

# 15-20-cv

*To Be Argued By:*  
ROBERT D. SNOOK  
Assistant Attorney General

**IN THE**  
**United States Court of Appeals**  
FOR THE SECOND CIRCUIT

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**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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ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF CONNECTICUT (Hartford)

No. 3:13cv1874

Hon. Janet Bond Arterton

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**SUPPLEMENTAL BRIEF OF DEFENDANT-APPELLEE**

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GEORGE JEPSEN  
ATTORNEY GENERAL

ROBERT D. SNOOK  
Assistant Attorney General  
55 Elm Street, P.O. Box 120  
Hartford, CT 06141-0120  
Tel: 860-808-5250  
Email: Robert.Snook@ct.gov

*Attorneys for the Defendant-Appellee*

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## **JURISDICTIONAL STATEMENT**

The Defendant, Robert J. Klee, Commissioner of the Department of Energy and Environmental Protection, in his official capacity, (“Commissioner”) relies on his jurisdictional statement filed in his brief of April 2, 2015.

## **INTRODUCTION**

On June 24, 2015, this Court ordered supplemental briefing in this matter addressing specifically the private right of action contained in 16 U.S.C. § 824a-3(h)(2)(B), the remedial enforcement provision of the Public Utilities Regulatory Policies Act of 1978 (“PURPA”), 16 U.S.C. Section 824a-3. The Court requested that the parties address (1) whether this provision provides Allco with a right of action to bring some or all of its claims; (2) whether Allco actually petitioned FERC to enforce the requirements of 16 U.S.C. §824a-3(f); (3) whether a failure to comply with the administrative exhaustion requirements strips this Court of subject-matter jurisdiction under *Niagara Mohawk Power Company v. FERC*, 306 F.3d 1264, 1269-70 (2d Cir. 2002); 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 PURPA and any rights under 42 U.S.C. §§ 1983, and 1988.

### **SUMMARY OF ARGUMENT**

In his main brief filed April 2, 2015, Defendant argued that Allco lacks standing as a disaffected bidder and that the Commissioner was not preempted from conducting a renewable energy resources procurement because the state did not set a wholesale rate in violation of the Federal Power Act.<sup>1</sup> The District Court agreed.<sup>2</sup> Consequently, Defendant did not address any substantive issues related to PURPA because it has consistently argued that the Commissioner's actions were conducted under state law and were wholly outside PURPA.<sup>3</sup>

If, however, this Court concludes that PURPA may be relevant, Defendant notes that Allco has alleged in its Amended Complaint that it has status as a Qualifying Facility ("QF") under PURPA. Section 824a-3(h)(2)(B) of PURPA permits a QF to petition FERC to enforce PURPA against State regulatory authorities or nonregulated utilities. If FERC declines to enforce PURPA, the QF may bring an action in

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<sup>1</sup> Defendant's Brief at pp. 8, 24.

<sup>2</sup> A218, 222.

<sup>3</sup> Defendant's Brief at pp. 7, 8, 16-17.

district court. However, Allco has not petitioned FERC and thus this Court lacks jurisdiction to consider claims brought under PURPA. Further, Congress has provided § 824a-3(h)(2)(B) as a comprehensive remedial scheme, thus foreclosing an implied right of action under PURPA or §§1983 and 1988.

### **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**

Defendant has argued in its main brief that the District Court properly concluded that Plaintiff lacks standing and failed to state a cause of action. Accordingly, Defendant did not analyze any enforcement rights Allco might have under PURPA.<sup>4</sup> Defendant continues to assert that PURPA is not properly invoked in this matter because the Commissioner was acting under provisions of state law and

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<sup>4</sup> Defendant's Brief at pp. 7, 8, 16-17

within state jurisdiction as preserved by the Federal Power Act.<sup>5</sup> It is a matter of great importance to the Commissioner that the state's energy procurement laws be upheld in the face of a preemption challenge because, as noted in his brief, the Commissioner is charged by law to advance the state's renewable energy policies and reduce pollution and greenhouse gas emissions.<sup>6</sup>

As directed by this Court's order, however, Defendant will assume for purposes of this supplemental brief that Allco has standing and that PURPA may apply. However, even if Allco may properly invoke the rights offered to QFs under PURPA, Allco still has failed to establish jurisdiction to bring suit against the Commissioner because Plaintiff has failed to exhaust its administrative remedies.

