UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

ALLCO FINANCE LIMITED, Plaintiff, v. ROBERT KLEE, in his official capacity as Commissioner of the CONNECTICUT DEPARTMENT OF ENERGY AND ENVIRONMENTAL PROTECTION, and ARTHUR HOUSE, JOHN W. BETKOSKI III, and MICHAEL CARON, in their official capacity as Commissioners of the CONNECTICUT PUBLIC UTILITIES REGULATORY AUTHORITY. Defendants.	Case No. 3:16-cv-508 **COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF FOR VIOLATIONS OF THE SUPREMACY CLAUSE OF THE UNITED STATES CONSTITUTION, THE FEDERAL POWER ACT AND THE PUBLIC UTILITY REGULATORY POLICIES ACT** **March 30, 2016**

NATURE OF THE ACTION

1. This case seeks declaratory and injunctive relief related to actions taken and to be taken by the Defendants in violation of the Federal Power Act[1] and the Public Utility Regulatory Policies Act ("PURPA")[2]. Many of the actions complained of herein were part of a complaint filed in 2013 by Plaintiff Allco Finance Limited ("Allco"), the dismissal of which by this Court was upheld by the Second Circuit Court of Appeals for failure to exhaust administrative remedies.[3] Exhaustion has now occurred. A related case currently pending before this Court is *Allco Finance Limited v. Klee*, Civ. A. No. 3:5-cv-00608-CSH ("*Allco II*") before the Honorable Charles S. Haight, Jr.

[1] 16 U.S.C. Ch. 12.

[2] 16 U.S.C. 824a-3.

[3] *See, Allco Finance Limited v. Klee*, 805 F.3d 89 (2d. Cir. 2015) ("*Allco I*").

2. In 2013, the Defendant Commissioner (the "Commissioner") of the Department of Energy and Environmental Protection ("DEEP") solicited proposals for the wholesale sale of electricity from renewable energy generators (the "2013 RFP") (*see*, Exhibit A). He then selected the winners of the solicitation (*see*, Exhibit B), and compelled Connecticut's two electric utilities (the "Connecticut Utilities") to enter into wholesale electricity contracts with the winners (*see*, Exhibit C).

3. Allco's "qualifying small power production facilit[ies]" as defined under the statute and "Qualifying Facilities" or "QFs" under FERC's regulations, *see* 16 U.S.C. § 796(17)(C); 18 C.F.R. § 292.203 and other QFs responded to the solicitation.

4. Notwithstanding the Federal Power Act's prohibition on state regulation of wholesale electricity sales – subject only to the limited exception for sales by QFs under PURPA – in September 2013, the Commissioner compelled the Connecticut Utilities to enter a contract with a generator, Number Nine Wind Farm LLC ("Number Nine"), which generator was approximately 250 megawatts ("MWs") in size, much too large to be a QF. As a consequence, the many QFs, including Allco's, which would have been selected were not selected.

5. On November 12, 2015, the Commissioner issued another solicitation seeking proposals for the wholesale sale of electricity from renewable energy generators (the "2015 RFP"). *See*, Exhibit D.

6. The 2015 RFP excludes most QFs from participation due to the requirement that a generating facility must have a minimum capacity of 20MWs in the case of a Class I renewable resource and 30MWs in the case of a hydro-electric resource.[4]

7. The Defendants actions in connection with the 2013 RFP and their imminent future actions under the 2015 RFP violate the Federal Power Act and the

[4] *See*, http://cleanenergyrfp.com/

State of Connecticut's ongoing obligation under § 824a-3(f) to implement Section 210 of PURPA.[5] *See*, *Allco Finance Limited v. Klee*, *Allco Finance Limited v. Klee*, 805 F.3d 89 (2d. Cir. 2015).

8. Here, the Defendants plainly intend to transgress the bright line of the Federal Power Act prohibiting State regulation of wholesale sales of electricity by compelling wholesale transactions between the Connecticut Utilities and counterparties of the Defendants' choosing. Compelling a specific wholesale transaction – one that would not have taken place but for the State's compulsion – plainly involves the regulation of wholesale sales, and thus falls squarely within the field that Congress has occupied.

