# No. 15-20

## THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

ALLCO FINANCE LIMITED,
*Plaintiff-Appellant*

v.

ROBERT KLEE, in his Official Capacity as Commissioner of the Connecticut Department of Energy and Environmental Protection,
*Defendant-Appellee*

and

NUMBER NINE WIND FARM LLC, FUSION SOLAR CENTER LLC, and the CONNECTICUT OFFICE OF CONSUMER COUNSEL,
*Intervenors-Appellees*,

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Appeal from the United States District Court for the District of Connecticut
No. 3:13-cv-01874
Hon. Janet Bond Arterton

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**REPLY BRIEF OF APPELLANT**

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## ARGUMENT

Rather than confront and respond to Allco's claims and arguments, the Appellees instead mischaracterize them. Regarding Article III standing, Allco's argument is simple and straightforward: It suffered an injury-in-fact when it was forced to compete in the Commissioner's procurement with large generators such as Number Nine Wind Farm, which are not Qualifying Facilities (or "QFs") under the Public Utility Regulatory Policies Act ("PURPA") (*see*, 16 U.S.C. § 796(17)(A)). Its injury-in-fact was fairly traceable to the violation of federal law that Allco alleges: namely, that the Federal Power Act does not permit a State to compel a wholesale electricity transaction, unless the transaction is with a Qualifying Facility, and thus, under federal law, Number Nine Wind Farm should have been excluded from the procurement; and Allco's injury is redressable, because its projects ranked high on the Commissioner's list and thus were likely to have been chosen but for Number Nine Wind Farm's selection, and because the Commissioner has indicated its intent to conduct future procurements in which Allco will participate.

The Commissioner's main argument is that Allco lacked standing because it fell outside the "zone of interests" protected by the Federal Power Act ("FPA"). The "zone of interests," however, is a test for prudential standing, not Article III standing. And the Commission fails to address either the cases holding that the zone-of-interests analysis simply does not apply in Supremacy Clause cases, or Allco's argument that, as a Qualifying Facility that Congress specifically sought to benefit through PURPA, its interests fall squarely within those Congress sought to protect.

On preemption, Allco's claim is again simple: in the Federal Power Act, Congress has occupied the field of wholesale sales of electricity. Thus, States may not enter that field of regulation. In PURPA, Congress subsequently carved out a role for States to regulate wholesale sales by Qualifying Facilities; but, with respect to wholesale sales by other generators, including Number Nine Wind Farm, States are not permitted to regulate. Here, the Commissioner plainly transgressed that line when he compelled a wholesale transaction – the Commission directed the utilities to enter wholesale contracts with counterparties of his choosing. Compelling a wholesale transaction –

one that would not have taken place but for the State's compulsion – plainly involves the regulation of wholesale sales, and thus falls squarely within the field that Congress has occupied.

The Commissioner's arguments to the contrary simply do not engage with this basic principle. The Commissioner contends that States retain significant authority to direct a utility's procurement decisions, including by requiring utilities to secure power generated by certain types of generation facilities. But such programs still leave the utilities themselves free to determine which particular generators to contract with. Those programs do not involve compelling particular wholesale transactions. Likewise, the Commissioner notes that States retain authority to review the prudence of utility purchase decisions. But prudence review involves an after-the-fact review of the utility's business judgment in entering into a particular transaction. Prudence review does not involve compelling a transaction in the first place.

What is more, the Commissioner's violation of the Federal Power Act is no mere technical intrusion into a federal field; rather, it is conflict with the Federal Energy Regulatory Commission's ("FERC") market-based approach to regulating the New England region. A market-based system, in which generators compete with one another to enter wholesale electricity contracts with willing purchasers, is simply incompatible with a scheme in which the State, through a command-and-control process, directs the utility as to which contracts it shall enter. The District Court's order should be reversed.

## I. Allco has established standing.

Congress enacted PURPA to address the conditions in the electricity market that evolved since the passage of title II of the FPA in 1935. *See, New York v. FERC*, 535 U.S. 1, 9 (2002) ("*New York*"). In Title II of PURPA, Congress amended the Federal Power Act and enacted Section 210 of PURPA in order to create a new class of "favored cogeneration and small power facilities" in the overall regulatory scheme of the Nation's energy markets. *FERC v. Mississippi*, 456 U.S. 742, 751 (1982).[1] Allco, as a favored Qualifying Facility under PURPA, is *precisely* the type of plaintiff Congress intended to benefit when it

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[1] Section 210(a) of PURPA provides all QFs with a guaranteed federal right to sell a QF's energy and capacity to electric utilities at that a calculable price. *See*, 16 U.S.C. §824a-3(a); 18 C.F.R. §292.304. That right is enforceable as a rule under the Federal Power Act. (*see*, 16 U.S.C. §824a-3(h)(1)). Sales by Qualifying Facilities are also given preference under Sections 205 and 206 of the Federal Power Act. (*see*, 18 C.F.R. §292.601(c)(1)).

created the new class of market participant in the Nation's energy markets. *See*, *S. Cal. Edison Co. v. FERC*, 195 F.3d 17, 23 (D.C. Cir. 1999) ("in deciding to confer substantial benefits on 'small power production facilities' Congress took care to define the class of potential beneficiaries.")

