16-2946 & 16-2949

To Be Argued By:
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Assistant Attorney General

IN 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

KATHERINE S. DYKES, JOHN W. BETKOSKI, III and MICHAEL CARON, in their Official Capacities as Commissioners of the Connecticut Public Utilities Regulatory Authority
Defendants-Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

BRIEF OF KATHERINE S. DYKES, JOHN W. BETKOSKI, III and MICHAEL CARON

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COUNTER JURISDICTIONAL STATEMENT

Jurisdiction for this appeal is predicated upon 28 U.S.C. § 1291, inasmuch as an order of the District Court was issued on August 18, 2016.

This Court lacks jurisdiction over plaintiff's action to enjoin Connecticut's renewable energy procurements because plaintiff lacks standing and fails to state a claim upon which relief can be granted. This case is not an enforcement action under Public Utilities Regulatory Policies Act of 1978 ("PURPA") Pub. L. No. 95-617, § 208, 92 Stat. 3117 (1978), which established a private right of action at 16 U.S.C. § 824a-3(h)(2)(B). Plaintiff's complaints do not cite § 824a-3(h)(2)(B) or refer to its provisions, nor does plaintiff seek to enforce PURPA's provisions. Rather, plaintiff seeks to "enforce" the Federal Power Act, codified at 16 U.S.C § 791a, *et seq*. However, plaintiff fails to identify any provision of the Federal Power Act that Connecticut violated.

This case is not an action under the Supremacy Clause of the United States Constitution, Art. VI, cl. 2. No statute authorizes plaintiff's claim, and the Supremacy Clause does not confer upon private actors any implied right of action to seek injunctive relief against the enforcement or implementation of state legislation.

The District Court properly dismissed plaintiff's action to enjoin Connecticut's renewable energy procurements.

COUNTER STATEMENT OF THE ISSUES

1. Whether the District Court properly dismissed plaintiff Allco's two preemption claims for lack of standing?
2. Whether the District Court's decision may be affirmed on the alternate grounds that Connecticut's renewable energy procurements are a proper exercise of state authority and state reserved authority under the Federal Power Act?
3. Whether the District Court properly dismissed plaintiff's dormant Commerce Clause challenge to a program created by Connecticut to subsidize renewable energy generation because Connecticut created the unique commerce at issue?
4. Whether the District Court properly denied plaintiff's Motion for Injunctive Relief?

COUNTER STATEMENT OF THE CASE

The plaintiff, Allco Finance Limited ("Allco" or plaintiff), has brought a series of lawsuits seeking to stop or direct renewable energy procurements conducted by the State of Connecticut. Filed in 2013, the first of these lawsuits was dismissed by the U.S. District Court. *Allco Fin. Ltd. v. Klee*, No. 3:13-cv-874 (JBA), 2014 WL 7004024 (D. Conn. 2014) ("*Allco I*"). The District Court's dismissal was affirmed on different

grounds by this Court. *Allco Fin. Ltd v. Klee*, 805 F.3d 89 (2d Cir. 2015) ("*Allco II*").

This appeal arises from the District Court's single omnibus dismissal of plaintiff's next two lawsuits. Both cases, 3:15-cv-608 (CSH) and 3:16-cv-508 (CSH), are captioned *Allco v. Klee, et al.*, and share the same plaintiff and same defendants. Both complaints challenge Connecticut state-law renewable energy procurements on the basis of preemption under the Supremacy Clause of the United States Constitution, Art. VI, cl. 2. Only 3:15-cv-608 challenges Connecticut's system of subsidizing renewable energy, known as renewable energy certificates, based upon an alleged violation of the dormant Commerce Clause.

Both complaints were dismissed in a single omnibus ruling dated August 18, 2016. See Joint Appendix at A159, A200-01; AX160, AX201-02. Specifically, plaintiff's preemption claims were dismissed for lack of standing and its dormant Commerce Clause claim was dismissed for failure to state a claim upon which relief could be granted. Judgment was entered in both cases on August 23, 2016. A202; AX203.

Plaintiff timely filed Notices of Appeal in both cases. A204; AX204. A motions panel granted a temporary injunction on November 2, 2016. Docket No. 16-2946, Doc. #87. This Court is considering plaintiff's appeals on a consolidated and expedited basis. The defendants respectfully request that the injunction

be immediately lifted and the District Court's decision be affirmed.

COUNTER STATEMENT OF THE FACTS

Plaintiff alleges it owns, operates and develops solar projects that are Qualifying Facilities ("QF") under the Public Utilities Regulatory Policies Act of 1978, Pub. L. No. 95-617, § 208, 92 Stat. 3117 (1978) ("PURPA"). Complaint, ¶13, A7; Complaint, ¶16, AX6. A QF is a generating facility that meets certain standards set by the Federal Energy Regulatory Commission ("FERC") regarding matters such as size, fuel use, and efficiency. Plaintiff owns QF projects, some of which are smaller than 20 megawatts (MW), and others are larger than 20MW. Plaintiff's Opening Brief ("Brief"), p. 19.

Katherine S. Dykes, John W. Betkoski, III, and Michael Caron are Utility Commissioners of the Public Utilities Regulatory Authority ("PURA"). PURA is a state agency that regulates investor-owned public utilities in Connecticut. Robert Klee is the Commissioner ("Commissioner") of the Connecticut Department of Energy and Environmental Protection ("DEEP"). DEEP has responsibilities related to energy policy and planning. See, e.g., Conn. Gen. Stat. § 16a-3.

Three Connecticut statutes authorize Commissioner Klee to solicit power purchase agreements ("PPA") with electric generating resources (or similar resources) to meet state public

policy purposes by issuing requests for proposals ("RFPs"). These statutes are Conn. Gen. Stat. §§ 16a-3f, 16a-3g, and 16a-3j.[1]

Conn. Gen. Stat. § 16a-3f authorizes Commissioner Klee to select proposals for Class I renewable energy sources that meet up to four percent of the load of Connecticut's electric distribution companies. Commissioner Klee is authorized by Conn. Gen. Stat. § 16a-3g to select proposals for Class I renewable energy sources and large-scale hydropower that meet up to five percent of the load of Connecticut's electric distribution companies. Conn. Gen. Stat. § 16a-3j(c) permits the Commissioner to solicit proposals from renewable energy sources, verifiable large-scale hydropower and associated transmission, and energy storage systems. Subsection (g) of that section limits the amount of resources to be procured under the statute.

Under each statute, Commissioner Klee conducts the RFP and selects the winning bidder(s), if any, based upon price and consistency with state emission goals and energy strategy goals,

[1] Conn. Gen. Stat. § 16a-3f is the codification of Section 6 of Public Act 13-303, *An Act Concerning Connecticut's Clean Energy Goals*, while § 16a-3g is the codification of Section 7 of Public Act 13-303. Section 1 of Public Act 15-107, *An Act Concerning Affordable and Reliable Energy*, is codified in the 2016 Supplement to the Connecticut General Statutes at § 16a-3j, and may be found at: https://www.cga.ct.gov/2016/sup/chap_295.htm#sec_16a-3j.

and other enumerated criteria. Under each statute, Commissioner Klee may reject some or all bids. None of the procurement statutes require a minimum amount to be procured. None of the procurement statutes obligate Commissioner Klee to issue another RFP if some or all bids are rejected.

Each statute provides that if any bids are selected, Commissioner Klee may direct state electric distribution companies to enter long-term contracts with the winning bidder(s) for products such as energy, capacity and environmental attributes. Successfully negotiated contracts between electric distribution companies and winning bidders must be submitted to and approved by PURA.

In 2013, Commissioner Klee conducted an RFP under Conn. Gen. Stat. § 16a-3f ("2013 RFP"). Plaintiff submitted bids into the 2013 RFP, but was not selected. Complaint, ¶¶27, 28, AX9. Commissioner Klee instead selected two winning projects, Fusion Solar Center LLC ("Fusion Solar") and Number Nine Wind Farm LLC ("Number Nine Wind"). AX47. Combined, the two projects represented 3.5% of electric distribution company load, leaving Commissioner Klee remaining authority under Conn. Gen. Stat. § 16a-3f to procure an additional 0.5% of load. AX49.

Both winning projects entered into contracts with Connecticut's electric distribution companies, Eversource Energy d/b/a The Connecticut Light and Power Company and The United

Illuminating Company. The Number Nine Wind and Fusion Solar contracts were submitted to PURA, which approved the agreements. In July of 2016, the Number Nine Wind power purchase agreement was terminated because Number Nine Wind was unable to meet certain milestones set forth in the agreements. A176; AX177.

On November 12, 2015, Commissioner Klee issued an RFP based upon Conn. Gen. Stat. §§ 16a-3j(c), 16a-3g and his remaining authority under 16a-3f (the "2015 RFP"). AX68. The 2015 RFP required eligible projects to have a minimum nameplate rating (a measure of generating capacity) of 20MW or greater. A42. Plaintiff did not submit a bid into the 2015 RFP. Complaint, ¶35, AX10. The Commissioner also issued an RFP pursuant to § 16a-3j(b) and (c), which sought bids from projects sized between 2 and 20MW, but plaintiff did not respond to that RFP either. A184; AX185. On October 24, 2016, the Commissioner completed his selection of projects in the 2015 RFP. Docket No. 16-2946, Doc. #75. The winning bidders and contracting utilities entered negotiations and any executed contracts will then be filed for review before PURA. *Id*.

In February of 2014, Allco filed its *Allco I* lawsuit to void the Number Nine Wind contracts resulting from the 2013 RFP. *Allco I* at *2, n.1. The PURA Commissioners were not defendants in *Allco I*. The *Allco I* lawsuit consisted of two counts. Count I alleged a violation of the Federal Power Act, 49 Stat. 847,

codified at 16 U.S.C § 791a, *et seq*. ("FPA") and the Supremacy Clause, and plaintiff sought a declaratory judgment that the contracts with the Number Nine Wind Project were invalid. *Allco I* at *2, n.1. Plaintiff also sought injunctive relief to enjoin Commissioner Klee from further purported violations of the FPA and PURPA. *Allco I* at *2, n.1. Count II asserted a violation of 42 U.S.C. § 1983. *Allco I* at *2, n.1. Plaintiff asserted that the contracts with the Number Nine Wind project were improper because, *inter alia*, that project was too large to be a small power production facility[2] under PURPA.[3] *Allco I* at *7, n.7. Plaintiff also asserted that Commissioner Klee's actions in the procurement set wholesale rates in violation of the FPA. *Allco I* at *2.

