No. 15-20-cv

To Be Argued By:
Robert D. Snook
Assistant Attorney General

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

No. 15-20

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

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

BRIEF OF DEFENDANT-APPELLEE

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JURISDICTIONAL STATEMENT

The underlying case was brought as a preemption challenge under the Federal Power Act and the Supremacy Clause with respect to the efforts of the Commissioner of the Department of Energy and Environmental Protection ("Commissioner" or "Defendant") to obtain new sources of renewable energy for Connecticut ratepayers. The District Court dismissed the case for lack of standing and failure to state a claim. Plaintiff appealed on January 2, 2015. A226.[1]

STATEMENT OF THE CASE

The District Court's decision effectively outlines the basic facts not in dispute. In order to implement important public policy goals involving the state's renewable energy portfolio, the Connecticut legislature passed Public Act 13-303 ("P.A. 13-303" or the "Act") an "Act Concerning Connecticut's Clean Energy Goals," codified at Conn. Gen. Stat. § 16a-3f. A204. Section 6 of P.A. 13-303 ("Section 6") authorized the Commissioner to solicit proposals from providers of renewable energy sources and, "if the commissioner finds such proposals to be in the interest of ratepayers including, but not limited to, the delivered price of such sources, and consistent with the requirements to reduce

[1] A. refers to the Joint Appendix.

greenhouse gas emissions . . . and in accordance with the policy goals outlined in the Comprehensive Energy Strategy, . . . the commissioner may select proposals . . . to meet up to four percent" of the state's electric load. A204-A205; P.A. 13-303. Thus, the Act permits approval of renewable energy projects to meet important state environmental goals and in response to a perceived shortfall in renewable energy certificates ("RECs").[2] See, Conn. Gen. Stat. §§ 16a-3a, 16a-3b. The Act further specifies that the "commissioner may direct the electric distribution companies to enter into power purchase agreements . . . for periods of not more than twenty years." A204-A205; P.A. 13-303, Section 6.[3]

On July 8, 2013, the Department of Energy and Environmental Protection ("DEEP" or "Department") released a Notice of Request for Proposals ("RFP") identifying P.A. 13-303 as the basis for the RFP. A205; A25. On July 22, 2013, Plaintiff filed five separate solar power bid proposals with the Department, joining 42 other bidders. *Id.* After an extensive review and consideration of the 47 bids, the Commissioner,

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[2] Renewable energy certificates are a state-mandated subsidy to encourage production of renewable energy.

[3] http://www.cga.ct.gov/2013/act/pa/pdf/2013PA-00303-R00SB-01138-PA.pdf.

in a letter dated September 18, 2013, ("the Directive") directed the state's two utilities, the Connecticut Light & Power Company ("CL&P"), now known as Eversource, and the United Illuminating Company ("UI"), to begin negotiations and enter into power purchase agreements ("PPAs") with two selected projects, the Fusion Solar Project and the Number Nine Wind Farm ("Number Nine"). Number Nine is a 250 megawatt (MW) wind power project. A52. None of Plaintiff's projects was selected.

On September 24, 2013, CL&P and UI filed for approval of PPAs with two Class I renewable energy projects with the Public Utilities Regulatory Authority ("PURA"). A14, *Compl.*, ¶ 54. On September 26, 2013, the Commissioner filed his Determination with PURA supporting his decision to select the two projects. A55. PURA approved the two PPAs on October 23, 2013. This lawsuit followed.

Allco alleges that the Commissioner violated federal law by directing the utilities to enter into contracts with the selected bidders, because under the Federal Power Act of 1935 16 U.S.C. § 791a, et seq. ("FPA"), Congress gave the Federal Energy Regulatory Commission ("FERC") exclusive jurisdiction over all wholesale electricity rates, charges, and terms. A5, Comp. ¶ 7. The core of Allco's argument is that the only exception "to the blanket rule prohibiting states from engaging in any type of regulation or setting the wholesale price for energy" *Id.*, ¶ 8, is under the Public Utility Regulatory Policies Act of 1978, 16 U.S.C. § 824a-3, ("PURPA"), which allows states to fix the price of energy under a power purchase agreement if (1) the facility is a "small power production facility," which is defined as no greater than 80 megawatts in size, and (2) the rate fixed in the power purchase agreement equals the facilities "avoided costs." A5, ¶ 11; A8, ¶ 24; A 15, ¶ 62; Brief, pp. 3, 10.

FACTUAL AND LEGAL BACKGROUND

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), *petitions for cert. filed,* Nos. 14-614, 14-623, and '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.

The FPA divides jurisdiction over the sale and delivery of electricity between the federal government and the states on the basis of the type of service being provided and the nature of the energy sale. *Niagara Mohawk Power Corp. v. F.E.R.C.*, 452 F.3d 822, 824 (D.C. Cir. 2006). In § 201(b) of the FPA, FERC is given jurisdiction over "the transmission of electric energy in interstate commerce" and "the sale of electric energy at wholesale in interstate commerce." 16 U.S.C. § 824(b)(1). "FERC's authority includes 'exclusive jurisdiction over the rates to be charged [to 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). For example, § 205 of the FPA prohibits, among other things, unreasonable rates and undue discrimination "with respect to any transmission or sale subject to the jurisdiction of the Commission," 16 U.S.C. §§ 824d(a)–(b), and § 206 authorizes FERC to correct unlawful practices and gives it jurisdiction over "any rule, regulation, practice, or contract affecting" such rates and charges, 16 U.S.C. § 824e(a).