**A. Allco has shown an injury-in-fact.**

Allco suffered an injury-in-fact when it was forced to compete in the Commissioner's procurement with large generators such as Number Nine Wind Farm, which are not Qualifying Facilities. Congress relaxed the ban on State's involvement in the area of wholesale sales in order to benefit Qualifying Facilities, such as Allco's. Thus any procurement that attempts to go beyond the limits set by Congress harms the very market participants that Congress intended to benefit. Allco is not required to show that it would have received a contract, although the Commissioner's ranking [A.67] indicate that would have been likely. *Clinton v. City of New York*, 524 U.S. 417, 433 n.22 (1998) ("[A] denial of a benefit in the bargaining process can itself create an Article III injury, irrespective of the end result.") Allco incurred costs in developing Qualifying Facility projects precisely because Congress designed them as favored market participants.

The Commissioner's actions are compounded by the effect that the addition of the selected projects affect the utilities' cost structure in a manner that will cause Allco to earn lower profit from future energy sales a under PURPA contract. Contrary to the Commissioner's assertions [Com. Br. at 13], this is not new argument. As stated in Allco's opening brief it was presented to the District Court in the briefing and at oral argument. [Allco's Opening Brief ("Op. Br.") 34-38]. As Allco explained in its opening brief [Op. Br. 34-38], there is a clear displacement effect that purchases have on a utility's cost structure.[2]

The Commissioner asserts that Allco did not suffer an injury because "this was not a procurement conducted under PURPA but one conducted solely pursuant to state law." [Commissioner's Brief ("Com.

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[2] The Commissioner's only substantive response was to make the wild assertion that Connecticut is a PURPA-free zone because allegedly the Connecticut Utilities "have no costs to avoid". [Com. Br. at 19]. If the Connecticut Utilities had no costs to avoid, then electricity would be virtually free in Connecticut and the Commissioner's calculation of avoided costs [A. 67] would have made no sense. In addition, the Commissioner's assertion that one of the Connecticut Utilities is exempt from PURPA is not true. *The United Illuminating Company*, 123 FERC ¶ 61,269 at P1 (2008).

Br.") at 14]. What the Commissioner misapprehends, however, is that any wholesale electricity procurement is governed by the FPA and PURPA. Neither the FPA nor PURPA is optional based upon whether the Commissioner decides to label it a "PURPA procurement" or something else. For that reason, the Commissioner's claim that Allco's opening brief footnote 10 concedes that the contract Allco needs is not available in Connecticut is plainly mistaken. The fact is that the Section 6 contracts are PURPA and FPA-governed contracts. A State is not prohibited from having multiple programs that comply with PURPA. A State is required to implement PURPA and one of those requirements is the availability of a long-term contract. 18 C.F.R. §292.304(d)(2)(ii). Here, the State of Connecticut has authorized the Commissioner the responsibility for long-term contracts. It is the Commissioner, not Connecticut's Public Utilities Regulatory Authority ("PURA"), who compels agreements with the selected generators and the corresponding change in retail rates to Connecticut retail customers.[3] Moreover, Allco has never asserted that a contract at

[3] *See*, *Application for Approval of Class I Renewable Power Purchase Agreements Resulting from Department of Energy and Environmental Protection's July 8, 2013 Requests for Proposals pursuant to Section 6*

avoided costs will not work for it. [Com. Br. at 16]. To the contrary, as evidenced here, the Commissioner calculated long-term avoided costs [A. 67], and Allco has asserted on multiple occasions that a contract at those calculated long-term avoided costs would, in fact, work for it.

**B. Allco established causation.**

The District Court correctly did not dispute that Allco could show causation. Allco's injury-in-fact was fairly traceable to the violation of federal law that Allco alleges: namely, that the Federal Power Act does not permit a State to compel a wholesale electricity transaction, unless the transaction is with a Qualifying Facility, and thus, under federal law, Number Nine Wind Farm should have been excluded from the procurement.

**C. Allco's injury is redressable.**

Allco's injury is redressable, because its projects ranked high on the Commissioner's list and thus were likely to have been chosen but for

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*of P.A. 13-303,* Final Decision, PURA Docket No. 13-09-19 (October 23, 2013) ("By Public Act 13-303, the Commissioner of the Department of Energy and Environmental Protection, and not the Public Utilities Regulatory Authority, determines whether the expenditure of ratepayer money for these Class I renewable power purchase agreements provides a net benefit to ratepayers.") (available at http://www.dpuc.state.ct.us/dockcurr.nsf/8e6fc37a54110e3e852576190052b64d/8b29b17e17254cd285257c0d006af56e?OpenDocument.)