The District Court dismissed plaintiff's lawsuit based upon lack of standing and failure to state a cause of action upon which relief can be granted. *Allco I* at *1. Judge Arterton held that plaintiff lacked standing to challenge the 2013 RFP because plaintiff was a disappointed bidder. *Allco I* at *5. Also, plaintiff failed to demonstrate that it is likely, as opposed to merely speculative, that its alleged injury will be

[2] Small power production facilities are defined at 16 U.S.C. § 796(17)(A), have a power production capacity of no more than 80MW, and use biomass, waste, or other renewable resources as a primary energy source.

[3] Plaintiff clarified at oral argument before the District Court in *Allco I* that it did not seek to invalidate the Fusion Solar contract. *Allco I* at *7, n.7.

redressed by a favorable decision. *Allco I* at *5. It did not necessarily follow that Allco's projects would have been selected if the Number Nine Wind and Fusion Solar projects were voided, or that the Commissioner would have taken any action at all. *Allco I* at *5. The District Court also dismissed plaintiff's 42 U.S.C. § 1983 claim as the FPA does not create any individual federal rights that can be enforced under § 1983. *Allco I* at *10.

Judge Arterton also held that plaintiff failed to state a valid claim, because Commissioner Klee did not set wholesale rates, and Conn. Gen. Stat. § 16a-3f is consistent with the powers reserved to states under the FPA. *Allco I* at *9. Further, Judge Arterton held that § 16a-3f is "devoid of any … market-distorting features that encroach on FERC's exclusive jurisdiction over setting wholesale rates." *Allco I* at *10.

Plaintiff appealed to this Court, which affirmed the District Court's dismissal on alternate grounds. *Allco Fin. Ltd. v. Klee*, 805 F.3d 89, 91 (2d Cir. 2015) ("*Allco II*"). This Court held: 1) PURPA's private right of action forecloses claims brought by plaintiff under 42 U.S.C. §§ 1983 and 1988; 2) plaintiff, a QF, could not bring an action to vindicate specific rights conferred by PURPA in district court without first exhausting administrative remedies; and 3) plaintiff lacked standing to bring a preemption claim that seeks solely to

invalidate the results of the 2013 RFP. *Allco II*, 805 F.3d at 91. This Court held invalidating the results of the 2013 RFP would "simply deny Allco's competitors a contractual benefit without redressing Allco's injury – its not being selected for a [Conn. Gen. Stat. § 16a-3f] contract." *Allco II*, 805 F.3d at 98.

While *Allco II* was pending, plaintiff filed the first of two lawsuits before the bar in this appeal. On April 26, 2015, plaintiff sued Commissioner Klee and the PURA Commissioners. *Allco Fin. Ltd. v. Klee*, No. 3:15-cv-608 (CSH) ("*Allco III*"). A4. *Allco III* is directed at the 2015 RFP, and alleges a slightly different preemption argument than in *Allco I*. Instead of claiming that Connecticut violated PURPA and the FPA by allegedly setting wholesale rates outside of PURPA, plaintiff claims in Count I that Connecticut violated PURPA and the FPA by issuing an RFP under which Connecticut would direct its regulated utility to enter a wholesale electric contract. Complaint, ¶5, A6. According to plaintiff, this action constitutes regulation of wholesale sales in violation of the FPA, because Connecticut purportedly may only direct its regulated utility to enter a wholesale electric contract if acting under PURPA. Complaint, ¶21, A9; ¶45, A14. In Count II of Allco III, plaintiff alleges Connecticut's implementation of its renewable energy portfolio standard violates the dormant

Commerce Clause. Complaint, ¶68, A19. Count III asserted similar §§ 1983 and 1988 claims as asserted in *Allco I*. Complaint, ¶¶72-80, A20-21.

Subsequent to this Court's decision in *Allco II*, plaintiff filed at FERC on November 9, 2015 a petition for enforcement under PURPA's Section 210(h)(2)(B), codified at 16 U.S.C. § 824a(h)(2)(B). The petition alleged that the 2013 and 2015 RFPs violated or would violate PURPA, and asked FERC to invalidate the 2013 RFP and permanently enjoin Connecticut from completing the 2015 RFP and other associated regulatory steps. On January 8, 2016, FERC issued a Notice of Intent Not to Act on plaintiff's petition. *Allco Renewable Energy Ltd. Allco Fin. Ltd.*, 154 FERC ¶ 61007, 2016 WL 126022 (Jan. 8, 2016). FERC's Notice neither validated nor invalidated the legal theories that formed the basis of plaintiff's petition.

Having exhausted its administrative remedies regarding the 2013 and 2015 RFPs, plaintiff filed the second lawsuit at issue in this consolidated appeal. On March 30, 2016, plaintiff filed suit at District Court seeking to invalidate the Number Nine Wind contract (which was subsequently terminated for reasons unrelated to plaintiff's lawsuits), and to enjoin the pending 2015 from going forward. *Allco Fin. Ltd. v. Klee*, No. 3:16-cv-508 (CSH) ("*Allco IV*") AX3. As in *Allco III*, plaintiff claims Connecticut violated PURPA and the FPA by issuing an RFP under

which Connecticut would direct its regulated utility to enter a wholesale electric contract. Complaint, ¶8, AX5; ¶44, AX12. According to plaintiff, this act constitutes regulation of wholesale sales in violation of the FPA, because Connecticut purportedly may only direct its regulated utility to enter a wholesale electric contract if acting under PURPA. Complaint, ¶44, AX12. On July 11, 2016, plaintiff agreed that its claims regarding the 2013 RFP were moot and proceeded solely on the 2015 RFP. A176; AX177; Doc. #33 in 3:16-cv-508.

Commissioner Klee and the PURA defendants moved to dismiss *Allco III* and *IV* pursuant to FRCP 12(b)(1) and 12(b)(6). On August 18, 2016, the District Court below dismissed the complaints. Docket No. 16-2946, Doc. #2; A159; AX160.

THE DISTRICT COURT DECISION BELOW

The District Court dismissed plaintiff's preemption claims for lack of standing, and dismissed plaintiff's dormant Commerce Clause claim for failure to state a cause of action for which relief can be granted.

Focusing on the 2015 RFP, the District Court found that plaintiff's alleged injury is not actual and imminent, and therefore is insufficient to support Article III standing. A185; AX186. Plaintiff claims to be injured because the procurement is limited to generating facilities of at least 20MW in capacity, and plaintiff alleges it was unable to bid because

it owns facilities that are under 20MW.[4] This injury, the court found, is limited and discrete. A184. Further, the claimed injury cannot be redressed because it is based upon plaintiff's conjectural belief that: 1) the court could require DEEP to issue a "PURPA-compliant RFP"; and 2) plaintiff would win the RFP and obtain a contract. A187-88. Thus, the court found plaintiff's claimed injury is conjectural and hypothetical, instead of actual and imminent. A189; AX190.

Plaintiff's dormant Commerce Clause claim was dismissed because Connecticut's REC system is a subsidy program created by the state to achieve environmental goals and paid for by Connecticut ratepayers, and Connecticut is not obligated to distribute that subsidy to other states that do not pay the subsidy's cost. A198-200.

Finally, the District Court dismissed plaintiff's § 1983 and 1988 claims because its preemption and dormant Commerce Clause claims were not viable and denied its motion for preliminary injunctive relief. A200, A209; AX201, A210.

SUMMARY OF ARGUMENT

This appeal is plaintiff's latest attempt to disrupt the lawful implementation of state statutes by DEEP and PURA.

[4] Beyond its inability to bid in the 2015 RFP, plaintiff also asserted an injury-in-fact based upon its inability to obtain a contract. That claim was rejected as conjectural or hypothetical. A183.

Plaintiff bases its standing on its status as a QF under PURPA. Nothing in the 2013 or 2015 RFPs impacts or affects plaintiff's rights and advantages under PURPA. Indeed, nothing in either RFP can. PURPA provides plaintiff with a statutory right to sell electricity to a utility at avoided cost, and the utility must buy. These statutory rights are unaffected by Connecticut's procurements. As a QF, plaintiff is entitled to a PURPA contract whether the Commissioner exercises some or all of his procurement authority, just as it was entitled to a PURPA contract before the procurements.

However, plaintiff does not seek a PURPA contract. Rather, plaintiff seeks to have the federal courts order the State of Connecticut to conduct an RFP according to plaintiff's terms and to award a contract – different and distinct from a PURPA contract – to plaintiff. Plaintiff is not entitled to such an order. Plaintiff has not suffered an injury in either fact or law. Plaintiff's claim also is not redressable by this action. The federal courts cannot rewrite state statutes nor may they order the State of Connecticut to conduct state statutory schemes in a fashion to ensure plaintiff prevails in a state RFP.

Plaintiff's Supremacy Clause claim also fails on the merits. Plaintiff lacks a private right of action, and the Supremacy Clause does not confer upon private actors any implied

right of action. Moreover, Connecticut's actions are entirely consistent with the Federal Power Act, FERC regulations, and U.S. Supreme Court precedent, up to and including a recent preemption case. No state is limited to procuring renewable energy generation through PURPA alone. PURPA is not the exclusive means for a state to ensure renewable energy generation. Plaintiff's efforts to sweep Connecticut's renewable energy procurement statutes under PURPA are unavailing.

Plaintiff's dormant Commerce Clause claim fails because Connecticut invented a subsidy program to reward renewable generators for displacing fossil fuel generation in New England. The subsidy is paid for by Connecticut ratepayers, and the Commerce Clause does not require Connecticut to distribute that subsidy throughout the country, particularly when doing so will not further Connecticut's legitimate interest in increasing the renewable energy actually used by Connecticut's citizens.

