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. 3:15-CV-608 (CSH) **PLAINTIFF'S MEMORANDUM IN SUPPORT OF MOTION FOR AN ORDER TO SHOW CAUSE FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION** **April 18, 2016**

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The Second Circuit Court of Appeals issued its revised opinion in *Allco Finance Limited v. Klee*, 805 F.3d 89 (2d. Cir. 2015) ("*Allco I*") on December 1, 2015. In accordance with the Second Circuit's instruction, Allco filed its petition for enforcement at the Federal Energy Regulatory Commission (the "FERC") covering both the Defendants' 2013 solicitation and the Defendants' 2015 solicitation. The FERC issued its notice of its intention not to act on January 6, 2016, thus satisfying the Second Circuit's requirements.

On November 12, 2015, Defendants issued a solicitation seeking proposals for the wholesale sale of electricity from renewable energy generators (the "2015 RFP") (*see*, Exhibit ("Exh.") A to the accompanying Declaration of Thomas Melone). 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. *See*, Melone Decl. at ¶3. The 2015 RFP and the Defendants' planned compulsion of wholesale electricity transactions violates the Federal Power Act (the "FPA") and Section 210 of the Public Utility Regulatory Policies Act ("PURPA")[1] because the FERC has the exclusive authority to regulate sale of electricity in interstate commerce (with one exception that does not apply here). A temporary restraining order and a preliminary injunction requiring the Defendants to cease all activity in connection with the 2015 RFP is needed because, without it, the Defendants can drag out the litigation, award contracts while the litigation is pending, and then claim that relief is barred because there would be no future action of the Defendants to enjoin.

A ruling for the Plaintiff would respect Congress' choice of allowing States to regulate wholesale sales of electricity only if the generator is a Qualifying Facility or QF[2], 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

[1] 16 U.S.C. § 824a-3.

[2] "[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.

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.

BACKGROUND

"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)." *See*, *Allco Finance Limited v. Klee*, 805 F.3d 89, 91 (2d Cir. 2015) ("*Allco I*") (emphasis added). Section 210 of PURPA provides for an exception, but it does not apply here.

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

Section 210 of PURPA does not, however, require that States act.[3] It requires only, as the Second Circuit recently stated, that States not act contrary to Section 210(a) and the FERC's regulations. *Allco I,* 805 F.3d at 97 ("A state's ongoing obligation under § 824a-3(f) to 'implement' PURPA regulations can be accomplished in a variety of ways, but, at a minimum, § 824a-3(f) undoubtedly prevents states from violating § 824a-3(a)".) And as the Second Circuit held in *Allco I*, State action compelling wholesale sales of electricity outside a State's limited

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

authority under Section 210 of PURPA violates Section 210(f) of PURPA, *see* 16 U.S.C. § 824a-3(f).

Allco Finance Limited ("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. 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 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.[4]

Allco asked the FERC to bring an enforcement action against the Defendants in connection with the 2015 RFP, *see*, Melone Decl. Exhibit B, 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. *See,* Melone Decl. Exhibit C. The Defendants' imminent future actions under the 2015 RFP will violate the FPA and the State of Connecticut's ongoing obligation under 16 U.S.C. § 824a-3(f) to implement Section 210 of PURPA.[5] *See*, *Allco I*, 805 F.3d at 97.

[4] 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.

[5] 16 U.S.C. § 824a-3(f).

ARGUMENT

Allco is entitled to a temporary restraining order and a preliminary injunction prohibiting the Defendants from taking further action related to the 2015 RFP. Allco meets the statutory requirements for an injunction under Section 210(h) of PURPA. In addition, Allco meets the traditional requirements for injunctive relief. Allco is likely to prevail on the merits, and certain to suffer irreparable injury if this motion is not granted. The Court must act now to prevent irreparable injury to the Allco, other QFs and the public. The prospect of harm to the Defendants is low if the motion is granted, and the public interest strongly favors Allco's motion.