However, the FPA is clear 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." *Id.* § 824(b)(1). Therefore, "[s]tates retain jurisdiction over retail sales of electricity and over local distribution facilities" *Niagara Mohawk Power Corp.*, 452 F.3d at 824.

The Supreme Court has 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* FERC Order No. 888, at 31,782, n.544. Further, the *Energy Nuclear Vermont Yankee LLC v. Shumlin*, 733 F.3d 393, 417 (2d Cir. 2013), cited by Allco at Brief, p. 60, clearly permits states to "direct the planning and resource decisions of utilities under their jurisdiction."

SUMMARY OF ARGUMENT

Allco lacks standing because it has not suffered an injury in fact to a recognized legal interest. Further, if it did sustain an injury it is not likely that any such injury could be redressed by a favorable decision. A212-A214. Allco, as a disappointed bidder, has no rights within the zone of interests protected by the FPA, and even if it did, this Court cannot grant Allco what it seeks; specifically a power contract under the state procurement, because, by its own terms, the authority to select a contract under that procurement ended a year ago. A212-A215.

With respect to the Plaintiff's preemption claim, the Commissioner acted wholly within the authority preserved to states under § 824(b)(1) of the FPA with respect to environmental and utility renewable portfolio matters and the state has not in any manner intruded upon any federally preempted area of interest because the state did not set any wholesale electric rate but, in fact, allowed the market to set the price at which market participants would provide electric power. A220-A222.

STANDARD OF REVIEW

A Court of Appeals reviews *de novo* a district court's dismissal for lack of standing and failure to state a claim. *Selevan v. New York Thruway Authority*, 584 F.3d 82, 88 (2d Cir. 2009). A plaintiff asserting subject matter jurisdiction has the burden of proving by a preponderance of the evidence that it exists." *Makarova v. United States,* 201 F.3d 110, 113 (2d Cir. 2000).

ARGUMENT

The District Court properly concluded that Plaintiff lacks standing and failed to state a cause of action. Plaintiff's injury is speculative at best and is not within the identified zone of interests of the FPA. Further, the Section 6 procurement was conducted solely under state law, which vests considerable discretion in the Commissioner, including the right not to select any project at all. Therefore, there is no reasonable likelihood that Plaintiff's project would ever be selected. Furthermore, as Allco clarified at oral argument before the District Court, its claim is that Section 6, as applied, is a violation of the FPA and PURPA, which preempt Section 6 by operation of the Supremacy Clause. (Oral Argument Tr. A146). Thus, if Plaintiff is successful in declaring the application of the Section 6 procurement law unconstitutional, there is no other relevant procurement authority for the Commissioner and no means to select this or any other project. If Plaintiff wins, it loses.

With regard to Plaintiff's claims that the FPA preempts the Section 6 procurement, it is clear that the Commissioner acted within his authority under state law in protecting the state's environmental interests and policies and his authority over "facilities used for the generation of electric energy. . . ." *Id.* § 824(b)(1). The plain text of Section 6 shows that the Commissioner has no authority under that law to "fix" or otherwise set the price of wholesale electric power being purchased and therefore the state law is in no way inconsistent with the FPA.

I. Standing

"[T]he irreducible constitutional minimum of standing contains three elements. First, the plaintiff must have suffered an 'injury in fact'—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) 'actual or imminent,' not 'conjectural' or 'hypothetical.' Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be 'fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court.' Third, it must be 'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision.'" *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992) (internal citations, alterations and footnotes omitted).

A. Allco lacks a cognizable injury

Allco is a disappointed bidder and the FPA provides no standing for disappointed bidders. Even if it did, this Court could not provide redress of Allco's claimed injury.

As noted in *Lujan*, a plaintiff must demonstrate an actual and not conjectural injury. Allco claims the "true injury alleged is the denial of the contract." Brief, p. 16. Specifically, Allco clearly and repeatedly asserts that, if the procurement had been conducted properly, it is virtually certain ("there is a strong likelihood", Brief, p. 18) that one of Allco's projects would have been selected. In turn, Allco's brief frames the District Court's decision dismissing its complaint as requiring "certainty" that Allco would prevail, *Id.*, but that is neither what the court said nor what the law requires.

As an initial matter, Allco is unable to cite to a single cases in which a court has found that a disappointed bidder has standing under the FPA to raise a preemption challenge to a state program such as the Section 6 procurement. District Court Decision, A212-A213.[4] In fact, it

[4] The closest federal case that appears to directly involve the question of bidder standing in federal court related to a state contract states: "[T]hese cases are instructive only in the context of a bid dispute

is clearly established that Allco's claimed interest "must be 'arguably within the zone of interests to be protected or regulated by the statute' that [it] says was violated," *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 132 S. Ct. 2199, 2210 (2012) (quoting *Association of Data Processing Service Organizations, Inc. v. Camp,* 397 U.S. 150, 153 (1970)), which in the instant case is the FPA. A211. The FPA nowhere indicates any intention of protecting bidders' rights. A212. Further, Allco acknowledged at oral argument that neither the FPA nor PURPA even mentions bidders, or any rights that accrue to them. Plaintiff admitted that the "statutes talk[] about the regulatory structure of the electricity markets more generally." A157. This