ARGUMENT

I. STANDARD OF REVIEW

This Court reviews de novo a dismissal of a complaint for lack of standing and for failure to state a claim. *Selevan v. New York Thruway Auth.*, 584 F.3d 82, 88 (2d Cir. 2009). The complaint must plead "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550

U.S. 544, 570 (2007). Although all allegations contained in the complaint are assumed to be true, this is "inapplicable to legal conclusions." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). A claim will have “facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Id*.

II. THE DISTRICT COURT PROPERLY DISMISSED PLAINTIFF'S PREEMPTION CLAIMS FOR LACK OF STANDING.

Plaintiff bears the burden to demonstrate that: 1) it has suffered an injury-in-fact; 2) the injury is fairly traceable to defendants' conduct; and 3) the injury is likely to be redressed by a favorable judicial decision. *Spokeo, Inc. v. Robins*, 136 S.Ct 1540, 1547 (2016). The District Court correctly found that plaintiff's "standing to sue problems are manifest" because its claimed injuries are not actual and imminent and plaintiff could not satisfy the redressability requirement for standing. A187-89. The recent U.S. Supreme Court decision, *Hughes v. Talen Energy Mktg., LLC*, 136 S.Ct. 1288 (2016) ("*Hughes*"), does not help plaintiff overcome its lack of injury or redressability.

Plaintiff did not suffer an injury-in-fact because: 1) plaintiff's rights as a PURPA QF are unaffected by Connecticut's procurements; 2) the alleged harm is purely conjectural, as plaintiff presumes it would have been awarded a

contract in the 2015 RFP, and would be awarded a contract in a reissued Conn. Gen. Stat. § 16a-3f procurement that has not yet taken place; 3) plaintiff has no legally protected interest in Connecticut's procurements or Connecticut ratepayer money backing the procurements; and 4) plaintiff did not bid into the 2015 RFP (or the RFP issued for smaller facilities). Under these circumstances, plaintiff does not present an actual or imminent harm.

Plaintiff likewise cannot satisfy the redressability prong of its burden to establish standing. The federal courts can neither rewrite state statutes nor can they require the Commissioner to issue an RFP to plaintiff's specification. Plaintiff cannot meet its burden of establishing standing, and the District Court's decision dismissing the two preemption claims for lack of standing must be affirmed.

A. Plaintiff's Status as a PURPA Qualifying Facility Does Not Convey Standing for Federal Power Act Preemption Claims.

Plaintiff contends that its primary claim of standing is through PURPA, specifically, 16 U.S.C. § 824a-3(h)(2)(B). Brief, pp. 29-38.[5] Plaintiff's PURPA rights are not impinged by the

[5] Plaintiff's complaint in 3:15-cv-608 fails to mention PURPA's private right of action. Plaintiff's complaint in 3:16-cv-508 only makes general, passing reference, simply stating that federal court "has jurisdiction under 16 U.S.C. § 824a-3(h)." AX5. Plaintiff merely states that it has satisfied the

state's procurements, and PURPA cannot save plaintiff's lack of standing.

In enacting PURPA, Congress directed FERC, in consultation with state utility commissions, to require utilities to buy electric generation from QFs. *FERC v. Mississippi*, 456 U.S. 742, 751 (1982); 16 U.S.C. § 824a–3(a). It created a "must-buy" obligation for electric utilities. A QF has a guaranteed buyer for its electric energy, as the electric utilities must purchase what is offered by the QF. That "must-buy" obligation survives to this day.

PURPA only authorizes actions against a state regulatory authority to require it to comply with the obligation to implement FERC's PURPA regulations. See 16 U.S.C. § 824a-3(h)(2)(B); see also *Allco II* at 92. Connecticut implemented PURPA by enacting Public Act 82-164, *An Act Concerning the Purchase of Power Produced by Cogeneration or Renewable Technology*, codified at Conn. Gen. Stat. § 16-243a and accompanying regulations. PURA's implementation has adapted to electric restructuring (the process by which states separated electric generation from electric distribution, and fostered a competitive retail electric market), and PURA has initiated a proceeding to examine its regulations. Plaintiff is pursuing

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exhaustion requirement of 16 U.S.C. § 824a-3(h), but makes no allegation regarding the statute. AX11.

separate litigation in state court to challenge Connecticut's current implementation of PURPA.[6]

The instant case, however, is not a PURPA implementation case, and plaintiff makes no attempt to reference the actual language of 16 U.S.C. § 824a-3(h)(2)(B) or to apply that language. Plaintiff's actual claim is that Connecticut's actions are preempted by the Federal Power Act, not that Connecticut failed to implement PURPA.[7]

The state's procurements challenged in the cases at bar, conducted outside of PURPA, take no PURPA rights away from plaintiff, and take no PURPA opportunities away from plaintiff. Plaintiff has a guaranteed outlet for its electricity. Plaintiff has not and cannot allege harm to Connecticut's implementation of PURPA resulting from the procurements.

Plaintiff contends that simply by permitting other renewable generation to be purchased, the other purchases would

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[6] See *Windham Solar LLC v. PURA*, Docket no. HHB-cv16-6035301-S, Connecticut Superior Court, Judicial District of New Britain and the pleadings therein.

[7] Plaintiff is not a private attorney general. Brief, pp. 48-50. No statute authorizes QFs to "bring a suit to prevent action by an officer in violation of his statutory powers…." *Associated Indus. of New York State v. Ickes*, 134 F.2d 694, 704 (2d Cir. 1943), *vacated*, 320 U.S. 707 (1943). 16 U.S.C. § 824a-3(h)(2)(B) authorizes only specific actions against state regulators. Further, even private attorneys general must show injury in fact. *Sierra Club v. SCM Corp.*, 747 F.2d 99, 107 n.2 (2d Cir. 1984). "If a plaintiff lacks Article III standing, Congress may not confer standing on that plaintiff by statute. *Cetacean Community v. Bush*, 386 F.3d 1169, 1174 (9th Cir. 2004), citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 576-77 (1992).

indirectly reduce the demand for plaintiff's electricity and the amount plaintiff would receive as a PURPA generator. Brief, pp. 33-38. The District Court held that plaintiff's price suppression theory regarding avoided costs was not adequately briefed, and thus did not rule upon whether the theory provides plaintiff standing. A185; AX186. The District Court further noted that even if presumed to be true, the injury would not be concrete or imminent to support standing. A185.

In response to the District Court's ruling, plaintiff now offers pages of new evidence regarding supply and demand to provide facts omitted from plaintiff's complaints. Brief, pp. 34-37. However, the "law of supply-and-demand is not the law of preemption." *PPL EnergyPlus LLC v. Solomon*, 766 F.3d 241, 255 (3d Cir. 2014), *cert. denied*, 136 S.Ct. 1728 (2016). "When a state regulates within its sphere of authority, the regulation's incidental effect on interstate commerce does not render the regulation invalid." *Id*.

Borrowing from antitrust jurisprudence, plaintiff contends that it has standing by mere fact that it is a "market participant," and that any action "plausibly" affecting a market will convey standing. Brief, pp. 32-33, 37. That is incorrect.

First and foremost, plaintiff is a QF, but a QF is not a "market participant" in the normal sense of the word, because regardless of the market, plaintiff is guaranteed a market to

sell its electricity through PURPA's "must-buy" provision. Further, mere status as a "market participant" fails to satisfy the elements of standing. Neither the *Solomon*, nor the *Hughes* decisions hold differently. *Cf*. Brief, p. 33.

The *Hughes* plaintiffs were electric generators who were participants in a FERC-regulated auction for electric capacity, and sought a declaratory judgment that a factually distinguishable regulatory program run by Maryland (see Section III.C. below) interfered with the FERC auction and set a wholesale rate for electricity. *Hughes*, 136 S.Ct. at 1296. The *Hughes* Court held that the state program established wholesale rates, and thus was preempted by the FPA. *Hughes*, 136 S.Ct. at 1297. Plaintiff is dissimilar to the Hughes plaintiffs, which directly participated in a FERC-regulated organized market. Here, plaintiff seeks to **avoid** FERC's organized markets and instead seeks bilateral contracts with electric companies by invoking PURPA.

The *Hughes* Court's merits ruling expressly avoided ruling based upon price suppression. *Hughes*, 136 S.Ct. at 1299 n13. Plaintiff contends, incorrectly, that mere increase in competition in a market automatically conveys standing. Brief, p. 33-37, relying on *Louisiana Energy and Power Authority v. FERC*, 141 F.3d 364, 367 n.5 (D.C. Cir. 1998) ("*La. Energy*"). The "irreducible constitutional minimum of standing requires

petitioner to show concrete injury that has either transpired or is imminent." *Occidental Permian Ltd. v. FERC*, 673 F.3d 1024, 1026 (D.C. Cir. 2012) (internal citation omitted). Plaintiff must be in competition and the increased competition must have actually occurred or was imminent. Compare *Louisiana Energy,* 141 F.3d at 367 (customer and direct competitor has standing) with *Occidental Permian*, 673 F.3d at 1028 (company not in competition does not have standing). Here, plaintiff is not a competitor to the participants in the state's procurements, as it did not bid, and the procurement has no impact on plaintiff's PURPA rights. PURPA grants plaintiff a "must-buy" advantage, separate and distinct from FERC's traditional wholesale markets. Nothing in the state's procurements adversely impacts that "must-buy" right. Thus nothing in Connecticut's procurements reduces "demand" for plaintiff's electricity.

Plaintiff further contends that by purchasing more renewable generation, the state procurements will reduce the wholesale market prices for renewable power and thus it will "impact" renewable energy generation. Brief, pp. 34-37. FERC's organized electricity market is resource neutral. It pays the same price for electricity generated by natural-gas fired electric plants as it does for renewable energy electric plants. As discussed in further detail below, nothing in the state procurements require that the successful bidders participate in

FERC's organized markets. Moreover, the amounts actually purchased are a tiny fraction of the overall market, and thus any potential "adverse" impacts if they did participate are in the realm of pure speculation and remote. Plaintiff's claim is too attenuated to support standing.