Number Nine Wind Farm's selection, and because the Commissioner has indicated, and has indeed already announced[4], his intent to conduct future procurements in which Allco will participate.[5]

Thus, at the very least, an order in Allco's favor in this case will prevent the Commissioner from engaging in the same unlawful conduct in his just announced procurement. In addition, Allco's injuries could also be addressed by an order compelling the Commissioner to direct the Connecticut Utilities to enter into a contract with Allco's Qualifying Facility as a remedy under 42 U.S.C. §1983.

**D. Allco has prudential standing.**

The Commissioner's main argument is that Allco lacked standing because it fell outside the "zone of interests" protected by the Federal

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[4] *See*, Op. Br. at 33.

[5] The Appellees admit that the existence of federal jurisdiction depends upon the facts as they existed when the complaint was filed. [Int. Br. 4], yet the Appellees are trying to continually move that determination date by claiming that the bids received have expired. As pointed out in Allco's opening brief, the Commissioner was incorrect that the bids have "expired". After six months the bidders merely had the right to withdraw their bids and the Commissioner does not claim that anyone has withdrawn their bid. Moreover, at the time that Allco filed the complaint, the bids were not yet six months old. Thus, if standing is determined when the complaint was filed, then the Appellee's statements regarding the status of the bids as of today are simply irrelevant.

Power Act. The "zone of interests," however, is a test for prudential standing, not Article III standing. And the Commission fails to address either the cases holding that the zone-of-interests analysis simply does not apply in Supremacy Clause cases, or Allco's argument that, as a market participant in the Nation's energy markets that Congress specifically sought to benefit through PURPA, its interests fall squarely within those Congress sought to protect.

## II. The Appellees's mischaracterizations cannot obscure the bright line between wholesale sales and other actions that may have only an indirect effect on the electricity market.

The singular "but for" act that brought the wholesale transactions into being in this case was state action compelling "the sale of electric energy at wholesale in interstate commerce".[6] *See*, FPA §201(b)(1). The Federal Power Act "delegated to [FERC] exclusive authority to regulate the transmission and sale at wholesale of electric energy in interstate commerce, without regard to the source of production". *New England Power Co. v. New Hampshire*, 455 U.S. 331, 340 (1982). That straightforward and unambiguous statutory delegation is found in the

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[6] Contrary to the Commissioner contention that if "Plaintiff wins, it loses" [Com. Br. at 9], Allco is not challenging Section 6 on its face. The challenge is based upon the application compelling wholesale transactions with other than Qualifying Facilities.

first sentence of FPA Section 201(b)(1).[7] *FPC v. S. Cal. Edison Co.*, 376 U.S. 205, 215 (1964) (Congress left "no power in the states to regulate … sales for resale in interstate commerce.").

In addition to the exclusive jurisdiction conferred over wholesale sales, the second sentence of FPA Section 201(b)(1) gives the FERC the exclusive jurisdiction over the *facilities* used for the sale of electric energy at wholesale in interstate commerce. The FERC's jurisdiction over facilities has an exception that provides the FERC:

> shall not have jurisdiction, except as specifically provided in this Part and the Part next following, over facilities used for the generation of electric energy or over facilities used in local distribution or only for the transmission of electric energy in intrastate commerce, or over facilities for the transmission of electric energy consumed wholly by the transmitter.

The plain language of the statute makes it clear that whatever authority is exercisable by a State under the State's authority over facilities does not extend to wholesale sales.[8] That is the bright-line in

[7] 16 U.S.C. §824. The only exceptions to FERC's exclusive jurisdiction over wholesale sales, which are not relevant here, relate to retail sales and to certain sales related to hydroelectric facilities.

[8] The language in Section 201(a) of the FPA referencing State authority is a mere policy declaration that does not affect the plain language in the first sentence of Section 201(b)(1). *See, New York*, 535 U.S. at 22 ("we have described the precise reserved state powers language in §

this case. The State's reserved authority to regulate facilities is of no relevance to the central issue, which is whether the specific transactions are "the sale of electric energy at wholesale in interstate commerce", and if they were, did the Commissioner exercise any authority over such wholesale sales. The answer to both in this case is unquestionably yes. The power purchase agreements with Number Nine Wind and Fusion Solar are clearly wholesale sales of electric energy in interstate commerce. In addition, those wholesale sales only came into being because of the singular act of the Commissioner compelling those transactions. Thus, the Commissioner acted in a field of exclusive Federal jurisdiction, and his action is pre-empted and the contracts void.[9] *See Silkwood v. Kerr-McGee Corp.*, 464 U.S. at 248

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201(a) as a mere policy declaration that cannot nullify a clear and specific grant of jurisdiction, even if the particular grant seems inconsistent with the broadly expressed purpose.) (internal quotations and citations omitted.)

