

Section 210(f), 16 U.S.C. § 824a-3(f) 5, 7

Section 210(h), 16 U.S.C. § 824a-3(h).......... 7, 8, 15, 26

Section 210(g)(2), 16 U.S.C. § 824a-3(g)(2).......... 26

TABLE OF AUTHORITIES

REGULATIONS: **PAGE**

18 C.F.R. § 292.101(b)(6) 9

18 C.F.R. § 292.301(b) 20

18 C.F.R. § 292.303(a) 8, 25

18 C.F.R. § 292.303(b) 8

18 C.F.R. § 292.304(a) 9

18 C.F.R. § 292.304(a)(1)....................9

18 C.F.R. § 292.304(a)(2)....................9

18 C.F.R. § 292.304(b)(2) 9, 24

18 C.F.R. § 292.304(b)(5) 22

18 C.F.R. § 292.304(d) 3, 18, 21, 24

18 C.F.R. § 292.304(d)(2) 21, 24

18 C.F.R. § 292.304(d)(2)(ii) 15

18 C.F.R. § 292.304(e) 9, 20

18 C.F.R. § 292.304(e)(2)(iii).................... 21

TABLE OF AUTHORITIES

REGULATIONS: **PAGE**

220 Mass. Code Regs. § 8.01(1) 9-10

220 Mass. Code Regs. § 8.02 10

220 Mass. Code Regs. § 8.03 .... 3, 18

220 Mass. Code Regs. § 8.03(1)(b) 10

220 Mass. Code Regs. § 8.05 .... 3, 18

220 Mass. Code Regs. § 8.05(2)(A) 10

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

ALLCO RENEWABLE ENERGY LIMITED, Plaintiff, v. MASSACHUSETTS ELECTRIC CO. D/B/A NATIONAL GRID; ANGELA M. O'CONNOR; JOLETTE A. WESTBROOK; and ROBERT HAYDEN, in their individual capacities and in their official capacities as Commissioners of the Massachusetts Department of Public Utilities; and JUDITH JUDSON, in her individual capacity and her official capacity as Commissioner of the Massachusetts Department of Energy Resources, Defendants.	No. 1:15-cv-13515-PBS

BRIEF OF AMICUS CURIAE
FEDERAL ENERGY REGULATORY COMMISSION

This Court invited the Federal Energy Regulatory Commission (Commission or FERC) to submit an *amicus curiae* brief in the above-captioned case, with regard to a Massachusetts Department of Public Utilities (Department) regulation that concerns the terms and conditions under which Massachusetts utilities buy electric energy from certain generation facilities. The Court asked whether the Department regulation conflicts with FERC regulations implementing section 210

of the Public Utility Regulatory Policies Act of 1978 (PURPA), 16 U.S.C. § 824a-3, in the context of a state with retail competition.

Plaintiff Allco Renewable Energy Limited (Allco) owns and develops qualifying facilities (as that term is defined by statute) located in Massachusetts, Georgia, New York, and other states. Allco sells the output of its qualifying facilities – power and renewable energy credits – to Defendant National Grid, which is the parent of Massachusetts Electric Company, a distribution utility. The sales from Allco to National Grid are made in accordance with a Department-administered tariff for sales under PURPA. *See* Massachusetts Electric Company, Nantucket Electric Company, Qualifying Facility Power Purchase Rate P, M.D.T.E. No. 1032-C (effective May 1, 2001). National Grid also buys power in wholesale energy markets operated by ISO New England Inc., a FERC-regulated regional transmission organization that operates the wholesale power grid for New England states including Massachusetts.

As the Commission understands the pleadings currently before the Court, Allco and National Grid disagree on several terms and conditions of their power and renewable energy credit sales arrangement. In addition to its question whether the Department's regulations conflict with FERC's regulations implementing PURPA, the Court has observed that Allco's Motion for Summary Judgment, ECF

No. 50, and National Grid's Motion to Dismiss, ECF No. 27, present the following issues:

1. Does section 210 of PURPA, 16 U.S.C. § 824a-3, and/or FERC's implementing regulations, 18 C.F.R. § 292.304(d), preempt the Department's regulations, 220 Mass. Code Regs. §§ 8.03-8.05, which only allow for a contract with a minimum specified term of 30 days at the ISO-New England spot market price?

2. Does Allco have the right under federal law to select a long-term, forecasted avoided-cost rate as opposed to an as-available, short-run avoided cost rate, based on the ISO-New England spot market price?

3. If so, is the term of the legally enforceable obligation equal to the term for which Allco's qualifying facilities commit to supply their electricity to National Grid or can the State specify a shorter term?

4. Does National Grid have a direct obligation to purchase from Allco's qualifying facilities under federal law, independent of Massachusetts's implementation of PURPA?

