No. 16-2946, 16-2949

To Be Argued By:
Robert D. Snook
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

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

ON 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.

OPPOSITION OF DEFENDANT-APPELLEE ROBERT KLEE

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INTRODUCTION

Appellant Allco Finance Limited ("Allco") has filed a motion ("Motion") before this Court pursuant to Federal Rule of Appellate Procedure 8(a) for an emergency injunction prohibiting the Defendants from awarding renewable energy contracts in connection with their current competitive solicitation while Allco's appeal is pending.[1] Allco additionally asked that this Court issue a temporary restraining order (before 6:00 pm on October 11, 2016) preventing any such awards or approvals while it considers Allco's Motion.

Allco moved for similar injunctive relief in the District Court, which the court denied, finding that Allco lacked standing to bring its underlying action. A183-225.

Defendant-Appellee Robert Klee, the Commissioner ("Commissioner" or "Defendant") of the Department of Energy and Environmental Protection ("DEEP") hereby opposes Allco's Motion

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[1] As will be discussed below, Allco's Motion seeks to enjoin the Commissioner from awarding energy contracts under a state program. Federal Rule of Appellate Procedure 8, however, does not authorize injunctive relief against *defendants*. Rule 8 only authorizes a stay of the judgment or order of *a district court* pending appeal (FRAP 8(a)(1)(A). Allco's motion is not authorized by Rule 8.

because the Motion is improper, Allco lacks standing to bring this matter, Allco has failed to show that it will succeed on the merits, Allco has not been irreparably injured, and because the public interest weighs heavily in favor of preventing the suspension of an important state program.[2]

BACKGROUND

Plaintiff Allco Finance Limited has appealed a decision of the District Court dismissing two separate complaints against the Commissioner of the Department of Energy and Environmental Protection and Arthur House, John Betkoski, III, and Michael Caron, Utility Commissioners ("PURA Commissioners") of the Public Utilities Regulatory Authority ("PURA"), in their official capacities. The underlying cases, each entitled *Allco v. Klee, et al.*, involve the implementation of two Connecticut statutes, Public Acts 13-303 and 15-

[2] This appeal is related to several earlier cases. The initial case, *Allco Fin. Ltd. v. Klee*, et al., No. 3:15-CV-1874 JBA, (please note that this opposition will employ the same terminology used by the District Court and call this case *Allco I*), was brought against the Defendant Commissioner related to the 2013 RFP. The District Court (Arterton, J.) dismissed Allco's complaint finding both a lack of standing and that the Commissioner did not set wholesale rates in violation of the FPA. *Allco I,* No. 3:13-CV-1874-JBA, 2014 WL 7004024 (D. Conn. Dec. 10, 2014). The Second Circuit affirmed on alternative grounds, *Allco v. Klee,* 805 F.3d 89, 93 (2d Cir. 2015) (*Allco II*).

107, that authorize the Commissioner to solicit proposals for development of renewable energy, review and select winning projects, and then direct state regulated utilities to negotiate contracts with the designated projects.

Allco is a generator of renewable energy and claims that Connecticut's statutory scheme for procuring renewable energy violates the Federal Power Act of 1935 ("FPA"), because Congress gave the Federal Energy Regulatory Commission ("FERC") exclusive jurisdiction over all wholesale electricity rates, charges, and terms. Allco asserts that states can only engage in any activity affecting the wholesale energy market under the Public Utility Regulatory Policies Act of 1978, 16 U.S.C. § 824a-3, ("PURPA"), which allows states to fix the price of energy under a power purchase agreement if the facility is a defined "qualifying facility" ("QF"), such as Allco. Motion, pp. 1-3; *Compl.*, ¶¶ 21, 42 A9, A13.[3] Allco further asserts that the state's competitive requests for proposals ("RFPs") do not comply with the terms of PURPA, and if they had, Allco would have received a contract. The Motion itself

[3] A_ refers to the Joint Appendix in Docket No. 16-2946.

states: "Allco has alleged that but for the presence of non-QFs, Allco would have been selected." Motion, p. 11. A113 ¶29.

Allco is seeking to enjoin the Commissioner's current renewable energy procurement conducted through a request for proposals ("2015 RFP") issued pursuant to his authority under Connecticut law, in particular Public Act 15-107. The 2015 RFP was issued on November 12, 2015, and more than fifty bids have been received from renewable energy developers. A182. Plaintiff Allco chose not to submit a bid in the 2015 procurement. *Compl.*, ¶ 35, AX10.[4] As of the date of this opposition, bids are under active consideration by the DEEP as well as by the relevant soliciting parties in Massachusetts and Rhode Island. Simultaneously, DEEP is also conducting a smaller scale 2-20 MW renewable energy procurement and is actively considering many bids.[5]

Allco sought a preliminary injunction before the District Court, which held that Allco lacked standing to bring its claims. A191. Allco

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[4] AX_ refers to the Joint Appendix in Docket No. 16-2949.

