UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

ALLCO FINANCE LIMITED, Plaintiff, v. DANIEL C. ESTY, in his official capacity as Commissioner of the CONNECTICUT DEPARTMENT OF ENERGY AND ENVIRONMENTAL PROTECTION, Defendant.	Case No. 3:13-cv-01874-JBA **FIRST AMENDED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF FOR VIOLATIONS OF THE SUPREMACY CLAUSE OF THE UNITED STATES CONSTITUTION AND THE FEDERAL POWER ACT** **February 26, 2014**

NATURE OF THE ACTION

1. Promoting renewable energy generating resources is unquestionably a laudable goal. It is also a societal imperative. For example, last month, scientists from the University of New South Wales and from the Universite´ Pierre et Marie Curie in Paris have published a report concluding that temperatures are on course to rise at least 4 degrees Celsius by the end of the century.[1] While the debate will obviously continue as to how high the Earth's temperatures will rise by the end of this century, there is little doubt that the effect will be potentially devastating. With political gridlock at the national level, legal steps to arrest climate change must come from existing tools and at the state and local level.

[1] Peter Hannam, *Climate change: Planet to warm by 4 degrees by 2100*, The Sydney Morning Herald (January 1, 2014, 5:13 AM), http://www.smh.com.au/environment/climate-change/climate-change-planet-to-warm-by-4-degrees-by-2100-20131231-304nw.html#ixzz2pAHhwEDc.

2. State governments have various tools to promote the development of renewable energy generating facilities. For example, using their traditional power to regulate the type and mix of facilities used for the generation of electric energy, state governments can require utilities subject to their jurisdiction to obtain a certain percentage their energy from renewable resources,. State governments can also enact net metering laws designed to increase the use of renewable energy. State governments can also require utilities to have a certain percentage their energy from renewable resources under long-term power purchase agreements ("PPAs").

3. State governments can also establish competitive procedures that regulated utilities must follow when the utility seeks to acquire energy and capacity. States may also promote renewable energy by providing tax incentives, easing environmental regulations, fast-tracking permits and zoning approval, and providing a myriad other similar incentives.

4. States can also promote renewable energy generating resources that are located within a utility's load serving area on the basis of reliability and a requirement that all resources, whether located in-state or out-of-state, deliver their energy to the relevant load area. Such a policy is also economically beneficial to local economies creating jobs and increasing the tax base. It is for that reason that the Connecticut Comprehensive Energy Strategy (the "CES") emphasizes the development of in-state renewable energy resources, and states the "fewer dollars [that] are used to buy out-of-state energy, . . . boosts Connecticut's economy and supports more jobs at home."[2]

5. In 2013, Connecticut enacted a series of laws designed to increase the use of renewable energy generating resources. One such law is Connecticut's enactment of Connecticut Public Act 13-303, Section 6 ("Section 6"), which empowers the Commissioner of the Connecticut Department of Energy and Environmental Protection (the "Defendant" or the "Commissioner") to solicit proposals for Connecticut Class I Renewable resources and compel the Connecticut Power and Light Company and United Illuminating (the "Connecticut Utilities") to enter into wholesale PPAs for a term of up to 20 years serving up to 4% of Connecticut's load.

[2] *See*, 2013 Comprehensive Energy Strategy for Connecticut, at p.1.

6. By enacting Section 6, the Connecticut Legislature recognized that executing a long-term fixed PPA with a creditworthy power purchaser is a prerequisite for almost all renewable energy projects. Without a long-term PPA, renewable energy projects, such as the Plaintiff's, would not be able to be built.

7. Although States have various tools to promote renewable energy, it is well-established that States may not promote renewable resources by regulating wholesale electricity sales, because any such regulation is preempted by federal law. When Congress passed the Federal Power Act[3] (the "FPA") in 1935, Congress "occupied the field" of wholesale electricity sales and gave the Federal Energy Regulatory Commission ("FERC") exclusive jurisdiction over all wholesale electricity rates, charges, and terms. In so doing, the FPA preempted any State regulation within the field of wholesale electricity sales.

8. The only exception to the blanket rule prohibiting states from engaging in any type of regulation or setting the wholesale price for energy is if the state government is acting under its authority under the Public Utility Regulatory Policies Act of 1978 ("PURPA"), *see* 16 U.S.C. § 824a-3.

9. Here, in July 2013 the Commissioner solicited proposals for renewable energy resources pursuant to Section 6 (the "RFP"). A copy of the RFP is attached hereto as Exhibit A.