9. This complaint seeks a declaration that the Number Nine wholesale sale contract is void, a declaration that the 2013 RFP and the 2015 RFP violate the Federal Power Act and Section 210 of PURPA, and an injunction prohibiting the Defendants from selecting any proposals and awarding any contracts under the 2015 RFP.

JURISDICTION AND VENUE

10. This Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. § 1331 because the action brings claims under the United States Constitution and federal law. This Court also has jurisdiction under 16 U.S.C. § 825p, which provides that District Courts of the United States shall have exclusive jurisdiction of violations of the Federal Power Act or the rules, regulations, and orders thereunder, and of all suits in equity and actions at law brought to enforce any liability or duty. This Court also has jurisdiction under 16 U.S.C. § 824a-3(h).

[5] 16 U.S.C. § 824a-3(f).

11. This Court is empowered to grant declaratory relief by 28 U.S.C. §§ 2201 and 2202 and Rule 57 of the Federal Rules of Civil Procedure and *Ex Parte Young*, 209 U.S. 123 (1908).

12. This Court is empowered to grant preliminary and permanent injunctive relief by, *inter alia*, 28 U.S.C § 2202 and Rule 65 of the Federal Rules of Civil Procedure.

13. This Court has personal jurisdiction over Defendants because the Defendants conduct a substantial portion of their duties in the District of Connecticut.

14. The offices of the Commissioner and DEEP are located in Hartford, Connecticut. The offices of the commissioners of the Public Utilities Regulatory Authority ("PURA") are located in New Britain, Connecticut.

15. Venue is proper in this District under 28 U.S.C. § 1391(b)(1) and (2) because a substantial part of the events giving rise to this action occurred in the District of Connecticut.

THE PARTIES

16. Plaintiff is the owner, operator and developer of various solar projects that are Qualifying Facilities located in Connecticut, Vermont, Massachusetts and New York as well as other States. *See,* Section 3(17) of the Federal Power Act, 16 U.S.C. §796(17). Plaintiff is a "qualifying small power producer" within the meaning of 16 U.S.C. §796(17)(D).

17. Defendant Robert Klee is the Commissioner of DEEP. Commissioner Klee is sued in his official capacity. The Commissioner, DEEP and entities within DEEP (such as PURA) are responsible for administering Connecticut's Renewable Portfolio Standard and Conn. Public Act 13-303 §§6-7, and Conn. Public Act 15-107 §1(c).

18. Defendants Arthur House, John W. Betkoski III, and Michael Caron are commissioners of PURA and are sued in their official capacity.

LEGAL BACKGROUND

FERC's exclusive jurisdiction to regulate wholesale transactions.

19. "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. *Id.* § 824(b). PURPA contains one such exception that permits states to *foster* electric generation by certain power production facilities." *See*, *Allco Finance Limited v. Klee*, 805 F.3d at 91-92.

20. The Second Circuit has made it clear that neither Defendant has the authority to regulate or compel any wholesale energy transaction nor any term of such a transaction, unless an exception applies. But that is exactly what the Defendants did in 2013 with the Number Nine contract and what they plan to do again in 2016 under the 2015 RFP.

PURPA's carve-out from FERC's exclusive jurisdiction to regulate wholesale transactions in order to foster QF generation.

21. Congress enacted PURPA to address the conditions in the electricity market that evolved since the passage of title II of the Federal Power Act in 1935. *See, New York v. FERC*, 535 U.S. 1, 9 (2002). In Title II of PURPA, Congress amended the Federal Power Act and enacted Section 210 of PURPA in order to

create a new class of "favored cogeneration and small power facilities" in the overall regulatory scheme of the Nation's energy markets. *FERC v. Mississippi*, 456 U.S. 742, 751 (1982).

22. Allco, as a favored Qualifying Facility under PURPA, is *precisely* the type of plaintiff Congress intended to benefit when it created the new class of market participant in the Nation's energy markets. *See*, *S. Cal. Edison Co. v. FERC*, 195 F.3d 17, 23 (D.C. Cir. 1999) ("in deciding to confer substantial benefits on 'small power production facilities' Congress took care to define the class of potential beneficiaries.")