B. Plaintiff Has No Property Rights in the State Procurements and thus Cannot Establish Any Cognizable Interest.

To support its claim for standing, plaintiff seeks to assert some property expectation in the state's RFPs. Plaintiff has no right to a state procurement and its claim to any harm from the state's procurement is based on pure speculation and conjecture.

Plaintiff’s purported harm is conjectural because it assumes DEEP will issue a "PURPA-compliant" RFP, and further presumes that plaintiff would be selected in the RFP and be awarded a contract. A187. As the District Court correctly found, there "is nothing in the Connecticut statute that would compel defendants to issue a new RFP" if the Court invalidated the 2015 RFP. A187-88; AX188-89. Conn. Gen. Stat. § 16a-3f requires the Commissioner to issue a solicitation, and that condition is satisfied, as demonstrated by the Fusion Solar contract. Both §§16a-3g and 16a-3j are entirely permissive and at the discretion of the Commissioner.

Whether plaintiff succeeds in a future competitive bidding process is entirely speculative, and the District Court correctly found that this presumption does not demonstrate concrete harm. A187; AX188. Indeed, plaintiff's speculation that it would surely be in the winner's circle is undermined by the fact that the size of the winner's circle is not prescribed by statute; neither § 16a-3f, § 16a-3g nor § 16a-3j require that any specific quantity of power be procured. The Commissioner is empowered to select those proposals he finds to be "in the interest of ratepayers." Conn. Gen. Stat. §§ 16a-3f, 16a-3g. No one knows how much power generation the Commissioner will ultimately determine to be "in the interest of ratepayers" based on the prices received that day. The Commissioner may cut off the solicitation after accepting only a few bids, or reject all of the bids. There is no baseline minimum quantity of power to be procured, and plaintiff's presumption that it would be in the winner's circle is entirely speculative.

Disregarding this Court's decision in *Allco II*, plaintiff relies on disappointed bidder cases such as *B.K. Instrument, Inc. v. United States*, 715 F.2d 713 (2d Cir. 1983) to support its argument. Brief, p.39. Plaintiff did not bid, so the cases are inapplicable. Moreover, this Court has already expressed extreme skepticism regarding the applicability of zone-of-interest cases here. *Allco II* at 94, n5, citing *Lexmark Int'l,*

Inc. v. Static Control Components, Inc., 134 S. Ct. 1377 (2014). The zone-of-interest analysis is appropriate for appeals under the Administrative Procedures Act and for statutorily created causes of action. *Lexmark*, 134 S. Ct. at 1388. This case is neither, and the disappointed bidder cases are inapplicable.

Nor can plaintiff demonstrate a property interest in Connecticut's procurements. Plaintiff relies on its status as a QF under PURPA, but Conn. Gen. Stat. §§ 16a-3f, 16a-3g and 16a-3j are not Connecticut's implementation of PURPA. They are state policy determinations wholly outside of PURPA.

PURPA neither provides plaintiff with a legally protected interest in all procurements, nor requires all state procurements to be conducted under PURPA. For example, Connecticut conducts standard service procurements under Conn. Gen. Stat. § 16-244c, zero-emission and low-emission REC procurements under Conn. Gen. Stat. §§ 16-244s and 16-244t, and has powers to issue RFPs under Conn. Gen. Stat. § 16a-3c. Simply being a QF does not arm plaintiff with a legally protected interest in each procurement conducted outside of PURPA, and it does not arm plaintiff with a legally protected interest in the instant procurements.

Plaintiff failed to bid into RFPs issued by the Commissioner for both larger and smaller facilities. The Commissioner issued RFPs for larger (at least 20MW) and smaller

facilities (under 20MW), and plaintiff owns facilities that could qualify for each. Brief, p. 19. It was given the opportunity to bid and did not. The Commissioner applied his authority by encouraging competition among different segments in the market in the interests of ratepayers. Boycotting the procurements does not provide plaintiff standing to rewrite the Commissioner's policy judgments.

C. Plaintiff's Claim Would Merely Deny Others a Contractual Benefit, and is Not Redressable.

Plaintiff seeks to rewrite Connecticut's statutes to require that the Commissioner re-issue RFPs, and to have the Commissioner re-issue the RFPs as "PURPA-compliant." Plaintiff's claim is not redressable by this Court. The Connecticut legislature wrote Conn. Gen. Stat. §§ 16a-3f, 16a-3g and 16a-3j to provide the Commissioner discretion to issue RFPs it deemed appropriate, including judgments as to the scale of projects solicited and the amount of power solicited, and provided the Commissioner discretion to select winning bids as appropriate at rates set by the bidders. Plaintiff's view of a "PURPA-compliant RFP" would insert facility size limitations not present in Connecticut's statutes, and presumably would require facilities to be compensated at regulator-set avoided costs determined under PURPA, a feature missing from Connecticut's

statutes. This Court cannot insert conditions into Connecticut's statutes.

Nor can this Court rewrite the statutes to require the Commissioner to reissue any RFPs. The Commissioner has satisfied its obligations under Conn. Gen. Stat. §§ 16a-3f, 16a-3g and 16a-3j to issue RFPs; there is no obligation to issue additional RFPs. Thus, this Court cannot fashion a remedy for plaintiff that will redress plaintiffs' injury. See *Oklahoma Corr. Professionals Ass'n, Inc. v. Jackson*, 2011 WL 10582154 (W.D. Oklahoma, April 19, 2011) at *3 (plaintiff lacked standing to raise claim that state statute causing termination of voluntary payroll deduction for state employee associations with fewer than 2000 members was unconstitutional because relief would require the court to eliminate the statutory 2000 member requirement).

Further, even if the Court enjoins Connecticut from implementing the renewable energy procurement statutes as written, without inserting conditions, plaintiff gains nothing. As this Court has previously found, plaintiff will merely succeed in denying other renewable developers a contractual benefit. *Allco II*, 805 F.3d at 98. Plaintiff cannot force Connecticut to reissue RFPs to plaintiff's specifications.

Plaintiff lacks standing to raise its preemption claims, and the District Court properly dismissed these claims.

III. CONNECTICUT'S PROCUREMENTS ARE CONSISTENT WITH THE FEDERAL POWER ACT.

Plaintiff's preemption claims fails for a number of reasons. First, in the absence of a statute providing a private action, plaintiff's Supremacy Clause claim fails. Second, the Federal Power Act is a much larger regulatory regime than PURPA, and states may act outside of PURPA. When states direct the activities of regulated utilities, they act pursuant to reserved authority under the FPA. *Hughes* now stands as a narrow exception to that rule, but Connecticut's actions here do not fit that exception.

A. Plaintiff's Supremacy Clause Claim is Foreclosed Because Plaintiff is a Private Actor Who Lacks an Express or Implied Right of Action under the Federal Power Act.

Plaintiff relies upon the Supremacy Clause to enjoin the implementation of state legislation, but the Supremacy Clause does not confer upon private actors any implied right of action to seek injunctive relief against the enforcement or implementation of state legislation. *Armstrong v. Exceptional Child Ctr., Inc.*, 135 S.Ct. 1378, 1383-84 (2015). "[T]he Supremacy Clause simply 'creates a rule of decision' by which courts are to resolve conflicts between state and federal laws. But it 'is not the source of any federal rights, and certainly does not create a cause of action' to enforce federal statutes that do not independently provide for private enforcement."

Davis v. Shah, 821 F.3d 231, 245 (2d Cir. 2016), citing *Armstrong*.

As set forth above, plaintiff's recitation to PURPA, 16 U.S.C. § 824a-3(h)(2)(B), does not authorize preemption claims under the Federal Power Act against state regulatory authorities. That PURPA section only authorizes actions against a state regulatory authority to require it to comply with the obligation to implement FERC's PURPA regulations. See, *Allco II*, 805 F.3d at 92. Because plaintiff's claims here do not actually rest upon or seek to enforce § 824a-3(h)(2)(B), PURPA is inapplicable and cannot form the basis of a Supremacy Clause preemption claim.[8] Plaintiff lacks either an express or implied right of action under the Federal Power Act, and therefore cannot maintain these Supremacy Clause Claims.

Further, equitable relief is improper because it "circumvent[s] Congress's" statutory scheme of remedial enforcement through the administrative agency. *Armstrong*, 135 S.Ct. at 1385. Because plaintiff complains about the legitimacy

[8] In *Allco II*, this Court analyzed plaintiff's complaint and determined that it was "in effect seeking to enforce PURPA's requirements," and therefore FERC must have the opportunity to review plaintiff's claim before it can be brought to District Court. *Allco II*, 805 F.3d at 94. It did not reach the merits of plaintiff's claim, and did not hold as a matter of law that plaintiff's preemption theory is a PURPA enforcement action. This Court noted that plaintiff did not at that time rely on the private right of action under § 824a-3(h)(2)(B), and plaintiff does not rely upon it here. *Id.*, 805 F.3d at 94.

of wholesale power contracts, it can raise these objections to FERC through the agency's extensive administrative processes. See *Hughes*, 136 S.Ct. at 1292 ("After the parties [to a wholesale power contract] have agreed to contract terms, FERC may review the rate for reasonableness.")

The *Hughes* Court only assumed without deciding that the *Hughes* plaintiffs could maintain an action for declaratory relief under the Supremacy Clause. *Hughes*, 136 S.Ct. at 1296 n.6. In doing so, it echoed the recently decided *Armstrong* case, and signaled that such private rights of action are foreclosed. The *Armstrong* case demonstrates that plaintiff cannot maintain an action for declaratory relief under the Supremacy Clause.

B. Connecticut's Actions are Consistent with State Reserved Authority Under the Federal Power Act.

Federal law acknowledges and presumes that states will establish competitive procedures for the purchase of wholesale electricity. State competitive procurements do not "[regulate] wholesale sales of electricity" as asserted by plaintiff. Brief, pp. 7, 52. Instead, they regulate purchases made by utilities, not sales.

A wholesale sale is a "sale of electric energy to any person for resale." 16 U.S.C. § 824(d). States do not engage in regulation of a wholesale sale by conducting a procurement or

by exercising regulatory authority over utilities which enter into a resulting power purchase agreement.

