# 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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**OPENING BRIEF OF APPELLANT**

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## CORPORATE DISCLOSURE STATEMENT

Allco Finance Limited is a privately held company in the business of developing solar energy projects. It has no parent companies, and no publicly held company owns 10 percent or more of its stock.

*/s/ Thomas Melone*

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## JURISDICTIONAL STATEMENT

This case involves a preemption challenge, under the Supremacy Clause and the Federal Power Act, to actions taken by the Commissioner of the Connecticut Department of Energy and Environmental Protection ("the Commissioner" and "the Department," respectively). The District Court had jurisdiction under 28 U.S.C. § 1331 because the claims arise under the Supremacy Clause and under 16 U.S.C. § 825p, which vests district courts with jurisdiction of violations of the Federal Power Act or the rules, regulations, and orders thereunder and "all suits" "to enforce any liability or duty" under the Federal Power Act.

On December 10, 2014, the District Court issued an Order dismissing the case for lack of standing and failure to state a claim and awarding final judgment to the Commissioner disposing of all of the parties' claims. A204-224, A225.[1] Plaintiff-Appellant Allco Finance Limited ("Allco") timely filed a notice of appeal on January 2, 2015. A226. This Court has jurisdiction over the appeal under 28 U.S.C. § 1291.

[1] A__ refers to the Joint Appendix.

## STATEMENT OF ISSUES

1. Whether Allco has standing to bring its claims.

2. Whether the Commissioner's action compelling a wholesale energy transaction violates the Federal Power Act and is preempted under the Supremacy Clause of the United States Constitution.

3. Whether Allco has potential claims under 42 U.S.C. § 1983.

## STATEMENT OF THE CASE

Under the Federal Power Act, Congress reserved to the Federal Energy Regulatory Commission ("FERC") the exclusive authority to regulate wholesale sales of electricity in interstate commerce. 16 U.S.C. § 824(b)(1). States are not permitted to act in that field. In the Public Utility Regulatory Policies Act ("PURPA"), Congress carved out a narrow exception to that general rule to foster electric generation by generators that were smaller than a certain size and that used renewable generation technology. 16 U.S.C. § 824a-3; *id.* § 796(17)(A). Generators falling within PURPA are known as "Qualifying Facilities," and states are permitted to regulate wholesale sales by Qualifying Facilities, provided that they receive a price for their electricity equal to the buying utility's "avoided costs" – that is, equal to the costs that the utility would otherwise have incurred procuring the same quantity of electricity from another source. Allco is in the business of developing Qualifying Facilities.

In 2013, Connecticut enacted a statute empowering the Commissioner to solicit proposals for renewable energy, to select winners of the solicitation, and to compel Connecticut's two electric utilities to enter into wholesale electricity contracts with the winners. Conn. Public Act 13-303 § 6 ("Section 6"). Allco submitted bids for a number of its Qualifying Facilities. A9 ¶ 33; A13 ¶ 46.

Notwithstanding the Federal Power Act's general prohibition on state regulation of wholesale electricity sales – subject only to the limited exception for sales by Qualifying Facilities under PURPA – in September 2013, the Commissioner compelled the electric utilities to enter a contract with a generator, Number Nine Wind Farm ("Number Nine Wind"), that was much too large to be a Qualifying Facility. A53. As a consequence, at least one of Allco's projects was not selected. The Commissioner also compelled the electric utilities to enter a contract with Fusion Solar Center ("Fusion Solar"), a generator that could qualify as a Qualifying Facility.

On February 26, 2014, Allco filed an Amended Complaint ("Complaint") contending that the Commissioner's actions were preempted by the Federal Power Act. A3-A23. It sought a declaration that the Commissioner's order compelling the utilities to enter contracts with Number Nine Wind and Fusion Solar, and the resulting contracts themselves, were invalid; and it sought an injunction restraining the

Commissioner from violating the Federal Power Act when conducting future procurements. A23. Allco also sought attorney's fees under 42 U.S.C. §§ 1983 and 1988 and relief from the Commissioner impermissibly discriminating against one of Allco's projects in favor of the Fusion Solar project.

On December 10, 2014, District Court Judge Janet Bond Arterton granted the Commissioner's motion to dismiss. *See Allco Finance Limited v. Klee*, Civ. A. No. 13-cv-1874, 2014 WL 7004024 (D. Conn. Dec. 10, 2014) (A204-A224). The District Court held that Allco lacked standing to bring its claims and that Allco had failed to state a preemption claim. This timely appeal followed.

## A. Legal Background.

### 1. The Federal Power Act and Competitive Wholesale Electricity Markets.

For most of the twentieth century, electric utilities were vertically integrated companies that enjoyed a monopoly over a service area, and both generated electricity and delivered it to retail customers within that service area. Because utilities typically operated within a single state, they were subject to extensive state regulation. State commissions set the electricity rates that utilities could charge their retail customers in order to allow the utilities to recover the costs associated with generating and delivering electricity, plus a reasonable rate of return. *See New York v. FERC*, 535 U.S. 1, 5 (2002).

Utilities began to recognize the advantage of being able to draw upon generation resources owned by other utilities to satisfy demand at peak times, and they began constructing transmission lines running across service areas and across state boundaries. Initially, interstate sales of electricity were unregulated. The Supreme Court had held that states were powerless to regulate such sales under the Commerce Clause, *see Public Utilities Commission v. Attleboro Steam & Electric Co.*, 273 U.S. 83, 389 (1927), resulting in what became known as "the *Attleboro* gap." *New York*, 535 U.S. at 5-6.

In 1935, Congress enacted the Federal Power Act to fill that gap, as well as to "extend[] federal coverage to some areas that previously had been state regulated." *Id.* at 6. Specifically, Congress gave the Federal Power Commission – now FERC – exclusive authority to regulate "the sale of electric energy at wholesale in interstate commerce." 16 U.S.C. § 824(b)(1). "[W]holesale," in this context, means any "sale of electric energy to any person for resale." *Id.* § 824(d). Thus, any sale of electricity in interstate commerce (with the exception of sales under PURPA, discussed *infra* at 9-11, and another exception not relevant here for certain hydroelectric energy) falls within FERC's exclusive regulatory authority, unless it is a "retail" sale to the factory, business, or home that will actually consume the electricity. *See 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."). Although Congress occupied the field of wholesale electricity sales, it reserved "except as specifically provided", a state's authority that the state previously enjoyed "over facilities used for the generation of electric energy or over facilities used in local distribution," 16 U.S.C. § 824(b)(1).

As the interstate electricity transmission grid developed, and as technology improved for transmitting electricity over long distances, interstate wholesale electricity markets became increasingly important. *New York*, 535 U.S. at 7-8. In the 1990s, Congress and FERC began to recognize the benefits of promoting competition in the market for electric generation. *Id.* at 10-11. Many states followed suit, including Connecticut. In 1998, Connecticut restructured its electricity market in order to rely on the competitive interstate wholesale electricity market. Conn. Public Act 98-28 ("Restructuring Act").[2] Connecticut utilities divested their generation assets to competitive generation companies that sold power in the wholesale market, *id.* § 5, and entities known as retail electric suppliers bought electricity in the wholesale market and competed for the opportunity to resell it to retail customers. The utilities continue to enjoy a monopoly over the service of distributing electricity over their network of wires. They also purchase electricity on the wholesale market to sell to retail customers that have not chosen another retail electric supplier. Conn. Public Act 03-135 § 4(c).[3]

Today, the wholesale electricity market in New England is overseen by ISO-New England, Inc., a FERC-regulated Independent System Operator. ISO-New England operates an energy market, in which generators compete to sell electricity by submitting "bids" in real time. ISO-New England matches supply and demand on a continuing basis, and, using a FERC-approved auction process, determines the

[2] The Restructuring Act is available at http://www.cga.ct.gov/ps98/Act/pa/1998PA-00028-R00HB-05005-PA.htm.

[3] Conn. Public Act 03-135 is available at http://www.cga.ct.gov/2003/act/Pa/2003PA-00135-R00SB-00733-PA.htm.

market price for electricity based on the bid of the least costly generation resource needed for supply to match demand. *See Blumenthal v. FERC*, 552 F.3d 875, 878 (D.C. Cir. 2009); *NSTAR Elec. & Gas Corp. v. FERC*, 481 F.3d 794, 797 (D.C. Cir. 2007). This method is intended to result in the operation of the most efficient set of generation resources at any particular point in time. Generators also sell electricity to wholesale buyers in freely negotiated, voluntary bilateral contracts, pursuant to FERC-approved market-based tariffs. "These tariffs, instead of setting forth rate schedules or rate-fixing contracts, simply state that the seller will enter into freely negotiated contracts with purchasers." *Morgan Stanley Capital Grp. Inc. v. Pub. Util. Dist. No. 1 of Snohomish Cnty*, 554 U.S. 527, 537 (2008).

### 2. Policies Encouraging Renewable Energy Generation.

Because renewable energy is typically more expensive to generate than energy using conventional fuels, renewable generators would have difficulty competing with conventional generation. However, both Congress and many states have enacted policies to promote renewable power.