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between a government contractor and the federal government. They do not reveal any binding precedent with regard to the situation at hand—a dispute between a subcontractor and a state or local government. Allco does not rely on the APA or any similar legislation that would provide it with standing. Thus, even if the Plaintiff were to make an argument related to its status as a disappointed bidder, this Court agrees that "a disappointed bidder does not have standing to challenge the award of a state contract as failing to comply with federal procurement policy set forth in federal regulations." *AlohaCare v. Hawaii, Dept. of Human Servs.,* 567 F.Supp.2d 1238, 1264 (D. Hawaii 2008) (citing *Sowell's Meats and Services, Inc. v. McSwain,* 788 F.2d 226, 228 n. 2 (4th Cir.1986))." *KM Enterprises, Inc. v. McDonald*, No. 11-CV-5098 ADS ETB, 2012 WL 4472010, at *15 (E.D.N.Y. Sept. 25, 2012) *aff'd*, 518 F. App'x 12 (2d Cir. 2013).

contrasts with certain federal defense program statutes which expressly permit disappointed bidders to challenge a failure to obtain a contract.[5] A212, *citing Gosnell v. Fed. Deposit Ins. Corp.*, 938 F.2d 372, 375-76 (2d Cir. 1991).

Allco also raises a new argument that it has standing based 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 PURPA." Brief, p. 33. Allco claims that

> Under PURPA . . . utilities are *required* to purchase power from Qualifying Facilities, such as Allco's facilities. 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 purchases from the Qualifying Facility.

Brief, p. 33. (Internal citations omitted. Emphasis in original.)

There are several problems with this argument. First, Plaintiff's brief does not cite to a single case in support of this position because

[5] At Brief page 25, Allco refers to *Northeastern Fla. Chapter, Associate Gen. Contractors of Am. v. Jacksonville*, 508 U.S. 656, 666 (1993), a case mentioned by the District Court for the proposition that a bidder may have standing even if it may not have received a contract. A11, fn 3. However, that case is an Equal Protection Clause case and was cited by the District Court to contrast the situation presented by Allco, whose claim is not under the Equal Protection Clause.

there are none. Second, this was not a procurement conducted under PURPA but one conducted solely pursuant to state law. In fact, Allco's brief highlights this point in footnote 10 where it states:

> 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

Brief, p. 34, fn 10. This is an extraordinary concession because Allco admits that the type of contract it needs to develop its project is simply not available under PURPA. There is no injury to Allco if the only PURPA contract available is insufficient for its needs.

Indeed it highlights a central flaw in Allco's claim of injury. In paragraph 60 of its Amended Complaint, Allco alleges that "[w]ithout a long-term PPA for a project, that project will not be built." A14. However, Allco does not want an "avoided costs" contract because it would be "**unable to develop** its proposed solar facilities." Brief, p. 34, fn 10. (Emphasis added.) In addition, in the footnote Allco acknowledges that there is a separate legal procedure under Connecticut law for implementing PURPA which does not provide for long-term contracts. Although Allco expresses displeasure with Connecticut's implementation of PURPA, it does not challenge it.

Because Connecticut's implementation of PURPA is not at issue here, Allco does not have a recognizable injury. That is, Allco cannot have it both ways. Allco has repeatedly asserted that the State can only regulate wholesale contracts within the authority provided by PURPA and that its injured rights "include the right to . . . sell energy and capacity, and to obtain a legally enforceable obligation to sell energy and capacity, to the Connecticut Utilities at the Connecticut Utilities' avoided costs." A 15,¶ 62; Brief, pp. 3, 10, 38; A101, A103, ¶ 37; A103 ¶ 45; Oral Argument A161 ("[W]e're entitled to receive a rate equal to the utility's avoided costs.") On pages 33-38 of its Brief, Allco offers a lengthy explanation purporting to show how the Section 6 procurement impacted the utilities' "avoided costs."[6] Then, in footnote 10, Allco concedes that whether or not the Section 6 procurement reduced avoided costs, a contract at the utilities' "avoided costs" will not work for it. See also Amended Complaint A14, ¶60. Consequently, there is no injury to Allco because the right to an avoided costs contract it claims it is entitled to is insufficient for its needs.

The Commissioner only has authority to run a procurement under state law, in this case P.A. 13-303 Section 6, not under PURPA. There is no Connecticut statute that allows the Commissioner to usurp the authority to set avoided costs, which under state law is given to PURA. Conn. Gen. Stat. § 16-243a. Ultimately, Allco cannot say that the

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[6] Allco offers "[a] mathematical example is helpful to illustrate the concept of avoided costs." Brief at 34. The example is not relevant and is neither helpful nor accurate. There is absolutely no evidence or, more importantly, no allegation that the 250 MW Number Nine project, operating at an expected capacity factor of 35%, will materially reduce the price of power generation in the New England region. Connecticut's regional loadshare is approximately 25%. Accordingly, Number Nine (3.4% of Connecticut load) is only 0.84% of regional load. This small a share of the regional load does not have a material effect on the marginal rate of power generation. The impact to the marginal rate was considered so insignificant it was not included in the list of factors considered in the scoring process under the Section 6 procurement. See, A61-A63.

