16-2946, 16-2949

THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

ALLCO FINANCE LIMITED,
Plaintiff-Appellant
v.

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

and

ARTHUR HOUSE, JOHN W. BETKOSKI, III, and MICHAEL CARON, in their Official Capacity as Commissioners of the Connecticut Public Utilities Regulatory Authority,

Defendants-Appellees,

Appeal from the United States District Court for the District of Connecticut
Nos. 3:15-cv-00608, 3:16-cv-00508
Hon. Charles S. Haight, Jr.

EMERGENCY MOTION FOR AN INJUNCTION PENDING APPEAL

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CORPORATE DISCLOSURE STATEMENT

Allco Finance Limited is a privately held company in the business of developing solar energy projects. It has no parent companies, and no publicly held company owns 10 percent or more of its stock.

/s/ Thomas Melone

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Appellant Allco Finance Limited ("Allco") moves this Court pursuant to Federal Rule of Appellate Procedure 8(a) for an emergency injunction prohibiting the Defendants from awarding and/or approving interstate wholesale electricity contracts in connection with their current energy solicitation while this appeal is pending. Allco also requests that this Court issue a temporary restraining order (before 6:00 pm on October 11, 2016) preventing any such awards or approvals while it considers Allco's motion. Allco moved for the same injunctive relief in the district court, which the court denied. A183-225. Allco notified Defendants of this motion. Defendants intend to file a response in opposition.

INTRODUCTION

States have no authority to regulate wholesale sales of electricity unless Congress creates an exception. *Allco Finance Ltd. v. Klee,* 805 F.3d 89 (2d Cir. 2015) ("*Allco II").* Congress created such an exception with the Public Utility Regulatory Policies Act, Pub. L. No. 95-617, 92 Stat. 3117 ("PURPA") but there is a catch. *First,* renewable energy generating facilities must meet the design standards specified by Congress for a "qualifying facility" or "QF."[1] *Second,* the price paid by the utility must be at the ratepayer-neutral price of the utility's avoided costs. 18 C.F.R. §292.303. The Defendants intend to compel interstate

[1] "[Q]ualifying small power production facilit[ies]" under the statute and "Qualifying Facilities" or QFs under FERC's regulations, *see* 16 U.S.C. § 796(17)(C); 18 C.F.R. § 292.203).

wholesale sale power contracts with renewable energy facilities that fail both of those Congressionally-mandated requirements. The Defendants simply seek to unilaterally remake regional interstate wholesale energy markets, retroactively abrogate the federal government's policy of promoting renewable energy QF generation, and upset settled, investment-backed expectations *after* private industry has already committed to its investments.

Just last term, a unanimous United States Supreme Court invalidated the State of Maryland's attempt to compel wholesale sales with State-selected generators, just like what Connecticut plans to do here. *See, Hughes v. Talen Energy Marketing, LLC*, 136 S. Ct. 1288 (2016) ("*Hughes*") directly affirming the Fourth Circuit's decision in *PPL EnergyPlus LLC v. Nazarian*, 753 F.3d 467 (4th Cir. 2014) ("*Nazarian*") and indirectly affirming the Third Circuit's decision in *PPL EnergyPlus LLC v. Solomon*, 766 F.3d 241 (3d Cir. 2014) ("*Solomon*"), *cert. den.* 136 S. Ct. 1728 (2016). *Solomon* invalidated New Jersey's attempt to compel wholesale sale contracts. Generators in the wholesale regional electricity market in those cases had standing to challenge State-compelled wholesale sale contracts between utilities and other generators, just like the ones at issue here.