I. LEGAL STANDARD.

Allco seeks a temporary restraining order and a preliminary injunction to prevent the Defendants from violating the FPA and PURPA. An injunction is specifically authorized by 16 U.S.C. § 824a-3(h). When an injunction is expressly authorized by statute, the standard preliminary injunction test does not apply. *SEC v. Mgmt. Dynamics, Inc*., 515 F.2d 801, 808 (2d Cir. 1975) ("As the issuance of an injunction in cases of this nature has statutory sanction, it is of no moment that the plaintiff has failed to show threatened irreparable injury or the like, for it would be enough if the statutory conditions for injunctive relief were made to appear"). Instead, the court must look to the "statutory conditions for injunctive relief," and may issue a preliminary injunction if it is clearly established that those conditions are met. *Id*. at 808. 16 U.S.C. § 824-3(h)(2)(B) authorizes injunctive relief if three conditions are met. First, the action is brought by a qualifying small power producer. Second, the qualifying small power producer petitioned the FERC to bring such action and 60 days have elapsed since the petition. Third, the action is brought to enforce the requirements of 16 U.S.C. § 824-3(f), and the applicable standard regarding the merits of the case is met.

Under traditional standards, a party seeking to obtain a preliminary injunction or temporary restraining order must demonstrate (1) that it is likely to suffer irreparable harm in the absence of preliminary relief, (2) "either (a) a likelihood of success on the merits or (b) sufficiently serious questions going to the merits of the case to make them a fair ground for litigation," *Forest City Daly Housing, Inc. v. Town of North Hempstead*, 175 F.3d 144, 149 (2d Cir. 1999), (3) that the balance of equities tips in its favor, and (4) that an injunction is in the public interest. *New York Progress and Protection PAC v. Walsh*, 733 F.3d 483 486 (2d Cir. 2013).

II. ALLCO IS LIKELY TO PREVAIL ON THE MERITS.

The Defendants intend to compel specific wholesale sales of electricity outside of their PURPA authority. Such State action is pre-empted. The Second Circuit was clear on the inability of a State to act in the area of wholesale sales: "[t]he 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)." *See*, *Allco I*, 805 F.3d at 91 (emphasis added). *See also, 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."). The Defendants' planned actions to force a Connecticut utility to enter a wholesale power contract through the State's command and control process plainly constitutes regulation in the field of wholesale energy sales, and no exception exists validating such action.

A. The Third and Fourth Circuits Have Invalidated Economically Identical Transactions.

The Third Circuit in *Solomon* and the Fourth Circuit in *Nazarian*[6] invalidated State action compelling economically identical wholesale arrangements as those that the Defendants' plan to compel here. Petitions for certiorari were filed in both the Third and Fourth Circuit cases, and the Supreme Court agreed to hear the Fourth Circuit case, now known as *Hughes v. Talen Energy Marketing, LLC*, Docket Nos. 14-614 and 14-623, which was argued on February 24, 2016. Allco participated as *amicus curiae* in support of respondents and the State of Connecticut appeared as *amicus curiae*, but in support of petitioners.

[6] *PPL EnergyPlus LLC v. Nazarian*, 753 F.3d 467 (4th Cir. 2014) ("*Nazarian*"), *cert. granted*, 136 S. Ct. 356 (2015); *PPL EnergyPlus LLC v. Solomon*, 766 F.3d 241 (3d Cir. 2014) ("*Solomon*"), *pet'n for cert. filed*, Nos. 14-634, 14-694. *Nazarian* involved a large gas-fired plant that simply did not meet the efficiency standards required to be a gas-fired QF. There is no size limitation for gas-fired cogeneration QFs. The 80MW size limitation only applies to renewable energy QFs. *See*, 16 U.S.C. § 796(18).