5. If so, does PURPA grant qualifying facilities, including Allco, a private cause of action directly against National Grid, such that Allco can bring suit against National Grid for violating PURPA and FERC's implementing regulations?

STATEMENT OF FACTS

I. Statutory and Regulatory Background

A. Public Utility Regulatory Policies Act of 1978

PURPA was part of a package of legislation called the National Energy Act. *FERC v. Mississippi*, 456 U.S. 742, 745 (1982). PURPA was designed to combat a nationwide energy crisis by encouraging conservation of oil and natural gas, and promoting the development of alternative energy resources. Title II of PURPA – specifically section 210, 16 U.S.C. § 824a-3 – encourages the development of small power production facilities with renewable fuel sources, such as solar energy. *Id.* at 750 n.11. *See also Am. Paper Inst., Inc. v. Am. Elec. Power Serv. Corp.*, 461 U.S. 402, 405 n.1 (1983) (same).

In order to "counter traditional utilities' reluctance to deal with these nontraditional facilities, the PURPA charges the Commission with implementing mandatory purchase and sell obligations, requiring electric utilities to purchase electric power from, and sell power to, qualifying cogeneration and small power production facilities (collectively, 'qualifying facilities')." *S. Cal. Edison Co. v. FERC*, 443 F.3d 94, 95 (D.C. Cir. 2006) (citing PURPA section 210(a)(1)-(2), 16 U.S.C. § 824a-3(a)(1)-(2)). *See also* 16 U.S.C. § 796(17)(A)(i)-(ii) (facility that generates no more than 80 megawatts of power from renewable resources is a qualifying facility). Such required purchases from qualifying facilities must be at

rates that are: (1) just and reasonable to electric consumers and in the public interest; (2) not discriminatory against qualifying facilities; and (3) not in excess of the incremental cost to the purchasing electric utility of alternative electric energy. *Id.* § 824a-3(b). The incremental cost of alternative energy – better known as "avoided cost" – is "the cost to the electric utility of the electric energy which, but for the purchase from [the qualifying facility], such utility would generate or purchase from another source." *Id.* § 824a-3(d). *See also S. Cal. Edison*, 443 F.3d at 96 (citing PURPA section 210(d), 16 U.S.C. § 824a-3(d), and cases) (same).

State regulatory authorities are required to implement PURPA in a way that gives effect to FERC's own regulations implementing PURPA. *See* PURPA section 210(f)(1), 16 U.S.C. § 824a-3(f)(1); *Mississippi*, 456 U.S. at 751.[1] "This unusual mandate differs from many other statutory regimes, where the states are given the option to either implement the federal law themselves or else have the federal government directly enforce the law." *Exelon Wind 1, LLC v. Nelson*, 766 F.3d 380, 384 (5th Cir. 2014). Generally speaking, and as further discussed below, "states play the primary role in calculating avoided costs and in overseeing the contractual relationship between [qualifying facilities] and utilities operating under the regulations promulgated by" FERC. *Indep. Energy Producers Ass'n v. Cal.*

[1] FERC typically refers to "states," "state regulatory authorities," "state commissions," and "state agencies" interchangeably to refer to state entities such as the Department.

Pub. Utils. Comm'n, 36 F.3d 848, 856 (9th Cir. 1994); *see also Idaho Wind Partners 1, LLC*, 143 FERC ¶ 61,248 at P 10 (2013) (same). FERC has allowed states "a wide degree of latitude in establishing an implementation plan for section 210 of PURPA, as long as such plans are consistent with [FERC's] regulations." *Am. REF-FUEL Co. of Hempstead*, 47 FERC ¶ 61,161 at 61,533 (1989). A "state commission may comply with the statutory requirements by issuing regulations, by resolving disputes on a case-by-case basis, or by taking any other action reasonably designed to give effect to FERC's rules." *Mississippi*, 456 U.S. at 751; *see also Small Power Production and Cogeneration Facilities; Regulations Implementing Section 210 of the Public Utility Regulatory Policies Act of 1978*, Order No. 69, FERC Stats. & Regs. ¶ 30,128 at 30,892 (the "requirement to implement [PURPA] may be fulfilled either (1) through the enactment of laws or regulations at the State level, (2) by application on a case-by-case basis by the State regulatory authority, or nonregulated utility, of the rules adopted by the Commission, or (3) by any other action reasonably designed to implement the Commission's rules"), *order on reh'g*, Order No. 69-A, FERC Stats. & Regs. ¶ 30,160 (1980), *aff'd in part and vacated in part on other grounds*, *Am. Elec. Power Serv. Corp. v. FERC*, 675 F.2d 1226 (D.C. Cir. 1982), *rev'd in part on other grounds*, *Am. Paper Inst., Inc. v. Am. Elec. Power Serv. Corp.*, 461 U.S. 402 (1983).