[9] *See also*, *PPL EnergyPlus LLC v. Solomon*, 766 F.3d 241, 253-254 (3d Cir. 2014), *petitions for cert. filed*, Nos. 14-634, 14-694 ("*Solomon*"), where the Third Circuit rejected the argument that a State's authority over new generation or utility portfolio management can provide an exception to FERC's Sale Jurisdiction:

> LCAPP's defenders respond that New Jersey's interference with capacity prices does not trigger

(1984) ("If Congress evidences an intent to occupy a given field, any state law falling within that field is pre-empted.").[10]

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> preemption because it is a lawful exercise of the state's authority to promote new generation resources. New Jersey does have authority over local energy matters, including the construction of power plants. *See, e.g., So. Cal. Edison Co. & San Diego Gas & Elec. Co.*, 71 FERC ¶ 61,269, at 3 (1995). But LCAPP incentivizes the construction of new power plants by regulating the rates new electric generators will receive for their capacity. New Jersey could have used other means to achieve its policy goals. Because Congress has evinced its intent to occupy the entire field of interstate capacity rates, however, New Jersey's reasons for regulating in the federal field cannot save its effort: "any state law falling within that [federal] field is preempted." *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 248 (1984).

[10] The Commissioner also suggests that he did not set a rate here. Setting a rate is only part of regulating and compelling a wholesale transaction. Exclusive Federal jurisdiction applies to "any rule, regulation, practice, or contract affecting such rate, charge, or classification." (*see*, 16 U.S.C. § 824e). Whether or not the Commissioner set a rate is not determinative of whether he intruded into a field of exclusive Federal regulation. Section 201(b)(1) of the FPA provides exclusive jurisdiction for wholesale sales, not just prices or rates. So even assuming *arguendo* that the Commissioner did not fix a rate (an argument rejected in *Solomon* and *PPL EnergyPlus LLC v. Nazarian,* 753 F.3d 467 (4th Cir. 2014), *petitions for cert. filed,* Nos. 14-614, 14-623 ("*Nazarian*")), State authority is pre-empted in all respects over "the sale of electric energy at wholesale" and there is no dispute that the transactions at issue fall within that category.

## III. The Commissioner's portfolio management authority, and his authority over "local facilities" does not permit the intrusion in a field of exclusive Federal jurisdiction.

Fundamentally, the Appellees confuse the bright line between wholesale transactions versus other actions of States that may have an indirect effect on wholesale prices. This case is not about trying to decide what actions of a State have indirect effects on the wholesale market. Rather this case is about a State compelling a specific and identifiable wholesale energy transaction. The wholesale transactions between the Connecticut Utilities and the Intervenors would not have occurred but for the state action of the Commissioner compelling the transaction.

The Commissioner agrees that the scope of the field pre-empted by the FPA is "the sale of electric energy at wholesale in interstate commerce. [Com. Br. at 5]. The Commissioner also agrees that the exclusive jurisdiction is not limited to rates but broadly includes the transaction itself. [Com. Br. at 5-6]. Yet the Commissioner still seeks to use vague notion of authority over portfolio management to make an end run around FERC's exclusive jurisdiction over any "sale of electric energy at wholesale". Yet the Commissioner cannot cite a single case that that says a State can compel a specific wholesale energy transaction.

The Commissioner refers to language this Court's opinion in *Entergy*[11] and from the Supreme Court's opinion in *New York,* 535 U.S. at 24 referencing State jurisdiction of local service issues, demand side management (which is an absence of an energy transaction), resource planning, utility generation and resource portfolios, and retail stranded cost charges. But that language from those cases says nothing about that authority reducing FERC's exclusive jurisdiction over wholesale sales.

Indeed, the Commissioner's argument in this case would create a massive loophole in the Federal Power Act that would destroy FERC's ability to regulate the market in a uniform and coherent manner. As

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[11] *See, Entergy Nuclear Vermont Yankee, LLC v. Shumlin*, 733 F.3d 393, 417 (2d Cir. 2013) ("Vermont Legislature can direct retail utilities 'purchase electricity from an environmentally friendly power producer in California or a cogeneration facility in Oklahoma,' if it so chooses".) That statement in *Entergy* quoted from the Supreme Court's opinion in *New York* in which the Supreme Court observed merely that the "purchase electricity from an environmentally friendly power producer in California or a cogeneration facility in Oklahoma" (*New York,* 535 U.S. at 8) was physically possible. It neither says nor implies anything about the power of a State to compel a wholesale transaction from such facilities.

