16-2946 & 16-2949

To Be Argued By:
Robert D. Snook
Assistant Attorney General

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

ALLCO FINANCE LIMITED,
Plaintiff-Appellant

v.

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

And

KATHERINE S. DYKES, JOHN W. BETKOSKI, III and MICHAEL CARON, in their Official Capacity as Commissioners of the Connecticut Public Utilities Regulatory Authority
Defendants-Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT
Nos. 3:15-cv-00608, 3:16-cv-00508

Hon. Charles S. Haight, Jr.

BRIEF OF DEFENDANT-APPELLEE ROBERT KLEE

GEORGE JEPSEN
ATTORNEY GENERAL

Robert D. Snook
Assistant Attorney General
55 Elm Street, P.O. Box 120
Hartford, CT 06141-0120
Tel. (860) 808-5250
Email: Robert.Snook@ct.gov

Attorneys for Defendant-Appellee

GEORGE JEPSEN
ATTORNEY GENERAL

Robert D. Snook
Assistant Attorney General
55 Elm Street
P.O. Box 120
Hartford, CT 06141-0120
Tel: 860-808-5250
Email: Robert.Snook@ct.gov

Attorneys for the Defendant-
Appellee

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constituional Provisions

Federal Statutes

State Statutes

Regulations

Public Acts

Other Authorities

JURISDICTIONAL STATEMENT

This is an appeal of a dismissal by the District Court of an enforcement action brought by Plainitff Allco Finance Limited ("Allco") pursuant to 16 U.S.C. § 824a-3(h)(2) of the Public Utility Regulatory Policies Act of 1978, 16 U.S.C. § 824a-3, ("PURPA"), and additionally, a preemption challenge under the Supremacy Clause, against the Commissioner of the Department of Energy and Environmental Protection ("Commissioner" or "Defendant") and Katherine S. Dykes, John W. Betkoski, III, and Michael Caron, Utility Commissioners ("PURA Commissioners") of the Public Utilities Regulatory Authority ("PURA"), in their official capacities.[1] Allco also brought a separate action under the Dormant Commerce Clause alleging that the state's

[1] This appeal is related to several earlier cases. The initial case, *Allco Fin. Ltd. v. Klee*, et al., No. 3:15-CV-1874 JBA, (please note that this opposition will employ the same terminology used by the District Court and call this case *Allco I*), was brought against the Defendant Commissioner related to the 2013 RFP. The District Court (Arterton, J.) dismissed Allco's complaint finding both a lack of standing and that the Commissioner did not set wholesale rates in violation of the FPA. *Allco I,* No. 3:13-CV-1874-JBA, 2014 WL 7004024 (D. Conn. Dec. 10, 2014). The Second Circuit affirmed on alternative grounds, *Allco v. Klee,* 805 F.3d 89, 93 (2d Cir. 2015) (*Allco II*).

renewable portfolio standard ("RPS") violates the dormant Commerce Clause.

The District Court dismissed the case, holding that Allco lacked standing to bring its claims. A191. The District Court also concluded that the state's RPS program did not violate the Dormant Commerce Clause. Allco filed a timely appeal on August 23, 2016. A204.[2]

[2] A. refers to the Joint Appendix in Docket No. 16-2946.

COUNTER-STATEMENT OF THE ISSUES

1. Did the District Court correctly conclude that Allco lacked standing?
2. Do Connecticut's competitive procurements violate the Federal Power Act?
3. Did the District Court properly conclude that Connecticut's renewable portfolio statute does not violate the Dormant Commerce Clause of the United States Constitution?

STATEMENT OF THE CASE

This case involves a challenge to Connecticut's competitive procurement efforts designed to obtain new renewable electric generation in order to meet important policy goals. Allco, a generator of renewable energy, has sued claiming that Connecticut's statutory scheme for procuring renewable energy violates the Federal Power Act of 1935 ("FPA"), because Congress gave the Federal Energy Regulatory Commission ("FERC") exclusive jurisdiction over all wholesale electricity rates, charges, and terms. A6. Allco asserts that states can only engage in any activity affecting the wholesale energy market under the Public Utility Regulatory Policies Act of 1978, 16 U.S.C. § 824a-3, ("PURPA"), a amendment to the FPA which allows states to fix the price of energy under a power purchase agreement for a limited type of statutorily defined "qualifying facilities" ("QFs"), such as Allco. *Compl.*, ¶¶ 41-55, A13-16. Allco further asserts that the state's competitive requests for proposals ("RFPs") do not comply with the terms of PURPA, and if they had, Allco would have received a contract. Appellant's Brief, p. 19; *Compl.*, ¶¶ 4, 29; AX4, AX9.[3]

[3] AX_ refers to the Joint Appendix in Docket No. 16-2949.