[5] Notice of Request for Proposals, DEEP (Mar. 9, 2016), *available at* http://www.dpuc.state.ct.us/DEEPEnergy.nsf/$EnergyView?OpenForm&Start=1&Count=30&Expand=5&Seq=1.

appealed on August 23, 2016. A204. On October 3, 2016, Allco filed this motion for a premininary injunction with this Court.

STANDARD OF REVIEW

A preliminary injunction is an "extraordinary remedy." *UBS Fin. Servs. V. W. Va. Univ. Hosps., Inc.*, 660 F.3d 643, 648 (2d Cir. 2011), quoting *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008); *see also Sussman v. Crawford,* 488 F.3d 136, 139 (2d Cir.2007). A movant must show, beyond "irreparable" harm or injury, a "likelihood of [ultimate] success" where, as here, the preliminary injunction would affect "governmental action taken in the public interest pursuant to a statutory or regulatory scheme." *Red Earth LLC v. United States*, 657 F.3d 138, 143 (2d Cir. 2011). That "likelihood of success" standard is heightened further to a "clear" or "substantial" showing of a likelihood of ultimate success where plaintiff seeks a preliminary injunction that would "alter, rather than maintain, the status quo." *Almontaser v. New York City Dep't of Educ.*, 519 F.3d 505, 508 (2d Cir. 2008). Finally, the preliminary injunction movant must also show "that the public's

interest weighs in favor of granting an injunction." *Red Earth LLC*, 657 F.3d 138, 143 (2d Cir. 2011).

Further, "[w]here the moving party seeks to stay government action taken in the public interest pursuant to a statutory or regulatory scheme, the district court should not apply the less rigorous fair-ground-for-litigation standard and should not grant the injunction unless the moving party establishes, along with irreparable injury, a likelihood that he will succeed on the merits of his claim." (internal citation omitted) *Able v. United States*, 44 F.3d 128, 131 (2d Cir. 1995). The exception "reflects the idea that governmental policies implemented through legislation or regulations developed through presumptively reasoned democratic processes are entitled to a higher degree of deference and should not be enjoined lightly." *Able*, 44 F.3d at 131.

ARGUMENT

I. Allco Seeks Relief Not Available Under FRAP 8

Federal Rule of Appellate Procedure 8 does not authorize the injunctive relief Plaintiff seeks. Allco's Motion seeks to enjoin Defendant Commissioner "from awarding . . . interstate wholesale electricity contracts in connection with [its] current energy solicitation."

Motion, p.1. Rule 8, however, does not authorize an appellate court to enjoin defendants. Rule 8 authorizes only one form of injunctive relief -- a stay of the judgment of a district court pending appeal (FRAP 8(a)(1)(A)). Plaintiff's Motion does not ask this Court to stay the trial court's judgment. Instead, it asks this Court to issue injunctive relief against the Commissioner that the District Court declined to issue. This relief is not authorized by Rule 8.

II. Allco Lacks Standing

The United States Supreme Court has recently addressed the importance of standing in the context of establishing the jurisdiction of a federal court in *Spokeo, Inc. v. Robins*, 136 S.Ct. 1540 (2016). The Court stated that:

> Our cases have established that the irreducible constitutional minimum of standing contains three elements. The plaintiff must have (1) suffered an 'injury in fact', (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable decision. The plaintiff, as the party invoking federal jurisdiction, bears the burden of establishing these elements.

136 S.Ct. at 1547 (*citations, internal quotations and ellipses omitted.*)

In this case Allco has not suffered an injury-in-fact, as any claimed injury is entirely speculative and conjectural, and this Court cannot grant Allco the relief sought.

A. Allco Lacks A Cognizable Injury And Any Claimed Injuries Cannot Be Redressed By this Court.

As noted in *Spokeo*, a plaintiff must demonstrate an "actual or imminent, not conjectural or hypothetical" injury and that injury must be redressable by a decision of the federal court. *Spokeo*, 136 S.Ct. at 1548. Allco has not suffered an actual injury and this Court cannot provide Allco the relief it seeks.

First, Allco declined to participate in the either of the current state competitive RFPs and therefore cannot establish that it has been injured by not getting a contract through an RFP it has not participated in. *Compl.*, ¶ 35, AX10.