23. Section 210 of PURPA did two things, each of which is independent from the other. *First,* it placed a mandatory purchase obligation on all electric utilities to purchase electricity from QFs, *see* 16 U.S.C. § 796(17)(C); 18 C.F.R. § 292.203. *Second*, it relaxed the Federal Power Act's *complete prohibition* on States acting within the field of wholesale sale of electricity, thus permitting States to engage in some regulation in order to *encourage* wholesale sales by QFs to electric utilities or in the words of the Second Circuit "to *foster* electric generation by certain power production facilities." *See*, *Allco Finance Limited v. Klee*, 805 F.3d at 91-92. (Emphasis added).

24. Section 210 of PURPA did not, however, require that States act.[6] It required only, as the Second Circuit recently stated, that States not act contrary to Section 210(a) and the FERC's regulations. *Allco Finance Limited v. Klee*, 805 F.3d 89, 97 (2d Cir. 2015) ("A state's ongoing obligation under § 824a-3(f) to

[6] It is now black letter constitutional law that Congress could not require the States to do anything under Section 210 of PURPA: "[T]he Constitution has never been understood to confer upon Congress the ability to require the States to govern according to Congress' instructions." *New York v. United States*, 505 U.S. 144, 162 (1992). "'[T]he Constitution simply does not give Congress the authority to require the States to regulate.' *New York*, 505 U.S., at 178, 112 S. Ct. 2408, 120 L. Ed. 2d 120. That is true whether Congress directly commands a State to regulate or indirectly coerces a State to adopt a federal regulatory system as its own." *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2602 (2012).

'implement' PURPA regulations can be accomplished in a variety of ways, but, at a minimum, § 824a-3(f) undoubtedly prevents states from violating § 824a-3(a)".)

25. Any state action compelling specific wholesale sales of electricity outside a State's limited authority under Section 210 of PURPA violates § 824a-3(f).

FACTS APPLICABLE TO ALL COUNTS

The Defendants' 2013 RFP.

26. In 2013, Connecticut enacted a statute empowering the Commissioner under state law to solicit proposals for renewable energy, to select winners of the solicitation, and to compel the Connecticut Utilities to enter into long-term contracts for the sale of wholesale electricity and/or Connecticut qualifying renewable energy credits with the winners. Conn. Public Act 13-303 §§6-7.

27. Allco offered five solar projects in response to the 2013 RFP, each of which was a QF.[7]

28. The Commissioner ordered the Connecticut Utilities to execute power purchase agreements ("PPAs") with two projects, the 250MW Number Nine wind project located in Maine and a 20MW solar project located in Connecticut. *See*, Exhibit C. In the proceedings before PURA, the Connecticut Utilities confirmed that they made no evaluation of the PPAs and merely executed the PPAs as they were told to do by the Commissioner. *See* Exhibit E attached hereto.

29. But for the Defendants' selection and approval of the Number Nine wind project, one or more of Allco's projects would have been selected, and received contracts.

[7] Allco's five projects were the Trumbull Solar project (which is not listed on Appendix 2 to Exhibit B (the "Rankings"), the Harwinton Solar project (listed as ranked #4 on the Rankings), the Bozrah Solar project (listed as #7 on the Rankings), the Bucks Solar project (listed as #10 on the Rankings), and the Franklin Solar project (listed as #13 on the Ranking). Allco's five projects were in the competitive range, with one facility proposing a lower price than one of the facilities selected, and another facility next in line behind one of the selected facilities.

30. Allco has petitioned PURA for approval of PPAs with one of the Connecticut Utilities for some of it QF solar projects in Connecticut, all of which are 2MW or smaller. Allco has received a determination from one of the leading consultants in the New England electricity market that Allco has been and will continue to be harmed unless the Number Nine PPA is declared void. That expert concluded, and the PPAs under consideration by PURA provide, that if the Number Nine PPA is declared void, the increase in the rate payable to those Allco QF projects would increase by $0.0016 per kWh, or in excess of $200,000 over the life of the contracts.

31. The harm to Allco's QFs is directly caused by the price suppression effect on the Connecticut Utility's avoided costs from the Number Nine PPA.

