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 SUR-REPLY MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANTS' MOTIONS TO DISMISS THE COMPLAINT** **August 10, 2015**

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Plaintiff Allco Finance Limited ("Plaintiff" or "Allco") hereby files this sur-reply memorandum of points and authorities in opposition to the Defendants' Motions to Dismiss the Complaint in order to address and clarify authority and positions raised by Defendants in their reply briefs.

I. THE TENTH CIRCUIT'S DECISION IN *ENERGY AND ENV'T LEGAL INST. V. EPEL.*

On July 13, 2015, the Tenth Circuit issued its opinion in *Energy and Env't Legal Inst. v. Epel*, No. 14-1216, 2015 U.S. App. LEXIS 12057 (10th Cir. July 13, 2015) ("*Epel*"), which rebuffed a challenge by coal producers to Colorado's renewable portfolio standard ("RPS"). The only similarity between *Epel* and this case is that *Epel* also involved an RPS law.

First, the Tenth Circuit clearly stated that it was not addressing the issue of whether the RPS would be unlawful under the Dormant Commerce Clause's prohibition against facially discriminatory state laws, which is at issue here. *See*, *Epel*, slip opinion at 6 ("whether Colorado's law survives the *Pike* or *Philadelphia* tests may be interesting questions, but they are ones that will have to await resolution in some other case some other day.")

Second, the facts of *Epel* are materially different. Here Allco is not claiming that the Connecticut RPS law is raising costs for out-of-region consumers. Allco is claiming that the Connecticut RPS law facially discriminates against Allco's out-of-region renewable energy credits ("RECs"), which de-values their value to potential buyers in Connecticut. That devaluation is plainly evident in the large price differential between RECs that utilities must buy under the RPS as compared to RECs purchased for the Connecticut Clean Energy Options program.

To be sure there is nothing in the Dormant Commerce Clause that would require Connecticut to maintain its RPS, and if it chose to repeal its RPS then there would be an absence of a state-mandated demand for RECs. Yet the same could be said for any facially discriminatory state statute that would require a Connecticut utility to buy certain property from in-region sources. For example, in *Wyoming v. Oklahoma*, 502 U.S. 437 (1992), the Supreme Court invalidated a statute that required coal-fired electric utilities in Oklahoma "to burn a mixture containing at least 10% Oklahoma-mined coal." *Id.* The Supreme Court determined that the statute discriminated against interstate commerce "on its face" because it "expressly reserve[d] a segment of the Oklahoma coal market for Oklahoma-mined coal, to the exclusion of coal mined in other States." *Id.* at 455. The result in *Wyoming v. Oklahoma* is particularly relevant here because the Oklahoma statute is analogous to Connecticut's RPS requirement that facially favors in-region RECs, and reserves 100% of its utility mandated RECs for in-region RECs to the exclusion of Allco's out-of-region RECs.

Fundamentally, Connecticut and Allco have a factual dispute as to what RECs are. For that reasons alone, it is improper to grant the Defendants' motions to dismiss. Connecticut did not create RECs by its RPS. RECs exist in a national market independently of Connecticut's RPS. Connecticut's Clean Energy Options program plainly establishes that fact. What Connecticut's RPS does, however, is simultaneously impose on utilities the obligation to obtain a certain amount of RECs while limiting the type of RECs that the utilities are permitted to obtain to

preferred in-region RECs. Connecticut's limitation is no different than the 10% in-state coal limitation invalidated in *Wyoming v. Oklahoma.* As in *Wyoming v. Oklahoma*, the fact that 90% was sourced out-of-state, which is one of Connecticut's arguments here, was insufficient to validate the requirement.

Indeed, Connecticut's simultaneous REC demand creation but limitation on what RECs can be used is no different than a situation where a State required its utilities to add some type of environmental control equipment to its power sources, but limited the permissible environmental control equipment to equipment that was manufacturer in-state or in-region. There, just, as here, the State could eliminate the environmental control requirement thus eliminating the demand. But such a limitation on the in-state or in-region equipment would be facially discriminatory and invalid, even though it would be justified by valid local economic reasons, and even though the State could eliminate the demand by eliminating the requirement.