Plaintiff seeks to redefine a "wholesale sale" to include all aspects of a wholesale transaction, including the procurement activity, but that contention is refuted by case law and FERC's regulations. The Third Circuit has held that "FERC's rate-making determination does not govern the entire wholesale transaction." *Kentucky W. Virginia Gas Co. v. Pennsylvania Pub. Util. Comm'n*, 837 F.2d 600, 608 (3d Cir. 1988), *cert denied*, 488 U.S. 941 (1988). Instead, the *Kentucky* Court "perceive[d] significant support for the authority of states to review the prudence of a retailer's gas purchasing decision." *Id*.[9] Connecticut's procurements are consistent with the recognized authority to review utility purchasing decisions.

FERC's regulations expressly recognize "the authority of a State commission in accordance with State and Federal law to establish [c]ompetitive procedures for the acquisition of electric energy … at wholesale." 18 C.F.R. § 35.27(b)(1).

In addition, state exercise of authority over utility purchases under the FPA includes "administration of integrated resource planning and utility buy-side and demand-side

[9] See, *Hughes*, 136 S.Ct. at 1298, n10 (…"the relevant provisions of the [Natural Gas Act and FPA] are analogous. This Court has routinely relied on NGA cases in determining the scope of the FPA, and vice versa.")

decisions." *New York v. FERC*, 535 U.S. 1, 24 (2002), citing Order No. 888, FERC Stats. & Regs. ¶31,036, 31,782, n.544 (May 10, 1996).[10] Integrated resource planning is a systematic process by which customer load is met by utilities. It is the

> planning and selection process for new energy resources that evaluates the full range of alternatives, including new generating capacity, **power purchases**, energy conservation and efficiency, cogeneration and district heating and cooling applications, and renewable energy resources, in order to provide adequate and reliable service to its electric customers at the lowest system cost.

(emphasis added) 16 U.S.C. § 2602(19). Thus, Congress recognizes state authority over power purchases, such as those at issue under Conn. Gen. Stat. §§ 16a-3f, 16a-3g, and 16a-3j.

The phrase "buy-side decisions" recognizes that electric generators are typically the sellers of electricity while electric utilities purchase power on behalf of customers and are buyers. Buy-side regulation, therefore, is the exercise of state regulatory authority over a regulated utility's power purchasing decisions. State oversight of buy-side decisions and

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[10] *Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities*, Order No. 888, 61 Fed. Reg. 21,540, 21,626 n.544 (May 10, 1996), FERC Stats. & Regs. ¶ 31,036, 31,782 n.544 (1996), *clarified*, 76 FERC ¶ 61,009 (1996), *modified*, Order No. 888-A, 62 Fed. Reg. 12,274 (Mar. 14, 1997), FERC Stats. & Regs. ¶ 31,048 (1997), *clarified*, 79 FERC ¶ 61,182 (1997), *order on reh'g*, Order No. 888-B, 81 FERC ¶ 61,248 (1997), *order on reh'g*, Order No. 888-C, 82 FERC ¶ 61,046 (1998), *aff'd in part and remanded in part sub nom. Transmission Access Policy Study Grp. v. FERC*, 225 F.3d 667 (D.C. Cir. 2000), *aff'd sub nom. New York v. FERC*, 535 U.S. 1, 122 S.Ct. 1012 (2002).

state authority to establish competitive procedures for the purchase of wholesale electricity is well-established and uncontroversial. For example, in *Allegheny Energy Supply Company, LLC*, 108 FERC ¶ 61082, 2004 WL 1700580 (July 29, 2004) ("*Allegheny*"), FERC authorized market-based rate sales between affiliated entities **based upon** Maryland's involvement in a process that procured electricity contracts. *Allegheny*, 108 FERC ¶61082 at ¶39. It acknowledged Maryland's role in designing the RFP process, in directing an independent monitor in the process, and in approving the results of the RFP. *Id*. FERC even referred to the process as "the Maryland Commission competitive bid process." *Id.* at ¶21.

In *Exelon Corporation*, 121 FERC ¶ 61092 at ¶¶6, 18, 2007 WL 3125530, (October 26, 2007) ("*Exelon Corp.*"), FERC approved a similar arrangement. However, in this case Illinois expressly created the Illinois Power Agency with the following powers:

> …responsibility to, among other things, design and **administer power procurement** through a competitive request for proposal (RFP) process to serve [standard service] customers - **with the utilities being required to sign the contracts with the winning bidders**.

Exelon Corp. at ¶6. FERC granted Exelon the requested waivers.

Thus, plaintiff's narrow construction of the FPA is inaccurate. Plaintiff asserts that states entirely lacked regulatory authority when the FPA was passed, and were then granted a small amount of regulatory power when PURPA was

enacted in 1978. Brief, pp. 10-16. This is not the case. Like the Natural Gas Act, the FPA "was drawn with meticulous regard for the continued exercise of state power, not to handicap or dilute it in any way." *Oneok, Inc. v. Learjet, Inc.*, 135 S.Ct. 1591, 1599 (2015). Consistent with its historical powers, Connecticut properly seeks to influence the resource mix of electric generating facilities used to supply electricity to customers in the state through Conn. Gen. Stat. §§ 16a-3f, 16a-3g, and 16a-3j.

C. State Procurements Produce Wholesale Contracts Consistent With FERC's Regulatory Regime.

In the recent *Hughes* case, the U.S. Supreme Court set forth FERC's two principal regulatory regimes as: 1) bilateral contracting; and 2) organized markets. *Hughes,* 136 S.Ct. at 1292–93. Organized markets are administered by regional transmission organizations and independent system operators subject to FERC jurisdiction. Bilateral contracts are also subject to FERC's jurisdiction, but under this regime, FERC grants market-based rate sales authority to generators, and parties agree to contract terms. *Hughes*, 136 S.Ct. at 1292. FERC may review sales after-the-fact for reasonableness. *Id*. This regime was discussed by the U.S. Supreme Court in *Morgan Stanley Capital Group Inc. v. Public Util. Dist. No. 1 of Snohomish Cty.*, 554 U.S. 527, 537 (2008).

Connecticut's contracts are formed under the *Morgan Stanley* regime. Connecticut's RFPs explicitly require the seller to "obtain and maintain any requisite authority to sell the output of the Facility at **market-based rates**." (emphasis added).[11] They solicit bids from both QFs and Exempt Wholesale Generators.[12] *Id*. Connecticut's contracts are an expression of FERC's regulatory regime, not a usurpation of it.[13]

Notably, Connecticut does not compel any wholesale generator to do anything; generators voluntarily submit bids to state-administered RFPs at whatever price the generators choose. Exercise of authority over a regulated utility, in the absence

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[11] Draft power purchase agreement issued with 2015 RFP, p. 22, found at: https://cleanenergyrfpdotcom.files.wordpress.com/2015/11/rps-class-i-renewable-draft-ppa.doc

[12] Exempt Wholesale Generators are defined at 16 U.S.C § 796(25).

[13] In a somewhat similar case dismissed by FERC, the State of Massachusetts required as a condition of a merger that a regulated electric company enter into a renewable energy contract with a wind developer. *Californians for Renewable Energy, Inc., (Care) & Barbara Durkin v. Nat'l Grid, Cape Wind, & the Massachusetts Dep't of Pub. Utilities*, 137 FERC ¶ 61113, 2011 WL 5479305 at ¶1 (Nov. 7, 2011). Like Connecticut's contracts, the Massachusetts contract required that the wind facility either obtain QF authority from FERC or file rates with FERC pursuant to Section 205 of the FPA. *Id*. at ¶33. Complainants objected that Massachusetts usurped FERC's FPA authority, and acted outside of PURPA because at that point in time, the seller had neither QF status nor market-based rate authority. *Id*., ¶¶2, 4. FERC found the FPA claims incomprehensible, rejected the QF claim as a mere timing argument, and noted that the contracts were ultimately subject to FERC review. *Id*., ¶32-33.

of rate-setting, has never been held to violate the FPA, and plaintiff does not offer any authority to the contrary.

Hughes does not hold, as plaintiff alleges, that Maryland was preempted because it "compelled" a contract. Brief, pp. 53-54. Plaintiff cites to no page of the decision for this holding and none can be found. Maryland was preempted solely because the contract at issue conditioned payment upon clearing the region's capacity auction, effectively establishing a wholesale rate. The *Hughes* contract was "tethered" to FERC's wholesale market. By contrast, neither the 2013 RFP nor the 2015 RFP procure contracts that condition payment upon clearing the region's capacity auction or other wholesale markets (known as contracts-for-differences). *Hughes* supports defendants.

Both the 2013 RFP and the 2015 RFP procure bilateral contracts, not *Hughes* contracts-for-differences. Both RFPs require the seller to deliver energy to a delivery point, where title transfers. AX25; A44. Thus, under both RFPs, energy changes hands. *Hughes* contracts-for-differences, in contrast, do not transfer ownership of any commodity. *Hughes*, 136 S.Ct. at 1299. Instead, they provide a support payment to generators in addition to the revenues received from FERC's wholesale capacity auction, thereby adjusting FERC's wholesale rate. *Hughes*, 136 S.Ct. at 1297. The 2015 RFP specifically rejects the capacity support payment model ("There will be no payments

or price supports … for capacity…."). A40. They are completely "untethered" to FERC's capacity market.

This critical distinction runs throughout *Hughes*. In limiting its holding, the *Hughes* Court stated:

> Nothing in this opinion should be read to foreclose Maryland and other States from encouraging production of new or clean generation through measures "untethered to a generator's wholesale market participation." Brief for Respondents 40. So long as a State does not condition payment of funds on capacity clearing the auction, the State's program would not suffer from the fatal defect that renders Maryland's program unacceptable.

Hughes, 136 S.Ct. at 1299. Under the *Hughes* contract-for-differences, the generator was compensated for showing up at the FERC auction. *Hughes*, 136 S.Ct. 1295. In contrast, Connecticut's contracts pay only in exchange for electricity; if the generators do not deliver electricity, they do not get paid. The Connecticut procurements do not condition payment upon participation in the wholesale market.

