

## NOTE

### NIAGARA MOHAWK POWER CORP. v. FERC

#### I. SUMMARY

Niagara Mohawk Power Corporation (Niagara),<sup>1</sup> asserted the rate New York state law set for certain energy purchases conflicted with the federal Public Utilities Regulatory Policies Act (PURPA) which provided a rate ceiling. Niagara alleged the state agency violated PURPA, and the Federal Energy Regulatory Commission (FERC) failed to enforce PURPA. Based on the following, defendant's motions to dismiss Niagara's complaint pursuant to Federal Rules of Civil Procedure 12(b) was granted in their entirety.

#### II. INTRODUCTION AND BACKGROUND

PURPA was intended by Congress to combat a nationwide energy crisis by promoting long-term economic growth by reducing the nation's reliance on oil and gas and to encourage development of alternative energy sources. Section 210(a) of PURPA required the FERC to "prescribe, and from time to time thereafter revise" rules requiring electric utilities to offer both the sale and purchase of electric energy from qualifying cogeneration facilities (QFs).<sup>2</sup> Section 210(b) of PURPA requires the rates that utilities paid for power purchased from QFs be "just and reasonable" to consumers and "not discriminate" against QFs.<sup>3</sup> Section 210(e) of PURPA states that QFs are exempt from federal and state regulatory control in connection with rates and financial organizations.<sup>4</sup>

These requirements were based on Congress' identification of two problems which impeded the development of non-traditional generational facilities: 1) traditional electrical utilities were reluctant to purchase power from, and sell power to non-traditional facilities; and 2) regulation of non-traditional facilities by state and federal utility authorities imposed undue financial burdens on small alternative energy producers.<sup>5</sup>

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1. Niagara Mohawk Power Corp. v. FERC, 162 F. Supp. 2d 107 (N.D.N.Y 2001).

2. A qualifying cogeneration facility is defined by the PURPA as a small power production facility of "not more than 80 megawatt ("MW") capacity," 16 U.S.C. § 824a-3(a) (2001). A QF produces electric energy primarily by use of solar or wind energy, waste, or geothermal resources and is owned by a person "not primarily engaged in the generation or sale of electric power (other than electric power solely from cogeneration facilities or small power production facilities)." 16 U.S.C. § 796(17)(A)-(E) (2001).

3. 16 U.S.C. § 824a-3(b) (2001).

4. See generally 16 U.S.C. § 824a-3(c).

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

Section 210(b) of PURPA states: “[n]o such rule prescribed under subsection (a) of this section [824a-3(b)] shall provide for a rate which exceeds the incremental cost to the electric utility of alternative electric energy.”<sup>6</sup> The definition of “incremental cost of alternative electric energy” is “. . .the cost to the electric utility of the electric energy which, but for the purchase from such cogenerator or small power producer, such utility would generate or purchase from another source.”<sup>7</sup> Congress describes the incremental cost in PURPA as “avoided costs” or costs which the utility “avoided” incurring itself by purchasing power from the QF.<sup>8</sup> Sections 824a-3(g)-(h) of title 16 describes the judicial review and commission enforcement schemes and provisions in PURPA:

Section 210(g) provides for (1) state court review of state regulatory authorities’ orders implementing PURPA; and (2) state court actions to enforce requirements of state regulatory authorities . . . . Section 210 (h)(1) provides that for enforcement purposes, rules and regulations promulgated pursuant to PURPA shall be treated like rules promulgated pursuant to the Federal Power Act (FPA), . . . which are enforceable by FERC in federal district court . . . The FPA grants FERC the authority to regulate the nationwide development of water and power resources, the transmission of electric energy in interstate commerce, the sale of such energy at wholesale in interstate commerce and the licensing and administration of public utilities . . . . Section 210(h)(2)(A) of PURPA provides that FERC may bring an enforcement action against a state regulatory agency in district court, and Section 210(h)(2)(B) allows a utility or cogenerator to petition FERC to enforce Section 210(f) which governs state regulatory authorities’ responsibilities to implement PURPA rules and regulations . . . . 3(h)(2)(B). If FERC declines to bring such an enforcement action, the utility or cogenerator can commence its own enforcement action against the state regulatory authority in district court . . . .

Congress directed that each state regulatory authority apply the rules given by the FERC pertaining to electric utilities’ obligation to purchase power from QFs in an effort by congress to apply the doctrine of PURPA to the states.<sup>10</sup> “Section 210(f)(1) of PURPA obligates state regulatory agencies to implement FERC’s rules through their own rulemaking. Prior to the enactment of PURPA, the FERC had exclusive authority to regulate wholesale power rates charged by utilities under the FPA.”<sup>11</sup>

New York’s legislature introduced a “Six-Cent Law” amendment that required a minimum six cents per kilowatt hour (kWh) sales price to be established for power purchased from state qualifying QFs.<sup>12</sup> Federally qualified QFs were not affected by the amendment but most entities that quali-

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6. 16 U.S.C. § 824a-3(b) (2001).

7. 16 U.S.C. § 824a-3(d) (2001).

8. 18 C.F.R. § 292.101(b)(6) (2001).

9. *Niagara Mohawk Power Corp. v. FERC*, 162 F. Supp. 2d 107, 111 n.3 (N.D.N.Y. 2001)(internal citations omitted).

10. 16 U.S.C. § 824a-3(f) (2001).

11. *Niagara*, 162 F. Supp. at 112 n.4.

12. N.Y. L. 1981, ch. 843, § 9.

fied as QFs under state law also qualified under PURPA.

On July 24, 1992, New York's legislature again amended Section 66-c of the Public Service Law and partially repealed the Six-Cent Law. The amendment preserved the minimum rate for:

any contract fully executed by the parties and filed with the [PSC] on or before [June 26, 1992] and (i) providing for the purchase of electricity at such minimum sales price; or (ii) providing for the purchase of electricity at a utility tariff rate referencing a statutory minimum sales price; or (iii) providing for the reconciliation or recalculation of such contract's purchase price by comparison to such statutory minimum sales price or tariff rate, for the duration of any such contract and performance thereunder, provided however, that such minimum sales price shall be implemented in accordance with the policies and conditions established by [PSC].<sup>13</sup>

A New York state court delivered final unappealable judgments prior to January 1, 1987, allowing QFs to legally receive the statutory minimum of six cents per kWh. The QFs that gained this legal right were "grandfathered" by the July 24, 1992 amendment.<sup>14</sup>

Niagara, a traditional electric utility, has eleven long-term contracts<sup>15</sup> with several QFs that required it to pay six cents per kWh for energy purchased, as prescribed by the New York Public Service Law. Niagara has brought the action mainly to obtain relief from the eleven long-term contracts with the QFs. At the heart of Niagara's concern is the fact that its payments under these contracts are ninety three million dollars greater than its "avoided costs."<sup>16</sup> Niagara sought to obtain relief by having the contracts, or the order and requirements on which they are based, revised, or revoked to comply with federal law. Federal law would limit QF purchase rates to a utility's avoided costs.<sup>17</sup>

### III. PROCEDURAL AND REGULATORY HISTORY

The FERC was required by PURPA to implement the statute "not later than 1 year after November 9, 1978."<sup>18</sup> Following public rulemaking proceedings, the FERC circulated regulations governing transactions between utilities and QFs in connection with purchase and sales of electricity.<sup>19</sup> In *American Electric Power Service Corp. v. FERC*,<sup>20</sup> four utilities

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13. *Niagara*, 162 F. Supp. 2d at 112 (quoting N.Y. pub. serv. law § 66-c(2) (McKinney 1996 Supp.)).