### **1. Section 824a-3(h)(2)(B) Provides QFs A Right of Action**

Allco has asserted in its Amended Complaint that it is a Qualifying Facility under PURPA.<sup>7</sup> As this Court has held: "The only private right of action under PURPA arises from § 210(h)(2)(B) of that statute," codified at 16 U.S.C. § 824a-3(h)(2)(B). *Niagara Mohawk*

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<sup>5</sup> Defendant's Brief at pp. 8-9, 15-16, 19-21.

<sup>6</sup> Defendant's Brief at pp. 1-2, 32-36

<sup>7</sup> Amended Complaint, ¶ 33; A9.



*Power Corp. v. FERC*, 306 F.3d 1264, 1269 (2d Cir. 2002). Section

824a-3(h)(2)(B) states:

(B) Any electric utility, qualifying cogenerator, or qualifying small power producer may petition the Commission to enforce the requirements of subsection (f) of this section as provided in subparagraph (A) of this paragraph. If the Commission does not initiate an enforcement action under subparagraph (A) against a State regulatory authority or nonregulated electric utility within 60 days following the date on which a petition is filed under this subparagraph with respect to such authority, the petitioner may bring an action in the appropriate United States district court to require such State regulatory authority or nonregulated electric utility to comply with such requirements, and such court may issue such injunctive or other relief as may be appropriate. The Commission may intervene as a matter of right in any such action.

Thus, under §824a-3(h)(2)(B), a QF has a private right of action to petition FERC to enforce the requirements of PURPA against a State regulatory agency or nonregulated utility. If FERC declines to bring such an enforcement action, the QF may bring an action to enforce in district court. *Id.* Congress has therefore identified a specific statutory provision for private redress of alleged violations of PURPA.

## **2. Allco Has Not Alleged that it Petitioned FERC to Enforce PURPA**

Allco has the affirmative burden of pleading that it has met all relevant jurisdictional prerequisites to bringing this action. A “plaintiff asserting subject matter jurisdiction has the burden of proving by a preponderance of the evidence that it exists.” *Lockett v. Bure*, 290 F.3d 493, 497 (2d Cir. 2002); *Makarova v. United States*, 201 F.3d 110, 113 (2d Cir. 2000). Nowhere in the Amended Complaint has Allco alleged that it has petitioned FERC to enforce PURPA against the Defendant. Because Allco has failed to allege that it has petitioned FERC, Allco has failed to plead a critical jurisdictional prerequisite.

As FERC itself has stated in a different case brought by Allco: “If a QF is dissatisfied with a state commission’s or nonregulated utility’s decision implementing PURPA and the Commission’s regulations, it may seek review of such a decision or enforcement of PURPA and the Commission’s PURPA regulations pursuant to section 210 of PURPA.” *Allco Renewable Energy Limited v. Massachusetts Electric Company*, Docket No. EL12-12-000, 146 FERC ¶ 61,107, (Feb. 20, 2014). Thus Allco should be well aware of the remedial enforcement provisions of PURPA which it has not invoked here.

### **3. Failure to Comply With §824a-3(h)(2)(B) Strips This Court of Jurisdiction**

As noted above, this Court has ruled that “The only private right of action under PURPA arises from § 210(h)(2)(B) of that statute.” codified at 16 U.S.C. § 824a-3(h)(2)(B). *Niagara Mohawk Power Corp. v. FERC*, 306 F.3d 1264, 1268 (2d Cir. 2002). In that case, a utility sued FERC and the New York Public Service Commission (“NYPSC”) alleging various claims under PURPA.