In 1978, Congress enacted PURPA to "accelerate the development of renewable and inexhaustible energy sources…" H.R. Rep. No. 95-496(IV), at 14 (1978). It directed FERC to adopt rules, and for state commissions to implement those rules, requiring utilities to purchase power from certain types of renewable generators known as Qualifying Facilities, 16 U.S.C. § 824a-3(a)– specifically, and as relevant here, generators that "produce[] electric energy solely by the use, as a primary energy source, of biomass, waste, renewable resources, geothermal resources, or any combination thereof; and … ha[ve] a power production capacity which … is not greater than 80 megawatts." 16 U.S.C. § 796(17)(A). Congress and FERC further directed that Qualifying Facilities were to be paid at a rate equal to the utility-buyer's "avoided costs" – that is, the costs that the utility would otherwise have incurred but for its purchase from the Qualifying Facility. 16 U.S.C. § 824a-3(b), (d); 18 C.F.R. § 292.304(b)(2); *see also Am. Paper Inst., Inc. v. Am. Elec. Power Serv. Corp.*, 461 U.S. 402, 417 (1983). Under PURPA, states are in charge of implementing and applying rules to require utilities to purchase from Qualifying Facilities, and states retain some flexibility in determining the utility's avoided costs. 16 U.S.C. § 824a-3(f)(1). In these respects, PURPA reflects a limited exception to FERC's otherwise exclusive authority over wholesale electricity sales.

In addition to implementing PURPA, states have also tried to encourage the growth of renewable generation by adopting "renewable portfolio standards."[4] These require utilities and other retail electric suppliers doing business in a state to procure a certain percentage of their electric supply from certain types of generators. Thus, for example, Connecticut has required the utilities and other retail electric suppliers in that state to obtain increasing amounts of their electricity in from renewable sources, rising to over 20 percent in 2020. Conn. Gen. Stat. § 16-245a(a)(15).

State renewable portfolio standards do not facially mandate any particular wholesale transaction. Rather, they leave each wholesale buyer/retail supplier to voluntarily negotiate contracts with renewable generators in order to satisfy the portfolio requirement. *See, e.g.*, Conn. Gen. Stat. § 16-245a; *id.* § 16-1(20). Utilities and other retail suppliers

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[4] *See, e.g.*, U.S. Energy Information Admin., "Most states have Renewable Portfolio Standards," *available at* http://www.eia.gov/todayinenergy/detail.cfm?id=4850.

demonstrate compliance with renewable portfolio standards by obtaining renewable energy credits ("RECs"), which reflect the "environmental attributes" of electricity generated using renewable fuel. *E.g.*, Conn. Gen. Stat. § 16-245a(b). Sometimes utilities and retail suppliers voluntarily negotiate contracts for electricity and RECs. But RECs can also be bought and sold independent of electricity; thus, renewable generators frequently will sell their RECs to utilities through a negotiated contract, and separately sell the electricity into the energy market administered by ISO-New England. *E.g.*, Conn. Gen. Stat. § 16-245a(g). When RECs are sold independent of electricity, FERC generally regards the sale of RECs as outside its authority over wholesale electricity sales. *See WSPP Inc.*, 139 FERC ¶ 61,061, P 24 (2012) ("[A]n unbundled REC transaction that is independent of a wholesale electric energy transaction does not fall within the Commission's jurisdiction under sections 201, 205 and 206 of the [Federal Power Act].").

## B. The Connecticut Procurement at Issue.

In 2013, Connecticut enacted Conn. Public Act 13-303 § 6 ("Section 6"), which empowers the Commissioner to solicit proposals for renewable energy, to select winners among the proposals, and to compel the state's utilities to enter into long-term wholesale power purchase agreements serving up to four percent of Connecticut's electricity needs. Section 6 provides:

> On or after January 1, 2013, the Commissioner … may … solicit proposals, in one solicitation or multiple solicitations, from providers of Class I renewable energy sources … If the commissioner finds such proposals to be in the interest of ratepayers … [he or she] may select proposals from such resources to meet up to four per cent of the load distributed by the state's electric distribution companies. The commissioner may direct the electric distribution companies to enter into power purchase agreements for energy, capacity, and environmental attributes, or any combination thereof, for periods of not more than twenty years…

Conn. Public Act 13-303 § 6.

In July 2013, the Commissioner solicited proposals pursuant to Section 6. A24-A51. Allco submitted proposals for five solar projects, each of which was no more than 80 megawatts and thus satisfied PURPA's criteria for a Qualifying Facility. A205; A12 ¶ 45.

In September 2013, the Commissioner selected two winning projects, Number Nine Wind, a 250 megawatt wind project located in Maine, and Fusion Solar, a 20 megawatt solar project located in Connecticut, and directed the state's utilities "to execute contracts for a combination of energy and environmental attributes" from these two generation facilities. A53. While Fusion Solar satisfied the size requirements to be a Qualifying Facility under PURPA, Number Nine Wind did not; as noted above, PURPA limits Qualifying Facilities to no more than 80 megawatts. 16 U.S.C. § 796(17)(A).

Number Nine Wind received a 15-year contract at a fixed price of $57.17 per megawatt-hour of energy. A74. As the contract itself makes clear, that fixed price will differ from the price that Number Nine Wind otherwise would have received from selling its electricity into the FERC-approved energy market administered by ISO-New England. *See* A74 (setting forth the contract price and contrasting it with the "Market Price"); *see also* A88 (defining "Market Price" as the price set by the ISO-New England markets); A118 ¶ 80.

In an accompanying determination, the Department "describ[ed] the basis for its selection of [these] two renewable energy projects to enter into long-term power purchase agreements pursuant to Section 6." A55. In so doing, the Department set forth a ranked list of proposals. Allco's Harwinton Solar project appeared fourth on that list. A67; A13 ¶ 46. Other Allco projects ranked seventh (Bozrah Solar), tenth (Bucks

Solar), and thirteenth (Franklin Solar). *Id.* Additionally, Allco bid a project at a lower price than Fusion Solar, but that project was inexplicably excluded from the ranked list. A13 ¶¶ 47-48.

### C. Proceedings in the District Court.

Allco filed a Complaint in District Court alleging that the Commissioner's implementation of Section 6 was preempted by the Federal Power Act, under both a "field preemption" theory – because the Commissioner, in compelling a wholesale transaction, regulated in an area reserved exclusively for FERC, A17-A18 ¶¶ 76, 79, 84-85 – and a "conflict preemption" theory, because the Commissioner's action conflicted with the market-based system of regulation established by FERC for the New England market. A18 ¶ 80; A20 ¶¶ 92-94. The Complaint alleged that the Commissioner's action in compelling a wholesale electricity transaction could be lawful only with respect to a Qualifying Facility under PURPA; yet Number Nine Wind was too large to be a Qualifying Facility. A14 ¶ 59.

The District Court dismissed the suit on two grounds. First, it held that Allco lacked standing, both because it lacked a cognizable injury-in-fact and because it failed to demonstrate that its injury was redressable. A209-A215. With regard to injury-in-fact, the District Court acknowledged that the "true injury alleged is the denial of the contract," A213, and did not deny that such an injury could constitute an injury-in-fact for purposes of Article III, but nevertheless held as a prudential matter that such an injury fell outside the "zone of interests" protected by the Federal Power Act. A211-A212. The District Court next found that Allco failed to demonstrate that such an injury would be redressable. A213. Although it acknowledged that Allco needed merely to show that redressability was "likely," not certain, A213, it held that "given the Commissioner's discretion to select projects, it does not necessarily follow that if Number Nine were not selected, Allco's projects" – including its fourth-ranked Harwinton Solar project – "would have been." A214. The court also noted that there was no guarantee that the Commissioner would conduct another procurement even if Allco prevailed, and that the Commissioner could not "make a redetermination based on the original ranks cited by Allco, because bidders were only required to keep their bids open for six months and the bids have now expired." A214.

The District Court further held that Allco had failed to state a preemption claim. A215-A222. The court reasoned that the Commissioner could not have intruded into the field of wholesale electricity regulation reserved for FERC, because bidders were able to offer to sell electricity at whatever price they wished, and the Commissioner simply ordered the utilities to accept the prices offered by certain bidders. A217-A218. The District Court then distinguished the present case from *PPL EnergyPlus LLC v. Nazarian*, 753 F.3d 467 (4th Cir. 2014), *pet'n for cert. filed*, Nos. 14-614, 14-623, and *PPL EnergyPlus LLC v. Solomon*, 766 F.3d 241 (3d Cir. 2014), *pet'n for cert. filed*, Nos. 14-634, 14-694. Those cases held preempted Maryland and New Jersey programs in which the two state public utility commissions conducted solicitations to receive bids from generators to build a new power plant. The bids reflected the fixed revenue stream the generators needed to construct the plant. The state commissions reviewed the bids, selected the winners, and ordered the states' utilities to enter into contracts providing the winners with the requested revenue stream. According to the District Court, the cases were distinguishable because the Maryland and New Jersey programs involved "market distortion," whereas Section 6 was "devoid of any such market-distorting features." A222.

Finally, the District Court dismissed Allco's claim under 42 U.S.C. § 1983 on the ground that the Federal Power Act did not create any individual federal rights that could be enforced under Section 1983. A223. This appeal followed.