10. Allco Finance Limited ("Plaintiff" or "Allco") offered five solar projects in response to the RFP. Allco had every reason to believe that the Commissioner would observe the two clear federal requirements that restrict his authority to act under Section 6 in the process of evaluating and selecting projects for PPAs as the result of the RFP.

11. Those two requirements are, *first*, he cannot fix the price of energy under a PPA for any generating facility unless that facility is a "small power production facility" under PURPA. *Second*, if he fixes the price of energy under a PPA for a facility that is a "small power production facility" he must make a determination that the rate fixed in the PPA equals the relevant utility's "avoided costs" under PURPA.

[3] 16 U.S.C., Ch.12.

12. The Commissioner received responses to the RFP that were more than enough for the Commissioner to select generating resources that would fulfill the goals of Section 6 and the CES, while at the same time observing the prohibition under the FPA of not setting or regulating the wholesale price of energy.

13. The Commissioner, however, ignored those two requirements and ordered the Connecticut Utilities to execute PPAs with two projects, a 250 megawatt ("MW") wind project located in Maine (the "Number Nine Wind Project") and a 20MW solar project located in Connecticut (the "Fusion Solar Project") at fixed wholesale prices.

14. The Commissioner's order is attached hereto as Exhibit B (the "Order"), and the alleged rationale for the Order is attached as Exhibit C hereto (the "Determination").

15. Plaintiff brings this civil action for violations of the Supremacy Clause of the United States Constitution related to the FPA and PURPA as the result of the Commissioner's failure to observe the two clear requirements of federal law that were applicable to the RFP and the exercise of his authority under Section 6.

16. This action seeks a declaration that the Commissioner violated the Supremacy Clause when he fixed the wholesale price of energy by directing the Connecticut Utilities to purchase energy at a particular price. This action also seeks appropriate injunctive relief to remedy the constitutional violation and invalidate the contracts that the Commissioner compelled the Connecticut Utilities to enter. In so doing, the action seeks to alleviate the past harm suffered by Plaintiff and to prevent the future harm that Plaintiff will suffer if the Commissioner is permitted to continue to take actions contrary to federal law.

17. This action also seeks to invalidate the contracts for the selected projects because those projects were selected based upon an unlawful state action. The Commissioner's directive compelling the Connecticut Utilities to enter into the contracts were executed unlawfully, pre-empted and void under the FPA. As a result, such acts undermined the objective and integrity of the RFP bidding process.

SUMMARY OF THE CLAIM

18. Wholesale electricity markets are complex, interstate, and regulated by the FERC under Part II of the FPA, 16 U.S.C. § 824. This case concerns the issuance of a certain order by the Defendant pursuant to Section 6, which provides the Defendant with the authority under Connecticut law to order the Connecticut Utilities to enter into agreements for the purchase of wholesale power from certain renewable energy generators.

19. The FPA gives the FERC exclusive jurisdiction to regulate all wholesale sales of electricity. Thus, the FERC has exclusive jurisdiction to regulate any wholesale electricity sale made by any projects that would be selected by the Commissioner as a result of the RFP. Neither the Commissioner nor the State of Connecticut may regulate the wholesale electricity sales unless permitted by PURPA; any such regulation by the Commissioner or the State of Connecticut is preempted by the FPA.

20. Exercising its jurisdiction under the FPA, the FERC has determined that a multistate, market-based system of setting wholesale electricity prices will lead to the most efficient allocation of generating resources by favoring efficient generators and disfavoring inefficient ones. In New England, the FERC has implemented that policy by authorizing wholesale electricity sales through a multistate market operated by an entity called ISO New England.

21. The problem faced by the Commissioner and proponents of renewable energy projects is that those projects will likely fare poorly in FERC's multistate, market-based system. Renewable energy is generally more expensive than power generated by non-renewable resources. Moreover, projects such as the Number Nine Wind Project do not deliver their power to Connecticut. As a result, such a project selling to a Connecticut utility would need to take on Enron-style energy risks because of the potential difference between the locational marginal price of energy in Maine (i.e., the point of delivery) and the locational marginal price of energy in Connecticut (i.e., the point where the energy is needed). Indeed, in areas of the United States

where there are many wind projects, it is a regular occurrence for the price of energy to be negative, which means that the generator must pay to put its energy onto the electrical grid.

22. The fact that the Number Nine Wind Project, which has been under development since 2003, has not been placed into commercial operation is a testament to the fact that the Enron-style risks are too great for any rational commercial business entity to bear for a project located in a wind-rich, but transmission poor, area such as Maine.

