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.

REPLY BRIEF OF APPELLANT ALLCO FINANCE LIMITED

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INTRODUCTION

Connecticut offers this Court a Trojan Horse. On the outside, Connecticut touts its renewable energy solicitation as a much needed effort to achieve its environmental goals. But on the inside lies Connecticut's policies eviscerating QFs'[1] rights, and a massive loophole in the Federal Power Act, *see* 16 U.S.C. §791a *et seq*. ("FPA"). Such a loophole would give States unlimited ability to compel interstate wholesale electricity transactions that support the political whims of a State under the guise of regulation of the construction of new generation, further sabotaging QF development. One State might prefer coal plants, another gas plants, still others nuclear or other forms of electric generation. Tellingly, neither Connecticut nor the amici dispute the fact that *all* Connecticut's environmental goals related to electrical generation can be met by Congress' preferred generators—qualifying facilities. Nor could they muster such an argument even if they tried. When States such as California, Georgia, Montana, Idaho, and North Carolina opened their doors to QFs, even for a limited time at long-term forecasted rates, they met great success.

Compelling a wholesale transaction – one that would not have taken place but for the State's compulsion – plainly involves the regulation of wholesale sales,

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

and thus falls squarely within the field that Congress has occupied. Connecticut's and amici's arguments to the contrary simply do not engage with this basic principle. Connecticut does not have, and never did have, the authority to compel wholesale sales of electricity outside of section 210 of the Public Utility Regulatory Policies Act, Pub. L. No. 95-617, 92 Stat. 3117 ("PURPA"). Congress drew the bright-line in the first sentence of FPA section 201(b)(1) at wholesale sales in interstate commerce, which the proposed contracts unquestionably are.

ARGUMENT

I. Allco Has Established Standing.

A. Allco Has Established Multiple Bases For Standing.

Connecticut argues that this Court got it wrong in *Allco Finance Limited v. Klee*, 805 F.3d 89 (2d Cir. 2015) ("*Allco II*") when it held Allco's action was in reality an action to enforce section 210 PURPA.[2] As this Court held in *Allco II*, Allco's primary claim of standing is under 16 U.S.C. §824a-3(h)(2)(B). 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), which is what Congress has done in 16 U.S.C. §824a-3(h)(2)(B).

[2] Connecticut's argument is a 180-degree turn from its argument to this Court in supplemental briefing in *Allco II*. *See*, Supplemental Brief of Appellee-Klee at 9, *Allco II,* July 14, 2015. ("Allco's Supremacy Clause count is predicated upon PURPA exactly as in *Niagara*.")

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. Congress also prescribed the redress that would remedy the injury by authorizing the district court to enjoin the offending actions and provide other appropriate relief.

Connecticut also asserts that none of Allco's injuries are redressable because the Commissioner has no authority to issue a PURPA-compliant solicitation. Not so, as the terms of the current solicitation demonstrate. Nothing in the Connecticut enabling statutes provides for a minimum 20-megawatt ("MW") size in order to participate in a solicitation. Yet the Commissioner imposed that limitation, excluding Allco QFs. AX10 ¶36. If the Commissioner can impose a size limit on the *lower end*, he certainly could impose one on the *higher end* that would comport with the design standards that Congress has prescribed for renewable energy QFs. Similarly, there is no restriction preventing the Commissioner from compelling the interstate wholesale energy contracts at a rate that complies with PURPA. The rate, like other terms, merely needs to be "in the interest of ratepayers." C.G.S. §§16a-3f, -3g. Moreover, as Allco explained in its opening brief, basic economic theory and decades of federal agency practice support Allco's position that it is surely *plausible* that Connecticut's actions, if not prevented or nullified, would injure Allco and that an order invalidating and enjoining Connecticut's actions would redress Allco's injuries regardless of whether Connecticut issued another solicitation.

Connecticut also relies on the language in *Allco II* regarding Allco's future sales not being "imminent when the complaint was filed." 805 F.3d at 98. That argument, which relates only to Allco's alternative bases for standing, is, as Allco noted in its opening brief, in tension with the standing provided to the generators in *Hughes*, *Nazarian* and *Solomon*.[3] In each of those cases, the generators complained of the adverse effects on sales and market opportunities *in the future*. Until the power plant related to the State-compelled wholesale contract was built, there would be no impact, and it generally takes years for such a plant to be constructed. But in response to that language in *Allco II*, Allco's complaint was more specific and, based upon expert testimony, quantified some of the market and imminent impacts. AX10 ¶¶30-32, AX15 ¶¶53, 54, 56, 57, AX16 ¶62. Further, as Allco explained in its opening brief, a risk of harm is sufficient. *See*, *Spokeo,* 136 S. Ct. at 1549; *see also*, *NRDC 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); *La. Energy & Power Authority v. FERC*, 141 F.3d 364

[3] *Hughes v. Talen Energy Marketing, LLC,* 136 S. Ct. 1288 (2016) ("*Hughes*"), *PPL EnergyPlus LLC v. Nazarian*, 753 F.3d 467 (4th Cir. 2014), *aff'd sub nom.*, *Hughes* ("*Nazarian*") and *PPL EnergyPlus LLC v. Solomon*, 766 F.3d 241 (3d Cir. 2014) *cert. den.* 136 S. Ct. 1728 (2016) ("*Solomon*")

(D.C. Cir. 1998) (a market participant does not need to wait until lower sales occur).

