15-20-cv

IN 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-Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

SUPPLEMENTAL BRIEF OF INTERVENORS-APPELLEES NUMBER NINE WIND FARM LLC and FUSION SOLAR CENTER LLC

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

REGULATIONS

STATEMENT OF THE SUPPLEMENTAL ISSUE

On June 24, 2015, this Court directed the parties to submit supplemental briefs addressing the following issues:

(1) Whether 16 U.S.C. § 824a-3(h)(2)(B) provides appellant Allco Finance Limited ("Allco") with a right of action to bring some or all of its claims;

(2) Whether Allco petitioned the Federal Energy Regulatory Commission ("FERC") to enforce the requirements of 16 U.S.C. § 824a-3(f);

(3) Whether a failure to comply with the administrative exhaustion provision strips this Court of subject-matter jurisdiction to consider claims brought under § 824a-3(h)(2)(B); and

(4) Whether the existence of this private right of action forecloses the availability of other rights of action, including an implied right of action under the Public Utility Regulatory Policies Act of 1978 ("PURPA") and rights of action under 42 U.S.C. §§ 1983 and 1988.

STANDARD OF REVIEW

Where, as here, "the trial court dismissed on the basis of the complaint alone or the complaint supplemented by undisputed facts from the record," this Court reviews the dismissal for lack of subject matter jurisdiction de novo. *Hamm v. United States*, 483 F.3d 135, 137 (2d Cir. 2007).

SUMMARY OF ARGUMENT

The Commissioner conducted the procurement at issue in this case under State law, specifically Section 6 of Connecticut Public Act 13-303. Allco contends that the manner in which the Commissioner conducted the procurement was inconsistent with the rules adopted by FERC under PURPA, rules designed to encourage production by small power facilities. Although Allco describes its claim as a violation of the Supremacy Clause, at its essence, Allco's claim is that the State of Connecticut failed to implement FERC's rules under PURPA. Indeed, Allco seeks a declaration that Connecticut's procurement is void for violating PURPA and an injunction obliging the State to comply with PURPA in future procurements. Allco's claim, therefore, falls within the scope of PURPA § 210(h)(2)(B), codified at 16 U.S.C. § 824a-3(h)(2)(B).

Allco could only have asserted a claim under § 210(h)(2)(B) if it had first exhausted its administrative remedies. Allco has failed to provide this Court with a record of having done so. As a result, as previously decided in *Niagara Mohawk Power Corp. v. Fed'l Energy Reg. Comm'n*, 306 F.3d 1264, 1269-71 (2d Cir. 2002), the Court lacks subject matter jurisdiction and the case must be dismissed.

ARGUMENT

I. THE JUDGMENT SHOULD BE AFFIRMED ON THE ALTERNATIVE GROUND THAT ALLCO FAILED TO EXHAUST ITS ADMINISTRATIVE REMEDIES.

In their opening brief, Number Nine Wind Farm LLC and Fusion Solar Center LLC, intervenors-appellees, demonstrated that Allco lacked standing to assert its claims and that it had failed to state a cognizable preemption claim. As shown below, this action should be dismissed for the additional, alternative ground that Allco failed to exhaust its administrative remedies under PURPA § 210(h)(2)(B).

A. Allco's Claims Fall Within PURPA § 210(h)(2)(B).

Section 210(h)(2)(B) of PURPA authorizes a qualifying small power producer to petition FERC to enforce the requirements contained in PURPA § 210(f). 16 U.S.C. § 824a-3(h)(2)(B). Section 210(f) obliges each State regulatory authority to implement the rules adopted by FERC "necessary to encourage . . . small power production" by requiring electric utilities to purchase electric energy from such facilities. 16 U.S.C. § 824a-3(a), (f). FERC's rules encouraging small power production are treated as rules under the Federal Power Act. 16 U.S.C. § 824a-3(h)(1). Qualified small power producers ("QFs"), authorized to enforce FERC's rules, own production facilities that generate electricity primarily from solar, wind, waste, or geothermal sources, and have a production capacity that does

not exceed 80 megawatts. 16 U.S.C. § 796(17)(A); 18 C.F.R. § 292.203(a). QF's may enforce FERC's rules against a State regulator by petitioning FERC and filing suit in Federal court if FERC fails to start an enforcement action within 60 days. 16 U.S.C. § 824a-3(h)(2)(B). QFs may also obtain judicial review of actions by a State regulator, may enforce a State's implementation of FERC's rules against an electric utility, and may seek damages for a utility's violation of State rules in state court. 16 U.S.C. §§ 824a-3(g)(2), 2633.

