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 (CSH) **MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANTS' MOTIONS TO DISMISS THE COMPLAINT** **June 15, 2016**

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INTRODUCTION

If, as Defendants claim, in *Hughes v. Talen Energy Marketing, LLC*, 136 S. Ct. 1288 (2016) *("Hughes")*, Justice Ginsburg said that States could compel specific wholesale electricity transactions, in Defendants' lingo, on the "buy-side" of transactions, then why did she not just say that? Why was a bi-lateral contract *not* in her list of things a State could do to encourage renewable energy, particularly when the petitioners went to great lengths before the Supreme Court to characterize their contract as a bi-lateral contract? The answer is simple. Whatever a State might be able to do to encourage renewable energy it cannot directly compel a wholesale energy transaction. As much as Defendants may try, they cannot obscure that bright line on the facts of this case.

Justice Ginsberg's list of measures that "States might employ" to encourage renewable energy included only things that do not involve wholesale sales, such as "land grants, direct subsidies, construction of state-owned generation facilities, or re-regulation of the energy sector." 136 S. Ct. at 1299. A State itself owning renewable generation is permissible because that is not a wholesale sale. Of course, just like the introduction of any new generation in the market, the State constructing new generation would have some effect on prices of other wholesale sales in the market. But the State constructing its own generation is not compelling any wholesale transaction. It is not a sale of any kind. As Justice Ginsburg noted, a State owning generation would be acting "within the domain Congress assigned to them even when their laws incidentally affect areas with FERC's domain." 136 S. Ct. at 1298. Similarly a State ordering its in-State utility to construct and own a renewable energy plant *within the State's borders,* the electricity from which would be sold to the utility's *retail* customers is also within a State's power under the Federal Power Act ("FPA") to regulate electric facilities located within the borders of the State. That is also not a wholesale sale, even though the introduction of that new renewable energy plant would have some effect on prices received with respect wholesale sales by others. Crucially, the examples given by Justice Ginsberg, some of which were also listed in prior decisions of the Federal Energy Regulatory Commission (the "FERC") cited in Defendants' briefs, are not the facts here. And that is the point. Here, the State has directly compelled specific wholesale sales, and plans to do so again.

Thus, we are not faced with a generally applicable law such as the state anti-trust law in *Oneok, Inc. v. Learjet, Inc.*, 135 S. Ct. 1591 (2015), cited by Defendants, which sought to examine potentially fraudulent behavior designed to increase wholesale and retail rates. That behavior was not a wholesale sale. Nor did *Oneok* involve a State compelling a wholesale sale. Rather, *Oneok* simply did not pre-empt State antitrust law enforcement against practices that affected *retail* rates, even though those potentially fraudulent practices may have also affected wholesale rates. That is not our case. Our case is direct State compulsion of a specific State-selected wholesale transaction.

We are also not faced with the FERC extending its reach to regulate certain retail practices because those practices are affecting wholesale rates, such as in *FERC v. Elec. Power Supply Ass'n*, 136 S. Ct. 760 (2016). This case is not about the linkage between retail and wholesale markets. Nor is this case about incidental effects of action in one market incidentally affecting the other. This case is a straight-up direct State regulation of wholesale sales. Worse, it is the regulation of wholesale sales from generators outside the State's borders. Here, the State directly compels a wholesale sale (including fixing the rate). Despite the various efforts in their briefs to do so, the Defendants cannot escape the clear facts of this case.

Notably the Defendants have abandoned the argument advanced at this Court's hearing on April 29, 2016, in *Allco Finance Limited v. Klee*, Docket 3:15-cv-00608 ("*Allco II*") that the Defendants are not compelling wholesale sales. Now the Defendants freely concede they have compelled and intend to compel wholesale sales of electricity. As a substantive matter that is a fatal concession. Abandoning other arguments previously made, the Defendants now focus on two principal arguments. First, that the wholesale sales in question are subject to FERC jurisdiction and the contracts will be filed with (and by implication approved by) the FERC[1], and second, that the law allows the Defendants to compel wholesale sales if the Defendant is compelling it from, in Defendants' lingo, the "buy-side."[2] Both arguments are easily debunked and have been unsuccessful at the Supreme Court in *Hughes*, the Third Circuit in *Solomon,*[3] the Fourth Circuit in *Nazarian*,[4] and the district courts in *Solomon*[5] and *Nazarian*.[6] Indeed, the argument that state-compelled wholesale sales can be cleansed of their illegality by a filing with the FERC under the *Morgan Stanley*[7] line of cases (which was also argued by Defendants at oral argument in *Allco II*) has not only been rejected by the FERC, and the lower courts in *Hughes* and *Solomon*, but is so weak that the petitioners did not even raise it at the Supreme Court in *Hughes*.[8]

[1] *See*, PURA Brief ("Br.") at 11 ("Because the Number Nine contract will be submitted to FERC, it will be subject to challenge at FERC under Section 206 of the FPA."); *see also*, DEEP Br. at 20-21.
[2] *See*, PURA Br. at 14-23; DEEP Br. at 18-20.
[3] *PPL EnergyPlus LLC v. Solomon*, 766 F.3d 241 (3d Cir. 2014) ("*Solomon*"), *cert. den.* 136 S. Ct. 1728 (2016).
[4] *PPL EnergyPlus LLC v. Nazarian*, 753 F.3d 467 (4th Cir. 2014) ("*Nazarian*"), *aff'd sub nom*. *Hughes v. Talen Energy Marketing, LLC*, 136 S. Ct. 1288 (2016).
[5] *PPL EnergyPlus LLC v. Hanna*, 977 F. Supp. 2d 372 (D. N.J. 2013), *aff'd* 766 F.3d 241 (3d Cir. 2014) *cert. den.* 136 S. Ct. 1728 (2016).
[6] *PPL EnergyPlus LLC v. Nazarian*, 974 F. Supp. 2d 790, 838 (D. Md. 2013), *aff'd*, 753 F.3d 467 (4th Cir. 2014), *aff'd sub nom. Hughes v. Talen Energy Marketing, LLC,* 136 S. Ct. 1288 (2016) ("*District Court Nazarian*")
[7] *Morgan Stanley Capital Grp. Inc. v. Pub. Util. Dist. No. 1 of Snohomish Cnty.*, 554 U.S. 527 (2008) ("*Morgan Stanley*").
[8] Defendant Klee has also abandoned the semantics argument made at oral argument in *Allco II* that the Commissioner only had the power to "direct" the Connecticut Utilities to enter into the contracts but did not have the power to "order" the Connecticut Utilities to do so. Black's Law Dictionary defines "order" as a "command,

The Defendants' second argument is based upon another unsuccessful argument made in *Hughes*. Contrary to Defendants' assertions, the facts in *Hughes* are in all material respects identical to the facts here. In *Hughes*, the State, in the Defendants' lingo, compelled the "buy-side" of the transaction. Also, as is the case here, the State in *Hughes* compelled the "buy-side" at a rate voluntary set by the bidder, i.e., the electric generator. Compelling a wholesale transaction, regardless from whose side it is compelled, is still regulating wholesale sales and pre-empted. The petitioners in the *Hughes* case had initially argued that the compelled contract between the generator and the utility was not a wholesale sale at all, the argument being that it was a contract-for-differences and was essentially a financial swap or hedge. At the Supreme Court, the petitioners switched gears and argued that the contract was the equivalent of a direct bi-lateral contract between the utility and the generator, which is our case here. When petitioners' counsel raised that new bi-lateral contract theory in oral argument, it was quickly sent to the junkyard to join the petitioners' initial argument. The following excerpt from oral argument in the *Hughes* case gets right to the point that a State compelled direct bi-lateral contract is also pre-empted.[9]

> JUSTICE ALITO: Well, there's another key difference. If you had done it directly with if CPV had contracted directly with the distribution utilities, that would have been subject to regulation by FERC, would it not?
>
> MR. STRAUSS: Yes. This contract was as well.

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> JUSTICE KAGAN: I'm not sure why it is that when you say it was subject to FERC's jurisdiction, that doesn't end the case right there against you, because if it's subject to FERC's jurisdiction, that means it's a wholesale sale. And that's for FERC to do is to set the rates and other terms of wholesale sales, and that's not for the States to do. So that means you're preempted.

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direction, or instruction." *See*, Black's Law Dictionary 9th Ed. for the iPhone/iPad/iPod. Vers. 2.1.2 (2013).

[9] The complete oral argument transcript is available at: http://www.supremecourt.gov/oral_arguments/argument_transcripts/14-614_g2hk.pdf.

Justice Kagan's point cuts directly to the heart of the issue. The compulsion of a wholesale contract regardless of whose "side" is being compelled by the State is still the compulsion of a transaction that is a wholesale sale, which is subject to FERC's jurisdiction. In Justice Kagan's words, that "end[s] the case right there against [Defendants]." Justice Thomas' concurrence echoes Justice Kagan's and Justice Alito's points made at oral argument. The simplicity of the issue before this Court is evident—if it's a wholesale sale then the State's action is impermissible. *See, Hughes*, 136 S. Ct at 1301 (Thomas, J., concurring) ("the statutory text and framework compel that conclusion, and that [the State's] program therefore cannot stand.")[10]

At bottom, the Defendants are just simply not content with the path Congress has provided the States' under PURPA to compel wholesale sales. Rather they ask this Court to overlook the plain language of the FPA and create a massive loophole to allow States through a command and control process to compel wholesale sales of electricity under the guise of regulation of the construction of new generation. Such a loophole would allow States unlimited ability to compel wholesale transactions that support the political whims of a State, further sabotaging QF development. One State might prefer coal plants, another gas plants, still others nuclear or other forms of electric generation.