23. The Commissioner's Order now allows those risks, which one of the world's largest wind project owners found unacceptable, to be passed onto, and borne by, Connecticut ratepayers without any economic benefits or job creation for Connecticut ratepayers.

24. In pre-empting the field of wholesale sales of energy, Congress and the FERC have made the judgment that large projects such as the Number Nine Wind Project must participate in the market-based energy market. On the other hand, Congress and the FERC have established the policy that small power production facilities, which are facilities not greater than 80MW in size, are to be encouraged, and that States have a role in encouraging such facilities, including some latitude in fixing the wholesale price of energy for such facilities.

25. Pursuant the Order, the Commissioner compelled the Connecticut Utilities to enter into PPAs at fixed wholesale prices for the Number Nine Wind Project and the Fusion Solar Project. The Order compelled the Connecticut Utilities to enter into the PPAs attached hereto as Exhibit D at the fixed wholesale prices stated in the respective PPAs.

26. Because the Order violates well-established principles under the Supremacy Clause of the United States Constitution, and violates the FPA, Plaintiff – the owner, developer and operator of electricity generators that are small power production facilities within the meaning of PURPA, a participant in the RFP and a likely participant in future procurements in Connecticut–is entitled to declaratory and injunctive relief barring implementation of the Order and the PPAs, and declaring that the Order, and the PPAs executed pursuant thereto, are void *ab initio*.

JURISDICTION AND VENUE

27. This Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. § 1331 because the action brings claims under the United States Constitution and federal law.

28. The Court is empowered to grant declaratory relief by 28 U.S.C. §§ 2201 and 2202 and Rule 57 of the Federal Rules of Civil Procedure and *Ex Parte Young*, 209 U.S. 123 (1908).

29. This Court is empowered to grant preliminary and permanent injunctive relief by, *inter alia*, 28 U.S.C § 2202 and Rule 65 of the Federal Rules of Civil Procedure.

30. 16 U.S.C. 825p provides that District Courts of the United States shall have exclusive jurisdiction of violations of the FPA or the rules, regulations, and orders thereunder, and of all suits in equity and actions at law brought to enforce any liability or duty.

31. This Court has personal jurisdiction over Defendant because the Defendant conducts a substantial portion of his duties as the Commissioner of DEEP in the District of Connecticut. The Commissioner's and the DEEP's main office is located in Hartford, Connecticut.

32. Venue is proper in this District under 28 U.S.C. § 1391(b)(1) and (2) because a substantial part of the events giving rise to this action occurred in the District of Connecticut.

THE PARTIES

33. Plaintiff is the owner, operator and developer of various solar projects, including the five solar projects submitted in response to the RFP, each of which constitute a "small power production facility" or "qualifying facility" within the meaning of Section 210(l) of PURPA. *See*, Section 3(17) of the FPA, 16 U.S.C. 796(17). The Plaintiff is a "qualifying small power producer" within the meaning of Section 210(h)(2)(B) of PURPA.

34. Defendant Daniel C. Esty is the Commissioner of the DEEP. Commissioner Esty is sued in his official capacity for declaratory and injunctive relief.

STATUTORY AND REGULATORY FRAMEWORK APPLICABLE TO ALL COUNTS

35. Under the Supremacy Clause of the United States Constitution, a state law, rule, tariff or action is preempted when Congress intends federal law to occupy the field or when state regulation stands as an obstacle to the accomplishment of Congress's goals. Under Part II of the FPA, 16 U.S.C. § 824(b), Congress has granted FERC the exclusive authority to regulate in the wholesale electricity field. Only FERC may set wholesale rates and regulate wholesale markets.

36. Attempts by States to fixed wholesale power rates, even for the most laudable goals or under the guise of state jurisdiction over generation facilities and a utility's mix of generation sources, have been consistently rejected. In the most widely known case during the past few years, *California Public Utilities Commission*, 132 F.E.R.C. P61,047 (2010) at ¶64, the FERC re-iterated that, except with respect to qualifying facilities under PURPA, there is no room for a State to take any action regulating the wholesale price of energy for a generation facility, such as what the Commissioner did here:

> The Commission's authority under the FPA includes the exclusive jurisdiction to regulate the rates, terms and conditions of sales for resale of electric energy in interstate commerce by public utilities. [*citing* 16 U.S.C. §§ 824, 824d, 824e; *Mississippi Power & Light Co. v. Mississippi ex rel. Moore*, 487 U.S. 354 (1988)]. While Congress has authorized a role for States in setting wholesale rates under PURPA, *Congress has not authorized other opportunities for States to set rates for wholesale sales in interstate commerce by public utilities, or indicated that the Commission's actions or inactions can give States this authority*. . . . . Because the CPUC's AB 1613 Decisions are setting rates for wholesale sales in interstate commerce by public utilities, we find that they are preempted by the FPA. (Emphasis added.)