Further, as noted by the District Court, the injury Allco seeks to have cured is "its being deprived of a State-directed contract . . . under the . . . statutory scheme." Decision, A187. Allco asserts that, if the procurement had been conducted properly, Allco would have participated and one of its projects would have been selected. Motion, p.

11. A113, ¶29. ("Allco has alleged that but for the presence of non-QFs, Allco would have been selected.")

Thus, to achieve Allco's desired results, Allco needs (1) to have the Commissioner issue a new "PURPA-compliant" RFP; and (2) must win the competitive selection. As the District Court phrased it:

> Allco's theory of recovery depends upon two layers of conjecture and speculation. First, Allco conjectures that the DEEP Commissioner will issue a new and different RFP, fully compliant with PURPA, which would allow all Qualifying Facilities . . . to bid for contracts. Second, Allco conjectures that, having joined what appears to be a large field of electric energy competitors, Allco will win the competition . . . .

Decision, A187.

As to the second point, winning the competitive evaluation, it is entirely conjectural that Allco would win a competitive procurement. That is the nature of RFPs; parties bid in and some (not all) are selected. In fact, enjoining the on-going procurement that Allco chose not to participate in would only block other companies from getting contracts and not give Allco anything. As this Court noted in a prior decision with regard to an earlier, 2013 state procurement RFP:

> But invalidating the [2013 RFP] contracts awarded to Fusion Solar and Number Nine would

> simply deny Allco's competitors a contractual benefit without redressing Allco's injury – its not being selected for a . . . contract. Because merely voiding its competitors' contracts would not redress Allco's injury, Allco also lacks standing to seek such equitable relief.

Allco II, 805 F.3d at 98.

As to the first conjecture, it is simply not possible for the Commissioner to issue a new, PURPA-compliant RFP if the 2015 RFP is enjoined. It must be stressed that the 2015 RFP was issued under *state law* and is not a PURPA procurement. The only authority the Commissioner has to issue a request for proposals for renewable energy is under Public Acts 13-303 and 15-107. The Commissioner has no other authority under state or federal law. The Connecticut legislature has only empowered the Commissioner to issue renewable energy RFPs under very strict terms. For example, Public Act 15-107 directs the Commissioner to solicit contracts for renewable energy projects as well as large-scale hydropower and natural gas capacity. P.A. 15-107, § 1 (2015) (codified at Conn. Gen. Stat. § 16a-3j). The salient state statute gives the Commissioner the following authority:

> The Commissioner . . . shall evaluate project proposals received under any solicitation issued

> pursuant to [this statute] based on factors including, but not limited to, (1) improvements to the reliability of the electric system . . .; (2) whether the benefits of the proposl outweigh the costs to ratpayers; (3) fuel diversity; (4) the extent to which the proposal contributes to meeting the requirements to reduce greenhouse gas emissions and improve air quality . . . ; (5) whther the proposal is in the best interest of ratepayers; and (6) whether the proposal is aligned with the policy goals outlines in the Integrated Resources Plan . . . and the Comprehensive Energy Strategy . . . including, but not limited to, environmental impacts.

Public Act 15-107, § 1(e). The statute empowers the Commissioner to consider ratepayer impacts, environmental impacts, fuel diversity, etc., but nowhere is the Commissioner permitted to set wholesale electric rates at avoided costs or any authority to implement PURPA.[6] There is, therefore, no legal authority for the Commissioner to issue the type of PURPA-compliant RFP that Allco wishes and thus no way a favorable court decision can redress Allco's injuries.

Allco also argues that it has standing because the 2015 RFP, if successful, will bring major new renewable energy into the region and would "directly compete with other renewable energy resources."

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[6] The implementation of PURPA under Connecticut law is given to the Public Utilities Regulatory Authority. *See*, Conn. Gen. Stat. §16-243a.

Motion, p. 10. In other words, the winning bids in the 2015 RFP would result in less demand for projects Allco may wish to build in the future.

Plaintiff's claim that the the RFP would adversely affect hypothetical future contracts also fails to sustain Allco's standing claim. The Second Circuit expressly recognized Allco's theory that the "PURPA sales that Allco fears it would make at a lower price clearly did not occur at the time that the complaint was filed, as they are future sales." *Allco I*, 805 F.3d at 94, fn. 3. For an injury to be an injury-in-fact, it must be cognizable at the time of the filing of the complaint. *Id.* Thus, Allco lacks standing to bring this matter.

