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.

OPENING BRIEF OF APPELLANT ALLCO FINANCE LIMITED

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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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JURISDICTIONAL STATEMENT

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 ("FPA"), 16 U.S.C. §791a *et seq.*, and the Public Utility Regulatory Policies Act, Pub. L. No. 95-617, 92 Stat. 3117 ("PURPA"), to actions taken, and proposed to be taken, by the Commissioner of the Connecticut Department of Energy and Environmental Protection ("the Commissioner" and "the Department," respectively) and the Connecticut Public Utilities Regulatory Authority ("PURA") (the Commissioner and the commissioners of PURA are collectively referred to as the "Defendants.") This case also challenges, under the Dormant Commerce Clause, the facial discrimination against out-of-region generators under Connecticut's Renewable Portfolio Standard. 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," under 28 U.S.C. §1331 because claims arise under the Supremacy Clause, and under 16 U.S.C. §825p, which vests district courts with jurisdiction of violations of the FPA or the rules, regulations, and orders thereunder and "all suits" "to enforce any liability or duty" under the FPA.[1]

The District Court dismissed the case for lack of standing and failure to state a claim and awarded final judgment to the Defendants disposing of all of the parties' claims. A159-203, AX160-203.[2] Plaintiff-Appellant Allco Finance Limited ("Allco") timely filed notices of appeal. A204, AX204. This Court has jurisdiction over the appeal under 28 U.S.C. §1291.

[1] Under 16 U.S.C. §824a-3(h), in any enforcement action the rules under Section 210 of PURPA are treated as rules under the FPA.

[2] A__ refers to the Joint Appendix in Docket No. 16-2946. AX__ refers to the Joint Appendix in Docket No. 16-2949.

STATEMENT OF ISSUES

1. Whether Allco has standing to maintain the action.

2. Whether Connecticut's actions allowing competition from renewable energy generation facilities that do not meet the Congressionally-mandated design requirements of 16 U.S.C. §796(17)(C), and compelling wholesale energy transactions with such non-qualifying facilities violate the FPA and PURPA and are preempted under the Supremacy Clause of the United States Constitution.

3. Whether Connecticut's discrimination in its renewable portfolio statute against out-of-region renewable energy generators violates the Dormant Commerce Clause of the United States Constitution.

4. Whether the District Court should have granted Allco's request for preliminary injunctive relief.

5. Whether dismissal, if proper, should have been without prejudice.

STATEMENT OF THE CASE

"No challenge–no challenge–poses a greater threat to future generations than climate change," President Obama declared in his 2015 State of the Union Address. This is Allco's second trip to this Court as part of Allco's ongoing effort to combat climate change by seeking to enforce rights of the FPA's special class of renewable energy generators known as "Qualifying Facilities" or "QFs."[3] The District Court's judgment deals a major setback to fighting climate change, and sabotages Congress' preference for QF generation. It validates Connecticut's efforts 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.

The District Court's reasoning:

- is directly contrary to this Court's opinion in *Allco Finance Ltd. v. Klee,* 805 F.3d 89 (2d Cir. 2015) (*"Allco II"*), that Allco's challenge to Connecticut's actions under its state procurement

[3] 16 U.S.C. §824a-3; *id.* §796(17)(C) ("qualifying small power production facility").

law *was* "an attempt to enforce 16 U.S.C. §824a-3(f)", *see*, *id.* at 97—the District Court held it *was not*;

- requiring Allco to show that Connecticut would re-issue a compliant solicitation, and that Allco would win that competition analyzes the wrong injury and, worse, would mean that all statutes that allow bidders to bring bid protests in federal court would be unconstitutional under Article III;
- eliminates standing for market-participant electric generators in interstate regional wholesale markets to challenge unlawful State-action, effectively repealing Congress' design standards and price constraints under the FPA and PURPA;
- allows States to compel interstate wholesale contracts at will, including with coal plants, nuclear plants and other environmentally destructive forms of electricity generation.
- ignores Congress' judgment embodied in 16 U.S.C. §824a-3(h)(2), that in interstate regional wholesale electricity markets, qualifying small power producers are injured and have standing to challenge State action violating the FPA and PURPA.

- ignores the fact that every federal judge (other than in Connecticut District Court) that has addressed the issue has invalidated indistinguishable State-compelled wholesale electricity contracts, including eight Supreme Court justices, six Court of Appeals' judges, and two District Court judges.

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 has done, and 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). Generators participating 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. Ignoring the clear authority providing standing to generators, such as Allco, to challenge State-compelled wholesale contracts for electricity, the District Court equated Connecticut's compulsion of billions of dollars of wholesale electricity contracts with a bare procedural violation, such as an incorrect zip code on a consumer credit report.

Perhaps worst of all, the District Court required that any challenger to a State procurement requires the challenger to prove he or she would win a future compliant procurement. That requirement not only misstates the law, but transcends the energy area, and would validate unbridled discrimination against any class, category or other group that was not favored by the State in a procurement.

States have no authority to regulate wholesale sales of electricity unless Congress creates an exception. *Allco II,* 805 F.3d at 89. Congress created such an exception with PURPA, but there is a catch—the electric generating facilities involved must meet certain design requirements. Those design requirements insure that those electric generators promote Congress' goals of reducing reliance on fossil fuels in an economic and environmentally sound manner. For those facilities that do not meet the required design standards, a State has no authority to compel wholesale sales. Allco is in the business of developing Qualifying Facilities.

In 2013, the Commissioner solicited proposals for renewable energy, selected winners of the solicitation, and compelled Connecticut's two electric utilities (the "Connecticut Utilities") to enter into wholesale electricity contracts with the winners. Allco submitted bids for a number of its QFs. AX9 ¶27, A11 ¶31. Notwithstanding the FPA's general prohibition on state regulation of wholesale electricity sales – subject only to the limited exception for sales by QFs under PURPA – the solicitation allowed competition from non-QFs. Worse, the Commissioner compelled the Connecticut Utilities to enter a contract with a non-QF generator, Number Nine Wind Farm ("Number Nine"), directly resulting in at least one of Allco's projects not being selected. AX4 ¶4, AX9 ¶¶28-29.

Allco filed a complaint seeking a declaration that the Commissioner's order compelling the Connecticut Utilities to enter the contract, and the resulting contract itself, was invalid; and it sought an injunction restraining the Commissioner from violating the FPA when conducting future procurements. The District Court dismissed Allco's complaint, *see Allco Finance Ltd. v. Klee*, Civ. A. No. 13-cv-1874, 2014 WL 7004024 (D. Conn. Dec. 10, 2014) ("*Allco I*"), holding that Allco lacked standing to bring its claims and had failed to state a preemption claim. Allco appealed to this Court.

While the appeal was pending the Commissioner announced a new solicitation. Allco filed a new complaint in District Court challenging the proposed new solicitation and challenging Connecticut's facial discrimination against out-of-region generators in its renewable portfolio statute. *See Allco Finance Ltd. v. Klee*, Civ. A. No. 15-cv-608 (D. Conn. filed April 26, 2015) ("*Allco III*"). A4-93.

This Court then issued its opinion in *Allco II* affirming the District Court in *Allco I*, albeit on different grounds. Then, Allco asked the Federal Energy Regulatory Commission (the "FERC") to bring an enforcement action against Connecticut in connection with both the 2013 and 2015 solicitations. On January 6, 2016, the FERC issued a notice declining to do so, authorizing Allco to bring such a suit. *Allco Renewable Energy Ltd.*, 154 FERC ¶61,007 (2016).[4] AX11, ¶39. On March 30, 2016, Allco filed another complaint in District Court challenging the 2013 and 2015 solicitations. *See Allco Finance Ltd. v.*

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[4] http://elibrary.FERC.gov/idmws/file_list.asp?accession_num=20160108-3010.

Klee, Civ. A. No. 16-cv-508 (D. Conn. filed March 30, 2016) ("*Allco IV*").[5] AX3-159.

On August 18, 2016, the District Court issued its opinion in *Allco III* and *Allco IV* dismissing Allco's complaint for lack of standing, denying Allco's motions for injunctive relief, and dismissing Allco's claim against Connecticut's facial discrimination against of out-of-region generators.[6] A159-201, AX160-202. This timely appeal followed.