37. The only role for the States in regulating wholesale energy prices in a contract is if a State is acting pursuant to its authority under PURPA. It is only under PURPA that a State can require a utility to purchase energy at a specified price, and in such case, the State must make a determination that the specified price equals the utility's avoided costs.

38. Congress enacted PURPA in 1978 as part of a package of legislation designed to address a nationwide energy crisis. *See FERC v. Mississippi*, 456 U.S. 742, 745, 750 (1982). In

section 210(a) of PURPA, 16 U.S.C. § 824a-3(a), Congress required FERC to promulgate "such rules as it determines necessary to encourage cogeneration and small power production"[4] development. *See generally* 18 C.F.R. pt. 292. Accordingly, Congress specifically directed FERC to issue rules requiring electric utilities to purchase electric energy from such facilities. 16 U.S.C. § 824a-3(a)(1). In its duly promulgated regulations, the FERC interpreted section 210(a) of PURPA, 16 U.S.C. § 824a-3(a), as imposing on electric utilities an obligation to purchase all electric energy and capacity made available from small power production facilities, which are "qualifying facilities" or "QFs". *See* 18 C.F.R. § 292.303.

39. Pursuant to 18 C.F.R. §292.304(a)(4) the rate for purchases from a new small power production facility must be at the utility's *full* avoided costs "i.e., the cost the utility would have incurred had it generated the electricity itself or purchased the electricity from another source."[5]

40. Section 210(f) of PURPA, 16 U.S.C. § 824a-3(f), requires State regulatory authorities and non-regulated electric utilities to implement FERC's PURPA regulations. As provided in PURPA section 210(h)(2)(A), 16 U.S.C. § 824a-3(h)(2)(A), FERC's PURPA regulations are treated as rules enforceable under section 314 of the Federal Power Act, 16 U.S.C. § 825m.

FACTS APPLICABLE TO ALL COUNTS

41. In his testimony on March 10, 2011, before the Committee on Executive and Legislative Nominations, Commissioner Esty stated:

> The Governor has made clear the importance of driving economic growth and creating jobs. DEP must also be a partner in this and pursue our work with an eye on how we will contribute to the state's economic revitalization.
> ***

[4] A cogeneration facility produces both electric energy and steam or some other form of useful energy, such as heat. 16 U.S.C. § 796(18)(A). A small power production facility uses biomass, waste, or renewable resources (such as wind, water, or solar energy) to produce no more than 80 megawatts of electric power. 16 U.S.C. § 796(17)(A).

[5] *See, Am. Paper Inst., Inc. v. Am. Elec. Power Serv. Corp.*, 461 U.S. 402, 404 (1983).

> But, as we move toward a "Double E" structure, I want to emphasize a third "E" -- the Economy**. *I share the Governor's belief that a commitment to job creation needs to be our top priority*** – and deeply believe that environmental progress is much easier to achieve when the public feels confident about the economic future.
>
> The addition of the "third E" - the economy - to our mission means that we as a department will become even more critical to the State's mission. We have an opportunity to help establish a clean technology and energy economy in Connecticut, which would bring jobs to the state, increase the quality of life for all of our residents, and establish Connecticut as a leader in the next great American economic growth opportunity.
>
> (Emphasis added.)

42. Clearly, those words from Commissioner Esty's testimony are a mere distance memory. By selecting the Number Nine Wind Project, the "third E" has gone by the wayside.

43. Instead of meeting the goals of the CES, and Commissioner Esty's own words, the Order results in nearly a billion dollars being sent to Maine to create jobs there. Doing that is tantamount to laying off 10,000 Connecticut workers for the next year, and depriving Connecticut municipalities and schools of the benefit of the ongoing tax revenue that they would realize from home-grown renewable energy. New or existing programs at Connecticut schools that could have benefitted from the tax revenue from Connecticut based projects will suffer. Instead it is Maine communities, businesses, schools and children that will benefit, not Connecticut's. And all this is done is secret, without disclosing the true cost and risks of the Number Nine Wind Project under the guise of deliberate process privilege, and foisting onto Connecticut homes and businesses Enron-style energy trading risks that no commercial enterprise would assume over 15 years.

