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) **REPLY MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFF'S MOTION FOR AN ORDER TO SHOW CAUSE FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION** **June 17, 2016**

Plaintiff has fully briefed the standing and merits of the issues in its memorandum filed on June 15, 2016, in opposition to the Defendants' motions to dismiss the complaint (ECF No. 27) and its initial memorandum in support of Plaintiff's motion for an order to show cause (ECF No. 13) (the "Memorandums"). In order to save the Court time, the Plaintiff will not repeat them all here as rebuttal to Defendants' arguments.

As the Court observed at the hearing in *Allco II*,[1] the FERC-approved auction market is "stalking through the corridors of this case like Hamlet's ghost in the battlements." Tr. at 35. Much like what Claudius did to his brother, the Defendants have sought to do to the FERC-approved market, and Congress' preference for QF[2] generation. But the Federal Power Act ("FPA") prevents even the possibility of such action by excluding States altogether from the field of wholesale sales. Of course, with respect to QFs under PURPA[3] Congress has reached a different conclusion and *has* authorized State regulation of wholesale

[1] *Allco Finance Limited v. Klee*, Docket 3:15-cv-00608 ("*Allco II*").
[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.

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.

The FERC approved market has two aspects. Buyers and sellers can transact in the real-time energy market or can enter into freely negotiated, voluntary bilateral contracts. The Defendants' contracts are neither. Thus it should be no surprise that just as the King's ghost would not leave Elsinore, the FERC-approved market will not leave us alone.

Justice Felix Frankfurter had three rules of administrative law: "(1) Read the statute; (2) read the statute; (3) read the statute!"[4] "[I]n interpreting a statute a court should always turn first to one, cardinal canon before all others. . . . [C]ourts must presume that a legislature says in a statute what it means and means in a statute what it says there. When the words of a statute are unambiguous, then, this first canon is also the last: 'judicial inquiry is complete.'" *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992) (citations omitted). The plain language of the FPA provides exclusive jurisdiction to the FERC over wholesale sales of energy including the rates and all other terms of any wholesale transaction. The only exception to that exclusive jurisdiction is a State's limited authority under section 210 of the PURPA to encourage electric generation from facilities that meet certain design requirements. The Defendants have conceded that they are not acting under their limited authority under PURPA, and that the facilities at issue do not meet the design requirements for PURPA to apply.

The Defendants have also conceded that they are compelling wholesale transactions. *See* PURA Br. at 9 (Connecticut "direct[s] [the utility] to accept the best offer and enter into a power purchase agreement.") Thus the plain language of the statute, in Justice Kagan's words from oral argument in *Hughes*[5], "end[s] the case right there against [Defendants]."[6]

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[3] The Public Utility Regulatory Policies Act, Pub. L. No. 95-617, 92 Stat. 3117 ("PURPA").
[4] Henry J. Friendly, *Mr. Justice Frankfurter and the Reading of Statutes, in* BENCHMARKS 196, 202 (1967).
[5] *Hughes v. Talen Energy Marketing, LLC,* 136 S. Ct. 1288 (2016) *("Hughes").*
[6] *See*, Transcript of Oral Argument at pp. 7-9 held on February 25, 2016, in *Hughes.* The complete oral argument transcript is available at:

As Plaintiff discussed in its Memorandums, 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 by Justices Alito and Kagan.[7]

Standing.

Perhaps realizing the fatal nature the plain language of the FPA has on their case, the Defendants continue to raise irrelevant and meritless arguments. For example, the Defendants' assertions regarding how the Public Utilities Regulatory Authority ("PURA") may be disregarding the Federal requirements for calculating avoided costs, *see* PURA Br. at 5, is not relevant. The calculation of avoided costs is specified in the FERC's regulations, *see* 18 CFR § 292.304, so Defendants' assertion that Connecticut law can override the FERC's regulations, and then that should be the yardstick for injury is preposterous.[8] Worse, Defendants now claim that Plaintiff's injury could be remedied by monetary damages, *see* PURA Br. at 7, after arguing the exact opposite in *Allco I*. Unless and until Defendants are prepared to waive sovereign immunity and concede the basis for such a damage action, its argument should be dismissed out-of-hand.

Plaintiff has standing because:

1. In specifically authorizing Plaintiff to bring an enforcement action under Section 210(h)(2)(B) of PURPA, Congress recognized the significant injury to all QFs from

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http://www.supremecourt.gov/oral_arguments/argument_transcripts/14-614_g2hk.pdf.

[7] *See*, Plaintiff's Memorandum of Points and Authorities in Opposition to Defendants' Motions to Dismiss the Complaint, June 15, 2016 at pp. 4-5.