Despite specific Congressional authorization to bring suit under 16 U.S.C. §824a-3(h)(2), the district court found that Allco did not have standing to challenge the Defendants' proposed compulsion of unlawful wholesale sale electricity contracts. The court's manifestly erroneous decision conflicts with decisions of the Supreme Court (*e.g.*, *Hughes*, *Spokeo, Inc., v. Robins*, 136 S. Ct. 1540 (2016) ("*Spokeo*"), *Clinton v. City of New York*, 524 U.S. 417 (1998), *FEC v. Akins*, 524 U.S. 11 (1998), *Utah v. Evans*, 536 U.S. 452 (2002)), this Court (*e.g.*, *Allco II*, *B.K. Instrument, Inc. v. United States*, 715 F.2d 713 (2d Cir. 1983)), and other circuits (*e.g., Solomon*, *Nazarian*, *La. Energy & Power Authority v. FERC*, 141 F.3d 364 (D.C. Cir. 1998), *Orion Tech., Inc. v. United States*, 704 F.3d 1344, 1349 (Fed. Cir. 2013)). Allco is therefore likely to prevail on appeal.

BACKGROUND

This case involves an enforcement action under 16 U.S.C. §824a-3(h)(2) including a preemption challenge under the Supremacy Clause, the Federal Power Act, *see* 16 U.S.C. §791a *et seq*. ("FPA"), and PURPA to actions proposed to be taken by the Defendants. The district court had jurisdiction under 16 U.S.C. §824a-3(h)(2), which empowers the district court to issue injunctive or other relief upon complaint of a "qualifying small power producer," such as Allco. A110 ¶16.

In 2013, Defendant Klee (the "Commissioner") solicited proposals for renewable energy, allowed competition from facilities not meeting Congress' design requirements, selected winners of the solicitation, and compelled Connecticut's two electric utilities (the "Connecticut Utilities") to enter into wholesale electricity contracts with the winners, one of which was a non-QF, directly resulting in at least one of Allco's projects not being selected. A108 ¶4, A113 ¶¶28-29. In 2015, the Commissioner issued another solicitation to electric generators (the "2015 RFP"), A136-179, for the purpose of compelling the Connecticut Utilities to enter into interstate wholesale power contracts, and announced on September 20, 2016, that compulsion of further interstate wholesale power contracts is imminent. *See*, https://cleanenergyrfp.com/.

This Court considered Allco's challenges to Connecticut's 2013 actions in *Allco II*. There this Court held that Allco's challenge *was* "an attempt to enforce 16 U.S.C. §824a-3(f)", *see*, 805 F.3d at 97, thus Allco needed to first exhaust administrative remedies with the Federal Energy Regulatory Commission (the "FERC") pursuant to 16 U.S.C. §824a-3(h)(2). *Id*. Allco exhausted administrative remedies at the FERC, challenging the 2013 and 2015 solicitations, A115 ¶39, and then returned to the district court where inexplicably, the court held the opposite—that Allco's challenge *was not* an attempt to enforce 16 U.S.C. §824a-3(f), and dismissed the case for lack of standing and failure to state a claim. *See*, A215 (this suit is about preemption … Allco is not seeking to enforce PURPA.")

Allco filed its opening brief on appeal from the judgment on September 28, 2016. *See*, A1-85. B. As Allco argues in its opening brief, the district court's decision finding that Allco lacked standing is premised on several reversible legal errors, which will require reversal of the district court's judgment. Allco moved in the district court to enjoin the Defendants' award and approval of interstate wholesale power contracts, which the district court denied. A224-225. To the extent Fed. R. App. P. 8(a)(1) requires the movant to move for the requested injunctive relief post-judgment, Allco relies in the alternative for purposes of this motion on Fed. R. App. P. 8(a)(2)(i) because the district court's opinion establishes that moving first in the district court would be impracticable, especially in light of the Defendants' imminent actions.

LEGAL STANDARD

This Court considers four factors in the exercise of its discretion to grant injunctive relief pending appeal:

> (1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.

Hilton v. Braunskill, 481 U.S. 770, 776 (1987). "The first two factors … are the most critical." *Nken v. Holder*, 556 U.S. 418, 434 (2009). Allco must show only that it has "a substantial possibility, although *less than a likelihood*, of success on appeal." *LaRouche v. Kezer*, 20 F.3d 68, 72 (2d Cir. 1994) (emphasis added) (citation and internal quotation marks omitted).