The Defendants arguments that are contingent upon a REC being viewed as a subsidy simply do not cure the *per se* invalid facial discrimination. For that reason, cases such as *West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186 (1994) are unavailing. There is no necessity to get to the discriminatory impact analysis of *West Lynn Creamery* in the circumstance, as here, where the statute facially discriminates against out-of-region interests.[1]

[1] The Seventh Circuit has applied the reasoning in *West Lynn Creamery* to the energy context. In *Alliance for Clean Coal v. Miller*, 44 F.3d 591, 5996 (7th Cir. 1995) the Seventh Circuit determined that the Illinois Coal Act discriminated against "cleaner" (low-sulfur) coal from western states, and thus violated the dormant Commerce Clause. The state argued that it had "merely agreed to

II. CONNECTICUT HAS ADOPTED THE NEPOOL RULE AS ITS OWN.

The Defendants raise a new argument that Allco should lobby NEPOOL to change the way NEPOOL mints RECs, and that Allco's dispute is with NEPOOL, not Connecticut. Connecticut has voluntarily adopted the NEPOOL discriminatory rule as its own. Its statements, therefore, that Connecticut has no responsibility for the discriminatory nature of the NEPOOL rule is simply incorrect. Connecticut was not required to adopt the discriminatory NEPOOL rule, as Connecticut's non-discriminatory REC rule under its Clean Energy Options program plainly shows. Connecticut chose to incorporate a facially discriminatory rule in its statute, and such incorporation has the same effect as if Connecticut has parroted back the exact language of the rule instead of using short-hand to incorporate it.

In addition, the Defendants assertion that a change in the NEPOOL rule that might abandon its facial discrimination against out-of-region RECs would flow through to Connecticut's RPS restriction is also incorrect. Conn. Gen. Stat. § 16-245a(b) disqualifies all RECs except two types:

> 1. Certificates issued by NEPOOL for a generating unit using Class I or Class II renewable energy sources located within NEPOOL, or

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subsidize the cost of using Illinois coal by requiring its own citizens to bear the cost of pollution control devices," (*id.* at 596) and that the Act "merely 'encourages' the local coal industry and does not in fact discriminate." *Id.* But the court reasoned that "Illinois rate-payers . . . footing the bill does not cure the discriminatory impact on western coal producers." *Id.*

> 2. Certificates issued by NEPOOL for a generating unit that imports its energy imported into NEPOOL "pursuant to New England Power Pool Generation Information System Rule 2.7(c), as in effect on January 1, 2006".

The second type of REC is frozen based upon the NEPOOL rule in effect on January 1, 2006. Thus any change in how NEPOOL generates RECs based upon imports, or the location of the generator would, in fact, not alter Connecticut's discriminatory treatment. Nor would a change in the NEPOOL rule affect the discriminatory effect that results from the first class of RECs having to be from a generator located in NEPOOL.

The critical fact at this stage of this case is that Connecticut's statute facially discriminates against Allco's out-of-region RECs. Whether Connecticut has reasons sufficient to justify that facial discrimination cannot be resolved on the bare record that exists[2].

III. THE FERC DECISIONS CITED BY DEFENDANTS ARE IRRELEVANT.

The Defendants imply that Allco's failure to address some FERC decisions, including ones in which Allco has been involved, has a substantive implication for the merits of this case. They do not. Allco did not address *Otter Creek Solar LLC*, 143 FERC ¶ 61282 (2013), *Winding Creek Solar LLC*, 151 FERC ¶ 61103 (2015) or

[2] While Connecticut seeks to justify its facial discrimination on the basis of renewable energy displacing fossil fuels in NEPOOL, it cannot show at this stage that in fact there is any correlation between renewable energy that may be generated in adjacent control areas and the displacement of fossil fuel generation in NEPOOL. The NEPOOL import rule only requires that a generator have transmission rights that match on a monthly basis the generation of the out-of-NEPOOL renewable energy generator. Thus, there is no requirement that energy from the renewable energy generator actually displace generation in NEPOOL.

Midwest Power Systems, Inc., 78 FERC ¶ 61,067 (1997), because they are not relevant to the issues presented.

Both *Otter Creek* and *Winding Creek* involved state-mandated programs that the States' claimed were PURPA-compliant because they were voluntary programs. The FERC issued a brief declaratory statement rejecting the challenge to those programs stating there is nothing in PURPA that prohibits generators and utilities from voluntarily entering into contracts. That unremarkable statement is not disputed by Allco as was made clear in Allco's initial opposition papers. *See*, Allco Memorandum at 38. Those FERC statements are not relevant here because Connecticut is compelling specific wholesale transactions. The transactions are not voluntarily entered into by both the generator and the utility.