In this action, Allco alleges that it is a "'qualifying small power producer' within the meaning of Section 210(h)(2)(B) of PURPA." First Amended Complaint, Feb. 26, 2014, ¶ 33 (Joint Appendix ("JA") A9). For purposes of this appeal, Allco's allegations must be taken as true. *Lee v. Governor of New York*, 87 F.3d 55, 58 n.3 (2d Cir. 1996). Thus, Allco must be presumed authorized to compel Connecticut to comply with FERC's rules encouraging small power production.

In this action, Allco claims that Connecticut has applied Section 6 of Connecticut Public Act 13-303, in violation of the FPA and PURPA. First Amended Complaint, Feb. 26, 2014, ¶¶ 84-89 (JA A18-A19). Allco contends that Connecticut violated the Supremacy Clause by violating PURPA in the manner in which it applied Section 6 of Public Act 13-303. Oral Argument Transcript, July 30, 2014, at 17-18 (JA A153-54). Allco seeks a declaration that Connecticut's

application of Section 6 is void for violation of PURPA, and an injunction compelling Connecticut to act in accordance with PURPA. First Amended Complaint, Feb. 26, 2014, Prayer for Relief ¶¶ 1-2 (JA A21-A22). Allco's Supremacy Clause claim is analytically identical to a claim that Connecticut failed to implement the rules adopted by FERC under PURPA. Thus, Allco's claim is one that may be brought under § 210(h)(2)(B), subject to the procedural requirements of that section.

Allco's characterization of its claim as a violation of the Supremacy Clause, rather than an enforcement action under PURPA, avails Allco nothing. The relevant analysis is the nature of the claim rather than the label attached to it by the plaintiff. *See Niagara Mohawk Power Corp.*, 306 F.3d 1269-71 (analyzing true nature of claim rather than label attached by plaintiff). Where a QF contends that a State violated PURPA and its related implementing regulations, the claim is cognizable under § 210(h)(2)(B) regardless of the label that the QF attaches to it. *Id.* at 1270. Where, as here, Allco could have brought its claim under PURPA, it "cannot avoid the administrative exhaustion requirement of § 210(h)(2)(B) simply by restating its PURPA claim under a different heading." *Id.*

Because Allco alleges a violation of PURPA and seeks to compel Connecticut to comply with PURPA, Allco could have asserted its claim under § 210(h)(2)(B).

B. Allco Has Not Exhausted Its Administrative Remedies.

Allco's right to enforce FERC's PURPA rules against Connecticut in Federal court is conditioned in two ways. First, Allco must petition FERC to commence an enforcement action against the State. 16 U.S.C. § 824a-3(h)(2)(B). Second, Allco may only commence an action such as this if FERC does not initiate an enforcement proceeding within 60 days of Allco's petition. *Id.* Satisfaction of these two steps is a prerequisite to subject matter jurisdiction over a claim under § 210(h)(2)(B). *Niagara Mohawk Power Corp.*, 306 F.3d at 1270.

Allco bears the burden of pleading and proving facts sufficient to establish subject matter jurisdiction over its claim. *Hamm*, 483 F.3d at 137. Allco has failed to plead that it petitioned FERC to enforce its PURPA rules against Connecticut. Allco has also failed to plead that it waited 60 days and that FERC failed to initiate an enforcement proceeding against the State in that period. Thus, the record before this Court lacks any evidence that Allco has satisfied the statutory prerequisites to subject matter jurisdiction over Allco's claim. Quite simply, Allco has failed to establish that it exhausted its administrative remedies under PURPA § 210(h)(2)(B).

C. Allco's Failure To Exhaust Mandates Dismissal Of Its Claims.

This Court's decision in *Niagara Mohawk Power Corp.* demonstrates that Allco's failure to exhaust its administrative remedies is fatal to its claim. In

Niagara Mohawk, the plaintiff challenged a state rate-setting regulation promulgated under PURPA § 210(f). 306 F.3d at 1270. Petitions under PURPA § 210(h)(2)(B) are intended to enforce compliance with § 210(f). *Id.* On this basis, the Court concluded that the plaintiff's Supremacy Clause claim was one that could be brought under PURPA § 210(h)(2)(B). *Id.* Indeed, notwithstanding the plaintiff's attempt to distinguish between its PURPA and Supremacy Clause claims, the Court concluded that both claims asserted the same theory, a violation of PURPA. The plaintiff could not be permitted to avoid the administrative exhaustion requirement of § 210(h)(2)(B) simply by restating its PURPA claim as one under the Supremacy Clause. *Id.* at 1270. Because the plaintiff had failed to exhaust, its claim was dismissed for lack of subject matter jurisdiction. *Id.* at 1271.

In addition to the statutory requirements of exhaustion, this Court reasoned that prudence also dictated dismissal of Niagara Mohawk's claim. In *Niagara Mohawk*, the Court noted that FERC had not yet addressed the issue raised by the plaintiff's claim. 306 F.3d at 1271. The action was, therefore, "premature." *Id.* at 1270-71. In the Court's view, consideration of the power company's claims before FERC had addressed the issue would have been imprudent.