noted in Allco's opening brief, FERC has chosen a market-based approach to regulation, in which some generators sell their output into a wholesale auction administered by a FERC-regulated entity known as ISO-New England, and others enter voluntary bilateral contracts with willing purchasers. Such a market-based system simply cannot function as FERC intended it if States are free to mandate involuntary wholesale transactions that, but for the State's intervention into the wholesale marketplace, would never have taken place. Under the guise of regulating utility purchasing decisions, States could simply take over the entire wholesale market, effectively eliminating FERC's regulatory power and supplanting its chosen regulatory approach. The Federal Power Act prevents even the possibility of such interference by excluding States altogether from the field of wholesale sales. *See Nazarian*, 763 F.3d at 477 (holding that "[e]ven if collision between the state and federal regulation in this case is not an inevitable consequence, it is sufficiently likely to warrant invalidating [a State] program in order to assure the effectuation of the comprehensive federal regulation ordained by Congress.") (quotation marks omitted). Of course, with respect to Qualifying Facilities under PURPA – which by definition are small and thus pose less of a threat to a uniform federal regulatory scheme – Congress has reached a different conclusion and *has* authorized State regulation of wholesale sales. That is why, contrary to the Commissioner's assertions, Allco can simultaneously object to the contract awarded to Number Nine Wind Farm – which is not a Qualifying Facility – and contend that its injuries would be redressed by a contract awarded to one of Allco's own Qualifying Facilities.[12]

The issue here is a narrow one which does not detract from a State's ability to influence utilities' purchasing decisions to buy from certain types of generation, or reviewing those for prudence in connection with retail rate recovery. Yet, there needs to be a line drawn somewhere and Congress drew the bright-line in the first sentence of

[12] Moreover, the Commissioner's interpretation would render superfluous the authority given to the States under Section 210 of the PURPA to compel wholesale energy transactions but only if two conditions were met: first, that the facility be a qualifying facility, and second, that the contract price be equal to the utility's avoided costs (thus insuring ratepayer neutrality). Those two conditions would be superfluous because a State could just do an end run around any restrictions on compelling wholesale sales merely by cleverly structuring a request for proposals or even in the absence of a request, under the guise of letting sellers know what offers would be accepted.

FPA Section 201(b)(1) at wholesale sales in interstate commerce, which the contracts with the Intervenors unquestionably are.[13]

## IV. The Commissioner's dire predictions of what will happen to Connecticut's other policies if the Court rules in Allco's favor are irrelevant and simply wrong.

The Commissioner's dire predictions of all the other programs that would allegedly be pre-empted if Allco's argument were [t]aken to its logical conclusion" [Com. Br. at 35], are simply irrelevant and incorrect.

The laundry list of programs that the Commissioner asserts would be adversely affected by a decision in Allco's favor [Com. Br. 35-36] simply underscores the Commissioner's misunderstanding of the issues. First, energy efficiency programs are not affected for two reasons: they involve no sale of electric energy, and they are retail (not wholesale) programs. A program that results in the absence of consumption is not a wholesale sale of energy in interstate commerce. In addition, a retail

[13] The Commissioner also references a State's authority regarding after the fact prudence review [Com. Br. at 31, fn. 14]. Allco has never argued that the State is prevented from deciding whether or not it will allow the recovery of certain costs in a utility's retail rates. Allowing recovery of costs in retail rates of the costs of contracts negotiated by utility's free from the compulsion of state action, however, has nothing to do with compelling a specific wholesale energy transaction.

program is not subject to FERC's jurisdiction, and Connecticut's energy efficiency programs are retail programs.[14]

Similarly, demand response programs are a retail program, and are not transactions for the wholesale sale of energy. The Commissioner admits that all the programs he mentions "reduce electric consumption" [Com. Br. at 36]. Thus they are transactions that involve no sale of energy, and are retail programs, both of which are not subject to FERC's jurisdiction. Thus the Commissioner's assertion that "Allco's interpretation would find all of these state energy planning efforts unconstitutional" is patently false.

The simple fact, as the results of the Commissioner's request for proposals demonstrates, is that there a more than enough Qualifying Facilities with which the State of Connecticut can compel wholesale transactions in full compliance with the FPA and PURPA, and still achieve all the renewable energy and system goals sought by the State of Connecticut. The Commissioner has no one to blame but himself if he refuses to follow the path that Congress has permitted.

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[14] *See,* http://www.energizect.com/about/CEEF. "CEEF [Connecticut Energy Efficiency Fund] supports a variety of programs that provide financial incentives to help Connecticut consumers reduce the amount of energy used in their homes and businesses.

## V. A market based tariff filing with FERC does not bring life back to a void agreement.

Appellees argue that the fact that the State compelled the wholesale transaction is irrelevant because whatever infirmity that is caused by such compulsion will be cured by Appellees' seeking approval from FERC for market based rate authority. [Intervenors Brief ("Int. Br.") at 29-32, 36-38; Com. Br. at 38].

In addition to that fact the Appellees argue [Int. Br. 30]:

> FERC, and not DEEP, will determine whether Number Nine and Fusion Solar may permissibly make sales to the EDCs at the negotiated rates set in the PPAs. Specifically, consistent with its market-based rate regime, FERC will determine whether or not Number Nine and Fusion Solar possess market power; if so, then Number Nine and/or Fusion Solar will need to mitigate that market power or lose the benefit of the DEEP procurement. If, more probably, FERC determines that Number Nine and Fusion Solar lack market power, then they will be granted market-based rate authority and will make sales to the EDCs consistent with the DEEP procurement, its PPAs with the EDCs, and their FERC-issued market-based rate authorization. FERC has approved of this sequence of approvals in connection with similar complaints.