With respect to the claim against FERC, the Court noted that 16 U.S.C. § 824a-3(h)(2)(B) does not permit suit against FERC under any circumstances and thus there was no private cause of action under PURPA against FERC. *Id.* With respect to the NYPSC, the Court found that “in the absence of proof that Niagara complied with the jurisdictional pre-requisites” of 16 U.S.C. § 824a-3(h)(2)(B) the Court had no jurisdiction against the state regulators and therefore dismissed the case. *Id.* at 1269-70.

The *Niagara* case, like the present case brought by Allco, included a Supremacy Clause claim against the state officials. *Niagara*, 306 F.3d at 1270. The district court in *Niagara* concluded that the utility was not required to exhaust its administrative remedies to bring the

constitutional claim, but the Second Circuit disagreed, holding that, because the Supremacy Clause and PURPA claims were essentially the same and sought the same relief, “Niagara cannot avoid the administrative exhaustion requirement . . . by restating its PURPA claim under a different heading.” *Id.*

Even though Defendant continues to assert that his actions are a lawful use of his authority under state law, Allco has chosen to base its case fundamentally on PURPA. The Amended Complaint expressly states that: “Plaintiff brings this civil action for violations of the Supremacy Clause of the United States Constitution related to the [Federal Power Act] and PURPA as the result of the Commissioner’s failure to observe the two clear requirements of federal law that were applicable to the [request for proposals] and the exercise of his authority under [state law].” Amended Complaint, ¶ 15, A6.

The gravamen of Allco’s case has always been that FERC has exclusive jurisdiction over wholesale power sales and that the only exception to this exclusive jurisdiction is under PURPA. Amended Complaint, ¶¶ 7, 8, 19, 20, 37, and 58; A5, A7, A10, A14. By allegedly disregarding PURPA, Allco claims the Commissioner intruded upon

FERC's exclusive jurisdiction in violation of the Supremacy Clause. Amended Complaint, ¶¶ 19, 26, 35, 82; A7, A8, A10, A18. It is clear therefore that Allco's Supremacy Clause count is predicated upon PURPA exactly as in *Niagara*.

Thus, as in *Niagara*, the Supremacy Clause claim in Allco is the same as the PURPA claim. As Allco has failed to meet the exhaustion requirements of the enforcement provision of PURPA, neither claim is properly before this Court.

**4. Section 824a-3(h)(2)(B) is the Only Private Right of Action Under PURPA Permitting A Claim Against A State And Forecloses Any Actions Under §§ 1983 and 1988**

The Court has asked whether the existence of the private right of action under §824a-3(h)(2)(B) forecloses other rights of action, including under 42 U.S.C. §§ 1983 and 1988.<sup>8</sup> A review of the decisional law makes clear that if Congress creates a defined statutory right of action,

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<sup>8</sup> The district court below correctly held that Allco must assert a violation of a federal right to seek redress through § 1983, but that the FPA creates no individual federal rights that can be enforced under § 1983. *Allco Fin. Ltd. v. Klee*, No. 3:13CV1874 JBA, 2014 WL 7004024 (D. Conn. Dec. 10, 2014) at \*10. A223. See *Albright v. Oliver*, 510 U.S. 266, 271, 114 S.Ct. 807 (1994).

such a right forecloses an implied right of action, particularly under §§ 1983 and 1988.