The same result must apply here. Allco has failed to plead exhaustion of its administrative remedies under § 210(h)(2)(B). Allco's Supremacy Clause claim is nothing more than a disguised claim for violation of PURPA § 210(f), just as in

Niagara Mohawk. Allco has not given FERC the opportunity to consider whether Connecticut acted within the sphere of authority retained by the States or whether Connecticut applied Section 6 in a manner consistent with PURPA. As a result, in addition to having failed to satisfy the statutory prerequisites to subject matter jurisdiction, this action is premature. Just as in *Niagara Mohawk*, Allco's failure to exhaust mandates dismissal.

D. PURPA's Remedial Scheme Forecloses Allco's § 1983 Claim

In determining whether PURPA's remedial scheme forecloses parties from seeking remedies for its violation under § 1983, "[t]he crucial consideration is what Congress intended." *Fitzgerald v. Barnstable Sch. Comm.*, 555 U.S. 246, 252 (2009). "If Congress intended a statute's remedial scheme to be the exclusive avenue through which a plaintiff may assert [the] claims, the § 1983 claims are precluded." *Id.* (internal citations omitted). "[S]uch congressional intent may be found directly in the statute creating the right, or inferred from the statute's creation of a comprehensive enforcement scheme that is incompatible with individual enforcement under § 1983." *City of Rancho Palos Verdes v. Abrams*, 544 U.S. 113, 120 (2005).

The remedial schemes of federal statutes span a broad spectrum, with those that are comprehensive generally prohibiting a claim under § 1983, while those offering few remedial provisions generally not precluding suit under § 1983. The

statutes in *Middlesex County Sewerage Authority v. National Sea Clammers Assoc.*, 453 U.S. 1, 20-21 (1981), exemplify the comprehensive end of the spectrum of remedial schemes. "[T]hese two statutes' 'unusually elaborate enforcement provisions,' . . . authorized the Environmental Protection Agency to seek civil and criminal penalties for violations, permitted 'any interested person' to seek judicial review, and contained detailed citizen suit provisions allowing for injunctive relief." *Fitzgerald*, 555 U.S. at 253 (discussing the statutes and Supreme Court analysis in *Sea Clammers* and noting that "[a]llowing parallel § 1983 claims to proceed . . . would have thwarted Congress' intent in formulating and detailing these provisions.").

Title IX of the Civil Rights Act of 1964 represents the other end of the statutory remedial scheme spectrum. 20 U.S.C. §§ 1681–1688. Title IX, as its only express remedial provision, has "an administrative procedure resulting in the withdrawal of federal funding from institutions that are not in compliance." *Fitzgerald*, 555 U.S. 255. Additionally, the Supreme Court has recognized an implied right of action in Title IX allowing "both injunctive relief and damages." *Id.* So, parallel and concurrent § 1983 claims would "neither circumvent required procedures, nor allow access to new remedies." *Id.* at 255-56.

Between these two poles, the Supreme Court has noted that "[t]he provision of an express, private means of redress in the statute itself is ordinarily an

indication that Congress did not intend to leave open a more expansive remedy under § 1983. . . . '[T]he express provision of one method of enforcing a substantive rule suggests that Congress intended to preclude others.'" *Rancho Palos Verdes*, 544 U.S. at 121 (quoting *Alexander v. Sandoval*, 532 U.S. 275, 290 (2001)). "Thus, the existence of a more restrictive private remedy for statutory violations has been the dividing line between those cases in which we have held that an action would lie under § 1983 and those in which we have held that it would not." *Id.* Specifically, the *Rancho Palos Verdes* Court found that the statute at issue in that case required an action for judicial review to be brought within 30 days of the agency's action, and the remedies allowed did not include compensatory damages nor attorneys' fees. "A § 1983 action, by contrast, can be brought much later than 30 days after the final action, . . . [a]nd the successful plaintiff may recover not only damages but reasonable attorney's fees and costs." *Id.* at 122-23. As a result, the Court held a § 1983 action could not lie.