Connecticut's additional claim that Allco declined to participate in the current solicitation is an inaccurate red herring. Allco's QFs under 20MWs were banned from participating. AX10 ¶36. Allco's QFs greater than 20MWs did not participate because of the unlawful terms and competition. AX11 ¶¶37-38. But that lack of participation for the larger QFs does not lessen the injuries-in-fact Allco suffered, prevent redressability, or detract from its standing either under 16 U.S.C. §824a-3(h)(2)(B) or from the circumstances of the unlawful 2013 solicitation.[4]

Connecticut also challenges Allco's standing based on the district court's double-level of conjecture analysis. But as Allco explained in its opening brief, that analysis is contrary to hornbook law on competitive procurements, and misapprehended Allco's injuries-in-fact. It also has no impact to Allco's standing as a qualifying small power producer under 16 U.S.C. §824a-3(h)(2)(B), or as a

[4] The joint notification to the district court of the demise of the Number Nine wind contract was merely to notify the court that Allco's claim seeking to invalidate that contract was moot. A176, AX177. It did not affect any other claim related to the 2013 or 2015 solicitation, or limit the appropriate relief that the district court could order.

market participant, as demonstrated by the standing provided to generators in *Hughes* and *Solomon*.[5]

Connecticut and amici also suggest, tongue-in-cheek, that Eversource's must-buy obligation under section 210 of PURPA eliminates Allco's alleged injuries. In doing so Connecticut seeks to improperly expand the issues in this case to include a review of Connecticut's PURPA Rate 980. Rate 980 has no relevance as to whether unlawful State action here should be invalidated or enjoined. Even if this Court entertained that expansion, Connecticut's Rate 980 is an as-available rate and not the long-term forecasted rate required by 18 C.F.R. §292.304(d)(2)(ii). Connecticut's Rate 980 has resulted in zero renewable energy facilities being built in the past two decades. Connecticut and amici Eversource know that a renewable energy facility cannot be built on the basis of an ever-changing rate. Financing parties will simply not provide the necessary capital to build a facility on that basis. That is one of the reasons why the State-selected generators in the 2015 solicitation would receive 20-year fixed rate contracts. It is surprising that amici and Connecticut even raised the argument because they know that the Massachusetts equivalent of Rate 980 was recently declared unlawful by the federal district court

[5] In *Nazarian*, the Fourth Circuit vindicated the interests of plaintiffs who were market participants 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.

in Massachusetts. *See, Allco Renewable Energy Ltd. v. Massachusetts Electric Co*., 1:15-cv-13515, 2016 U.S. Dist. LEXIS 130617 (D. Mass. September 23, 2016). FERC has also weighed in and declared Connecticut's restricting QFs to Rate 980 as unlawful. *Windham Solar LLC*, 157 FERC ¶61,134 (November 22, 2016). Allco's challenge to Connecticut's unlawful actions here is not diminished by further unlawful actions of Connecticut or Eversource.

B. *Armstrong* Supports A Private Right of Action Under PURPA and the FPA.

Not content with challenging this Court's conclusion in *Allco II* that Allco's action is grounded in PURPA, Connecticut also raises the new argument that the *Hughes*, *Nazarian*, and *Solomon* courts simply whiffed on the issue of whether generators can challenge State intrusion into exclusive federal jurisdiction under the FPA. Connecticut makes its claim based upon footnote 6 in *Hughes* and the Supreme Court's decision in *Armstrong v. Exceptional Child Center, Inc.*, 135 S. Ct. 1378 (2015) ("*Armstrong*").

Contrary to Connecticut's assertion, footnote 6 in the *Hughes* opinion merely noted that it was not deciding whether the filed-rate doctrine, an affirmative defense, was relevant. The footnote does not question whether a cause of action existed, which as a threshold jurisdictional issue would have been one the Supreme Court would have raised *sua sponte* if it thought there was an issue. Regardless, the amicus brief cited in footnote 6 misapprehended FERC's process for filing contracts and its jurisdiction over States. *See infra* at 22-25. Moreover, the Fourth Circuit rejected that jurisdictional argument as "meritless," and this Court should as well. *See Nazarian,* 753 F.3d at 474, fn.1.

Nor does Connecticut's newly minted argument regarding *Armstrong* affect Allco's action. This Court's holding in *Allco II* settles the issue. As an action under 16 U.S.C. §824a-3(h)(2)(B), Congress specifically authorized the action against Connecticut. In any such action FERC's rules under section 210 are enforceable as rules under the FPA, and Connecticut is treated as a person under the FPA. *See*, 16 U.S.C. §§824a-3(h)(1), (h)(2). The district courts are given exclusive jurisdiction over such an action under §824a-3(h)(2)(B) and under the FPA. *See*, 16 U.S.C. §825p.