32. The harm to Allco and its QFs is imminent, quantifiable through expert testimony, and the declaration of the Number Nine PPA as void will redress Allco's injury by entitling its QFs to receive a higher avoided cost rate in excess of $200,000 over the life of those contracts.

The Defendants' 2015 RFP.

33. On November 12, 2015, DEEP issued the 2015 RFP under Section 6 and 7 of Public Act 13-303 ("Sections 6 and 7") and Section 1(c) of Public Act 15-107 ("Section 1(c)"). *See*, Exhibit D.

34. DEEP has stated that it plans to select the winners and compel the Connecticut Utilities to enter contracts within the next few weeks.

35. Allco did not respond to the 2015 RFP because of the unlawful terms, restrictions, and conditions of the RFP.

36. Allco's QF projects that are under 20MW in size, which includes projects in Connecticut, Vermont and Massachusetts, were prohibited from responding to the 2015 RFP.

37. For Allco's QF projects that were 20MW or greater, those projects would were subject to unlawful conditions, such as payment of significant fees, placing a significant state regulatory burden on very specific generators that Congress sought to benefit.

38. Even if there were no fees, the 2015 RFP violates the Federal Power Act and PURPA, thus making participation in a lawful solicitation impossible for Allco's QFs that are 20MW or greater. The 2015 RFP allows competition from, and indeed its primary focus is on, massive hydroelectric non-QF projects from Canada, and massive non-QF wind projects from Maine.[8]

39. Allco asked the Federal Energy Regulatory Commission (the "FERC") to bring an enforcement action against the Defendants in respect of the 2013 RFP and the 2015 RFP, and on January 6, 2016, the FERC issued a notice declining to do so, satisfying the exhaustion requirement of 16 U.S.C. § 824a-3(h). *See, Allco Renewable Energy Limited*, 154 FERC ¶ 61,007 (2016).

COUNT I

VIOLATION OF PURPA, THE FEDERAL POWER ACT AND THE SUPREMACY CLAUSE OF THE UNITED STATES CONSTITUTION

40. Plaintiff re-alleges and incorporates by reference the allegations contained in paragraphs 1 through 39 as though fully set forth herein.

41. Under the Supremacy Clause of the United States Constitution, a state law, rule, tariff or action is preempted when Congress intends federal law to occupy the field into which the state intrudes or when state regulation stands as an obstacle to the accomplishment of Congress's goals. Under Part II of the Federal Power Act, 16 U.S.C. § 824(b), Congress has granted FERC the exclusive authority

[8] The Defendants received proposals for approximately 8,000 MWs of generation only 100MW (roughly 1%) of which are from QFs that the Defendants could in theory exercise their ability to compel contracts with the Connecticut Utilities.

to regulate in the field of wholesale electricity sales, and interstate transmission service. Only FERC may set rates, terms or conditions with respect to wholesale transactions and interstate transmission service.

42. In section 210 of PURPA, Congress carved out a role for States to regulate wholesale sales by Qualifying Facilities; but, with respect to wholesale sales by other generators, including generators that the Commissioner has solicited proposals from, States are not permitted to regulate.

43. The Defendants actions compelling the Number Nine PPA violated PURPA and the Federal Power Act, and are pre-empted.

44. Based upon the purpose of Sections 1(c), 6 and 7 to compel specific wholesale transactions, the Commissioner's actions in the 2013 RFP, and the issuance of the 2015 RFP, the Defendants will force the Connecticut Utilities to enter additional wholesale power contracts. Such State action plainly constitutes regulation in the field of wholesale energy sales and is categorically preempted on field pre-emption grounds. The Third and Fourth Circuits have invalidated materially indistinguishable actions on field preemption grounds. *PPL EnergyPlus LLC v. Nazarian*, 753 F.3d 467 (4th Cir. 2014), *cert. granted*, 136 S. Ct. 356 (2015); *PPL EnergyPlus LLC v. Solomon*, 766 F.3d 241 (3d Cir. 2014), *pet'n for cert. filed*, Nos. 14-634, 14-694. It matters not what effect on market prices the Defendants' actions may have: "If Congress evidences an intent to occupy a given field, any state law falling within that field is pre-empted." *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 248 (1984).