As described above, PURPA has its own comprehensive enforcement scheme, and plaintiff may not skirt its requirements. “When a state official is alleged to have violated a federal statute which provides its own comprehensive enforcement scheme, the requirements of that enforcement procedure may not be bypassed by bringing suit directly under § 1983.” *Rancho Palos Verdes v. Abrams*, 544 U.S. 113, 121, 125 S.Ct. 1453 (2005); *Middlesex County Sewerage Auth. v. Nat’l Sea Clammers*, 453 U.S. 1, 20, 101 S. Ct. 2615 (1981)(“[W]hen the remedial devices provided in a particular Act are sufficiently comprehensive, they may suffice to demonstrate congressional intent to preclude the remedy of suits under Section 1983.”). *See also, Municipal Electric Utilities Ass’n. v. Conable*, 577 F. Supp. 158, 163-64 (D.D.C. 1983) (Federal Power Act has a detailed remedial scheme precluding a Section 1983 claim).

PURPA includes specific and detailed remedies in 16 U.S.C. § 824a–3(h) (see *Niagara Mohawk*, 306 F.3d at 1268), and therefore demonstrates congressional intent to preclude suits under § 1983 for

violations of PURPA. *See also, North Am. Natural Resources v. Michigan PSC*, 73 F. Supp. 2d 804, 809 (W.D. Mich. 1999) (“[S]pecific and detailed remedies provided by [PURPA] demonstrate congressional intent to preclude suits under § 1983 for violations of PURPA.”) Allco therefore may not maintain a claim under § 1983 or § 1988 based upon alleged violation of its PURPA rights.

**CONCLUSION**

For all the foregoing reasons, the Defendants move that this Court to uphold the decision of the District Court.

Respectfully submitted,

DEFENDANT,  
ROBERT KLEE  
COMMISSIONER  
DEPARTMENT OF ENERGY  
AND ENVIRONMENTAL  
PROTECTION

GEORGE JEPSEN  
ATTORNEY GENERAL

By: /s/ Robert D. Snook  
Robert D. Snook  
Assistant Attorney General  
Juris # ct10897  
55 Elm Street  
P.O. Box 120  
Hartford, CT 06141-0120  
Tel: (860) 808-5250  
Fax: (860) 808-5347



**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 2,010 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.

/s/ Robert D. Snook  
Robert D. Snook  
Assistant Attorney General

## CERTIFICATION OF SERVICE

I hereby certify that true and accurate copies of the foregoing supplemental 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 14<sup>th</sup> day of July, 2015, to the Clerk of this Court and the following counsel of record:

Thomas Melone, Esq.  
Allco Renewable Energy Limited  
77 Water Street, 8th floor  
New York, New York 10005  
T: (212) 681-1120  
[Thomas.Melone@AllcoUS.com](mailto:Thomas.Melone@AllcoUS.com)  
*Counsel for Plaintiff Allco Finance Limited*

Matthew E. Price, Esq.  
Jenner & Block LLP  
1099 New York Ave. NW Suite 900  
Washington, DC 20001  
P: (202) 639-6873  
F: (202) 639-6066  
Email: [mprice@jenner.com](mailto:mprice@jenner.com)  
*Counsel for Plaintiff Allco Finance Limited*

Bradford S. Babbitt, Esq.  
Robinson & Cole LLP  
280 Trumbull Street  
Hartford, CT 06103  
P: (860) 275-8209 | F: (860) 275-8299  
[bbabbitt@rc.com](mailto:bbabbitt@rc.com)  
*Counsel for Number Nine Wind Farm LLC*

Lee D. Hoffman, Esq.  
Pullman & Comley LLC  
90 State House Square  
Hartford, CT 06103-3702  
P: (860) 424-4315 F: (860) 424-4370  
[lhoffman@pullcom.com](mailto:lhoffman@pullcom.com)  
*Counsel for Fusion Solar Center, LLC*

Joseph A. Rosenthal, Esq.  
Office of Consumer Counsel  
10 Franklin Square  
New Britain, CT 06051  
P: (860) 827-2906 | F: (860) 827-2929  
[Joseph.Rosenthal@ct.gov](mailto:Joseph.Rosenthal@ct.gov)  
*Counsel for Connecticut Office of Consumer Counsel*

/s/ Robert D. Snook  
Robert D. Snook  
Assistant Attorney General