In support of their position the Intervenors cite *Californians for Renewable Energy, Inc., v. National Grid*, 137 FERC ¶61,113 (2011), *reh'g denied*, 139 FERC ¶61,117 (2012) ("CARE"). That case is inapposite. In *CARE,* there was no claim of pre-emption as there is here, and as there was in *Solomon* and *Nazarian*. Nor was there any claim that the contract was not voluntarily entered into by both the utility and the generator. Indeed, the record in that case revealed that the negotiation of rates and terms occurred over the period of a number of years before the parties executed an agreement. In addition, the claim made by the complainants was strictly based upon the rate, and it was years ahead of when a filing would be made by the generator with the FERC to obtain market-based rate authority. As a result the FERC considered the complaint pre-mature. That case is nothing like this case. Here, the contract is the product of unlawful and pre-empted state action, and thus void. A prospective future market based rate filing years in the future[15] does not cure the fact that the PPAs were the product of illegal state action now. In addition, the contract was not the product of voluntary negotiation, but the result of an order from the Commissioner.

This same argument was raised and rejected in *Solomon* and *Nazarian* for the simple reason that an agreement that is compelled

[15] A filing for market-based rate authority cannot be filed earlier than 120 days before the commercial operation date of the facility.

based upon illegal state action is void *ab initio* and no subsequent action can bring life back to a void contract. *See, Solomon,* 766 F.3d at 253 stating:

> Anticipating this result, LCAPP's defenders contend that if the Standard Offer Capacity Agreements set capacity prices then the law would not be preempted because the reasonableness of the Agreement's rates would be within FERC's exclusive jurisdiction to review. True, FERC has jurisdiction over certain contracts that set rates between market participants. *See NRG Power Mktg., LLC v. Me. Pub. Utils. Comm'n*, 558 U.S. 165, 171 (2010). But this argument conflates the inquiry into LCAPP's field of regulation with an inquiry into the reasonableness of the Standard Offer Capacity Rates. Here, whether the Standard Offer Capacity Agreements pick "just and reasonable" capacity prices is beside the point. What matters is that the Agreements have set capacity prices in the first place.

*See, also*, *PPL EnergyPlus LLC v. Nazarian*, 974 F. Supp. 2d 790, 838 (D. Md. 2013), *aff'd,* 753 F.3d 467 (4th Cir. 2014), *petitions for cert. filed*, Nos. 14-614, 14-623

The question of whether a contract is the product of unlawful state action is a question for the courts, not the FERC. The contracts here are void and thus any filing at FERC based upon those agreements would be a substantive nullity. The FERC has recently rejected the *Nazarian* and *Solomon's* generator's attempt to bring life back into the dead agreements in those cases. *See, CPV Shore, LLC*, 148 FERC ¶ 61,096 at P28 (2014) (stating "[i]n considering whether the rates, terms, and conditions in a contract are just, reasonable, and not unduly preferential or discriminatory under the FPA the contract must first be a valid contract. The Commission must reject a rate filing that is a nullity.") In so doing the FERC relied on

*Pub. Util. Dist. No. 1 of Snohomish Cnty., Wash.*, 115 FERC ¶ 61,375, at P 32 (2006) ("If the [power sales] Agreement is not valid and binding, the Commission need not consider whether the just and reasonable standard or the public interest standard should apply."); and

*Independent Oil & Gas Ass'n of W. Virginia.,* 18 FERC ¶ 61,289, at 61,608 (1982) ("[A]s a threshold matter, the Commission must determine the contractual validity of a rate filing before deciding whether the filing constitutes a just and reasonable rate[.]").

The FERC's ratemaking determinations are simply not relevant to the Court's preemption analysis.[16] To the contrary, the Fourth Circuit

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[16] The Commission is not, through its determinations under Section 205 of the FPA or otherwise, empowered to re-draw the jurisdictional lines established by Congress or to authorize a state's intrusion into the field exclusively reserved to the Commission. *See, Arizona v. United States*, 132 S. Ct. 2492, 2502 (2012) (when Congress "occupies an entire field . .

in *Nazarian* explained that "[p]reemption of all varieties is ultimately a question of *congressional* intent," and that "[s]tatutory text and structure provide the most reliable guideposts in this inquiry."[17] Similarly, the Third Circuit in *Solomon* sought the FERC's views, but only as to whether the FPA preempted the New Jersey statute that led to the execution of the agreements, rather than as to whether the rates in the agreements were just and reasonable under FPA Section 205.[18]

The Intervenors attempt to further confuse the issue through its discussion regarding market-power. That discussion is a mere distraction. Those rules apply for "market-based rate transactions [that] are deemed not to have been undertaken at arms-length . . . ." *See, Allegheny Energy Supply Company, LLC*, 108 FERC ¶ 61,082 (2004) ("*Allegheny*") and *Boston Edison Company re: Edgar Electric*

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. even complementary state regulation is impermissible," and all "state regulation in the area" is foreclosed, "even if it is parallel to federal standard"); *Kurns v. R.R. Friction Prods. Corp.*, 132 S. Ct. 1261, 1270 (2012) (holding that state requirements are field preempted notwithstanding federal government's contrary argument); *PLIVA, Inc. v. Mensing*, 131 S. Ct. 2567, 2575 (2011) (holding that state requirements conflict with federal law notwithstanding suggestion that state requirements were consistent).