In the Third and Fourth Circuit cases the wholesale energy transaction took the form of what in electricity lingo is referred to as a contract-for-differences. In that type of financial structure, the generator sells its energy into the FERC-approved regional energy market. Then the generator receives from, or pays to, the local electric utility the difference between the fixed price guaranteed in the contract-for-differences and what was actually received in the market. In the lower courts, the petitioners had argued that the contract-for-differences was merely a financial hedging product and was not governed by the FPA because no sale of energy actually took place under the contract-for-differences.

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. In its briefing before the Second Circuit in *Allco I* and the Supreme Court in *Talen*, Allco provided the following illustration showing that the structure of the contract-for-differences is economically identical to what the Defendants propose to do—compelling a wholesale energy transaction under a power purchase agreement ("PPA").

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 PPA like the one here, the generator sells to the utility for $60. The utility then resells into the spot market (or avoids purchases from the spot market) at $50. Under the contract-for-differences, 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 guaranteed net revenue is $60 and the utility's net cost is $10. In both cases, the State compelled a wholesale energy transaction that guaranteed a fixed revenue stream to the generator equal to $60.

At the Supreme Court, the petitioners and their *amici* reversed course arguing that the contract-for-differences was indeed identical to a direct long-term PPA, and urged the Supreme Court to analyze it that way. The rationale for the shift seemed to be rooted in the petitioners' argument (also advanced by the State of Connecticut) that a State has the right under the FPA to compel its utilities to enter into wholesale power contracts under the guise of a State's authority to manage its utilities' generation portfolios. As Allco pointed out in its *amicus* brief in *Talen*, the Supreme Court rejected that argument long ago. *See, Pub. Utils. Comm'n v. Attleboro Steam & Elec. Co.*, 273 U.S. 83, 90 (1927) ("*Attleboro*") (Such sales are "not subject to regulation by either of the two States in the guise of protection to their respective local interests.")

While it is impossible to predict what the Supreme Court will do, the transcript of the oral argument indicates that none of the Justices were buying what the petitioners were selling.[7] The following excerpt from oral argument in the *Nazarian/Talen* case gets right to the point.

> 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.

Justice Kagan's point cuts directly to the heart of the issue. Outside of PURPA, States have no authority to regulate in any way a wholesale transaction. In Justice Kagan's words, here that "end[s] the case right there against [Defendants]."

B. <u>The Defendants' Planned Actions Do Not Fall Within the State's Authority Reserved under the Federal Power Act over Generation Facilities or to Direct Utility Planning and Resource Decisions</u>.

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:

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

> 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.[8] 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.[9]

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. *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. Nevertheless, the Defendants assert that States retain power to "'direct the planning and resource decisions of utilities under

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[8] 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 v. FERC,* 535 U.S. 1, 22 (2002) *("New York")* ("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.)

[9] Even assuming *arguendo* that the Defendants actions do not set a rate (an argument rejected by the Third and Fourth Circuits in an identical situation), 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 the Defendants set a rate is not determinative of whether their actions intrude 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 the Defendants fix 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.

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.

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.

C. <u>State Renewable Energy Mandates are Simply Irrelevant</u>.

Connecticut, like some other States, require utilities and other retail electric suppliers to procure a certain percentage of their electric supply from certain types of generators. Those requirements importantly 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.

D. The Methodology for Avoided Costs in ISO-New England is Irrelevant.

Plaintiff agrees that the Connecticut Utilities' avoided costs are based upon the ISO-New England market. In connection with the 2013 RFP and the 2015 RFP the Defendants obtained expert forecasts of future prices in the ISO-New England market to evaluate proposals. The fact that the Connecticut Public Utilities Regulatory Authority ("PURA") stopped calculating avoided costs based upon generation owned by Connecticut Utilities (because they ceased owning generation) is only relevant to the methodology of calculating long-term forecasted avoided costs of the Connecticut Utilities, not whether such future costs can be forecasted. The Defendants' own use of long-term avoided cost forecasts in connection with evaluating the bids from the 2013 and 2015 RFPs demonstrably confirms that fact. But regardless, 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).