44. On July 8, 2013, the Connecticut DEEP issued the RFP pursuant to Section 6. The RFP sought up to 174MW of full-time generating capacity, which is (according to the RFP) approximately 525MW of wind equivalent nameplate capacity. In terms of nameplate solar capacity, the 174MW is approximately equal to 1,000MW.

45. The Plaintiff submitted five solar projects to DEEP in response to the RFP, all of which were 80MW in size or smaller.

46. For all 80MW projects offered by Plaintiff in the RFP, the Plaintiff offered the option to choose and evaluate such project at a size as small as 20MW. Allco's five projects were the Trumbull Solar project (which is not listed on Appendix 2 to Exhibit C (the "Rankings")), the Harwinton Solar project (listed as ranked #4 on the Rankings), the Bozrah Solar project (listed as #7 on the Rankings), the Bucks Solar project (listed as #10 on the Rankings), and the Franklin Solar project (listed as #13 on the Ranking)Allco's five projects were the Trumbull Solar project (which was not listed on (the "Rankings")), the Harwinton Solar project (listed as ranked #4 on the Rankings), the Bozrah Solar project (listed as #7 on the Rankings), the Bucks Solar project (listed as #10 on the Rankings), and the Franklin Solar project (listed as #13 on the Ranking).

47. The Trumbull Solar project was the lowest price project of all five submitted by the Plaintiff, and was a lower price that the selected Fusion Solar project. As a result, its absence from the Rankings in unexplainable. The Defendant has similarly offered no explanation as to its absence.

48. There was no valid basis on which the Trumbull Solar project should have been ranked lower than the Fusion Solar project or the Velgouse Solar project.

49. The Defendant has refused to provide any explanation as to the ranking or lack thereof for the Trumbull Solar project.

50. The price offered by one or more of the Plaintiff's projects equaled the Connecticut Utilities avoided costs.

51. The approximate total nameplate capacity of the top 13 projects in the Rankings (excluding the Number Nine Wind Project and Highland Wind[6]) is 390MW.

52. If the Number Nine Wind Project were not selected, the Commissioner would have selected Plaintiff's Harwinton, Bozrah, Bucks and Franklin solar projects.

[6] The only two projects in the top 13 in the Rankings that did not publicly disclose their size when their response to the RFP was submitted were the Number Nine Wind Project and Highland Wind. The Maine Governor's Office of Energy Independence and Security's March 2012 Maine Wind Energy Development Assessment lists Highland Wind as 117MW, exceeding the 80MW cap for small power production facilities. *See*, http://maine.gov/energy/pdf/Binder1.pdf, at p.15.

53. Pursuant to the Order dated September 18, 2013, the Commissioner ordered the Connecticut Utilities to enter into a PPA at a fixed wholesale price for a term of 15 years with the 250MW Number Nine Wind Project, and at a different fixed wholesale price for a term of 20 years with the 20MW Fusion Solar Project.

54. On September 24, 2013, the Connecticut Utilities filed their petition with the Public Utilities Regulatory Authority ("PURA") for approval for cost recovery for the PPAs with the Number Nine Wind Project and the Fusion Solar Project.

55. In the proceedings before PURA, the Connecticut Utilities confirmed that they made no evaluation of the PPAs and merely executed the PPAs as they were told to do by the Order. *See* Exhibit E attached hereto.

56. No determination was made by the Commissioner, DEEP or PURA that the fixed wholesale prices in either PPA were equal to the Connecticut Utilities' avoided costs.

57. Under the FPA, it is only the FERC that has the right to regulate wholesale power prices.

58. The only area in which a State has the authority to regulate wholesale prices is if the State is acting under the authority granted to it under PURPA. [7]

59. The 250MW Number Nine Wind Project is not a small power production facility because it exceeds 80MW.

INJURIES SOUGHT TO BE REDRESSED

60. The Plaintiff's five solar projects need to enter into long-term PPAs in order to obtain financing to allow the projects to be built. Without a long-term PPA for a project, that project will not be built.

61. The need for a PPA is one of the reasons for the enactment of Section 6.

62. Plaintiff has suffered an injury in fact because the Plaintiff as a small power producer and participant in energy markets has a legally protected interest to be free from

[7] *See*, *California Pub. Utils. Comm'n*, 132 FERC ¶61,047 (2010), *California Pub. Utils. Comm'n*, 133 FERC ¶61,059 (2010), and *California Pub. Utils. Comm'n*, 134 FERC ¶61,044 (2011).

unlawful actions of State officials related to those markets. Plaintiff has a legally protected interest in being able to participate in energy market solicitations for generating facilities, such as the RFP, free from unlawful action of State officials. Plaintiff as a small power producer has specific protected interests under the FPA and PURPA with respect to selling energy to utilities, such as the Connecticut Utilities. Those specific interests include the right to Plaintiff 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. Those rights include the right to prevent State officials from circumventing those rights by awarding contracts or directing the Connecticut Utilities to enter into contracts in violation of either the FPA or PURPA.