[8] Defendants' assertions regarding avoided costs also conflict with the plain language of Connecticut law. *See*, Conn. Gen. Stat. § 16-243a(d) provides that avoided costs equal the "anticipated avoided costs over the life of the contract" and that the contract can at the option of the generator extend to 30

violations of the statute, *SEC v. Mgmt. Dynamics, Inc.*, 515 F.2d 801, 808-809 (2d Cir. 1975), and authorized plaintiffs, such as Allco, to bring this type of action and authorized this Court to provide injunctive and other relief to redress the injury by declaring unlawful and enjoining Defendants' actions.

2. The Plaintiff has been injured because the 2015 RFP attempts to go beyond the limits set by Congress harming the very market participants that Congress 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), is a cognizable injury for standing purposes that would be fully redressed by enjoining the 2015 RFP and requiring any procurement to comply with the FPA and PURPA. While the Defendants may argue that enjoining the 2015 RFP may not result in a new RFP being issued, history from the 2013 RFP shows that argument is wrong. As Attorney Snook stated in oral argument in *Allco II*,[9] and as discussed in Plaintiff's Memorandums,[10] the State needs to do something to address its shortfall in renewable energy production. Thus the Commissioner would likely re-issue a compliant RFP.

3. The Plaintiff has been injured by its QFs being unlawfully excluded from the 2015 RFP, thus eliminating the path to a Section 6, 7 or 1(c) contract for those QFs. Absent the right to compel contracts with generators that fail to meet the design requirements set by Congress, the Defendants will have no alternative but to allow all QFs to seek a Section 6, 7 or 1(c) contract.

4. The Plaintiff has been injured by its QFs having to pay unlawful fees that the Defendants concede were wholly unnecessary, and by definition unreasonable, for QFs seeking contracts with Connecticut.

5. The Plaintiff has been injured by the initial and ongoing violation of the FPA and PURPA from the compulsion of the Number Nine contract because the Plaintiff has

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years.

[9] *See*, Tr. at 37.

[10] *See*, Plaintiff's Memorandum of Points and Authorities in Opposition to Defendants' Motions to Dismiss the Complaint, June 15, 2016 at p. 16.

exercised its right under PURPA for many of its QFs to sell energy and capacity to the Connecticut Utilities, and the price to which Plaintiff is entitled to receive will be higher if the Number Nine contract is declared void and the Defendants' are enjoined from taking further action including allowing cost recovery with respect to the Number Nine contract, thus redressing Plaintiff's injury.

6. The Plaintiff will be injured by the initial and ongoing violation of the FPA and PURPA from the compulsion of contracts under the 2015 RFP because the Plaintiff's other QFs are in development and will soon exercise their rights under PURPA to sell energy and capacity to the Connecticut Utilities and the price to which Plaintiff would be entitled to receive would be lower if the Defendants are permitted to compel contracts under the 2015 RFP in violation of he FPA and PURPA. If those contracts are prevented, declared void and the Defendants' are enjoined from taking further action including allowing cost recovery with respect to those contracts, the Plaintiff's injury would be redressed.

The Standard for an Injunction.

As the Defendants now concede, the normal threshold for an injunction is the "fair ground for litigation" standard, *see* PURA Br. at 3. Defendants argue, however, for the higher standard of "likelihood of success" on the merits because in their view the action the Defendants are taking is in the public interest. The Defendants assertion is nothing more than a self-serving conclusion that any action Defendants take are *per se* in the public interest. But the public interest in this case is found in Federal law, not in the challenged actions of the State. The Defendants self-servingly 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, is in the public interest, but that is a conclusion without any basis of support. The Defendants cannot, and do not, provide any explanation as to why the exercise of their State law authority cannot just as effectively be used for QF transactions.

The Defendants have many PURPA-compliant avenues through which they can fulfill their renewable energy goals. 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. For those same reasons, the public interest in Connecticut strongly favors Allco's motion. The public interest also favors Allco 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. Indeed, the Defendants' primary focus is on projects that will send jobs to Canada by purchasing Canadian hydro-electric energy. In contrast, Allco QFs and most other QFs in a compliant RFP would bring jobs, economic activity and tax revenue for Connecticut towns and schools.

Moreover, as Plaintiff explained in its Memorandums, the higher standard for public interest cases simply would not apply in any event as the facts here are not even remotely akin to *Yakus v. United States*, 321 U.S. 414 (1944). *See*, Plaintiff's Memorandum in Support of Motion for an Order to Show Cause for Temporary Restraining Order and Preliminary Injunction (ECF No. 13) at pp. 17-19.

Remarkably, the Defendants do not even address Allco's statutory standing under Section 210(h)(2)(B) of PURPA. In *Allco I*, the Second Circuit authorized Allco's suit through an enforcement action under Section 210(h)(2)(B) of PURPA. 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." *Associated Indus. of N.Y. v. Ickes*, 134 F.2d 694, 704 (2d Cir. 1943), *vacated on other grounds,* 320 U.S. 707 (1943).