Section 210(h) of PURPA provides that either FERC or a private party may seek to enforce FERC rules implementing PURPA, in federal district court, against a state regulatory authority. *See* 16 U.S.C. § 824a-3(h); *accord Indus. Cogenerators v. FERC*, 47 F.3d 1231, 1234 (D.C. Cir. 1995). FERC and federal courts have recognized two types of PURPA enforcement petitions: implementation challenges, which involve claims that the state agency has not implemented FERC's regulations relating to purchases and sales of electricity to and from qualifying facilities in a manner consistent with section 210(f) of PURPA, 16 U.S.C. § 824a-3(f); and as-applied claims, which involve arguments that a state has unlawfully applied its own implementation of PURPA to an individual petitioner. *Policy Statement Regarding the Commission's Enforcement Role Under Section 210 of the Public Utility Regulatory Policies Act of 1978*, 23 FERC ¶ 61,304 at 61,645 (1983) (1983 Policy Statement); *accord Exelon Wind 1 v. Nelson*, 766 F.3d at 388; *Power Res. Grp., Inc. v. Pub. Util. Comm'n of Tex.*, 422 F.3d 231, 235 (5th Cir. 2005). Federal district courts have jurisdiction only over implementation claims; jurisdiction over "as applied" claims is reserved to state courts. *Power Res. Grp.*, 422 F.3d at 235-36; *Mass. Inst. of Tech. v. Mass. Dep't of Pub. Utils.*, 941 F. Supp. 233, 236-37 (D. Mass. 1996); *cf. Indus. Cogenerators*, 47 F.3d at 1235-36 ("Congress created in [16 U.S.C. § 824a-3] a complete and independent scheme by which the purposes of the PURPA are to be

realized. That scheme involves the promulgation of regulations by the FERC, and their subsequent enforcement exclusively in federal district court, at the insistence of either a private party or of the FERC itself.").

A private party that wishes to enforce FERC rules in federal district court must first petition FERC to do so. *See Indus. Cogenerators*, 47 F.3d at 1234 (citing PURPA section 210(h)(2)(A)-(B), 16 U.S.C. § 824a-3(h)(2)(A)-(B)). But FERC has discretion over the exercise of its enforcement authority. 1983 Policy Statement, 23 FERC ¶ 61,304 at 61,645. If FERC does not initiate an enforcement action within 60 days of receiving a petition for enforcement, then the petitioning party may initiate such an action on its own. *Indus. Cogenerators*, 47 F.3d at 1234 (citing PURPA section 210(h)(2)(B), 16 U.S.C. § 824a-3(h)(2)(B)).

1. FERC's PURPA Regulations

In 1980, FERC promulgated rules implementing section 210 of PURPA; these rules are codified at 18 C.F.R. pt. 292. *See* Order No. 69, FERC Stats. & Regs. ¶ 30,128 (describing regulations and summarizing analytical process that led to their development). FERC's regulations implement the obligations set forth in PURPA that utilities buy "any energy and capacity which is made available from a qualifying facility," 18 C.F.R. § 292.303(a), and sell "any energy and capacity requested by the qualifying facility," *id.* § 292.303(b). *See* PURPA sections 210(a), (b), and (d), 824 U.S.C. §§ 824a-3(a), (b), (d). Consistent with section

210(b) of PURPA, FERC's regulations require that the rates for purchases from qualifying facilities be just and reasonable to the electric consumer of the electric utility and in the public interest, and not discriminate against qualifying facilities. *Compare* 18 C.F.R. § 292.304(a)(1) *with* 16 U.S.C. § 824a-3(b).

FERC's regulations state that nothing requires any electric utility to pay more than the "avoided costs for purchases." 18 C.F.R. § 292.304(a)(2). Avoided costs, as noted *supra*, are the incremental costs to an electric utility of electric energy or capacity or both which, but for the purchase from the qualifying facility, such utility would generate itself or purchase from another source. *Id.* § 292.101(b)(6). A rate for purchases satisfies the requirements of 18 C.F.R. § 292.304(a) if it equals the avoided costs determined after consideration of specific factors set forth in 18 C.F.R. § 292.304(e). *Id.* § 292.304(b)(2). FERC's regulations thus provide for a utility to purchase electricity from a qualifying facility at the utility's "full avoided cost." *Am. Paper Inst.*, 461 U.S. at 406; *accord Indep. Energy Producers*, 36 F.3d at 858.

2. Massachusetts's Implementation of PURPA

Massachusetts has implemented PURPA, and FERC's regulations implementing PURPA, via Department regulations codified at 220 Mass. Code Regs. §§ 8.00-8.08, which govern rates, terms, and conditions of sales from qualifying facilities to distribution companies in Massachusetts. 220 Mass. Code

Regs. § 8.01(1). Under these regulations, a distribution company generally is "an electric utility company engaging in the distribution of electricity owning, operating, or controlling distribution facilities and subject to the ratemaking authority" of the Department. *Id.* § 8.02.