E. Neither the SG Nor the FERC have approved the Defendants' Proposed Actions.

In their opposition brief in *Allco Finance Limited v. Klee*, 3:15-cv-00608 (CSH) ("*Allco II*"), the Defendants excerpt various quotations from the SG's brief in *Talen* for 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*, *Allco II*, Doc. 46, 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 in Section II.C., 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 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.

F. The Defendants' Proposed Actions are Also Conflict Preempted.

FERC has adopted a market-based approach to regulating the energy markets in ISO-New England.[10] In planning to order the execution of contract with various generators, the Defendants will pursue a conflicting regulatory framework – one in which the State can compel a utility to enter into a non-voluntary wholesale power transaction at a price that differs from the prevailing market price. Not only does that framework conflict with FERC's chosen regulatory approach, but it also undermines the special treatment that Congress intended to give to QFs under PURPA, which includes the authorization to compel long-term contracts with QFs, such as the 20-year contracts sought by generators under the 2015 RFP. Congress has not made that same accommodation for non-QFs, which are expected to compete on their own merits in the FERC-regulated wholesale market. This is the epitome of a conflict with federal law.

A ruling 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, resulting in unlimited ability to compel wholesale transactions that support the political whims of a State, further sabotaging QF development. One State might

[10] ISO-New England covers the states of Connecticut, Rhode Island, Massachusetts, Vermont, New Hampshire and most of Main.

prefer coal plants, another gas plants, still others nuclear or other forms of electric generation. 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, Congress has reached a different conclusion and *has* authorized State regulation of wholesale sales, including the ability to compel a 20-year fixed-rate contract such as what the Defendants plan to compel here. The 2015 RFP, however, is not limited to QFs, and it is not open to all QFs, and consequently the one exception with respect to State regulation of wholesale sales is not applicable.

Furthermore, if this Court permits Connecticut to use its alleged 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 contracts as the Defendants seek 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 (and their preferred generation, such as coal, gas, nuclear or renewable), ignoring and undermining the FERC-approved system and Congress' preference for QF generation, 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.

But the authority the Defendants seek from this Court does not stop with facilities within a State's own borders. The Defendants seek not only to use compelled wholesale transactions to support new electric generation in Connecticut, but they seek to use compelled wholesale transactions to compel new construction in other States as well, all under the guise of "local portfolio management." 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.

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 Defendants plan to compel unquestionably are.

III. ALLCO HAS STANDING.

The Defendants argue in *Allco II* (and will likely argue here) that Allco lacks standing 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*, *Klee*, 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 QF, and that standing was not dependent upon Allco's being a bidder—disappointed or otherwise. Allco's standing is its status as a small power producer under Section 210(h) of PURPA.

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." *Klee*, 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. ("under Allco's theory, the only way in which it may obtain a Section 6 contract is for the Commissioner to conduct a PURPA compliant bidding process.") 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.[11]

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 plainly be caused by the Defendants' own decision to include non-QFs, exclude most QFs and impose burdensome conditions in the 2015 RFP.

In addition, as stated in the Complaint, the compulsion of wholesale transactions under the 2015 RFP with non-QFs will reduce the Connecticut Utilities' avoided costs, thus harming Allco's QFs and other QFs.

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, now that the Second Circuit has authorized Allco's suit through an enforcement action under Section 210(h)(2)(B) of PURPA, in the capacity as a private

[11]Many of Allco's and other QFs were banned from participation in the 2015 RFP. The fact that the State is holding another RFP 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 otherwise confer on the Defendants the power to compel wholesale transactions. 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.

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).

> While Congress can constitutionally authorize no one, in the absence of an actual justiciable controversy, to bring a suit for the judicial determination either of the constitutionality of a statute or the scope of powers conferred by a statute upon government officers, it can constitutionally authorize one of its own officials, such as the Attorney General, to bring a proceeding to prevent another official from acting in violation of his statutory powers; for then an actual controversy exists, and the Attorney General can properly be vested with authority, in such a controversy, to vindicate the interest of the public or the government. Instead of designating the Attorney General, or some other public officer, to bring such proceedings, Congress can constitutionally enact a statute conferring on any non-official person, or on a designated group of non-official persons, authority to bring a suit to prevent action by an officer in violation of his statutory powers; for then, in like manner, 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, even if the sole purpose is to vindicate the public interest. Such persons, so authorized, are, so to speak, private Attorney Generals.

