15-20

To Be Argued By:
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Assistant Attorney General

IN THE
United States Court of Appeals
FOR THE SECOND CIRCUIT

ALLCO FINANCE LIMITED,
Plaintiff-Appellant,

v.

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

OFFICE OF CONSUMER COUNSEL, FUSION SOLAR LLC, NUMBER NINE WIND FARM LLC, GREENSKIES RENEWABLE ENERGY, LLC,
Intervenors-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT (Hartford)
No. 3:13cv1874
Hon. Janet Bond Arterton

PETITION FOR REHEARING OF DEFENDANT-APPELLEE

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RULE 40 STATEMENT

Pursuant to Federal Rule of Appellate Procedure 40, the Defendant, Robert J. Klee, Commissioner of the Department of Energy and Environmental Protection, in his official capacity, (“Commissioner") seeks correction or deletion of two sentences of dicta in the November 6, 2015, decision in this matter because those two sentences inaccurately discuss an important issue of the law of preemption, potentially calling into question numerous lawful, existing and planned electric energy contracts between publicly regulated utilities and electric power generators, in contravention of clearly established law of this circuit and the Supreme Court. Removal of these sentences will not otherwise affect the decision.

This Court's decision of November 6, 2015, affirmed the dismissal of all counts of Plaintiff's Complaint, correctly held that the action is foreclosed by Public Utility Regulatory Policies Act of 1978, 16 U.S.C. § 824a-3, ("PURPA's") private right of action, that Allco failed to exhaust its administrative remedies, and that Allco lacks standing to bring a preemption action on the facts of this case. Nevertheless, the Court incorrectly described a key legal point regarding the general

applicability of PURPA to matters such as the contracts presented in this case. On page 12 of the decision, the Court states that "the only way in which Allco may obtain a Section 6 contract is for the Commissioner to conduct a PURPA-compliant bidding process. . . ." and on page 16 the Court says that "[b]ased on the record before us, the only way in which the Commissioner can issue a Section 6 contract that is not preempted by the Federal Power Act is if that contract meets the requirements of the PURPA exception." These two sentences suggest that the Federal Power Act ("FPA") preempts any state authority to require regulated utilities to enter into wholesale power contracts for, for example, renewable energy or other sources of electricity unless the state uses the PURPA exception to the FPA. That suggestion directly contravenes established precedent in this Circuit as well as a controlling decision of the Supreme Court.[1]

Connecticut and other states consistently require utilities to enter into contracts for power for their customers, outside of PURPA, because PURPA only involves certain small, renewable generators. The

[1] See, *Entergy Nuclear Vermont Yankee LLC v. Shumlin*, 733 F.3d 393, 417 (2d Cir. 2013); *New York v. FERC*, 535 U.S. 1, 24 (2002), *citing* Order No. 888, at 31,782, n.544; *Niagara Mohawk Power Company v. FERC*, 306 F.3d 1264, 1269-70 (2d Cir. 2002);

sentences of the decision quoted above threaten major legal confusion, and possible disruption of lawful contracts throughout the nation for appropriate, desirable and lawful renewable energy projects.

REASONS FOR GRANTING THE PETITION

THE PANEL'S DICTA CITED ABOVE CONFLICTS WITH THIS CIRCUIT'S PRECEDENT AND OTHER CASELAW REGARDING THE FEDERAL POWER ACT.

As noted by the District Court:

> the FPA, which "was designed in part to fill the regulatory gap created by the dormant Commerce Clause and cover the then-nascent field of interstate electricity sales," *PPL EnergyPlus LLC v. Nazarian*, 753 F.3d 467, 472 (4th Cir. 2014), "also extended federal coverage to some areas that previously had been state regulated," *New York*, 535 U.S. at 6 (footnote omitted). The FPA charged FERC "to provide effective federal regulation of the expanding business of transmitting and selling electric power in interstate commerce." *Id.* (quoting *Gulf States Util. Co. v. FPC,* 411 U.S. 747, 758 (1973)).

A207. "FERC's authority includes 'exclusive jurisdiction over the rates to be charged [a utility's] interstate wholesale customers.'" *Entergy Nuclear Vermont Yankee, LLC v. Shumlin*, 733 F.3d 393, 432 (2d Cir. 2013) (quoting *Nantahala Power & Light Co. v. Thornburg,* 476 U.S. 953, 966 (1986)) (alterations in original).

The FPA explicitly states that "except as specifically provided in this subchapter and subchapter III of this chapter," FERC has no jurisdiction "over facilities used for the generation of electric energy or over facilities used in local distribution or only for the transmission of electric energy in intrastate commerce, or over facilities for the transmission of electric energy consumed wholly by the transmitter." 16 U.S.C. § 824(b)(1). Therefore, "[s]tates retain jurisdiction over retail sales of electricity and over local distribution facilities." *Niagara Mohawk Power Corp. v. F.E.R.C.*, 452 F.3d 822, 824 (D.C. Cir. 2006).

The Supreme Court has further explained that under the FPA, states retain "authority over local service issues, including reliability of local service; administration of integrated resource planning and utility buy-side and demand-side decisions, including DSM [demand-side management]; authority over utility generation and resource portfolios; and authority to impose nonbypassable distribution or retail stranded cost charges." *New York v. FERC*, 535 U.S. 1, 24 (2002), *citing* Order No. 888, at 31,782, n.544. (1996).