14. *See generally* N.Y. Pub. Serv. Law § 66-c(2) (McKinney 1996 Supp.).

15. Niagara's Complaint demands relief from eighteen long-term QF contracts, but seven of those were settled via a Stipulation and Order negotiated in connection with a Master Restructuring Agreement between Niagara and several QFs, many of whom were at one time defendant-interveners in this matter.

16. *Niagara Mohawk Power Corp. v. FERC*, 162 F. Supp. 2d 107, 112 (N.D.N.Y. 2001).

17. 16 U.S.C. § 824a-3(b) (2001).

18. 16 U.S.C. § 824a-3(a) (2001).

19. Order No. 69, Small Power Prod. & Cogeneration Facilities; Regs. Implementing Section 210 of [the PURPA], 45 Fed. Reg. 12,214 (1980).

20. *American Elec. Power Serv. Corp. v. FERC*, 675 F.2d 1226 (D.C. Cir. 1982).

challenged the legality of the very regulations at issue in the present case.

In *American Electric*, the court held the FERC failed to adequately explain or justify its adoption of the full avoided cost standard in light of the enabling statute, PURPA, which mandated that rates charged to consumers be reasonable and that rates paid to QFs not exceed utilities incremental costs.<sup>21</sup> The "just and reasonable" language was used by the plaintiff utilities in *American Electric*, because the language related to the purchase rates in section 210(b) of PURPA, requiring the rates to be set at the lowest possible reasonable rate consistent with the maintenance of adequate service in the public interest.<sup>22</sup> Although the FERC could have required contract rates set at less than avoided costs, the FERC adopted "as a uniform rule, the maximum purchase rate specified in the statute," after concluding that the full avoided costs standard "would be just and reasonable in every case" as necessary to encourage cogeneration.<sup>23</sup> The court found that the FERC failed to adequately balance interests of cogenerators, the public, and consumers of electric utilities in rejecting, in an "across-the-board manner," contract rates below fully avoided costs.<sup>24</sup>

In *American Paper Institute, Inc. v. American Electric Power Service Corp.*, the Supreme Court partially reversed the D.C. Circuit's conclusion that the FERC had improperly promulgated its avoided costs rules.<sup>25</sup> The Court held the FERC had fulfilled its obligation under PURPA to set a rate which was "in the public interest."<sup>26</sup> The Court found: "the words 'public interest' in a regulatory statute . . . take meaning from the purposes of the regulatory legislation."<sup>27</sup> The Court found that the main purpose of PURPA was to encourage cogeneration and that "just and reasonable to . . . consumers" means PURPA required the FERC to only "consider[] . . . potential rate savings for electric utility consumers."<sup>28</sup> The Court stated the FERC did consider the possibility of such rate savings, but rejected a percentage of avoided costs approach after determining that purchase rates set at below avoided costs might discourage QF production.<sup>29</sup>

The PSC implemented rules from both PURPA and section 66-c of the New York Public Service Law in 1982 (also known as Opinion 82-10).<sup>30</sup> There, the PSC set the standard for how to calculate a utilities' avoided cost. The PSC also ordered all utilities to file estimated long-run avoided costs (LRACs also known as "buyback" tariffs) designed to implement PURPA and New York's Section 66-c.<sup>31</sup> The PSC further stated that New

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21. *Id.* at 1232.

22. *Niagara*, 162 F. Supp. 2d at 113.

23. *Id.* at 1233.

24. *American Electric*, 675 F.2d at 1236.

25. *American Paper Inst., Inc. v. Am. Elec. Power Serv. Corp.*, 461 U.S. 402 (1983).

26. *Id.* at 410.

27. *American Paper*, 461 U.S. at 417.

28. *Id.* at 415 n.9.

29. *American Paper*, 461 U.S. at 415.

30. *Consolidated Edison Co. of New York, Inc.*, 48 P.U.R. 4th 94 (1982).

31. *Id.*

York utilities such as Consolidated Edison Company of New York, Inc. (ConEd) must thereafter offer to purchase electric energy from QFs which were qualified under either PURPA or section 66-c, or both, at a rate of at least six cents per kWh. Opinion 82-10 said that QFs be paid the greater of the six-cent rate or the utility's avoided cost rate that is set forth in its buy-back tariffs.<sup>32</sup>

ConEd challenged the PSC's requirement that it make purchases from QFs which only qualified under the Public Service Law.<sup>33</sup> Additionally, ConEd argued the state mandated minimum purchase rate of six cents per kWh is at times higher than the federal rate of avoided cost set by the FERC and, thus, is invalid as contrary to federal law.<sup>34</sup> The utility company argued that PURPA pre-empted the Six-Cent Law to the extent that it required utilities to pay more than its avoided costs for QF purchases.<sup>35</sup> ConEd also argued that the FPA pre-empted the PSC from compelling utilities to purchase power from only state qualifying QFs since the FERC has the exclusive jurisdiction over sale of energy at wholesale in interstate commerce.<sup>36</sup> Niagara participated in the case as *amicus curiae*.

The PSC's order of implementing the Six-Cent Law was reversed by the appellate division. The court found the Six-Cent Law as contrary and pre-empted by federal law insofar as it required purchases in excess of the avoided cost rate established by PURPA and the FERC regulations.<sup>37</sup> The appellate division also modified the PSC's determination by holding that New York could only require ConEd to make purchases from QFs which qualified under PURPA.<sup>38</sup> The court reasoned that the required purchase of electricity from state qualifying QFs fell impermissibly under the pre-emptive blanket of the FPA.<sup>39</sup>

The PSC filed an appeal of the appellate division's determination in *Consolidated Edison I*. While waiting for the court of appeals to make a decision, the PSC continued to tell utilities to sign contracts at the six-cent rate, but to include provisions to eliminate the statutory minimum if the PSC lost on appeal.<sup>40</sup> Niagara requested that one QF contract be expressly conditioned on the outcome of the appeal. This contract, with Energy Oil, Inc., was signed prior to the appellate division's decision in *Consolidated Edison I*, but not forwarded for approval by the PSC until after the notice of appeal was filed. The PSC did not want to reformulate the contract but granted Niagara's request to obtain full recovery of the cost of the contract

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32. *Consolidated Edison Co.*, 48 P.U.R. 4th 94.

33. *Consolidated Edison Co. of N.Y., Inc. v. Pub. Serv. Comm'n (Consolidated Edison I)*, 98 A.D. 2d 377, 380 (N.Y. App. Div. 1983).

34. *Id.*

35. *Consolidated Edison I*, 98 A.D. 2d at 380.

36. 16 U.S.C. § 210(f)(1) (2001).

37. *Consolidated Edison I*, 98 A.D. 2d at 380.

38. *Id.*

39. *Consolidated Edison I*, 98 A.D. 2d 377, 380 (N.Y. App. Div. 1983).

40. *Niagara Mohawk Power Corp. v. FERC*, 162 F. Supp. 2d 107, 114 (N.D.N.Y. 2001).

with Energy Oil, Inc. from its ratepayers.<sup>41</sup> Niagara did not appeal this order.

Following the PSC's order that utilities file proposed purchase or "buyback" tariffs designed to implement PURPA and Public Service Law Section 66-c in Opinion 82-10, Niagara proposed its buyback tariff.<sup>42</sup> Niagara proposed that QFs should be required to elect the statutory minimum of six cents per kWh should this rate exceed the utility's estimated LRACs.<sup>43</sup> The PSC rejected this proposal, reaffirming its directive in Opinion 82-10 that QFs be paid the higher of the two rates.<sup>44</sup> Niagara did not appeal this order.