But even in the absence of the specific authorization under 16 U.S.C. §824a-3(h)(2)(B), *Armstrong* confirms a generator's right to challenge unlawful State actions, and is in accord with the expansive view historically taken by this Court under the FPA, 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) ("We hold that the Federal Power Act gives petitioners a legal right to protect their special interests.")

"The ability to sue to enjoin unconstitutional actions by state and federal officers is the creation of courts of equity, and reflects a long history of judicial review of illegal executive action, tracing back to England." *Armstrong*, 135 S. Ct. at 1384. It never has depended upon the Supremacy Clause. *Id*. The *Armstrong* question is whether the relevant statute demonstrates Congress' affirmative "'intent to foreclose' equitable relief" using the Supremacy Clause's rule of decision. *Id.* at 1385. In *Armstrong*, the majority[6] concluded that two factors *taken together* indicated that Congress precluded forms of relief other than the specific remedies of the Medicaid statute. It was only because those two factors were present that the 5-4 majority was assembled. *First*, "'the express provision of one method of enforcing a substantive rule suggests that Congress intended to preclude others.' *Alexander v. Sandoval*, 532 U.S. 275, 290 (2001)." *Second*, "the judicially unadministrable nature of §30(A)'s text" made it the type of provision suited for the expertise of an agency. Justice Scalia made it clear, however, that the first factor alone—the express provision of a remedy—"might not, *by itself* preclude the availability of" another remedy, but that it was only when that factor was combined with a statute imbued with the necessity for analyzing competing considerations such as maintaining "efficiency, economy, and quality of care" while *trying to create* a system that does not result in "unnecessary utilization of . . . care and services," that militated against another judicial remedy. In his concurring opinion, Justice Breyer—the fifth vote—emphasized that an extra-

[6] In *Armstrong*, four justices joined Parts I, II, and III of Justice Scalia's majority opinion. Only three joined Part IV.

statutory judicial remedy would have involved not just an analysis of, and application of, an existing rule, but the *creation of the regime itself* to take into the competing factors and establish the relevant guideposts.

Neither *Armstrong* factor is present here. The first factor was present in *Armstrong* because Congress provided a remedy, i.e., "the withholding of Medicaid funds." *Id*. at 1385. Here there is no comparable remedy against Connecticut. Absent the specific provision of §824a-3(h)(2)(B) treating Connecticut as a person under the FPA, Connecticut is not subject to FPA jurisdiction. *See*, *Vote Solar Initiative*, 157 FERC ¶61,080 (2016) at P2 (A State "is not an entity that, for purposes of enforcement, the [FERC] may, by order, require to take or not take particular actions.") Even if FERC had jurisdiction to decide whether a contract was pre-empted by unlawful State action—which is a question FERC does not assert it has the authority to decide, *see infra* at 22—it has no ability to issue orders that are binding on the State. In order for the first factor to apply, there must be an "equivalent 'carefully crafted and intricate remedial scheme' for enforcement." *Armstrong*, 135 S. Ct. at 1393 (Sotomayor, J. dissenting). That does not exist against Connecticut under the FPA standing alone. It is difficult to see how it could be concluded that *the absence* of any remedy against Connecticut "suggests that Congress intended to preclude" the traditional action to invalidate and enjoin unlawful State action. Indeed, when Congress intended to exclude a private right of action under specific sections of the FPA, it so stated. *See*, 16 U.S.C. §824v(b).

Nor is the second *Armstrong* factor present. Section 201 of the FPA—the basis for an FPA preemption challenge—deals with the allocation of statutory authority rather than creation of a particular regulatory regime. Section 201 does not contain any "judicially unadministrable" standard.

II. Connecticut Is Unlawfully Regulating Interstate Wholesale Sales of Electricity.

Connecticut has conceded the obvious—the 2015 solicitation does not comply with PURPA. Klee Brief at 19 ("the 2015 RFP … is not a PURPA procurement.") Nevertheless, Connecticut claims that it is not regulating wholesale sales by its compulsion of wholesale sale contracts, but merely "directing utility resource mix decisions" through bilateral contracts. Klee Brief at 31. "There is a saying that if something looks like a duck, walks like a duck, and quacks like a duck, then it is probably a duck." *In re Sorah*, 163 F.3d 397, 401 (6th Cir. 1998); *Sessoms v. Grounds*, 776 F.3d 615, 617 (9th Cir. 2015) (*en banc*). Connecticut plans to compel "bilateral contracts." Those contracts are *interstate wholesale electricity contracts.* Those contracts only come into being through the State's order compelling such contracts. Under no reasonable view can actions taken only because of a State-compelled order be considered *voluntary*. Nor can an order backed by the machinery of State government be considered anything but regulation.