Defendants' arguments have now been reduced to relying on out of context quotes and

[10] The PURA Defendants have conceded that "States cannot set the rates of wholesale transactions." *See*, PURA Br. at 17, fn. 4. That concession is also fatal. By compelling a wholesale transaction the Defendants are additionally setting the rate for that wholesale sale. *See, Solomon*, 766 F.3d at 253 (3d Cir. 2014) ("we agree with the District Court that 'the Board essentially sets a price for wholesale energy sales.'") *See also, id*. ("whether the Standard Offer Capacity Agreements pick 'just and reasonable' capacity prices is beside the point. What matters is that the Agreements have set capacity prices in the first place.") *See also, District Court Nazarian,* 974 F. Supp. 2d at 832 fn. 48:

> The Court finds unpersuasive Defendants' contention that the contract price is a competitive market price because [the generator] initially proposed that price as part of the RFP. [] *The contract price became operative only after reviewed, evaluated, and accepted by the PSC in an agency order*. [] Accordingly, although it was proposed by [the generator], the contract price in the CfD is a price "set" or "determined" by the PSC. (Emphasis added.)

ignoring the plain language of the statute, other cases, and most remarkably, the Second Circuit's opinion in *Allco Finance Limited v. Klee*, 805 F.3d 89 (2d Cir. 2015) ("*Allco I*"), which stated a State has no authority to regulate wholesale sales except under PURPA. *See*, *Allco I*, 805 F.3d at 91-92 (2d Cir. 2015) ("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.") (Emphasis added). The Defendants simply do not want to face the simple truth—they are compelling wholesale sales which they do not have, and never did have, the authority to do.

This Court should maintain the bright line preempting State action that mandates wholesale energy transactions (other than with QFs under PURPA). Maintenance of that bright line not only is mandated by the plain language of the statute, but will have the benefit of forcing States to address their renewable energy goals through PURPA—Congress' designated avenue.

STATEMENT

A. Legal Background.

1. The Federal Power Act and Competitive Wholesale Electricity Markets.

For most of the twentieth century, electric utilities were vertically integrated companies that enjoyed a monopoly over a service area, and both generated electricity and delivered it to retail customers within that service area. Because utilities typically operated within a single state, they were subject to extensive state regulation. State commissions set the electricity rates that utilities could charge their retail customers in order to allow the utilities to recover the costs associated with generating and delivering electricity, plus a reasonable rate of return. *See*, *New York v. FERC*, 535 U.S. 1, 5 (2002) ("*New York*").

Utilities began to recognize the advantage of being able to draw upon generation resources owned by other utilities to satisfy demand at peak times, and they began constructing transmission lines running across service areas and across state boundaries. Initially, interstate sales of electricity were unregulated. The Supreme Court held that States were powerless to regulate such sales under the Commerce Clause, *see, Pub. Utils. Comm'n v. Attleboro Steam & Elec. Co.*, 273 U.S. 83, 89 (1927) ("*Attleboro*"), resulting in what became known as "the *Attleboro* gap." *New York*, 535 U.S. at 5-6.

It was against the backdrop of a State's absence of power to regulate wholesale transactions that in 1935, Congress enacted the FPA to fill that gap, as well as to "extend[] federal coverage to some areas that previously had been state regulated." *Id.* at 6. Specifically, Congress gave the Federal Power Commission – now FERC – exclusive authority to regulate "the sale of electric energy at wholesale in interstate commerce." 16 U.S.C. § 824(b)(1). "[W]holesale," in this context, means any "sale of electric energy to any person for resale." *Id.* § 824(d). Thus, any sale of electricity in interstate commerce (with the exception of sales under PURPA and another exception not relevant here for certain hydroelectric energy) falls within FERC's exclusive regulatory authority, unless it is a "retail" sale to the factory, business or home that will actually consume the electricity. *See, FPC v. S. Cal. Edison Co.*, 376 U.S. 205, 215 (1964) (Congress left "no power in the states to regulate … sales for resale in interstate commerce."). Although Congress occupied the field of wholesale electricity sales, it reserved "except as specifically provided," a State's authority that the State previously enjoyed "over facilities used for the generation of electric energy or over facilities used in local distribution," 16 U.S.C. § 824(b)(1).

As the interstate electricity transmission grid developed, and as technology improved for transmitting electricity over long distances, interstate wholesale electricity markets became increasingly important. *New York*, 535 U.S. at 7-8. In the 1990s, Congress and FERC began to recognize the benefits of promoting competition in the market for electric generation. *Id.* at 10-11. Many states followed suit. Utilities divested their generation assets to competitive generation companies that sold power in the wholesale market, and entities known as retail electric suppliers bought electricity in the wholesale market and competed for the opportunity to resell it to retail customers. The utilities continue to enjoy a monopoly over the service of distributing electricity over their network of wires. They also purchase electricity on the wholesale market to sell to retail customers that have not chosen another retail electric supplier.

Today, the wholesale electricity markets in various areas of the United States are overseen by FERC-regulated independent system operators, which operate an energy market, in which generators compete to sell electricity by submitting "bids" in real time. Those ISOs match supply and demand on a continuing basis and using a FERC-approved auction process, determine the market price for electricity based on the bid of the least costly generation resource needed for supply to match demand. *See, Blumenthal v. FERC*, 552 F.3d 875, 878 (D.C. Cir. 2009); *NSTAR Elec. & Gas Corp. v. FERC*, 481 F.3d 794, 797 (D.C. Cir. 2007). Similarly, ISOs make sure sufficient capacity exists in the system through a competitive auction three years out. These competitive methods are intended to result in the operation of the most efficient set of generation resources at any particular point in time. Generators also sell electricity to wholesale buyers in freely negotiated, voluntary bilateral contracts, pursuant to FERC-approved market-based tariffs. "These tariffs, instead of setting forth rate schedules or rate-fixing contracts, simply state that the seller will enter into freely negotiated contracts with purchasers." *Morgan Stanley Capital Grp. Inc. v. Pub. Util. Dist. No. 1 of Snohomish Cnty.*, 554 U.S. 527, 537 (2008).

2. PURPA: Relaxing the Ban on State Regulation of Wholesale Transactions and Policies Promoting Specific Classes of Generation.

In 1978, Congress enacted PURPA to "accelerate the development of renewable and inexhaustible energy sources…" H.R. Rep. No. 95-496(IV), at 14 (1978). It directed FERC to adopt rules, and for state commissions to implement those rules, requiring utilities to purchase power from certain types of generators known as QFs,[11] 16 U.S.C. § 824a-3(a)– specifically, qualifying renewable energy facilities, 16 U.S.C. § 796(17)(C), and qualifying cogeneration facilities, 16 U.S.C. § 796(18)(C). Congress and FERC further directed that QFs were to be paid at a rate equal to the utility-buyer's "avoided costs" – that is, the costs that the utility would otherwise have incurred but for its purchase from the QF. 16 U.S.C. § 824a-3(b), (d); 18 C.F.R. § 292.304(b)(2); *see also Am. Paper Inst., Inc. v. Am. Elec. Power Serv. Corp.*, 461 U.S. 402, 417 (1983).

Under PURPA, States have the authority to implement and apply rules requiring utilities to purchase from QF, 16 U.S.C. § 824a-3(f)(1), including compelling the entry into long-term 15 to 20-year agreements, such as the Defendants did in connection with the 2013 RFP and propose to do again in connection with the 2015 RFP. In these respects, PURPA reflects a limited exception to FERC's otherwise exclusive authority over wholesale electricity sales.

In addition to implementing PURPA, some States have also tried to encourage the growth of renewable generation by adopting "renewable portfolio standards."[12] These require utilities

[11] "[Q]ualifying small power production facilit[ies]" under the statute and "Qualifying Facilities" or "QFs" under FERC's regulations, *see* 16 U.S.C. § 796(17)(C); 18 C.F.R. § 292.203.

[12] *See, e.g.*, U.S. Energy Information Admin., "Most states have Renewable Portfolio Standards," *available at*

and other retail electric suppliers doing business in a state to procure a certain percentage of their electric supply from certain types of generators. However, importantly States do not mandate construction of new facilities or wholesale sales. Rather such renewable energy mandates give the utility the option to make a payment in the nature of a State tax, commonly referred to as an alternate compliance payment, in order to avoid constructing or acquiring renewable energy. Thus, State renewable portfolio standards do not facially mandate any particular wholesale transaction. Rather, they leave each wholesale buyer/retail supplier to voluntarily negotiate contracts with renewable generators in order to satisfy the portfolio requirement, or to ignore the requirement and pay the alternative compliance payment.

In most cases, utilities and other retail suppliers demonstrate compliance with renewable portfolio standards by obtaining renewable energy credits ("RECs"), which reflect the "environmental attributes" of electricity generated using renewable fuel. Sometimes utilities and retail suppliers voluntarily negotiate contracts for electricity and RECs. But RECs can also be bought and sold independent of electricity; thus, renewable generators frequently will sell their RECs to utilities through a negotiated contract, and separately sell the electricity into the energy market. When RECs are sold independent of electricity, FERC generally regards the sale of RECs as outside its authority over wholesale electricity sales. *See*, *WSPP Inc.*, 139 FERC ¶ 61,061, P 24 (2012) ("[A]n unbundled REC transaction that is independent of a wholesale electric energy transaction does not fall within the Commission's jurisdiction under sections 201, 205 and 206 of the [Federal Power Act].").