63. The Plaintiff has suffered injury in fact because the costs incurred in developing the five projects are now lost because of Defendant's unlawful actions.

64. The Plaintiff has suffered injury because, by the Commissioner directing the Connecticut Utilities to enter into the PPAs under the Order, the available capacity available to legally qualified generators under Section 6 is reduced and almost completely eliminated.

65. The Plaintiff has suffered injury because one or more of the Plaintiff's projects would have been selected if the Number Nine Wind Project was not. The Rankings confirm that it is not only likely, but a near certainty, that if the Number Nine Wind Project had not been selected as a result of the Commissioner's unlawful action, one or more of Plaintiff's projects would have been selected. As a result, the Plaintiff has suffered harm by not being able to enter into a PPA with the Connecticut Utilities.

66. It is likely that the Plaintiff's injuries will be redressed by a favorable decision. If the Plaintiff receives a favorable decision in this case, it is likely, if not a virtual certainty that one of two scenarios would result. The first is that the Commissioner would make a redetermination based upon the RFP that comports with federal law, in which case, based upon the Rankings, it is likely that one or more of Plaintiff's projects would be selected. The second is that the Commissioner would issue a new RFP and make a determination that comports with

federal law, in which case, in light of the target goal of 4%, it is likely that one or more of the Plaintiff's proposals would be selected because the pool of available proposals is likely to be similar, and in any event not different enough to be material from the pool of projects submitted to the RFP.

67. In light of the stated goals of the Connecticut Legislature, the Governor, and the Defendant, it is a remote possibility that the Defendant would do nothing if a decision in Plaintiff's favor were issued in this case.

68. A re-determination based upon the RFP, or a determination under a new RFP, would likely result, based upon the Commissioner's calculations shown in the Rankings, that one or more of the Plaintiff's projects would be determined to be at a price that satisfied the avoided cost standard under PURPA.

69. In any case, whether or not a new RFP is issued under Section 6, a redetermination is made as a result of the RFP, or no further action is taken by Defendant, a favorable decision for Plaintiff in this case would redress the injuries to Plaintiff, and the future injuries that would result from unlawful State action interfering with Plaintiff's participation in the energy markets and Plaintiff's rights under the FPA and PURPA.

70. Moreover, Defendant has acknowledged that there will be future procurement opportunities in which Plaintiff's projects could participate. However, unless a favorable decision is issued to Plaintiff in this case, the Defendant will more than likely continue take action in violation of the FPA, PURPA and the Supremacy Clause which will likely adversely affect Plaintiff's participation in those future procurement opportunities.

71. An injunction is necessary and appropriate because Defendant acting in his official capacity is acting in and will continue to act in violation of the Constitution and federal law. Without an injunction from this Court, the Defendant will continue to act in violation of the FPA and the Supremacy Clause. This complaint seeks to prevent those future unlawful acts. For that reason, the Plaintiff seeks an injunction requesting that the Defendant be restrained from acting in contravention of controlling federal law in the future.

COUNT I

VIOLATION OF THE FEDERAL POWER ACT AND THE SUPREMACY CLAUSE OF THE UNITED STATES CONSTITUTION

72. Plaintiff re-alleges and incorporates by reference the allegations contained in paragraphs 1 through 71 as though fully set forth herein.

73. Under the Supremacy Clause of the United States Constitution, action by a state is preempted when Congress intends Federal law to occupy the field, as well as in cases where the State law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. The Supremacy Clause of the United States Constitution renders federal law "the supreme Law of the Land." U.S. Const. art. VI, cl. 2. Under the Supremacy Clause of the United States Constitution, action by a state is preempted when Congress intends federal law to occupy the field or when state regulation stands as an obstacle to the accomplishment of Congress's goals.

74. Under the FPA, the FERC has 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. § 24(b)(1). In contrast, States have jurisdiction over, *inter alia*, "facilities used for the generation of electric energy." *Id.*

75. Pursuant to the FPA, the FERC has adopted an elaborate regulatory framework to regulate wholesale electric energy rates.

76. By enacting the FPA, Congress intended to give the FERC exclusive jurisdiction over setting wholesale electric energy and capacity rates or prices and thus intended this field to be occupied exclusively by federal regulation. Thus, state action that regulates within this field is void under the doctrine of field preemption.