[17] *Nazarian,* 753 F.3d at 474 *(emphasis added).*

[18] *See PPL EnergyPlus, LLC. v. Solomon*, Nos. 13-4330, *et al.* (3d Cir. Feb. 21, 2014) (unpublished).

*Energy Company,* 55 FERC ¶ 61,382 (1991) ("*Edgar*"). But *Allegheny* and *Edgar* do not say anything about state compulsion of a wholesale contract, as is the case here. Rather they were about voluntary contracts between franchised public utilities and their affiliates (involving no state action whatsoever) and the affiliate abuse problems that arise in the case of such contracts. Indeed, the *Allegheny*/*Edgar* standards were crafted to address the opposite problem to the one presented here: the problem that arises when one contracting party is all too willing to enter into a sweetheart deal at the expense of its captive customers.

Not only have the Intervenors offered no basis upon which the FERC could accept the void contracts, they have not even attempted to explain why, if the contracts are, as they claim, "market-based rate" transactions, they would even be filing them. In Order No. 2001, the FERC made clear that market-based rate contracts, other than affiliate contracts (*i.e.*, contracts to which *Allegheny* and *Edgar* would be relevant) should not be filed and should instead be reported in the relevant market-based rate seller's electric quarterly reports.[19] Since that time, the FERC has consistently rejected sellers' attempts to file individual market-based rate contracts, stating that "agreements under market-based rate tariffs *shall not* be filed with the Commission."[20] Moreover, even when the FERC required the filing of market-based rate contracts prior to the implementation of Order No. 2001, the FERC made clear that the filings were "not traditional [FPA] section 205 filings, but rather [we]re informational filings submitted in response to the filing requirements found in the orders granting market-based rate

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[19] *See Revised Public Utility Filing Requirements*, Order No. 2001, FERC Stats. & Regs. ¶ 31,127 at P 7, *reh'g denied*, Order No. 2001-A, 100 FERC ¶ 61,074, *reh'g denied*, Order No. 2001-B, 100 FERC ¶ 61,342, *order directing filing*, Order No. 2001-C, 101 FERC ¶ 61,314 (2002), *order directing filing*, Order No. 2001-D, 102 FERC ¶ 61,334 (2003), *order refining filing requirements*, Order No. 2001-E, 105 FERC ¶ 61,352 (2003), *on clarification*, Order No. 2001-F, 106 FERC ¶ 61,060 (2004), *order revising filing requirements*, Order No. 2001-G, 120 FERC ¶ 61,270, *on reh'g & clarification*, Order No. 2001-H, 121 FERC ¶ 61,289 (2007), *order revising filing requirements*, Order No. 2001-I, FERC Stats. & Regs. ¶ 31,282 (2008).

[20] *Westar Energy, Inc.*, Docket No. ER06-1429-000 (Oct. 10, 2006) (unreported) (emphasis added). *See also, e.g.*, *First Energy Corp.*, Docket Nos. ER06-1386-000, *et al.* (Oct. 4, 2006) (corrected Oct. 10, 2006) (unreported) (same); *American Elec. Power Serv. Corp.*, Docket No. ER06-907-000 (June 12, 2006) (unreported) (same).

authority."[21] The FERC further made clear that it was "not required by the FPA to act on such filings," or "to find that such agreements themselves are just and reasonable," and that "the filing of such agreements d[id] not serve as a vehicle to challenge the justness and reasonableness of either the agreements themselves or the underlying market-based rate authority."[22] Even if the FERC were to ignore the fact that the contracts are substantive nullities, it would still be compelled to reject the Intervenors' filings as unnecessary and unjustified under its market-based rate filing rules. Thus, any attempt by Intervenors to convince this Court that the FERC would be approving the contracts in connection with a market-based rate authority filing is simply untrue.

## VI. The Commissioner has failed to rebut the presumption that Allco has a claim under 42 U.S.C. § 1983.

In his brief, the Commissioner asserts three defenses to Allco's Section 1983 action: first, that a disappointed bidder has no rights

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[21] *GWF Energy LLC*, 97 FERC ¶ 61,297 at 62,391 (2001), *reh'g denied*, 98 FERC ¶ 61,330 (2002).