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http://www.eia.gov/todayinenergy/detail.cfm?id=4850.

B. The Defendants Compulsion of Wholesale Sales through the Procurements at Issue.

The 2013 RFP

In 2013, Connecticut enacted Conn. Public Act 13-303 § 6 ("Section 6"), which empowers the Commissioner to solicit proposals for renewable energy, to select winners among the proposals, and to compel the state's utilities to enter into long-term wholesale power purchase agreements serving up to four percent of Connecticut's electricity needs. In July 2013, the Commissioner solicited proposals pursuant to Section 6 (the "2013 RFP"). Allco submitted proposals for five solar projects, each of which was no more than 80 megawatts and thus satisfied PURPA's criteria for a QF. In September 2013, the Commissioner selected two winning projects, Number Nine Wind, a 250 megawatt wind project located in Maine, and Fusion Solar, a 20 megawatt solar project located in Connecticut, and directed the state's utilities "to execute contracts for a combination of energy and environmental attributes" from these two generation facilities. While Fusion Solar satisfied the size requirements to be a QF under PURPA, Number Nine Wind did not. 16 U.S.C. § 796(17)(A).

Number Nine Wind received a 15-year contract at a fixed price of $57.17 per megawatt-hour of energy. As the contract itself makes clear, that fixed price will differ from the price that Number Nine Wind otherwise would have received from selling its electricity into the FERC-approved energy market administered by ISO-New England. *See*, Number Nine PPA, Exh. D (setting forth the contract price and contrasting it with the "Market Price"); *see also* Number Nine PPA, p. 6 (defining "Market Price" as the price set by the ISO-New England markets).

In an accompanying determination, the Connecticut Department of Energy and Environmental Protection ("DEEP") set forth a ranked list of proposals. Allco's Harwinton Solar project appeared fourth on that list. Other Allco projects ranked seventh (Bozrah Solar), tenth (Bucks Solar), and thirteenth (Franklin Solar). Additionally, Allco bid a project at a lower price than Fusion Solar, but that project was inexplicably excluded from the ranked list.

The 2015 RFP

On November 12, 2015, Defendants issued a solicitation seeking proposals for the wholesale sale of electricity from renewable energy generators (the "2015 RFP"). Defendants have received various proposals and are currently evaluating the proposals. The Defendants have indicated that the selection of the winners and the compulsion of wholesale electricity transactions is imminent. Allco is the owner, operator and developer of various solar projects that are QFs located in Connecticut, Vermont, Massachusetts and New York as well as other States. Allco is a "qualifying small power producer" within the meaning of 16 U.S.C. §796(17)(D). Allco's QF projects that are under 20 megawatts ("MWs") in size, which include projects in Connecticut, Vermont and Massachusetts, were prohibited from responding to the 2015 RFP. For Allco's QF projects that were 20MW or greater, those projects were subject to unlawful conditions, such as payment of significant fees, thus placing a significant state regulatory burden on very specific generators that Congress sought to benefit.[13] All such burdensome State regulatory conditions are pre-empted by 16 U.S.C. § 824a-3(e). As a result, Allco could not, and did not, respond to the 2015 RFP because of the unlawful terms, restrictions, and conditions of the 2015 RFP.

Even if there were no fees, the 2015 RFP violates the FPA and PURPA, thus making participation in a lawful solicitation impossible for Allco's QFs that are 20MW or greater. The

[13] The Defendants claim that they did not receive or charge any fees, and that all fees received from bidders in the 2015 RFP went to out-of-state entities. That concession proves that the fees for bidding for Connecticut's renewable energy capacity was patently unreasonable. The fact that the Defendants merely acted as enforcers for out-of-state entities is in many ways worse.

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.[14]

Allco asked the FERC to bring an enforcement action against the Defendants in connection with the both 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), and authorizing Allco to bring such a suit.

SUMMARY OF THE ARGUMENT

Under the FPA, Congress reserved to the FERC the exclusive authority to regulate wholesale sales of electricity in interstate commerce including rates, rules, regulations, practices, and contracts related thereto. 16 U.S.C. § 824(b)(1). Nothing in the FPA suggests that the States share power to regulate these matters. As the Supreme Court held in *Attleboro*, States never had the authority to regulate interstate sales of electricity, regardless of the target or motive of the States. The States were simply powerless to regulate such sales, no matter what their local intra-state interest was. *See*, *Attleboro*, 273 U.S. at 90. (Such sales are "not subject to regulation by either of the two States in the guise of protection to their respective local interests.")

Thus in 1935 when the FPA was passed, Congress was not displacing traditional State authority over wholesale sales. It cannot be said that States enjoyed some "traditional" authority over such sales when the FPA was enacted, whether under the guise of "portfolio management" or authority over local generation facilities as the Supreme Court made clear in *Attleboro*.

The plain language of the FPA vests the regulation of such wholesale transactions solely within FERC's jurisdiction. Although the language of the FPA leaves States with certain

[14] 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 under PURPA.

authority over generation facilities, the plain "except as specifically provided" language of Section 201(b)(1) of the FPA qualifies that authority by carving out wholesale transactions.

In Section 210 of PURPA, Congress carved out a narrow exception to FERC's exclusive authority to foster electric generation by generators that used efficient cogeneration or renewable generation technology. 16 U.S.C. § 824a-3; *id.* §§ 796(17)(C), 796(18)(C). Generators falling within PURPA are known as "Qualifying Facilities," or "QFs" and States have certain authority to regulate wholesale sales by QFs, including compelling a fixed 15-year or 20-year contract rate, such as the one Defendants have done, and again seek to do. Congress has not made that same accommodation for non-QFs, such as the Number Nine Wind Farm that do not meet the design standards for QFs. Facilities not meeting those design standards are expected to compete on their own merits in the FERC-regulated wholesale market.

As the Supreme Court made clear in *Attleboro*, States were powerless to regulate wholesale transactions, which includes the power to compel such a transaction in the first place. *Attleboro* makes it clear that at the time the FPA was passed, neither State authority over utility portfolio management nor local generation facilities provided a State the ability to regulate a wholesale transaction, such as the one at issue in this case, regardless of the "target" or "motivation" of the State. *See, Attleboro* at 273 U.S. at 87 (rejecting the State's argument that in order to "effectively exercise its power to regulate the rates for electricity furnished [to in-state retail] consumers, [the State needed to] also regulat[e] the rates for the [utility's wholesale transaction].") No one can seriously argue that when Congress enacted the FPA, it was reserving to the States authority to compel transactions over which the Supreme Court said they never had.

The facts of this case are straight-forward: Connecticut's decision to force a utility to enter a wholesale power contract through its command and control process plainly constitutes regulation in the field of wholesale energy sales, which is categorically field preempted. Failure to invalidate such action would effectively eliminate any restriction on a State's ability to regulate wholesale sales for new facilities. States would be able to compel wholesale transactions that support the political whims of a State, further sabotaging QF development. One State might prefer coal plants, another gas plants, still others nuclear or other forms of electric generation.

Furthermore, if this Court permits Connecticut to use its jurisdiction over in-state generation facilities or "portfolio management" as an excuse to compel wholesale transactions, (1) the authority given to States under PURPA to compel wholesale transactions with QFs (including compelling long-term 15-year to 20-year rates involved here) would be superfluous, (2) Congress' PURPA price-limit of avoided costs, which insures ratepayer neutrality, would no longer be a constraint on State action: States would be free to compel wholesale transactions at any price, regardless of the method of procurement, (3) States would be free to pursue their own market construct, ignoring and undermining the FERC-approved system, and (4) the logical extension would be State authority to regulate all wholesale sales under the guise or "target" of regulating retail rates or another "local interest," exactly what was rejected in *Attleboro* and banned at the time the FPA was enacted.

Connecticut's actions are also conflict preempted. FERC has adopted a market-based approach to regulating the energy markets in ISO-New England. In ordering the execution of the contract with State-selected generators, Connecticut is pursuing 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 QFs under PURPA, including the authorization to compel long-term contracts, such as the 15-year to 20-year contracts involved here. This is the epitome of a conflict with federal law.

ARGUMENT

I. ALLCO HAS STANDING.

As an initial matter, Plaintiff objects to the Defendants' attempts to testify in this proceeding through various statements made in the motions to dismiss. Such testimony is improper at this stage of the proceeding. For example, the PURA Defendants at page 13 of their brief state that if Plaintiff succeeds it will gain nothing because "little reason will exist for Connecticut to proceed on" the basis of acquiring energy from QFs. First, that declaration of fact is highly suspect, particularly in light of Attorney Snook's statement at oral argument in *Allco II* that Connecticut is facing an impending shortfall of renewable energy. *See*, Tr. at 37. Second, it is a factual issue to which fact witnesses such as Commissioner Klee and representatives of DEEP can testify. Third, the number of actual small QFs that have responded to the Defendants' RFPs belie counsel's purported testimony. There have been more than enough bids from QFs received by the Defendants to address the impending shortfall, perhaps multiple times over. In addition, the Defendants simply have no idea how many bidders like plaintiff were prohibited or discouraged from bidding because of the facility size restrictions, high fees and the illegal participation of massive out-of-state facilities. Fourth, are the Defendants really saying they will act like a petulant child and simply refuse to acquire renewable energy when the climate dangers of not doing so are potentially devastating?