Commissioner is limited to acting under PURPA, a power he does not have, and then insist on a non-avoided costs contract.

B. Allco Has Failed to Demonstrate That Its Claimed Injury is Redressable

Allco has failed to satisfy the third requirement for standing—that it is "'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision.'" *Lujan*, 504 U.S. at 560–61. Allco contends that because one of its projects was ranked fourth, that is likely or highly likely that Allco would win a contract if the procurement had been run correctly. Brief, pp. 28-29.

The District Court found that there is no degree of certainty that any of Allco's projects would have been selected. As is clearly evident in the relevant statute, the Section 6 procurement did not obligate the Commissioner to select *any* project and certainly no project based solely on the listed rankings, because the rankings were only part of the selection criteria. A213-A214.

The Court found:

> However, nothing in the statute mandates that projects be selected based upon their ranking. Instead, the proposals were ranked "[b]ased on [an] analysis of price and non-price factors" and then provided to the Commissioner to determine

> if they were "'in the interest of ratepayers. . . and in accordance with the policy goals outlined in the'" statute. (Commissioner's Determination at 10 quoting Section 6.) Although the Commissioner selected the six highest-ranked projects to proceed with contract negotiations with the Connecticut Utilities, only the first- and third-ranked projects were selected and the second-ranked project was not. (*See id.* at App'x 2.) Thus, given the Commissioner's discretion to select projects, it does not necessarily follow that if Number Nine were not selected, Allco's projects would have been.

A213-A214.

The record very clearly shows that the Commissioner did not select projects in the strict numerical order found in the rankings. *Id.* Further, the formal Request for Proposals required bid proposal prices to be held for only 180 days. A214.[7] That time passed well before the Court's decision was issued, and any bids that were the basis of the rankings referred to by Allco are now stale. A169-A170. Because the time limit has long expired, the Commissioner could not simply pick the

[7] See Request for Proposals, p.8, available under "Public Act 13-303 – Section 6 – 2013 Class I Renewable Procurement" at http://www.ct.gov/deep/energyfilings. Proposal Certification (RFP Section 2.2.11): Applicants were required to sign the Proposal Certification Form in Appendix B verifying that the price(s), terms and conditions of the proposal were valid for at least 180 days following submission.

next project on the list and, moreover, has no authority under the Section 6 procurement statute to simply return to out-of-date rankings and pick another project. As for any future procurement, Brief, p. 33, any suggestion that any particular bidder would be likely to win a contract in the future is the purest speculation and is insufficient to establish standing in this case for this procurement.

Finally, while PURPA may have relevance in those states that have not deregulated, it is of no significance in deregulated states, such as Connecticut. Specifically, as utilities in deregulated states are no longer required to maintain their own generation facilities, they have no costs to avoid and the basis of PURPA no longer exists and Allco can hardly claim to be injured. See, Conn. Gen. Stat. § 16-244e.

Specifically, Connecticut deregulated its utilities in 1998[8] and, state regulators (the Department of Public Utility Control, predecessor to PURA) have ruled:

> It is obvious to all Parties that the term "avoided cost" . . . as currently being applied in existing [PURPA] contracts is no longer applicable as the [utilities] have divested their generation assets

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[8] The Restructuring Act is available at http7/www.cga.ct.gov/ps98/Act/pa/1998PA-00028-R00HB-05005-PA.htm.

> from which the original "avoided cost" calculations were made.

DPUC Review of the Electric Generation and Financing Requirements of Resource Recovery Facilities, Docket No. 06-08-25 (2007). [9]

Ultimately, even if Plaintiff has an inchoate PURPA-based right of some type to require utilities to purchase its power at avoided cost, enforcement of any such right would not properly be part of this appeal because the proper forum for such litigation would be before FERC or, more likely, in state forum because FERC relies on state regulators to determine what constitutes avoided costs for their regulated utilities. As Allco acknowledges in its Brief, fn 10, a law defining avoided costs exists in Connecticut. Conn. Gen. Stat. § 16-243a. *See, also, Southern California Edison Company*, 70 FERC P 16215, 1995 WL 169000 (1995). Beyond this, Section 1253 of the Energy Policy Act of 2005 provides utilities the opportunity to seek relief of the statutory obligations of PURPA relied upon by the Plaintiff, which relief one of the state investor-owned utilities (United Illuminating) has sought and obtained.[10] Thus, even if PURPA was applicable, and even if the state

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[9] The Final Decision is in Docket 06-08-25 and is available at http://www.ct.gov/pura/docketsearch.

[10] *The United Illuminating Company*, 123 FERC ¶ 61,269.

regulator (Connecticut Public Utilities Regulatory Authority) could devise some approximate value for an avoided cost calculation, one of the only two state utilities is exempt from PURPA. There is no authority under Section 6 to impose the full cost of a designated project on a subset of the state's ratepayers.

This leads to a third problem with Allco's claim that an action against the Commissioner will lead to a decision by this Court providing redress of its claimed injury. The sole defendant in this case is the Commissioner of the Connecticut Department of Energy and Environmental Protection. The Commissioner is responsible for environmental matters and energy policy issues and has no regulatory authority under PURPA. See Conn. Gen. Stat. §§ 22a-2, 22a-2d, 22a-5; 16a-3a and 16a-3d. The only state agency even hypothetically involved with PURPA is the Connecticut Public Utilities Regulatory Authority, which is not a party to this suit. Therefore, no order by this Court in this action can bring redress to Allco.