Department regulations permit a qualifying facility to sell either under a standard contract available to all qualifying facilities "at the Short-run Rate only," or under a negotiated contract executed by the qualifying facility and a distribution company. *Id.* § 8.03(1)(b). A Short-run Rate is the "hourly market clearing price for energy and the monthly market clearing price for capacity, as determined by" ISO New England Inc. *Id.* § 8.02. As relevant here, and as the Court has highlighted, Department regulations state that qualifying facilities with a design capacity of one megawatt or greater "shall have their output metered and purchased at rates equal to the payments received by the Distribution Company from the [ISO New England Inc.] power exchange for such output for the hours in which the Qualifying Facility generated electricity in excess of its requirements." *Id.* § 8.05(2)(A).

B. FERC's Consideration of PURPA Implementation in Light of Energy Market Developments

Historically, "utilities were vertically integrated monopolies; electricity generation, transmission, and distribution for a particular geographic area were generally provided by and under the control of a single regulated utility. Sales of those services were 'bundled,' meaning consumers paid a single price for generation, transmission, and distribution." *Midwest ISO Transmission Owners v. FERC*, 373 F.3d 1361, 1363 (D.C. Cir. 2004). But in more recent years – since PURPA was enacted – FERC has encouraged competition and reliability improvements in the wholesale market for electric power through provision of non-discriminatory efficient access to transmission over broad geographic areas. *See Morgan Stanley Capital Grp. v. Pub. Util. Dist. No. 1*, 554 U.S. 527, 536-37 (2008). Independent system operators and regional transmission organizations, such as ISO New England Inc., now provide such access in many regions of the country. *See generally Ill. Commerce Comm'n v. FERC*, 721 F.3d 764, 769 (7th Cir. 2013); *Midwest ISO Transmission Owners*, 373 F.3d at 1364.

The Commission has planned a technical conference to examine, among other things, issues related to implementation of PURPA in light of changes in energy markets since the statute was enacted. *See* Supplemental Notice of Technical Conference, Attachment 1 at 1-2, Docket No. AD16-16-000 (May 9, 2016). The conference, scheduled for June 29, 2016, will focus on two broad

issues: the mandatory purchase obligation under PURPA and the determination of avoided costs for those purchases. *Id.* at 1. One panel of speakers will address "issues related to the Commission's regulations implementing the mandatory purchase obligation . . . in light of changes in the electricity markets since the enactment of PURPA." *Id.* at 1. Another panel will discuss "various methods for calculating avoided cost," including "whether an avoided cost methodology may reflect the locational and/or time value of [qualifying facility] output" and "the role of wholesale market revenues in developing avoided cost calculations." *Id.* at 2-3. Panelists and other interested parties – including Allco – have submitted written, on-the-record comments to the Commission in advance of the conference, and their remarks are publicly available on the Commission's eLibrary website, available at http://www.ferc.gov/docs-filing/elibrary.asp.

C. History of Dispute

1. Negotiations Between Allco and National Grid

In 2011, Allco offered to sell the production, capacity, and Massachusetts renewable energy credits from several of its solar photovoltaic qualifying facilities in Massachusetts to National Grid, pursuant to PURPA, at what Allco described as National Grid's avoided costs. National Grid, disputing Allco's characterization of avoided costs, then offered to purchase Allco's energy, excluding its renewable

energy credits, under a standard power purchase agreement and corresponding avoided cost terms set out in a Department-administered tariff pursuant to PURPA.

2. Allco's Complaints Against National Grid, Petition for Enforcement Against the Department, and Petition for Review of the Department's Orders

Allco filed a complaint against National Grid with the Department after the parties could not agree on terms for National Grid's purchase of Allco's power. Allco asked the Department to declare that: (1) National Grid has a legally enforceable obligation to purchase from each of Allco's qualifying facilities located in Massachusetts; (2) the energy purchase rate for those purchases would be based on National Grid's avoided costs over 25 years, calculated at the time National Grid incurred the legally enforceable obligation, March 28, 2011; and (3) National Grid's avoided costs for that time period equal the contract rate in an earlier Department proceeding. Allco claimed that National Grid's avoided costs should be based on the rate methodology that the Department used in its *Cape Wind* proceeding, *Petition of Mass. Elec. Co. and Nantucket Elec. Co. each d/b/a National Grid for Approval of Long-Term Contracts for Renewable Energy with Cape Wind Assocs., LLC*, Docket No. 10-54, Order (Nov. 22, 2010) (*Cape Wind*). Allco has described the rate methodology of *Cape Wind* as using "three long-term market forecasts as the baseline to determine what costs National Grid would avoid if it entered into a power purchase agreement with" a particular wind farm. Motion

for Summary Judgment at 11 n.15, ECF No. 50. According to Allco, those forecasts are based on National Grid's long-term forecasted avoided costs related to the ISO New England Inc. wholesale market and National Grid's status as a load-serving entity. *See id.*

Allco also filed a complaint against National Grid before FERC, raising allegations similar to those that it made before the Department. But FERC, citing the ongoing proceeding before the Department, dismissed that complaint as premature. *See Allco Renewable Energy Ltd. v. Mass. Elec. Co.*, 146 FERC ¶ 61,107 at P 1 (2014).

