No. 17-

IN THE

Supreme Court of the United States

ALLCO FINANCE LIMITED,

Petitioner,

v.

ROBERT KLEE, in his Official Capacity as Commissioner of the Connecticut Department of Energy and Environmental Protection,

and

KATHERINE S. DYKES, JOHN W. BETKOSKI, III AND MICHAEL CARON, in their Official Capacities as Commissioners of the Connecticut Public Utilities Regulatory Authority,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

THOMAS MELONE
Counsel of Record
ALLCO RENEWABLE ENERGY LIMITED
1745 Broadway, 17th Floor
New York, New York 10019
(212) 681-1120
Thomas.Melone@AllcoUS.com

QUESTIONS PRESENTED

Under the Federal Power Act, 16 U.S.C. §§824 *et seq.*, (the "FPA") the Federal Energy Regulatory Commission ("FERC") has exclusive jurisdiction to regulate interstate wholesale electricity sales. Congress carved-out one exception to FERC's exclusive jurisdiction for certain generators known as "qualifying facilities" under section 210 of the Public Utility Regulatory Policies Act, 16 U.S.C. §824a-3. To qualify for that exception the generators must meet specific design standards set by Congress and the FERC. Petitioner is a developer of small solar energy qualifying facilities.

Seeking to cause the construction of new power plants in Connecticut as well as in nearby States, Connecticut conducted a competitive procurement and directed its local utilities to enter into long-term wholesale electricity contracts with the bidders selected by Connecticut. Under those contracts, the State-selected bidder would sell the electricity at a fixed price for 20 years to the local utility, and the utility would, in turn, immediately sell the electricity into the FERC-supervised energy auction market. If the auction revenue received by the utility differs from what the utility paid the bidder, the utility credits, or charges, as the case may be, the difference to retail ratepayers.

The Second Circuit panel interpreted this Court's recent decision in *Hughes v. Talen Energy Mktg., LLC*, 136 S. Ct. 1288, 1292, 194 L. Ed. 2d 414 (2016) as eroding FERC's exclusive jurisdiction under the FPA.

The questions presented are:

1. Where, as a result of a State-run procurement, the State selects certain electric generators and directs its local utilities to enter into long-term wholesale electricity contracts with the State-selected generators, are the program and the resulting contracts, "field preempted" as a State's attempt to regulate interstate wholesale sales?

2. Is a long-term interstate wholesale electricity contract that would not have been entered into but for the coercive action of the State, "conflict preempted" because it provides incentives different from the incentives provided by the FERC-supervised energy market?

PARTIES TO THE PROCEEDING

The Petitioner below, who is the Petitioner before this Court, is Allco Finance Limited.

The Respondents below, who are the Respondents before this Court, are Robert Klee, in his official capacity as Commissioner of the Connecticut Department of Energy and Environmental Protection, and Katie Dykes, John W. Betkoski, III, and Michael Caron, in their official capacity as Commissioners of the Connecticut Public Utilities Regulatory Authority.

RULE 29.6 DISCLOSURE STATEMENT

Allco Finance Limited is a privately held company in the business of developing solar energy projects. It has no parent companies, and no publicly held company owns 10 percent or more of its stock.

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PETITION FOR A WRIT OF CERTIORARI

Allco Finance Limited ("Allco") respectfully seeks a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The opinion of the Second Circuit affirming the decision of the district court is reported at 861 F.3d 82 and reprinted in the Appendix to the Petition ("App.") beginning at App.1a. The Second Circuit judgment is reprinted beginning at App.56a, and its order denying rehearing is reprinted beginning at App.58a.

The opinion of the district court dismissing Petitioner's complaint is unreported. It is reprinted beginning at App.60a. The district court judgment is reprinted beginning at App.126a. The order of the Federal Energy Regulatory Commission ("FERC") providing notice of its intent not to act to enforce section 210(f) of the Public Utility Regulatory Policies Act, Pub. L. No. 95-617, 92 Stat. 3117 ("PURPA") in response to Petitioner's administrative complaint is reported at 154 FERC ¶61,007 (2016) and reprinted beginning at App.128a.