Under no reasonable reading of *Hughes* can *State-compelled wholesale* power contracts be considered permissible. In *Hughes,* Justice Ginsberg listed measures that "States might employ" to encourage renewable energy. The list included only things that do not involve wholesale sales, such as "land grants, direct subsidies, construction of state-owned generation facilities, or re-regulation of the energy sector." *Hughes*, 136 S. Ct. at 1299. A State itself owning renewable generation is not a wholesale sale. Similarly, re-regulation resulting in a State ordering its in-State utility to construct and own a renewable energy plant *within the State's borders*, the electricity from which would be sold to the utility's *retail* customers is not a wholesale sale. Notably, a bilateral contract is *not* on Justice Ginsberg's list of things a State could do to encourage renewable energy, even though the petitioners went to great lengths before the Supreme Court to characterize their contract-for-differences as the equivalent of a long-term bi-lateral power purchase agreement. Indeed, as Allco argued in its opening brief, the notion that a compelled wholesale bilateral contract was somehow permissible was rejected out-of-hand at oral argument. Opening Brief at 52-54. Here, Connecticut's actions "strikes at the heart of the [FERC's] statutory power." *Nazarian,* 753 F.3d at 478. 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 [the defendants]." Opening Brief at 54.

Connecticut also alleges it is not setting rates because the bidder initially proposes the rate. By compelling a wholesale transaction Connecticut is additionally setting the rate for that wholesale sale. *See, Nazarian,* 753 F.3d at 476, *Solomon*, 766 F.3d at 253 ("we agree with the District Court that 'the Board essentially sets a price for wholesale energy sales.'") *See also, PPL EnergyPlus LLC v. Nazarian*, 974 F. Supp. 2d 790, 832 fn. 48 (D. Md. 2013):

> The Court finds unpersuasive Defendants' contention that the contract price is a competitive market price because [the generator] initially proposed that price as part of the RFP. [] *The contract price became operative only after reviewed, evaluated, and accepted by the PSC in an agency order.* [] Accordingly, although it was proposed by [the generator], the contract price in the CfD is a price "set" or "determined" by the PSC.

(Emphasis added.)

But setting a rate is only part of regulating and compelling a wholesale transaction. Exclusive Federal jurisdiction applies to "any rule, regulation, practice, or contract affecting such rate, charge, or classification." *See*, 16 U.S.C. §824e. FPA section 201(b)(1) provides exclusive jurisdiction for wholesale sales and contracts, not just prices or rates. Regardless of whether Connecticut fixes a rate, State authority is pre-empted in all respects over "the sale of electric energy at wholesale" and there is no dispute that the transactions at issue fall within that category.

To make matters worse, just like the contracts in *Hughes*, the contracts that the Defendants plan to compel are indeed tied to the FERC-approved auction market—here the energy market as opposed to the capacity market discussed in *Hughes*. The Connecticut electric distribution utilities—Eversource and United Illuminating Company (the "Connecticut Utilities")—take delivery of the energy at an ISO-New England market node, and simultaneously resell it into the ISO-New England wholesale market. Then each utility gets to recover from ratepayers any loss, and any gain is given over to ratepayers, exactly what was done in *Hughes*. In both *Hughes* and here, the State compels a long-term guaranteed payment stream. In both *Hughes* and here, the product is sold into the FERC-approved market, and there is a financial adjustment upward or downward to account for the difference in the FERC market price and the guaranteed price. *See also*, Opening Brief at 53, fn. 11 for a numerical example.

Connecticut and amici also assert that States retain power to "'direct the planning and resource decisions of utilities under their jurisdiction,'" quoting *Entergy Nuclear Vermont Yankee, LLC v. Shumlin*, 733 F.3d 393, 417 (2d Cir. 2013) ("*Entergy*") ("Vermont Legislature can direct retail utilities to 'purchase electricity from an environmentally friendly power producer in California or a cogeneration facility in Oklahoma,' if it so chooses".) That statement in *Entergy* quoted from the Supreme Court's opinion in *New York v. FERC*, 535 U.S. 1, 8 (2002) ("*New York*") in which the Supreme Court observed merely that the "purchase [of] electricity from an environmentally friendly power producer in California or a cogeneration facility in Oklahoma" was physically possible.[7] It neither says nor implies anything about the power of a State to compel a wholesale transaction from such facilities. Moreover, the language in *Entergy* and in *New York,* 535 U.S. at 24, referencing State jurisdiction of local service issues, resource planning and utility generation and resource portfolios says nothing about that authority reducing FERC's exclusive jurisdiction over wholesale sales. Similarly, Connecticut's attempt to label its actions as affecting only the "buy-side" of a transaction is a distinction without a difference. *See, Nazarian*, 753 F.3d at 476 (FERC's exclusive jurisdiction covers "the supply side" of a wholesale transaction.) And the presumption against preemption does not apply in the interstate energy area. *Nazarian*, 753 F.3d at 477.