C. Prudential Standing

Finally, Plaintiff raises a new, though misguided, theory of standing. Plaintiff spends nine pages of its Brief arguing that the District Court "erred in holding that Allco lacked prudential standing to bring its suit." Brief, pp. 19, 38-48. However, the judicially-created concept of prudential standing is, in fact, a limitation on Article III standing, and does not relieve a plaintiff of the obligation first to prove Article III standing. Because the District Court found that Allco lacked Article III standing, it did not refer to prudential standing in its decision. Plaintiff's apparent argument that prudential standing is an alternative or independent basis for standing is inapposite.[11]

Standing arises out of the requirements of Article III of the Constitution and, as noted by the District Court, requires a certain "irreducible constitutional minimum. . . ." A209 (citations omitted.) Prudential standing, on the other hand is a judicial limitation on standing that has already been determined to meet the constitutional requirements. See *Elk Grove Unified School Dist. v. Newdow,* 542 U.S. 1, 11, 124 S.Ct. 2301, 159 L.Ed.2d 98 (2004) (prudential standing

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[11] For example, the Brief states: "[I]f Allco can show it has prudential standing under *either* source of law, its case may proceed." Brief, p. 39.

doctrine "embodies judicially self-imposed limits on the exercise of federal jurisdiction" (internal quotation marks omitted)). As the Supreme Court has noted: "the source of the plaintiff's claim to relief assumes critical importance with respect to the prudential rules of standing that, apart from Article III's minimum requirements, serve to limit the role of the courts in resolving public disputes." *Warth v. Seldin*, 422 U.S. 490, 500 (1975). Prudential standing, therefore is a limitation on a federal court's jurisdiction that only comes into play *after* Article III standing is found.

In the present case, the District Court found that Allco was not within the zone-of-interest of the FPA and had not established that a favorable decision would be likely to redress any injuries claimed. Thus, the Article III requirements had not been met and prudential standing was not at issue before the District Court.

II. Preemption

The central issue raised by the Plaintiff is that the FPA preempts any state intrusion into the field of wholesale energy rates. Brief, p. 3. The core of Plaintiff's argument is the statement, made repeatedly,

> that [h]ere 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 . . . nor a price that is freely negotiated between seller and purchaser.

Brief, p. 53.

Plaintiff's argument fails because the FPA preempts the field of wholesale rate regulation but leaves generation mix and other matters to the states and because DEEP's action neither regulated nor set rates.

Two federal courts of appeals have recently addressed the issue of field preemption under the FPA and concluded that the FPA preempts the field of wholesale power *rates*. *PPL EnergyPlus LLC v. Hanna*, 977 F.Supp.2d 372 (D.N.J. 2013), *aff'd*, 766 F.3d 241 (3d Cir. 2014), *petitions for cert. filed,* Nos. 14-634, 14-694; *PPL EnergyPlus LLC v. Nazarian,* 753 F.3d 467 (4th Cir. 2014), *petitions for cert. filed*, Nos. 14-614, 14-623. As noted in *Nazarian*:

> A wealth of case law confirms FERC's exclusive power to regulate wholesale sales of energy in interstate commerce, including the justness and reasonableness of the rates charged. "The [FPA] long has been recognized as a comprehensive scheme of federal regulation of all wholesales of [energy] in interstate commerce," *Schneidewind v. ANR Pipeline Co.,* 485 U.S. 293, 300, 108 S.Ct. 1145, 99 L.Ed.2d 316 (1988) (internal quotation marks omitted), and "FERC's jurisdiction over

> interstate wholesale rates is exclusive," *Appalachian Power Co. v. Pub. Serv. Comm'n,* 812 F.2d 898, 902 (4th Cir.1987); *see also New England Power Co. v. New Hampshire,* 455 U.S. 331, 340, 102 S.Ct. 1096, 71 L.Ed.2d 188 (1982).

Nazarian, 753 F.3d at 475. The *Nazarian* court continued that the federal scheme thus "leaves no room either for direct state regulation of the prices of interstate wholesales of [energy], or for state regulations which would indirectly achieve the same result." *Id.* at 475 (citation omitted). The Court held: "Applying these principles, we conclude that the Generation Order is field preempted because it functionally sets the rate that CPV receives for its sales . . . ." *Id.* at 476.

Therefore, *Nazarian* and *Hanna* stand for the proposition that states cannot set wholesale *rates* or impose *rate* mechanisms that indirectly set wholesale rates.

However, the FPA clearly protects some areas of state authority. For example, "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).

The law is clear and well-settled. 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. Further, *Energy Nuclear Vermont Yankee LLC v. Shumlin*, 733 F.3d 393, 417 (2d Cir. 2013), clearly permits states to "direct the planning and resource decisions of utilities under their jurisdiction." That is precisely what Connecticut did.

In the present case Allco argued before the District Court that the Commissioner "fixed" the wholesale energy rate by selecting contracts in which the generators had offered wholesale rates. A216. The District Court concluded that selecting a contract with a rate freely offered by a generator is not the same as fixing a wholesale rate in violation of the FPA. A218, A222.