A. Legal Background.

1. The FPA And Competitive Wholesale Electricity Markets.

For most of the twentieth century, electric utilities were vertically integrated companies that enjoyed a monopoly over a service area, and both generated electricity and delivered it to retail customers within that service area. Because utilities typically operated within a single State, they were subject to extensive state regulation. State

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[5] The filing of a complaint after issuance of the FERC notice was necessary to provide the additional facts to challenge the Number Nine contract and to avoid the issue of whether the FERC petition was a "claims-processing" condition or jurisdictional. *See, Solutions for Utils., Inc. v. Cal. PUC*, 596 Fed. Appx. 571 (9th Cir. 2015).

[6] While *Allco III and IV* were pending the contract with Number Nine was terminated so Allco withdrew the part of its requested relief that the District Court invalidate the Number Nine contract. *See*, 3:16-cv-508, Docket No. 33.

commissions set the electricity rates that utilities could charge their retail customers in order to allow the utilities to recover the costs associated with generating and delivering electricity, plus a reasonable rate of return. *See, New York v. FERC*, 535 U.S. 1, 5 (2002) ("*New York*").

Utilities began to recognize the advantage of being able to draw upon generation resources owned by other utilities to satisfy demand at peak times, and they began constructing transmission lines running across service areas and across state boundaries. Initially, interstate sales of electricity were unregulated. The Supreme Court had held that States were powerless to regulate such sales under the Commerce Clause, *see, Pub. Utils. Comm'n v. Attleboro Steam & Elec. Co.*, 273 U.S. 83, 89 (1927) ("*Attleboro*"), resulting in what became known as "the *Attleboro* gap." *New York*, 535 U.S. at 5-6.

It was against the backdrop of a State's absence of power to regulate wholesale transactions that in 1935, Congress enacted the FPA to fill that gap, as well as to "extend[] federal coverage to some areas that previously had been state regulated." *Id.* at 6. Specifically, Congress gave the Federal Power Commission – now FERC – exclusive authority to regulate "the sale of electric energy at wholesale in interstate commerce." 16 U.S.C. §824(b)(1). "[W]holesale," in this context, means any "sale of electric energy to any person for resale." *Id.* §824(d). Thus, any sale of electricity in interstate commerce (with the exception of sales under PURPA, and another exception not relevant here for certain hydroelectric energy) falls within FERC's exclusive regulatory authority, unless it is a "retail" sale to the factory, business or home that will actually consume the electricity. *See, FPC v. S. Cal. Edison Co.*, 376 U.S. 205, 215 (1964) (Congress left "no power in the states to regulate ... sales for resale in interstate commerce."). Although Congress occupied the field of wholesale electricity sales, it reserved "except as specifically provided," a State's authority that the State previously enjoyed "over facilities used for the generation of electric energy or over facilities used in local distribution." 16 U.S.C. §824(b)(1).

As the interstate electricity transmission grid developed, interstate wholesale electricity markets became increasingly important. *New York*, 535 U.S. at 7-8. In the 1990s, Congress and FERC began to recognize the benefits of promoting competition in the market for electric generation. *Id.* at 10-11. Many states followed suit, including Connecticut. In 1998, Connecticut restructured its electricity market in order to rely on the competitive interstate wholesale electricity market. Conn. Public Act 98-28 ("Restructuring Act").[7] Connecticut utilities divested their generation assets to competitive generation companies that sold power in the wholesale market, *id.* §5, and entities known as retail electric suppliers bought electricity in the wholesale market and competed for the opportunity to resell it to retail customers. The utilities continue to enjoy a monopoly over the service of distributing electricity over their network of wires. They also purchase electricity on the wholesale market to sell to retail customers that have not chosen another retail electric supplier. Conn. Public Act 03-135 §4(c).[8]

Today, the wholesale electricity market in New England is overseen by ISO-New England, Inc., a FERC-regulated Independent System Operator. ISO-New England operates an energy market, in which generators compete to sell electricity by submitting "bids" in real

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

[8] Conn. Public Act 03-135 is available at http://www.cga.ct.gov/2003/act/Pa/2003PA-00135-R00SB-00733-PA.htm.

time. ISO-New England matches supply and demand on a continuing basis, and, using a FERC-approved auction process, determines the market price for electricity based on the bid of the least costly generation resource needed for supply to match demand. *See Blumenthal v. FERC*, 552 F.3d 875, 878 (D.C. Cir. 2009); *NSTAR Elec. & Gas Corp. v. FERC*, 481 F.3d 794, 797 (D.C. Cir. 2007). This method is intended to result in the operation of the most efficient set of generation resources at any particular point in time. Similarly, ISO-New England makes sure sufficient capacity exists in the system through a competitive auction three years out. It is that competitive capacity auction that is the FERC-approved market mechanism for the development of new generation, outside of PURPA. *Hughes,* 136 S. Ct. at 1294. These competitive methods are intended to result in the operation of the most efficient set of generation resources at any particular point in time. Generators also sell electricity to wholesale buyers in freely negotiated, voluntary bilateral contracts, pursuant to FERC-approved market-based tariffs. "These tariffs, instead of setting forth rate schedules or rate-fixing contracts, simply state that the seller will enter into freely negotiated contracts with purchasers." *Morgan*

Stanley Capital Grp. Inc. v. Pub. Util. Dist. No. 1 of Snohomish Cnty., 554 U.S. 527, 537 (2008).

2. PURPA: Relaxing The Ban On State Regulation Of Wholesale Transactions And Promoting Classes Of Generation Meeting Certain Design Requirements.

In 1978, Congress enacted PURPA to "accelerate the development of renewable and inexhaustible energy sources…" H.R. Rep. No. 95-496(IV), at 14 (1978). It directed FERC to adopt rules, and for state commissions to implement those rules, requiring utilities to purchase power from QFs, 16 U.S.C. §824a-3(a). Congress and FERC further directed that QFs were 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 purchase from the QF. 16 U.S.C. §824a-3(b), (d); 18 C.F.R. §292.304(b)(2); *see also Am. Paper Inst., Inc. v. Am. Elec. Power Serv. Corp.*, 461 U.S. 402, 417 (1983).

Under PURPA, the FERC still maintains the ultimate authority to regulate wholesale rates. *See* FPA §§205, 206*, see also*, *Wheelabrator Lisbon, Inc. v. Conn. DPUC*, 53 F.3d 183, 188 (2d Cir. 2008) ("under the PURPA regulatory regime, FERC—and not state agencies—[are] responsible for regulating the rates charged by qualifying facilities in power purchase agreements.") But States have the authority to implement the FERC's rules requiring utilities to purchase from QFs, 16 U.S.C. §824a-3(f)(1), including compelling the entry into long-term 20-year agreements, such as what Connecticut seeks in this case. In these respects, PURPA reflects a limited exception to FERC's otherwise exclusive authority over wholesale electricity sales. But States have the ability to do nothing and stay out of PURPA altogether because the federal government cannot require States to regulate or to adopt a federal regulatory scheme as its own. *See*, *New York v. United States*, 505 U.S. 144, 162 (1992). *See also*, *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2602 (2012) ("the Constitution simply does not give Congress the authority to require the States to regulate. [] That is true whether Congress directly commands a State to regulate or indirectly coerces a State to adopt a federal regulatory system as its own.") (internal citations and quotations omitted.)

3. Connecticut's Renewable Portfolio Standard.

Connecticut has implemented a renewable portfolio standard ("RPS"), *see* C.G.S. §16-245a, which requires electric suppliers to have a certain percentage of their electricity mix be attributable to renewable energy sources. The RPS requirement can be satisfied by an electric supplier owning renewable generation, entering into a power purchase agreement to acquire renewable energy and the associated renewable energy credits ("RECs"), or by the acquisition of RECs alone. A10 ¶23. RECs reflect the "environmental attributes" of electricity generated using renewable fuel. C.G.S. §16-245a(b). A4 ¶1.

Importantly, State renewable portfolio standards do not generally facially mandate any particular wholesale transaction. Rather, the utility has the option to make a payment in the nature of a State tax, commonly referred to as an alternate compliance payment, in order to avoid constructing or acquiring renewable energy, *see, e.g.*, C.G.S. §16-245a; *id.* §16-1(20), which sets that payment at $55/megawatt-hour for Connecticut class I RECs. When RECs are sold independent of electricity, FERC generally regards the sale of RECs as outside its authority over wholesale electricity sales. *See, WSPP Inc.*, 139 FERC ¶61,061, P24 (2012) ("[A]n unbundled REC transaction that is independent of a wholesale electric energy transaction does not fall within the Commission's jurisdiction under sections 201, 205 and 206 of the FPA.").