The PSC then approved Niagara's estimated LRACs<sup>45</sup> but stated that unless it lost *Consolidated Edison I*, Niagara's minimum QF contract rate would be six cents per kWh.<sup>46</sup> Again, Niagara did not appeal this order.

Approximately two weeks later, the court of appeals revised the appellate division's order in *Consolidated Edison II*, finding that PURPA did not pre-empt the PSC regulation requiring electric utilities to purchase power from federally qualifying QFs at a rate in excess of avoided costs.<sup>47</sup> Basing its decision on review of the statute's legislative history, including the FERC's 1980 preamble to PURPA rules in which it suggested that states were free to impose rates in excess of avoided cost,<sup>48</sup> the court stated that PURPA's avoided cost ceiling was the maximum rate the federal gov-

41. Memorandum from Niagara Mohawk Power Corp. Requesting Approval of a Purchase Agreement with Energy Oil, Inc. & Full Recovery of Purchase Costs via the Fuel Adjustment Clause (Mar. 28, 1984) (on file with the New York Public Service Commission (N.Y. P.S.C.)).

42. *Niagara*, 162 F. Supp. 2d at 114.

43. *Id.*

44. Order Concerning Proposed Tariff, *Niagara Mohawk Power Corp.*, Case No. 27574, 23 N.Y. P.S.C. 5204, 5227 (1983).

45. Order Endorsing Settlement & Establishing Policy on Long-Run Avoided Costs, *Niagara Mohawk Power Corp.*, 24 N.Y. P.S.C. 5583, 5590, 1984 N.Y. PUC LEXIS 85 (1984).

46. *Niagara Mohawk Power Corp. v. FERC*, 162 F. Supp. 2d 107, 115 (N.D.N.Y. 2001).

47. *Consolidated Edison Co. v. Public Serv. Com.* (*Consolidated Edison II*), 63 N.Y.2d 424, 433 (1984).

48. In the preamble to the PURPA regulations, the FERC left the states free to utilize their own means of encouraging alternative energy production, stating:

This Commission has set the rate for purchases at a level which it believes appropriate to encourage cogeneration and small power production, as required by section 210 of the PURPA. While the rules prescribed under section 210 of PURPA are subject to the statutory parameters, the States are free, under their own authority, to enact laws or regulations providing for rates that would result in even greater encouragement of these technologies. However, State laws or regulations which would provide rates lower than the federal standards would fail to provide the requisite encouragement to these technologies, and must yield to federal laws. If a State program were to provide that electric utilities must purchase power from certain types of facilities, among which are including "qualifying facilities" at a rate higher than that provided by these rules, a qualifying facility might seek to obtain the benefits of that State program. In such a case, however, the higher rates would be based on State authority to establish such rates, and not on the Commission rules.

Order No. 69, Small Power Prod. & Cogeneration Facilities; Regs. Implementing Section 210 of [PURPA], 45 Fed. Reg. 12,214, at 12,224 (1980).

ernment could require in the context of encouraging alternative power production.<sup>49</sup>

The court rejected ConEd's argument that a second equally compelling objective of PURPA was to avoid consumer-ratepayer subsidies after the court determined that New York Public Service Law § 66-c furthered PURPA's objective by enhancing the bargaining power of QFs through a guaranteed rate of six cents per kWh.<sup>50</sup> The court cited the Supreme Court's decision in *American Paper*,<sup>51</sup> which stated the impact of the state-imposed rate on costs to consumer ratepayers was "but one factor that the FERC was obligated to consider when it established avoided costs as the maximum rate to be imposed by Federal authorities."<sup>52</sup> The court went on to say that the Supreme Court accepted the FERC's explanation as reasonable because:

it was more important that the rate 'provide a significant incentive for a higher growth rate' and that the resulting decreased reliance on fossil fuel and increased energy efficiency would benefit the ratepayers and the Nation as a whole.<sup>53</sup> [S]imilarly, while it is recognized that rate savings may not be achieved for consumers under section 66-c of the Public Service Law because the six cents per kilowatt hour rate may at times exceed current avoided costs, at least in the short run, the rate does nevertheless further PURPA's objective because it encourages alternative energy production, and in a manner suited to the needs of this State.<sup>54</sup>

Based on the foregoing, the court of appeals held state regulation in the field was "not supplanted by PURPA but could be used to expand the federal PURPA-based incentives."<sup>55</sup> The Supreme Court of New York summarized the case by saying that:

the PSC has the authority to require utilities to offer to purchase power from Federal qualifying facilities (including those which qualify under both PURPA and the Public Service Law). The PSC may also require a utility to offer to purchase power from Federal qualifying facilities at a minimum rate of 6 cents per kilowatt hour in accordance with section 66-c of the Public Service Law.<sup>56</sup>

The court affirmed the holding of the appellate division as it related to the PSC regulations, which required utilities to offer to purchase power from purely state qualifying QFs pre-empted by the FPA.<sup>57</sup> The PSC argued that such sales were not pre-empted because the FPA only prohibits state regulation of "interstate commerce" if the electric energy is "trans-

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49. *Id.* at 435.

50. *Consolidated Edison II*, 63 N.Y.2d at 437.

51. *American Paper Inst., Inc. v. American Elec. Power Serv.*, 461 U.S. 402, 413-16 (1983).

52. *Id.*

53. *Consolidated Edison II*, 63 N.Y.2d 424, 437-38 (1984) (citing *American Paper*, 461 U.S. at 414-16).

54. *Id.* at 438.

55. *Consolidated Edison II*, 63 N.Y.2d at 436.

56. *Id.* at 438.

57. *Consolidated Edison II*, 63 N.Y.2d at 438.

mitted from a State and consumed at any point outside thereof.”<sup>58</sup> The FPA was needed to “fill the gap” left by the Supreme Court’s decision in *Public Utilities Commission of Rhode Island v. Attleboro Steam & Electric Co.*,<sup>59</sup> which held that states lacked power to regulate interstate sales of electricity wholesale.<sup>60</sup> Based on the *Attleboro Steam* holding, the court concluded that the FPA pre-empted any regulation by the PSC of sales at wholesale in interstate commerce between a utility such as ConEd and purely state qualifying QFs.<sup>61</sup>

ConEd appealed the court’s refusal to find pre-emption to the United States Supreme Court, however the case was dismissed summarily for want of a substantial federal question.<sup>62</sup> This was the only time Niagara sought judicial review of the constitutionality of the Six-Cent Law. Although Niagara objected to pay what it considered to be an unlawful minimum rate, Niagara complied with several PSC orders between 1982 and 1992 which required it to pay more than its avoided costs for QF power purchases.<sup>63</sup> Instead of an appeal or challenge to these orders, Niagara was awarded, in most cases, the right to “pass through” the costs to these long-term contracts (also known as power purchase agreements (PPA)) directly to its ratepayers.<sup>64</sup>

#### IV. FERC PROCEEDING

On July 31, 1987, certain utilities filed a petition<sup>65</sup> with the FERC for a declaratory order challenging the application of the Six-Cent Law to QF purchases. Niagara, along with Long Island Lighting Company (LILCO), intervened in this proceeding.<sup>66</sup> In a decision which reversed its previous position as set forth in the 1980 preamble to PURPA regulations, the FERC issued a prospective order on April 14, 1988 in *Orange & Rockland Utilities, Inc. (Orange & Rockland I)*, holding that in light of changes which had occurred in the industry since 1980, states thereafter could not impose any rate for sales by QFs to utilities in excess of avoided cost.<sup>67</sup> The PSC, among others, appealed *Orange & Rockland I* to the Second Circuit that

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58. Consolidated Edison II, 63 N.Y.2d 424, 439-40 (1984)(citing 16 U.S.C. § 824(c)).