On appeal, Allco appears to have dropped the rate fixing argument and claims instead that the Commissioner "compelled" or "forced" the utilities to enter into wholesale energy contracts, which action itself is an intrusion into a federally preempted zone if interest. Brief, pp. 52-56. This assumes, of course, that there has been an intrusion into a particular field of federal preemption. This, in turn, requires an examination of what constitutes the field in question that is preempted and what state acts in or around that field are permitted under the FPA. It is clear from the cases cited above that states retain their traditional authority over generation mix, integrated resources planning and other areas.

"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)) (Emphasis added). However, as noted by the District Court, the Commissioner did not exercise jurisdiction over rates in the Section 6 procurement. A222.

The salient state statute gives the Commissioner the following authority:

> If the commissioner finds such proposals to be in the interest of ratepayers including, but not limited to, the delivered price of such sources, and consistent with the requirements to reduce greenhouse gas emissions in accordance with section 22a-200a of the general statutes, and in accordance with the policy goals outlined in the Comprehensive Energy Strategy, adopted pursuant to section 16a-3d of the general statutes, the commissioner 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.
>
> . . .
>
> Any such agreement shall be subject to review and approval by the Public Utilities Regulatory Authority, which review shall commence upon the filing of the signed power purchase agreement with the authority.

Public Act 13-303, Section 6.

Nowhere does this statute give the Commissioner the power to set or fix wholesale electric. The Commissioner can review the bids offered to determine if they meet the terms of the statute, including such matters as if they are in the ratepayers' interest, meet certain renewable energy and greenhouse gas emissions goals and are consistent with various state environmental policy objectives. All of these are either unequivocally state environmental interests or "buy-side" matters as contemplated in *New York* and *Energy Nuclear Vermont Yankee.* Once the Commissioner determines those bids that meet those goals, he directs the utilities to enter into negotiations with successful bidders.[12] The action of the Commissioner is not the final action in the procurement process because it is now up to the bidders and utilities to negotiate a contract. The Commissioner is not a part of those negotiations and is not a signatory to any contracts eventually finalized. Once the parties, the bidders and the utilities, finish their negotiations, the contracts are submitted to the state regulator, PURA for final approval. It is the decision of PURA that is a final and

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[12] In *Town of Barnstable v. Berwick*, 17 F. Supp. 3d 113, 114 (D. Mass. 2014) Plaintiffs sought injunctive relief to "'remedy the constitutional violation' by invalidating the Cape Wind contract that 'Massachusetts compelled NSTAR to enter.'" The court noted, in footnote 26, that "what may have influenced a utility's choice in setting its initial rates does not encroach on the . . . power of FERC to review and approve those rates after the fact." *Id*. It should be noted, however, the *Barnstable* court dismissed the case on sovereign immunity grounds noting that the plaintiffs were seeking retroactive relief against a sovereign, i.e., the voiding of an existing contract. *Id*. at 122.

enforceable decision at the state level. Of course, the Section 6 procurement expressly obligates the signing parties to comply with all relevant FERC rules for wholesale energy contracts.[13]

Allco, in its Complaint and in its Brief, points to the Commissioner's letter of September 18, 2013, A53, as proof that the Commissioner forced the utilities into these contracts. A6, ¶¶ 13, 17; A14, ¶ 53; Brief, p.4. This letter does not fix any wholesale energy or capacity price. What it does is memorialize the Commissioner's decision regarding environmental and energy policy aspects of the generation mix for supplying Connecticut domestic utilities. A55, A61-A64. No one seriously argues that the Commissioner lacks authority to decide issues of state environmental policy. Further, the FPA is clear, as the *Nazarian* Court ruled: "FERC rules encourage the construction of new plants . . . . They seek to preclude state distortion of wholesale prices while preserving general state authority over generation sources." The Commissioner, as the District Court held, did not intrude on wholesale

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[13] Power Purchase Agreement Section 3.5(k) obligates the Seller to ensure compliance with FERC requirements. See "Request for Proposals" – Power Purchase Agreement (PPA) – available under "Public Act 13-303 – Section 6 – 2013 Class I Renewable Procurement" at http://www.ct.gov/deep/energyfilings.

prices because he could not do so under state law and, in fact, the prices were freely offered by the bidders at their sole discretion. A220-A222.

Allco, however, broadens its argument on appeal by claiming that the FPA's "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 state from deciding otherwise." Brief, p.55. This remarkable statement is not supported by any citation or precedent and is flatly contradicted by existing law.[14]

It is beyond dispute that, along with after-the-fact prudence reviews, states exercise their authority by supervising competitive power-supply solicitations. *E.g.*, *Commonwealth Atl. Ltd. P'ship*, *supra*; *see also* 18 C.F.R. § 35.27(b)(1) (providing that nothing in FERC's rate-

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[14] FERC's authority does *not* govern the entirety of wholesale transactions. *Kentucky W. Va. Gas Co. v. Pa. Pub. Util. Comm'n*, 837 F.2d 600, 608-09 (3d Cir.) ("FERC"s rate-making determination does not govern the entire wholesale transaction" or preclude states from exercising their "traditional power to consider the prudence of a retailer's purchasing decision."), *cert. denied*, 488 U.S. 941 (1988); Market-Based Rates for Wholesale Sales of Electric Energy, Capacity and Ancillary Services by Public Utilities, Order No. 697-A, 73 Fed. Reg. 25,832, 25,892 & n.597 (May 7, 2008), *cert. denied sub nom. Pub. Citizen Inc. v. FERC*, 133 S. Ct. 26 (2012) ("Order No. 697-A"); *Central Vt. Pub. Serv. Corp.*, 84 FERC P 61,194, at 61,972 (1998), and cases citing therein.