C.G.S. §16-245a(b)(1) restricts the RECs that qualify for the RPS to two types of RECs. A10 ¶24. The first type of qualifying Connecticut REC is for energy produced by a renewable energy generating unit that is located within the ISO-New England control area (i.e., Connecticut, Massachusetts, Vermont, New Hampshire, Rhode Island and most of Maine). A10 ¶25. The second class of qualifying Connecticut REC is for renewable energy produced within a control area that is adjacent to the ISO-New England control area, i.e., ISO-New York, northern Maine, Quebec and New Brunswick. A10 ¶26. However, RECs related to energy produced from those adjacent areas only qualify as Connecticut RECs if one other significant condition is satisfied—the generator must obtain costly transmission rights to import the energy to ISO-New England. A10 ¶26. RECs from generating facilities located in States outside of ISO-New England or an adjacent control area do not qualify as Connecticut RECs under any conditions. A10 ¶27.

B. Connecticut's Compulsion Of Wholesale Sales With Generators Not Meeting Congressionally-Mandated Design Requirements.

In 2013, the Commissioner solicited proposals for renewable energy (the "2013 RFP"). AX19. Allco submitted proposals for five solar QF projects. AX4 ¶3, AX9 ¶27. The Commissioner selected two winning projects, one of which was Number Nine, a 250-megawatt wind project located in Maine, and directed the Connecticut Utilities "to execute contracts for a combination of energy and environmental attributes" from those two generation facilities. AX64. While one of the winners satisfied the design standards to be a QF, Number Nine did not. But for the Defendants' selection of Number Nine, one or more of Allco's projects would have been selected and received contracts. AX4, ¶4, AX9 ¶29.

In 2015, the Commissioner issued another solicitation (the "2015 RFP"). AX67. Defendants have received various proposals and are currently evaluating the proposals. Allco's QF projects that are under 20 megawatts ("MWs") in size were *prohibited* from responding to the 2015 RFP. AX10 ¶36. For Allco's QF projects that were 20MW or greater, the 2015 RFP placed a significant state regulatory burden by requiring significant fees, and allowed competition from generators that did not meet the Congressionally-mandated design requirements to be a QF. AX11 ¶¶37-38.

SUMMARY OF THE ARGUMENT

Congress and FERC have created a framework for the Nation's wholesale electricity markets in the FPA and PURPA. The rules of the market are intended to send signals to investors. 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. For example, QFs have the right to force an electric utility to purchase their electricity at a price referred to as the utility's avoided costs, 18 C.F.R. §292.303, which is a market price designed to insure ratepayer neutrality. Another aspect of a QF's favored status is 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. For QF developers like Allco, the market framework signals that QF developers should invest money in developing QFs because QFs have been singled out for preferred treatment. Private companies, such as Allco, reasonably rely on the federal market framework supporting QF generation. Allco, a "qualifying small power producer" within the meaning of section 210(h)(2)(B) of PURPA, *see* 16 U.S.C. §796(17)(D), has already invested over $3 million in developing QF solar projects in Connecticut. A7 ¶13, AX6 ¶16.

Now that this Court has held that Allco's action is an enforcement under section 210(h)(2)(B) of PURPA, standing is straightforward. "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, Inc., v. Robins*, 136 S. Ct. 1540, 1549 (2016) ("*Spokeo*") (internal quotations and citations omitted.) In section 210, Congress defined the injury-in-fact. It defined the legally protected interest and defined those market participants that, in Congress' judgment, suffer concrete and particularized harm when a State violates its obligations under PURPA and the FPA. Limiting the right of action to a specific group of market participants—qualifying small power producers (such as Allco), electric utilities and qualifying cogenerators—represents Congress' judgment that those specific market participants are, by definition, injured in a concrete, imminent and particularized way when a State fails to observe its limited role in the Nation's energy market framework. Congress also prescribed the redress that would remedy the injury when it authorized the District Court to enjoin the offending actions and provide other appropriate relief.

But Allco alleged more than just being a qualifying small power producer in Connecticut. Allco alleged reduced profits and opportunities caused by Connecticut's unlawful actions, and even went so far as to engage an expert to quantify the adverse impact to some of its QFs from just the Number Nine contract alone. AX10 ¶¶30-32, AX15 ¶¶53-57, AX16 ¶¶59, 62. 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 from the District Court voiding illegal contracts and prohibiting the compulsion of future wholesale sales with non-QFs would, in fact, redress the market harms to Allco.

Allco also has standing on additional grounds. Allco has standing based upon the events related to the 2013 RFP. Allco has alleged that but for the presence of non-QFs, Allco would have been selected. That creates standing for an injunction to prevent similar actions with future procurements, i.e., the 2015 RFP. Allco suffered a plain pocketbook injury caused by the Commissioner allowing competition from non-QF generators who cannot legally receive State-compelled contracts, and then his awarding of an energy contract to Allco's direct non-QF competitor. That injury would be redressed by a judgment in Allco's favor – if the Commissioner's illegal procurement was invalidated, there is a strong likelihood both that Allco would prevail in a future compliant procurement, and that it would sell its energy at a higher price even in the absence of a future procurement. The District Court concluded that Allco could not show redressability because there was no *certainty* that the Commissioner would conduct a future procurement or that Allco would prevail in such a procurement. But that analysis both misapprehended the proper standard for redressability, and ignored

Allco's contention that it was harmed by the procurement's effect on energy rates regardless of whether the Commissioner conducted a second procurement.

Allco also has standing based upon the events related to the 2015 RFP. Allco's QFs were either excluded from participation or subject to unlawful conditions including unlawful competition. *See, La. Energy & Power Auth. v. FERC*, 141 F.3d 364 (D.C. Cir. 1998) ("*La. Energy*") ("We repeatedly have held that parties suffer constitutional injury in fact when agencies lift regulatory restrictions on their competitors or otherwise allow increased competition.") *See, MD Pharm., Inc. v. DEA*, 133 F.3d 8, 11 (D.C. Cir. 1998) ("increased competition represents a cognizable Article III injury").

The District Court recognized the market dynamic of "a large field of [] competitors," AX188, in the energy markets, but ignored the competitive rules established by Congress. In the energy area just like in sports, competitors must meet certain standards. No one would question the right of a runner that met the standards to claim foul if other competitors did not meet prescribed standards. So too here. Would-be participants who do not adhere to prescribed standards should be banned from competing. Competitors that *do meet* the standards have incurred costs and expended effort to meet those standards, and are injured by the very presence of those that do not meet the standards.

Under all bases, Allco's injuries are particularized because it has alleged that it has been, and in the future would be, affected by market generators that would not have been built and entered the market but for Connecticut's illegal compulsion of contracts. Allco's injury is concrete and imminent because Allco is a qualifying small power producer in Connecticut, and there are specific projects that Allco has spent millions of dollars in developing based upon a federal market framework that prohibits Connecticut's proposed actions. Allco's harms are also concrete and imminent because there are specific competitions involved—the 2013 RFP and the 2015 RFP—and even if Allco would be unsuccessful in a non-compliant RFP, Allco's market opportunities are adversely affected *now* because its projects are in advanced stages of development *now*. Allco's injury is redressable because the District Court can ban non-QF participation, invalidate non-QF contracts, and require that the State adhere to the rules prescribed by Congress if a

State wants to compel wholesale sales. Such a remedy would certainly eliminate the adverse market impacts from the illegal compulsion of contracts even if Connecticut never issued another solicitation.

An affirmance in this case would harm the long-term development of renewable energy because it would sabotage QF development. Congress has given States specific authority under PURPA to regulate wholesale sales by QFs, including compelling a 20-year contract such as what Connecticut did in 2013 and proposes to do again in connection with the 2015 RFP. The Defendants have chosen to ignore that authority, which provides more than enough flexibility to meet all renewable energy goals of the State of Connecticut, and the United States for that matter, multiple times over.