JURISDICTION

The Second Circuit issued its opinion on June 28, 2017. Petitioner timely sought rehearing on July 12, 2017. Rehearing was denied on August 17, 2017.

The jurisdiction of this Court is properly invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Supremacy Clause is set forth at App.130a. Relevant provisions of the FPA are reprinted beginning at App.131a. Section 210 of PURPA, 16 U.S.C. §824a-3, is reprinted beginning at App.153a.

STATEMENT

The permissibility of State-coerced bilateral contracting, which is what occurred here, was rejected out-of-hand at oral argument in *Hughes v. Talen Energy Mktg., LLC*, 136 S. Ct. 1288, 1292, 194 L. Ed. 2d 414 (2016) ("*Hughes*").

In the lower courts in *Hughes,* the petitioners had argued that the compelled contract-for-differences with the utility 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. In this Court, the petitioners changed course arguing that the contract-for-differences was identical to a direct long-term bilateral power purchase agreement (which is at issue here). The reason for the shift seemed to be rooted in the purported proposition (adopted by the Second Circuit panel) that a State has the right under the FPA to compel or direct its utilities to enter into wholesale power contracts under the guise of a State's authority to manage its utilities' generation portfolios. An excerpt from oral argument shows that at least two justices rejected that argument out-of-hand because the fact the contract *is* subject to FERC's jurisdiction dooms the contract:

> 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.
> ***
> 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.[1]

Justice Kagan's point cuts directly to the heart of the issue here. Outside of PURPA, States have no authority to regulate in any way a wholesale electricity transaction, including its terms or the

[1] Transcript of Oral Argument at 7, 9, *Hughes* (No. 14-614), available at: http://www.supremecourt.gov/oral_arguments/argument_transcripts/14-614_g2hk.pdf.

circumstances under which it occurs. In Justice Kagan's words, that "end[s] the case right there against [Connecticut]." The fact that wholesale contracts here were the result of coercive state action should end the merits of the case.

But the Second Circuit panel saw it differently. While conceding that the Connecticut wholesale contracts were FERC-jurisdictional, the Second Circuit held that Connecticut could still direct its utilities to enter into them. The central question presented is whether a State through its command and control process can coerce a utility to enter into a specific bi-lateral interstate wholesale electricity contract, outside of a State's authority under section 210 of PURPA.

The Second Circuit's decision creates a massive loophole in the FPA and deals a major setback to fighting climate change by validating State coercive action *regulating* wholesale electricity sales in support of not only wind and solar, but coal, oil, nuclear and other forms of environmentally destructive electricity generation. Making matters worse, the panel's decision retroactively abrogates the federal government's policy of promoting certain renewable energy qualifying facility generation embodied in PURPA, leaving the energy wholesale markets subject to the political whims of the States.

A. Regulatory Background.

States have no authority to *regulate* wholesale sales of electricity unless Congress creates an exception. FPA § 201(b). 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). All aspects of "wholesale sales themselves," including the conditions under which they take place, are within FERC's exclusive jurisdiction. *FERC v. Elec. Power Supply Ass'n*, 136 S. Ct. 760, 775, fn.7 (2016). Nothing in the FPA suggests that the States share power to regulate these matters.

A State's authority over facilities or purchasing decisions expressly does not extend to wholesale sales. FPA § 201(b)(1). As this Court held in *Pub. Utils. Comm'n v. Attleboro Steam & Elec. Co.*, 273 U.S. 83 (1927) ("*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 this Court made clear in *Attleboro*.

Today, the wholesale electricity markets in various areas of the United States are overseen by FERC-regulated independent system operators ("ISOs"), 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).