## SUMMARY OF THE ARGUMENT

1. The District Court erred in holding that Allco lacked standing to bring its claims. First, Allco has constitutional standing. It suffered a plain pocketbook injury caused by the Commissioner's award of a valuable energy contract to its direct competitor. That injury would be redressed by a judgment in Allco's favor – if the Commissioner's illegal procurement was invalidated, there is a strong likelihood both that Allco would prevail in a future procurement under Section 6, and that it would sell its energy at a higher price even in the absence of a future procurement. The District Court concluded that Allco could not show redressability because there was no *certainty* that the Commissioner would conduct a future procurement or that Allco would prevail in that procurement. But that analysis both misapprehended

the proper standard for redressability in the bid procurement context, and ignored Allco's contention that it was harmed by the procurement's effect on energy rates regardless of whether the Commissioner conducted a second procurement.

Second, Allco has prudential standing. To the extent the prudential standing doctrine has any force in the context of a Supremacy Clause challenge to state action, Allco, as a market participant, plainly falls within the zone of interests protected by the Federal Power Act and PURPA. The District Court held that Allco lacked prudential standing based on a single 24-year-old case that turned on particular features of a statute, FIRREA, that is the polar opposite of the Federal Power Act. No court has ever denied prudential standing to a plaintiff asserting a Supremacy Clause challenge in remotely comparable circumstances, and this Court should not be the first.

2. The District Court erred in dismissing Allco's preemption claim. First, Allco stated a field preemption claim: The Commissioner's decision to force a utility to enter a wholesale power contract plainly constitutes regulation in the field of wholesale energy sales, which is

categorically preempted. The Third and Fourth Circuits have recently invalidated materially indistinguishable programs on field preemption grounds. *PPL EnergyPlus LLC v. Nazarian*, 753 F.3d 467 (4th Cir. 2014), *pet'n for cert. filed*, Nos. 14-614, 14-623; *PPL EnergyPlus LLC v. Solomon*, 766 F.3d 241 (3d Cir. 2014), *pet'n for cert. filed*, Nos. 14-634, 14-694.

Second, Allco stated a conflict preemption claim. FERC has adopted a market-based approach to regulating the energy markets in New England. Under that framework, FERC has approved an auction-based energy market in which generators compete in real time to provide energy at lowest cost. It has also allowed generators to enter into voluntarily negotiated long-term contracts. In ordering Connecticut utilities to contract with Number Nine Wind, the Commissioner pursued a conflicting regulatory framework – one in which the state can compel a utility to enter into a non-voluntary wholesale power transaction at a price that differs from the prevailing market price. Not only does that framework conflict with FERC's chosen regulatory approach, but it also undermines the special treatment that Congress intended to give to small renewable generators under PURPA. This is the epitome of a conflict with federal law.

Finally, the District Court erred in dismissing Allco's claim under 42 U.S.C. §1983. Neither the Federal Power Act nor PURPA provide a "comprehensive" remedial scheme such that an action under 42 U.S.C. §1983 is implicitly excluded.

## ARGUMENT

### I. Standard of Review.

This Court reviews *de novo* a district court's dismissal of a complaint for lack of standing and for failure to state a claim. *Selevan v. New York Thruway Authority*, 584 F.3d 82, 88 (2d Cir. 2009). At the motion-to-dismiss stage, all allegations of fact in the complaint must be accepted as true and construed in the light most favorable to the plaintiff. *Thompson v. Cnty. of Franklin,* 15 F.3d 245, 249 (2d Cir. 1994). A complaint must have sufficient factual allegations to "state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal,* 566 U.S. 662, 678 (2009) (quoting *Bell Atlantic v. Twombly*, 550 U.S. 544, 570 (2007)). A claim is facially plausible "when the pleaded factual content allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.*

## II. The District Court Erred in Holding That Allco Lacked Standing.

The District Court held that Allco lacked both Article III and prudential standing to bring its claims. As explained below, that decision was incorrect: Allco satisfies both standing requirements.

### A. Allco Has Article III Standing.

To establish Article III standing, Allco must demonstrate "(1) injury-in-fact, which is a 'concrete and particularized' harm to a 'legally protected interest'; (2) causation in the form of a 'fairly traceable' connection between the asserted injury-in-fact and the alleged actions of the defendant; and (3) redressability, or a non-speculative likelihood that the injury can be remedied by the requested relief." *W.R. Huff Asset Mgmt. Co., LLC v. Deloitte & Touche LLP*, 549 F.3d 100, 106-07 (2d Cir. 2008) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992)). As explained below, Allco can meet these requirements under two distinct theories of injury.

### 1. Allco's Loss of the Contract Is Sufficient to Establish Standing.

First, Allco can establish standing based on its failure to prevail in the Commissioner's procurement. Allco's theory of standing is identical to the theory of any disappointed bidder challenging any procurement. It suffered an injury-in-fact based on its economic interest in the procurement; that injury-in-fact was caused by the Commissioner's illegal actions in connection with the procurement; and that injury-in-fact would be redressed when the Commissioner makes a revised determination in the challenged procurement or conducts a new procurement complying with federal law. If Allco lacked constitutional standing to bring this suit, then virtually all statutes that allow bidders to bring bid protests in federal court would be unconstitutional under Article III. That cannot possibly be the law. *See generally* 28 U.S.C. § 1491(b)(1) (authorizing bid protests in federal court); *B.K. Instrument, Inc. v. United States*, 715 F.2d 713 (2d Cir. 1983) (collecting authority establishing, under certain circumstances, bidders' right to protest contract awards). As explained below, the District Court's contrary reasoning is contrary to hornbook law on standing in competitive procurements.

### *a. Allco established injury-in-fact.*

First, although the District Court's opinion is ambiguous on this point, the District Court appeared to hold that Allco could not show a "concrete, particularized injury." The Court distinguished other authority in which generators lost "millions of dollars" on the ground that "Allco has suffered no such injury and despite not being awarded this particular contract remains free to sell whatever energy it wishes in the open market, underscoring the reality that the true injury alleged is the denial of the contract." A213.

Although this reasoning is difficult to understand, the District Court appeared to hold that Allco could not show a concrete injury because it could not *guarantee* that it lost the procurement due to the Commissioner's violation of federal law. If this was the District Court's reasoning, it is plainly wrong. *See Clinton v. City of New York*, 524 U.S. 417, 433 n.22 (1998) ("The Government argues that there can be an Article III injury only if [plaintiff] would have actually obtained a facility on favorable terms. We have held, however, that a denial of a benefit in the bargaining process can itself create an Article III injury, irrespective of the end result."); *cf. Natural Resources Defense Council,* *Inc. v. FDA*, 710 F.3d 71, 81 (2d Cir. 2013) (plaintiff can establish injury-in-fact based on showing of increased risk of harm, even when harm is not guaranteed). Indeed, the District Court cited authority holding that in the Equal Protection context, a disappointed bidder is recognized as having standing even without alleging he would have obtained the benefit but for the illegal barrier. A212 n.3 (discussing *Ne. Fla. Chapter, Associated Gen. Contractors of Am. v. Jacksonville*, 508 U.S. 656, 666 (1993)). As the Supreme Court subsequently underscored, *Jacksonville* establishes that under Article III, prospective bidders could establish an injury-in-fact "even though there was no showing that any party would have received a contract absent the ordinance." *Clinton*, 524 U.S. at 433 n.22. As such, it is difficult to understand how the District Court could have held that, under Article III, Plaintiffs failed to show an injury-in-fact.[5]

[5] The District Court also observed that "despite not being awarded this particular contract," Allco "remains free to sell whatever energy it wishes in the open market." A213. This observation has nothing to do with Plaintiff's standing; the fact that Allco may continue to attempt to enter a contract, or choose to sell its output into an energy market where prices are volatile, does not mean it lacks standing to challenge the loss of a valuable contract. *See also infra* note 9. Moreover, if the District Court's conclusion were correct, then there is no action the Commissioner could ever take, including compelling a wholesale sale

### *b. Allco established causation.*

The District Court correctly did not dispute that Allco could show causation. Allco alleges that the Commissioner violated federal law by failing to restrict the procurement to Qualifying Facilities under PURPA. This "denial of a benefit in the bargaining process," *Clinton*, 524 U.S. at 433 n.22, was plainly caused by the Commissioner's own decision to include non-Qualifying Facilities in the procurement.

### *c. Allco established redressability.*

Although the District Court did not contest causation, it held that Allco could not show redressability because it could not guarantee it would be awarded a new contract in a re-procurement. The Court rejected Allco's contention that it would receive a new contract based on its high ranking in the original solicitation, observing that "nothing in the statute mandates that projects be selected based upon their ranking." A213. The District Court also hypothesized that the Commissioner might just stop conducting procurements. A212-A213. Each of these reasons is seriously flawed.

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without asking for bids, that would be able to be challenged because a would-be generator is always in theory able to sell its energy on the open market.

The District Court's first theory – that despite Allco's high ranking in the first procurement, the Commissioner might simply have selected a lower-ranked bidder in a follow-up procurement – is wrong for multiple reasons. First, it misunderstands the injury-in-fact at issue. As the Supreme Court held in *Clinton*, "denial of a benefit in the bargaining process can itself create an Article III injury," regardless of whether the bidder would ultimately have won the procurement. *Clinton*, 524 U.S. at 433. Allco has alleged such an injury – it alleges that the Commissioner violated federal law by opening the procurement up to large generators that were not Qualifying Facilities under PURPA. Framed in those terms, Allco's injury can surely be redressed by the court – the court can direct that subsequent procurements be conducted in accordance with federal law, *i.e.*, without the presence of large generators. By addressing whether the Court could redress *Allco's loss of the contract*, the District Court erroneously analyzed redressability of the wrong injury.[6]

[6] Another injury suffered by Allco is its expenditure of development costs in preparing bids for a procurement that was then conducted in violation of law, by including large generators that were not Qualifying Facilities. This injury, too, would be redressed if a new procurement were conducted.