77. In addition, under the federal regulatory framework, wholesale electric energy prices must be freely negotiated between electric generation facilities and distributors. Any

attempt by a State to compel distributors to purchase energy from generation facilities at a particular price is void under the doctrine of conflict preemption.

78. Neither the Commissioner nor the State of Connecticut can directly dictate the price of a wholesale electricity contract.

79. By directing the Connecticut Utilities to enter into a PPA at a particular price, the Commissioner intruded on the FERC's exclusive jurisdiction to regulate wholesale electric energy prices. Accordingly, the Number Nine Wind Farm Project and Fusion Solar Project contracts are the product of state action that is illegal under the doctrine of field preemption.

80. In addition, by requiring the Connecticut Utilities to purchase power at a fixed price from the State's favored generator, pursuant to criteria developed by the State, prevents the Connecticut Utilities from freely negotiating for a different contractual price, thus violating federal law and policy which requires wholesale electric energy prices to be set pursuant to freely-negotiated market transactions. Accordingly, the PPAs are the product of state action that is illegal under the doctrine of conflict preemption.

81. Plaintiff has no adequate remedy at law and no opportunity for compensation for the Defendant's violations of the Supremacy Clause.

82. Plaintiff will suffer irreparable harm by the violation of the Supremacy Clause, and the balance of harms favors Plaintiff, because Plaintiff will suffer substantial economic losses due to the inability to build its projects, sell the energy and capacity from those projects, and recover the costs it has incurred in developing those projects, but the Commissioner is immune from suit for retrospective relief.

83. Plaintiff will suffer irreparable future harm if the Commissioner is permitted to continue to take actions prohibited by federal law. The harm to Plaintiff will include, without limitation, the harm specified in ¶¶60-71 of this Complaint.

84. In passing the FPA, Congress intended FERC to have exclusive jurisdiction over the field of wholesale electricity regulation. Section 201(b) of the FPA, codified at 16 U.S.C. § 824(b), sets out the scope of federal regulatory power and draws a bright line between mutually

exclusive spheres of state and federal authority. The FPA left no power to the States to regulate wholesale electricity transactions, including wholesale sales of capacity, in interstate commerce except if the States are acting in compliance with PURPA.

85. The Order is preempted because it intrudes on the FERC's exclusive jurisdiction to regulate wholesale transactions for capacity and energy. The Order sets the price at which the Connecticut Utilities would purchase energy from the Number Nine Wind Project and the Fusion Solar Project.

86. The Commissioner fixing that price constitutes the setting of the wholesale price for energy. As such it is only valid if it results from a proper implementation of PURPA.

87. The Number Nine Wind Project is not a small power production facility because it is 250MW, which is far in excess of the maximum 80MW permitted size. As a result, the Order is not a valid exercise of the Commissioner's authority under PURPA with respect to the Number Nine Wind Project.

88. Assuming that the Fusion Solar Project is a small power production facility, no determination was made that the fixed price for the Fusion Solar Project equals the Connecticut Utilities' avoided costs. As a result, the Order is not a valid exercise of the Commissioner's authority under PURPA with respect to the Fusion Solar Project.

89. The Order invades the FERC's exclusive jurisdiction to set wholesale rates and therefore is pre-empted and void, and as a result the PPAs are pre-empted and void *ab initio*.[8]

90. Plaintiff has no adequate remedy at law and no opportunity for compensation for the Order's violation of the Supremacy Clause.

[8] *See*, *Connecticut Light and Power Company*, 70 FERC P61,012, 61,030 (1995) (stating "[h]enceforth, however, if parties are required by state law or policy to sign contracts that reflect rates for QF sales at wholesale that are in excess of avoided cost, those contracts will be considered to be void ab initio.") *See also, PPL EnergyPlus LLC v. Nazarian*, 2013 U.S. Dist. LEXIS 140210, * 110 (D. Md. 2013)(holding that no matter how disguised a fixed contract price set by the State to be paid to the generator is void); *PPL EnergyPlus, LLC v. Hanna*, 2013 U.S. Dist. LEXIS 147273 (D. N.J. 2013)(holding to the same effect but holding that incentives for local generation because of reliability concerns is reasonable).

91. The Plaintiff has already suffered harm as stated herein because if the Number Nine Wind Project were not selected, one or more of Plaintiff's projects would have been selected for a PPA.

92. The Defendant's actions also interferes with the FERC's achievement of its regulatory goals in the wholesale electricity markets, and Congress' goals, of encouraging and providing special rules that favor, small power production.