Defendant also engages in impermissible fact testimony when the Defendants attempt to describe what may or may not be how the PURA calculates avoided costs. *See*, PURA Br. at 11-

12. How PURA thinks avoided costs should be determined is irrelevant to a motion to dismiss.[15] Defendants are also injecting impermissible factual, even though irrelevant, testimony regarding avoided costs in a proceeding before the Massachusetts Department of Public Utilities. The multitude of tangents that Defendants go down are intended to distract the Court from the very straightforward legal issue in this case.

Remarkably, the Defendants do not address the statutory standing provided to plaintiff by PURPA. One of the aspects of this case the Second Circuit made clear in *Allco I* is that plaintiff's action here is one based upon PURPA, and thus plaintiff's standing is based upon PURPA. The Defendants have no authority to compel wholesale sales outside of PURPA, and as a qualifying small power producer Allco has standing to bring this action under 16 U.S.C. 824a-3(h) to cure the Defendants' ongoing and imminent violations. The Second Circuit in *Allco I* has already stated that Allco has standing to bring this action so long as Allco exhausted its administrative remedies before the FERC, which it has. The only standing issue decided by the Second Circuit adversely to plaintiff related to standing to challenge the Number Nine wind contract because of two evidentiary deficiencies. Those two deficiencies have been cured.

A. Allco has standing to challenge the 2013 Procurement and the Number Nine contract.

Allco has standing for three principal reasons. *First*, Allco has alleged it has been, and continues, to be injured by Defendants' compulsion of the Number Nine contract, and the continuing approval of cost recovery for the Number Nine project. The Number Nine contract,

[15] How avoided costs are or should be calculated in Connecticut is simply irrelevant to the issue of whether the State is regulating wholesale sales, and violating its obligations under 16 U.S.C. § 824a-3(f). Defendants' new meritless argument on standing starts with more fact testimony from Defendants. The factual premise of Defendants' standing argument is that PURA is illegally calculating avoided costs under PURPA by eliminating access to a long-term forecasted rate required by 18 CFR § 292.304(d)(2)(ii). Thus Defendants posit that Allco cannot be harmed by Connecticut's actions in this case because Connecticut has already unlawfully harmed Allco through PURA's actions in calculating avoided costs.

as it is first in time before Allco's contracts, would cause Allco's QFs to earn lower revenues because the federal-mandated must-buy rate that the Connecticut Utilities must pay for energy and capacity provided by Allco's QFs would be lower (as explained further in Section II.B. below). As the Defendants point out, the Second Circuit addressed the generalities of a similar claim of injury in *Allco I*. But unlike *Allco I*, the precise amount of the injury is now supported and quantified by expert testimony, and unlike *Allco I* the injury is imminent because many of the Allco QFs have exercised their federally guaranteed right to put their energy and capacity to the Connecticut Light and Power Company. Those are the two key differences that were not present in *Allco I* but are present here. And Allco's injury is clearly redressable. If this Court declares the Number Nine contract void, then as the expert testimony will state (and as Allco has alleged in the complaint) the injury to Allco's QFs' revenue will be eliminated. Similarly if this Court were to enjoin future actions of the Defendants related to the Number Nine contract, such as enjoining the ongoing approval for cost recovery, the Number Nine contract would be terminated, thus also eliminating the adverse effect on its QFs' revenue.[16]

Second, now that the Second Circuit has authorized Allco's suit through an enforcement action under Section 210(h)(2)(B) of PURPA, Allco also has standing in the capacity as a private attorney general, the origins of which in the Second Circuit can be traced to Judge Friendly's decision in *Associated Indus. of N.Y. v. Ickes*, 134 F.2d 694 (2d Cir. 1943), *vacated on other grounds*, 320 U.S. 707 (1943). Congress has authorized the FERC to bring an action to enforce

[16] This latter avenue of redressability by enjoining future actions permitting cost recovery of an illegally compelled power purchase agreement was explained by the First Circuit in *Barnstable v. O'Connor*, 786 F.3d 130 (1st Cir. 2015). In *Barnstable*, the plaintiffs sought to enjoin the commissioners of the Massachusetts Department of Public Utilities from approving cost recovery from ratepayers for future payments made under an already approved power purchase agreement for the proposed Cape Wind project. The First Circuit held that the fact that the contract had been approved in the past would not prevent the district court from enjoining future action related to other aspects of the contract, including future cost recovery, and any other actions or approvals that might be required related to the contract, thus redressing plaintiffs' injuries. There, as here, the existence of the unlawfully compelled contract represents an "ongoing violation" of the FPA and PURPA.

Section 210(f) of PURPA. If the FERC declines to bring such an action after being petitioned to do so, then a qualifying small power producer, such as Allco, has been designated by Congress to bring such suit—"there is an actual controversy, and there is nothing constitutionally prohibiting Congress from empowering any person, official or not, to institute a proceeding involving such a controversy." *Id.*, 134 F.2d at 704.[17]

Third, voiding the Number Nine contract will increase the likelihood that Plaintiff would receive a Section 6, Section 7 or Section 1(c) contract. If all the unlawfully compelled contracts are voided, the capacity available for QFs would increase, providing a path to a contract as well as an increased likelihood of receipt of such a contract. And since Allco was in the competitive range in the RFP, there is a sufficient likelihood that Allco would be again.

B. Allco Has Standing to Challenge the 2015 RFP.

The Defendants argue that Allco lacks standing to challenge the 2015 RFP because it did not participate in an unlawful RFP. The Second Circuit in *Allco I* rejected that argument. The Second Circuit held that Allco's challenge to future actions of the Defendants was an action to enforce PURPA because Allco was seeking to prevent the compulsion of wholesale transactions other than through the only avenue open to States—Section 210 of PURPA. *See, Allco I*, 805 F.3d at 97. ("[Allco's] claim is [] an attempt to enforce § 824a-3(f).") Thus, Allco's standing to challenge all future actions of the State was based upon its status as a small power producer under Section 210(h) of PURPA, and that standing was not dependent upon Allco's being a bidder—disappointed or otherwise. Indeed it would be nonsensical to say that Allco lacked

[17] Indeed, Allco, as one of Judge Friendly's private Attorney Generals, is in a similar position to the plaintiff in *SEC v. Mgmt. Dynamics, Inc.*, 515 F.2d 801, 808 (2d Cir. 1975) in which the Second Circuit noted that "the SEC appears in these proceedings not as an ordinary litigant, but as a statutory guardian charged with safeguarding the public interest in enforcing the securities laws." Here, Congress gave qualifying small power producers, such as Allco, the right to enforce the requirements of Section 210(f) of PURPA when the FERC decided it did not want to pursue the action itself. If the FERC were pursuing this action, there would be no question that it would be entitled to proceed. So too here, Allco should be in the same position as the FERC would be.

standing to challenge government action because Allco did not respond to the RFP that the government itself prohibited Allco from so responding.

Allco's injury is self-evident as the Second Circuit recognized: "As Allco acknowledges, its 'status as a small power producer' under PURPA 'is relevant to [its] Article III standing and to explain[ing] why [its] injury is redressable.' [] As such, any equitable relief relating to future contracts awarded under Section 6 necessarily implicates PURPA; otherwise, such relief would provide no path by which Allco could eventually obtain a non-preempted Section 6 contract."[18] *Allco I*, 805 F.3d at 96. The Second Circuit recognized that forcing the Defendants to conduct a PURPA compliant RFP would redress Allco's injury *by providing a path to a contract*. *See*, *Allco I*, 805 F.3d at 94. Further, the Second Circuit recognized that by enjoining Defendants' future actions in connection with non-compliant RFPs, a path would be established for Allco's QFs to receive non-preempted contracts. That is exactly why Allco will suffer irreparable harm: if the Defendants are permitted to award contracts through a non-compliant RFP, the path to a contract for Allco QFs will disappear.

Congress relaxed the ban on State's involvement in the area of wholesale sales in order to benefit QFs, such as Allco's, and, as the Second Circuit recognized in *Allco I*, conferred *statutory standing* to challenge State action that goes beyond the limits set by the FPA and PURPA. 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

[18] As stated in the complaint, many of Allco's QFs were banned from participation. The fact that the State is holding another RFP, not under Sections 6 and 7 of Pub. Act 13-303, for QFs between 2MW and 20MW, in which some, but not all, of the Allco QFs would fit the size requirement cannot legitimize an otherwise unlawful and non-compliant RFP or confer the power to compel wholesale sales. Moreover, the available contracts under that 2-20MW RFP will be only a small fraction of what would be available to Allco's QFs if the 2015 RFP complied with federal law.

plainly be caused by the Defendants' own decision to include non-QFs, exclude most QFs and impose burdensome conditions in the 2015 RFP. Additionally, now that the Second Circuit has authorized Allco's suit through an enforcement action under Section 210(h)(2)(B) of PURPA, injury to Allco is implied by Congress through the statute itself. *SEC v. Mgmt. Dynamics, Inc*., 515 F.2d 801, 808-809 (2d Cir. 1975). Allco also has standing, as discussed above, under Section 210(h)(2)(B) of PURPA, in the capacity as a private attorney general.

II. CONNECTICUT'S ORDER AND PLANNED ORDERS COMPELLING WHOLESALE TRANSACTIONS ARE FIELD PREEMPTED.

Under the theory of field preemption, state action is preempted when it intrudes into an area that Congress has occupied for exclusive federal regulation. *See, Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 248 (1984) ("If Congress evidences an intent to occupy a given field, any state law falling within that field is pre-empted."). When Congress has reserved a field for exclusive federal regulation, a plaintiff need not demonstrate any actual conflict with federal regulation in order to demonstrate preemption; it is enough that the state has acted in a field that is forbidden to it. *See*, *Arizona v. United States*, 132 S. Ct. 2492, 2502 (2012) ("[w]here Congress occupies an entire field, … even complementary state regulation is impermissible. Field preemption reflects a congressional decision to foreclose any state regulation in the area, even if it is parallel to federal standards.")