Second, even assuming the redressability analysis should focus on whether Allco would prevail in a re-procurement, the District Court's analysis was incorrect. To establish standing, a plaintiff is not required to show a *guarantee* that the court's actions would redress its injury; rather, it must simply show that "it is likely, as opposed to merely speculative, that the injury will be redressed." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180-81 (2000). In the bid protest context, the Federal Circuit holds that to establish standing, a disappointed bidder must show only that it had a "substantial chance" of winning the procurement, which requires a showing that it was in the "competitive range." *Orion Tech., Inc. v. United States*, 704 F.3d 1344, 1349 (Fed. Cir. 2013).

Allco's well-pleaded allegations easily meet that standard. Allco alleges that Harwinton Solar was ranked fourth, and next in line, on the Commissioner's rankings, *see* A13 ¶ 46, A67; this plainly put it in the "competitive range" and gave it a "substantial chance" of winning a procurement that complied with federal law. That is especially so because of the size of Number Nine Wind relative to Allco's Harwinton Solar project and other bidders. Number Nine Wind was awarded a contract for 936,443 megawatt-hours per year; by contrast, Fusion Solar, which like Allco's Harwinton project, was a smaller solar project, was awarded a contract for 36,907 megawatt-hours per year. A67; *see also* A13 ¶¶ 51-52, A67. Had Number Nine Wind not received a contract, the Department would have needed to choose numerous other smaller projects to come even close to replacing its output. It is true that there is no *guarantee* that in a re-procurement, the Commissioner would select the highest-ranking bid, and Allco's Complaint does not contend otherwise. But given that the whole purpose of the Commissioner's ranking was to select bids, it is likely – and, surely, far from *speculative* –that the Commissioner would follow the result of his own ranking process. The District Court faulted Allco for failing to establish sufficient "support for its prediction," A214, but at the pleadings stage, Allco was not required to provide evidentiary support; rather, it was required merely to show that its claims are "plausible." *Iqbal*, 556 U.S. at 678. It is "plausible," to say the least, that the Commissioner would follow his own rankings.[7]

[7] In an effort to show that Allco might not prevail in a re-procurement, the District Court observed that the Commissioner selected the first- and third-ranked projects, rather than the second-ranked project.

The District Court also stated that Allco's injury was not redressable because Allco could not guarantee that the Commissioner would conduct a new re-procurement. A214. This reasoning, too, contradicts well-settled case law.

The Supreme Court has repeatedly and squarely held that a plaintiff can establish standing based on the *predicted* behavior of executive officials, even if that behavior is not guaranteed. In *Utah v. Evans*, 536 U.S. 452 (2002), the Supreme Court held that Utah had standing to challenge a census report, even though no executive official had any obligation to follow the terms of the new report. *Id.* at 463-64. The court found it "substantially likely" that the Executive Branch would abide by the new report, and thus held that the "practical consequence" of altering the report was "a significant increase in the likelihood that the plaintiff would obtain relief that directly redresses

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A213-A214. But it failed to note that the second- and third-ranked projects were offered by the same developer, which was presumably indifferent to which project would be selected. In any event, the reason for the Commissioner's selection of the third-ranked project can be determined in discovery. At the pleadings stage, it was inappropriate for the District Court to draw inferences regarding Allco's chances in a future procurement based on the Commissioner's selection of the third-ranked project.

the injury suffered," even though there was no guarantee that the Executive Branch would take any action based on the court's ruling. *Id.* at 464. Similarly, in *FEC v. Akins*, 524 U.S. 11, 25 (1998), the Court found that a plaintiff had "standing to obtain court determination that the organization was a 'political committee' where that determination would make agency more likely to require reporting, despite [the] agency's power not to order reporting regardless." *Evans*, 536 U.S. at 464 (describing *Akins*); *see also id.* (collecting other, similar cases). These cases show that as long as it is likely the agency will afford relief, the plaintiff can establish standing, even if there is a possibility that the agency will ultimately decline to redress the plaintiff's injury.

Here, Allco's Complaint adequately alleges that it is likely that the Commissioner will conduct a new procurement. A15-A16 ¶¶ 66, 67, 70. As the Complaint states, the authority given to the Commissioner under Section 6 is a major initiative of the Governor of the State of Connecticut, and the Department described the procurement as "an important step forward in the implementation of Governor Daniel P. Malloy's vision for … [the] energy future for the ratepayers of the State of Connecticut." A55; A11-A12 ¶ 41. This allegation establishes that it is at least *likely* that, if the District Court invalidates the prior procurement, the Commissioner would conduct a procurement rather than completely ignoring Section 6.

Moreover, the Commissioner has already conducted one procurement under Section 6, which demonstrates a predisposition to conduct another one. *See, e.g.*, *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 152 (2010) (in case where agency's prior briefing took "the view that a partial deregulation reflecting its proposed limitations is in the public interest," plaintiff could establish redressability based on the "strong likelihood" that agency would engage in such deregulation in the future, even though it theoretically had the option not to).

The District Court suggested that the Commissioner might change his mind and simply halt procurements under Section 6 based on dissatisfaction with the Court's injunction, A214, but this speculation was inappropriate at the motion to dismiss stage. For present purposes, all that matters is that Allco's Complaint surely puts forth a plausible allegation that if the procurement is nullified, then the

Governor and the Commissioner would try again.[8] Indeed, the Department has already proven the District Court's speculation wrong. Yesterday, the Department released a draft procurement soliciting bids under Section 6 as well as under Section 7 of Conn. Public Act 13-303.[9]

### 2. Allco's Reduced Prospective Earnings Under PURPA Are Sufficient to Establish Standing.

Independently, Allco has standing on the independent ground that the procurement will affect the utilities' cost structure in a manner that will cause Allco to earn lower profit from future energy sales under

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[8] The District Court's opinion includes the following assertion: "the Commissioner could not simply make a redetermination based on the original rankings cited by Allco, because bidders were only required to keep their bids open for six months and the bids have now expired." A214. This assertion was not based on the Complaint or any document appended thereto. Rather, it was based on an oral argument statement by counsel for the Commissioner that had no basis in the record. Moreover, that statement was factually wrong. The relevant bid document states that the bidder agreed that the "prices, terms and conditions [were] valid for at least 180 days." *See* http://www.dpuc.state.ct.us/DEEPEnergy.nsf/c6c6d525f7cdd1168525797d0047c5bf/8eb0a41a8b1efe0285257ba2006d6ffe?OpenDocument . This means that the bidders could withdraw their bids if they so chose after 180 days. There is no evidence to support the conclusion that bidders have likely withdrawn, or would likely withdraw, their bids, especially Qualifying Facilities that may have been following the progress of this case.

[9] *See* http://cleanenergyrfp.com/

PURPA.[10]

Allco's theory is straightforward. Under PURPA and its implementing regulations, utilities are *required* to purchase power from Qualifying Facilities, such as Allco's facilities. *See* 16 U.S.C. § 824a-3(a)(2); 18 C.F.R. § 292.303(a). Further, Qualifying Facilities are *required* to be paid at a rate equal to the utility-buyer's "avoided costs" – that is, the costs that the utility would otherwise have incurred but for its purchase from the Qualifying Facility. 16 U.S.C. § 824a-3(b), (d); 18 C.F.R. § 292.304(b)(2). In the case of Allco's facilities, which need a long-term contract (*see* A14 ¶ 60), the avoided cost rate is the long-term rate under 18 C.F.R. § 292.304(d)(2)(ii).

A mathematical example is helpful to illustrate the concept of avoided costs. Suppose a utility needs 100 MW of power, and suppose it

[10] Allco strongly prefers to enter a contract under the Section 6 procurement as compared to securing a PURPA contract under another route, and thus the potential availability of a PURPA contract does not mitigate Allco's injury. That is because, as the Complaint alleges, without a long-term power purchase agreement of the kind awarded by the Commissioner in the procurement, Allco will be unable to develop its proposed solar facilities. *See* A14 ¶ 60. Under Connecticut law purporting to implement PURPA, there is no process for Allco to obtain a long-term contract from the utilities. Instead, Allco would be compensated at a short-run avoided cost rate, which can be quite volatile and would not provide Allco with the same revenue assurance as the long-term contracts awarded by the Commissioner.

is filling that need by purchasing 25 MW of power from each of four different generators. Further, suppose the utility is paying different amounts of money to the four generators: $10 to the first, $20 to the second, $30 to the third, and $40 to the fourth generator.