On July 22, 2014, the Department denied Allco's complaint against National Grid. The Department found that National Grid's offer to purchase Allco's output pursuant to National Grid's avoided cost tariff was reasonable, and rejected Allco's request for an avoided cost rate equal to the rate in *Cape Wind*. The Department generally reasoned that *Cape Wind* involved neither a qualifying facility nor an analysis of National Grid's avoided costs pursuant to PURPA and FERC's regulations implementing PURPA. *Petition of Allco Renewable Energy Limited pursuant to 220 C.M.R. § 8.08(2) for an investigation by the Dep't of Pub. Utils. into Allco's offer to sell to Mass. Elec. Co. d/b/a National Grid*, Docket No. 11-59, Order at 9-12 (Mass. D.P.U. July 22, 2014). Allco then filed a petition for review of the Department's order with the Supreme Judicial Court of Massachusetts for

Suffolk County, seeking a finding that Allco's qualifying facilities are entitled to a contract for a term of 25 years at costs avoided by National Grid as determined in *Cape Wind*. That petition for review is currently pending.

Allco also returned to FERC, and filed a petition for enforcement under section 210(h) of PURPA, 16 U.S.C. § 824a-3(h). Allco asked FERC to invalidate the Department's regulations regarding legally enforceable obligations, and the Department's requirement "that purchases from qualifying facilities must be priced at the time of delivery, and not calculated at the time the legally enforceable obligation is incurred." *Allco Renewable Energy Ltd.*, 148 FERC ¶ 61,233 at P 1 (2014). FERC gave notice that it intended not to act on Allco's petition for enforcement against the Department. *Id.* P 2.

3. The Instant Litigation

On October 6, 2015, as amended on February 11, 2016, Allco filed the instant complaint against Defendants. As relevant here, Allco argues that the Department's regulations implementing PURPA, 22 Code Mass. Regs. §§ 8.00 *et seq.*, are preempted by the Supremacy Clause of the United States Constitution and therefore void because they are inconsistent with PURPA and with FERC's implementing regulations. Allco argues that the Department's regulations deny qualifying facilities the right to "long-run forecasted rates" guaranteed by 18 C.F.R. § 292.304(d)(2)(ii). Allco asks the Court to order National Grid to buy

Allco's qualifying facilities' output at National Grid's long-term avoided costs, as determined by the Department in *Cape Wind*. Allco requests damages in the amount of the net income Allco would have received using the avoided cost rates in *Cape Wind*. *See* First Amended Complaint, ECF No. 25 ¶¶ 2, 6-8, Prayer for Relief.

National Grid has moved to dismiss Allco's complaint, arguing that it has satisfied its PURPA obligations because it offered to purchase the output of Allco's qualifying facilities at the avoided cost rate that is specified in Department regulations, and reflected in its Department-jurisdictional tariffs. Memorandum in Support of Motion to Dismiss, ECF No. 28 at 9-11. National Grid claims that it is not obligated to purchase Allco's power at the rate Allco seeks, and that the pricing reflected in the power purchase agreement with the Cape Wind project is a negotiated rate pursuant to a different statute, not a PURPA "avoided cost" rate with a qualifying facility. *Id.* at 10. In the alternative, National Grid argues that this Court should abstain from ruling on this case in light of ongoing proceedings before the Massachusetts state court. *Id.* at 12-13 (citing cases).

DISCUSSION

The Commission appreciates the complexity of the issues that this case presents. In the past FERC has evaluated issues concerning the intersection of PURPA requirements with the needs of utilities that operate and participate in regional energy markets, but it has never previously addressed the Department regulations at issue here, or addressed state requirements concerning the length of PURPA contracts. In fact, on two occasions FERC declined to address some of the same issues that Allco raises in this litigation. *Allco*, 148 FERC ¶ 61,233; *Allco. v. Mass. Elec. Co.*, 146 FERC ¶ 61,107. FERC's upcoming technical conference may provide information that further illuminates the issues in this case and other, related concerns.

Accordingly, the Commission continues to decline to provide a definitive opinion as to the specific question of whether the Department regulations are consistent with PURPA, or with FERC's implementation of PURPA. The Commission also declines to provide its views on the merits of Allco's motion for summary judgment and National Grid's motion to dismiss the Complaint. But the Commission will broadly discuss the more specific issues the Court has identified from the pending pleadings, to the extent the Commission has issued rulings in other contexts.