Allco is seeking a contract through the state's competitive procurement process but wishes that contract to conform to the reqirements of PURPA. Allco lacks standing because it is entirely conjectural to conclude that Allco would actually win a competitive selection and thus its claimed injuries are remote and speculative. Additionally, Allco's claimed injury cannot be redressed by the court because Allco has attempted to bring this action seeking a contract under PURPA, but the Defendant Commissioner has no PURPA authority and can only provide Allco with a contract pursuant to the entirely separate state law procurement process. Finally, the state's procurement statutes are not preempted by federal law but are valid exercises of the state's authority to direct the resource mix of its regulated utilities and do not permit the Commissioner to set or fix wholesale electric rates which rates are within the exclusive jurisdiction of FERC.

In a separate count, Allco claims that the Connecticut renewable portfolio standards ("RPS") statute[4] discriminates against suppliers like

[4] Conn. Gen. Stat. § 16-245a(b); as amended by P.A. 13-303, *available at* http://www.cga.ct.gov/2013/act/pa/pdf/2013PA-00303-R00SB-01138-PA.pdf.

Allco, which generates clean energy in Georgia. *Compl.*, ¶¶ 1-3, A4-A5. To the contrary, Connecticut's RPS statute does not discriminate against interstate commerce but instead provides a state subsidy in the form of guaranteed cost recovery from Connecticut ratepayers to participants in a state-created market designed to encourage the development of renewable energy to displace fossil fuel generation.

STATEMENT OF THE FACTS

A. Connecticut's Renewable Energy Procurement Efforts

On February 19, 2013, the Department of Energy and Environmental Protection ("DEEP"), as directed by Conn. Gen. Stat. § 16a-3d, released Connecticut's first Comprehensive Energy Strategy ("2013 CES"). The 2013 CES sets forth the key findings and policy goals that will direct the state's energy and environmental planning for the near and long-term.[5] *Compl.*, ¶, 28, A11. The 2013 CES recommended that Connecticut and other New England states encourage new renewable energy generation in order to meet the needs of

[5] *2013 Comprehensive Energy Strategy for Connecticut*, DEEP (Feb 19, 2013), *available at* http://www.ct.gov/deep/lib/deep/energy/cep/2013_ces_executive_summary_final.pdf.

environmental regulatory programs.[6] These programs in Connecticut include the Global Warming Solutions Act[7] and the Regional Greenhouse Gas Initiative[8] designed to address climate change and the Integrated Resources Plan[9] and Renewable Portfolio Standard[10] designed to meet other important environmental and energy goals. In addition, the state has a mandatory obligation to reduce Connecticut's air quality problems. As of the time of submission of this brief, the entire state of Connecticut is in violation of the ozone limits established under the federal Clean Air Act.[11] In totality, these various statutes and programs grant the Commissioner authority to take actions to increase the state's reliance on local renewable energy and offset carbon emissions.

In order to implement the state policy goals of carbon reductions, air quality and renewable energy, the Connecticut legislature passed

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[6] *See* Conn. Gen. Stat. § 22a-200c et seq (setting forth requirements to reduce greenhouse gas emissions).
[7] Conn. Gen. Stat. § 22a-200a
[8] Conn. Gen. Stat. § 22a-200c
[9] Conn. Gen. Stat. § 16a-3a
[10] Conn. Gen. Stat. § 16-245a
[11] U.S. Environmental Protection Agency, 8-Hour Ozone (2008) Designated Area/State Information, *available at* https://www3.epa.gov/airquality/greenbook/hbtc.html.

two public acts. The first was Public Act (P.A.) 13-303, "An Act Concerning Connecticut's Clean Energy Goals." Public Act 13-303 authorized the Commissioner to solicit proposals from providers of renewable energy sources and, "[i]f the commissioner finds such proposals to be in the interest of ratepayers including, but not limited to, the delivered price of such sources, and consistent with the requirements to reduce greenhouse gas emissions . . . and in accordance with the policy goals outlined in the [2013 CES] . . . the commissioner may select proposals . . . to meet up to four percent" of the state's electric load. Public Act No. 13-303, § 6 (2013) (codified at Conn. Gen. Stat. § 16a-3f). The Act further specifies that the "commissioner may direct the electric distribution companies to enter into power purchase agreements . . . ." *Id.*

Two years later, P.A. 15-107, using very similar language, directed the Commissioner to solicit additional contracts for large-scale renewable energy projects as well as large-scale hydropower and natural gas capacity. P.A. 15-107, § 1 (2015) (codified at Conn. Gen. Stat. § 16a-3j). Under both public acts, the Commissioner must determine if the projects submitted in response to the solicitation are

consistent with state environmental and renewable energy goals and if they are in the ratepayers' interest. If so, the Commissioner is authorized to direct utilities to enter into such contracts. Nowhere in Connecticut law is the Commissioner permitted to set wholesale electric energy rates or given powers to implement any authority under PURPA. Conn. Gen. Stat. §§ 16a-3f, 16a-3j.