As the Fourth Circuit recognized, "A wealth of case law confirms FERC's exclusive power to regulate wholesale sales of energy in interstate commerce." *Nazarian*, 753 F.3d at 475; *see, e.g.*, *S. Cal. Edison*, 376 U.S. at 215-16 ("Congress meant to draw a bright line, easily ascertained, between state and federal jurisdiction…. This was done … by making [FERC] jurisdiction plenary and extending it to all wholesale sales in interstate commerce except those which Congress has made explicitly subject to regulation by the States."); *New England Power*

Co. v. New Hampshire, 455 U.S. 331, 340 (1982) (the FPA "delegated to [FERC] exclusive authority to regulate the transmission and sale at wholesale of electric energy in interstate commerce, without regard to the source of production.")[19] Thus, for example, the FPA gives FERC exclusive authority not only to set all "rates and charges made, demanded, or received … in connection with the transmission or sale of electric energy subject to the jurisdiction of the Commission," but also "all rules and regulations affecting or pertaining to such rates or charges." 16 U.S.C. § 824d(a).

A. Connecticut's Actions Intrude into a Field Reserved for FERC.

In addition to the exclusive jurisdiction conferred over wholesale sales, the second sentence of Section 201(b)(1) of the FPA gives the FERC the exclusive jurisdiction over the *facilities* used for the sale of electric energy at wholesale in interstate commerce. The FERC's jurisdiction over facilities has an exception that provides the FERC:

> shall not have jurisdiction, except as specifically provided in this Part and the Part next following, over facilities used for the generation of electric energy or over facilities used in local distribution or only for the transmission of electric energy in intrastate commerce, or over facilities for the transmission of electric energy consumed wholly by the transmitter.

The plain language of the statute makes it clear that whatever authority is exercisable by a State under the State's authority over facilities does not extend to wholesale sales.[20] That is the bright-line in this case. The State's reserved authority to regulate facilities is of no relevance to

[19] With respect to the FPA, even the ordinary presumption against preemption of traditional state authority has no application here. Wholesale electricity sales in interstate commerce were never subject to state regulation, *see New York*, 535 U.S. at 6, and thus the FPA does not displace the state's traditional police powers. What is more, the presumption "is not triggered when the State regulates in an area where there has been a history of significant federal presence," *United States v. Locke*, 529 U.S. 89, 108 (2000), which is true of wholesale electricity regulation.

[20] The language in Section 201(a) of the FPA referencing State authority is a mere policy declaration that does not affect the plain language in the first sentence of Section 201(b)(1). *See, New York*, 535 U.S. at 22 ("we have described the precise reserved state powers language in § 201(a) as a mere policy declaration that cannot nullify a clear and specific grant of jurisdiction, even if the particular grant seems inconsistent with the broadly expressed purpose.") (internal quotations and citations omitted.)

the central issue, which is whether the specific transactions are "the sale of electric energy at wholesale in interstate commerce," and if they were, did Connecticut exercise any authority over such wholesale sales. The answer to both in this case is unquestionably yes. The agreement with Number Nine Wind Farm and the proposed agreements with other non-QF generators are clearly wholesale sales of electric energy in interstate commerce. In addition, those wholesale sales only came into, and will come into, being because of the singular act of the State of Connecticut compelling those transactions. Thus, Connecticut acted in, and plans to act in, a field of exclusive Federal jurisdiction, and its actions are pre-empted and the contracts void. *See*, *Silkwood v. Kerr-McGee Corp.*, 464 U.S. at 248 (1984) ("If Congress evidences an intent to occupy a given field, any state law falling within that field is pre-empted.")

Even assuming *arguendo* that Connecticut did not set a wholesale rate here (an argument rejected in *Nazarian*), setting a rate is only part of regulating and compelling a wholesale transaction. Exclusive Federal jurisdiction applies to "any rule, regulation, practice, or contract affecting such rate, charge, or classification." (*see*, 16 U.S.C. § 824e). Whether or not Connecticut set a rate is not determinative of whether it intruded into a field of exclusive Federal regulation. Section 201(b)(1) of the FPA provides exclusive jurisdiction for wholesale sales and contracts, not just prices or rates. Regardless of whether Connecticut fixed a rate, State authority is pre-empted in all respects over "the sale of electric energy at wholesale" and there is no dispute that the transactions at issue fall within that category.

B. The Federal Power Act's Preemptive Provisions are Necessary to Render PURPA Effective.

PURPA was enacted for the express purpose of creating a new class of "favored cogeneration and small power facilities" in the overall regulatory scheme. *FERC v. Mississippi*, 456 U.S. 742, 751 (1982). It did so by enacting a limited exception, applicable to such facilities, to the blanket prohibition on state regulation of wholesale energy sales, as well as an open access interconnection and transmission policy for such generators. 16 U.S.C. § 824a-3. The FPA's preemptive provisions are necessary to render PURPA effective – by preempting state regulation *except as to* QFs, the FPA ensures that QFs are singled out for favored treatment.

Under PURPA and its implementing regulations, Congress put a limit on the price at which a State could compel a wholesale energy transaction in order to assure ratepayer neutrality. That price limit is equal to the utility-buyer's "avoided costs" – that is, the costs that the utility would otherwise have incurred but for its purchase from the QF. 16 U.S.C. § 824a-3(b), (d); 18 C.F.R. § 292.304(b)(2). In the case of new renewable energy facilities, which need a long-term contract, the avoided cost rate is the long-term rate under 18 C.F.R. § 292.304(d)(2)(ii). Thus, in respect of QFs, Connecticut could compel a wholesale transaction at a fixed 15-year rate, such as what was sought and received by Number Nine here. Number Nine and almost all of the bidders in the 2015 RFP, however, are not QFs so Congress' specific authorization to allow a State to compel such a rate or contract does not apply.

Connecticut's manipulation of the wholesale market specifically harms QFs in two ways. First, it makes superfluous the authority provided to States to regulate wholesale transactions for the benefit of QFs. That specific State authority includes the State's ability to compel wholesale transactions at 15-year or 20-year fixed rate such as what is involved here.[21] Number Nine and almost all of the bidders in the 2015 RFP, however, are not QFs, thus Congress' has chosen not to make the same accommodation for those non-QFs. Connecticut should not be able to

[21] FERC has stated that a QF has the right to a long-term fixed rate because "'an investor needs to be able to estimate, with reasonable certainty, the expected return on a potential investment before construction of a facility.'" *JD Wind 1 LLC*, 130 FERC ¶ 61,127, at para. 23 (2010) (quoting 45 Fed. Reg. at 12,218). Being "able to evaluate the financial feasibility" of a renewable energy QF in this manner, *id.* (quoting 45 Fed. Reg. at 12,218), is a critical prerequisite for moving forward with a project.

effectively eliminate a QF's preferred status by making an end-run around FERC's exclusive jurisdiction, and Congress' preference and design standards for QF generation.

Second, Connecticut's actions lower prices that new QF generation, Congress' preferred choice, would obtain. When power is purchased from Number Nine or another large non-QF generator, it relieves the utility of the need to purchase that power from some alternative source. Naturally, the utility would shed its most expensive alternative source of power first. This means that the cost of the most expensive power in the utility's portfolio has *decreased* as a result of the procurement – in PURPA's lingo, its "avoided costs" have decreased. And accordingly, so too has the rate that a QF is legally entitled to receive under PURPA. This injury-in-fact would be caused by Connecticut's action. In light of that statutory scheme, it is easy to understand how QFs would be injured by State actions compelling wholesale transactions with non-QFs.

Simply put, if this Court permits Connecticut to use its jurisdiction over in-state generation facilities or "portfolio management" as an excuse to compel wholesale transactions, (1) the authority given to States under PURPA to compel wholesale transactions with QFs would be superfluous, (2) Congress' PURPA price-limit of avoided costs, which insures ratepayer neutrality, would no longer be a constraint on State action: States would be free to compel wholesale transactions at any price, regardless of the method of procurement, and (3) States would be free to pursue their own market construct, ignoring and undermining the FERC-approved system, and Congress' preference and design standards for QF generation.

C. Connecticut's Actions Do Not Fall Within the State's Authority Reserved under the FPA over Generation Facilities or to Direct Utility Planning and Resource Decisions.

In addition to the exclusive jurisdiction conferred over wholesale sales, the second sentence of Section 201(b)(1) of the FPA gives the FERC the exclusive jurisdiction over the *facilities* used for the sale of electric energy at wholesale in interstate commerce. The FERC's jurisdiction over facilities has an exception that provides the FERC:

> shall not have jurisdiction, except as specifically provided in this Part and the Part next following, over facilities used for the generation of electric energy or over facilities used in local distribution or only for the transmission of electric energy in intrastate commerce, or over facilities for the transmission of electric energy consumed wholly by the transmitter.