filing regulations "[l]imits the authority of a State commission in accordance with State and Federal law to establish . . . [c]ompetitive procedures for the acquisition of electric energy . . . purchased at wholesale."). And far from disapproving state involvement, FERC has encouraged and even relied on it. *E.g.*, *Allegheny Energy Supply Co.*, 108 FERC P 61,082, PP 18, 36-39 (2004) (emphasizing that a utility's solicitation was based on an RFP developed in a [Public Service Commission] proceeding and subject to PSC and PSC-selected consultant supervision).

The State's authority to direct the procurement of renewable energy has been expressly identified by FERC when it 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*." (Emphasis added.) *Southern California Edison Company*, 71 FERC P 61269, 1995 WL 327268. "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." *Southern California Edison Company*, 70 FERC P 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.").

This is especially true in the New England region. FERC has recognized that the entry of such state-sponsored new resources into the FERC-regulated market administered by ISO-New England, subject to applicable market rules, is consistent with FERC's regulation of the interstate wholesale markets. *See, e.g.*, *ISO New England, Inc.*, 135 FERC P 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 . . . .") As FERC has recognized, therefore, the design of the market rules in FERC-regulated markets neutralizes any potential adverse impacts of State initiatives on market rates while accommodating States' rights to ensure reliability for their citizens and pursue "legitimate policy goals."

Allco, however, warns that if states were free to compel utilities to enter into favored contracts at prices other than the market price, "FERC's entire market-based regulatory scheme could unravel." Indeed, Allco adds that "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. . . ." Brief, p.55.

The cases cited above show that states are free to use criteria other than cost when directing utilities to purchase generation in order to "pursue policy interests within their jurisdiction." Further, this argument stands the law of preemption on its head. Plaintiff claims that even if the Commissioner does not regulate price in any manner, but acts wholly within the State's traditional jurisdiction over environmental issues and generation mix, it would frustrate FERC's "goal of establishing a competitive market designed to meet demand at least cost. . . ." Brief, p. 55. Plaintiff cannot show any precedent for this argument as none exists. Moreover, state actions that do not regulate price but only indirectly affect FERC markets have not been preempted. As noted in *Nazarian*, "[i]t goes without saying that not 'every state statute that has some indirect effect' on wholesale rates is preempted, *Schneidewind,* 485 U.S. at 308, for 'there can be little if any regulation of production that might not have at least an incremental effect on the costs of purchasers in some market,' *Nw. Cent. Pipeline Corp.,* 489 U.S. at 514."

Taken to its logical conclusion, Allco's claim that state action that indirectly impacts market rates violates the FPA would, among other things, preempt the Department's effort over the last several years to expand its energy efficiency programs (operated through exactly the same two electric utilities that signed the contracts in this case).[15] In fact the Department has publicly announced "a three-year . . . [plan] to achieve annual energy savings of 1% through a budget of approximately $180 million per year. . . ."[16] Beyond energy efficiency programs, there are numerous other state initiatives (e.g., improvement of transmission

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[15] Conn. Public Act 13-298, available at http://www.cga.ct.gov/2013/act/pa/pdf/2013PA-00298-R00HB-06360-PA.pdf.

[16] Final 2014 Integrated Resources Plan for Connecticut, p. 7, available at http://www.ct.gov/deep/irp.

lines reducing line loss, demand response programs allowing termination of service in times of high demand, etc.) that clearly and directly reduce electric consumption and could lower Connecticut's high electric costs. Allco's interpretation would find all of these state energy planning efforts unconstitutional.

Plaintiff's explication of *Nazarian* and *Hanna* can be dealt with summarily. According to Allco, the Section 6 procurement is "materially identical" to that in the above referenced cases. Actually, in those cases, the courts found that the respective states had established contractual mechanisms that supplanted the FERC approved market price. In this case, the District Court explicitly found the opposite; that the Commissioner did not fix or set market price.[17] A222.

More to the point, Allco states the "[t]his case is simpler, and the intrusion . . . much more obvious and direct.... [because] here the Commissioner has simply compelled the utilities to buy the electricity itself." Brief, p. 58. Actually, what the Commissioner did was fully

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[17] Among other things, these cases involve contracts-for-differences that functionally set prices in a FERC-regulated wholesale electricity market to incentivize the development of new, in-state gas-fired generation. In contrast, DEEP's Section 6 procurement sought energy, renewable energy certificates and capacity at whatever price the markets offered.

within the *New York v. FERC* Court's holding that states retain authority over "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. Section 6 was expressly designed to impact utility resource portfolios and integrated resource planning without giving the Commissioner the ability to set rates because the prices were set by the bidders, including Allco.