45. The Defendants' actions compelling the Number Nine PPA and the Defendants' likely decision to force the Connecticut Utilities to enter one or more wholesale power contracts from the 2015 RFP are also preempted on conflict pre-emption grounds. FERC has adopted a market-based approach to regulating the energy markets in New England. Under that framework, FERC has approved an

auction-based energy market in which generators compete in real time to provide energy at lowest cost. It has also allowed generators to enter into voluntarily negotiated long-term contracts. In ordering Connecticut Utilities to contract with non-Qualifying Facilities, the Defendants will pursue a conflicting regulatory framework – one in which the State can compel a utility to enter into a non-voluntary wholesale power transaction at a price that differs from the prevailing market price. Not only does that framework conflict with FERC's chosen regulatory approach, but it also undermines the special treatment that Congress intended to give to QF generators under PURPA. This is the epitome of a conflict with federal law.

46. Congress carved out a role for States to regulate wholesale sales to foster the development of QFs; thus, a State cannot regulate wholesale sales except by generators that constitute QFs.

47. Allco and its Qualifying Facilities have been injured by the Defendants allowing competition in the RFPs from generators that are not Qualifying Facilities. Congress relaxed the ban on State's involvement in the area of wholesale sales in order to benefit Qualifying Facilities, such as Allco's. Thus any procurement that attempts to go beyond the limits set by Congress harms the very market participants that Congress created and intended to benefit. This "denial of a benefit in the bargaining process," *Clinton v. City of New York*, 524 U.S. 417, 433 n.22 (1998), will would be plainly caused by the Defendants' own decision to include non-Qualifying Facilities in the procurement. As a result any procurement must be limited to Qualifying Facilities.

48. In addition to the Defendants' planned unlawful actions compelling wholesale transactions, the Defendants also imposed burdensome conditions upon a Qualifying Facility's participation in the 2015 RFP, including a fee merely to submit a proposal. The imposition of such a fee is a State imposed regulatory condition on

the exercise of a Qualifying Facility's right to participate in the Nation's energy market. All such burdensome State regulatory conditions are pre-empted by 16 U.S.C. § 824a-3(e). When Congress relaxed the Federal Power Act's prohibition on State's regulating wholesale transactions, it only did so if, and to the extent, a State complies with the rules under Section 210 of PURPA. Imposition of such a fee imposes a condition that simply does not appear in Section 210 of PURPA or the FERC's regulations thereunder, and conflicts with the requirement that any State action foster QF development.

49. Similarly, Section 210 of PURPA does not permit a State to exclude certain sized Qualifying Facilities as market participants. Yet that is what the Defendants have done in the 2015 RFP by requiring a 20-MW minimum facility size for participation.

50. Plaintiff as developer and owner of Qualifying Facilities has specific protected interests as a Congressionally-created participant in the Nation's energy markets under the Federal Power Act and PURPA. Plaintiff seeks to prevent State officials from circumventing those benefits and the special status as market participants Congress sought to confer on Qualifying Facilities.

51. Congress created Qualifying Facilities specifically so they could replace non-Qualifying Facility generation in the Nation's energy markets. The Defendants' proposed actions directly harms Allco's Qualifying Facilities by effectively eliminating their special status as Congressionally-favored market participants.

52. Plaintiff has suffered and will continue to suffer injury-in-fact based on its economic interest in the procurements; that injury-in-fact will be caused by the Defendants' illegal actions in connection with the procurements; and that injury-in-fact would be redressed when the Commissioner revises the procurements to comply with federal law.

53. Plaintiff has suffered and will continue to suffer injury-in-fact from the compulsion of the Number Nine PPA because of the quantifiable reduction in the Connecticut Utilities' long-term forecasted avoided costs thus reducing the revenue that Plaintiff's Qualifying Facilities would receive under the PPA for its solar facilities under Section 210 of PURPA by more than $200,000 over the life of the contracts.

54. Plaintiff will suffer injury-in-fact from the compulsion of contracts from the 2015 RFP because of the further quantifiable reduction in the Connecticut Utilities' long-term forecasted avoided costs reducing the revenue that Plaintiff would receive under PPAs for its other QFs under Section 210 of PURPA, which QFs will also be imminently seeking PPAs from the Connecticut Utilities.