I. Federal Preemption of the Department Regulations

The Court explained that one issue presented in the parties' cross-motions concerns federal preemption of the Department regulations:

> Does section 210 of PURPA, 16 U.S.C. § 824a-3, and/or FERC's implementing regulations, 18 C.F.R. § 292.304(d), preempt the MDPU's regulations, 220 Mass. Code Regs. 8.03-8.05, which only allow for a contract with a minimum specified term of 30 days at the ISO-New England spot market price?

"[F]ederal law preempts contrary state law." *Hughes v. Talen Energy Mktg., LLC*, 136 S. Ct. 1288, 1297 (2016) (addressing preemptive effect of FERC wholesale ratesetting authority under the Federal Power Act). "[A] federal agency acting within the scope of its congressionally delegated authority may pre-empt state regulation." *La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 369 (1986); *cf. Allco Finance Ltd. v. Klee*, 805 F.3d 89, 91-92 (2d Cir. 2015) (recognizing PURPA's permission for states to promote electric generation by qualifying facilities as an exception to FERC's otherwise-exclusive authority to regulate sales of electricity at wholesale in interstate commerce under the Federal Power Act, wherein a "state may regulate wholesale sales by qualifying facilities, but those facilities must generally receive a price for their electricity equal to the buying utility's 'avoided costs'" (citations omitted)).

FERC has said that qualifying facilities are entitled to "long-term avoided cost contracts or other legally enforceable obligations with rates determined at the

time the obligation is incurred, even if the avoided costs at the time of delivery ultimately differ from those calculated at the time the obligation is originally incurred." *JD Wind 1, LLC*, 130 FERC ¶ 61,127, P 23 (2010); *cf. Hydrodynamics Inc.*, 146 FERC ¶ 61,193 at PP 32-33 (2014) (state rule limiting long-term PURPA contracts to certain qualifying facilities is inconsistent with PURPA and FERC regulations "to the extent that it offers the competitive solicitation process as the only means by which a [qualifying facility] greater than 10 MW can obtain long-term avoided cost rates" and provides "a practical disincentive to amicable contract formation because a utility may refuse to negotiate with a [qualifying facility] at all, and yet [that rule] precludes any eventual contract formation where no competitive solicitation is held. Such obstacles to the formation of a legally enforceable obligation were found unreasonable by the Commission [in another case], and are equally unreasonable here and contrary to the express goal of PURPA to 'encourage' [qualifying facility] development").[2] FERC's regulations and precedent, however, have not specified a minimum or a maximum required length of time for a contract or other legally enforceable obligation.

[2] The United States Court of Appeals for the Fifth Circuit and the Montana Supreme Court have disposed of these cases on rationales different from FERC's understanding, but did not otherwise reverse or vacate FERC's stated positions in these cases. *See Exelon Wind 1, L.L.C. v. Nelson*, 766 F.3d 380 (5th Cir. 2014); *Whitehall Wind, LLC v. Mont. Pub. Serv. Comm'n*, 379 Mont. 119 (2015).

Qualifying facilities have some flexibility to choose how they are paid. They are always entitled to receive the avoided cost of energy, *see S. Cal. Edison*, 443 F.3d at 95, but nothing limits the ability of a qualifying facility and an electric utility to agree to a rate for purchases that differs from the rate that would otherwise be required under FERC's regulations. 18 C.F.R. § 292.301(b). In developing the latter rule, FERC "reasoned that a contracted-for-rate would never exceed true avoided costs and would thus be consistent with PURPA." *Cedar Creek Wind, LLC*, 137 FERC ¶ 61,006 at P 39 n.73 (2011).

As to what constitutes avoided cost, FERC has specified that in determining avoided cost, parties should take into account, to the extent practicable, factors such as: (1) the utility's cost data; (2) the terms of any contract including the duration of the obligation; (3) the availability of capacity or energy from a qualifying facility during the system daily and seasonal peak periods; (4) the relationship of the availability of energy or capacity from the qualifying facility to the ability of the electric utility to avoid costs; and (5) the costs or savings resulting from variations in line losses from those that would have existed in the absence of purchases from the qualifying facility. *Cal. Pub. Utils. Comm'n*, 133 FERC ¶ 61,059 at P 23 (2010) (citing 18 C.F.R. § 292.304(e)); *see also* Order No. 69, FERC Stats. & Regs. ¶ 30,128 at 30,883-86 (discussing factors in greater detail); *accord Indep. Energy Producers*, 36 F.3d at 857 (FERC's regulations "require that

avoided costs be based on enumerated data regarding the utility's operational and cost characteristics . . . and on the availability, usefulness, type, and reliability of the energy or capacity that is purchased"); *id.* at 856 (interpreting 18 C.F.R. § 292.304(e)(2)(iii) as "recogniz[ing] that the value of electric energy provided by the [qualifying facility] varies depending on the terms of its commitment to the utility, the length of time during which the [qualifying facility] has guaranteed that it will supply electric energy to the utility, the certainty and dependability of the supply, and the existence in the contract of penalty provisions for the breach of any contractual obligations").