B. Renewable Energy Procurements

The Commissioner has issued several RFPs based on the authority of P.A. 13-303 and P.A. 15-107. The first was on July 8, 2013, when DEEP released a Notice of Request for Proposals issued pursuant to P.A. 13-303 ("2013 Procurement"). A166. On July 22, 2013, Plaintiff submitted five solar power bid proposals alongside forty-two other project submissions. *Id.* After an extensive review and consideration of the forty-seven bids, the Commissioner directed the electric distribution companies to negotiate possible purchase power agreements ("PPAs") with two selected projects, the Fusion Solar Center, a 20 megawatt ("MW") solar project, and the Number Nine Wind Farm, a 250 MW wind power project. A166. None of Plaintiff's projects was selected. *Id.* PURA, after a full hearing and review required by statute, approved the

two PPAs. Final Decision, PURA Docket No. 13-09-19 (October 23, 2013).[12]

More recently, a three state renewable energy procurement draft RFP was issued on February 26, 2015, and subsequently issued in final form on November 12, 2015 ("2015 RFP") by the Commonwealth of Massachusetts, and the States of Connecticut and Rhode Island. *Compl.*, ¶ 29, A11. More than fifty bids were received from renewable energy developers, including solar developers. P.A. 15-107(c), A11, A122-23, A173, A182. Simultaneously, as required by P.A. 15-107(b), the Commissioner is currently conducting a smaller scale renewable energy procurement for solar and other projects in the 2 to 20 MW range.[13] P.A. 15-107(b), A117. Plaintiff Allco chose not to submit a bid in either of the two 2015 procurements. A118, A184. On October 24, 2016, the Commissioner completed his evaluation and selection of projects in the 2015 RFP and notified winning bidders to begin contract

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[12] *Application for Approval of Class I Renewable Power Purchase Agreements Resulting from Department of Energy and Environmental Protection's July 8, 2013 Requests for Proposals pursuant to Section 6 of P.A. 13-303*, Final Decision, PURA Docket No. 13-09-19 (October 23, 2013), *available at* http://www.ct.gov/pura/docketsearch.

[13] Notice of Request for Proposals, DEEP (Mar. 9, 2016), *available at* http://www.dpuc.state.ct.us/DEEPEnergy.nsf/$EnergyView?OpenForm&Start=1&Count=30&Expand=5&Seq=1.

negotiations with the state's regulated utilities. Relevant authorities in Massachusetts and Rhode Island did likewise. On October 27, 2016, the Commissioner similarly completed his selection of projects in the smaller, 2 to 20 MW RFP.

C. Procedural Background

This appeal is related to several earlier cases. The initial case, *Allco Fin. Ltd. v. Klee*, et al., No. 3:13-CV-1874 JBA, was brought by Allco against the Defendant DEEP Commissioner regarding a 2013 energy procurement effort (the "2013 RFP"). A5. The District Court (Arterton, J.) dismissed Allco's complaint, finding both a lack of standing and further that the Commissioner did not set wholesale rates and thus the procurement could not be barred by the FPA. *Allco I,* No. 3:13-CV-1874-JBA, 2014 WL 7004024 (D. Conn. Dec. 10, 2014), A166-67. The Second Circuit affirmed on alternative grounds, *Allco v. Klee,* 805 F.3d 89, 93 (2d Cir. 2015) (*Allco II*). Specifically, this Court ruled that to the extent that Allco properly asserts a claim under PURPA, 16 U.S.C. § 824a-3, Allco failed to exhaust its administrative remedies with FERC. *Id.* (citing *Niagara Mohawk Power Corp.* v. *FERC*, 306 F.3d 1264, 1269-70 (2d Cir. 2002)); *see* 16 U.S.C. § 824a-3(h). Allco

responded to the Court's ruling by filing a PURPA administrative implementation challenge under 16 U.S.C. §824a-3(h) with the FERC. *Allco Renewable Energy Ltd*., FERC Docket No. EL16-11-000 (filed Nov. 9, 2015). FERC responded in its January 8, 2016, Notice of Intent Not to Act, declining to take action under PURPA. *Allco Renewable Energy Ltd*., 154 FERC ¶ 61,007 (2016).[14]