Not content with the States' power under PURPA, the Defendants ask this Court to overlook the plain language of the FPA and create a massive loophole to allow States through a command and control process to compel wholesale sales of electricity under the guise of regulation of the construction of new generation. Such a loophole would allow States unlimited ability to compel wholesale transactions that support the political whims of a State, further sabotaging QF development. One State might prefer coal plants, another gas plants, still others nuclear or other forms of electric generation. Connecticut is simply seeking the ability to create its own constructs and market mechanisms for regulating the wholesale supply of energy and capacity outside of the FERC's approved market mechanisms and Congress' preference for QF generation.

For all those reasons, Allco was entitled to the preliminary injunctive relief it sought. Injunctive relief is specifically authorized by the statute. The Defendants have allowed competition from non-QFs and clearly intend to unlawfully compel wholesale sales with those non-QFs.

Connecticut also facially discriminates against out-of-region renewable energy generators by excluding their renewable energy attributes from qualifying in Connecticut's market. Such facial discrimination violates the Dormant Commerce Clause because it is not narrowly-tailored to meet a compelling State interest that could not be met through nondiscriminatory means.

ARGUMENT

I. Standard Of Review.

This Court reviews *de novo* a district court's dismissal of a complaint for lack of standing and for failure to state a claim. *Selevan v. New York Thruway Authority*, 584 F.3d 82, 88 (2d Cir. 2009). At the motion-to-dismiss stage, all allegations of fact in the complaint must be accepted as true and construed in the light most favorable to the plaintiff. *Thompson v. Cnty. of Franklin,* 15 F.3d 245, 249 (2d Cir. 1994). A complaint must have sufficient factual allegations to "state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal,* 566 U.S. 662, 678 (2009) (quoting *Bell Atlantic v. Twombly*, 550 U.S. 544, 570 (2007)).

II. The District Court Disagreed With This Court's Holding In *Allco II* That Allco's Action Is "An Attempt To Enforce §824a-3(f)" And Denied Allco Standing For Count I.

Contrary to this Court's opinion in *Allco II*, the District Court held that Allco's action was not an action seeking to enforce PURPA, AX192, because Allco was not challenging a "state regulation promulgated under [§210(f)] but [] a state procurement law." AX192. That erroneous framework through which the District Court viewed Allco's case is directly contrary to this Court's holding that Allco's challenge to a state procurement law "is still an attempt to enforce § 824a-3(f)." *See*, 805 F.3d at 97.

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)). As explained below, Allco can meet these requirements under four distinct theories.[9]

A. Allco's Status As A Qualifying Small Power Producer In Connecticut Is Sufficient To Establish Article III Standing.

"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

[9] The District Court correctly did not dispute that Allco could show causation, which is obviously satisfied, so Allco has not separately briefed that aspect.

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 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.

Allco is a market participant in the energy market in Connecticut. Under the framework created by Congress and the FERC, generators that do not meet the design standards for QFs must compete in the FERC-approved wholesale markets. Generators that do meet Congress' QF design standards have special rights and States have the authority to promote such QF generation outside of the FERC-approved wholesale markets. 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. A very concrete and particularized part of that market construct is that States can only compel wholesale sales with 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 investing money in developing QF projects. Allco has reasonably relied on the federal government's market framework supporting QF generation. Connecticut's proposed actions upset settled, investment-backed expectations *after* Allco has already committed to its investments. Connecticut's proposed actions operate in retroactive fashion to strand the very investments the federal government has encouraged. As such Allco has a concrete, particularized and imminent interest in unlawful State action that upsets the Congress' preference for QF generation and completely changes the market signals that QFs should invest money in development based upon their preferred status.

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 markets participants identified by Congress *plausibly* suffer concrete and particularized harm when a State takes unlawful actions related to the energy markets, especially when Allco alleged specific economic harms. 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 satisfied that standard.

Allco's standing does not need to rely on its status as a bidder, disappointed or otherwise. Allco's injury is recognized by section 210(h)(2) of PURPA. It is concrete and particularized, and Congress specified the redress. As a qualifying small power producer in Connecticut, the Defendants' actions violate *Allco's* statutory rights, not just rights of other producers. 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 other generators would obtain, or *plausibly* affect Allco's QFs investment. 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")

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).

B. Allco Has Additional Bases For Article III Standing.

1. Allco Has Article III Standing Based Upon Its Allegations of Economic And Competitive Harm.

Allco alleged that it would suffer lower market opportunities and prices for its QFs energy, and that it would suffer 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. AX10 ¶¶30-32, AX14-15 ¶¶52-57, AX16 ¶59. This injury-in-fact was 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.

The District Court's recognized the market dynamics of competition in the energy supply area in its handicapping of Allco's chances of success in a future procurement, AX188, yet it failed to give any recognition to the elementary economic theory of supply and demand.[10] 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). Connecticut plans to compel wholesale sales for 4,250 gigawatt-hours of electricity per year to ISO-New England. AX77. It is a serious error to conclude that it is *implausible* that such an amount would not

[10] Allco gratefully acknowledges the contributions to this section of the brief of the Institute for Policy Integrity at New York University School of Law.

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. It is clear error to not recognize that substitutions of QF renewable energy would occur if non-QF generators were not built. The non-QF contracts represent an enormous amount of renewable energy that would virtually eliminate the demand for QF renewable energy in Connecticut for years.

As early as 1979, federal agencies recognized that canceling *even a single* oil and gas lease would cause the market to respond by substituting not just oil and gas from other sources, but alternative fuel types as well. *Final Environmental Statement, OCS Sale No. 48, Proposed 1979 Outer Continental Shelf Oil and Gas Lease Sale Offshore Southern California*, 1508–1532 (1979). Now Interior's Bureau of Ocean Energy Management ("BOEM") uses its *Market Simulation Model* (*MarketSim*) to estimate the amount and percentage of substitutes the economy would adopt should a particular program area not be offered to lease. *See, e.g.,* BOEM, *Proposed Final Outer Continental Shelf Oil & Gas Leasing Program 2012–2017*, 110 (2012); *see also* BOEM, *2012–2017 Final Programmatic Environmental Impact Statement*, *supra* at 4-643. Importantly, nothing in BOEM's modeling is unique to the offshore oil and gas context. According to BOEM, "MarketSim's economics-based model representation of U.S. energy markets . . . simulates end-use domestic consumption of oil, natural gas, coal and electricity in four sectors (residential, commercial, industrial and transportation); primary energy production; and the transformation of primary energy into electricity." BOEM, *The Revised Market Simulation Model (MarketSim): Model Description* 2 (2012). These basic economic substitution principles apply equally here with respect to the effects on Allco's and other QFs from the compulsion by Connecticut of non-QF generation.

Other agencies have similarly recognized how energy management decisions affect energy supply and demand. *See* Office of Surface Mining, *Draft Stream Protection Rule Environmental Impact Statement*, at 4-175 to 4-176 (2015); *id.* at 4-160 to 4-161; FERC, *Lake Charles Liquefaction Project—Final Environmental Impact Statement*, 3-3 (2015); Nuclear Reg. Comm'n, *Generic Environmental Impact Statement for License Renewal of Nuclear Plants* §8.2 (1996) ("Denial of a renewed license . . . may lead to the selection of other electric generating sources to meet energy demands.")

Other cases firmly support Article III standing of market participants to challenge government actions *plausibly* affecting the market in which they operate. For example, in *Nazarian*, the Fourth Circuit vindicated the interests of plaintiffs who were generators like Allco, without even addressing standing, even though the issue had been briefed to the court. *See* Brief of the Maryland Public Service Commission, *PPL EnergyPlus v. Nazarian*, No. 13-2419, 2014 WL 413948, at *6-*14. Similarly, in *Solomon* the generators in the market had Article III standing to challenge identical State-compelled contracts because of the plausible risk of price and competitive impacts to the market. 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). *See, id.* ("[P]etitioners sufficiently establish their constitutional standing by showing that the challenged action authorizes allegedly illegal transactions that have the clear and immediate potential to compete with the petitioners' own sales. They need not wait for specific, allegedly illegal transactions to hurt them competitively." *Id.* (internal quotations and citations omitted.))

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. AX10 ¶¶30-32, AX14-15 ¶¶52-57, AX16 ¶59. Nor is there a basis to conclude that those effects would not likely be redressed by voiding and prohibiting the illegal conduct.

2. Loss Of The Contract In 2013 Is Sufficient To Establish Standing To Challenge Future Actions.

Allco has established standing based on its failure to prevail in the Commissioner's 2013 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.

