**UNITED STATES DISTRICT COURT**

**DISTRICT OF CONNECTICUT**

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| ALLCO FINANCE LIMITED,<br><br>Plaintiff,<br><br>v.<br><br>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.<br><br>Defendants. | Case No. 3:16-CV-508 (CSH)<br><br>**PLAINTIFF'S FIRST NOTICE OF ADDITIONAL AUTHORITY**<br><br>**April 19, 2016** |

Plaintiff Allco Finance Limited submits this notice of additional authority related to the pending motion for an order to show cause [ECF docket no. 13]. On April 19, 2016, the United States Supreme Court unanimously affirmed the judgment of the Fourth Circuit Court of Appeals in *Nazarian* in *Hughes v. Talen Energy Marketing, LLC*, Nos. 14-614, 14-623, ___ U.S. ___ (2016) ("*Talen*"), and effectively affirmed the judgment of the Third Circuit in *Solomon*,[1] as the opinion discusses both cases. The Supreme Court's opinion is attached.

The Supreme Court's opinion re-affirms that States simply have no authority to regulate wholesale sales of electricity outside of Section 210 of PURPA. The opinion also represents a rejection of many of the arguments made here by the Defendants, which were also rejected by the Third and Fourth Circuits, such as the notion that a State regulating only the "buy-side" of a wholesale energy transaction was not regulating wholesale sales, the notion that the bidders proposing the price was a relevant factor, and whatever a State's reserved authority under the

[1] *PPL EnergyPlus LLC v. Nazarian*, 753 F.3d 467 (4th Cir. 2014) ("*Nazarian*"), *aff'd sub. nom. Hughes v. Talen Energy Marketing, LLC* Nos. 14-614, 14-623, ___ U.S. ___ (2016); *PPL EnergyPlus LLC v. Solomon*, 766 F.3d 241 (3d Cir. 2014) ("*Solomon*"), *pet'n for cert. filed*, Nos. 14-634, 14-694.

Federal Power Act may be, that it goes beyond "in-state" facilities. *See*, slip op. at 2 ("The States' reserved authority includes control over in-state "facilities used for the generation of electric energy." §824(b)(1).) .

While the Supreme Court stated that its holding was limited, *see* slip op. at 15, the opinion touched on several other issues present in the current case. The Supreme Court specifically pointed out that Maryland's goal of trying to encourage in-state generation does not redeem State action in a field reserved exclusively for the Federal Energy Regulatory Commission (the "FERC"). *See*, slip op. at 13 ("States may not seek to achieve ends, however legitimate, through regulatory means that intrude on FERC's authority over interstate wholesale rates."); *See also*, slip. op. at 13-14 ("That Maryland was attempting to encourage construction of new in-state generation does not save its program."); slip. op. at 14 ("*Mississippi Power & Light* and *Nantahala* make clear that States interfere with FERC's authority by disregarding interstate wholesale rates FERC has deemed just and reasonable, even when States exercise their traditional authority over retail rates or, as here, in-state generation.")

The Supreme Court also stated that whether or not the Maryland program resulted in price distortion was irrelevant. *See*, slip op. at 13, fn. 11. ("Even assuming that [FERC's] change has prevented Maryland's program from distorting the auction's price signals, however—a point the parties dispute—Maryland cannot regulate in a domain Congress assigned to FERC.") Actual price distortion was an issue that the district court deemed relevant in *Allco Finance Limited v. Klee*, Civ. A. No. 13-cv-1874, 2014 WL 7004024 (D. Conn. Dec. 10, 2014) as it sought to distinguish *Nazarian. See also*, Thomas, J., concurring at 2 ("To resolve these cases, it is enough to conclude that Maryland's program invades FERC's exclusive jurisdiction.")

Notably, when the Supreme Court discussed potential ways to encourage development of new and clean generation, it did not mention state compulsion of long-term wholesale sale contracts as a permissible option. Rather it limited the potential ways that might pass muster to methods that do not compel specific wholesale sales, "including tax incentives, land grants,

direct subsidies, construction of state-owned generation facilities, or re-regulation of the energy sector." *See*, slip. op. at 15.

While the Supreme Court noted that a contract-for-differences differs from a bi-lateral power purchase agreement in that capacity is not transferred to the utility outside of the auction, the Court touched on the key difference that Allco has emphasized in this case between normal bi-lateral contracts and those at issue here. The difference is "state action [] which compels private actors (LSEs) to enter into [the] contracts." *See*, slip. op. at 15, fn. 12. That is what the Defendants propose to do here. Moreover, here as in *Talen*, the power purchase agreements are "tethered to a generator's wholesale market participation." *See,* slip op. at 15. As shown on Figure E-1 and E-2 of the 2015 RFP, just like the generator in *Talen*, under the 2015 RFP Qualified Clean Energy via Transmission Project, the generator sells to the FERC-approved market and receives "support payments" from the Connecticut utility. Even for a straight bi-lateral power purchase agreement the generator delivers the energy to the utility at the ISO-New England node, and the utility immediately resells it into the ISO-New England market, charging or crediting Connecticut ratepayers for the differences.

The Supreme Court's affirmance of the Fourth Circuit lays aside all doubt that the Defendants' proposed imminent actions will intrude in an area exclusively reserved for the FERC, and as such their actions violate the Federal Power Act and the Defendants' obligations under 16 U.S.C. § 824a-3(f).

Dated: April 20, 2016

*/s/ Thomas Melone*

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