A party faces irreparable harm where, "but for the grant of equitable relief, there is a substantial chance that upon final resolution of the action the parties cannot be returned to the positions they previously occupied." *Brenntag Int'l Chems., Inc. v. Bank of India*, 175 F.3d 245, 249 (2d Cir. 2001); *see also Nken*, 556 U.S. at 421 ("if a court takes the time it needs, the court's decision may in some cases come too late for the party seeking review").

ARGUMENT

Allco has appealed the district court's decision finding that Allco lacked standing and was not entitled to preliminary injunctive relief prohibiting the Defendants from compelling interstate wholesale energy contracts. Allco is likely to prevail in its appeal, and because it will suffer irreparable injury if Defendants compel wholesale electricity contracts, this Court should enjoin Defendants from awarding and/or approving any contracts during the pendency of Allco's appeal.

I. Allco Is Likely To Succeed On Appeal.

A. Allco Has Standing To Bring Its Claims.

To establish Article III standing, Allco must demonstrate "(1) injury-in-fact, which is a 'concrete and particularized' harm to a 'legally protected interest'; (2) causation in the form of a 'fairly traceable' connection between the asserted injury-in-fact and the alleged actions of the defendant; and (3) redressability, or a non-speculative likelihood that the injury can be remedied by the requested relief." *W.R. Huff Asset Mgmt. Co., LLC v. Deloitte & Touche LLP*, 549 F.3d 100, 106-07 (2d Cir. 2008)(citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992)).

Congress and FERC have created a framework for the Nation's wholesale electricity markets in the FPA and PURPA. Broadly speaking there are two categories of electric generators in the Nation's electricity markets—generators that meet the design standards to be a QF, and those that do not. Those generators that do not meet the design standards for QFs must compete in the regional FERC-approved wholesale energy and capacity markets. Generators that do meet Congress' QF design standards may compete in those regional markets as well, but they also have special rights and favored status. As relevant here, Congress has relaxed the complete ban on State involvement in wholesale electricity markets and has given States the right to *promote QF generation* by compelling electric utilities to enter into long-term wholesale sales contracts with QFs, such as what Connecticut proposes to do here.

Like any market construct, the rules of the market are intended to send signals to investors. *PPL EnergyPlus LLC v. Nazarian*, 974 F. Supp. 2d 790, 813 (D. Md. 2013) (the rules that govern the energy markets send "long-term price signals … designed to stimulate investment.") For QF developers like Allco, those market signals encourage QF developers to invest money in developing QFs. For States that are interested in pursuing a specific renewable energy policy, QF market participants know that States may only *compel* such wholesale sales with QF generation. That results, as here, with QF developers such as Allco investing money in developing QF projects.

"Congress has the power to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before." *Spokeo*, 136 S. Ct. at 1549 (internal quotations and citations omitted.) That is what Congress has done in section 210(h)(2) of PURPA. The Nation's energy markets are complex and interstate. Congress defined the injury, and based upon its judgment of the working of the Nation's energy markets also defined those that have a concrete and particularized stake—qualifying small power producers, electric utilities and qualifying cogenerators. Congress also prescribed the redress that would remedy the injury by authorizing the district court to enjoin the offending actions and provide other appropriate relief. "Congress is well positioned to identify intangible harms that meet minimum Article III requirements, its judgment is also instructive and important." *Spokeo*, 136 S. Ct. at 1549.

It is therefore difficult to understand the district court equating Allco's harms to a "bare procedural violation" such as an incorrect zip code in a credit report discussed in *Spokeo*. 136 S. Ct. at 1550. Unlike *Spokeo* where the Court could "not imagine how the dissemination of an incorrect zip code, without more, could work any concrete harm," *id*., it is easy to imagine how the specific market participants identified by Congress *plausibly* suffer concrete and particularized harm when a State takes unlawful actions related to the energy markets, especially so when Allco alleged specific economic harms. A99 ¶¶51-55, A114 ¶¶30-32, A117 ¶47, A118 ¶¶50-52, A119 ¶53-57. Moreover, the mere "risk of real harm [can] satisfy the requirements of concreteness," *Spokeo,* 136 S. Ct. at 1549, and there are situations where no additional harm needs to be shown beyond the intangible harm identified in a statute. *Id*. citing *FEC v. Akins*, 524 U. S. 11, 20–25 (1998) and *Pub. Citizen v. Dep't of Justice*, 491 U.S. 440, 449 (1989). Allco easily satisfies that standard.