The plain language—"except as specifically provided"—makes it clear that whatever authority is exercisable by a State under the State's authority over facilities does not extend to wholesale sales. That is the bright-line in this case. The State's reserved authority to regulate facilities *within its own borders* is of no relevance to the central issue, which is whether the specific transactions are "the sale of electric energy at wholesale in interstate commerce," and if they are, do the Defendants plan to exercise any authority over such wholesale sales. The answer to both in this case is unquestionably yes. The proposed PPAs are clearly wholesale sales of electric energy in interstate commerce. In addition, those wholesale sales will only come into being because of the singular act of the State of Connecticut compelling those transactions.

Notwithstanding the fact that when the FPA was passed, States had no authority to regulate wholesale transactions under the guise of local power, the Defendants assert that under the FPA States retain power to "'direct the planning and resource decisions of utilities under their jurisdiction,'" (quoting *Entergy Nuclear Vermont Yankee, LLC v. Shumlin*, 733 F.3d 393, 417 (2d Cir. 2013)) ("Vermont Legislature can direct retail utilities to 'purchase electricity from an environmentally friendly power producer in California or a cogeneration facility in Oklahoma,' if it so chooses".) That statement in *Entergy* quoted from the Supreme Court's opinion in *New York* in which the Supreme Court observed merely that the "purchase [of] electricity from an environmentally friendly power producer in California or a cogeneration facility in Oklahoma", *New York*, 535 U.S. at 8, was physically possible. It neither says nor implies anything about the power of a State to compel a wholesale transaction from such facilities.

Moreover, the language in the opinion in *Entergy* and from the Supreme Court's opinion in *New York,* 535 U.S. at 24, referencing State jurisdiction of local service issues, demand side management (which is an absence of an energy transaction), resource planning, utility generation and resource portfolios, and retail stranded cost charges says nothing about that authority reducing FERC's exclusive jurisdiction over wholesale sales.

Rather States act as a regulator, approving utility's resource plans, and regulating the terms on which power plants are built and retired *within their own borders*. *Conn. Dep't of Pub. Util. Control v. FERC*, 569 F.3d 477, 481 (D.C. Cir. 2009). But the state's power in this regard is not unbounded. As the statute makes clear, States retain such authority "except as specifically provided" by the FPA, 16 U.S.C. § 824(b)(1) – and the FPA expressly provides that FERC shall have exclusive authority over wholesale electricity sales.

Thus, a State cannot invoke its authority over resource planning decisions in order to justify the regulation of wholesale sales. Nor can Connecticut claim to be acting pursuant to the state's reserved power under Section 16 U.S.C. §824(b)(1) with respect to "facilities used for the generation of electric energy." 16 U.S.C. § 824(b)(1). It is clear that at the time the FPA was passed the States had no such authority regardless of the effect on the local interest. *See, Attleboro*, 273 U.S. at 90. (Such sales are "not subject to regulation by either of the two States in the guise of protection to their respective local interests.")

Defendants rely heavily on FERC's orders in *Midwest Power Systems, Inc*., 78 FERC ¶ 61,067 ("*Midwest*") and *Southern California Edison Co*., 71 FERC ¶ 61,269 (1995) ("*SoCal*

Edison"). First, those orders have no precedential value. Such a declaratory order or notice is "akin to an informal guidance letter." *Exelon Wind 1, LLC v. Nelson*, 766 F.3d 380, 391 (5th Cir. 2014). It does not have the force of law, as it does not fix any rights or obligations, but instead, "much like a memorandum of law" or an amicus brief, it merely advises the parties and the district court of the agency's perspective. *Niagara Mohawk Power Corp. v. FERC*, 117 F.3d 1485, 1488 (D.C. Cir. 1997) (quotation marks omitted); *id*. (declaratory order issued in response to PURPA petition for enforcement does "nothing more than state how the FERC interprets its own regulations" (quotation marks omitted)); *Indus. Cogenerators v. FERC*, 47 F.3d 1231, 1235 (D.C. Cir. 1995) (holding, regarding declaratory order issued in response to petition for PURPA enforcement, that "[u]nlike the declaratory order of a court, which does fix the rights of the parties, this Declaratory Order merely advised the parties of the Commission's position.").

But even if those FERC orders had precedential value, they do not support Defendants' position. Plaintiff has never argued that Defendants do not have permissible paths to encourage renewable energy. They certainly do, and Justice Ginsburg in *Hughes* provided a list of examples. What plaintiff has argued is that compelling wholesale sales is not one of those permissible ways, unless it fits within PURPA. Neither *Midwest* nor *SoCal Edison* hold that States may compel wholesale sales with public utilities outside of PURPA. Indeed, in both those cases it was made clear that PURPA constrained the wholesale transactions. To be sure, Defendants are correct when they state that "renewable generators <u>do not have to be QFs at all</u>." *See*, PURA Br. 24 (emphasis in original). But that reference in *SoCal Edison* to exempt wholesale generators being able to supply renewable energy pursuant to market rate authority is nothing more than FERC not objecting to State renewable portfolio standards and observing that even large renewable energy generators can enter into voluntary agreements with utilities to satisfy State RPS requirements. Similarly, Defendant Klee's citations to other FERC orders are simply inapposite and have nothing to do with the compulsion of a wholesale sale.[22] The plaintiff does not dispute that voluntary bi-lateral contracts between generators and utilities are permissible. That is not the case here, however, as this case involves a State compelled contract.

III. CONNECTICUT'S ACTIONS ARE CONFLICT PREEMPTED.

Under the theory of conflict preemption, state action is preempted when it "'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 373 (2000) (quoting *Hines v. Davidowitz*, 312 U. S. 52, 66-67 (1941)).

A. Connecticut's Actions Conflict with Implementation of FERC's Market-Based Regulatory Scheme.

FERC has exercised its authority by adopting a market-based regulatory structure for the Connecticut region. FERC has established, through ISO-New England, an interstate auction market on which electricity is bought and sold in real time, and capacity is purchased through the annual auctions three years in advance. FERC has also allowed generators, through "market-based tariffs," to enter into "freely negotiated contracts with purchasers." *Morgan Stanley*, 554 U.S. at 531. The rationale for FERC's policy is that the dynamics of the free and competitive marketplace will enable buyers to obtain electricity at the lowest prices.

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[22] *See*, DEEP Br. at 24-25. For example, DEEP refers to *ISO New England, Inc.*, 126 FERC ¶ 61,080 (2009) P38, but as that same paragraph makes clear that order and FERC's quoted language had nothing to do with wholesale sales. Rather it addressed changes proposed to ISO New England's open access transmission tariff for the interconnection of generators. ("The revisions proposed here simply coordinate ISO-NE's interconnection procedures with the Forward Capacity Market rules.") Similarly, DEEP's citation of *Commonwealth Atl. Ltd. P'ship*, 51 FERC ¶ 61,368 (1990) is irrelevant. There it was the public utility itself that solicited proposals "pursuant to nonbinding guidelines issued by the [state commission]." *Id.* at ¶ 62,238. But consistent with Allco's claims here, those State guidelines applied to solicitations for only QFs. *Id*. at fn. 11 ("*Re Purchase of Electricity by Public Utilities From Qualifying Facilities*, 87 PUR4th 185 (1988) (SCC Order). The SCC Order recommended that such bidding programs center around competitive negotiation rather than a "price only" selection process.")

Here, Connecticut has waded into FERC's field of regulation and adopted a regulatory scheme different than FERC's: one in which state commissions can compel entry into a wholesale electricity contract, and do so at a price that is neither the FERC-regulated market price resulting from ISO-New England, nor a price that is either freely negotiated between seller and purchaser, or the price permitted by PURPA.

Under the FPA, however, only FERC gets to make the rules governing wholesale electricity transactions. As Justice Scalia has noted, "[i]t is common ground that if FERC has jurisdiction over a subject, the States cannot have jurisdiction over the same subject." *Miss. Power & Light Co. v. Miss. ex rel. Moore*, 487 U.S. 354, 377 (1988) (Scalia, J., concurring). Connecticut's actions both intrude on the field reserved exclusively for FERC, and thus are field preempted, and also conflict with FERC's chosen market-based regulatory approach and the favored status and rights of QFs under the FPA, and thus are conflict preempted as well.

The federal field is not narrowly limited to wholesale pricing. As the plain language of the statute makes clear, federal authority extends to "the sale of electric energy at wholesale in interstate commerce" more broadly, 16 U.S.C. § 824(b)(1), and includes "all rules and regulations affecting or pertaining to such rates or charges." *Id.* § 824d(a). That grant of authority to FERC includes the power to regulate the circumstances and prices under which buyers and sellers are permitted to enter wholesale electricity contracts, as well as whether such contracts must be voluntary. And it precludes States from deciding otherwise.

Indeed, if States were free to compel their utilities to enter into whichever wholesale electricity transactions that the State preferred, including at prices different than the market price for electricity, FERC's entire market-based regulatory scheme could unravel. State-mandated purchasing decisions could be guided by any number of factors other than cost and thus FERC's goal of establishing a competitive market designed to meet demand at least cost would be frustrated. Thus, it is simply irrelevant that the State played no role in determining the price offered by bidders.[23] The State compelled the utility to enter a contract with the State's chosen winner, and thereby mandated a wholesale sale of electricity that would not have taken place absent the State's compulsion.

B. Connecticut's Actions Compelling Wholesale Transactions with non-QFs conflict with PURPA.

Congress has chosen to allow States to compel wholesale contracts, including at fixed rates over 15 to 20 years only for QFs under PURPA. Congress has not made the same accommodation for projects like Number Nine that do not meet the design standards for QFs.[24] Facilities not meeting those design standards are expected to compete on their own merits in the FERC-regulated wholesale market.