The District Court erroneously held that Allco would need to show that Connecticut would conduct, and Allco would win, a future compliant procurement. The District Court's reasoning is plainly wrong. *See Clinton v. City of New York*, 524 U.S. 417, 433 n.22 (1998) ("The Government argues that there can be an Article III injury only if [plaintiff] would have actually obtained a facility on favorable terms. We have held, however, that a denial of a benefit in the bargaining process can itself create an Article III injury, irrespective of the end result."); *cf. Natural Resources Defense Council, Inc. v. FDA*, 710 F.3d 71, 81 (2d Cir. 2013) (plaintiff can establish injury-in-fact based on showing of increased risk of harm, even when harm is not guaranteed). *Ne. Fla. Chapter, Associated Gen. Contractors of Am. v. Jacksonville*, 508 U.S. 656, 666 (1993)) (under Article III, prospective bidders could establish an injury-in-fact "even though there was no showing that any party would have received a contract absent the ordinance." *Clinton*, 524 U.S. at 433 n.22.)

As such, it is difficult to understand how the District Court could have held that, under Article III, Allco failed to show an injury-in-fact. Relying in *Spokeo*, the District Court's essentially equated Allco's injury with a presumed inconsequential mistaken zip code in a credit report. But the zip code analogy from the majority opinion in *Spokeo* confirms why Allco's injuries are concrete and particularized, and why the District Court's issuance of an injunction can redress them. The District Court concludes that the large competitive field (which includes non-QFs) diminishes Allco's chances of success to a long-shot (even though the results of the 2013 RFP show otherwise). But following the District Court's line of thinking, Allco's injury and the redressability of that injury should be handicapped by looking at the field of competitors as it should be—only generators that meet Congress' design standard, i.e., QFs—and not upon the State's attempt to increase competition by unilaterally lifting the FPA's restrictions on compelled wholesale sales with non-QFs.

The District Court's theory – that despite Allco's high ranking in the 2013 RFP, the Commissioner might simply have selected a lower-ranked bidder in a follow-up compliant procurement – is wrong for multiple reasons. *First*, it misunderstands the injury-in-fact at issue. As the Supreme Court held in *Clinton*, "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. *Clinton*, 524 U.S. at 433. 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 under PURPA. *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.

Second, 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 RFP Harwinton Solar was ranked fourth, and next in line, on the Commissioner's rankings, *see* AX9 ¶27, AX60; this plainly put it in the "competitive range" and gave it a "substantial chance" of winning a procurement *that complied with federal law*. That is especially so because of the size of Number Nine relative to Allco's Harwinton Solar project and other bidders. Number Nine was awarded a contract for 936,443 megawatt-hours per year; by contrast, Fusion Solar, which like Allco's Harwinton project, was a smaller solar project, was awarded a contract for 36,907 megawatt-hours per year. AX60; *see also* AX9 ¶28. Had Number Nine not received a contract, the Department would have needed to choose numerous other smaller projects to come even close to replacing its output. It is true that there is no *guarantee* that in a compliant re-procurement, the Commissioner would select the highest-ranking bid, and Allco's Complaint does not contend otherwise. But given that the whole purpose of the Commissioner's ranking was to select bids, it is likely – and, surely, far from *speculative* –that the Commissioner would follow the result of his own ranking process.

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." *Iqbal*, 556 U.S. at 678. It is "plausible," to say the least, that the Allco would be in the competitive range in any compliant re-procurement.

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. AX188. 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. In *Utah v. Evans*, 536 U.S. 452 (2002) ("*Evans*"), the Supreme Court held that Utah had standing to challenge a census report, even though no executive official had any obligation to follow the terms of the new report. *Id.* at 463-64. The court found it "substantially likely" that the Executive Branch would abide by the new report, and thus held that the "practical consequence" of altering the report was "a significant increase in the likelihood that the plaintiff would obtain relief that directly redresses the injury suffered," even though there was no guarantee that the Executive Branch would take any action based on the court's ruling. *Id.* at 464. Similarly, in *FEC v. Akins*, 524 U.S. 11, 25 (1998), the Court found that a plaintiff had "standing to obtain court determination that the organization was a 'political committee' where that determination would make agency more likely to require reporting, despite [the] agency's power not to order reporting regardless." *Evans*, 536 U.S. at 464 (describing *Akins*); *see also id.* (collecting other, similar cases). These cases show that as long as it is likely the agency will afford relief, the plaintiff can establish standing, even if there is a possibility that the agency will ultimately decline to redress the plaintiff's injury.

Here, Allco's Complaint adequately alleges that it is likely that the Commissioner will conduct a new procurement. AX14 ¶52, AX15 ¶57, A16 ¶51, A17 ¶56. This allegation establishes that it is at least *likely* that, if the District Court invalidates the prior procurement, the Commissioner would conduct a procurement rather than completely ignoring its procurement authority.

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) (in case where agency's prior briefing took "the view that a partial deregulation reflecting its proposed limitations is in the public interest," plaintiff could establish redressability based on the "strong likelihood" that agency would engage in such deregulation in the future, even though it theoretically had the option not to). Further, the Commissioner's counsel has warned of a looming renewable energy shortage in Connecticut, A130, 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.

3. Exclusion From, And The Conditions Of, The 2015 RFP Are Sufficient To Establish Article III Standing.

Allco has standing based upon the conditions imposed by the 2015 RFP. Many of Allco's QF were excluded because of the minimum size requirement of 20MW. AX10 ¶8. The District Court agreed that the exclusion constituted an injury but did not view it as an injury-in-fact for standing because it was speculation that if the District Court stopped the 2015 RFP that the Defendants would conduct a compliant procurement, and that Allco QFs would win. AX188. The District Court's reasoning conflated the injury-in-fact element with redressability. The District Court's double-hurdle reasoning would bar standing for all sorts of challenges in the procurement context including, for example, if the State had a procurement for electrical services on a state building but then barred minorities or women from bidding. As discussed above, the District Court's analysis simply misstates the law. Moreover, motions to dismiss for failure to state a claim must be decided based on *whether* a plaintiff's complaint is plausible rather than *how* plausible it is. *Anderson News, L.L.C. v. Am. Media, Inc.*, 680 F.3d 162, 185 (2d Cir. 2012) ("[a] court ruling on such a motion may not properly dismiss a complaint that states a plausible version of the events merely because the court finds a different version more plausible"); *id.* at 189 ("the question is whether there are sufficient factual allegations to make the complaint's claim plausible.") The District Court engaged in its own independent speculation of how plausible it would be that the Defendants would conduct a compliant procurement and that Allco would win. As discussed above, it was certainly *plausible* that the Defendants would conduct a re-procurement. They have acknowledged a looming deficient in renewable energy generation, A130, and they have already issued a second procurement since Allco's first challenge in 2013. Based upon Allco's performance in the 2013 RFP it was certainly plausible that Allco would win a compliant re-procurement and that, at the very least, Allco would be in the competitive range.

For Allco's QFs that were excluded they suffered an injury-in-fact just by being excluded. If they were included, they would have been in the same position as Allco's QFs greater than 20MWs—being subject to unlawful fees and the unlawful competition of non-QFs. The State's attempt to unilaterally lift Federal restrictions on its ability to compel wholesale sales with non-QFs, thus increasing competition is itself an Article III injury. *See, La. Energy*, 141 F.3d at 367. Both of these injuries would be redressed by an injunction prohibiting procurements from excluding any QFs and including competition from non-QFs.

4. Allco Has Standing Under *Associated Indus. of N.Y. v. Ickes*, 134 F.2d 694 (2d Cir. 1943).

Allco is in the position of the 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) ("*Ickes*"). Congress has authorized the FERC to bring an action to enforce Section 210(f) of PURPA. If the FERC declines to bring such an action after being petitioned to do so, then a qualifying small power producer, such as Allco, has been designated by Congress to bring such suit—"there is an actual controversy, and there is nothing constitutionally prohibiting Congress from empowering any person, official or not, to institute a proceeding involving such a controversy." *Ickes*, 134 F.2d at 704. Allco, as one of Judge Friendly's private Attorney Generals, is in a similar position to the plaintiff in *SEC v. Mgmt. Dynamics, Inc.*, 515 F.2d 801, 808 (2d Cir. 1975) in which this Court noted that "the SEC appears in these proceedings not as an ordinary litigant, but as a statutory guardian charged with safeguarding the public interest in enforcing the securities laws." Here, Congress gave qualifying small power producers, such as Allco, the right to enforce the requirements of Section 210(f) of PURPA when the FERC decided it did not want to pursue the action itself. If the FERC were pursuing this action, there would be no question that it would be entitled to proceed. So too here, Allco should be in the same position as the FERC would be.