59. Public Utils. Comm’n of Rhode Island (PUCRI), v. Attleboro Steam & Elec. Co. 273 U.S. 83, 89-90 (1927).

60. *Id.*

61. *PUCRI*, 243 U.S. at 89-90 n.44.

62. Consolidated Edison Co. of New York, Inc. v. PSC (Consolidated Edison III), 470 U.S. 1075 (1985).

63. Niagara appealed only one of these orders. The utility argued that PSC could not require it to pay the minimum statutory rate of six-cents per kWh to out-of-state QFs, but did not challenge the lawfulness of the Six-Cent Law. Nevertheless, Niagara’s petition for review was dismissed. *Niagara v. Pub. Serv. Comm’n.*, 530 N.Y.S.2d 626 (N.Y. App. Div. 1988).

64. *Niagara Mohawk Power Corp. v. FERC*, 162 F. Supp. 2d 107, 117 (N.D.N.Y. 2001).

65. The utilities that filed the petition include Orange & Rockland Utilities along with two other New York Utilities. See generally *Niagara*, 162 F. Supp. 2d at 117.

66. *Niagara*, 162 F. Supp. 2d at 117.

67. 43 F.E.R.C. ¶ 61,067 (1988).



held judicial review was premature.<sup>68</sup> Although the court found that the FERC's decision in *Orange & Rockland I* "created considerable uncertainty in the industry," it still determined that the FERC had taken no final action which was ripe for review citing the June 16, 1988, order staying *Orange & Rockland I* as well as the ongoing rulemaking proceeding.<sup>69</sup> Thus, the application of FERC's decision in *Orange & Rockland I* remained in limbo.

*Connecticut Light & Power Co.*<sup>70</sup> was issued as a declaratory proceeding by the FERC on January 11, 1995, in which Niagara had intervened. According to the FERC, PURPA prevented a Connecticut statute requiring an electric utility to buy power from particular QFs at a rate greater than the avoided cost.<sup>71</sup> The FERC stated that its preamble to its own rules and regulations did not support any legal basis for states to have independent authority to set rates for sales by QFs that were above the avoided cost cap included in PURPA.<sup>72</sup> Thus, the FERC pre-empted the Connecticut statute's requirement of rates above avoided cost.<sup>73</sup> This result was "appropriately applied" to Connecticut Light & Power Co. since it had been opposing this rate at least since 1987.<sup>74</sup> The FERC warned:

[it would] not entertain requests as a result of this order asking us to invalidate on this basis other, pre-existing contracts where the avoided cost issue could have been raised. The appropriate time to challenge a state-imposed rate is up to or at the time the contract is signed, not several years into a contract which heretofore has been satisfactory to both parties.<sup>75</sup>

From now on, the FERC determined that contracts, which were the product of state law or policy requiring PPA rates in excess of avoided costs, would be void from inception.<sup>76</sup>

The New York Legislature amended Public Service Law Section 66-c in 1992 by partially repealing the Six-Cent Law.<sup>77</sup> When it issued *Connecticut Light & Power I*, FERC filed *Orange & Rockland Utilities, Inc.*,<sup>78</sup> in which it dismissed as moot Orange & Rockland's original petition (in which Niagara had intervened).<sup>79</sup> There, the FERC determined that its decision in *Orange & Rockland I* had never become effective. The FERC held that the April 14, 1988 order was not intended to apply retroactively and that it was almost immediately stayed by virtue of *Orange & Rockland*

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68. *Occidental Chem. Co. v. FERC*, 869 F.2d 127, 129 (2d Cir. 1989).

69. *Id.* at 128-29.

70. *Connecticut Light & Power Co. (Connecticut Light & Power I)*, 70 F.E.R.C. ¶ 61,012 (1995).

71. *Id.* at 61,029 (1995).

72. 70 F.E.R.C. ¶ 61,012, at 61,029.

73. *Niagara*, 162 F. Supp. 2d at 118.

74. 70 F.E.R.C. ¶ 61,012, at 61,029.

75. *Connecticut Light & Power I*, 70 F.E.R.C. ¶ 61,012 (1995).

76. *Id.* at 61,030.

77. N.Y. L. 1981, ch. 843, § 9.

78. *Orange & Rockland Utils., Inc. (Orange & Rockland III)*, 70 F.E.R.C. ¶ 61,014 (1995).

79. *Niagara Mohawk Power Corp. v. FERC*, 162 F. Supp. 2d 107, 118 (N.D.N.Y. 2001).

*II* on June 16, 1988.<sup>80</sup> “The prospective application of the April 14 order coupled with the stay of that order resulted in that order never having been made effective.”<sup>81</sup> Furthermore, “the statutory minimum six-cent rate which was the subject of the petition” was repealed.<sup>82</sup> The FERC then determined that Orange & Rockland’s petition had been “overtaken by subsequent events,” was therefore moot, and would be dismissed.<sup>83</sup>

On February 10, 1995, Niagara and LILCO petitioned the FERC for rehearing of both *Connecticut Light & Power I* and *Orange & Rockland III*.<sup>84</sup> In *Connecticut Light & Power II*, Niagara and LILCO objected to the FERC’s decision not to apply the holding of *Connecticut Light & Power I* to other pre-existing contracts. On the other side, several QFs objected to the FERC’s determination that Connecticut was pre-empted from imposing a PPA rate in excess of avoided costs for QF purchases. The QFs argued *Connecticut Light & Power I* could not be applied to invalidate contracts reflecting the six-cent minimum rate required by New York Public Service Law Section 66-c because of the Supreme Court’s dismissal in *Consolidated Edison III* for lack of a federal question, which, they argued, was a bar to the FERC’s determination on the merits of the Six-Cent Law.<sup>85</sup> The QFs argued that the New York Supreme Court’s dismissal in *Consolidated Edison III* was equal to an approval from the New York Court of Appeals decision in *Consolidated Edison II*, which upheld the constitutionality of the Six-Cent Law.<sup>86</sup>

The FERC rejected the argument in the first instance that “[w]hile dismissal of an appeal for want of a substantial federal question is a decision on the merits of a particular case insofar as it leaves the underlying judgment undisturbed,” it did not mean that the FERC and all other subsequent courts were bound “for all time and in all cases by the New York Court of Appeals’ interpretation of the meaning and reach of PURPA.”<sup>87</sup> Instead, the FERC determined that the Supreme Court’s dismissal on ju-

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80. *Id.*

81. *Orange & Rockland III*, 70 F.E.R.C. ¶ 61,014, at 61,034 (1995).

82. *Id.* at 61,034.

83. *Orange & Rockland III*, 70 F.E.R.C. ¶ 61,014, at 61,034 (1995).

84. The FERC considered the requests as reconsideration. The FERC, after citing to *Industrial Cogenerator v. FERC*, 47 F.3d 1231 (D.C. Cir. 1995) (holding that appellate courts have no jurisdiction to review non-binding FERC orders interpreting its own regulations under section 210 of PURPA), decided that “formal rehearings do not lie, either on a mandatory or a discretionary basis, in cases that involve solely section 210 [PURPA] issues.” *Connecticut Light & Power Co. (Connecticut Light & Power II)*, 71 F.E.R.C. ¶ 61,035, at 61,148 n.2 (1995); *Orange & Rockland Utils., Inc. (Orange & Rockland IV)*, 71 F.E.R.C. ¶ 61,034, at 61,144 n.2 (1995).

85. *Connecticut Light & Power II*, 71 F.E.R.C. ¶ 61,035, at 61,152.

86. *Niagara Mohawk Power Corp. v. FERC*, 162 F. Supp. 2d 107, 119 (N.D.N.Y. 2001).