So too here. Congress has authorized the FERC to bring an action to enforce 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*.

IV. ALLCO HAS MET THE REQUIREMENTS FOR AN INJUNCTION.

A. Allco Meets the Statutory Requirements for Injunctive Relief Under 16 U.S.C.§ 824a-3(h)(2)(B).

Allco meets the "statutory conditions for injunctive relief," under 16 U.S.C. § 824a-3(h)(2)(B) and the Court may issue a preliminary injunction on that basis. *SEC v. Mgmt. Dynamics, Inc*., 515 F.2d 801, 808 (2d Cir. 1975) ("As the issuance of an injunction in cases of this nature has statutory sanction, it is of no moment that the plaintiff has failed to show threatened irreparable injury or the like, for it would be enough if the statutory conditions for injunctive relief were made to appear"). First, Allco is a qualifying small power producer.

Second, it applied to the FERC to bring an action against the Defendants and the FERC declined to do so. Third, the Second Circuit has made clear that State action compelling wholesale electricity transactions outside the confines of a State's authority under PURPA violates a State's ongoing obligation to implement Section 210 of PURPA, which this action is brought to enforce. *Allco I*, 805 F.3d at 97. Allco has demonstrated that there is a substantial likelihood that the Defendants are engaging in or about to engage in actions that violate the FPA and their obligations to implement PURPA. Thus Allco has satisfied the statutory criteria and the injunction should be issued.

Indeed, Allco, as one of Judge Friendly's private Attorney Generals, is in a similar position to the plaintiff in *Management Dynamics* 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," such that "the standards of the public interest not the requirements of private litigation measure the propriety and need for injunctive relief." 515 F.2d at 808 (internal quotation marks omitted). Where an injunction is given "statutory imprimatur," the "finding that future violations are likely to occur implies that a significant injury to the public has been shown to the judge's satisfaction." *Id*. at 808-09; *see also Gov't of Virgin Islands v. Virgin Islands Paving, Inc*., 714 F.2d 283, 286 (3d Cir. 1983) ("[W]hen a statute contains, either explicitly or implicitly, a finding that violations will harm the public, the courts may grant preliminary equitable relief on a showing of a statutory violation without requiring any additional showing of irreparable harm."). 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 an injunction upon a showing that the Defendants are likely to engage in a violation of the statute. So too here, as far as entitlement to an injunction, Allco should be in the same position as the FERC would be.

B. Allco Also Meets the Traditional Requirements for Injunctive Relief.

1. *Allco meets the fair-ground-for-litigation standard and the likely to prevail on the merits standard*.

For the reasons discussed above, Allco is likely to prevail on the merits, and most certainly meets the fair-grounds for litigation standard. But it is the less rigorous fair-ground-for-litigation standard that should apply here.

The Second Circuit has held that in certain cases seeking to stay governmental action taken in the public interest pursuant to a statutory or regulatory scheme, the less rigorous fair-ground-for-litigation standard should not apply, but rather the likelihood of success on the merits should apply. *See, e.g., Union Carbide Agricultural Products Co. v. Costle*, 632 F.2d 1014, 1018 (2d Cir. 1980), *cert. denied*, 450 U.S. 996 (1981); *Medical Soc. of New York v. Toia*, 560 F.2d 535, 538 (2d Cir. 1977). For example, in *Medical Society*, the Second Circuit, in a case brought by physicians, patients, and a medical society challenging certain Medicaid regulations, held that the fair-ground-for-litigation branch of the test should not have been used but rather a likelihood of success on the merits because "the grant of interim relief may adversely affect the public interest in a manner which cannot be compensated for by an injunction bond." *Id*.