III. The District Court Erred By Denying Allco's Motion For Injunctive Relief.

Allco is entitled to a preliminary injunction prohibiting the Defendants from taking further action related to the 2015 RFP. Allco meets the statutory requirements for an injunction under Section 210(h) of PURPA. In addition, Allco meets the traditional requirements for injunctive relief. Allco is likely to prevail on the merits, and certain to suffer irreparable injury if the motion is not granted. The prospect of harm to the Defendants is low if the motion is granted, and the public interest strongly favors Allco's motion.

A. Legal Standard.

Allco asked the District Court to issue a preliminary injunction to prevent the Defendants from violating the FPA and PURPA. An injunction is specifically authorized by 16 U.S.C. §824a-3(h). When an injunction is expressly authorized by statute, the standard preliminary injunction test does not apply. *SEC v. Mgmt. Dynamics, Inc.*, 515 F.2d 801, 808 (2d Cir. 1975) ("As the issuance of an injunction in cases of this nature has statutory sanction, it is of no moment that the plaintiff has failed to show threatened irreparable injury or the like, for it would be enough if the statutory conditions for injunctive relief were made to appear"). Instead, the court must look to the "statutory conditions for injunctive relief," and may issue a preliminary injunction if it is clearly established that those conditions are met. *Id.* at 808. 16 U.S.C. §824a-3(h)(2)(B) authorizes injunctive relief if three conditions are met. First, the action is brought by a qualifying small power producer. Second, the qualifying small power producer petitioned the FERC to bring such action and 60 days have elapsed since the petition. Third, the action is brought to enforce the requirements of 16 U.S.C. §824a-3(f), and the applicable standard regarding the merits of the case is met.

Under traditional standards, a party seeking to obtain a preliminary injunction or temporary restraining order must demonstrate (1) that it is likely to suffer irreparable harm in the absence of preliminary relief, (2) "either (a) a likelihood of success on the merits or (b) sufficiently serious questions going to the merits of the case to make them a fair ground for litigation," *Forest City Daly Housing, Inc. v. Town of North Hempstead*, 175 F.3d 144, 149 (2d Cir. 1999), (3) that the balance of equities tips in its favor, and (4) that an injunction is in the public interest. *New York Progress and Protection PAC v. Walsh*, 733 F.3d 483, 486 (2d Cir. 2013).

B. Allco Is Likely To Prevail On The Merits.

1. The Defendants Are Unlawfully Regulating In The Field Of Wholesale Sales.

"States may not act in [wholesale sale of electricity] this 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 a wholesale power contract 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.

2. The Supreme Court And The Third And Fourth Circuits Have Invalidated Economically Identical Compelled Wholesale Contracts.

The decision of the Fourth Circuit in *Hughes,* which was affirmed by the Supreme Court, and the decision of the Third Circuit in *Solomon,* invalidating economically identical wholesale arrangements confirm that the Defendants' action in 2013 and its planned actions are unlawful. 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 PPA, and urged the Supreme Court to analyze it that way.[11] 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

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[11] Providing generators with revenue assurance by compelling utilities to enter into a complicated contract-for-differences is the equivalent of compelling the utilities to buy the electricity itself under a long-term power purchase agreement. A power purchase agreement is economically identical to the contract-for-differences at issue here, as is illustrated in the following example:

> In both cases, the generator submits a bid to the state specifying the long-term rate per megawatt or megawatt-hour that the generator needs to be guaranteed (for example, $60). Suppose that the market price for energy is $50. Under a <u>power purchase agreement</u>, the generator sells to utility for $60. The utility then resells into the spot market (or avoids purchases from the spot market) at $50. Under the <u>contract-for-differences</u>, the generator sells into the spot market at $50. The utility makes a side payment to the generator of $10. In both cases, the generator's net revenue is $60 and the utility's net cost is $10.

guise of a State's authority to manage its utilities' generation portfolios. A brief excerpt from oral argument highlights the Supreme Court's reception to that idea:[12]

> 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.

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.

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[12] The complete oral argument transcript is available at: http://www.supremecourt.gov/oral_arguments/argument_transcripts/14-614_g2hk.pdf.

3. The Defendants' Planned Actions Do Not Fall Within The State's Authority Over Generation Facilities Or To Direct Utility Planning And Resource Decisions.

In addition to the exclusive jurisdiction conferred over wholesale sales, the second sentence of Section 201(b)(1) of the FPA gives the FERC the exclusive jurisdiction over the *facilities* used for the sale of electric energy at wholesale in interstate commerce. The FERC's jurisdiction over facilities has an exception that provides the FERC:

> shall not have jurisdiction, except as specifically provided in this Part and the Part next following, 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.

The plain language—"except as specifically provided"—makes it clear that whatever authority is exercisable by a State under the State's authority over facilities does not extend to wholesale sales. That is the bright-line in this case. The State's reserved authority to regulate facilities within its own borders is of no relevance to the central issue, which is whether the specific transactions are "the sale of electric energy at wholesale in interstate commerce," and if they are, do the Defendants plan to exercise any authority over such wholesale sales. The answer to both in this case is unquestionably yes. The proposed

PPAs are clearly wholesale sales of electric energy in interstate commerce. In addition, those wholesale sales will only come into being because of the singular act of the State of Connecticut compelling those transactions.

As the Supreme Court held in *Attleboro*, States never had the authority to regulate interstate sales of electricity, regardless of the target or motive of the States. *See, Attleboro*, 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.

4. The Defendants' Proposed Actions Are Also Conflict Preempted.

FERC has adopted a market-based approach to regulating the energy markets in ISO-New England. In planning to order the execution of contract with various generators, the Defendants will pursue a conflicting regulatory framework. Not only does that framework conflict with FERC's chosen regulatory approach, but it also undermines the special treatment that Congress intended to give to QFs under PURPA, which includes the authorization to compel long-term contracts with QFs, such as the 20-year contracts sought by generators under the 2015 RFP. Congress has not made that same accommodation for non-QFs, which are expected to compete on their own merits in the FERC-regulated wholesale market. This is the epitome of a conflict with federal law.

C. The FPA's Preemptive Provisions Are Necessary To Render PURPA Effective.

PURPA was enacted for the express purpose of creating a new class of "favored cogeneration and small power facilities" in the overall regulatory scheme. *FERC v. Mississippi*, 456 U.S. 742, 751 (1982). It did so by enacting a limited exception, applicable to such facilities, to the blanket prohibition on state regulation of wholesale energy sales, as well as an open access interconnection and transmission policy for such generators. 16 U.S.C. §824a-3. The FPA's preemptive provisions are necessary to render PURPA effective – by preempting state regulation *except as to* QFs, the FPA ensures that QFs are singled out for favored treatment. Congress has chosen to allow States to compel wholesale contracts, including at fixed rates over 15 to 20 years only for QFs under PURPA. Congress has not made the same accommodation for projects that do not meet the design standards for QFs.

Connecticut's actions lower prices and market opportunities that new QF generation, Congress' preferred choice, would obtain. When power is purchased from large non-QF generator, it relieves the utility of the need to purchase that power from some alternative source by increasing supply. Naturally, the utility would shed its most expensive alternative source of power first. This means that the cost of the most expensive power in the utility's portfolio has *decreased* as a result of the procurement – in PURPA's lingo, its "avoided costs" have decreased. And accordingly, so too has the rate that a QF is legally entitled to receive under PURPA, or could otherwise receive in the market. This injury-in-fact would be caused by Connecticut's action. In light of that statutory scheme, it is easy to understand how QFs would be injured by State actions compelling wholesale transactions with non-QFs.

Allco's assertion of injury to its QFs from lower market prices and opportunities caused by the Defendants' actions are also supported by the basic rules of supply and demand, as well as the cases and federal agency practice described above.