Congress relaxed the ban on State's involvement in the area of wholesale sales in order to benefit QFs. Thus any procurement that attempts to go beyond the limits set by Congress harms the very market participants that Congress intended to benefit. Interference with that policy will impede the achievement of Congress' goals in enacting PURPA. The simple fact is that there are more than enough QFs with which Connecticut can compel wholesale transactions for 15 to 20-year terms in full compliance with the FPA and PURPA. Similarly, PURPA provides more than

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[23] But as discussed above, the State did also fix a rate here. *See*, footnote 10, *supra*.

[24] *See, e.g., Cal. Pub. Utils. Comm'n*, 132 FERC ¶61,047 (2010) at P64:

> The Commission's authority under the FPA includes the exclusive jurisdiction to regulate the rates, terms and conditions of sales for resale of electric energy in interstate commerce by public utilities. [*citing* 16 U.S.C. §§ 824, 824d, 824e; *Miss. Power & Light Co. v. Miss. ex rel. Moore*, 487 U.S. 354 (1988)]. While Congress has authorized a role for States in setting wholesale rates under PURPA, Congress has not authorized other opportunities for States to set rates for wholesale sales in interstate commerce by public utilities, or indicated that the Commission's actions or inactions can give States this authority.

enough authority for Connecticut to meet all renewable energy goals multiple times over. The Defendants have no one to blame but themselves if they refuse to follow the path that Congress has permitted.

IV. SIMILAR ATTEMPTS TO CREATE A STATE-SPONSORED SEPARATE MARKET CONSTRUCT HAVE BEEN DECLARED ILLEGAL.

A. The Defendants Wish to Create Their Own Wholesale Market Construct.

The Defendants argue (PURA Br. at 18) that Defendants are not insulating sellers from FERC markets by compelling bi-lateral contracts. Such an assertion is objectionable at this stage of the proceeding because it is more purported factual testimony. Worse, it is patently absurd. Not only does the long-term contract insulate a generator from the prices it would otherwise receive in the FERC-approved ISO-New England market, but it creates an entire State-sponsored wholesale price construct outside of the FERC-approved market. The *raison d'être* of the bi-lateral contract is to provide a fixed revenue stream and *insulate* a generator from the fluctuations of the FERC-approved market.

B. The Supreme Court and the Third and Fourth Circuits Have Invalidated Economically Identical Transactions.

The decision of the Fourth Circuit in *Hughes*, which was affirmed by the Supreme Court, and the decision of the Third Circuit in *Solomon*, invalidating economically identical wholesale arrangements confirm that the Defendants' action in 2013 and its planned actions are unlawful. The *Hughes* wholesale sale transaction was structured as a contract-for-differences, which as the petitioners in *Hughes* ultimately conceded, is economically indistinguishable from a direct power purchase agreement between the utility and the generator.[25] In *Hughes*, the State of Maryland

[25] Providing generators with revenue assurance by compelling utilities to enter into a complicated contract-for-differences is the equivalent of compelling the utilities to buy the electricity itself under a long-term power purchase agreement. A power purchase agreement is economically identical to the contract-for-differences at issue here, as is

advanced the same argument used by the Defendants here—that the State had the right to regulate the "buy-side", i.e., the utility side, and compel the wholesale transaction. That argument was rejected.

With nowhere else to turn, the Defendants' arguments here have devolved into incorrect assertions of predictive behavior of various courts and the solicitor general. PURA Defendants assert: "If plaintiff's theory were true, the U.S. District Court, the Fourth Circuit Court of Appeals, and the U.S. Supreme Court would not have analyzed the effect of the Generation Order on FERC's market." PURA Br. at 22. The Defendants conveniently forget the arguments made in that case. The State argued that the contracts were just financial hedges and not wholesale sales at all because no electricity was actually sold directly by the generator to the utility. In the words of Attorney Hollander the contract purportedly "served as a more cost-effective means of subsidizing the development of new electric generation facilities."[26] It was the States purported characterization that was the reason why the various courts in the *Hughes* case analyzed the effect of the Generation Order. But as discussed above, once the State attempted to argue that what it had been calling a financial hedge was in reality identical to a direct bi-lateral contract, Justices Alito and Kagan rejected that argument out-of-hand because a State-compelled bi-lateral contract is unquestionably a wholesale sale and thus pre-empted.

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illustrated in the following example:

> In both cases, the generator submits a bid to the state specifying the long-term rate per megawatt or megawatt-hour that the generator needs to be guaranteed (for example, $60). Suppose that the market price for energy is $50. Under a <u>power purchase agreement</u>, the generator sells to utility for $60. The utility then resells into the spot market (or avoids purchases from the spot market) at $50. Under the <u>contract-for-differences</u>, the generator sells into the spot market at $50. The utility makes a side payment to the generator of $10. In both cases, the generator's net revenue is $60 and the utility's net cost is $10.

[26] *See*, p. 14 of the brief of various State amici available at: http://www.americanbar.org/content/dam/aba/publications/supreme_court_preview/briefs_2015_2016/14-614_amicus_pet_Connecticut.pdf.

C. The Number Nine Contract and the Proposed Contracts Are Tethered to the FERC-Approved Market.

Whether tethered to the market or not, the Number Nine contract and the other proposed contracts are still both field and conflict pre-empted, but because the concept of being tethered was mentioned by Justice Ginsburg in *Hughes*, plaintiff will discuss how these contracts are also tethered to the FERC market. The Connecticut utilities enter into the compelled contract and, for example, in the case of the Number Nine Wind farm in Maine, the Connecticut utility takes delivery of the energy in Maine and then just resells it into the ISO-NE market. The energy never reaches Connecticut. The state program provides for the Connecticut utility to sell the power into the ISO-New England market in Maine, and then the utility gets to recover from ratepayers any loss, and any gain is given over to ratepayers, exactly what was done from an economic perspective in the *Hughes* case. In both *Hughes* and here, the State compels a long-term guaranteed payment stream for the wholesale sale for the energy. In both *Hughes* and here, the product is sold into the FERC approved market, and there is a financial adjustment upward or downward to account for the difference in the FERC market price and the guaranteed price.

D. Neither the Solicitor General ("SG") Nor the FERC have approved the Defendants' Actions or Proposed Actions.

Defendants excerpt various quotations from the SG's brief in *Hughes* for the proposition that the SG agrees with the district court in *Allco I*. A reading of the full passage shows that is not what the SG said. The SG's observations regarding *Allco I* simply restated the court's holding. It did not state that the SG agreed with the court's holding. Rather the only statement made by the SG was that "[p]ermissible state programs may include a requirement that local utilities purchase a percentage of electricity from a particular generator or from renewable resources, or the creation of renewable energy certificates to be independently used by utilities in compliance with state requirements." *See*, PURA Appendix at 79. The SG qualified the statement by using "may" so it is reserving judgment until the facts of each program are known. Moreover, as discussed above, those renewable mandates do not compel the construction of facilities or wholesale sales. But to the extent that SG meant that a state can compel a wholesale transaction with a specific generator, particularly one out-of-state, such a conclusion conflicts with the plain meaning of the FPA, the Supreme Court's judgment in *Hughes*, the Second Circuit's statements in *Allco I*, the Third Circuit's opinion in *Solomon* and the Fourth Circuit's opinion in *Nazarian*, as well as the wealth of case law cited in those opinions.

V. JUDGMENT FOR THE DEFENDANTS WOULD CREATE A MASSIVE LOOPHOLE WITH NO PRACTICAL LIMIT ON A STATE'S AUTHORITY TO REGULATE WHOLESALE SALES.

Judgment for the Defendants in this case would create a massive loophole in the FPA that would destroy FERC's ability to regulate the market in a uniform and coherent manner. FERC has chosen a market-based approach to regulation, in which some generators sell their output into a wholesale auction administered by ISO-New England, and others enter voluntary bilateral contracts with willing purchasers. Such a market-based system simply cannot function as FERC intended if States are free to mandate involuntary wholesale transactions that, but for the State's intervention into the wholesale marketplace, would never have taken place.

Under the guise of regulating utility purchasing decisions, States could simply take over the entire wholesale market, effectively eliminating FERC's regulatory power and supplanting its chosen regulatory approach. The FPA prevents even the possibility of such interference by excluding States altogether from the field of wholesale sales. Of course, with respect to QFs under PURPA Congress has reached a different conclusion and *has* authorized State regulation of wholesale sales, including the ability to compel a 15 to 20-year fixed-rate contract such as at issue here, but only for facilities meeting the design standards for QFs.

But the authority the Defendants seek from this Court does not stop with facilities within a State's own borders. Connecticut seeks not only to use compelled wholesale transactions to support new electric generation in its own State, but it seeks to use compelled wholesale transactions to compel new construction in other States as well, all under the guise of "local portfolio management." Indeed, the almost singular focus of the Defendants is to compel Connecticut utilities to enter into long-term wholesale power purchase contracts from non-QFs to build new generation in other States, the energy from which *would never reach Connecticut* but would be re-sold in further wholesale transactions outside Connecticut.

Whatever the scope of a State's reserved authority, it is limited to facilities within the state's own borders. As the Supreme Court has observed "the legislative history [of the FPA] is replete with statements describing Congress' intent to preserve state jurisdiction *over local facilities*." *New York*, 535 U.S. at 535 (emphasis added). Local facilities are facilities within a State's own borders, not facilities located several States away.

Finally, the logical extension of the Defendants' argument would be State authority to regulate all wholesale sales under the guise or "target" of regulating retail rates or another "local interest," thus unraveling the FERC-approved system and Congress' preference for QF generation.