Now, suppose a Qualifying Facility offers 25 MW of power for sale. The utility is generally *required* to buy that power from the Qualifying Facility, subject to certain statutory exceptions and limitations. *See generally* 16 U.S.C. § 824a-3(a)(2); 18 C.F.R § 292.303(a). As a result, the utility may now shed 25 MW of its current power portfolio. Naturally, the utility will shed its most expensive power – the 25 MW of power that costs $40. Thus, under PURPA, the utility is *required* to pay $40 to the qualifying facility. This is because the utility's "avoided costs" are $40 – the marginal cost the utility avoided by purchasing power from the Qualifying Facility instead of the most expensive generator.[11]

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[11] *See* Order No. 69: Final Rule Regarding the Implementation of Section 210 of the Public Utility Regulatory Policies Act of 1978, 45 Fed. Reg. 12,214, 12,216 (Feb. 19, 1980) (codified at 18 C.F.R. pt. 292) ("Order No. 69"), in which the FERC stated that avoided costs are determined by reference to the highest marginal cost unit or future expansion that would be avoided:

In light of that statutory scheme, it is easy to understand how Allco was injured by the procurement. The utilities purchased power from Number Nine Wind, relieving the utilities of the need to purchase that power from some alternative source. Naturally, the utilities will attempt to shed their most expensive alternative source of power first. This means that the cost of the most expensive power in the utilities' portfolio has *decreased* as a result of the procurement – in PURPA's lingo, its "avoided costs" have decreased. And accordingly, so too has the rate that Allco could receive under PURPA. This injury-in-fact was caused by the procurement, and it would be redressed if the

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> The Commission has added the term 'incremental' to modify the costs which an electric utility would avoid as a result of making a purchase from a qualifying facility. Under the principles of economic dispatch, utilities generally turn on last and turn off first their generating units with the highest running cost. At any given time, an economically dispatched utility can avoid operating its highest-cost units as a result of making a purchase from a qualifying facility. The utility's avoided incremental costs (and not average system costs) should be used to calculate avoided costs. With regard to capacity, if a purchase from a qualifying facility permits the utility to avoid the addition of new capacity, then the avoided cost of the new capacity and not the average embedded system cost of capacity should be used.

procurement was invalidated. This is classic economic harm that requires no prediction or speculation and is independently sufficient to establish standing.

Allco explained this precise point to the District Court in its opposition to the motion to dismiss. It stated: "Defendant ignores the very obvious and concrete fact that the addition of a generating resource for 15 years that represents almost 4% of the Connecticut Utilities load has a definite adverse effect on the calculation of the Connecticut Utilities' avoided costs because there are fewer costs that could now be avoided by the addition of one of Plaintiff's projects. That, in turn, adversely affects the price that the Plaintiff could obtain under PURPA for any one of its projects." Pltf. Mem. in Opp., Dkt. 34 at 13. Yet the District Court ignored it.

Indeed, the District Court's order demonstrates that it did not understand how PURPA's "avoided costs" provisions work. The District Court stated that under PURPA, states may fix the price of energy "if (1) the facility is a "small power production facility," … and (2) "the rate fixed in the power purchase agreement equals *the facilities 'avoided costs.'"*" A205 (emphasis added). The italicized portion of the District

Court's opinion is incorrect. The rate is not equal to the *facility's* avoided costs. The rate is equal to the *utility's* avoided costs – i.e., the cost the *utility* avoided by buying from the qualifying facility. Given the District Court's incorrect description of PURPA's "avoided costs" framework, it is unsurprising that the District Court failed to address Allco's standing based on that framework.

Accordingly, the Court should hold that Allco has standing based on its statutory entitlement to sell energy at a rate equal to "avoided costs."[12]

**B. Allco Has Prudential Standing.**

The District Court erred in holding that Allco lacked prudential standing to bring its suit. Allco has prudential standing on two independent grounds. First, Allco has prudential standing under the Supremacy Clause because that constitutional provision imposes no zone-of-interest requirement. Second, Allco has prudential standing under the Federal Power Act because it is at least arguable that the Act was intended to protect the interests of market participants, and in

[12] Alternatively, because the District Court failed to address this issue, the Court may wish to consider remanding for further proceedings, including a possible evidentiary hearing, on this theory of standing.

particular those with Qualifying Facilities.

Allco's first claim arises under two different sources of law: directly under the Supremacy Clause, and under 16 U.S.C. § 825p, the cause of action supplied by the Federal Power Act. *See* A17, Count I ("Violation of the Federal Power Act and the Supremacy Clause"); A8 ¶ 26 (noting that the Order violates both the Supremacy Clause and the Federal Power Act); A9 ¶ 30 (citing § 825p). Thus, if Allco can show it has prudential standing under *either* source of law, its case may proceed. In fact, Allco has prudential standing under *both* the Supremacy Clause *and* the Federal Power Act.

First, Allco has prudential standing under the Supremacy Clause for the simple reason that the "zone of interests" requirement does not exist in cases brought directly under the Supremacy Clause. Although this Court has not squarely addressed the "zone of interests" rule in the context of Supremacy Clause challenges, other circuits have rejected the "zone of interests" requirement in Supremacy Clause cases. *See, e.g.*, *Pharm. Research & Mfrs. of Am. v. Concannon*, 249 F.3d 66, 73 (1st Cir. 2001) ("PhRMA has … asserted … a preemption-based challenge under the Supremacy Clause. In this type of action, it is the interests protected by the Supremacy Clause, not by the preempting statute, that are at issue.... As the Third Circuit recently pointed out, an entity does not need prudential standing to invoke the protection of the Supremacy Clause ... Thus, regardless of whether the Medicaid statute's relevant provisions were designed to benefit PhRMA, PhRMA can invoke the statute's preemptive force" (citing *St. Thomas-St. John Hotel & Tourism Ass'n v. Virgin Islands*, 218 F.3d 232, 241 (3d Cir. 2000))); *Taubman Realty Group Ltd. Partnership v. Mineta*, 320 F.3d 475, 481 (4th Cir. 2003) (plaintiff "does not have to meet the additional standing requirement involving the zone of interests test with respect to its Supremacy Clause claim"); *see also Wilderness Soc'y v. Kane County*, 632 F.3d 1162, 1170 (10th Cir. 2011) (en banc) (collecting authority holding that the zone-of-interests requirement does not apply in the Supremacy Clause context). This authority is consistent with the Supreme Court's recent observation that rejecting claims "on the grounds that are 'prudential,' rather than constitutional ... is in some tension with ...the principle that a federal court's obligation to hear and decide cases within its jurisdiction is virtually unflagging." *Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2347 (2014) (quotation marks omitted). The District Court had no basis for imposing a judge-made, "prudential" limitation on an action brought under a constitutional provision that by its terms imposes no such limitation.

Second, and in the alternative, Allco has prudential standing under the Federal Power Act. This Court has explained that the zone-of-interests requirement is "not a rigorous one," and that a "plaintiff's right of review may be denied only if the plaintiff's interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit. *The test is not meant to be especially demanding*." *Selevan,* 584 F.3d at 91-92 (internal citations and quotation marks omitted, emphasis in original). The "requirement is satisfied whenever the interest sought to be protected by [plaintiffs] is *arguably* within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." *Id.* (internal citations and quotation marks omitted, emphasis in original). Further, "for a plaintiff's interests to be arguably within the 'zone of interests' to be protected by a statute, there does not have to be an indication of congressional purpose to benefit the would-be plaintiff." *Nat'l Credit*

*Union Admin. v. First Nat'l Bank & Trust Co.*, 522 U.S. 479, 492 (1998) (internal quotation marks omitted). Rather, the court must "first discern the interests 'arguably ... to be protected' by the statutory provision at issue" and then "inquire whether the plaintiff's interests affected by the agency action in question are among them." *Id.* (ellipsis in original).

Allco easily satisfies that modest requirement. This case concerns the Federal Power Act's preemption of state law, which serves to protect "areas of exclusive federal authority" from state regulation. *Nazarian*, 753 F.3d at 475-76. Here, Congress has decided to protect wholesale electricity sales, as negotiated in contracts between generators and utilities, from state regulation. *Id.* at 477-78. It is at least *arguable* – and in fact, it is almost self-evident – that Congress intended to protect the interests of the very entities who are negotiating those transactions and are directly subject to those regulations.

Abundant authority supports the proposition that Allco falls within the Federal Power Act's zone of interests. In determining who may seek review of FERC orders in violation of the Federal Power Act, this Court has taken an extremely expansive view of the Federal Power

Act's zone of interests, going as far as to hold that plaintiffs pursuing *non-economic* interests may bring suit to enforce the Federal Power Act. *Scenic Hudson Preservation Conference v. FPC*, 354 F.2d 608, 615-16 (2d Cir. 1965). Courts have also repeatedly found that market participants possess prudential standing under the Federal Power Act and similar regulatory schemes. *See, e.g.*, *La. Energy & Pub. Auth. v. FERC*, 141 F.3d 364, 367 n.5 (D.C. Cir. 1998) (citing cases).

Moreover, in *Nazarian*, also a preemption case like this one, the Fourth Circuit vindicated the interests of plaintiffs who were market participants like Allco, without even addressing standing, even though the issue had been briefed to the court. *See* Brief of the Maryland Public Service Commission, *PPL EnergyPlus v. Nazarian*, No. 13-2419, 2014 WL 413948, at *6-*14. There is simply no basis for holding that Allco, an electric generator squarely under FERC's jurisdiction, is *inarguably* outside of the Federal Power Act's zone of interests.

