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 IN SUPPORT OF EMERGENCY MOTION FOR AN INJUNCTION PENDING APPEAL

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October 10, 2016

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

INTRODUCTION

An injunction prohibiting the Defendants from awarding and/or approving interstate wholesale electricity contracts while this appeal is pending is needed to *maintain* the *status quo*. As of now, no interstate wholesale electricity contracts have been compelled or approved from the current solicitation. Allco's motion for relief, which is described in Fed. R. App. P. 8(a)(1)(C) ("an order … granting an injunction while an appeal is pending"), seeks to retain that status.

ARGUMENT

I. The Defendants Have Not Asserted Any Harm To Them Or The Public Interest If The Injunction Is Issued.

Defendants have failed to articulate any tangible harm that will befall them or the public *by delaying* awarding and approving contracts while this appeal is pending. Defendants merely use generalized language that an injunction would "threaten" the solicitation, "interfere" with State policies, and "immediately affect" the bidders. Opposition ("Opp.") at 14. Clearly, the purpose of this litigation is to "interfere" with Connecticut's unlawful policy of violating the Federal Power Act, *see* 16 U.S.C. §791a *et seq*. ("FPA") and the Public Utility Regulatory Policies Act, Pub. L. No. 95-617, 92 Stat. 3117 ("PURPA"). The Defendants cannot claim harm from interference with the unlawful conduct at the heart of this suit. Moreover, the Defendants issued the 2015 solicitation, and all bidders responded, knowing of Allco's challenge. A delay of the process, a cancellation of 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*, Allco's March 27, 2015, public comment letter: https://cleanenergyrfp.com/archived-documents-and-public-comments-2/.

The Defendants' environmental policy goals can be fulfilled by a PURPA-compliant solicitation, and they do 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. The Defendants simply desire to proceed as they see fit, making that authority superfluous and ignoring the FPA's restriction on State regulation of wholesale sales and Congress' QF[1] design standards. If the Defendants 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. One State might prefer coal plants, another gas plants, still others nuclear or other forms of electric generation.

[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).

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 the Defendants concede they are not doing. Thus the public interest factor strongly favors Allco's motion.

II. The Defendants' Opposition Confirms That Allco Satisfies The Irreparable Harm Criteria.

The Defendants' opposition cites *Allco Finance Ltd. v. Klee,* 805 F.3d 89 (2d Cir. 2015) ("*Allco II")*, where this Court held that Allco did not have standing to challenge *specific* State-compelled contracts. *See*, 805 F.3d at 98, Opp. at 9-10. While that holding is in tension with the standing provided to generators in *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*"), it means that without an injunction, the Defendants will compel wholesale transactions and run out the clock, resulting in a hollow victory if this Court later rules in Allco's favor.

III. Allco Has Standing To Challenge Defendants' Actions.

The Defendants have failed to even mention Allco's primary claim of standing under 16 U.S.C. §824a-3(h)(2)(B). Nor have they addressed Congress' "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). "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. Congress defined the injury, and based upon its judgment of the working of the Nation's energy markets also defined those that have a concrete and particularized stake—qualifying small power producers, electric utilities and qualifying cogenerators. Congress also prescribed the redress that would remedy the injury by authorizing the district court to enjoin the offending actions and provide other appropriate relief. The Defendants' opposition only focuses on Allco's alternative bases for standing. Thus, at least for purposes of this motion, the Defendants' failure to contest Allco's standing under 16 U.S.C. §824a-3(h)(2)(B) should establish that Allco is likely to succeed on standing.

With respect to Allco's alternative bases for standing, the Defendants assert that none of Allco's injuries are redressable because the Commissioner has no authority under Connecticut law to issue a PURPA-compliant solicitation. Not so, as the terms of the solicitation demonstrate. Nothing in the Connecticut enabling statutes provides for a minimum 20 megawatt ("MW") size in order to participate.

Yet the Commissioner imposed that limitation, excluding Allco QFs. A114 ¶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 size 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.

The Defendants also rely 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 motion, in tension with the standing provided to the generators in *Hughes*, *Nazarian* and *Solomon*. In each of those cases, the generators complained of the adverse effects on sales and market opportunities *in the future*. By definition, 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. A114 ¶¶30-32, A119 ¶¶53, 54, 56, 57, A120 ¶62. Further, as Allco explained in its motion, 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 (D.C. Cir. 1998) (a market participant does not need to wait until lower sales occur). And, as Allco explained in its motion, basic economic theory and decades of federal agency practice support Allco's position that it is surely *plausible* that the Defendants' actions, if not prevented or nullified, would injure Allco.

The Defendants' additional claim that Allco "declined to participate" in the current solicitation is an inaccurate red herring. Allco's QFs under 20 MWs were banned from participating. A114 ¶36. Allco's QFs greater than 20 MWs did not participate because of the unlawful terms and competition. A115 ¶¶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.

The Defendants also challenge Allco' standing based on the district court's double-level of conjecture analysis. But as Allco explained in its motion and 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 qualifying small power producer under 16 U.S.C. §824a-3(h)(2)(B), or as a market participant, as demonstrated by the standing provided to generators in *Hughes* and *Solomon*.

IV. Allco Is Likely To Succeed On The Merits.

The Defendants have conceded the obvious—the Defendants' 2015 solicitation does not comply with PURPA. Opp. at 10 ("the 2015 RFP … is not a PURPA procurement.") Nevertheless, the Defendants' claim that they are not regulating wholesale sales by their compulsion of wholesale sale contracts, but merely "directing utility resource mix decisions … through bilateral contracts." Opp. at 14. "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*). The Defendants plan 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, which the excerpt from oral argument in *Hughes* cited in Allco's motion plainly shows.

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." 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 as a bilateral contract.

The Defendants also allege they are not setting rates because the bidder initially proposes the rate (an argument rejected in *Solomon* and *Nazarian* because the rate, like the contract, only comes into force through the order of the State.) 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 the Defendants fix 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 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 the 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 for the wholesale sale for the energy. 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*, A63, fn. 11 for a numerical example.

Lastly, the Defendants 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) ("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) 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. It neither says nor implies anything about the power of a State to compel a wholesale transaction from such facilities.

Rather 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. Dep't of Pub. Util. Control v. FERC*, 569 F.3d 477, 481 (D.C. Cir. 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.

The Defendants' exclusion of certain QFs, allowing increased competition from non-QFs, and its planned actions to force the Connecticut Utilities to enter wholesale power contracts with non-QFs through the State's command and control process plainly constitutes regulation in the field of wholesale energy sales, and no exception exists validating such action.

CONCLUSION

For the above reasons and those in Allco's motion, this Court should issue the requested injunctive relief.

Dated: October 10, 2016

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CERTIFICATE OF SERVICE

I hereby certify that on the 10th day of October, 2016, I caused to be served, using the Court's CM/ECF system, a copy of the foregoing Reply In Support of Allco's Emergency Motion to all counsel of record.

__*/s/ Thomas Melone*_________