87. *Id.* (citing *Washington v. Confederated Bands & Tribes of the Yakima Indian Nation*, 439 U.S. 463, 477 n.20 (1979) (summary action by Supreme Court does not necessarily reflect agreement with the opinion of the court whose judgment is appealed); *Anderson v. Celebrezze*, 664 F.2d 554, 558-60 (6th Cir. 1981) *aff’d in relevant part*, 460 U.S. 780, 784 n.5 (1983) (to reach any other conclusion would allow parties seeking Supreme Court review to control effect of Supreme Court’s summary actions through careful structuring of appeals)).

isdictional grounds “went only to the specific challenges presented to the Supreme Court . . . only to what was necessary for the Supreme Court to decide the case; its reach went no further.”<sup>88</sup> Moreover, the FERC held that the court of appeals’ decision in *Consolidated Edison II* relied to great extent on the 1980 preamble to the FERC’s PURPA rules, a “predicate which has now been overturned.”<sup>89</sup>

As to the arguments by Niagara and LILCO regarding the FERC’s refusal to apply its pre-emption determination on the merits to the parties and contracts not directly before it in *Connecticut Light & Power I*, FERC said its actions were necessary to

avoid the substantial injustice that our determination on the merits in this proceeding might otherwise have created if applied to invalidate other, pre-existing QF contracts that [were] not involved in the present litigation.<sup>90</sup> This approach is especially appropriate here given the apparent confusion created by the language contained in the preamble to our regulations. The United States District Court for the District of Connecticut, which directed Connecticut Light & Power to put this matter before us,<sup>91</sup> for one, noted that in light of the language contained in the 1980 preamble to our regulations the law was “unsettled and conflicting.” As a consequence, some states in reliance on the preamble language have required rates that were above avoided cost for QF sales at wholesale. We have now expressly ruled that is impermissible, and thus have cleared up the confusion that, admittedly, the language of the Commission’s 1980 preamble had a hand in creating. In light of the confusion that the preamble language created, we believe it inappropriate to entertain requests to invalidate other, pre-existing contracts where the avoided cost issue could have been raised but was not raised.<sup>92</sup>

Significantly, the FERC gave the impression that Niagara was merely an interested participant in Connecticut Light & Power’s challenge of a Connecticut statute instead of a party that had offered its own specific factual and legal challenge to application of the Six-Cent Law.<sup>93</sup> The FERC highlighted that based on Niagara and LILCO’s intervenor – as opposed to party – status, the FERC had no information of “precisely how many contracts and how many different projects” would be affected by its pre-

88. *Connecticut Light & Power II*, 71 F.E.R.C. ¶ 61,035, at 61,152-3 (citing *Anderson*, 460 U.S. at 785 n.5).

89. *Id.*

90. 71 F.E.R.C. ¶ 61,035, at 61,154.

91. As referenced by the FERC in *Connecticut Light & Power I*, the utility had been litigating the lawfulness of the rates in its state-imposed PPAs since 1987. After obtaining partial relief from the Connecticut Supreme Court regarding one aspect of its challenge – the rate that the municipal QF in question could charge for power – Connecticut Light & Power brought an action for declaratory and injunctive relief in United States district court alleging that Connecticut’s regulatory scheme for municipal resources recovery facilities was pre-empted by section 210 of PURPA. *Connecticut Light & Power v. South Eastern Connecticut Reg’l Res. Recovery Auth.*, 822 F. Supp. 888, 891 (D.Conn. 1993). There, the court deferred determination of the case on the merits holding that the issue of whether the statute was so pre-empted should be referred to the FERC under the doctrine of primary jurisdiction. *Id.*

92. 71 F.E.R.C. ¶ 61,035, at 61,154.

93. *Niagara Mohawk Power Corp. v. FERC*, 162 F. Supp. 2d 107, 120 (N.D.N.Y. 2001).

emption challenge.<sup>94</sup> As a result, the FERC denied petitions for reconsideration filed by Niagara and LILCO.<sup>95</sup>

In the *Orange & Rockland IV* case, both utilities objected to the FERC's determination that the petition filed by Orange & Rockland in 1987 was moot and requested the FERC deem contracts with QFs set at rates above avoided cost void *ab initio* or at least those entered since April 14, 1988.<sup>96</sup> The FERC denied both petitions stating that its April 14, 1988 order in *Orange & Rockland I* was to be applied only on a prospective basis.<sup>97</sup> Indeed, the FERC deemed it "appropriate at this date to agree to LILCO's and Niagara's requests and now make such a determination effective as to all pre-existing contracts."<sup>98</sup> Niagara and LILCO relied on *Connecticut Light & Power I* in arguing that, like the petitioner utility in that case, they had continually challenged the Six-Cent Law since 1987 when Orange & Rockland first filed its petition.<sup>99</sup> Thus, the utilities argued the Six-Cent Law, similar to the Connecticut statute, should be held inconsistent with and pre-empted by PURPA.<sup>100</sup>

The FERC did not agree with the reasoning of Niagara and LILCO's argument, noting that it had expressly declined to extend its ruling in *Connecticut Light & Power I* to pre-existing contracts where the issue of pre-emption could have been raised but was not to avoid "substantial injustice."<sup>101</sup> The FERC also noted that it reaffirmed this determination in *Connecticut Light & Power II* on reconsideration.<sup>102</sup> While the FERC acknowledged the Six-Cent Law had been under challenge since 1987, it declined to afford Niagara and LILCO the same status it has extended to Connecticut Light & Power. The FERC's reason in the first instance is that Niagara:

was and is only an intervener in this proceeding. Niagara . . . has never filed a separate petition seeking relief as to its own QF contracts. Moreover, since 1988, when [FERC] limited its order in this proceeding to future contracts, and then stayed the effectiveness of the order, Niagara . . . has made no filing at [FERC] or, to our knowledge, initiated state or federal court litigation seeking to challenge the rates in its own QF contracts as violating the avoided cost requirement of PURPA. This contrasts starkly with the continuing effort by [Connecticut Light & Power] to challenge its contract in state court, in federal court and then at this Commission.<sup>103</sup>

The FERC further rejected the notion that Niagara and LILCO had relied justifiably on the FERC's pre-emption determination in *Orange & Rockland I* since that order was to apply only prospectively and it's effec-

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94. *Connecticut Light & Power II*, 71 F.E.R.C. ¶ 61,035, at 61,152 (1995).

95. *Niagara*, 162 F. Supp. 2d at 120.

96. 71 F.E.R.C. ¶ 61,035, at 61,145 (1995).

97. *Id.* at 61,146.

98. 71 F.E.R.C. ¶ 61,035, at 61,146-47.

99. *Niagara Mohawk Power Corp. v. FERC*, 162 F. Supp. 2d 107, 120 (N.D.N.Y. 2001).

100. *Id.*

101. *Connecticut Light & Power II*, 71 F.E.R.C. ¶ 61,035, at 61,147 (1995).

102. *Niagara*, 162 F. Supp. 2d at 120.