Moreover, Allco contends here that the Federal Power Act precludes state regulation of state rates except as permitted by PURPA, and it is absolutely clear that Allco is within the "zone of interests" protected by PURPA. PURPA was enacted for the express purpose of creating a new class of "favored cogeneration and small power facilities" in the overall regulatory scheme. *FERC v. Mississippi*, 456 U.S. 742, 751 (1982). It did so by enacting a limited exception, applicable to such facilities, to the blanket prohibition on state regulation of wholesale energy sales, as well as an open access interconnection and transmission policy for such generators. 16 U.S.C. §824a-3. Allco, as a favored Qualifying Facility under PURPA, is *precisely* the type of plaintiff Congress intended to benefit when it enacted PURPA. Here, of course, Allco brings an action based on the Federal Power Act's preemptive provisions rather than under PURPA. But Allco's contention is that the Federal Power Act's preemptive provisions are necessary to render PURPA effective – by preempting state regulation *except as to* Qualifying Facilities such as Allco's, the Federal Power Act ensures that Qualifying Facilities are singled out for favored treatment. Allco surely falls within the "zone of interests" of this statutory scheme.

In rejecting this straightforward reasoning, the District Court held that there was "no provision of the complex regulatory scheme that evinces a concern for bidders' rights," and that "Congress had quite another purpose in mind with the enactment of the Federal Power Act, which was to provide effective federal regulation of the expanding business of transmitting and selling electric power in interstate commerce." A212 (quotation marks omitted). This analysis is clearly wrong for several reasons. For one, given that the bidders are the very entities who are in the "business of transmitting and selling electric power in interstate commerce," and the very entities who are directly affected by the state regulation that is preempted, it is difficult to understand how the Court could not identify a "concern" for the interest of those entities. For another, PURPA plainly establishes a concern for Qualifying Facilities insofar as they attempt to negotiate power purchase agreements – *i.e.*, are "bidders."

More fundamentally, the Supreme Court rejected the District Court's mode of analysis in *National Credit Union*. There, the Court considered a statute which provided that "[f]ederal credit union membership shall be limited to groups having a common bond of occupation or association, or to groups within a well-defined neighborhood, community, or rural district." 522 U.S. at 482-83 (quotation marks omitted). A group of banks brought suit seeking to use this provision to avoid competition from federal credit unions. *Id.* at

485. The Supreme Court held that the banks had prudential standing because the statute demonstrates an "interest in limiting the markets that federal credit unions can serve," and the banks share that same interest. *Id.* at 493-94. The Court squarely rejected the argument that Congress's purpose in enacting the statute was "to create a new source of credit for people of modest means" rather than to benefit banks, holding that Congress's purpose was irrelevant to the prudential standing analysis. *Id.* at 496-98.

So too here. Even if the District Court was correct in identifying some distinction between the goal of "provid[ing] effective federal regulation of the expanding business of transmitting and selling electric power in interstate commerce" and the goal of assisting bidders for that electric power, it erred in holding that distinction was relevant to prudential standing. Regardless of the existence of any express evidence of congressional intent to benefit bidders for utility contracts, it is at least arguable that the Federal Power Act's preemptive provisions protects such bidders, which is sufficient to establish prudential standing.

The District Court relied on *Gosnell v. FDIC*, 938 F.2d 372, 375

(2d Cir. 1991), but that case is far afield. In *Gosnell*, the FDIC liquidated a bank and sold its artwork to a museum. *Id.* at 373-74. The plaintiff was an art collector who sought to prevent this sale so he could bid on the artwork. *Id.* at 374. This Court held that the plaintiff lacked prudential standing, because federal law gave "the FDIC broad discretion in disposing of the assets under its control" and "consciously decided not to impose" a requirement for competitive bidding on the FDIC. *Id.* at 376. Thus, the court reasoned, "were we to allow disappointed bidders such as Gosnell to challenge the manner in which the FDIC chooses to dispose of its assets, we would undermine Congress' intent to allow the FDIC broad discretion in the disposition of its assets." *Id.*

Even assuming *Gosnell* remains good law in light of *National Credit Union*[13], it is poles apart from this case. In *Gosnell*, the Court relied solely on the fact that FIRREA *granted* the FDIC, a government agency, the complete discretion to make whatever transactions it

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[13] It is also doubtful that *Gosnell* remains good law in light of subsequent authority showing that the Court's analysis of Gosnell's claim went to the merits, not to Gosnell's standing. *See, e.g.*, *Chabad Lubavitch of Litchfield County, Inc. v. Litchfield Historic Dist. Comm'n*, 768 F.3d 183, 200-02 & n.15 (2d Cir. 2014), *petition for cert. filed*, No. 14-1001.

wished. Here, however, Allco relies on the preemptive provisions of the Federal Power Act, which *prevents* state agencies from involving themselves in wholesale market transactions. The Federal Power Act plainly does *not* grant state agencies "a wide range of discretion" in this area, *id.* at 376, and *Gosnell*'s reasoning is thus wholly irrelevant to the prudential standing inquiry.

## III. Allco's Complaint Stated a Preemption Claim.

The District Court erred in dismissing Allco's preemption claim. Allco stated a preemption claim on two independent grounds. First, Allco stated a field preemption claim based on its allegation that the Commissioner improperly regulated wholesale energy sales, which fall exclusively within federal jurisdiction. Second, Allco stated a conflict preemption claim based on its allegation that the Commissioner's actions conflicted with FERC's regulatory scheme.

### A. Legal Standard Governing Preemption.

The Supreme Court has recognized two distinct types of preemption: field preemption and conflict preemption. *See Crosby v. National Foreign Trade Council*, 530 U.S. 363, 372-73 (2000).

Under the theory of field preemption, state action is preempted when it intrudes into an area that Congress has occupied for exclusive federal regulation. *See Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 248 (1984) ("If Congress evidences an intent to occupy a given field, any state law falling within that field is pre-empted."). When Congress has reserved a field for exclusive federal regulation, a plaintiff need not demonstrate any actual conflict with federal regulation in order to demonstrate preemption; it is enough that the state has acted in a field that is forbidden to it. *See Nazarian*, 753 F.3d at 474 ("Actual conflict between a challenged state enactment and relevant federal law is unnecessary to a finding of field preemption; instead it is the mere fact of intrusion that offends the Supremacy Clause."). Indeed, the Supreme Court has held that "[w]here Congress occupies an entire field, … even complementary state regulation is impermissible. Field preemption reflects a congressional decision to foreclose any state regulation in the area, even if it is parallel to federal standards." *Arizona v. United States*, 132 S. Ct. 2492, 2502 (2012).

Under the theory of conflict preemption, state action is preempted when it "'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *Crosby*, 530 U.S. at 373 (quoting *Hines v. Davidowitz*, 312 U. S. 52, 66-67 (1941)).

### B. FERC Enjoys Exclusive Authority to Regulate Wholesale Electricity Sales, and Has Used That Authority to Implement a Market-Based Regulatory Scheme.

As the Fourth Circuit recently recognized, "A wealth of case law confirms FERC's exclusive power to regulate wholesale sales of energy in interstate commerce." *Nazarian*, 753 F.3d at 475; *see, e.g.*, *S. Cal. Edison*, 376 U.S. at 215-16 ("Congress meant to draw a bright line, easily ascertained, between state and federal jurisdiction.... This was done ... by making [FERC] jurisdiction plenary and extending it to all wholesale sales in interstate commerce except those which Congress has made explicitly subject to regulation by the States."); *New England Power Co. v. New Hampshire*, 455 U.S. 331, 340 (1982) (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"); *Pa. Water & Power Co. v. FPC*, 193 F.2d 230, 239 (D.C. Cir. 1951) (through the Federal Power Act, Congress has "occupied the field with regard to interstate wholesale rates of electric companies."), *aff'd*, 343 U.S. 414 (1952); *Transmission Access Policy Study Grp. v. FERC*, 225 F.3d 667, 723 (D.C. Cir. 2000) (noting "FERC's exclusive jurisdiction over all aspects of wholesale sales")., *aff'd*, 535 U.S. 1 (2002).[14]

Thus, for example, the Federal Power Act gives FERC exclusive authority not only to set all "rates and charges made, demanded, or received ... in connection with the transmission or sale of electric energy subject to the jurisdiction of the Commission," but also "all rules and regulations affecting or pertaining to such rates or charges." 16 U.S.C. § 824d(a).

FERC has exercised its authority by adopting a market-based regulatory structure for the New England region. *See Blumenthal*, 552 F.3d at 878. As discussed above, *supra* at 8-9, FERC has established, through ISO-New England, an interstate auction market on which

[14] With respect to the Federal Power Act, even the ordinary presumption against preemption of traditional state authority has no application. *Cf.* A15 (District Court invoking the presumption against preemption). Wholesale electricity sales in interstate commerce were never subject to state regulation, *see New York*, 535 U.S. at 6, and thus the Federal Power Act does not displace the state's traditional police powers. What is more, the presumption "is not triggered when the State regulates in an area where there has been a history of significant federal presence," *United States v. Locke*, 529 U.S. 89, 108 (2000), which is true of wholesale electricity regulation. *See Nazarian*, 753 F.3d at 477; *see also Pub. Utils. Dist. No. 1 v. IDACORP, Inc.*, 379 F.3d 641, 648 n.7 (9th Cir. 2004) ("This presumption is almost certainly not applicable here because the federal government has long regulated wholesale electricity rates.").

electricity is bought and sold in real time. *Blumenthal*, 552 F.3d at 878 (describing the auction mechanism). FERC has also allowed generators, through "market-based tariffs," to enter into "freely negotiated contracts with purchasers." *Morgan Stanley*, 554 U.S. at 531.