93. Plaintiff will suffer irreparable harm by the violation of the Supremacy Clause because Plaintiff's projects are competing for a limited supply of long-term renewable energy contracts in Connecticut, and the Defendant's interference with the wholesale energy market in violation of the FPA will cause Plaintiff to suffer substantial economic losses, but Connecticut is immune from suit for retrospective relief.

94. The public interest will be harmed by the violation of the Supremacy Clause because the Order frustrates Congress' desire to place wholesale energy markets under the exclusive purview of FERC and, by interfering with the workings of PURPA, will undermine Congress' choice to encourage small power production facilities.

95. The public interest has been harmed and will continue to be harmed if the Commissioner is not prevented from the granting of contracts through arbitrary or capricious action as a result of illegal state action.

96. Additionally, Connecticut ratepayers will be required to pay for the long-term, fixed-price contracts which the Order requires the Connecticut Utilities to enter into without a determination of whether those prices reflect avoided costs resulting in ratepayers bearing the risk of paying substantial subsidies.

97. Plaintiff is entitled to judgment under 28 U.S.C. §§ 2201(a) and 2202, declaring that the Order violates the Supremacy Clause (Article VI, Clause 2) of the United States Constitution, and that the PPAs executed for the Number Nine Wind Project and the Fusion Solar Project are void *ab initio*.

98. Granting the requested declaratory and injunctive relief will harm the Commissioner and the State of Connecticut less (if at all) than denying the relief would harm Plaintiff.

COUNT II

VIOLATION OF 42 U.S.C. §1983

99. Plaintiff re-alleges and incorporates by reference the allegations contained in paragraphs 1 through 98 as though fully set forth herein.

100. Under 42 U.S.C. § 1983, "[e]very person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

101. If the price of the Fusion Solar Project was equal to the Connecticut Utilities avoided costs and thus a valid exercise of the State's authority under PURPA, the Commissioner impermissibly discriminated against the Plaintiff's projects that offered a price at or below avoided costs, and below the price of the Fusion Solar Project.

102. In addition, the Plaintiff has suffered injury because one or more of the Plaintiff's projects would have been selected if the Number Nine Wind Project was not. The price offered by one or more of the Plaintiff's projects equaled the Connecticut Utilities avoided costs.

103. The Rankings confirm that it is not only likely, but a near certainty, that if the Number Nine Wind Project had not been selected as a result of the Commissioner's unlawful actions, one or more of Plaintiff's projects would have been selected. As a result, the Plaintiff has suffered harm and damages by not being able to enter into a PPA with the Connecticut Utilities and the result of Defendant's violation of 42 U.S.C. § 1983.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff respectfully requests the following relief:

(1) That the Court find and declare as follows:

a. The Order is the product of illegal state action and therefore void under the FPA and the Supremacy Clause of the United States Constitution and without legal force and effect;

b. The PPAs with the Number Nine Wind Project and the Fusion Solar Project to be the product of illegal state action and therefore and therefore are void *ab initio* and without legal force and effect; and

c. The bidding process and selection was based upon an unlawful procedure and unlawful state action and such acts undermined the objective and integrity of the RFP bidding process

(2) That this Court enjoin the Commissioner from enforcing or otherwise putting into effect any part of the Order and enjoin the Commissioner from issuing further orders and decisions that are inconsistent with the FPA and PURPA;

(3) That this Court award Plaintiff damages and their reasonable attorneys' fees under 42 U.S.C. §§ 1983 and 1988; and

(4) That Plaintiff be granted such other further relief as the Court may deem just and proper.

Dated: February 26, 2014

/s/ Thomas Melone

Thomas Melone (phv06465)
ALLCO RENEWABLE ENERGY LIMITED*
14 Wall St., 20th Floor
New York, NY 10005
Telephone: (212) 681-1120
Facsimile: (801) 858-8818
Thomas.Melone@AllcoUS.com
*For identification purposes only

Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on February 26, 2014, a copy of the foregoing First Amended Complaint was filed electronically and served by mail on anyone unable to accept electronic filing. Notice of this filing will be sent by e-mail to all parties by operation of the Court's electronic filing system or by mail to any one unable to accept electronic filing as indicated on the Notice of Electronic Filing. Parties may access this filing through the Court's CM/ECF System.

/s/ Thomas Melone
Thomas Melone (phv06465)
ALLCO RENEWABLE ENERGY LIMITED*
14 Wall St., 20th Floor
New York, NY 10005
Telephone: (212) 681-1120
Facsimile: (801) 858-8818
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