[22] *Id. See also Public Utils. Comm'n of Cal. v. Sellers of Long Term Contracts to the Cal. Dept. of Water Res.*, 100 FERC ¶ 61,098 at P 16 (FERC acceptance of market-based rate contract did not mean that "the Commission has determined the justness and reasonableness of the . . . contract"), *reh'g denied*, 100 FERC ¶ 61,333 (2002).

under 42 U.S.C. § 1983; second, that the FPA does not create any individual federal rights; third, neither the FPA nor PURPA place binding obligations on the Commissioner. [Com. Br. at 41.] The Commissioner is wrong on all counts.

Congress enacted PURPA to address the conditions in the electricity market that evolved since the passage of title II of the FPA in 1935. *See, New York*, 535 U.S. at 9. Allco's Qualifying Facilities are intended beneficiaries of PURPA, and the FPA as amended by PURPA. *See*, *Freehold Cogeneration Assoc. L.P. v. Bd. Regulatory Comm'rs,* 44 F.3d 1183, 1191 (3d Cir. 1995) ("Section 210 of PURPA sets forth the benefit to which QFs are entitled. It creates a market for their energy."); *S. Cal. Edison Co. v. FERC*, 195 F.3d 17, 23 (D.C. Cir. 1999) ("in deciding to confer substantial benefits on 'small power production facilities' Congress took care to define the class of potential beneficiaries.")

Section 210(a) of PURPA provides all QFs with a guaranteed federal right to sell a QF's energy and capacity to electric utilities at that utilities long-term forecasted avoided costs.[23] Section 210(f) of

[23] *See*, 16 U.S.C. §824a-3(a); 18 C.F.R. §292.304.

PURPA requires States to implement that guaranteed federal right. Part of that implementation is a QFs' right to a long-term contract.[24] Here, the State of Connecticut has delegated the Commissioner the responsibility for the fulfillment of that role.

Here, one of Allco's Qualifying Facilities—Trumbull Solar—offered a price less than the amount determined by the Commissioner to be avoided costs[25], which price was also less the price of the selected Fusion Solar project. [A. 13, ¶47.] The Commissioner's action not selecting Allco blocked the Connecticut Utilities from entering into a contract with Allco's Trumbull Solar, thus violating its guaranteed right to sell at an avoided cost price. In addition, the Commissioner's actions violated Allco's rights under the Federal Power Act and PURPA to (i) participate in the energy market free of unlawful action of the state[26], and (ii) have the avoided costs of the utilities determined without regard to unlawful compelled wholesale transactions.

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[24] *See*, 18 C.F.R. §292.304(d)(2)(ii).

[25] The Commissioner made a determination of what the long-term forecasted avoided were for the Connecticut Utilities in connection with his review. That is how the Commissioner calculated the "Cumulative PV Net Saving ($000)" shown on the overall ranking. [A. 67].

[26] When Congress intended to exclude private rights under the Federal Power Act, it did so explicitly. *See*, Section 824v(b) of the Federal Power Act.

Although the Commissioner now tries to attach some liability to PURA for the entire process, it is the Commissioner who is the one who conducted the procurement and signed the letter directing the Connecticut Utilities to enter into the contracts. As PURA stated in its final decision on the contracts, PURA's role is just a rubber stamp.[27] It is the Commissioner who violated federal law by invading the federal field, as the documents attached to the complaint demonstrate, and violated Allco's rights.

The burden to demonstrate that Congress has expressly withdrawn the Section 1983 remedy is on the defendant. *Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103, 106 (1989). "We do not lightly conclude that Congress intended to preclude reliance on § 1983 as a remedy for the deprivation of a federally secured right." *Id.* at 107. Moreover, the mere existence of a comprehensive enforcement does not preclude 1983 remedies. *Id.* at 108. Here, the Commissioner has offered no authority to meet his burden to show that Congress withdrew a cause of action under Section 1983. Therefore his

[27] *See*, footnote 2, *supra*.

arguments should be rejected.[28]

## CONCLUSION

For the foregoing reasons and the reasons stated in Allco's opening brief, this Court should reverse the judgment of the District Court and remand with instructions to deny the Commissioner's motion to dismiss.

Respectfully submitted this 16th day of April 2015.


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[28] The Intervenors did not respond to the Section 1983 issue.

## CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32 and Local Rule 32.1, I hereby certify that this brief complies with the type-volume limitations set forth in Fed. R. App. P. 32(a)(7)(B)(i) because this brief contains 6,636 words, as counted by Microsoft Word, excluding the items that may be excluded under Federal Rule 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) because this brief has been prepared in 14-point, proportionally spaced Century font using Microsoft Word.

*<u>/s/ Thomas Melone</u>*

## CERTIFICATE OF SERVICE

I hereby certify that on the 16th day of April, 2015, I caused to be served, using the Court's CM/ECF system, a copy of the foregoing Reply Brief of Appellant to all counsel of record.

__*/s/ Thomas Melone*_________