103. *Id.*

tiveness was nevertheless almost immediately stayed.<sup>104</sup> “For the Commission, at this late date, suddenly to act to invalidate existing contracts that expressly had not been invalidated by its earlier orders in this proceeding would not be consistent with the need to avoid substantial injustice to the parties to such contracts.”<sup>105</sup>

#### A. District of Columbia Circuit Court Decision

On April 12, 1995, Niagara petitioned the United States Court of Appeals in the District of Columbia Circuit Court for review of two FERC actions: (1) refusal to apply its decision in *Connecticut Light & Power I* to all pre-existing contracts, and (2) its dismissal of Orange & Rockland’s petition as moot in *Orange & Rockland III*. In *Niagara v. FERC*,<sup>106</sup> the court dismissed Niagara’s appeal for want of jurisdiction.<sup>107</sup> The FERC argued therein that the challenged order:

d[id] nothing more than announce the interpretation of PURPA upon which [it] would rely in an enforcement action.<sup>108</sup> The orders [did] not determine any factual question such as “whether the rates . . . do or do not exceed avoided cost.” Nor are they binding upon the district court in which any enforcement action might be pursued.<sup>109</sup>

The FERC advised the court to stick to its determination in *Industrial Cogenerators v. FERC*<sup>110</sup> that Congress did not confer jurisdiction upon federal courts of appeal to review a declaratory order in which the FERC interprets PURPA.<sup>111</sup>

Niagara argued that *Industrial Cogenerators* was irrelevant because each of the orders which were challenged in *Niagara v. FERC* “announc[ed] a rule of general application and not [as in *Industrial Cogenerators*], a decision limited to a specific set of facts.”<sup>112</sup> To wit, Niagara argued “nothing in *Industrial Cogenerators* suggests that the procedure for judicial review must differ because the FERC eventually decided to resolve the issue in a declaratory ruling rather than through a rulemaking.”<sup>113</sup> Moreover, Niagara contended that the enforcement action urged by the FERC as an adequate remedy was ill-suited for review of FERC’s actions, since such

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104. *Niagara*, 162 F. Supp. 2d at 121.

105. 71 F.E.R.C. ¶ 61,035, at 61,147.

106. *Niagara v. FERC*, 117 F.3d 1485 (D.C. Cir. 1997).

107. *Id.*

108. Under the PURPA, the FERC may bring an enforcement action in federal district court against any state electrical regulatory authority which fails to implement FERC regulations designed to encourage cogeneration. 16 U.S.C. § 824a-3(h)(2)(A) (2001). Alternatively, a utility or cogenerator may petition the FERC to bring such an action and, if the agency declines, may itself sue the state regulatory authority in district court. *Id.* § 824a-3(h)(2)(B).

109. *Niagara*, 117 F.3d at 1487-88.

110. *Industrial Cogenerators v. FERC*, 47 F.3d 1231 (D.C. Cir. 1995).

111. *Niagara v. FERC*, 117 F.3d 1485, 1488 (D.C. Cir. 1997).

112. *Id.*

113. *Niagara*, 117 F.3d at 1488.

actions were aimed at non-compliant state commissions and could not be brought directly against the FERC.<sup>114</sup>

The District of Columbia Circuit recognized that it had “expressly reserved” on the question of whether it had jurisdiction to review the FERC order promulgated under PURPA which announced a “rule of general application, not tied to a particular set of facts potentially subject to the statutory enforcement scheme.”<sup>115</sup> While the court agreed with Niagara that “the orders . . . at issue announce[d] a rule of general application,” it answered the previously reserved question by concluding that Congress did not authorize it to review the FERC order announcing a rule of general application.<sup>116</sup>

An order that does no more than announce the Commission’s interpretation of PURPA or one of the agency’s implementing regulations is of no legal moment unless and until a district court adopts that interpretation when called upon to enforce PURPA. As a result, in the framework established by the Congress it is the district court that has been given the task of deciding in the first instance whether to adopt or reject a position advocated by the Commission. The courts of appeals accordingly do not have pre-enforcement jurisdiction to review a declaratory order that merely announces the position advocated by the FERC.<sup>117</sup>

In applying this underlying principle to the two orders of which Niagara sought judicial review, the court held:

The order issued by . . . FERC in the *Connecticut Light & Power* [I] proceeding is, as we said of the order at issue in *Industrial Cogenerators*, “much like a memorandum of law”; it does “nothing more than state how the FERC interprets its own regulations.” The district court in which *Connecticut Light & Power*’s suit is pending may or may not decide to defer to the Commission’s interpretation. Under the Administrative Procedure Act the district court must . . . determine whether the Commission’s interpretation of the statute is reasonable . . . [and] the district court is perfectly capable of performing even if the Commission chooses not to intervene.<sup>118</sup>

The court then stated that there would be an unneeded conflict for the court of appeals to review the order at that time.<sup>119</sup> The court continued its analysis by stating that Congress could not have intended the courts of appeals to review a declaratory order interpreting PURPA because it would upset the enforcement scheme created by section 210 to keep the district court the court of first instance.

Orange and Rockland is no different. The Commission’s declaratory order concerning the New York statute prescribing a six-cent rate had no legally binding effect; at most, it could have commanded some deference from a dis-

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114. *Id.* at 1488.

115. *Niagara*, 117 F.3d at 1488 (quoting *Industrial Cogenerators v. FERC*, 47 F.3d 1231, 1236 (D.C. 1995)).

116. *Niagara v. FERC*, 117 F.3d 1485, 1488 (D.C. Cir. 1997).

117. *Id.* (citing *Industrial Cogenerators*, 47 F.3d at 1235).

118. *Niagara*, 117 F.3d at 1488-89 (citing *Industrial Cogenerators*, 47 F.3d at 1235).

119. *Id.*

strict court in a future enforcement action. Thus the petitioners ask us, when they petition for review of the order vacating the 1988 declaration, to review an order that 'does nothing more than withdraw [an] ineffectual declaratory order.' As we held in *Industrial Cogenerators*, we are without jurisdiction to do that.<sup>120</sup>

### B. *Niagara's Complaint and Motion*

One month after it filed petitions for review of FERC's order in *Connecticut Light & Power II* and *Orange & Rockland III*, but well before the District of Columbia Circuit issued the above-referenced decision, Niagara filed the present complaint against the FERC, the PSC, and the individual commissioners of the PSC which it amended in July 1995.<sup>121</sup> Following this, the New York State Electric and Gas Corporation (NYSEG) moved and was granted leave to intervene as a plaintiff, and several QFs,<sup>122</sup> along with Independent Power Producers of New York, Inc. (IPPNY),<sup>123</sup> which later intervened as defendants.<sup>124</sup> All defendants moved to dismiss for lack of subject matter jurisdiction and failure to state a claim pursuant to Rule 12(b)(1) and (6) of the Federal Rules of Civil Procedure. After soliciting arguments from the parties as to whether she should rescue herself from determination of the case given her prior status as a PSC commissioner, and deciding that recusal was not required, Judge Pooler<sup>125</sup> scheduled oral arguments of defendant's motion for March 4, 1996.<sup>126</sup>

The FERC then moved to stay action in the case pending the above-referenced decision by the D.C. Circuit in *Niagara v. FERC*, which the motion judge (then Judge Pooler) accepted on submittal following oral argument of defendant's dispositive motions. On April 15, 1997, Judge Pooler granted the motion to stay the action, pending determination of the District of Columbia Circuit Court's decision on Niagara's petitions for review. On July 11, 1997, the District of Columbia Circuit Court issued its decision on the *Niagara v. FERC* case as discussed above.<sup>127</sup>

After Niagara entered a contingent settlement agreement involving New York's governor, its legislature and PSC designed to restructure or terminate some of its PPAs with QFs (the Master Restructuring Agreement). Niagara, IPPNY, and several QF interveners thereafter moved

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120. *Niagara*, 117 F.3d at 1488-89 (citing *Industrial Cogenerators*, 47 F.3d at 1235).

121. The PSC moved to intervene as a party plaintiff and Independent Power Producers of New York also moved to intervene as a defendant. By order dated February 25, 1998, the U.S. Magistrate denied these motions without prejudice subject to renewal upon this Court's determination of the parties' dispositive motions.