The rationale for FERC's policy is that the dynamics of the free and competitive marketplace will enable buyers to obtain electricity at the lowest prices. *See Pub. Util. Dist. No. 1 of Snohomish Cnty. v. Dynegy Power Mktg., Inc.*, 384 F.3d 756, 760 (9th Cir. 2004) (explaining that "a seller cannot raise its price above the competitive level without losing substantial business to rival sellers unless the seller has market power," and therefore, in a competitive market in which sellers lack market power, there is "strong reason to believe that sellers will be able to charge only just and reasonable rates") (internal quotation and citation omitted).

### C. The Commissioner's Order Compelling a Contract With Number Nine Wind Farm Is Preempted.

#### 1. The Commissioner Has Unlawfully Regulated in the Field of Wholesale Sales and, Moreover, Has Acted in Conflict With FERC's Policy.

Allco has stated a claim under both a field preemption theory and a conflict preemption theory.[15] Here, the state has waded into FERC's field of regulation and adopted a regulatory scheme different than FERC's: one in which state commissions can compel entry into a wholesale electricity contract, and do so at a price that is neither the FERC-regulated market price resulting from the ISO-New England auction, *see supra* at 14 (explaining that the contract price differs from the market price), nor a price that is freely negotiated between seller and purchaser.

Under the Federal Power Act, however, only FERC gets to make the rules governing wholesale electricity transactions. As Justice Scalia has noted, "[i]t is common ground that if FERC has jurisdiction over a subject, the States cannot have jurisdiction over the same subject."

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[15] The District Court stated, A215, that Allco was only advancing a field pre-emption argument (citing Tr. 32 [A58]). That is incorrect. The Complaint and the Memorandum in opposition to the motion to dismiss clearly set forth both a field and a conflict preemption claim. *See* A17-A18 ¶¶ 76, 79, 84-85 (field preemption); A18 ¶ 80; A111 ¶¶ 92-94 (conflict preemption); Pltf. Mem. in Opp., Dkt. 34 at 18-21. The page of the oral argument transcript cited by the District Court merely states that, in order to establish field preemption, a plaintiff need not demonstrate any actual conflict. A168. On the preceding transcript page, counsel described the "market distortion" – *i.e.*, the actual conflict – that results from the Commissioner's action. A167. And subsequently counsel made clear that Allco was also alleging a conflict with federal policy. A193-A194, A196.

*Miss. Power & Light Co. v. Miss. ex rel. Moore*, 487 U.S. 354, 377 (1988) (Scalia, J., concurring). The Commissioner's actions both intrude on the field reserved exclusively for FERC, and thus are field preempted, and also conflict with FERC's chosen market-based regulatory approach and the favored status and rights of Qualifying Facilities under the Federal Power Act, and thus are conflict preempted as well. *Cf.* A222 (District Court asserting "there is no market distortion").

Although the District Court did not dispute the basic proposition that FERC enjoys exclusive authority over wholesale electricity sales, A217, it nevertheless found that the Commissioner's action fell outside that field because the Department merely received bids offered by generators, and then chose among those bids and compelled the utilities to accept them. *See* A218-19 ("Defendant plays no role in determining the price offered by bidders."). According to the District Court, state action can be preempted only if it "in fact 'fixed' the contract prices." A220.

That is incorrect. The federal field is not narrowly limited to wholesale pricing. As the plain language of the statute makes clear, federal authority extends to "the sale of electric energy at wholesale in interstate commerce" more broadly, 16 U.S.C. § 824(b)(1), and includes "all rules and regulations affecting or pertaining to such rates or charges." *Id.* § 824d(a); *see also Nazarian*, 753 F.3d at 475 (describing the "breadth of [Congress's] grant of authority" to FERC in the Federal Power Act and the statute's "capacious substantive and remedial provisions"). That grant of authority to FERC includes the power to regulate the circumstances and prices under which buyers and sellers are permitted to enter wholesale electricity contracts, as well as whether such contracts must be voluntary. And it precludes states from deciding otherwise.

Indeed, if states were free to compel their utilities to enter into whichever wholesale electricity transactions that the state preferred, including at prices different than the market price for electricity, FERC's entire market-based regulatory scheme could unravel. State-mandated purchasing decisions could be guided by any number of factors other than cost – indeed, the Department used undisclosed non-price criteria in this very case – and thus FERC's goal of establishing a competitive market designed to meet demand at least cost would be frustrated. Thus, it is simply irrelevant that the state "play[ed] no role in determining the price offered by bidders." A222. The state compelled the utilities to enter contracts with the State's chosen winners, and thereby mandated a wholesale sale of electricity that would not have taken place absent the state's compulsion. And the Supreme Court has held that the Federal Power Act "left no power in the states to regulate … sales for resale in interstate commerce." *S. Cal. Edison*, 376 U.S. at 215.

### 2. Recent Decisions by the Third and Fourth Circuits Confirm That the Commissioner's Actions Were Preempted.

The *Nazarian* decision from the Fourth Circuit, 75 F.3d 467, and the *Solomon* decision from the Third Circuit, 766 F.3d 241, found state programs materially identical to the one in this case to be preempted. In both those cases, just like this one, the state solicited bids from generators, who named the price at which they were willing to sell. The state then selected winning bidders, and compelled the utilities to enter into contracts guaranteeing the winning bidders a fixed long-term revenue stream for the sales of electricity – which was a price different than the market-price in the FERC-regulated auction market, just as the contract price here is different than the market price the generator would receive from the ISO-New England energy market, *supra* at 14; *see PPL EnergyPlus LLC v. Nazarian*, 974 F. Supp. 2d 790, 822 (D. Md. 2013) (describing selection process), *aff'd,* 753 F.3d 467 (4th Cir. 2014), *petitions for cert. filed*, Nos. 14-614, 14-623; *PPL EnergyPlus LLC v. Hanna*, 977 F. Supp. 2d 372, 393-94 (D.N.J. 2013) (describing selection process), *aff'd*, 766 F.3d 241 (3d Cir. 2014), *petitions for cert. filed*, Nos. 14-634, 14-694.

The only material difference between those cases and this one involved the pricing mechanism used by the state to guarantee the fixed long-term revenue stream. In those cases, the states adopted what is known as a "contract-for-differences": the winning bidders would sell into the market, and if market revenues fell below the contract price, the utilities would make up the difference. If market revenues exceeded the contract price, the winning bidders would remit the excess back to the utilities. *See Solomon*, 766 F.3d at 252; *Nazarian*, 753 F.3d at 473-74. The states argued in those cases that the contract-for-differences was a mere side financial arrangement akin to a hedge, and was not part of any sale of electricity. And the key question in those cases was whether the side payments were sufficiently connected with the sale of electricity that they fell within the federal regulatory field. The courts held that they were. *Nazarian*, 753 F.3d at 476; *Solomon*, 766 F.3d at 252-53.

This case is much simpler, and the intrusion into the federal field is much more obvious and direct. Rather than providing generators with revenue assurance by compelling utilities to enter into a complicated contract-for-differences, here the Commissioner has simply compelled the utilities to buy the electricity itself. Thus, there can be no question in this case that the Commissioner regulated in the field of wholesale sales.[16]

The District Court sought to distinguish *Nazarian* and *Solomon* on the ground that those cases involved state schemes with "market-

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[16] The power purchase agreement used in this case is economically identical to the contract-for-differences at issue in *Nazarian* and *Solomon*, as is illustrated in the following example:

In both cases, the generator submits a bid to the state specifying the long-term rate per megawatt or megawatt-hour that the generator needs to be guarantee (for example, \$60). Suppose that the market price for energy is \$50. Under a <u>power purchase agreement</u> like the one here, the generator sells to utility for \$60. The utility then resells into the spot market (or avoids purchases from the spot market) at \$50. Under the <u>contract-for</u>-differences, the generator sells into the spot market at \$50. The utility makes a side payment to the generator of \$10. In both cases, the generator's net revenue is \$60 and the utility's net cost is \$10.

distorting features." A222. However, that effort to distinguish the cases fails, for two reasons. First, the presence or absence of market distortion is simply irrelevant to field preemption. As noted above, under the doctrine of field preemption, state action is preempted merely because it lies within an exclusive federal field – even when the state action is *complementary* to federal policy. *See supra* at 48-49. Second, while market distortion might be relevant to the doctrine of *conflict* preemption, the complaint does allege a conflict with federal policy: specifically, Congress has chosen to allow states to compel wholesale contracts only for Qualifying Facilities under PURPA, and has not made the same accommodation for larger renewable projects like Number Nine Wind, which are expected to compete on their own merits in the FERC-regulated wholesale market. Interference with that policy will impede the achievement of Congress's goals in enacting PURPA. *See* A18 ¶ 82; A20 ¶¶ 92-94; *see also* A167, A193-194 (transcript pages in which counsel explains how the Commissioner's actions distort the market). At the motion-to-dismiss stage, the District Court was required to treat that well-pleaded allegation as true; instead, the District Court simply ignored it.

### 3. The Commissioner's Actions Do Not Fall Within the State's Authority to Direct Utility Planning and Resource Decisions.