III. Allco Cannot Meet the Requirements for an Injunction

To enjoin the 2015 RFP, Allco must show "irreparable" harm or injury, and a "likelihood of [ultimate] success," particularly in the case where a preliminary injunction would affect "governmental action taken in the public interest pursuant to a statutory or regulatory scheme." *Red Earth LLC v. United States*, 657 F.3d 138, 143 (2d Cir. 2011). Finally, the preliminary injunction movant must also show "that the public's interest weighs in favor of granting an injunction." *Red Earth LLC*, 657 F.3d 138, 143 (2d Cir. 2011).

A. No Irreparable Injury

As noted above in the discussion regarding standing, Allco is not participating in the 2015 RFP and thus has not suffered and cannot suffer any cognizable injury. Additionally, Allco's claimed injuries are hypothetical at best and cannot be redressed by an order of this Court because the 2015 RFP is not being conducted pursuant to PURPA. Finally, to the extent Allco has rights under PURPA, it has other avenues to pursue those rights and is in fact currently before state regulators seeking PURPA contracts for several solar projects. *See*, PURA Docket No. 16-03-08. [7]

B. The Public Interest Favors Denying An Injunction.

While Plaintiff does not face irreparable harm, there is a clear threat to the public interest from enjoing on-going state programs designed to meet important environmental and public policy goals. Specifically, the 2015 RPF is directed by an act of the legislature and has consumed significant state resources. Other states in New England are conducting similar efforts and there is a clear intention to coordinate procurements to obtain the greatest ratepayer benefits.

[7] http://www.dpuc.state.ct.us/dockcurr.nsf/8e6fc37a54110e3e852576190052b64d/f5d852fd421d7aa585257f8700585f8a?OpenDocument

A182. Enjoining Connecticut's procurement would directly threaten this major undertaking and substantially interfere with the state's environmental policies, renewable energy goals and system reliability efforts.[8] In addition, the preparation of the more than 50 bids submitted into the 2015 RFP required significant funds and effort by private developers all of whom will be immediately affected by an injunction. A182. An injunction at this point would have immediate adverse impacts to important public policy programs.

C. Likelihood of Success

Allco cannot demonstrate that it is likely to succeed on the merits of its claim. Plaintiff asserts that states are barred by the FPA from any actions regulating wholesale sales outside of the Public Utility Regulatory Policies Act of 1978, 16 U.S.C. § 824a-3. Motion, pp. 1-2. Allco argues that the 2015 RFP does not comply with PURPA and thus is preempted under the Supremacy Clause. Motion, pp. 17-18. The central error in Allco's position is that the Commissioner is not regulating wholesale rates at all but is directing utility resource mix decisions (as permitted by federal law) through bilateral contracts,

[8] *See, e.g.*, Conn. Gen. Stat. § 22a-200c

which the Supreme Court has recently ruled are not preempted by the FPA. *Hughes v. Talen Energy Marketing LLC*, 136 S.Ct. 1288, 1299 (2016).

Federal Power Act

As the Second Court noted in *Allco II*:

> the Federal Power Act gives the [FERC] exclusive authority to regulate sales of electricity at wholesale in interstate commerce. *See* 16 U.S.C. § 824(b)(1). States may not act in this area unless Congress creates an exception.

Allco II, 805 F.3d at 91. Specifically, "FERC's authority includes 'exclusive jurisdiction over the rates to be charged [a utility's] interstate wholesale customers.'" *Entergy Nuclear Vermont Yankee, LLC v. Shumlin*, 733 F.3d 393, 432 (2d Cir. 2013) (quoting *Nantahala Power & Light Co. v. Thornburg,* 476 U.S. 953, 966 (1986)) (alterations in original). On the other hand, the Supreme Court has explained that under the FPA, states retain "authority over local service issues, including reliability of local service; administration of integrated resource planning and utility buy-side and demand-side decisions, . . [and] authority over utility generation and resource portfolios . . . ." *New York v. FERC*, 535 U.S. 1, 24 (2002), *citing* Order No. 888, at 31,782,

n.544. Further, *Entergy Nuclear Vermont Yankee LLC v. Shumlin*, 733 F.3d 393, 417 (2d Cir. 2013), clearly permits states to "direct the planning and resource decisions of utilities under their jurisdiction."

FERC Jurisdiciton

Overall, as the District Court noted below:

> There are two ways in which FERC achieves its regulatory aims. First, Generators and [utilites] can enter private bilateral contracts called `Power Purchase Agreements' (PPAs). See *Hughes*, 136 at 1292. If these bilateral contracts are made in good faith and are the sresult of arms-length negotiation, then the are presumed reasonable by FERC. *Id.* (*citing Morgan Stanley*, 554 U.S. at 546-58). Second [regional grid operators] can buy from and sell to generators and [utilities] through a FERC-approved auction process. *Id.*

Decision, A163.