The issue here is a narrow one which does not detract from a State's ability to influence utilities' purchasing decisions to buy from certain types of generation, or reviewing those for prudence in connection with retail rate recovery. Yet, there needs to be a line drawn somewhere and Congress drew the bright-line in the first sentence of Section 201(b)(1) of the FPA at wholesale sales in interstate commerce, which the contracts at issue here unquestionably are.

VI. A MARKET-BASED TARIFF FILING WITH FERC CANNOT BRING LIFE BACK TO A VOID AGREEMENT.

The PURA Defendants argue that the compelled contracts will be subject to challenge at FERC under Section 206 of the FPA. PURA Br. at 11. From that point the PURA Defendants extract the notion that Plaintiff must challenge the Number Nine contract there, and not here. Not so. The State intrusion into FERC's exclusive jurisdiction cannot be cured by Number Nine's or any other non-QF seeking approval from FERC for market based rate authority.

Here, the contracts are the product of unlawful and pre-empted state action, and thus void. A prospective future market based rate filing years in the future[27] does not cure the fact that the contract is the product of illegal state action now for the simple reason that an agreement that is compelled based upon illegal state action is void *ab initio* and no subsequent action can bring life back to a void contract. *See, Solomon*, 766 F.3d at 253. *See also, District Court Nazarian*, 974 F. Supp. at 838.

The question of whether a contract is the product of unlawful state action is a question for the courts, not the FERC. The contracts here are void and thus any filing at FERC based upon those agreements would be a substantive nullity. For that reason, the FERC rejected the attempt by the *Hughes* generator to bring life back into its contracts. *See, CPV Shore, LLC*, 148 FERC ¶ 61,096 at P28 (2014) (stating "[i]n considering whether the rates, terms, and conditions in a contract are just, reasonable, and not unduly preferential or discriminatory under the FPA the contract must first be a valid contract. The Commission must reject a rate filing that is a

[27] A filing for market-based rate authority cannot be filed earlier than 120 days before the commercial operation date of the facility.

nullity.") *See also, Pub. Util. Dist. No. 1 of Snohomish Cnty.*, 115 FERC ¶ 61,375, at P 32 (2006) ("If the [power sales] Agreement is not valid and binding, the Commission need not consider whether the just and reasonable standard or the public interest standard should apply.") The FERC's ratemaking determinations are simply not relevant to the Court's preemption analysis.[28] To the contrary, the Fourth Circuit in *Nazarian* explained that "[p]reemption of all varieties is ultimately a question of *congressional* intent," and that "[s]tatutory text and structure provide the most reliable guideposts in this inquiry."[29]

Moreover, the Defendants offer no basis upon which the FERC could accept the Number Nine contract. Defendants have not explained why, if the contract is a "market-based rate" transaction submitted pursuant to FERC, Number Nine would even be filing it. In Order No. 2001, the FERC made clear that market-based rate contracts, other than affiliate contracts (*i.e.*, contracts to which *Allegheny* and *Edgar* would be relevant[30]) should not be filed and should instead be reported in the relevant market-based rate seller's electric quarterly reports.[31] Since that time, the FERC has consistently rejected sellers' attempts to file individual market-based rate contracts, stating that "agreements under market-based rate tariffs *shall not* be filed with the

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[28] The FERC is not, through its determinations under Section 205 of the FPA or otherwise, empowered to re-draw the jurisdictional lines established by Congress or to authorize a state's intrusion into the field exclusively reserved to the FERC. *See Arizona v. United States*, 132 S. Ct. 2492, 2502 (2012) (when Congress "occupies an entire field . . . even complementary state regulation is impermissible," and all "state regulation in the area" is foreclosed, "even if it is parallel to federal standard"); *Kurns v. R.R. Friction Prods. Corp.*, 132 S. Ct. 1261, 1270 (2012) (holding that state requirements are field preempted notwithstanding federal government's contrary argument); *PLIVA, Inc. v. Mensing*, 131 S. Ct. 2567, 2575 (2011) (holding that state requirements conflict with federal law notwithstanding suggestion that state requirements were consistent).

[29] *Nazarian*, 753 F.3d at 474 *(emphasis added).*

[30] *See, Allegheny Energy Supply Co., LLC*, 108 FERC ¶ 61,082 (2004) ("*Allegheny*") and *Boston Edison Co. re: Edgar Elec. Energy Co.*, 55 FERC ¶ 61,382 (1991) ("*Edgar*").

[31] *See Revised Public Utility Filing Requirements*, Order No. 2001, FERC Stats. & Regs. ¶ 31,127 at P 7, *reh'g denied*, Order No. 2001-A, 100 FERC ¶ 61,074, *reh'g denied*, Order No. 2001-B, 100 FERC ¶ 61,342, *order directing filing*, Order No. 2001-C, 101 FERC ¶ 61,314 (2002), *order directing filing*, Order No. 2001-D, 102 FERC ¶ 61,334 (2003), *order refining filing requirements*, Order No. 2001-E, 105 FERC ¶ 61,352 (2003), *on clarification*, Order No. 2001-F, 106 FERC ¶ 61,060 (2004), *order revising filing requirements*, Order No. 2001-G, 120 FERC ¶ 61,270, *on reh'g & clarification*, Order No. 2001-H, 121 FERC ¶ 61,289 (2007), *order revising filing requirements*, Order No. 2001-I, FERC Stats. & Regs. ¶ 31,282 (2008).

Commission."[32] Moreover, even when the FERC required the filing of market-based rate contracts prior to the implementation of Order No. 2001, the FERC made clear that the filings were "not traditional [FPA] section 205 filings, but rather [we]re informational filings submitted in response to the filing requirements found in the orders granting market-based rate authority."[33] The FERC further made clear that it was "not required by the FPA to act on such filings," or "to find that such agreements themselves are just and reasonable," and that "the filing of such agreements d[id] not serve as a vehicle to challenge the justness and reasonableness of either the agreements themselves or the underlying market-based rate authority."[34] Even if the FERC were to ignore the fact that the contracts are substantive nullities, it would still be compelled to reject the filings as unnecessary and unjustified under its market-based rate filing rules. Thus, any attempt by the Defendants to convince this Court that the FERC would be approving the contracts in connection with a market-based rate authority filing is simply incorrect.

But Defendants do not stop there with their misuse of the *Allegheny* case. The PURA Defendants rely heavily on *Allegheny* for their purported proposition that the FERC has approved state-compelled bi-lateral contracts. Not so. *Allegheny* addressed the unique circumstance of affiliate transactions and whether a utility has market power. The Defendants' reliance of *Allegheny* (*see*, PURA Br. at 21-22) is simply another out-of-context attempt at distraction. The rules addressed in *Allegheny* are applicable to "market-based rate transactions [that] are deemed not to have been undertaken at arms-length . . . ." But *Allegheny* and *Edgar* do not say anything about state compulsion of a wholesale contract, as is the case here. Rather they

[32] *Westar Energy, Inc.*, Docket No. ER06-1429-000 (Oct. 10, 2006) (unreported) (emphasis added). *See also, e.g.*, *First Energy Corp.*, Docket Nos. ER06-1386-000, *et al.* (Oct. 4, 2006) (corrected Oct. 10, 2006) (unreported) (same).

[33] *GWF Energy LLC*, 97 FERC ¶ 61,297 at 62,391 (2001), *reh'g denied*, 98 FERC ¶ 61,330 (2002).

[34] *Id. See also, Pub. Utils. Comm'n of Cal. v. Sellers of Long Term Contracts to the Cal. Dept. of Water Res.*, 100 FERC ¶ 61,098 at P 16 (FERC acceptance of market-based rate contract did not mean that "the Commission has determined the justness and reasonableness of the . . . contract"), *reh'g denied*, 100 FERC ¶ 61,333 (2002).

were about *voluntary* contracts between franchised public utilities and their affiliates (involving no state action whatsoever) and the affiliate abuse problems that arise in the case of such contracts. Indeed, the *Allegheny*/*Edgar* standards were crafted to address the opposite problem to the one presented here: the problem that arises when one contracting party is all too willing to enter into a sweetheart deal at the expense of its captive customers.

CONCLUSION

Defendants' argument that the RFPs were conducted under authority of State law and not PURPA concedes that the RFP were not PURPA-compliant, and thus violate Defendants' ongoing obligation under 16 U.S.C. § 824a-3(f). A ruling for the Plaintiff would respect Congress' choice of allowing States to regulate wholesale sales of electricity only if the generator is a QF, while still permitting Connecticut to fulfill its renewable energy goals. A ruling for the Defendants, on the other hand, would create a massive loophole in the FPA that would destroy FERC's ability to regulate the market in a uniform and coherent manner, would allow States to sabotage QF generation, and would set a precedent supporting not only State compulsion of wholesale contracts for renewable energy, but coal plants, gas plants, nuclear plants or other forms of electric generation, all based upon the political whims of the State. For the reasons stated above, the Defendants' motions to dismiss should be denied.

Dated: June 15, 2016

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CERTIFICATE OF SERVICE

I hereby certify that on June 15, 2016, a copy of the PLAINTIFF'S MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANTS' MOTIONS TO DISMISS THE COMPLAINT was filed electronically and served by mail on anyone unable to accept electronic filing. Notice of this filing will be sent by e-mail to all parties by operation of the Court's electronic filing system or by mail to any one unable to accept electronic filing as indicated on the Notice of Electronic Filing. Parties may access this filing through the Court's CM/ECF System.

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