Here, just like in *Hughes*, it cannot be disputed that the construction of the new generation compelled by the State could *plausibly* have an effect on market prices that Allco's facilities would obtain, or *plausibly* affect Allco's QF investments. Indeed, in *Hughes* that price effect was the reason for the compelled wholesale sale in the first place. *See*, *PPL EnergyPlus LLC v. Nazarian*, *supra*, 974 F. Supp. 2d at 817 (increasing supply "would decrease the price received by [other] generators for energy and capacity"). Such market effects are also consistent with basic economic theory and decades of federal agency analysis in the energy markets. Increasing the supply of any normal good (including renewable energy) puts downward pressure on that good's market price. N. Gregory Mankiw, *Principles of Economics* 74–78, 80–81 (5th ed. 2008). As early as 1979, federal agencies recognized that canceling *even a single* oil and gas lease would cause market substitution impacts. *See*, A45-47. Under the 2015 solicitation, Connecticut plans to compel wholesale sales for 4,250 gigawatt-hours of electricity per year to ISO-New England. A145. It is a serious error to conclude that it is *implausible* that such an amount would not have any impact on renewable energy generation from other sources, such as Allco's QFs. Electricity from 2015 RFP non-QF winners (all of which would not be built but for the Defendants' compelled wholesale contracts) directly compete with other renewable energy resources, such that *increasing the supply of non-QF electricity results in less QF renewable energy demand* in ISO-New England.

Courts have repeatedly found that market participants possess standing under the FPA and similar regulatory schemes. *See, e.g.*, *Solomon, Nazarian*, *La. Energy*, 141 F.3d at 367 n.5 (citing cases). Similarly, in determining who may seek review of FERC orders in violation of the FPA, this Court has taken an extremely expansive view going as far as to hold that plaintiffs pursuing *non-economic* interests may bring suit to enforce the FPA. *Scenic Hudson Preservation Conference v. FPC*, 354 F.2d 608, 615-16 (2d Cir. 1965).

But Allco alleged more than just being a qualifying small power producer in Connecticut, including increased risk of losses, reduced prices and opportunities, and an increased risk that its projects would never get built, thus losing the investment in the projects, in each case as the result of the Defendants' unlawful compulsion of wholesale transactions with non-QFs. A99 ¶¶51-55, A114 ¶¶30-32, A117 ¶47, A118 ¶¶50-52, A119 ¶53-57. This injury-in-fact would be caused by the Defendants' actions, and it would be redressed if the procurement was invalidated. This is classic economic harm that requires no prediction or speculation and is independently sufficient to establish standing. Those adverse market impacts are clearly redressable even if Connecticut never held another procurement. Those are also the same category of adverse market impacts that provided standing to generators to successfully challenge economically identical State-compelled wholesale transactions in *Hughes, Solomon and Nazarian*. Just as in those cases, an injunction voiding illegal contracts and prohibiting the compulsion of future wholesale sales with non-QFs would, in fact, redress the risk of market harms to Allco. There is simply no basis for holding that Allco, an electric generator squarely under FERC's jurisdiction and a QF under PURPA, has no particularized, concrete and imminent interest in the *plausible* adverse market effects of new renewable energy capacity built because of illegally compelled transactions, especially when Allco plainly alleged such effects. Nor is there a basis to conclude that those effects would not likely be redressed by voiding and prohibiting the illegal conduct.