However, even if this Court were inclined to glean some relevant substantive proposition from *Otter Creek* and *Winding Creek* as the Defendants urge, FERC's declaratory orders in those cases do not command *Chevron*-style deference from this Court. "While this FERC-issued document is rather impressively called a Declaratory Order, it is actually akin to an informal guidance letter." *Exelon Wind 1, LLC v. Nelson*, 766 F.3d 380, 391 (5th Cir. 2014); *Indus. Cogenerators v. FERC*, 47 F.3d 1231, 1235 (D.C. Cir. 1995) ("[FERC] nowhere purported to make the Declaratory Order binding upon [the state commission], nor can we imagine how it could do so. Unlike the declaratory order of a court, which does fix the rights of the parties, this Declaratory Order merely advised the parties of the Commission's position."). FERC's "declaratory order" does not carry the force of law; it merely

offers FERC's opinion regarding Otter Creek's or Winding Creek's claims, while authorizing Otter Creek and Winding Creek to pursue those claims in the district court. The Supreme Court has explained that "[i]nterpretations such as those in opinion letters … which lack the force of law … do not warrant *Chevron*-style deference." *Christensen v. Harris Cnty.*, 529 U.S. 576, 587 (2000); *Exelon Wind*, 766 F.3d at 391-93 (refusing to defer to FERC-issued "declaratory order" issued in response to petition for enforcement under PURPA).

Furthermore, FERC's declaratory order is "entitled to respect" only to the extent that it is persuasive. *Christensen v. Harris Cnty.*, 529 U.S. 576, 587 (2000) (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)). "The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade…." *See Skidmore*, 323 U.S. at 140. Thus, the substantive merits of FERC's order are integral to the deference it should receive. In *Otter Creek* and *Winding Creek*, FERC's declaratory orders were not at all persuasive as the analysis mischaracterized the facts and the FERC engaged in no meaningful legal analysis.

Specifically, there is no category of alternative programs that States are permitted to mandate which the declaratory orders say exist. Through the Federal Power Act, Congress has occupied the field of wholesale sales of electricity. Thus, States may not enter that field of regulation. *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."); *PPL Energy Plus LLC v. Nazarian*, 753 F.3d 467, 475 (4th Cir. 2014) ("A wealth of case law confirms FERC's exclusive power to regulate wholesale sales of energy in interstate commerce…."). In PURPA, Congress subsequently carved out a limited role for States to engage in some regulation of wholesale sales by certain QFs. Thus, unless a State's regulation of wholesale sales is consistent with PURPA, it falls within the field that Congress has occupied for exclusive federal regulation. There is no room in the statutory scheme for "alternative" State regulation of wholesale sales. Thus, a State's regulation of wholesale sales, which the "alternative" programs in those orders unquestionably were, would still be preempted because the terms were not consistent with PURPA.

Similarly *Midwest Power* is also not relevant. FERC's holding in *Midwest Power* only stands for the proposition that a state commission has some ability to order utilities to purchase renewable generation. The Federal Power Act and subsequent authority make it clear that whatever authority a State may have stops at its borders. For example, States are not preempted within their own borders from mandating the construction of new generation capacity or from regulating the terms on which power plants are built and retired. *Conn. Dep't of Public Utility Control v. FERC*, 569 F.3d 477, 481 (D.C. Cir. 2009); *PJM Interconnection, L.L.C.*, 135 FERC ¶ 61,022 at P 142 (2011) (a state may "act within its borders to ensure resource adequacy or to favor particular types of new generation"), *clarified on reh'g*, 137 FERC ¶ 61,145 (2011).

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 Federal Power Act, 16 U.S.C. § 824(b)(1) – and the Federal Power Act expressly provides that FERC shall have exclusive authority over the terms and conditions of wholesale electricity sales. Thus, a State cannot invoke its authority over resource planning decisions in order to justify the regulation of wholesale sales. If it could, the ability of FERC to effectuate a comprehensive regulatory scheme would be seriously undermined. *See Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 308-09 (1988) (holding preempted a state law "whose central purpose is to regulate matters that Congress intended FERC to regulate").

IV. DEFENDANTS QUALIFIED IMMUNITY CLAIM CANNOT BE DECIDED ON A MOTION TO DISMISS.

Qualified immunity under section 1983 protects a state or local government official sued in an individual capacity from damages liability where the official can show that he or she acted with a reasonable belief in the constitutionality of the challenged conduct. Here there is nothing in the record to support such a claim. It is just too early in the process to determine whether qualified immunity would or would not apply.

Respectfully submitted this 10th day of August 2015.

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CERTIFICATE OF SERVICE

I hereby certify that on September 8, 2015, a copy of the foregoing Plaintiff's sur-reply memorandum of points and authorities in opposition to Defendants' motions to dismiss 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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