Bilateral contracts are not and cannot be economically identical to the *Hughes* contracts-for-differences, as plaintiff insists. Brief, pp. 52-54. Plaintiff's numerical examples intended to analogize the two are unavailing. Brief, p. 53, n11. Plaintiff compares a bilateral contract for electricity at $60/mWh with another bilateral contract for energy at $50/mWh. In plaintiff's example, the latter contract is supplemented with a side payment of $10/mWh. If plaintiff synthetically created a

contract-for-differences in the latter example, it does not matter. Connecticut's contracts directly exchange dollars for electricity, exactly as the *Hughes* Court describes as permissible. There is no side bet exchange of money that is wholly dependent upon the clearing price of an auction, in which no title to electricity is transferred.

The U.S. Solicitor General expressly recognized that bilateral contracts do not conflict with FERC jurisdiction. In its *Hughes* brief, the Solicitor General stated that it would have been perfectly acceptable if Maryland eschewed contracts-for-differences and "had instead **ordered** its utilities to enter into **bilateral contracts** with the **state selected** generator to build new capacity… ." (emphasis added) *Amicus Curiae* Brief of the United States in *Hughes v. Talen Energy Marketing, LLC*, 2016 WL 344494 at 18 (U.S., January 29, 2016) ("Solicitor General Hughes *Amicus* Brief").

Positions of the federal government are accorded deference where, as here, they are not *post hoc* rationalizations advanced by an agency seeking to defend an agency's past actions against attack. *Chase Bank USA, N.A. v. McCoy*, 562 U.S. 195, 209 (2011), (quoting *Auer v. Robbins*, 519 U.S. 452, 462 (1997) (internal quotations omitted). The Solicitor General clearly supported Connecticut's approach. *Hughes* had nothing to do with PURPA, and yet the Solicitor General wrote that **Maryland could**

order bilateral contracts with state selected generators, directly controverting plaintiff's preemption theory. Solicitor General *Hughes Amicus* Brief, 2016 WL 344494 at 18. Further, the Solicitor General cited Judge Arterton's decision in *Allco I* as an example of jurisdictionally appropriate bilateral contracts that are not threatened by *Hughes* (including her holding that the 2013 Procurement is "devoid of any * * * market-distorting features that encroach [upon] FERC's exclusive jurisdiction over setting wholesale rates)." Solicitor General *Hughes Amicus* Brief, 2016 WL 344494 at 34. Plaintiff's contention that Connecticut's bilateral contracts encroach upon federal jurisdiction is thus expressly rejected by the federal government itself.

Finally, plaintiff's narrowly-drawn and incorrect theory of FPA jurisdiction lacks force because plaintiff posed the identical argument to the *Hughes* Court, which did not adopt it. Plaintiff submitted an *amicus curiae* brief to the *Hughes* Court which included each element of the jurisdictional argument made here. Specifically, plaintiff claimed that "Congress relaxed the ban on State's involvement in the area of wholesale sales in order to benefit Qualifying Facilities," and that "Congress has chosen to allow States to compel wholesale contracts, including at fixed rates over 20 years such as was sought by CPV, **only** for Qualifying Facilities under PURPA." (emphasis added) *Amicus*

Curiae Brief of Allco Renewable Energy Limited, 2016 WL 344493 (U.S. January 19, 2016) at 30. The *Hughes* Court did not so rule, because plaintiff's theory is without basis in law and in fact. Instead, the *Hughes* Court rejected only state-sponsored contracts-for-differences because those contracts replaced the FERC-regulated wholesale rate. In doing so, it did not set forth a prescriptive list of permissible state actions, or offer any opinion regarding any other program. *Hughes*, 136 S.Ct. at 1299.

D. States Can Procure Electricity Outside of PURPA.

The FPA does not constrain states to fulfill renewable energy goals solely through PURPA, as plaintiff contends. Brief, pp. 52-56. Indeed, FERC has repeatedly acknowledged that states may act outside of PURPA. In *Midwest Power Systems, Inc.*, 78 FERC ¶¶ 61,067, 61248, 1997 WL 34082 (January 29, 1997), FERC stated that "states have numerous ways outside of PURPA to encourage renewable resources." *Id*. Consistent with state jurisdictional powers discussed in *New York v. FERC*, FERC held:

> As a general matter, states have broad powers under state law to direct the planning and resource decisions of utilities under their jurisdiction. States may, for example, order utilities to build renewable generators themselves, or deny certification of other types of facilities if state law so permits. **They also**, assuming state law permits, **may order utilities to purchase** renewable generation. . . . States also may seek to encourage renewable or other

> types of resources through their tax structure, or by giving direct subsidies.

(emphasis added) *Midwest Power Systems, Inc.*, 78 FERC at ¶ 61248, citing *Southern California Edison Company and San Diego Gas & Electric Company*, 71 FERC ¶ 61,269, 1995 WL 327268 (June 2, 1995) ("*SoCal Edison*"). Connecticut is ordering utilities to purchase renewable generation outside of PURPA, precisely as FERC describes. Nor are states limited to seeking renewable energy through QFs. *SoCal Edison* directly states that renewable generators do not have to be QFs at all. *SoCal Edison*, 71 FERC at ¶ 62,080.

Even as recently as 2013, in an application filed by plaintiff's affiliate, Otter Creek, FERC rejected plaintiff's view that states cannot act outside of PURPA. *Otter Creek Solar LLC*, 143 FERC ¶¶ 61282, 62969, 2013 WL 3243131 (June 27, 2013). In that case, Vermont established a renewable energy program outside of PURPA. Otter Creek objected. FERC rejected Otter Creek's petition, stating that nothing prevents a utility from agreeing to a rate outside of PURPA. *Otter Creek Solar LLC*, 143 FERC at 62969.

Plaintiff's construction of the FPA, in which states entirely lacked authority over anything to do with wholesale transactions until the enactment of PURPA, is incorrect. When implementing PURPA, FERC acknowledged that states generally have

"authority under [s]tate law to review contracts for purchases as part of [the state's] regulation of electric utilities," and that "[s]uch authority may continue to be exercised if consistent with … PURPA and [FERC's] implementing regulations."[14] States were not in a regulatory straight-jacket from the enactment of the FPA through PURPA, as plaintiff suggests. PURPA merely added a new regulatory program with unique characteristics.

Congress inserted language into PURPA that directly contradicts plaintiff's preemption claims. Congress amended PURPA § 111 by defining integrated resource planning, which includes power purchases. 16 U.S.C. § 2602(19). Next, Section 712 of the Energy Policy Act of 1992, Pub. L. 102-486, §712, 106 Stat. 2910-2911 (1992), amended PURPA § 111 by adding a new paragraph. Codified at 16 U.S.C. § 2621(d)(10)(A)(iii), the amendment to PURPA states:

> (A) To the extent that a State regulatory authority requires or allows electric utilities for which it has ratemaking authority to consider the purchase of long-term wholesale power supplies as a means of meeting

[14] *Small Power Production and Cogeneration Facilities; Regulations Implementing Section 210 of the Public Utility Regulatory Policies Act of 1978*, FERC Order No. 69, 45 Fed. Reg. 12,214, 12,233 (Feb. 25, 1980), FERC Stats & Regs. ¶ 30,128, at 30,896 (1980), *order on reh'g*, Order No. 69-A, 45 Fed. Reg. 33,958 (May 21, 1980), FERC Stats. & Regs. ¶ 30,160 (1980), *aff'd in part and vacated in part sub nom. Am. Elec. Power Serv. Corp. v. FERC*, 675 F.2d 1226 (D.C. Cir. 1982), *rev'd in part sub nom. Am. Paper Inst., Inc. v. Am. Elec. Power Serv. Corp.*, 461 U.S. 402 (1983).

> electric demand, such authority shall perform a general evaluation of:
>
> > (iii) whether to implement procedures for the advance approval or disapproval of the purchase of a particular long-term wholesale power supply.

This provision would make no sense if state regulatory authorities were limited to QFs; those generators already have the benefit of the "must-buy" obligation placed on utilities. This provision only makes sense if states can require the purchase of long-term wholesale power.

"'The purpose of Congress is the ultimate touchstone' in every pre-emption case." *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996), citing *Retail Clerks v. Schermerhorn*, 375 U.S. 96, 103, (1963). Further, there is a "presumption against the pre-emption of state police power regulations." *Medtronic*, 518 U.S. at 485, citing *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 112 (1992). "[R]egulation of utilities is one of the most important of the functions traditionally associated with the police power of the States." *Arkansas Elec. Co-op. Corp. v. Arkansas Pub. Serv. Comm'n*, 461 U.S. 375, 377 (1983).

Congress recognized state authority over power purchases when defining integrated resource planning. 16 U.S.C. § 2602(19). It required states to consider procedures related to the purchase of long-term wholesale power supply. 16 U.S.C. § 2621(d)(10)(A)(iii). It reserved authority to states in 16 U.S.C § 824(b)(1). There is no basis to conclude that Congress

intended for states to have no role with wholesale power supply unless acting under PURPA and only with respect to QFs.

E. Connecticut is Not Conflict Preempted Because FERC Explicitly Accommodates State Procurements.

Plaintiff argues that Connecticut's actions conflict with FERC's energy markets in New England, and undermine PURPA. Brief, pp 56-57. Plaintiff's claims are without merit.

"Conflict preemption arises when a state law conflicts with a federal statute or a regulation promulgated by a federal agency acting within the scope of its congressionally delegated authority." *Lanier v. Bats Exch., Inc.*, 838 F.3d 139, 151 (2d Cir. 2016).

Several years ago, FERC reacted to concerns regarding the impact of "state sponsored" generation on its New England capacity market, and fashioned a two-pronged approach. First, it established a general rule that state-sponsored generation is subject to a minimum offer price rule, in which new capacity resources must bid above an administratively determined price floor. *ISO New England Inc. & New England Power Pool Participants Comm.*, 155 FERC ¶ 61023, 2016 WL 1533041 at ¶6 (Apr. 8, 2016)(rehearing granted June 8, 2016). Later, FERC adopted a renewable energy exception to the general rule that exempted 200MW of state-sponsored renewable energy from scrutiny under the minimum offer price rule. *Id.*, at ¶¶16-17. With

these actions, FERC explicitly and expressly accommodated state-sponsored generation. No conflict exists. Instead, FERC "acknowledg[ed] the rights of states to pursue policy interests within their jurisdiction," and did not find a conflict warranting preemption. *Id*. at ¶4.