Plaintiff implies that projects greater than 80 megawatts (i.e. non-Qualifying Facilities under PURPA) are only able to sell power in the regional market, which would preclude long-term power purchase agreements. Brief, p. 59. There is no citation to any support for this. To the contrary:

> Modeled on the Interstate Commerce Act, the FPA requires regulated utilities to file compilations of their rate schedules, or 'tariffs,' with the Commission, and to provide service to electricity purchasers on the terms and prices there set forth. Section 824d(c). Utilities wishing to change their tariffs must notify the Commission 60 days before the change is to go into effect. Section 824d(d). Unlike the Interstate Commerce Act, however, the FPA also permits utilities to set rates with individual electricity

> purchases through bilateral contracts. Section 824d(c), (d). As we have explained elsewhere, the FPA 'departed from the scheme of purely tariff-based regulation and acknowledged that contracts between commercial buyers and sellers could be used in ratesetting. Like tariffs, contracts must be filed with the Commission before they go into effect.

Morgan Stanley Capital Group, Inc. v. Public Utility Dist. No. 1 of Snohomish City, 554 U.S. 527 (2008). FERC has never ruled that long-term, non-regional market contracts are impermissible and in fact regularly reviews and approves them. The Section 6 procurement expressly obligates the parties to submit the contracts to FERC for approval.[18]

The inherent contradiction in Plaintiff's argument becomes clear when followed to its logical conclusion. If the Commissioner cannot review and select bids for bilateral contracts within his authority to direct integrated resources planning and direct utility portfolio management, then the Section 6 procurement effort will fail. The only authority the Commissioner has to entertain Allco's projects is found in

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[18] Power Purchase Agreement Section 3.5(k) obligates the Seller to ensure compliance with FERC requirements. See "Request for Proposals" – Power Purchase Agreement (PPA) – available under "Public Act 13-303 – Section 6 – 2013 Class I Renewable Procurement" at http://www.ct.gov/deep/energyfilings.

Section 6. If Allco is correct, the Commissioner will be without authority to select any projects, including Allco's.

Finally, Plaintiff correctly states that the Number Nine Wind Farm is located in Maine. Allco asserts that a state cannot site a generation facility outside of its borders, relying on that potion of the FPA that reserves state authority over local facilities. Brief, p. 63.

Plaintiff confuses direct state regulatory authority under the FPA, which expressly prohibits FERC jurisdiction over the siting of local generation facilities, with the very different authority of state and private utilities to contract with generators in other states. In fact, Allco's interpretation of federal law flatly violates the Commerce Clause. Nothing in the FPA or elsewhere limits the power of the State to direct its domestic utilities to negotiate contracts with generators within or without state borders and this Court has recently ruled that "it is clear that the Vermont Legislature can direct retail utilities to 'purchase electricity from an environmentally friendly power producer in California or a cogeneration facility in Oklahoma,' if it so chooses. *New York,* 535 U.S. at 8, 122 S.Ct. 1012 (internal quotation marks omitted)." *Entergy Nuclear Vermont Yankee, LLC v. Shumlin*, 733 F.3d

393, 417 (2d Cir. 2013). Ultimately that is what FERC-designed markets are attempting to do when setting up a regional, as opposed to purely local, energy market system.

III. Section 1983

Allco contends that "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 judiciary to enforce" and thus provide a sufficient federal right upon which to base a § 1983 claim. Brief, p.64.

"Section 1983 is not itself a source of substantive rights, but merely provides a method for vindicating federal rights elsewhere conferred." *Albright v. Oliver*, 510 U.S. 266, 271, S. Ct. 807, 811 (1994) (internal citations omitted.) Consequently, a 1983 action must be based on a constitutional claim or a claim of a violation of a federal right. *Blessing v. Freestone*, 520 U.S. 329, 340 (1997) ("In order to seek redress through section 1983, . . . a plaintiff must assert the violation of a federal right, not merely a violation of a federal law.") As the District Court noted: "'The first step in any such claim is to identify the specific . . . right allegedly infringed.' *Albright*, 510 U.S. at 271. Plaintiff cites no authority for the proposition that even if Section 6, as implemented, were found to be preempted by the FPA, that a disappointed bidder could maintain an action against state officials under § 1983. A223. The FPA does not create any individual federal rights that can be enforced under § 1983, *Id*. Plaintiff can raise no appropriate claim.

A more fundamental problem with Plaintiff's assertion that it can assert a right against the Commissioner under § 1983 is that the FPA and PURPA place no binding obligations on the Commissioner. The Commissioner handles environmental protection and energy policy issues. PURA is the state's utility regulator. PURPA, moreover, involves Qualifying Facility generators, state utilities and state utility regulators, none of whom are part of this suit.

CONCLUSION

For all the foregoing reasons, the Defendant moves that this Court uphold the decision of the District Court.

Respectfully submitted,

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CERTIFICATION OF COMPLIANCE WITH RULE 32(A)(7)

I hereby certify that this brief complies with the type-volume limitations of Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure in that this brief contains 8,307 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), and complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32 (a)(6) because it has been prepared in a monospaced typeface (century schoolbook) with 10.5 or fewer characters per inch.

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CERTIFICATION OF SERVICE

I hereby certify that true and accurate copies of the foregoing brief were served by first class mail, postage prepaid, by Brescia's Printing Service in accordance with Rule 25 of the Federal Rules of Appellate Procedure on this 2d day of April, 2015, to the Clerk of this Court and the following counsel of record:

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