If this Court permits Connecticut to use its alleged jurisdiction over in-state generation facilities or "portfolio management" as an excuse to compel wholesale transactions, (1) the authority given to States under PURPA to compel wholesale transactions with QFs (including compelling long-term contracts as the Defendants seek here) would be superfluous, (2) Congress' PURPA price-limit of avoided costs, which insures ratepayer neutrality, would no longer be a constraint on State action: States would be free to compel wholesale transactions at any price, regardless of the method of procurement, (3) States would be free 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, and (4) the logical extension would be State authority to regulate all wholesale sales under the guise or "target" of regulating retail rates or another "local interest," exactly what was rejected in *Attleboro* and banned at the time the FPA was enacted.

Any procurement that attempts to go beyond the limits set by Congress harms the very market participants that Congress intended to benefit. Interference with that policy will impede the achievement of Congress' goals in enacting PURPA. The simple fact is that there are more than enough QFs with which Connecticut can compel wholesale transactions for 15 to 20-year terms in full compliance with the FPA and PURPA. Similarly, PURPA provides more than enough authority for Connecticut to meet all renewable energy goals multiple times over. The Defendants have no one to blame but themselves if they refuse to follow the path that Congress has permitted.

D. Affirmance Would Create A Massive Loophole With No Practical Limit On A State's Authority To Regulate Wholesale Sales.

Judgment for the Defendants in this case would create a massive loophole in the FPA that would destroy FERC's ability to regulate the market in a uniform and coherent manner. FERC has chosen a market-based approach to regulation, in which some generators sell their output into a wholesale auction administered by ISO-New England, and others enter voluntary bilateral contracts with willing purchasers. Such a market-based system simply cannot function as FERC intended if States are free to mandate involuntary wholesale transactions that, but for the State's intervention into the wholesale marketplace, would never have taken place.

Under the guise of regulating utility purchasing decisions, States could simply take over the entire wholesale market, effectively eliminating FERC's regulatory power and supplanting its chosen regulatory approach. The FPA prevents even the possibility of such interference by excluding States altogether from the field of wholesale sales. Of course, with respect to QFs under PURPA Congress has reached a different conclusion and *has* authorized State regulation of wholesale sales, including the ability to compel a 15 to 20-year fixed-rate contract such as at issue here, but only for facilities meeting the design standards for QFs. The 2015 RFP, however, is not limited to QFs, and it is not open to all QFs, and consequently the one exception with respect to State regulation of wholesale sales is not applicable.

IV. The District Court Erred In Dismissing Allco's Claim Under The Dormant Commerce Clause.

A. Connecticut Is Acting As A Regulator, Not A Market Participant.

A threshold question is whether Connecticut is acting as a regulator or as a market participant. If a State is acting as a market participant then it is not constrained by the Dormant Commerce Clause. *See, Dep't of Revenue v. Davis*, 553 U.S. 328, 339 (2008). Here Connecticut is *regulating* because it is exercising powers unavailable to private parties. *Brown & Williamson Tobacco Corp. v. Pataki*, 320 F.3d

200, 208 (2d Cir. 2003) quoting *United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 261 F.3d 245, 255 (2d Cir. 2001). It is compelling the private and public electric suppliers in Connecticut to either prove they have acquired the environmental attributes to a certain amount of in-region renewable energy generation, or pay a penalty equal to $55 per megawatt-hour for any shortfall. The District Court correctly concluded that Connecticut is acting as a regulator, and not as a market participant. AX197.

B. Regional Balkanization Is Prohibited By The Dormant Commerce Clause.

The next issue is whether a State can discriminate against products from other States. Allco concedes that Connecticut is not favoring, either facially or in practice, in-state RECs as compared to *all* out-of-state RECs. But creating economic regions among States that would band together and prohibit commerce, ban products or impose tariffs on commerce from States outside the region is equally offensive to the economic balkanization the Commerce Clause was intended to prohibit. *See, Ne. Bancorp, Inc. v. Bd. of Governors of the Fed. Reserve Sys.*, 472 U.S. 159, 174 (1985) ("There can be little dispute that the dormant Commerce Clause would prohibit a group of States from establishing a system of regional banking by excluding bank holding companies from outside the region if Congress had remained completely silent on the subject," citing *Lewis v. BT Investment Managers, Inc.*, 447 U.S. 27, 39-44 (1980)).

A State "may not, under the guise of exerting its police powers … make discriminations against the products and industries of some of the States in favor of the products and industries of its own or of other States." *Brimmer v. Rebman*, 138 U.S. 78, 82 (1891). It is simply inconsistent with the concept of the federal Union for Connecticut to establish a preferential trade region and regulate a vital portion of interstate commerce under a discriminatory regime that boycotts disfavored states. *See, Great Atlantic & Pacific Tea Co. v. Cottrell*, 424 U.S. 366, 380-81 (1976), *quoting Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 523, n.17 (1935) ("The Constitution was framed under the dominion of a political philosophy less parochial in range. It was framed upon the theory that the peoples of the several states must sink or swim together, and that in the long run prosperity and salvation are in union and not division.")

The Connecticut statute distinguishes among the RECs from other states explicitly on the basis of their state of origin. Connecticut opens its door to RECs of Massachusetts, Maine, New Hampshire, Vermont and Rhode Island in an unqualified manner, but it excludes or attaches restrictions to RECs of New York, New Jersey, Pennsylvania, Georgia and the rest.

C. The Defendants' Ban On Out-of-Region RECs Is *Per Se* Unconstitutional.

1. Connecticut's Statute Facially Discriminates Against Out-of-Region Interests.

State laws that are facially discriminatory to interstate commerce are subject to strict scrutiny (compelling state interest + narrowly tailored), and will be found invalid unless the state can show that the policy serves a sufficiently legitimate state interest which could not be served as well by available nondiscriminatory means. *Maine v. Taylor*, 477 U.S. 131 (1986). An over-arching goal of environmental preservation is not a sufficient state justification to render a discriminatory regulation valid. *W. Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 206 (1994). The two issues that must be addressed next is whether Connecticut's statute facially discriminates against out-of-region interests, and if so, is it narrowly tailored to address a compelling state interest.

It cannot be disputed that the Connecticut statute discriminates against out-of-region generators. It does that in multiple ways. *First*, it facially excludes from the market for Connecticut RECs any generation outside Connecticut's preferred zone. *Second*, for generators in adjacent electricity grid zones, it requires those generators to incur significant, and frequently prohibitive, costs to transmit the electricity from out-of-region to in-region. *Third*, it allows generators in the preferred zone, such as generators in the northern most regions of Maine, to qualify even if that generator's electricity never reaches Connecticut, has zero value, or even has negative value.

But using an analogy to Louisiana shrimp, the District Court determined that the Connecticut statute did not discriminate against out-of-region RECs because those out-of-region RECs are different because they do not qualify as Connecticut RECs. Such reasoning is obviously circular. What the District Court has actually done is to extend the market participant doctrine from cases such as *Hughes v. Alexandria Scrap* Corp., 426 U.S. 794 (1976) and *Reeves, Inc. v. State*, 447 U.S. 429 (1980) to allow States to *create* discriminatory markets *through regulation*. True, Connecticut is creating a demand in Connecticut-specific RECs that otherwise did not exist, but it is not doing so as a market participant, it is doing so as a regulator. While recognizing that the State of Connecticut was not entering the REC market as a market participant the District Court nevertheless expanded to market participant rationale to situations where the State has created the market through State regulation. AX200. ("Connecticut created a market for RECs, and is not obligated to spread the benefit of that market to states that do not also bear the burden of the cost of the subsidy, which is ultimately paid by Connecticut ratepayers.")

The District Court's extension of the market participant cases to the State as regulator enables a State to first define the "product" in terms of regional preference, and then to create the "demand" by requiring private entities within Connecticut to acquire a specified amount of the newly-defined product. Such authority would validate a host of regional discrimination. A Connecticut law would be valid that defined the "product" as "electrical wire manufactured in the northeast" and then required all utilities to use a minimum amount of that product. A Connecticut law that defined the "product" as "milk produced from cows located in the northeast" and then required all restaurants to buy a specified amount of such newly-defined product would be valid. The products that could be defined by geographical restriction would be numerous, and the demand for that newly defined product would be created by the State as regulator, just as it is the case with Connecticut RECs.