Further, FERC accommodates state-sponsored generation without regard to PURPA. Its orders relating to the minimum offer price rule and the renewables exemption accommodating state-sponsored generation make no mention of PURPA, because neither the FPA nor FERC constrain states to PURPA. Indeed, FERC's actions would not be necessary at all if the states were constrained to PURPA. FERC's orders defeat plaintiff's claims.

IV. CONNECTICUT'S RPS PROGRAM CONSTITUTIONALLY INVENTED CLASS I AND CLASS II RENEWABLE ENERGY CERTIFICATES TO REWARD RENEWABLE ENERGY GENERATORS FOR DISPLACING FOSSIL FUEL GENERATION ON THE NEW ENGLAND ELECTRIC GRID.

The District Court properly held that the Commerce Clause does not obligate Connecticut ratepayers to subsidize renewable generation in Georgia and throughout the United States. A199; AX200. Connecticut created a subsidy program to reward renewable generators, invented the product used to enable the subsidy, known as Connecticut Class I and II renewable energy certificates ("RECs"), and adopted a regional verification system for the subsidy program. These actions are the purest example of a state creating commerce that would not otherwise

exist. Moreover, Connecticut RECs are not the same as and are not similarly situated with other RECs. Plaintiff failed to state a claim upon which relief can be granted.

RECs are wholly a state creation. *Am. Ref-Fuel Co., Covanta Energy Grp., Montenay Power Corp., & Wheelabrator Technologies Inc.*, 105 FERC ¶ 61004, 61007, 2003 WL 22255784 (Oct. 1, 2003). See also *Wheelabrator Lisbon, Inc. v. Connecticut Dept. of Pub. Util. Control*, 531 F.3d 183, 190 (2d Cir. 2008) (state law governs the transfer of RECs, which are a state creation). They represent the environmental attributes of electric generation, and can be sold separately from the underlying energy. A4, ¶1. Connecticut legislatively created the Connecticut Class I and Class II REC in two steps.

In step one, Connecticut created the renewable energy portfolio standard ("RPS"). Connecticut created the RPS standard by: a) establishing a definition of Class I and Class II renewable energy (now defined at Conn. Gen. Stat. § 16-1(a)(20) and (21)); and b) requiring retail electricity providers to include an increasing percentage of Class I and Class II energy in the portfolio of energy supply used to serve retail customers in the state. Conn. Gen. Stat. § 16-245a(a).

In step two, Connecticut adopted the New England Power Pool Generation Information System ("NEPOOL GIS") as the statutory method of complying with the RPS. Retail electricity providers

must demonstrate compliance with the RPS by buying RECs issued by NEPOOL GIS. Conn. Gen. Stat. § 16-245a(b). NEPOOL GIS functions under a set of operating rules that permit it to mint a REC for electricity generated: a) within the jurisdiction of ISO New England, Inc., the regional independent system operator; or b) generated within adjacent control areas, which plaintiff correctly identifies as the control areas of ISO-New York, the Northern Maine Independent System Administrator, Inc., and Quebec and New Brunswick. ¶26, A10. Because RECs are minted for verified electric generation, and because NEPOOL GIS ensures that RECs are not double-counted, the platform serves an important clearinghouse function for New England.

The NEPOOL GIS rules do not favor any particular state, and in fact "ninety percent of REC supply in Connecticut comes from other states." A192; AX193. However, the RECs must be linked to electric generation that is generated within ISO-NE or can be delivered to ISO-NE in accordance with NEPOOL GIS rules. This requirement is known as the "deliverability requirement" and is expressly incorporated in Conn. Gen. Stat. § 16-245a(b) where that statute references NEPOOL GIS Operating Rule 2.7(c).

NEPOOL GIS long ago explained the reason for the deliverability requirement. It ensures that "GIS certificates are only awarded for renewable energy that is consumed in the NEPOOL control area and displaces fossil fuel generation in New

England." PURA Decision dated November 9, 2005 in Docket No. 04-01-13, *DPUC Review of RPS Standards and Trading Programs in New York, Pennsylvania, New Jersey, Delaware and Maryland*, p. 5. The deliverability requirement was created by NEPOOL because: 1) "it reflects the realities of how power moves," 2) "[t]he purpose of the GIS is to reflect accurately the emission characteristics of energy that is actually consumed in the NEPOOL Control Area"; and 3) "[a]llowing non-adjacent imported energy would diminish the accuracy of the emission characteristics." *Id*. Consequently, in-region generators displace because they are located on the grid. Adjacent-region generators displace when they deliver electricity in accordance with NEPOOL GIS Operating Rule 2.7(c).[15]

"Any notion of discrimination assumes a comparison of substantially similar entities," and "when the allegedly competing entities provide different products … there is a threshold question whether the companies are indeed similarly situated for constitutional purposes." *General Motors Corp. v. Tracy*, 519 U.S. 278, 298–99 (1997). Connecticut Class I and II RECs are not comparable to RECs minted in Georgia. RECs minted in Georgia do not demonstrate displacement of fossil fuel

[15] Though Rule 2.7(c) would allow plaintiff to import power from plaintiff's New York facilities into ISO-NE and receive RECs, plaintiff does not import its electricity in accordance with Rule 2.7(c) because of the costs associated with following the rule. A12, ¶34.

generation in New England. They do not demonstrate an increased amount of renewable energy in the electricity used to serve customers in New England and in Connecticut. As such, plaintiff's Georgia RECs are not substantially similar to Connecticut Class I and II RECs, and fail the threshold question from *Gen. Motors*.

Further, because Connecticut Class I and II RECs exist entirely by dint of state legislation, trade in these RECs is not natural interstate commerce. Thus the District Court correctly noted that "the RPS statute does not present the typical dormant commerce clause issue." A197; AX198. Indeed, there "is not an interstate market for RECs that comply with Connecticut requirements." *Id*. Connecticut invented Connecticut Class I and II RECs, and continues to redefine those products over the years. See, e.g., Connecticut Public Act 98-28, §§1(a)(26), (27); Conn. Gen. Stat. § 16-1(a)(20), (21).

Plaintiff asserts that restricting acceptable RPS compliance to NEPOOL GIS minted Class I and II RECs impermissibly burdens interstate commerce. Brief, pp. 61-63. However, the RPS and Connecticut Class I and II RECs are unique products which exist only because of state legislation. The RPS and RECs are "a market for a product that the [State] has created and of which the [State] is the sole manufacturer." *McBurney v. Young*, 133 S.Ct. 1709, 1720 (2013). Connecticut's

RPS compliance requirement does not violate the dormant Commerce Clause.

Connecticut Class I and II RECs are also a subsidy, as found by the District Court. A198; AX199. The subsidy is an additional revenue stream for renewable energy generators, and flows from Connecticut ratepayers to renewable energy generators. Connecticut mandates that retail electricity providers must have RECs in hand to demonstrate RPS compliance, and the sellers must buy NEPOOL GIS RECs from generators. Retail electricity providers pass along these RPS compliance costs to Connecticut ratepayers. This cycle is a subsidy fashioned by Connecticut to reward renewable generators for displacing fossil fuel generation on the New England grid.

In *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794 (1976) ("*Alexandria Scrap*"), the State of Maryland established a subsidy to speed up the scrap cycle associated with abandoned cars. *Alexandria Scrap*, 426 U.S. at 797. Even though the state imposed a more exacting documentation requirement on out-of-state processors than in-state processors, the *Alexandria Scrap* Court held that the subsidy was not a "barrier of a type forbidden by the Commerce Clause…." *Alexandria Scrap*, 426 U.S. at 809-810.[16] Connecticut's REC program is a purer, more

[16] Justice Stevens' concurrence reduced the issue to its essence with two observations. First, he noted that the very subsidized

powerful example than *Alexandria Scrap* of state-created, subsidized commerce that is entirely inoffensive to the dormant Commerce Clause.

Notably, the State of Maryland subsidized commerce of an existing product in an existing market. It did not invent automobile hulks, and did not invent the market for automobile hulks. Connecticut's REC market is a far more powerful example of state-created, subsidized commerce because, as acknowledged by plaintiff, Connecticut invented the Connecticut Class I and Class II REC and the market for those RECs. ¶24, A10. Creating and refining Connecticut's REC market cannot "imped[e] free private trade in the national marketplace," because there is no national marketplace for RECs. A197, quoting *Reeves v. Stake*, 447 U.S. 429, 436-37 (1980).

The relatively recent decision in *Dep't of Revenue of Ky. v. Davis*, 553 U.S. 328, 345-348 (2008) ("*Davis*") supports the District Court's legal analysis. The *Davis Court* upheld Kentucky's tax exemption for income earned from state and local bonds. *Davis*, 553 U.S. at 343. The majority opinion upheld

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commerce that the *Alexandria Scrap* plaintiff claimed to be burdened "would never have existed if in the first instance Maryland had decided to confine its subsidy to operators of Maryland plants." *Alexandria Scrap*, 426 U.S. at 815. Second, he noted that the "failure to create [abandoned car] commerce would have been unobjectionable because the Commerce Clause surely does not impose on the States any obligation to subsidize out-of-state business." *Alexandria Scrap*, 426 U.S. at 815-816.

Kentucky because its tax exemption for state-issued bonds supported a traditional government function and did not treat substantially similar interests differently. *Davis*, 553 U.S. at 339-340, 343.[17]

Connecticut's program supports a traditional government function. It is a policy decision of the state legislature to influence the mix of electric generation used to serve customers, and to increase the proportion of renewable generation used to serve Connecticut customers.