Allco also has standing based upon the events related to the 2013 procurement, which this Court reviewed in *Allco II*. Allco has alleged that but for the presence of non-QFs, Allco would have been selected. A113 ¶29. That creates standing for an injunction to prevent similar unlawful actions with future procurements, i.e., the 2015 RFP. Allco's theory of standing is identical to the theory of any disappointed bidder challenging any procurement. It suffered an injury-in-fact based on its economic interest in the procurement; that injury-in-fact was caused by the Commissioner's illegal actions in connection with the procurement; and that injury-in-fact would be redressed when the Commissioner makes a revised determination in the challenged procurement or conducts a new procurement complying with federal law. If Allco lacked constitutional standing to bring this suit, then virtually all statutes that allow bidders to bring bid protests in federal court would be unconstitutional under Article III. That cannot possibly be the law. *See generally* 28 U.S.C. § 1491(b)(1) (authorizing bid protests in federal court); *B.K. Instrument, Inc. v. United States*, 715 F.2d 713 (2d Cir. 1983) (collecting authority establishing, under certain circumstances, bidders' right to protest contract awards). The district court's contrary reasoning is contrary to hornbook law on standing in competitive procurements.

Allco also has standing independently from the terms of the 2015 RFP. Allco's QFs were either excluded from participation or would have been subject to the same unlawful competition as the 2013 solicitation. A114 ¶36, A115 ¶37. The D.C. Circuit has held that allowing increased competition by itself, which is what Connecticut has done, establishes Article III standing without any necessity to wait to see if there may be market impacts. *La. Energy*, 141 F.3d at 367 ("We repeatedly have held that parties suffer constitutional injury in fact when agencies lift regulatory restrictions on their competitors or otherwise allow increased competition.") (collecting cases).

The district court also erroneously held that Allco would need to show that Connecticut would conduct, and Allco would win, a future compliant procurement in order to show a non-speculative likelihood of redressability. The district court's reasoning is plainly wrong. *See Clinton v. City of New York*, 524 U.S. 417, 433 (1998) ("denial of a benefit in the bargaining process can itself create an Article III injury," regardless of whether the bidder would ultimately have won the procurement.) Allco has alleged such an injury – it alleges that the Commissioner violated federal law by opening the procurement up to large generators that were not QFs. *See*, *La. Energy*, 141 F.3d at 367 (such increased competition is an Article III injury). Framed in those terms, Allco's injury can surely be redressed by the court – the court can direct that subsequent procurements be conducted in accordance with federal law, *i.e.*, without the presence of non-QF generators. By addressing whether the Court could redress *Allco's loss of a contract*, the district court erroneously analyzed redressability of the wrong injury.

Even assuming the redressability analysis should focus on whether Allco would prevail in a re-procurement, the district court's analysis was incorrect. To establish standing, a plaintiff is not required to show a *guarantee* that the court's actions would redress its injury; rather, it must simply show that "it is likely, as opposed to merely speculative, that the injury will be redressed." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180-81 (2000). In the bid protest context, the Federal Circuit holds that to establish standing, a disappointed bidder must show only that it had a "substantial chance" of winning the procurement, which requires a showing that it was in the "competitive range." *Orion Tech., Inc. v. United States*, 704 F.3d 1344, 1349 (Fed. Cir. 2013).

Allco's well-pleaded allegations easily meet that standard. Allco alleges that in the 2013 procurement Harwinton Solar was ranked fourth, and next in line, on the Commissioner's rankings, *see* A113 ¶27, A135; this plainly put it in the "competitive range" and gave it a "substantial chance" of winning a procurement *that complied with federal law*. At the pleadings stage Allco was not required to provide evidentiary support for its predictions; rather, it was required merely to show that its claims are "plausible." *Ashcroft v. Iqbal,* 566 U.S. 622, 678 (2009). It is "plausible," to say the least, that the Allco would be in the competitive range in any compliant re-procurement. A94 ¶31.