Thus, the conclusion that a state can only require utilities to contract for energy under the requirements of PURPA directly

contravenes Federal Power Act and this Court's ruling in *Entergy Nuclear Vermont Yankee LLC v. Shumlin*, 733 F.3d 393, 417 (2d Cir. 2013). In *Shumlin*, this Court held that the FPA clearly permits states to "direct the planning and resource decisions of utilities under their jurisdiction. . . . States may . . . order utilities to purchase renewable generation. . . ." *Id.* That is exactly what the Commissioner did here.

As the cases cited above demonstrate, and the United States Supreme Court and FERC itself agree, states retain considerable freedom of action in directing their regulated utilities to contract for and provide various types of energy, including renewable energy, outside of PURPA. In fact not a single case has been advanced stating that states are restricted only to the requirements of PURPA when directing the generation mix of their regulated utilities. It is clear, therefore, that under existing law, states enjoy broad authority over regulated utilities including the authority to direct their utilities' resource portfolios, resource planning decisions. Under the state law in question in this case, the Commissioner was doing precisely that, directing utilities to contract for more renewable energy, a decision affecting the utilities' resource portfolios.

THE PANEL'S DICTA ALSO CONFLICTS WITH FERC'S VIEWS ON WHETHER STATE CONTRACTS THAT DO NOT SET RATES ARE PREEMPTED BY THE FEDERAL POWER ACT.

The States' authority to direct the procurement of renewable energy has been expressly approved by FERC. In *Southern California Edison Company*, 71 FERC ¶ 61269, 1995 WL 327268, FERC recognized that "states have broad powers under state law to direct the planning and resource decisions of utilities under their jurisdiction. States may, for example, order utilities to build renewable generators themselves, or deny certification of other types of facilities as state law so permits. *They also, assuming state law permits, may order utilities to purchase renewable generation*." *Id*. (Emphasis added.) FERC also has held that "We respect the fact that resource planning and resource decisions are the prerogative of state commissions and that states may wish to diversify their generation mix to meet environmental goals in a variety of ways…. Under state authority, a state may choose to require a utility to construct generation capacity of a preferred technology or to purchase power from the supplier of a particular type of resource." *Southern California Edison Company*, 70 FERC ¶ 61215, 1995 WL 169000. *See also*, *Midwest Power Systems, Inc.*, 78 FERC ¶ 61,067,

1997 WL 34082 (FERC held that "states have numerous ways outside of PURPA to encourage renewable resources."). *See also*, *ISO New England, Inc.*, 135 FERC ¶ 61,029 (Apr. 13, 2011) at P 170 ("The Commission acknowledges the rights of states to pursue policy interests within their jurisdiction"); P 171 ("We recognize that states and state agencies may conclude that the procurement of new capacity, even at times when the market-clearing price indicates entry of new capacity is not needed, will further specific legitimate policy goals . . . .")

In fact, FERC has recently argued to the U.S. Supreme Court that the Connecticut state contracts at issue in this matter are expressly not preempted by the Federal Power Act.[2] (Solicitor General's brief attached hereto.)[3] In his brief, the Solicitor General distinguished the

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[2] The General Counsel for FERC and the Solicitor General submitted the brief for the United States in No. 14-623 *Hughes v. PPL EnergPlus, LLC*, consolidated with No. 14-614, *CPV Maryland, LLC v. PPL EnergyPlus,. LLC.* On October 9, 2015, the Court granted certiorari, over the Solicitor General's objection.

[3] *Rothstein v. Balboa Ins. Co.*, No. 14-1112, 2014 WL 4179879, at *1 (2d Cir. June 25, 2014); (citing *Rothman v. Gregor*, 220 F.3d 81, 92 (2d Cir.2000) (taking judicial notice of another complaint "as a public record") (citation omitted).

types of contracts held to be preempted by the courts below from "permissible" state contracts, arguing that

> Permissible state programs might also involve contracts between generators and utilities that are not directly tied to participation in and clearing the PJM auction, a requirement that local utilities purchase a percentage of electricity from a particular generator or renewable resources, or the creation of renewable energy certificates to be independently used by utilities in compliance with state requirements.

SG Brief, p. 22. Connecticut's program at issue in this case falls squarely within the "permissible" state programs set forth by the Solicitor General and FERC. Indeed, the Solicitor General cited with approval the District Court's holding below in this case that the Connecticut program was not "preempted by FERC's authority over wholesale rates for electricity." *Id.*, citing District Court's decision at *6-*10. FERC noted that the "Connecticut law did not directly distort the wholesale market," and thus was not preempted by the Federal Power Act. SG Brief, p.23.

MODIFICATION BY THIS COURT IS APPROPRIATE

As noted above, the District Court concluded that the Federal Power Act did not preempt the Commissioner's actions.[4] In its decision

[4] A218, 222.

of November 6, 2015, this Court agreed that Allco lacks standing and had failed to exhaust its administrative remedies but, in the two sentences quoted earlier, stated that Commissioner can only conduct a Section 6 procurement that is not preempted by the FPA by invoking PURPA. The Court did not provide a citation or other basis for these statements, and, as described above, they constitute an inaccurate statement of existing law. Although these sentences are dicta, there is significant concern that renewable energy projects will not be able to obtain financing unless and until these sentences are clarified. If projects are unable to get financing, there may never be an opportunity for a case to proceed far enough for a court to obtain jurisdiction to directly answer this question. Federal Rule of Appellate Procedure 40 permits this Court to correct a misapprehension of relevant law or fact.

The two sentences in question can be excised from the opinion without affecting the holding or the reasoning supporting it.

CONCLUSION

For all the foregoing reasons, the Defendant petitions this court to correct or clarify its decision by excising the two sentences described above.

Respectfully submitted,

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