To be sure, as the District Court recognized, states do retain power to "'direct the planning and resource decisions of utilities under their jurisdiction.'" A220 (quoting *Entergy Nuclear Vermont Yankee, LLC v. Shumlin*, 733 F.3d 393, 417 (2d Cir. 2013)). For example, states are not preempted within their own borders from mandating the construction of new generation capacity or from regulating the terms on which power plants are built and retired. *Conn. Dep't of Public Utility Control v. FERC*, 569 F.3d 477, 481 (D.C. Cir. 2009); *PJM Interconnection, L.L.C.*, 135 FERC ¶ 61,022 at P 142 (2011) (a state may "act within its borders to ensure resource adequacy or to favor particular types of new generation"), *clarified on reh'g*, 137 FERC ¶ 61,145 (2011).

But the state's power in this regard is not unbounded. As the statute makes clear, states retain such authority "except as specifically provided" by the Federal Power Act, 16 U.S.C. § 824(b)(1) – and the Federal Power Act expressly provides that FERC shall have exclusive authority over wholesale electricity sales. Thus, a state cannot invoke its authority over resource planning decisions in order to justify the regulation of wholesale sales. If it could, the ability of FERC to effectuate a comprehensive regulatory scheme would be seriously undermined. *See Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 308-09 (1988) (holding preempted a state law "whose central purpose is to regulate matters that Congress intended FERC to regulate"); *id.* at 310 ("When a state regulation 'affect[s] the ability of [FERC] to regulate comprehensively . . . the . . . sale of natural gas, and to achieve the uniformity of regulation which was an objective of the Natural Gas Act' or presents the 'prospect of interference with the federal regulatory power,' then the state law may be pre-empted even though 'collision between the state and federal regulation may not be an inevitable consequence.'" (quoting *N. Natural Gas Co. v. State Corp. Comm'n*, 372 U.S. 84, 91-92 (1963) (second ellipses added))).[17]

Accordingly, when states (including Connecticut) have sought to encourage renewable generation, they have typically done so in ways that avoid compelling particular wholesale electricity transactions. For example, they have required utilities to build their own renewable

[17] In this respect, the Natural Gas Act and the Federal Power Act are interchangeable. *See Nazarian*, 753 F.3d at 477.

generation facilities. Or, as discussed above, *supra* at 11-12, they have adopted renewable portfolio standards that require utilities to source a certain percentage of their electricity needs from renewable facilities, but stop short of compelling a utility to enter a wholesale contract with a particular generator chosen by the state.

Here, by contrast, the Commissioner went so far as to mandate a wholesale electricity transaction at a price different than the prevailing market price for electricity. In doing so, he exceeded the limits of state authority, in violation of the Federal Power Act and the Supremacy Clause. The Commissioner's action can be defended only to the extent that it falls within the narrow exception provided by PURPA, which, as noted above, does allow states to compel transactions with Qualifying Facilities. While one of the generators selected by the Commissioner, Fusion Solar, does appear to satisfy the requirements for a Qualifying Facility, Number Nine Wind does not. Qualifying Facilities must be smaller than 80 megawatts in size, and Number Nine Wind was 250 megawatts.

Nor can the Commissioner claim to be acting pursuant to the state's reserved power under Section 16 U.S.C. §824(b)(1) with respect to "facilities used for the generation of electric energy." 16 U.S.C. § 824(b)(1). Whatever the scope of that reserved authority, it is limited to facilities within the state's own borders. Number Nine Wind is located in Maine, not Connecticut. Connecticut does not have, and never did have, the right to regulate the siting and building of physical generation facilities located in other states. As the Supreme Court observed "the legislative history [of the Federal Power Act] is replete with statements describing Congress' intent to preserve state jurisdiction *over local facilities*." *New York*, 535 U.S. at 535 (emphasis added). Local facilities are facilities within a state's own borders, not facilities located several states away.

Accordingly, the Commissioner's action compelling the utilities to enter into wholesale energy contracts with Number Nine Wind was preempted, and those contracts are void *ab initio*.

## IV. The District Court Erred in Dismissing Allco's Claim Under 42 U.S.C. § 1983.

42 U.S.C. § 1983 affords remedies for deprivation of "rights" under statutes as well as the Constitution, *see Maine v. Thiboutot,* 448 U.S. 1 (1980) (§ 1983 claim for deprivation of any federal statutory right), provided that Congress has not foreclosed such an enforcement in the

statute itself, *Marshall v. Switzer,* 10 F.3d 925, 928 (2d Cir. 1993). The statute invoked must unambiguously confer a "right" not just some benefit or interest, *see Gonzaga University v. Doe*, 536 U.S. 273, 283 (2002). A statute creates a right enforceable under § 1983 "only if it is 'sufficiently specific and definite' to be within the competence of the judiciary to enforce." *Marshall,* 10 F.3d at 928 (citing *Wright v. Roanoke Redev. & Hous. Auth.*, 479 U.S. 418, 432 (1987)), and the statute imposes a binding obligation on the government unit rather than merely expressing a congressional preference for a certain kind of conduct. *Id.*

PURPA clearly "focuses" on small and nontraditional energy supplying facilities such as Allco's, who hence are "intended beneficiar[ies]" thereof. The Federal Power Act and PURPA undisputedly place binding obligations on the Commissioner, and the interests asserted by Allco are not so vague or amorphous that they are beyond the competence of the judiciary to enforce. "Once a plaintiff demonstrates that a statute confers an individual right, the right is presumptively enforceable by §1983." *See Gonzaga University*, 536 U.S. at 284. Congress' intent to exclude other remedies like § 1983, when not expressly stated, will be implied only when the statute which creates the right also provides a "comprehensive" statutory remedy. *See Middlesex County Sewage Authority v. Nat'l Sea Clammers Ass'n*, 453 U.S. 1, 19-21 (1981). Congress' adoption of a broad Federal Tort Claims Act [FTCA] did not implicitly exclude § 1983 remedies because the former lacked the damages remedies and deterrents, as well as a jury trial right. *See Carlson v. Green*, 446 U.S. 14, 20-23 (1980). *See also*, *Wheelabrator Lisbon, Inc. v. Conn. Dep't of Pub. Util. Control*, 531 F.3d 183 (2d Cir. 2008) (PURPA generator brought suit under 42 U.S.C. § 1983, seeking declaratory and injunctive relief and this Court addressed the merits and did not question whether a § 1983 action could be brought.)

Neither the Federal Power Act nor PURPA provide a "comprehensive" remedial scheme such that an action under 42 U.S.C. § 1983 is implicitly excluded. First, PURPA does not authorize a district court enforcement action against a regulated public utility – i.e. PURPA specifically permits suit exclusively against a state regulatory body and unregulated utilities, and against no one else regardless of fault or damages causation, *see Niagara Mohawk Power Corp. v. FERC*, 306 F.3d 1264, 1268 (2d Cir. 2002) (cannot even sue FERC).

Second, damages, and/or individualized or retrospective relief plus attorney's fees, are unavailable under the Federal Power Act or PURPA statutes in actions such as this; rather, the claims are confined to an effort to prospectively void state action and insure that the State complies with Federal law in the future. This form of relief, even if granted, could not conceivably afford the kind of expeditious remedy required for a start-up business indefinitely frozen from operation and losing money in order to be in operation mode while awaiting compliance with the law. Thus, this is not an example of a viable remedial scheme which plaintiffs merely wish to make more "expansive," but rather nonexistent remedies which plaintiffs wish to supplement with § 1983 to afford the only such remedies possible. *See Carlson*, 446 U.S. at 20-23. It is undisputed that when Congress, in adopting a statutory remedy, has not explicitly excluded other remedies, such exclusion will nevertheless be implied only when the statutory remedy is "comprehensive." However, if mere enactment of any remedy suffices, no matter how limited, then "comprehensive" has no meaning whatsoever.

When Congress in 1978 amended the Federal Power Act enacting PURPA, it was well aware of § 1983 remedies and could have—but did not—expressly state that the Federal Power Act's (and PURPA's) remedies are exclusive and courts should not "lightly" infer any exclusion of § 1983 remedies. *See Smith v. Robinson*, 468 U.S. 992, 1012 (1984) (repeatedly emphasized comprehensive nature of remedies therein). The actions in *Nazarian* and *Solomon* are clear examples. The Federal Power Act and PURPA remedies may involve a complex scheme but there is nothing comprehensive about the remedial scheme, in the §1983 sense.

Here, the Commissioner's actions violated Allco's rights under the Federal Power Act to (i) participate in the energy market free of unlawful action of the state, and (ii) have the avoided costs of the utilities determined without regard to unlawful compelled wholesale transactions. In addition, once the Commissioner decided to compel wholesale transactions, whether he knew it or not, to the extent his action was valid, he was exercising his authority under PURPA. Under PURPA, a small power producer such as Allco has the right to sell the output from its Qualifying Facility at the utilities' avoided costs. Under

PURPA as relevant here, price is the only consideration. Other factors such as permitting issues are left to other state and local officials, not the Commissioner. The Commissioner's actions violated Allco's right in respect of one of its Qualifying Facilities because the Commissioner selected Fusion Solar, which had a higher price. The Commissioner impermissibly discriminated against that Allco Qualifying Facility without any legal basis, and in doing so, denied the right to sell as provided under PURPA.

## CONCLUSION

For the foregoing reasons, 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 26th day of February 2015.

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## 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 13,417 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.

*/s/ Thomas Melone*

## CERTIFICATE OF SERVICE

I hereby certify that on the 6th day of March, 2015, I caused to be served, using the Court's CM/ECF system, a copy of the foregoing Brief of Appellant and the accompanying Joint Appendix to all counsel of record.

*/s/ Thomas Melone*