The precise level of avoided cost may depend upon the structure of a qualifying facility's agreement with a purchasing utility. FERC has held that qualifying facilities may choose to sell energy "as-available," with no advance commitment and with the avoided costs calculated at the time of delivery, or pursuant to a legally enforceable obligation over a specified term. *Entergy Servs., Inc.*, 137 FERC ¶ 61,199 at P 17 (2011) (citing 18 C.F.R. § 292.304(d)), *order on reh'g*, 143 FERC ¶ 61,143 (2013), *order on reh'g*, 148 FERC ¶ 61,209 (2014). A qualifying facility selling pursuant to a legally enforceable obligation over a specified term may choose, before the specified term, that rates for such purchases be calculated "at the time of delivery" or "at the time the obligation is incurred." 18 C.F.R. § 292.304(d)(2). This choice "enables a qualifying facility to establish a

fixed contract price for its energy and capacity at the outset of its obligation or to receive the avoided costs determined at the time of delivery." Order No. 69, FERC Stats. & Regs. ¶ 30,128 at 30,880.

It is also acceptable for both parties to rely on estimates of avoided costs. Where "rates for purchases are based upon estimates of avoided costs over the specific term of the contract or other legally enforceable obligation, the rates for such purchases do not violate this subpart if the rates for such purchases differ from avoided costs at the time of delivery." 18 C.F.R. § 292.304(b)(5); *see W. Penn Power Co.*, 71 FERC ¶ 61,153 at 61,486 (1995) (same); *see also Idaho Wind Partners 1*, 143 FERC ¶ 61,248 at P 16 (rule "demonstrates the Commission's priority of preserving the expectations of parties to long-term PURPA" power purchase agreements). So, for example, using a level payment schedule from the utility to the qualifying facility, in order to match more closely the schedule of debt service of the facility, would be acceptable under FERC's regulations implementing PURPA as "long as the total payment over the duration of the contract term does not exceed the estimated avoided costs." Order No. 69, FERC Stats. & Regs. ¶ 30,128 at 30,881. This arrangement benefits both the qualifying facility and the purchasing utility because it insulates the qualifying facility against changes in circumstances, and it "preserve[s] the bargain entered into by the electric utility; should the actual avoided costs be higher than those

contracted for, the electric utility is nevertheless entitled to retain the benefit of its contracted for, or otherwise legally enforceable, lower price for purchases from the qualifying facility." *Id.* at 30,880.

Finally, consistent with the discussion above regarding states' roles under PURPA, FERC has said that states, not FERC, determine the specific parameters of individual qualifying facility power purchase agreements, including the date at which a legally enforceable obligation is incurred under state law. *W. Penn Power*, 71 FERC ¶ 61,153 at 61,495. "[W]hether the particular facts applicable to an individual [qualifying facility] necessitate modifications of other terms and conditions of the [qualifying facility's] contract with the purchasing utility is a matter for the States to determine. [FERC] does not intend to adjudicate the specific provisions of individual [qualifying facility] contracts." *Id.* at 61,495.

II. Length of PURPA Contract Term

The Court has identified two related issues concerning the structure of a qualifying facility's contract with its host utility:

- Does Allco have the right under federal law to select a long-term, forecasted avoided-cost rate as opposed to an as-available, short-run avoided-cost rate, based on the ISO-New England spot market price?

- If so, is the term of the legally enforceable obligation equal to the term for which Allco's qualifying facilities commit to supply their electricity to National Grid or can the State specify a shorter term?

As described *supra* pages 21-22, FERC's regulations provide a qualifying facility the option of choosing to sell energy "as-available," with the avoided costs calculated at the time of delivery, or pursuant to a legally enforceable obligation over a specified term. 18 C.F.R. § 292.304(d). A qualifying facility selling pursuant to a legally enforceable obligation over a specified term may choose, before the specified term, that the rates for such purchases be calculated "at the time of delivery" or "at the time the obligation is incurred." *Id.* § 292.304(d)(2). FERC's regulations provide that where "rates for purchases are based upon estimates of avoided costs over the specific term of the contract or other legally enforceable obligation, the rates for such purchases do not violate this subpart if the rates for such purchases differ from avoided costs at the time of delivery." *Id.* § 292.304(b)(2). FERC has stated that "in order to be able to evaluate the financial feasibility of a [qualifying facility], an investor needs to be able to estimate, with reasonable certainty, the expected return on a potential investment before construction of a facility. This return will be determined in part by the price at which the qualifying facility can sell its electric output." Order No. 69, FERC Stats. & Regs. ¶ 30,128 at 30,868. *See also JD Wind 1, LLC*, 130 FERC ¶ 61,127 at P 23 (quoting part of same passage).