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 injure the rights of all QFs

including Allco's, as well as the public interest declared by Congress favoring QFs. Section 210(h)(2)(B) specifically authorizes injunctions which implies significant injury from violations of the statute. *SEC v. Mgmt. Dynamics, Inc*., 515 F.2d 801, 808-809 (2d Cir. 1975). Yet Defendants offer no rebuttal to Allco's statutory standing. 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"). The Defendants' failure to even address that basis for the injunction is an implicit concession that this Court can issue the injunction on that basis.

The Defendants' "Buy-Side" Argument.

The Defendants' posit that they have the authority to compel a wholesale transaction if they are only compelling the utility to enter into the contract. Thus, the Defendants claim that compelling only the utility to enter into the contract is "not regulating wholesale sales," *see* PURA Br. at fn. 3. But compelling a wholesale transaction, regardless from whose side it is compelled, is still regulating wholesale sales and pre-empted as Justices Alito and Kagan immediately recognized. Moreover, as in *Hughes*, the Defendants cannot run from the fact that it is only State action that brings the contract into existence. This obvious fact regarding "State action" was recognized early on by the district court in *Hughes,* and affirmed by the Fourth Circuit and the Supreme Court. *See, PPL EnergyPlus LLC v. Nazarian*, 974 F. Supp. 2d 790, 832 fn. 48 (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):

> 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.)

So too here, we have heard repeatedly from Defendants that they have the option to select no bids. Thus, as in *Hughes,* the contracts here become operative only after the State solicits and evaluates the bids through its command and control process which culminates in the State ordering the utilities to enter into the wholesale contracts.[11] Here, as in *Hughes*, State action is the pre-requisite, and here, as in *Hughes*, the contracts only become operative based upon the State's action.

The "Parade of Horribles."

At footnote 3 of its brief, the PURA Defendants claim that the Plaintiff's "parade of horribles"[12] is "inapt" because in Defendant's view "States would not set rates at their discretion; rates are formed by offers to sell into a competitive procurement process." But while that may or may not be true in this instance, the Defendants' do not dispute, nor can they dispute, that if the Defendants get the result they seek here, there would be no limit on *the State's power* to compel contracts or set rates. There is simply no basis in the FPA or otherwise for this Court to hold that the Defendants have the ability to compel wholesale sales but only if they do so through something called a "competitive solicitation." As the Defendants' 2015 RFP vividly demonstrates a "competitive" RFP can easily be skewed by eliminating certain competitors (as was done with projects less than 20MW), or by limiting the types of generators.

Nor do the Defendants' do dispute that a ruling for the Defendants would, under the guise of regulation of the construction of new generation or portfolio management, create a massive loophole in the FPA that would *give States the power* to destroy FERC's ability to

[11] The notion that a State is not regulating wholesale sales or setting a price if it merely regulates the utility "buy-side" of the transaction has also been explicitly rejected by the FERC in *California Public Utilities Commission*, 132 FERC ¶61,047 (2010) at P64. There the California Public Utilities Commission ("CPUC") argued that it was not compelling wholesale sales by requiring its utility to have a standing offer to enter into a long-term contract with certain types of generators. The CPUC argued that because sellers were voluntarily entering into the contracts, the CPUC was regulating only the utility "buy-side." The FERC rejected that "buy-side" argument. *Id*.

[12] *See*, Plaintiff's Memorandum in Support of Motion for an Order to Show Cause for Temporary Restraining Order and Preliminary Injunction, April 18, 2016, at p. 12; *see also*, Plaintiff's Memorandum of Points and Authorities in Opposition to Defendants' Motions to Dismiss the Complaint at pp. 5, 15, 24-25 and 35-36.

regulate the market in a uniform and coherent manner, would *give States the power* to 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.

Indeed the Defendants to do not, and cannot, contest that a ruling in their favor would result in (1) the authority given to States under PURPA to compel wholesale transactions with QFs being superfluous, (2) Congress' PURPA price-limit of avoided costs, which insures ratepayer neutrality, no longer being a constraint on State action: States would be free to compel wholesale transactions at any price, regardless of the method of procurement, (3) States being free to pursue their own market construct, ignoring and undermining the FERC-approved system, and (4) the logical extension of State authority to regulation of 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.

For the reason stated above and in Plaintiff's Memorandums, the Plaintiff asks this Court to issue the requested injunction as soon as possible.

Respectfully submitted,

Dated: June 17, 2016

/s/ Thomas Melone

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CERTIFICATE OF SERVICE

I hereby certify that on June 17, 2016, a copy of the REPLY MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFF'S MOTION FOR AN ORDER TO SHOW CAUSE FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION 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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