The basis for the Second Circuit's higher likelihood of success standard comes from the United States Supreme Court's decision in *Yakus v. United States*, 321 U.S. 414 (1944). *See, New York Pathological and X-ray Laboratories, Inc. v. INS*, 523 F.2d 79, 81 (2d Cir. 1975), *Medical Soc. of New York v. Toia*, 560 F.2d 535, 538 (2d Cir. 1977).

An analysis of *Yakus* shows why the higher standard should not apply here. In *Yakus*, a butcher was convicted of selling beef at a price that violated regulations issued putting a price ceiling on the sale of meat. Those regulations were issued under an Act passed by Congress designed to limit inflation during World War II. In the Act, Congress had specifically eliminated the ability of the federal courts to enjoin the application of the law pending a final determination of the validity of the Act or any regulation thereunder by a specific federal court. The Supreme Court held that Congress had made the decision that it was in the public interest that the Act and regulations be given immediate effect, and thus the public interest standard in that case would require a higher showing on the merits:

> The harm resulting from delayed or unequal price control is beyond repair. And one of the problems involved in the prevention of inflation by establishment of a nation-wide system of price control is the disorganization which would result if enforcement of price orders were delayed or sporadic or were unequal or conflicting in different parts of the country. These evils might well arise if regulations with respect to which there was full opportunity for administrative revision were to be made ineffective by injunction or stay of their enforcement in advance of such revision or of final determination of their validity.
>
> 321 U.S. at 432.

The Supreme Court essentially deferred to Congress' judgment as to the "public interest" factor for injunctive relief. In other words, Congress had specifically concluded that interim injunctive relief that would delay enforcement of the war-time price controls was not in the public interest, and in light of that determination, a higher standard on the merits was appropriate:

> Here, in the exercise of the power to protect the national economy from the disruptive influences of inflation in time of war Congress has seen fit to postpone injunctions restraining the operations of price regulations until their lawfulness could be ascertained by an appropriate and expeditious procedure. In so doing it has done only what a court of equity could have done, in the exercise of its discretion to protect the public interest. What the courts could do Congress can do as the guardian of the public interest of the nation in time of war.
>
> 321 U.S. at 441-442.

The case against the Defendants is nothing like *Yakus*. Here, Congress had declared that it is in the public interest that States not have any ability to get involved in regulating wholesale sales of electricity. The Second Circuit in *Allco I* reiterated that: "*States may not act in this area unless Congress creates an exception. Id.* § 824(b)." *See*, *Allco I*, 805 F.3d at 91. The only exception is when States seek to *promote* QF generation under Section 210 of PURPA. The Defendants concede they are not seeking to promote QF generation or to exercise their authority under Section 210 of PURPA. In *Allco I* the Second Circuit held a challenge under Section 210(h)(2)(B) of PURPA was the appropriate path for Allco to challenge to the Defendants' proposed actions, thus acknowledging that the Defendants violations of the FPA derogate the rights of all QFs and the public interest declared by Congress favoring QFs.

The Defendants assert that the manner in which they propose to exercise of their power under section 1(c) of Conn. Pub. Act 15-107 and sections 6 and 7 of Conn. Pub. Act 13-303, are in the public interest, but that is a conclusion without any basis of support. An injunction will not result in any harm to the Connecticut public interest, and indeed an injunction is in the public interest, as discussed below. The Defendants have many PURPA-compliant avenues through which they can fulfill their renewable energy goals. In addition, given the Defendants' proposed RFP timetable, an injunction and an expedited discovery and summary judgment schedule would have no impact on the approval of contracts by the Defendants' projected date of the end of 2016. Furthermore, an injunction would have no effect on the deadline for commercial operation of selected projects, which is December 2020.