As noted in response to the first question, FERC's regulations and precedent do not specify a minimum or maximum required length of time for measuring

avoided cost rates and for the length of a contract. A rate for purchase from a qualifying facility, however, must meet the criteria described above in PURPA and FERC's regulations implementing PURPA for an electric utility's purchases from qualifying facilities.

III. Purchase Obligation Under Federal Law and Private Rights of Action Under PURPA

The Court's fourth and fifth questions are:

- Does National Grid have a direct obligation to purchase from Allco's qualifying facilities under federal law, independent of Massachusetts's implementation of PURPA?
- If so, does PURPA grant qualifying facilities, including Allco, a private cause of action directly against National Grid, such that Allco can bring suit against National Grid for violating PURPA and FERC's implementing regulations?

As described above, PURPA imposes an obligation to "purchase electric energy from [qualifying] facilities," 16 U.S.C. § 824a-3(a), and FERC's regulations implementing PURPA impose on each electric utility an obligation to purchase "any energy and capacity which is made available from a qualifying facility." 18 C.F.R. § 292.303(a). *See also, e.g.*, *Am. Paper Inst.*, 461 U.S. at 404-06 (same); *Mississippi*, 456 U.S. at 751 (same).

With regard to private rights of action, as described above, the enforcement provisions of section 210(h) of PURPA lay out an enforcement process centered on a state's implementation of PURPA under section 210(f) of PURPA. The statute

requires that in order for a private party to enforce PURPA against a state or a non-regulated utility, that party must first ask the Commission to initiate an enforcement action in federal district court. *See Indus. Cogenerators*, 47 F.3d at 1234 (citing PURPA section 210(h)(2)(A)-(B), 16 U.S.C. § 824a-3(h)(2)(A)-(B)). Should the Commission, in its discretion, choose not to do so, the private party may initiate its own enforcement action in federal district court. *Id.* (citing PURPA section 210(h)(2)(B), 16 U.S.C. § 824a-3(h)(2)(B)); 1983 Policy Statement, 23 FERC ¶ 61,304 at 61,645. (As explained *supra* page 15, the Commission declined to initiate such an enforcement action when presented with a petition from Allco.)

In contrast, section 210(g)(2) of PURPA provides that "any person (including the Secretary [of Energy]) may bring an action against any electric utility, qualifying small power producer, or qualifying cogenerator to enforce any requirement established by a State regulatory authority or nonregulated electric utility pursuant to subsection (f)." 16 U.S.C. § 824a-3(g)(2); c*f.* 1983 Policy Statement, 23 FERC ¶ 61,304 at 61,645 (describing as-applied claim that would properly lie in a state judicial forum of competent jurisdiction); *see also* *N. Hartland, LLC v. Cent. Vt. Pub. Serv. Corp.*, 105 FERC ¶ 61,037 at P 11 (2003); *Kawaihae Cogeneration Partners*, 84 FERC ¶ 61,325 at 62,456-57 (1998); *Mass. Inst. of Tech.*, 74 FERC ¶ 61,221 at 61,749-50 (1996). FERC has not addressed directly the question of private causes of action for damages independent

of the PURPA enforcement scheme. *See PáTu Wind Farm, LLC v. Portland Gen. Elec. Co.*, 150 FERC ¶ 61,032 at P 57 (2015) (whether utility owes "reparations" to qualifying facility for breach of contract is best left to the state regulatory commission or an appropriate court), *reh'g denied*, 151 FERC ¶ 61,223 (2015), *appeal pending sub nom. Portland Gen. Elec. Co., et al. v. FERC*, D.C. Cir. Nos. 15-1237, *et al.* (briefing completed).

Respectfully submitted,

Max Minzner
General Counsel

Robert H. Solomon
Solicitor

/s/ Elizabeth E. Rylander
Elizabeth E. Rylander
S. L. Higginbottom
Joshua A. Kirstein
Attorneys

Federal Energy Regulatory Commission
Washington, D.C. 20426
Tel: (202) 502-8466
Fax: (202) 273-0901
elizabeth.rylander@ferc.gov

June 24, 2016

CERTIFICATE OF SERVICE

I hereby certify that this document, filed through the Electronic Case Filing system, will be sent electronically to the registered participants as identified on the Notice of Electronic Filing, and paper copies will be sent to non-registered participants.

/s/ Elizabeth E. Rylander
Elizabeth E. Rylander

June 24, 2016