States act as a regulator of retail rates and practices, approving utility's resource plans, and regulating the terms on which power plants are built and retired *within their own borders*. *Conn. DPUC v. FERC*, 569 F.3d 477, 481 (D.C. Cir.

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[7] Notably, the use of terms renewable generators together with cogenerators is found in the definition of a QF, so both the *Entergy* court and the *New York* court may have only been referring to QFs.

2009). But the State's power in this regard is not unbounded. As the statute makes clear, States retain such authority "except as specifically provided" by the FPA, 16 U.S.C. §824(b)(1) – and the FPA expressly provides that FERC shall have exclusive authority over wholesale electricity sales.[8]

Defendants and amici also rely on *Midwest Power Systems, Inc*., 78 FERC ¶61,067 ("*Midwest*") and *Southern California Edison Co*., 71 FERC ¶61,269 (1995) ("*SoCal Edison*"), which are FERC orders that "'much like a memorandum of law'" advises the parties of the agency's perspective. *Niagara Mohawk Power Corp. v. FERC,* 117 F.3d 1485, 1488 (D.C. Cir. 1997) (quoting *Indus. Cogenerators v. FERC*, 47 F.3d 1231, 1235 (D.C. Cir. 1995)). Even if those FERC orders had precedential value, they do not support Connecticut's position. Neither *Midwest* nor *SoCal Edison* hold that States may compel wholesale sales with public utilities outside of PURPA. Indeed, in both those cases it was made clear that PURPA constrained the wholesale transactions. To be sure, "renewable generators <u>do not have to be QFs at all</u>," *see*, PURA Brief at 41 (emphasis in original), but that un-remarkable reference in *SoCal Edison* is nothing more than

[8] The language in Section 201(a) of the FPA referencing State authority is a mere policy declaration that does not affect the plain language in the first sentence of Section 201(b)(1). *See, New York*, 535 U.S. at 22 ("we have described the precise reserved state powers language in §201(a) as a mere policy declaration that cannot nullify a clear and specific grant of jurisdiction, even if the particular grant seems inconsistent with the broadly expressed purpose.") (internal quotations and citations omitted.)

FERC observing that even large renewable energy generators can enter into voluntary agreements with utilities. Similarly, Connecticut's citations to other FERC orders are simply inapposite and have nothing to do with the compulsion of a wholesale sale.[9]

Lastly, we are not faced with a generally applicable law, such as the state anti-trust law in *Oneok, Inc. v. Learjet, Inc.,* 135 S. Ct. 1591 (2015), which sought to examine potentially fraudulent behavior designed to increase wholesale and retail rates. That behavior was not a wholesale sale. Nor did *Oneok* involve a State compelling a wholesale sale. *Oneok* simply did not pre-empt State antitrust law enforcement against practices that affected *retail* rates, even though those potentially fraudulent practices may have also affected wholesale rates. This case is direct State compulsion of a specific State-selected wholesale transaction.

Nor are we faced with FERC extending its reach into the retail sphere by regulating demand response as in *FERC v. Elec. Power Supply Ass'n*, 136 S. Ct. 760 (2016) ("*EPSA*"). This case is not about the linkage between retail and wholesale markets. Nor is this case about incidental effects of action in one market potentially affecting the other. This case is a straight-up direct State regulation of

[9] *Exelon Corp*., 121 FERC ¶61,092 (2007) involved a standards of conduct waiver between Exelon's transmission arm and its marketing and energy affiliates. It said nothing about the authority to compel wholesale contracts. Similarly, *Californians for Renewable Energy, Inc., v. National Grid*, 137 FERC ¶61,113 (2011) did not involve a pre-emption claim.

wholesale sales. All aspects of "wholesale sales themselves" are within FERC's exclusive jurisdiction. *EPSA*, 136 S. Ct. at 775, fn. 7.

If Connecticut can compel interstate wholesale sale contracts outside of PURPA under the guise of utility portfolio regulation, then the exception has swallowed the whole. Tellingly, neither Connecticut nor amici contend otherwise. A wind generator today may be a coal plant or nuclear plant tomorrow. If this Court approves Connecticut's actions, then it would also be setting a precedent for other States, such as West Virginia and Wyoming, to promote their coal generation priorities through compulsion of wholesale sales, further sabotaging QF generation. To make matters worse, a ruling for Connecticut would make the authority Congress provided to States under section 210 of PURPA superfluous. Neither Connecticut nor amici argue to the contrary.

Under the guise of regulating utility purchasing decisions, States could simply take over the entire wholesale market, effectively eliminating FERC's regulatory power. 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 20-year fixed-rate contract, but only for facilities meeting the design standards for QFs. 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 FERC's approved market mechanisms and Congress' preference for QF generation.

Nor do the defendants or amici contend that Connecticut's environmental goals could not be easily addressed within the confines of the design standards for generators set by Congress in section 210 of PURPA. This case is *not* about choosing between addressing environmental goals and adhering to the plain language of the FPA. Congress has already provided a path for both—section 210 of PURPA, and States that have chosen to follow that path have met great success.