The district court also stated that Allco's injury was not redressable because Allco could not guarantee that the Commissioner would conduct a new re-procurement. This reasoning, too, contradicts well-settled case law. The Supreme

Court has repeatedly and squarely held that a plaintiff can establish standing based on the *predicted* behavior of executive officials, even if that behavior is not guaranteed. *See, Utah v. Evans*, 536 U.S. 452, 463-64 (2002); *FEC v. Akins*, 524 U.S. 11, 25 (1998). Here, Allco's Complaint adequately alleges that it is likely that the Commissioner will conduct a new compliant procurement, A99 ¶51, A100 ¶56, A118 ¶52, A119 ¶57. Moreover, the Commissioner has already conducted one procurement, and is in the process of a second procurement, which demonstrates a predisposition to conduct another one. *See, e.g.*, *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 152 (2010). Further, the Commissioner's counsel has warned of a looming renewable energy shortage in Connecticut, A181, which also supports Allco's allegation that the predictive behavior will lead to a new compliant RFP if the current one is stopped. For present purposes, all that matters is that Allco's Complaint surely puts forth a *plausible* allegation that if non-compliant procurements are nullified, then the Defendants would try again.

Allco also has standing in the position of a private attorney general under 16 U.S.C. §824a-3(h)(2) and this Court's precedent in *Associated Indus. of N.Y. v. Ickes*, 134 F.2d 694 (2d Cir. 1943), *vacated on other grounds,* 320 U.S. 707 (1943). A58-60. Much like a *qui tam* plaintiff, Allco has been designated by Congress to enforce PURPA if the FERC declines to do so.

B. Allco Is Likely To Prevail On The Merits.

"States may not act in the [wholesale sale of electricity] area unless Congress creates an exception. *Id.* § 824(b)." *See*, *Allco II*, 805 F.3d at 91. The Defendants' exclusion of certain QFs, allowing increased competition from non-QFs and its planned actions to force the Connecticut Utilities to enter wholesale power contracts with non-QFs through the State's command and control process plainly constitutes regulation in the field of wholesale energy sales, and no exception exists validating such action.

The decisions in *Hughes, Nazarian* and *Solomon,* invalidating economically identical wholesale arrangements confirm that the Defendants' action in 2013 and its planned actions are unlawful. Indeed, the case here is stronger than in those cases. In the lower courts in *Hughes,* the petitioners had argued that the compelled contract-for-differences with the utility was merely a financial hedging product and was not governed by the FPA because no sale of energy actually took place under the contract-for-differences. At the Supreme Court, the petitioners reversed course arguing that the contract-for-differences was indeed identical to a direct long-term power purchase agreement (which is at issue here), and urged the Supreme Court to analyze it that way. The rationale for the shift seemed to be rooted in the petitioners' argument (also advanced by Connecticut here) that a State has the right under the FPA to compel its utilities to enter into wholesale power contracts under the guise of a State's authority to manage its utilities' generation portfolios. An excerpt from oral argument is instructive:

> JUSTICE ALITO: Well, there's another key difference. If you had done it directly with if CPV had contracted directly with the distribution utilities, that would have been subject to regulation by FERC, would it not?
>
> MR. STRAUSS: Yes. This contract was as well.

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> JUSTICE KAGAN: I'm not sure why it is that when you say it was subject to FERC's jurisdiction, that doesn't end the case right there against you, because if it's subject to FERC's jurisdiction, that means it's a wholesale sale. And that's for FERC to do is to set the rates and other terms of wholesale sales, and that's not for the States to do. So that means you're preempted.[2]

Justice Kagan's point cuts directly to the heart of the issue. Outside of PURPA, States have no authority to regulate in any way a wholesale transaction. In Justice Kagan's words, that "end[s] the case right there against [Defendants]." So too here. The fact that the Defendants' compelled and plan to compel contracts are wholesale sales with non-QFs ends the merits of the case.