The District Court was paraphrasing a recent decision of the United States Supreme Court addressing the nature and extent of FERC's jurisdiction under the FPA in *Hughes v. Talen Energy Marketing LLC*, 136 S.Ct. 1288 (2016). The *Hughes* court noted that the FPA vests exclusive jurisdiction over wholesale energy sales in the FERC. FERC, in turn, exercises its jurisdiction in two ways:

> Interstate wholesale transactions in deregulated markets typically occur through two mechanisms. The first is bilateral contracting: [load serving entities] sign agreements with generators to purchase a certain amount of electricity at a certain rate over a certain period of time. After the parties have agreed to contract terms, FERC may review the rate for reasonableness. *See Morgan Stanley Capital Group Inc. v. Public Util. Dist. No. 1 of Snohomish Cty.*, 554 U.S. 527, 546-548 (2008) . . . . Second, [regional grid operators] administer a number of competitive wholesale auctions. . . .

Hughes, 136 at 1292-93. Thus, as the Supreme Court ruled, bilateral contracts and regional auctions both are acceptable and do not violate the FPA.

Allco asserts that the state procurements are "identical" to the prohibited transactions in *Hughes*. Motion, p. 11. In reality, the Supreme Court explicitly differentiated the contracts for differences in *Hughes* from the standard bilateral contracts "which FERC has long accommodated. . . ." *Hughes,* 136 S. Ct. at 1299. Specifically, *Hughes* "involve[d] the capacity auction administered" by a regional grid opertor. *Id.* at 1293. The Court noted that the State of Maryland had, in that case, required a generator to participate in the regional auction, but at a different rate from the FERC-approved market rate and thus

"Maryland's program invades FERC's regulatory turf." *Id.* at 1297. The Court hastened to add that "the contract at issue here differs from traditional bilateral contracts in this significant respect: The contract for differences does not transfer ownership of capacity from one to another outside the auction. Instead, the contract for differences operates within the auction. . . ." *Id.* at 1299.

The Court concluded:

> 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.

Id. *Hughes* involved the State of Maryland's intrusion into the regional market rate. In contrast, the Connecticut 2015 RFP involves classic bilateral contracts and did not "condition the payment of funds on capacity clearing the auction." Thus, the 2015 RFP does "not suffer from the fatal defect" in *Hughes*.

Finally, not only are bilateral contracts not preempted by the FPA, but state regulatory decisions directing utilities to add renewable energy as part of the state's resource mix are expressly permitted by the FPA.

Federal law is clear that states have the authority to direct the procurement of renewable energy as this Court held in *Entergy Nuclear Vermont Yankee LLC v. Shumlin*, 733 F.3d 393, 417 (2d Cir. 2013). In *Shumlin*, this Court held that:

> [S]tates 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 . . . order utilities to purchase renewable generation. . . . [I]t is clear that the Vermont Legislature can direct retail utilities to "purchase electricity from an environmentally friendly power producer in California or a cogeneration facility on Oklahoma, if it so chooses.

Shumlin, 733 F.3d 393, 417, citing *S. Cal. Edison Co. San Diego Gas & Elec. Co.*, 71 FERC P 61269 at *8 (June 2, 1995). FERC "respect[s] the fact that resource planning and resource decisions are the prerogative of state commissions and that states may wish to diversify their generation mix to meet environmental goals in a variety of ways." *Southern California Edison Company*, 70 FERC P 61215, 1995 WL 169000 (1995).

The Commissioner has issued a renewable energy RFP under *state* law to address *state* environmental and resource adequacy needs.

Nothing in state law permits the Commssioner to change, modify, or affect regional energy auction prices or in any manner intrude upon FERC's jurisdiction. Therefore, the 2015 RFP is not preempted by the Federal Power Act and Allco cannot prevail on the merits of its case.

CONCLUSION

For all the foregoing reasons, the Defendant Commissioner moves that this Court deny Allco a preliminary injunction.

Respectfully submitted,

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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 4,473 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 (century schoolbook) with 10.5 or fewer characters per inch.

/s/ Robert D. Snook
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CERTIFICATION OF SERVICE

I hereby certify that true and accurate copies of the foregoing Opposition were served using the Court's CM/ECF system and a copy of the foregoing Opposition was sent to all counsel of record.

/s/ Robert D. Snook
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