In section 210 of PURPA, Congress carved out a narrow exception to FERC's exclusive authority over wholesale sales 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,"[2] and States have certain authority to regulate wholesale sales by Qualifying Facilities, including compelling a fixed 20-year contract rate, such as what Connecticut has done here. Congress has not made that same accommodation for non-Qualifying Facilities. Facilities not meeting QF-design standards are expected to compete on their own merits in the FERC-regulated wholesale market.

B. This Proceeding.

In 2013 and 2015, Defendant-Respondent Klee solicited proposals for renewable energy, allowed competition from facilities not meeting Congress' QF-design requirements, selected winners of the solicitation, and directed Connecticut's two investor-owned utilities to enter into wholesale electricity contracts with generators that fall outside the narrow PURPA carve-out. But for the 2013 selection of a non-QF generator, one of Allco's QF generators would have been selected. In the case of the 2015 solicitation, Allco's QFs were prohibited from participating because they were smaller than the minimum size requirement of the solicitation.

Petitioner Allco filed two complaints, one challenging the 2013 solicitation and the other challenging the 2015 solicitation. Allco sought a declaration that Connecticut's actions directing the

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[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).

Connecticut utilities to enter the contracts that did not qualify for the PURPA carve-out, and the resulting contracts themselves, were invalid; and Allco sought an injunction restraining Connecticut from violating the FPA when conducting future procurements. The district court dismissed Allco's complaints on the basis of lack of standing. App.60a. The Second Circuit ruled that Allco had standing, but failed to state a pre-emption claim. App.1a.

REASONS FOR GRANTING THE PETITION

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.

The Second Circuit's ruling dangerously restructures the federal-state division of authority under the FPA by effectively eliminating any practical limitation on a State's ability to regulate wholesale sales for new and old facilities, both within and outside of the State. States can compel wholesale transactions that support the political whims of a State. One State might prefer coal plants, another gas plants, still others nuclear or other forms of electric generation.

The Second Circuit's ruling also ignores and undermines the FERC-supervised energy auction system. FERC has adopted a market-based approach to regulating the energy markets in New England. In directing its local utilities to enter into specific contracts, Connecticut pursued 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 Qualifying Facilities under PURPA, including the authorization to compel long-term contracts, such as the 20-year contracts Connecticut ordered here.

Making matters worse, the FERC is currently reviewing whether, and if so to what extent, it should accommodate certain State policy goals in the area of wholesale sales. *See*, FERC Docket AD17-11-000, *State Policies and Wholesale Markets Operated by ISO New England Inc., New York Independent System Operator, Inc., and PJM Interconnection, L.L.C.* (opened March 3, 2017). The Second Circuit's ruling short-circuits that entire process by effectively blessing State regulation of wholesale electricity contracts through State coercive action.

I. The Second Circuit Has Fundamentally Altered The FPA's Division Of State-Federal Authority.

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).

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

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.")

This Court has on numerous occasions confirmed FERC's exclusive power to regulate wholesale sales of energy in interstate commerce. *see, e.g.*, *FPC v. Southern California Edison Co.*, 376 U.S. 205, 215-16 (1964) ("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 Federal Power Act "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.")[3]

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

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[3] 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 v. FERC,* 535 U.S. 1, 6 (2002), 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.

not extend to wholesale sales.[4] That is the bright-line in this case. The State's reserved authority to regulate facilities 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 were, did Connecticut exercise any authority over such wholesale sales. The answer to both in this case is unquestionably yes.

The agreements with Connecticut's local utilities are clearly wholesale sales of electric energy in interstate commerce. In addition, those wholesale sales only came into being because of the singular act of the State of Connecticut directing the utilities to enter into those transactions. But for Connecticut's coercive State action the contracts would not have been executed.