Nor, as Allco has explained in its opening brief, A65-66, do the Defendants' planned actions fall within a State's authority over generation facilities or to direct utility planning and resource decisions. The plain language of FPA section 201(b)(1)—"except as specifically provided"—makes it clear that whatever authority is exercisable by a State under the State's authority over facilities does

[2] *See*, http://www.supremecourt.gov/oral_arguments/argument_transcripts/14-614_g2hk.pdf.

not extend to wholesale sales. That is the bright-line in this case. The proposed contracts are clearly wholesale sales of electric energy in interstate commerce, and will only come into being because of the singular act of the State of Connecticut compelling those transactions. Moreover, as the Supreme Court held in *Pub. Utils. Comm'n v. Attleboro Steam & Electric Co.*, 273 U.S. 83 (1927), States never had the authority to regulate interstate sales of electricity, regardless of the target or motive of the States. *See,* 273 U.S. at 90. (Such sales are "not subject to regulation by either of the two States in the guise of protection to their respective local interests.") Thus in 1935 when the FPA was passed, Congress was not displacing traditional State authority over wholesale sales.

The Defendants' proposed actions are also conflict preempted. A56-57. FERC has adopted a market-based approach to regulating the energy markets in ISO-New England. In planning to order the execution of contracts with various non-QF generators, the Defendants will pursue a conflicting regulatory framework, and in the process undermine, and make superfluous, the special treatment that Congress intended to give to QFs, which includes the authorization to States to compel long-term contracts with QFs, such as the 20-year contracts under the 2015 RFP. Congress has not made that same accommodation for non-QFs. This is the epitome of a conflict with federal law. At bottom, the Defendants seek to create a massive loophole in the FPA to allow States to pursue their own market construct (and their preferred generation, such as coal, gas, nuclear or renewable), ignoring and undermining the FERC-approved system and Congress' preference for QF generation.

II. Allco Will Suffer Irreparable Harm Absent An Injunction.

Irreparable harm is defined as an injury for which a monetary award cannot be adequate compensation. *JSG Trading Corp. v. Tray-Wrap, Inc.*, 917 F.2d 75, 79 (2d Cir. 1990). The failure to prevent the Defendants, who are immune from suit for monetary damages, from compelling wholesale transactions will cause irreparable harm to Allco. In *Allco II*, this Court held that Allco did not have standing to challenge *specific* State-compelled contracts. *See*, 805 F.3d at 98. While that holding is in tension with the standing provided to generators in *Hughes*, *Solomon* and *Nazarian*, it means that without an injunction now, the Defendants will compel wholesale transactions, causing the injuries-in-fact described above, including eliminating a path to a contract through a compliant solicitation, thus succeeding in running out the clock. This case is a textbook example of the need for injunction to preserve the court's ability to render a meaningful decision on the merits by avoiding irreparable harm in the interim.

III. An Injunction Will Not Harm The Defendants Or The Public Interest.

The Defendants will not be harmed if the injunction is granted because the Defendants can always choose to satisfy their renewable energy goals with QF generation. Further, as a matter of law, the Defendants cannot show any harm by being required to follow the path set by Congress, and being prevented from pursuing an agenda that conflicts with what Congress prescribed. It is well established that there is a strong public interest in favor of the enforcement of public laws and regulations. *FTC v. Whole Foods Mkt., Inc.*, 548 F.3d 1028, 1035 (D.C. Cir. 2008) (recognizing "the public interest in effective enforcement of the antitrust laws."). Here Congress has declared that the public interest lies in the development of QF generation, and that States have no authority to regulate or compel wholesale electricity transactions except when fostering *QF generation*. The Defendants' seek to act contrary to the public interest by unilaterally remaking regional interstate wholesale energy markets, retroactively abrogating the federal government's policy of promoting renewable energy QF generation, and upsetting settled, investment-backed expectations *after* private industry has already committed to its investments. Accordingly, the public interest, like the other injunctive factors, strongly favors the granting of injunctive relief.

CONCLUSION

For the above reasons, this Court should issue the requested injunctive relief.

Dated: October 3, 2016

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CERTIFICATE OF SERVICE

I hereby certify that on the 3rd day of October, 2016, I caused to be served, using the Court's CM/ECF system, a copy of the foregoing Emergency Motion to all counsel of record.

__*/s/ Thomas Melone*__________