III. FERC Has Not Sanctioned Connecticut's Solicitations.

FERC has not sanctioned Connecticut's actions. Connecticut's and the amici's musings about what the Solicitor General meant in its amicus brief in *Hughes* are irrelevant.[10] FERC had an opportunity to take a position in this case when FERC reviewed Allco's petition for enforcement. FERC declined.

A. The MOPR And Reg. 35.27.

The ISO-New England minimum price offer rule ("MOPR") and its limited renewable energy exception neither grants nor approves of State authority to do anything. *First*, the existence of the MOPR, which the State-selected generators

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[10] The Solicitor General's observations regarding *Allco I* simply restated the court's holding. It did not state that the Solicitor General agreed with the court's holding.

cleared, did not excuse Maryland's or New Jersey's unlawful regulation of wholesale sales. *Nazarian*, 753 F.3d at 479. The fact that a limited amount of renewable energy facilities can clear the MOPR through an exception is also irrelevant. In fact, FERC has specifically disclaimed that the MOPR was passing any substantive judgments on State's actions. *Id*. *Second*, States have the ability to promote renewable generation by compelling wholesale sales with QFs or ordering the Connecticut Utilities to build in-state renewable generation that they would own in order to service their retail load. The limited exception to the MOPR might allow those facilities to participate in the capacity market. *Third*, the fact that the renewable energy exception to the MOPR is, in fact, limited, is a clear expression that it in no way confers an unlimited ability on States to engage in policies that result in the construction of new generation. *Fourth,* the plain language of the MOPR exception just provides a classification—Renewable Technology Resource—it does not validate illegal State actions. As amici Eversource's citation to footnote 59 on *ISO-New England Inc*., 155 FERC ¶61,023 (2016) makes clear, the state actions must be "legitimate state actions."

Similarly, FERC's section 35.27 regulation does not grant or approve of State authority to do anything. Regulation 35.27 simply says that nothing in FERC's tariff schedule filing regulations, 18 C.F.R. part 35-Filing of Rate

Schedules and Tariffs, is intended to eliminate State actions that *are otherwise lawful*. 18 C.F.R. §§35.27 (a), (b).

B. FERC Could Not Sanction The Regulation By Connecticut Of Interstate Wholesale Sales.

In Connecticut's view, FERC has delegated it the right to regulate interstate wholesale sales outside of PURPA. In addition to the lack of any language of such purported delegation in the FPA or FERC's regulations, Connecticut's argument would require Federal courts to hold that the purported delegation of authority was constitutional.

Congress gave FERC the exclusive authority to regulate wholesale sales with the narrow exception of PURPA. It did not authorize a further delegation by FERC to the States. States are not vested with "legislative Powers." Art. I, §1. Nor are they vested with the "executive Power," Art. II, §1, cl. 1. The State's rules would not go through the process for notice and comment under the Administrative Procedure Act, *see* 5 U.S.C. §551 *et seq*. (the "APA"). A State is not constrained by the APA, one of the critical "accountability checkpoints." *See INS v. Chadha*, 462 U.S. 919, 959 (1983). "It would dash the whole scheme if Congress could give its power away to an entity that is not constrained by those checkpoints." *See, DOT v. Ass'n of Am. R.R.*, 135 S. Ct. 1225, 1237 (2015) (Alito, J. concurring). Yet that is what would result if States were provided any authority by FERC to regulate wholesale sales outside of PURPA.

C. It Is Well-Settled That The Determination Of The Validity Of A Contract Is For the Courts And A Filing Of The State-Selected Generator's Contract Is A Nullity.

Connecticut and the amici also argue that the State-compelled contracts would, when executed, be freely negotiated, voluntary contracts subject to FERC's review as to reasonableness under the *Morgan Stanley* line of cases.[11] That argument too was rejected in *Nazarian* and *Solomon*. *Solomon*, 766 F.3d at 253 ("this argument conflates the inquiry into [the State's] field of regulation with an inquiry into the reasonableness of [rates].") The bilateral contracts here are interstate wholesale electricity contracts that only come into being through the State's order compelling the utilities to enter into such contracts. Under no reasonable view can actions taken only because of a State-compelled order be considered *voluntary*. The *Morgan Stanley* defense is simply inapplicable. *Solomon*, 766 F.3d at 253 ("whether the Standard Offer Capacity Agreements pick 'just and reasonable' capacity prices is beside the point.") Further, when the State-selected generators attempted to file the contracts with FERC—then asserting that the contracts were in fact FERC-jurisdictional—FERC rejected the filings as a nullity because it is for the courts to decide in the validity of the contracts in the first instance. *See, CPV Shore, LLC*, 148 FERC ¶61,096 at P28 (2014) (stating "[i]n considering whether the rates, terms, and conditions in a contract are just,

[11] *Morgan Stanley Capital Grp. Inc. v. Pub. Util. Dist. No. 1 of Snohomish Cnty*, 554 U.S. 527 (2008).

reasonable, and not unduly preferential or discriminatory under the FPA the contract must first be a valid contract. The Commission must reject a rate filing that is a nullity.")