122. Intervening QFs include: Power City Partners, L.P., Ag-Energy, L.P., Seneca Power Partners, L.P., Sterling Power Partners, L.P., P&N Partners, L.P., Onodaga Cogeneration Limited Partnership, Project Orange Associates, L.P., United Development Group-Niagara, L.P., American Ref-Fuel Company, and Cogen Energy Technology, L.P.

123. IPPNY is a trade organization representing the interests of QFs statewide.

124. *Niagara Mohawk Power Corp. v. FERC*, 162 F. Supp. 2d 107, 123 (N.D.N.Y. 2001).

125. Now a Circuit Judge for the Second Circuit Court of Appeals to whom this matter was originally assigned.

126. *Niagara*, 162 F. Supp. 2d at 123.

127. *Id.*

jointly to again stay the proceedings in the Northern District of New York. This agreement was expected to resolve many of the issues in Niagara's lawsuit against several of the parties. Based on this, Judge Pooler issued an order staying the action until April 15, 1998.<sup>128</sup> In April 1998, Judge Pooler extended the stay to July 15, 1998, in view of the lingering uncertainty as to the closing date of the Master Restructuring Agreement.<sup>129</sup> On July 10, 1998, Judge Pooler signed a Stipulated Order executed by all the parties whereby Niagara's claims against all intervening defendant QFs were dismissed.<sup>130</sup> However, Niagara's claims were based on the six-cent PPAs which were not affected by the Master Restructuring Agreement were preserved.<sup>131</sup> After that, Niagara requested that in view of expiration of the long-standing stay, the court decide the pending motions to dismiss.<sup>132</sup>

#### V. NIAGARA'S PRESENT CLAIMS

In the first count of the amended complaint, Niagara argued the PSC's orders, which implemented New York's Six-Cent Law, constituted state regulation of the wholesale sale of electric power, an area pre-empted by the FPA.<sup>133</sup> Niagara also argued that the Six-Cent Law and the PSC's implementation of the same: (1) violated the PURPA and its implementing rules and (2) violated the Supremacy Clause of the United States Constitution.<sup>134</sup> In its second cause of action, Niagara alleged that the FERC's decision to refuse to apply the avoided cost limitation of PURPA and its own regulations to Niagara's existing six-cent PPAs was arbitrary, capricious, an abuse of discretion, not in accordance with law, in excess of statutory authority, and otherwise violative of the Administrative Procedural Act (APA).<sup>135</sup> Finally, Niagara alleged that FERC's action or inaction violated PURPA's incremental cost limitation.<sup>136</sup>

In a letter dated August 20, 1998, Niagara advised the court that the utility believes it will pay approximately ninety-three million dollars more than current estimates of its LRACs over the life of the agreements. Niagara acknowledged that the figure is less than the sum at stake prior to execution of the Master Restructuring Agreement, it contended that the amount of money still at issue is nevertheless "substantial," compelling it

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128. *Niagara*, 162 F. Supp. 2d at 123.

129. *Id.*

130. *Niagara Mohawk Power Corp. v. FERC*, 162 F. Supp. 2d 107, 123 (N.D.N.Y. 2001).

131. *Id.*

132. *Niagara*, 162 F. Supp. 2d at 123.

133. *Id.*

134. *Niagara*, 162 F. Supp. 2d at 123.

135. The APA, codified at sections 551 through 555 of title 5 of the United States Code, prescribes procedures by which federal agencies may promulgate rules and make adjudicative determinations. The APA also establishes a right to judicial review of such rulemaking and agency decisions. The APA also serves as a default mechanism for review in instances where review procedures are not specified in a governing statute. *Brown v. Massachusetts*, 487 U.S. 879 (1988).

136. *Niagara Mohawk Power Corp. v. FERC*, 162 F. Supp. 2d 107, 124 (N.D.N.Y. 2001).



to proceed with the case.<sup>137</sup>

## VI. DISCUSSION

Following review of the defendants motion to dismiss, the court accepted all allegations in the amended complaint as true, drew all inferences in favor of Niagara, and found dismissal appropriate.<sup>138</sup>

### A. Motion to Dismiss the Claims Against FERC

#### 1. Claims Pursuant to PURPA

The FERC asserted that Niagara's claim against it is based on section 210 of the PURPA must be dismissed for failure to state a claim.<sup>139</sup> The pleading alleges: "FERC's refusal to apply the incremental and avoided cost limitations of PURPA and its regulations under PURPA to Niagara's existing QF contracts constitute a violation of the incremental cost limitation of PURPA."<sup>140</sup> However, PURPA section 210 does not provide a right of action for a party aggrieved by the FERC's alleged failure to implement these statutory guidelines.

Subsection (A) of PURPA section 210(h)(2) authorizes the FERC to enforce state implementation of its regulations against a non-complaint state regulatory authority or non-regulated utility in district court, while subsection (B) allows an electric utility or QF to petition the FERC to commence such an action.<sup>141</sup> Only if the FERC declines to do so may the utility or QF commence its own action to force a state agency or non-regulated utility to comply with the FERC's regulations.<sup>142</sup> Niagara sued the FERC itself for failure to comply with PURPA's rate cap without citing section 210(h) of PURPA in its complaint or stating that it complied with the administrative pre-requisite of petitioning the FERC to commence an enforcement action. But the "enforcement" contemplated under the statute is of the FERC regulations against non-compliant state commissions.<sup>143</sup> Niagara "turns PURPA inside out by seeking to enforce the statute's alleged rate cap against FERC."<sup>144</sup> Niagara admits in its memorandum of law in opposition to defendant's motions that an enforcement action under section 210 of PURPA against the PSC "does not bring FERC itself into court."<sup>145</sup> Therefore, the court dismissed Niagara's

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137. *Id.*

138. *Albright v. Oliver*, 510 U.S. 266, 268 (1994); *McEvoy v. Spencer*, 124 F.3d 92, 95 (2d Cir. 1997).

139. *Niagara*, 162 F. Supp. 2d at 124.

140. First Amended Complaint, at ¶ 38, *Niagara Mohawk Power Corp. v. FERC*, 162 F. Supp. 2d 107, 124 (N.D.N.Y. 2001).

141. *Niagara*, 162 F. Supp. 2d at 125.

142. 16 U.S.C. § 824a-3(h)(2) (2001).

143. *Id.* § 824a-3(f),(h).

144. *NYSEG v. Saranac Power Partners, L.P.*, 117 F. Supp. 2d 211, 255 (N.D.N.Y. 2000).

145. *Niagara Mohawk Power Corp. v. FERC*, 162 F. Supp. 2d 107, 125 (N.D.N.Y. 2001).

claim.<sup>146</sup>

## 2. Claims Pursuant to the APA

### a. Failure to State a Claim

The court ruled that Niagara's claim that the FERC's refusal to invalidate existing QF contracts pursuant to PURPA violated the APA, failed to state a cause of action upon which relief can be granted, and must be dismissed pursuant to Federal Rules of Civil Procedure 12(b)(6).<sup>147</sup>

The court agreed with defendants that, because no statute clearly provides a right of review of the FERC decisions interpreting PURPA, no such right exists under the APA unless Niagara demonstrates it has no other remedy at law.<sup>148</sup> Defendants argued that PURPA's enforcement scheme and Niagara's statutory right to sue the PSC pursuant to section 210(h) of PURPA is an adequate remedy thus precluding judicial review.<sup>149</sup> Niagara contended that it cannot get a complete remedy by suing the PSC alone.<sup>150</sup> Niagara went on to say that the FERC's presence is needed as a defendant when judicial review of a FERC ruling is the issue.<sup>151</sup>

As discussed above, the District of Columbia Circuit Court ruled that the FERC is not a necessary party to an enforcement action, even where a district court is called upon to review the reasonableness or applicability of a regulatory interpretation by the agency.<sup>152</sup> The court went on to state that to the extent the District of Columbia Circuit Court's decision in *Industrial Cogenerators* left any doubt about the sufficiency of PURPA's enforcement plan in addressing Niagara's claims in this case, its decision in *Niagara v. FERC* erased it.<sup>153</sup> Because Niagara is capable of getting complete relief in the context of its PURPA section 210(h) enforcement action against the PSC, where the court was fully equipped to accept or reject the FERC's interpretation of PURPA and its regulations in *Connecticut Light & Power I* and *Orange & Rockland III*, Niagara has no right to APA review of these orders.<sup>154</sup>

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146. *Id.*

147. *Niagara*, 162 F. Supp. 2d at 133.