55. Plaintiff has suffered injury-in-fact because its QFs less than 20MWs in size have been barred from participating in the 2015 RFP.

56. The Plaintiff will suffer injury in fact because there is an increase in the risk that the costs incurred by Plaintiff in developing its Connecticut-based Qualifying Facilities will be lost because of the unlawful terms and conditions of the 2015 RFP and the Defendant's unlawful actions in connection therewith.

57. It is likely that the Plaintiff's injuries will be redressed by a favorable decision. If the Plaintiff receives a favorable decision in this case, it is likely, (i) the Commissioner would revise the 2015 RFP to conform to federal law, (ii) the risk of Plaintiff losing its investments in its developing Qualifies Facilities would be decreased, (iii) the future revenue decrease to Allco's Qualifying Facilities from the adverse effect on the Connecticut Utilities' forecasted long-term avoided costs will be eliminated, (iv) the fees that the 2015 RFP requires for participation would be eliminated, and (v) Plaintiff's Qualifying Facilities under 20 megawatts would be able to participate in the solicitation.

58. Even if the Commissioner decides to withdraw and not reissue any RFP in the future under Sections 1(c), 6 and 7, a favorable decision for Plaintiff in this case would redress the future injuries that would result from unlawful State action interfering with Plaintiff's participation in the energy markets.

59. Unless a favorable decision is issued to Plaintiff in this case, the Defendants will more than likely continue take action in violation of the Federal Power Act, PURPA and the Supremacy Clause which will likely adversely affect Plaintiff's participation in any future opportunities to obtain PPAs for its generating facilities.

60. An injunction is necessary and appropriate because Defendants acting in their official capacity are acting in, and will continue to act in, violation of the Constitution and federal law. Without an injunction from this Court, the Defendants will continue to act in violation of the Federal Power Act, the Supremacy Clause and PURPA. This complaint seeks to prevent those future unlawful acts. For that reason, the Plaintiff seeks an injunction requesting that the Defendants be restrained from acting in contravention of controlling federal law in the future.

61. Plaintiff has no adequate remedy at law and no opportunity for compensation for the Defendants' violations of the Supremacy Clause, the Federal Power Act and PURPA.

62. Plaintiff will suffer irreparable harm by the violation of the Supremacy Clause, the Federal Power Act and PURPA, and the balance of harms favors Plaintiff, because Plaintiff will suffer substantial economic losses due to the inability to build its projects, sell the energy and capacity from those projects, and recover the costs it has incurred in developing those projects, but the Defendants are immune from suit for retrospective relief.

63. Granting the requested declaratory and injunctive relief will harm the Defendants and the State of Connecticut less (if at all) than denying the relief would harm Plaintiff.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff respectfully requests the following relief:

(1) That the Court find and declare as follows:

a. (i) the Defendants can only exercise their authority under Sections 1(c), 6 and 7 with respect to Qualifying Facilities, (ii) any action taken by the Defendants to compel a transaction with non-Qualifying Facilities is pre-empted, (iii) the imposition of the fee required for participation in the 2015 RFP or future solicitations by Qualifying Facilities is pre-empted, (iv) requiring Qualifying Facilities be a minimum project size for participation violates Section 210 of PURPA and the Federal Power Act, (v) issuing a solicitation allowing competition from non-QFs violates PURPA and the Federal Power Act and (vi) the Number Nine PPA from the 2013 RFP and any agreements executed by the Connecticut Utilities pursuant to the 2015 RFP are void *ab initio*;

(2) That this Court enjoin the Defendants from issuing further solicitations, orders or decisions that are inconsistent with the Federal Power Act and PURPA and issue an order (i) enjoining further action related to the 2015 RFP, including evaluation, selection, negotiation or approval of any proposals or contracts, (ii) barring non-Qualifying Facility participation in the 2015 RFP and any future solicitation, (iii) barring fees for QF participation, and (iv) barring a minimum project size for QF participation;

(3) That Plaintiff be granted such other further relief as the Court may deem just and proper.

Dated: March 30, 2016

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