Connecticut's intrusion into FERC's exclusive jurisdiction cannot be cured by a State-selected generator filing its power contract with FERC seeking approval from FERC for market based rate authority, as the *Nazarian* and *Solomon* generators' failed attempt to do so shows. Here, the contracts would be the product of unlawful and pre-empted state action, and thus void. A prospective future market based rate filing years in the future[12] does not cure the fact that the contract is the product of illegal state action now for the simple reason that an agreement that is compelled based upon illegal state action is void *ab initio* and no subsequent action can bring life back to a void contract. The question of whether a contract is the product of unlawful state action is a question for the courts, not FERC.

Moreover, Connecticut and amici offer no basis upon which FERC could accept the contracts. They have not explained why, if the contracts are "market-based rate" transactions, the generators would even be filing them. In Order No. 2001, FERC made clear that market-based rate contracts, other than affiliate

[12] A filing for market-based rate authority cannot be filed earlier than 120 days before the commercial operation date of the facility.

contracts (*i.e.*, contracts to which *Allegheny* would be relevant[13]) should not be filed and should instead be reported in the relevant market-based rate seller's electric quarterly reports.[14] Since that time, FERC has consistently rejected sellers' attempts to file individual market-based rate contracts, stating that "agreements under market-based rate tariffs *shall not* be filed with the Commission."[15] Moreover, even when FERC required the filing of market-based rate contracts prior to the implementation of Order No. 2001, FERC made clear that the filings were "not traditional [FPA] section 205 filings, but rather [we]re informational filings submitted in response to the filing requirements found in the orders granting market-based rate authority."[16] FERC further made clear that it was "not required by the FPA to act on such filings," or "to find that such agreements themselves are just and reasonable," and that "the filing of such agreements d[id] not serve as a vehicle to challenge the justness and reasonableness of either the agreements

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[13] *See, Allegheny Energy Supply Co., LLC*, 108 FERC ¶61,082 (2004) ("*Allegheny*"), which is about standards involving voluntary contracts between franchised public utilities and their affiliates (involving no state action whatsoever) and the affiliate abuse problems that arise in the case of such contracts.

[14] *See, Revised Public Utility Filing Requirements*, Order No. 2001, FERC Stats. & Regs. ¶31,127 at P7.

[15] *Westar Energy, Inc.*, Docket No. ER06-1429-000 (Oct. 10, 2006) (unreported) (emphasis added); *First Energy Corp.*, Docket Nos. ER06-1386-000 (Oct. 4, 2006) (corrected Oct. 10, 2006) (unreported) (same).

[16] *GWF Energy LLC*, 97 FERC ¶61,297 at ¶62,391 (2001), *reh'g den.*, 98 FERC ¶61,330 (2002).

themselves or the underlying market-based rate authority."[17] Even if FERC were to ignore the fact that the contracts are substantive nullities, it would still be compelled to reject the Connecticut state-selected generators' filings as unnecessary and unjustified under its market-based rate filing rules. Thus, any attempt by Connecticut or amici to convince this Court that FERC would be approving the contracts in connection with a market-based rate authority filing is simply incorrect.

IV. The Injunction Should Be Maintained.

Connecticut is unlawfully regulating interstate wholesale electricity contracts and Allco has met the standards for injunctive relief. Connecticut has failed to articulate any tangible harm that will befall it or the public by enjoining awarding and approving contracts from the 2015 solicitation. The Defendants issued the 2015 solicitation, and all bidders responded, knowing of Allco's challenge. A cancellation of the solicitation, or a re-issuance of a PURPA-compliant solicitation, were possibilities of which the Defendants and all bidders were keenly aware when they commenced and participated in the process. *See*,

[17] *Id. See also*, *Pub. Utils. Comm'n v. Sellers of Long Term Contracts*, 100 FERC ¶61,098 at P16 (FERC acceptance of market-based rate contract did not mean that "the Commission has determined the justness and reasonableness of the . . . contract").

Allco's March 27, 2015, public comment letter: https://cleanenergyrfp.com/archived-documents-and-public-comments-2/.

Connecticut's environmental policy goals can be fulfilled by a PURPA-compliant solicitation, and it does not contend otherwise. Thus there is no harm to state environmental goals. Under section 210 of PURPA, the Defendants have the ability to compel the 20-year wholesale contracts that they seek in the current solicitation. Connecticut simply desires to proceed as it sees fit, making that authority superfluous and ignoring the FPA's restriction on State regulation of wholesale sales and Congress' QF design standards. If Connecticut can unilaterally remake regional interstate wholesale energy markets, and retroactively abrogate the federal government's policy of promoting renewable energy QFs, all under the guise of purported important state policies, then other States could do the same. Such a loophole would allow States unlimited ability to compel wholesale transactions that support the political whims of a State, further sabotaging QF development and efforts to combat climate change. Congress has precluded that possibility by banning State regulation of wholesale sales of electricity except with plants meeting the design standards of a QF. Congress has declared that it is in the public interest that States not have any ability to regulate wholesale sales of electricity unless *promoting* QF generation, which Connecticut concedes it is not doing.