A. The Second Circuit's Decision Creates A Massive Loophole In The FPA.

The Second Circuit's ruling creates a massive loophole in the FPA that will destroy FERC's ability to regulate the market in a uniform and coherent manner. FERC has chosen a market-based approach

[4] 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.)

to regulation, in which some generators sell their output into a wholesale auction administered by ISO-New England, and others enter into voluntary bilateral contracts with *willing* (not coerced) purchasers. Such a market-based system simply cannot function as FERC intended if States are free to coerce wholesale transactions that, but for the State's intervention into the wholesale marketplace, would never have taken place. Such a loophole will 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.

Connecticut is pursuing a conflicting regulatory framework, and in the process undermining, and making superfluous, the special treatment that Congress intended to give to QFs, which includes the authorization to States to compel long-term contracts with QFs. Under the guise of regulating utility purchasing decisions, States can now 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.

B. The FPA'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.

Congress has chosen to allow States to compel wholesale contracts only for Qualifying Facilities under PURPA. Congress has not made the same accommodation for projects that do not meet the design standards for Qualifying Facilities.[5] 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

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[5] *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.

to benefit Qualifying Facilities. 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 FPA's preemptive provisions are necessary to render PURPA effective – by preempting state regulation *except as to* Qualifying Facilities, the FPA ensures that Qualifying Facilities are singled out for favored treatment. The simple fact is that there are more than enough Qualifying Facilities with which Connecticut can compel wholesale transactions for 20-year terms in full compliance with the FPA Act and PURPA. Similarly, PURPA provides more than enough authority for States to meet all renewable energy goals multiple times over. The States have no one to blame but themselves if they refuse to follow the path that Congress has permitted.

II. Wholesale Sale Contracts Entered Into Solely As A Result Of Coercive State Action Are The Product Of Regulation Of Wholesale Sales By Connecticut.

Allco alleged that Connecticut compelled and intended to compel more interstate wholesale sale power contracts with renewable energy facilities that fail PURPA's Congressionally-mandated requirements. The Second Circuit, however, concluded that Connecticut only "directed" the utilities to enter into contracts, and that such direction did not rise to the level of "compulsion," nor did it constitute regulation of wholesale sales.

Whether "directing" a certain course of action, or "compelling" that course of action is qualitatively different is beside the point. In both situations Connecticut is "regulating" wholesale sales of electricity by State coercive action. In both situations it is beyond doubt that the contracts, which the Second Circuit conceded fall within FERC's exclusive jurisdiction, would not have been entered into were it not for the State's coercive action.

"It 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.[6]

The question is whether Connecticut is *regulating* in an area exclusively reserved for FERC—wholesale sales. If Connecticut is, then its actions are pre-empted. Even under the panel's view of what a "direction" is, Connecticut is clearly *regulating* wholesale sales through coercive state action.

No one disputes that but for the Connecticut Commissioner's "direction," the contracts would never have been executed. No one disputes that the Connecticut Commissioner set the price and other major business terms by his acceptance thereof, and directed the Connecticut utilities to finalize contracts on that basis. Regardless of whether Connecticut's state action constitutes a watered-down compulsion (i.e., a "direction" as the panel concluded), a straight-up "compulsion," or other coercive action, Connecticut's exclusion of certain QFs from its solicitations, such as Petitioner's allowing increased competition from non-QFs and its actions directing the Connecticut utilities to enter into wholesale power contracts through the State's command and control process plainly constitutes

[6] The FERC convened a technical conference on May 1-2, 2017, to review to what extent should FERC try to accommodate State action similar to Connecticut's. *See*, FERC docket AD17-11-000, *supra*. The panel's decision takes much of FERC's decision making authority away by holding that Connecticut's actions are protected by a State's reserved authority over local facilities under the FPA.

regulation in the field of wholesale energy sales by setting the terms and conditions of the contracts, the conditions under which they take place, and who can participate. No exception in the FPA exists validating such action.[7]

Moreover, the central purpose of the Connecticut law and Connecticut's direction are to create wholesale sales where they would not otherwise occur. *See Schneidewind* v. *ANR Pipeline Co.*, 485 U.S. 293, 308-309 (1988) (holding pre-empted a state law "whose central purpose is to regulate matters that Congress intended FERC to regulate"). The Second Circuit panel simply used the wrong legal test, which led to its erroneous conclusion that Connecticut's actions are not pre-empted.