The program is also justified based upon its legitimate local objectives and absence of economic protectionism. The RPS program subsidizes renewable generators to displace fossil fuel generation on the ISO-NE electric grid in favor of renewable generation, and utilizes Connecticut Class I and II RECs minted by NEPOOL GIS to do so. A193; AX194. It results in greater amounts of renewable generation on the New England grid and in the electricity used by Connecticut ratepayers. Whether plaintiff believes the RPS program does so well or poorly, or believes it should be done differently, is of no moment. Brief, pp. 69-72. Nor does the program benefit in-state interests at

[17] The *Davis* plurality also upheld the state program, concluding that when commercial and regulatory activities "[complement] each other" and "[tie] the regulation [to a] civic objective" instead of raw discrimination, the regulatory activity should not be viewed in isolation as Commerce Clause discrimination. *Davis*, 553 U.S. at 347-348.

the expense of out-of-state interests, because Connecticut sends 90% of its Class I REC subsidy out-of-state. A192; AX193.

The regional limitation was not produced by state legislators seeking to elevate local interests to the exclusion of out-of-state interests. In fact, the regional limitation was adopted by Connecticut, but **created** by a regional organization formed under the auspices of the federal government. Connecticut adopted the NEPOOL GIS platform for RPS compliance.

The platform was created by NEPOOL, a voluntary association of New England Energy Market sectors that does not even include state regulators. *New England Power Pool*, 88 FERC ¶ 61079, 61181, 1999 WL 500664 (July 16, 1999). NEPOOL is governed through a committee structure expressly approved by FERC. *New England Power Pool*, 88 FERC at ¶ 61079. Consequently, Connecticut's adoption of the NEPOOL GIS platform, complete with its regional limitations, does not reflect economic protectionism. Connecticut's RPS program achieves legitimate local objectives, including use of a regional verification center and clearinghouse. No basis exists to strike down Connecticut legislation in the name of state economic protectionism. It incorporates a regional framework written under the auspices of the federal government.

Plaintiff implies, but does not directly contend, that the District Court's reliance on *Alexandria Scrap* is misplaced when

a state regulates the market it has created. Brief, p. 61. Plaintiff provides no support for this argument, and none exists. Plaintiff generally mentions *Davis*, but cites no holding of the case. Nor does plaintiff provide any logic as to why a state is unconstrained by the Commerce Clause when it creates a product and market that did not previously exist (Brief, p. 61), but becomes automatically and categorically subject to the Commerce Clause when it establishes, implements and enforces the rules for the market it has created. Dormant Commerce Clause law "is driven by concern about 'economic protectionism – that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors." *Davis*, 553 U.S. at 337. None of these concerns arise simply because a state regulates a market it has created.

Connecticut is under no obligation to subsidize plaintiff's electric generation in Georgia, or another developer's renewable generation in Arizona, or another developer's renewable generation in Washington state merely because Connecticut created a subsidy in the form of Connecticut Class I and II RECs. A state can regulate the subsidy market it created without invoking Commerce Clause scrutiny.

Plaintiff also accuses the state of "banning" out-of-region RECs and creating a form of regional balkanization that offends

the dormant Commerce Clause. Brief, pp. 62-69. These claims are groundless.

Connecticut's law does not ban out-of-region RECs. Plaintiff's RECs can be sold to any Connecticut entity wishing to buy them, at whatever price the market will bear. Plaintiff's Georgia RECs could, for example, be purchased in Connecticut by a company wishing to green its image. The RECs are simply ineligible for the subsidized price created by the Connecticut RPS program and funded by Connecticut ratepayers. What plaintiff terms a "ban" is no ban at all.[18]

Plaintiff's remaining arguments are unavailing. In *Wyoming v. Oklahoma*, 502 U.S. 437 (1992), the State of Oklahoma required in-state utilities to burn a percentage of in-state coal for electric generation. The set-aside economically advantaged a domestic fuel source and protected that fuel source from interstate markets. *Wyoming*, 502 U.S. at 440. The State of Oklahoma prevented out-of-state fuel sources from being

[18] Plaintiff's reliance on the hypothetical presented in *NE Bancorp, Inc. v. Bd. of Governors of Fed. Reserve Sys.*, 472 U.S. 159, 174 (1985) simply is inapplicable. Brief, p. 62. Connecticut created its Class I and II subsidy, and relies upon a regional clearinghouse for RPS compliance. As long as the RECs comply with the NEPOOL GIS rules, they are eligible for the Connecticut subsidy, even from outside of New England. The facts do not fit a regional balkanization theory, and the *NE Bancorp Court* did not create any such theory in *dicta*. Moreover, regional banking takes place in an established interstate market, whereas Connecticut's REC market was invented by Connecticut, and is not similarly situated with other RECs.

purchased and combusted into electrons when it established a set-aside preference for in-state coal.

Connecticut did not establish a preference for utilities to combust an in-state fuel source at the expense of out-of-state fuel sources. As plaintiff concedes, "Connecticut is not favoring, either facially or in practice, in-state RECs as compared to all out-of-state RECs." Brief, p. 62. Connecticut is handing out a subsidy, a reward for generating electricity from renewable resources that displace fossil fuel resources on the New England grid as verified by a regional clearinghouse.

Further, the State of Oklahoma did not invent coal. Rather, it created a set-aside preference for in-state coal. *Wyoming*, 502 U.S. 455. Coal as a fuel source for electric generation, and the interstate market for coal, existed long prior to Oklahoma's actions. In contrast, Connecticut created the Class I and Class II REC, commerce that would not exist but for Connecticut’s actions.

Plaintiff’s pollution control equipment hypothetical is similarly unavailing. Brief, pp. 68-69. Plaintiff merely substitutes pollution control equipment for coal in the *Wyoming* case. In plaintiff's hypothetical, manufacturers create pollution control equipment, including in-state manufacturers, and the state requires utilities to install only the pollution control equipment manufactured by in-state entities. Like

Wyoming, plaintiff's hypothetical involves neither a subsidy, nor commerce invented by the state. Connecticut is merely restricting the geographic area to which it will subsidize renewable generators because doing so displaces fossil fuel resources on the New England grid.

As plaintiff acknowledges, Connecticut created demand for Connecticut Class I and II RECs, and could eliminate the demand tomorrow by eliminating the RPS and its REC requirement. Brief, pp. 68-69. However, plaintiff attempts to use its pollution control equipment example to show that even if a pollution control equipment requirement is eliminated tomorrow and demand disappears, the in-state or in-region requirement remains invalid. *Id*. This argument misses the mark, and only serves to illustrate the extent to which Connecticut Class I and II RECs are wholly a state creation. If Connecticut eliminated the RPS and its REC requirement tomorrow, there would be no commerce at all in Connecticut Class I and II RECs, because those products would simply no longer exist.

Even if examined under the test articulated in *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970), plaintiff fails to state a valid claim. "Under the *Pike* balancing test, [plaintiffs] must show that a statute enacted for a legitimate public purpose, although apparently evenhanded, actually imposes burdens on interstate commerce that exceed the burdens on

intrastate commerce, and that those excess burdens on interstate commerce are clearly excessive in relation to the putative local benefits." (internal citations omitted, internal quotations omitted) *Freedom Holdings, Inc. v. Spitzer*, 357 F.3d 205, 217 (2d Cir. 2004).

Connecticut treats in-state renewable energy and out-of-state renewable energy uniformly, as both are eligible for RPS compliance so long as the generator can obtain a NEPOOL GIS REC. Connecticut reasonably relies upon the NEPOOL GIS system to mint and verify RECs. Connecticut also reasonably directs its policy efforts to subsidize renewable generation to benefit its residents. Plaintiff's true complaint is that the RPS subsidy system Connecticut created does not subsidize its own renewable generation, even though plaintiff's generation does not or cannot meet NEPOOL GIS deliverability requirements

No strictly local benefit is elevated over purported interstate commerce burdens. Connecticut's RPS creates a regional benefit. It fosters renewable energy development throughout New England and in adjacent control areas.

The District Court correctly concluded that Connecticut's RPS compliance program does not violate the dormant Commerce Clause because Connecticut ratepayers are not obligated to subsidize renewable generation in Georgia and throughout the United States. The dormant Commerce Clause challenge failed to

state a claim upon which relief can be granted, and the District Court properly dismissed the claim. This Court should affirm.

V. THE DISTRICT COURT PROPERLY DENIED PLAINTIFF'S MOTION FOR INJUNCTIVE RELIEF.

Plaintiff's motion to the District Court for preliminary injunctive relief was denied as moot because the underlying complaints were dismissed for lack of standing. A200. Plaintiff offers no case law or argument demonstrating that injunctive relief can survive when a plaintiff lacks standing to bring an action. Denial of plaintiff's motion for injunctive relief is required when plaintiff lacks standing. See, *Am. Freedom Law Ctr. v. Obama*, 106 F. Supp. 3d 104, 113 (D.D.C. 2015), *aff'd*, 821 F.3d 44 (D.C. Cir. 2016) ("As the plaintiffs lack standing to bring their asserted claims, the Court **must** also deny as moot the plaintiffs' motion for a preliminary injunction.") (emphasis added). Instead, plaintiff reargues its motion for preliminary injunction. Brief, pp. 50-60. The District Court's ruling denying plaintiff's preliminary injunction should be affirmed.

CONCLUSION

For the foregoing reasons, the decision of the District Court should be affirmed in its entirety.

Respectfully submitted,

KATHERINE S. DYKES, JOHN W. BETKOSKI, III and MICHAEL CARON, IN THEIR OFFICIAL CAPACITIES AS COMMISSIONERS OF THE CONNECTICUT PUBLIC UTILITIES REGULATORY AUTHORITY

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CERTIFICATION OF COMPLIANCE WITH RULE 32(A)(7)

I hereby certify that this brief complies with the type-volume limitations of Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure in that this brief contains 12,965 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), and complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32 (a)(6) because it has been prepared in a monospaced typeface (courier new) with 10.5 or fewer characters per inch.

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CERTIFICATION OF SERVICE

I hereby certify that true and accurate copies of the foregoing brief were served by first class mail, postage prepaid, by Brescia's Printing Service in accordance with Rule 25 of the Federal Rules of Appellate Procedure on this 22nd day of November, 2016, to the Clerk of this Court and the following counsel of record:

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