V. NEPOOL's Ruling And Connecticut's Litigation Undercuts Defendants' Factual Assertions Regarding Its Discrimination Against Out-of-Region RECs.

As Allco argued in its opening brief, Connecticut is not acting as a market participant; it is acting as a regulator. Nor is Connecticut is merely spending "ratepayer" funds. Connecticut is a de-regulated State and generation suppliers do not get to recover their costs of renewable energy credits ("RECs") through typical utility cost recovery. Rather the cost of RECs is merely a cost of goods sold which suppliers may or may not be able to cover in retail rates.

The Defendants and the amici, like the District Court, continue to make arguments based upon factual assertions that are not based on any evidence in the record. Their collective argument boils down to factual assertions that RECs from facilities in ISO-New England or an adjacent control area are not similarly-situated to RECs from either Allco's New York or Georgia facilities. That is not true. RECs are not a product created solely by Connecticut. RECs represent the environmental attributes of electrical generation. Electricity generated by a solar facility in Georgia has the same environmental attributes as electricity generated by a solar facility in Vermont. Both contribute equally to displacement of carbon dioxide and other harmful pollutants. The purpose of the dormant Commerce Clause is to ensure that [r]ivalries among the States are . . . kept to a minimum, and a proliferation of trade zones is prevented." *Granholm v. Heald*, 544 U.S. 460, 472

(2005).[18] What Connecticut has done is created a regulatory trade zone that discriminates against out-of-region RECs based upon the artificial boundaries of the ISO-New England accounting system.

As Allco argued in its opening brief, all the Defendants and the amici's arguments are undercut by the NEPOOL's ruling in *In the Matter of the Appeal Case Brookfield Energy Marketing, Inc*., No. 02-NE-BD-2008 (NEPOOL Board of Review 2009) ("NEPOOL Ruling"). The ISO-New England geographical boundaries are simply an accident of an artificially created management system and "change as markets develop." *Id*. at 9.

NEPOOL rejected the contention "that New England can only benefit (or *will benefit more*) from renewable generation within the restricted area." *Id*. at 10. (Emphasis added.) NEPOOL noted that "argument is inconsistent with the States' positions in the RGGI (Regional Greenhouse Gases Initiative) agreement and also with the lawsuits filed by the New England States . . . which aim to reduce coal fired generation and to promote 'cleaner' generation, including renewable energy, in areas very remote from New England such as Ohio and West Virginia." *Id*. The NEPOOL ruling was referring to lawsuits filed by Connecticut and other New

[18] Defendants' references to operation of the ISO-New England electric grid, including its fuel diversity, reliability and price volatility are all matters within the jurisdiction of ISO-New England and FERC. Thus, they would not justify discriminatory State actions designed to intrude into those areas.

England States against facilities in Ohio and other far away States because those facilities affected New England's air quality. *See, e.g., Connecticut v. Am. Elec. Power Co.*, 582 F.3d 309 (2d Cir. 2009) *rev'd* 564 U.S. 410 (2011). Connecticut wants to have its cake and eat it too. On the one hand, it complains that far-away generators are polluting Connecticut's environment, but when it comes to regional protectionism, Connecticut sings the opposite tune. As NEPOOL stated "the 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." NEPOOL Ruling at 10.[19]

To make matters worse, Connecticut's trade zone interferes with the United States' obligations under the now in-force Paris Agreement under the United Nations Framework Convention on Climate Change (the "Paris Agreement"). Climate change and the free trading of environmental attributes is a national concern, and now a national obligation. As the various environmental amici state, the climate change attributes of a solar facility in Georgia are identical to a solar facility in ISO-New England. *See*, NRDC Brief at 31. The United States' commitment in the Paris Agreement is to achieve specified Intended Nationally Determined Contributions and to "aim to reach global peaking of greenhouse gas

[19] Allco does not challenge Connecticut's separate incentives for what are known as ZRECs and LRECs (which are small in-state renewable generation facilities) because under the FPA, a State has the right to incentivize, and thus favor, *in-State* facilities so long as the State is not compelling wholesale sales.

emissions as soon as possible [] and to undertake rapid reductions thereafter." Connecticut's trade zone substantially interferes with the national market for environmental attributes that are necessary for compliance with the Paris Agreement.

CONCLUSION

This Court should reverse the District Court, maintain the existing injunction, and order the District Court to continue the injunction against Connecticut.

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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 6,999 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 Times New Roman font using Microsoft Word.

/s/ Thomas Melone

CERTIFICATE OF SERVICE

I hereby certify that on the 29th day of November, 2016, I caused to be served, using the Court's CM/ECF system, a copy of the foregoing Appellant's Reply Brief to all counsel of record.

/s/ Thomas Melone