The District Court's analysis is implicitly based upon the notion that out-of-region generators have nothing to complain about because Connecticut is under no obligation to regulate, and once it does regulate the out-of-region generators are in no worse a position than they were before. In other words, there were no Connecticut buyers before, and after the State regulation there were still no buyers. But RECs, as the District Court recognized, are in fact a national product.

To be sure there is nothing in the Dormant Commerce Clause that would require Connecticut to maintain its RPS, and if it chose to repeal its RPS then there would be an absence of a state-mandated demand for RECs. Yet the same could be said for any facially discriminatory state statute that would require a Connecticut utility to buy certain property from in-region sources. For example, in *Wyoming v. Oklahoma*, 502 U.S. 437 (1992), the Supreme Court invalidated a statute that required coal-fired electric utilities in Oklahoma "to burn a mixture containing at least 10% Oklahoma-mined coal." *Id.* The Supreme Court determined that the statute discriminated against interstate commerce "on its face" because it "expressly reserve[d] a segment of the Oklahoma coal market for Oklahoma-mined coal, to the exclusion of coal mined in other States." *Id.* at 455. The result in *Wyoming v. Oklahoma* is particularly relevant here because the Oklahoma statute is analogous to Connecticut's RPS requirement that facially favors in-region RECs, and reserves 100% of its utility mandated RECs for in-region RECs to the exclusion of Allco's out-of-region RECs.

Indeed, Connecticut's simultaneous REC demand creation but limitation on what RECs can be used is no different than a situation where a State required its utilities to add some type of environmental control equipment to its power sources, but limited the permissible environmental control equipment to equipment that was manufactured in-state or in-region. There, just as here, the State could eliminate the environmental control requirement, thus eliminating the demand. But such a limitation on the in-state or in-region equipment would be facially discriminatory and invalid, even though it would be justified by valid local economic reasons, and even though the State could eliminate the demand by eliminating the requirement.

Whether the State imposes a regulation that creates demand that was not there, increases demand already present, or lowers demand, the regulation is still regulating interstate commerce in a facially discriminatory manner.

2. The District Court Engaged In Improper Fact-Finding.

Here it is clear that the Connecticut REC statute creates a regional preferred zone by excluding RECs from out-of-region. Such facial discrimination can survive challenge if it is narrowly tailored to address a compelling state interest that could not be addressed by nondiscriminatory means. The essence of this prong of the analysis must rest on facts. Those facts cannot be determined at the motion to dismiss stage based upon unsupported factual assertions in briefs. But that is exactly what happened here.

The District Court improperly found facts to justify the statute's facial discrimination. For example, the District Court stated: "Connecticut, through its RPS statute, has created a secondary REC market that incentivizes the production and distribution of clean energy in and around Connecticut, *where it will have a measurable impact on Connecticut's environmental goals*." AX199. (Emphasis added.) That statement is a finding of fact that certain generators have a measurable impact on Connecticut's environmental goals, whereas generators that fall outside that zone do not. That finding constitutes error at the motion to dismiss stage. Worse, as Allco cited in its opposition, such a finding is flatly contradicted by the New England Power Pool ("NEPOOL") itself. *See*, *In the Matter of the Appeal Case Brookfield Energy Marketing, Inc.*, No. 02-NE-BD-2008 (NEPOOL Board of Review 2009) at 10.[13] ("[T]he Northeast's clean air concerns and the partial resolution of those concerns through the increased use of renewable energy extend beyond the New England States and the adjacent control areas.") *Id.* at 10.

Ignoring NEPOOL's expert opinion, the District Court continued its factual justification for the out-of-region ban by making further

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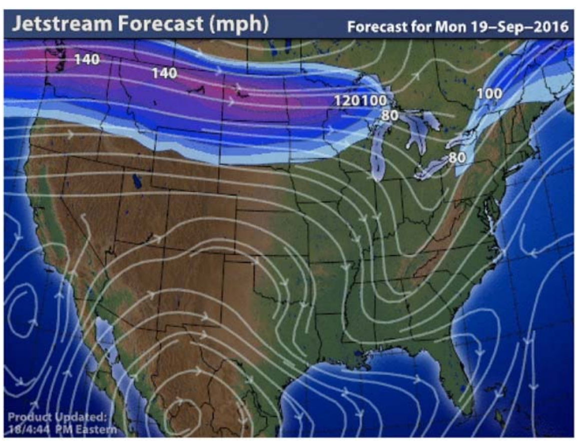
[13] Available at www.nepool.com/uploads/RB_Decision_2008_02.pdf.

factual findings related to "'non-attainment' status in relation to nitrogen oxide and particle emission NAAQS," AX200, and Connecticut's "obligation under the Clean Air Act to develop a State Implementation Plant [sic] ('SIP')" related to those particle emissions. The District Court concluded that "[e]xtending the RECs to Georgia does nothing to help Connecticut reach attainment status." AX200. Those factual findings justifying the out-of-region ban are improper at the motion to dismiss stage. Worse, they are contradicted by NEPOOL, as discussed above. Worse still, the District Court completely ignored Allco's facilities in New York, a State that borders Connecticut. Even worse, the District Court's factual finding implicitly concludes that the in-region zone is tailored to help achieve favorable resolution of non-attainment status that appears nowhere in the record.

Moreover, the District Court's factual conclusions are questionable based upon the well-known physics of the Jetstream in the United States, which blows west to east. A renewable energy generator in northern Maine, whose electricity can never hope of reaching Connecticut because of transmission constraints could not possibly be more helpful than a generator located across the Connecticut border in

New York. Parts of Ohio, West Virginia, Pennsylvania, Maryland and Virginia are all closer to Connecticut than windy areas in the northern most tip of Maine.

It is true that the Allco's Georgia facilities are located father away from Connecticut than its New York facilities, but the following Jetstream forecast for September 19, 2016, shows precisely why the District Court's factual conclusions are pure conjecture. The portion of the Jetstream that blows across northern Georgia continues directly across Connecticut.



http://www.intellicast.com/National/Wind/JetStream.aspx.

Regardless, even if this Court does not hold Connecticut's facial discrimination is invalid as a matter of law, the District Court engaged in improper fact-finding at this stage of the case. It therefore must be reversed.

V. The District Court Erred By Dismissing Allco's Complaints With Prejudice.

Even if this Court's affirms the dismissal, the Court should vacate the with prejudice aspect. This Court has a "strong preference for resolving disputes on the merits." *Williams v. Citigroup Inc.*, 659 F.3d 208, 212-13 (2d Cir. 2011) (per curiam) (internal quotation marks omitted); *see also Foman v. Davis*, 371 U.S. 178, 182 (1962) ("If the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits.") A dismissal with prejudice prevents Allco from seeking leave to amend in order to cure the deficiencies that led to the dismissal. Surely, in light of the Article III standing afforded to generators in *Hughes* and *Solomon*, challenging virtually identical State action compelling wholesale sales based upon market harm, it cannot be said that an amendment would be futile.

Moreover, the existence of the unlawfully-compelled contracts represents an ongoing violation of the FPA and PURPA. In *Barnstable v. O'Connor*, 786 F.3d 130 (1st Cir. 2015), the First Circuit held that the fact that a challenged wholesale power contract had been approved in the past would not prevent the district court from enjoining future action related to other aspects of the contract, including future cost recovery, and any other actions or approvals that might be required related to the contract. There, as here, the existence of the unlawfully compelled contracts represent an "ongoing violation" of the FPA and PURPA. A "with prejudice" dismissal might bar Allco from challenging the ongoing violation related to economic harms to current or future QFs.

CONCLUSION

For the foregoing reasons, this Court should reverse the judgment of the District Court and remand with instructions to issue the preliminary injunction and deny the Defendants' motions to dismiss.

Respectfully submitted this 28th day of September 2016.

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32 and Local Rule 32.1, I hereby certify that this brief complies with the type-volume limitations set forth in Fed. R. App. P. 32(a)(7)(B)(i) because this brief contains 13,998 words, as counted by Microsoft Word, excluding the items that may be excluded under Federal Rule 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) because this brief has been prepared in 14-point, proportionally spaced Century font using Microsoft Word.

/s/ Thomas Melone

CERTIFICATE OF SERVICE

I hereby certify that on the 28th day of September, 2016, I caused to be served, using the Court's CM/ECF system, a copy of the foregoing Brief of Appellant and the accompanying Joint Appendix to all counsel of record.

__*/s/ Thomas Melone*_________