2. *Allco and other QFs Will Face Irreparable Damage Absent an Injunction.*

The failure to prevent the Defendants from compelling wholesale transactions will cause irreparable harm to Allco and other QFs. Irreparable harm is defined as an injury for which a monetary award cannot be adequate compensation. *JSG Trading Corp. v. Tray-Wrap, Inc*., 917 F.2d 75, 79 (2d Cir. 1990). "The fundamental purpose in granting preliminary injunctive relief has always been to preserve the court's ability to later render a meaningful final decision on the merits by preventing irreparable harm in the interim." *Schipke v. Tracfone Wireless, Inc*., No. 3:15-cv-1244 (SRU), 2015 U.S. Dist. LEXIS 157690, *2 (D. Conn. 2015). Here, without an injunction, the Defendants will proceed to compel wholesale electricity transactions from the 2015 RFP. Once that is done, the Defendants' will argue that there is no longer any State action to enjoin. The State action would have already occurred, and the Defendants are immune from damages so there is no monetary award available. The Defendants would then have succeeded in their strategy of running out the clock by presenting this Court with a continuing moving target—initially asserting the claims are not ripe because the Defendants allegedly had not decided what to do, and then once the Defendants compel contracts arguing that it is too late because there is no longer a future action to enjoin. This case is a textbook example of one where an injunction is needed "to preserve the court's ability to later render a meaningful final decision on the merits by preventing irreparable harm in the interim." *Id*.

Allco is certain to suffer irreparable injury because this Court can only enjoin future actions of the Defendants, and by the time this case is decided, the Defendants will have acted, which will eliminate the path to a non-preempted contract.

3. *There is Little Possibility of Harm to Defendants if Relief is Granted.*

The Defendants are not harmed if the injunction is granted because the Defendants can always choose to satisfy their renewable energy goals with QF generation. Furthermore, as a matter of law, the Defendants cannot show any harm to them by being required to follow the path set by Congress, and being prevented from pursuing an agenda that conflicts with what Congress prescribed.

The 2015 RFP schedule allows until December 31, 2016, for the approval of any contracts by PURA, and in-service dates by December 31, 2020. Because PURA must approve any contracts within 30 days of filing, the Defendants have until November 30, 2016, to file contracts. Allco is more than willing to engage in an expedited discovery and summary judgment schedule in order to insure that a decision is reached within a timeframe consistent with those projected dates.

4. *There is a Strong Public Interest in Granting Allco's Motion.*

It is well established that there is a strong public interest in favor of the enforcement of public laws and regulations. *F.T.C. v. Whole Foods Mkt., Inc.*, 548 F.3d 1028, 1035 (D.C. Cir. 2008) (recognizing "the public interest in effective enforcement of the antitrust laws."). Here Congress has declared that the public interest lies in the development of QF generation, and that States have no authority to regulate or compel wholesale electricity transactions except when fostering QF generation. In stark contrast, the Defendants' actions have precluded most QFs from participating in its 2015 RFP, have attached burdensome conditions to QF participation, and are conducting a solicitation that fails to comply with a State's authority under federal law.

Instead the Defendants have indicated their intent to compel transactions with massive non-QF hydro-electric and wind projects, contrary to the public interest as declared by Congress and contrary to explicit federal law. Accordingly, the public interest, like the other injunctive factors, strongly favors the granting of injunctive relief. Moreover, the public interest in Connecticut strongly favors Allco's motion because the Defendants plan to compel wholesale transactions for massive out-of-state facilities that will bring no jobs, economic activity or revenue to Connecticut. In contrast, Allco QF's and most other QFs in a compliant RFP would bring jobs, economic activity and tax revenue for Connecticut towns and schools.

CONCLUSION

WHEREFORE, Plaintiff respectfully requests the Court order the Defendants and their officers, agents, attorneys, servants, employees, and attorneys, to cease all activity related to the 2015 RFP and be enjoined from selecting any proposals, awarding any contracts, and/or approving any contracts from the 2015 RFP.

Dated: April 18, 2016

/s/ Thomas Melone

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