Here, PURPA provides specific remedies that enable QFs such as Allco to obtain judicial review of their rights under PURPA or under any rule or regulation promulgated by the FERC pursuant to PURPA. *See* 16 U.S.C. § 824a-3(g), (h). PURPA permits aggrieved QFs to sue for PURPA violations either against State regulators, in federal court, after unsuccessfully petitioning FERC to bring an enforcement action, or against utilities, in state court only. *Solutions for Utils., Inc.*

v. Cal. PUC, slip op., No. 2:11-cv-04975-SJO, at 12 (C.D. Cal. Dec. 2, 2011). "The specific and detailed remedies provided by the statute demonstrate congressional intent to preclude suits under § 1983 for violations of PURPA." *North Am. Natural Res. v. Michigan PSC*, 73 F. Supp. 2d 804, 809 (W.D. Mich. 1999). Indeed, PURPA's remedial scheme has been described as elaborate, multi-layered, and complex. *See, e.g., New York Elec. & Gas Corp. v. Saranac Power*, 117 F. Supp. 2d 211, 216-17 (N.D.N.Y. 2000) ("PURPA contains an elaborate enforcement scheme and provisions for judicial review"); *Niagara Mohawk Power Corp. v. FERC*, 162 F.Supp. 2d 107, 111 n.3 (N.D.N.Y. 2001) (same); *Power Res. Group, Inc. v. Klein*, 2004 U.S. Dist. LEXIS 28820, at *14-16 (W.D. Tex. Feb. 18, 2004) (PURPA's "enforcement scheme is multi-layered . . . [and] complex."), *aff'd,* 422 F.3d 231 (5th Cir. 2005) (describing PURPA's enforcement provisions as "unique" and "multi-layered.").

As with the statutes at issue in *Rancho Palos Verdes*, the private remedy afforded by PURPA is more restrictive than § 1983, as PURPA obliges a QF to petition FERC and to wait 60 days before filing suit. Section 1983 contains no such limitations. Similarly, PURPA adds no remedies to those available under § 1983, such as injunctive relief. Because PURPA limits relief in ways that § 1983 does not and adds no remedies to those available under § 1983, PURPA supports an inference that Congress intended PURPA's remedies to be exclusive. *See*

Rancho Palos Verdes, 544 U.S. at 120-23. Indeed, as Court of Appeals for the Ninth Circuit has recently explained, the fact "[t]hat PURPA provides fewer remedies than § 1983 is evidence that Congress did not intend to permit a PURPA claim to be brought under § 1983." *Solutions for Utils., Inc. v. Cal. PUC*,, 596 F. App'x 571, 572 (9th Cir. 2015).

Several other courts have also concluded that PURPA's remedial scheme forecloses a claim for violation of PURPA under § 1983. *E.g.*, *Winding Creek Solar LLC v. Peevey*, No. 13-cv-04934-JD, 2015 U.S. Dist. LEXIS 18887, at *21 (N.D. Cal. Feb. 17, 2015) (dismissing § 1983 claim because "PURPA, of course, expressly provides specific remedies in cases like these."); *Solutions for Utils., Inc.*, slip op., No. 2:11-cv-04975-SJO, at 12 (dismissing because "[i]n light of this comprehensive statutory scheme, [plaintiff] may not sue under § 1983 for violations of its PURPA rights."), *aff'd*, 596 F.App'x 571, 572 (9th Cir. 2015) ("Because PURPA has a comprehensive remedial scheme, [plaintiff] is precluded from alleging a PURPA violation through § 1983."); *North Am. Natural Res.*, 73 F. Supp. 2d at 809.

PURPA's detailed, multi-layered, and complex remedial scheme demonstrates Congress's intent that PURPA be the exclusive avenue through which a plaintiff seek redress for its violation. Because allowing a claim under § 1983 claim would circumvent Congress's carefully tailored remedial scheme and

expand the remedies available to a QF, Allco cannot claims for violation of PURPA under § 1983.

CONCLUSION

As demonstrated in the Intervenors' opening brief, Allco lacks standing to pursue its claims in this action, and failed to state a claim of preemption upon which relief can be granted. This Court's decision in *Niagara Mohawk Power Co.* establishes that the judgment should be affirmed on the alternative grounds that Allco failed to exhaust its administrative remedies. For all of these reasons, the judgment should be affirmed.

NUMBER NINE WIND FARM LLC and FUSION SOLAR CENTER LLC

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CERTIFICATE OF COMPLIANCE PURSUANT TO FEDERAL RULE OF APPELLATE PROCEDURE 32(A)(7)(C)

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), counsel for Intervenors-Appellees Number Nine Wind Farm LLC and Fusion Solar Center LLC certifies that this supplemental brief complies with the type-volume limitations of Federal Rule of Appellate Procedure 32(a)(7)(B). The foregoing Brief is printed using a proportionally spaced, 14-point Times New Roman typeface and contains 2,649 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii). The certificate was prepared in reliance on the word count option in the review menu of the Microsoft Office Professional Plus Word 2010 word-processing software program that was used to prepare this brief.

/s/ Bradford S. Babbitt
Bradford S. Babbitt

CERTIFICATE OF SERVICE

I hereby certify that on the 17th day of July, 2015, I caused to be served, using the Court's CM/ECF system, a copy of the foregoing Supplemental Brief of Intervenors-Appellees to all counsel of record.

/s/ Bradford S. Babbitt
Bradford S. Babbitt