148. The APA contemplates judicial review of "agency action made reviewable by statute and final agency action for which there is no other remedy in a court." 5 U.S.C. § 704 (2001); *see also* *Brown v. Massachusetts*, 487 U.S. 879, 903 (1988).

149. *Niagara*, 162 F. Supp. 2d at 125.

150. *Id.*

151. *Niagara*, 162 F. Supp. 2d at 125.

152. *Niagara v. FERC*, 117 F.3d 1485, 1488 (D.C. Cir. 1997).

153. *Niagara Mohawk Power Corp. v. FERC*, 162 F. Supp. 2d 107, 126 (N.D.N.Y. 2001).

154. *New York City Employees' Retirement Sys. (NYCERS) v. Sec. & Exchange Comm'n*, 45 F.3d 7, 14 (2d Cir. 1995) (litigants with remedies against parties other than administrative agency which rendered adverse determination are not entitled to APA review of said agency's action); *Marlowe v. United States Department of Education*, 820 F.2d 581, 583 (2d Cir. 1987).

## b. Subject Matter Jurisdiction

The FERC also argued in the alternative, in case Niagara's claims against the FERC were not fatally flawed by failure to state a claim, that the court lacked subject matter jurisdiction over Niagara's claims.<sup>155</sup> The FERC alleged: (1) there is no justifiable controversy because the declaratory orders at issue have no present effect on Niagara and (2) the claims herein are not ripe for adjudication.<sup>156</sup> The FERC argued that the issues that Niagara presented are not purely legal since it makes several factual claims in its complaint including allegations concerning "the massive continuing financial burden imposed on Niagara and its ratepayers; the non-voluntary nature of the contracts; the QF's deliberate reliance on law and regulations which they knew were subject to change; . . . and the fact that New York's Six-Cent Law has been under continuous challenge since at least 1987."<sup>157</sup> Niagara also alleged it was "at least as diligent as [Connecticut Light & Power] in challenging the state requirement to purchase QF power at a rate above avoided cost, and that as to some of the contracts at issue in this case application of federal law [PURPA] would reduce the rates charged without any amendment of the pricing provisions of the contracts."<sup>158</sup> The FERC argued that resolution of these factual matters must occur, if at all, in the context of PSC administrative proceedings or enforcement action under section 210(h) of PURPA.<sup>159</sup> Niagara failed to respond to this argument.

Additionally, FERC argued the declaratory orders challenged by Niagara were not final agency action since no legal right or obligations flow from them.<sup>160</sup> Niagara did not dispute this argument, nor could it in light of the District of Columbia Circuit Court's opinion in *Niagara v. FERC* concerning the required effect of the *Connecticut Light & Power I* and *Orange*

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155. *Niagara*, 162 F. Supp. 2d at 133.

156. In the context of administrative law, the "ripeness" doctrine "prevent[s] the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies," and also "protect[s] the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties." *Abbott Labs v. Gardner*, 387 U.S. 136, 148-49 (1967). In applying the doctrine, courts must consider:

- (1) whether the issues presented are purely legal;
- (2) whether the challenged agency action constitutes "final agency action" within the meaning of the Administrative Procedure Act;
- (3) whether the challenged agency action has or will have a direct and immediate impact on the petitioner; and
- (4) whether the resolution of the issues will foster, rather than impede, effective enforcement and administration by that agency.

*Occidental Chem. Co. v. FERC*, 869 F.2d 127, 129 (2d Cir. 1989) (quoting *Pennzoil Co. v. FERC*, 742 F.2d 242, 244 (5th Cir. 1984)).

157. *Niagara*, 162 F. Supp. 2d at 133.

158. *Id.*

159. *Niagara*, 162 F. Supp. 2d at 133.

160. *Id.* at 134.

& *Rockland III* orders.<sup>161</sup> In a related argument, the FERC alleged that the subject orders neither had nor have any pressing impact on Niagara because the utility kept whatever rights it had to implement PURPA against the PSC.<sup>162</sup> Niagara responded by stating that the FERC attempted to “define the legal framework within which the state regulatory commissions must administer PURPA in a manner that adversely affects Niagara’s right to obtain relief from six-cent payments.” The FERC’s decisions in *Connecticut Light & Power II* and *Orange & Rockland IV* do not have a present effect on its legal rights.<sup>163</sup> As discussed above, Niagara did not actually challenge FERC’s definition of the legal framework in which the PSC must administer PURPA and attendant New York law.<sup>164</sup> Instead, Niagara challenged FERC’s refusal to apply it retroactively to invalidate existing contracts, a decision that is reserved to the FERC’s enforcement discretion.<sup>165</sup> The FERC eventually averred that judicial intervention would interfere with the orderly course of the enforcement mechanism provided by PURPA.<sup>166</sup> As discussed above, the notion that the FERC’s orders are not “final agency action” and that pre-enforcement review of them would “disrupt the elaborate enforcement scheme that the Congress created” in PURPA was affirmed by the District of Columbia Circuit Court in *Niagara v. FERC*.<sup>167</sup>

As a result, the court held an absence of subject matter jurisdiction as the second independent basis for dismissing Niagara’s claims against the FERC.<sup>168</sup>

## VI. CONCLUSION

Niagara asserted the Six-Cent Law set for certain energy purchases conflicted with PURPA, which provided a rate ceiling. Niagara alleged the Six-Cent Law implemented by New York State: (1) violated PURPA and its implementing rules and (2) allowed a legal cause of action against the FERC in its decision to refuse to apply the avoided cost limitation of PURPA and its own regulations to the existing Six-Cent Law. Niagara further contended that the FERC’s action or inaction violates PURPA’s incremental cost limitation. The FERC responded by asserting Niagara’s claim against it based on section 210 of PURPA must be dismissed for failure to state a claim. Nowhere in the complaint did Niagara state a legal ground for proceeding against the FERC based directly on PURPA. The defendant’s motions to dismiss Niagara’s complaint pursuant to Federal

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161. *Niagara v. FERC*, 117 F.3d 1485, 1488 (D.C. Cir. 1997).

162. *Niagara Mohawk Power Corp. v. FERC*, 162 F. Supp. 2d 107, 134 (N.D.N.Y. 2001).

163. *Id.*

164. *Niagara*, 162 F. Supp. 2d at 134.

165. *Heckler v. Chaney*, 470 U.S. 821, 831 (1985).

166. *Niagara*, 162 F. Supp. 2d at 134.

167. *Niagara v. FERC*, 117 F.3d 1437, 1489 (D.C. Cir. 1997).

168. *Niagara Mohawk Power Corp. v. FERC*, 162 F. Supp. 2d 107, 136 (N.D.N.Y. 2001).

Rules of Civil Procedure 12(b) were granted in their entirety.

*Rohit C. Sharma*

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