If a State had the right under the FPA to direct or require a utility to enter into certain wholesale sale transactions, then the contract in *Hughes* would have passed muster. It did not. If the power is reserved to the State under the FPA, it matters not what the form the transaction takes. But that was not the outcome in *Hughes.*

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[7] The Second Circuit's opinion is also internally inconsistent. In the panel's decision regarding renewable energy credits, the panel implicitly concedes that Connecticut is acting as a regulator, and thus regulating the Connecticut utilities' activities, but when it comes to "directing" the utilities to enter into wholesale sale contracts, that State action, the panel concludes, is not "regulating" wholesale sales.

III. The Second Circuit's Decision Conflicts With The Plain Language Of The FPA And With *Hughes*.

A. The FPA Expressly Excludes Wholesale Contracts From A State's Reserved Authority.

The plain language of FPA section 201(b)(1)—"except as specifically provided"—makes it clear that whatever authority is exercisable by a State under the State's authority over facilities or purchasing decisions *does not extend to wholesale sales*. That is the bright-line in this case.

As Justices Alito and Kagan made clear at oral argument in *Hughes*, *see* page 3 above, the fact that the Connecticut contracts are FERC-jurisdictional wholesale sales dooms the contract.

Moreover, contrary to the Second Circuit's view, the fact that the FERC has the legal authority to review wholesale sale contracts does not make the State's coercive actions acceptable. It is not the FERC that needs to react to State regulation of wholesale sales. State regulation is simply pre-empted regardless of whether the FERC has the ability to accept or reject the terms of the contracts. *See, Hughes*, at 13, fn.11 ("Maryland cannot regulate in a domain Congress assigned to FERC and then require FERC to accommodate Maryland's intrusion.")

B. As In *Hughes*, The Connecticut Contracts Are Tethered To The FERC-Supervised Energy Auction Market.

The Second Circuit panel distinguished *Hughes* on the basis that the contracts that arose from the State's coercive action are not "tethered" to the FERC-supervised energy auction market. That is simply not true in two respects and reflects the Second Circuit's misunderstanding of the contracts which the utilities were directed to execute and the workings of the FERC-supervised energy auction market.

First, the State-directed contracts require delivery of the energy at a specific location, most of which are outside of Connecticut, where the utility will simultaneously resell it in the FERC-supervised energy auction market. The contracts provide that the price the generator receives will be reduced in certain circumstances based upon the auction price received by the Connecticut utility. Thus similar to *Hughes*, the price received by the generator is conditioned under certain circumstances on the FERC auction price.

Second, the contracts here are economically indistinguishable from the contract in *Hughes* and cannot function without the existence of the FERC auction market.[8] The only difference between

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[8] A Connecticut State-mandated energy contract is economically identical to a contract-for-differences involved in *Hughes*, as is illustrated in the following example:

Hughes and here is that the form of the transaction in *Hughes* has the generator selling directly into the FERC auction, whereas here the generator sells to the utility who simultaneously resells into the FERC energy auction. But in both cases, the energy is sold into the auction market. Here, as in *Hughes*, the contracts entered into solely as a result of State coercive action guarantee the generator a different rate than it would receive in the FERC auction market because the generator receives the pre-determined price.

CONCLUSION

The petition should be granted.

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 Connecticut contracts, 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 net revenue is $60 and the utility's net cost is $10.

Respectfully submitted,

THOMAS MELONE
Counsel of Record
Allco Renewable Energy Limited
1745 Broadway, 17th floor
New York, New York 10019
(212) 681-1120
Thomas.Melone@AllcoUS.com

COUNSEL FOR PETITIONER

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