Subsequently, Allco brought another case, *Allco Fin. Ltd. v. Klee et al*, No. 3:15-CV-608 CSH, (*Allco III*), filed on April 26, 2015, which is based in part upon the same legal theory advanced in *Allco I* against both Defendants Klee and the PURA Commissioners. A166. Allco then brought a very similar action on March 30, 2016, against the same defendants and including the same basic legal theory in *Allco Fin. Ltd. v. Klee et al*, No. 3:16-CV-508 CSH, (*Allco IV*). A167. *Allco IV* restates the essential allegations of *Allco I* and *Allco III*, in that the 2013 RFP was in violation of the Federal Power Act's prohibition on state regulation of wholesale electricity sales – subject only to the limited

[14] The District Court reviewed the enforcement request made by Allco to FERC and concluded that it was sufficiently broad to satisfy the exhaustion requirement noted by this Court in *Allco II* with respect to both the 2013 RFP and 2015 RFP and therefore Allco had satisfied the jurisdictional prerequisite noted by this Court with regard to both *Allco I* and *III*. A173

exception for sales by statutorily defined clean energy qualifying facilities ("QFs"), such as Allco's, under PURPA and that the 2015 Procurement should also be preempted. *Allco IV* also added a new count claiming that the state's RPS violates the dormant Commerce Clause because it does not permit Allco to sell renewable energy certificates generated in Georgia to Connecticut utilities. A18-A19.

On March 30, 2016, Allco moved for a temporary restraining order and preliminary injunction in *Allco III* seeking an order from this Court that the 2015 RFP is preempted by the FPA and enjoining any further action by the state. Argument was heard on this motion for a preliminary injunction on April 27, 2016.

The District Court ruled on both *Allco III* and *IV*, acknowledging that Allco had met its exhaustion requirements and then addressing the question of standing based on the recent case of *Spokeo, Inc. v. Robins*, 136 S.Ct. 1540 (2016). The court held that Allco's claimed injury was conjectural and therefore Allco lacked standing to bring its suit. A188, A191. With regard to its Dormant Commerce Clause count, the District Court held that Connecticut's RPS statute creates a local state market for RECs and does not impede any national market and thus the

Dormant Commerce Clause does not apply. A200. Because of its rulings dismissing the two complaints, the District Court held that the request for a preliminary injunction was moot. *Id.*

SUMMARY OF ARGUMENT

The District Court correctly held that Allco lacks standing because its claimed injuries are wholly conjectural and, further, because its alleged injuries cannot be redressed by a favorable decision. Its injuries are conjectural because the procurements are competitive and it is speculative that Allco would actually ever win selection. A183. Its alleged injuries are not redressable because this Court cannot grant Allco what it seeks; specifically a PURPA-style contract issued pursuant to a state competitive procurement statute that does not give the Commissioner authority to act under PURPA. A188 - A191. Should this Court conclude, however, that Allco has standing, Allco has failed to state a preemption claim because the Commissioner acted wholly within the authority preserved to states with respect to environmental and utility integrated resource planning and has not intruded upon FERC's exclusive authority over wholesale electric rates.

Similarly, the District Court correctly found that Connecticut has not acted to impede or affect any national market, but has, rather, created a secondary market in environmental compliance instruments or RECs to further proper state environmental, public health, and energy policy goals. A200.

ARGUMENT

I. STANDARD OF REVIEW

A Court of Appeals reviews *de novo* a district court's dismissal for lack of standing and failure to state a claim. *Selevan v. New York Thruway Authority*, 584 F.3d 82, 88 (2d Cir. 2009). A plaintiff asserting subject matter jurisdiction has the burden of proving by a preponderance of the evidence that it exists. *Makarova v. United States,* 201 F.3d 110, 113 (2d Cir. 2000).

Allco is seeking an injuction barring the current and future procurements, unless they are consistent with PURPA. An injunction is an "extraordinary remedy." *UBS Fin. Servs. V. W. Va. Univ. Hosps., Inc.,* 660 F.3d 643, 648 (2d Cir. 2011), *quoting Winter v. Natural Res. Def. Council, Inc.,* 555 U.S. 7, 24 (2008); *see also Sussman v. Crawford*, 488 F.3d 136, 139 (2d Cir.2007). A movant must show, beyond

"irreparable" harm or injury, a "likelihood of [ultimate] success" where, as here, the preliminary injunction would affect "governmental action taken in the public interest pursuant to a statutory or regulatory scheme." *Red Earth LLC v. United States*, 657 F.3d 138, 143 (2d Cir. 2011). That "likelihood of success" standard is heightened further to require a "clear" or "substantial" showing of a likelihood of ultimate success where plaintiff seeks a preliminary injunction that would "alter, rather than maintain, the status quo." *Almontaser v. New York City Dep't of Educ.*, 519 F.3d 505, 508 (2d Cir. 2008). Finally, the preliminary injunction movant must also show "that the public's interest weighs in favor of granting an injunction." *Red Earth LLC*, 657 F.3d 138, 143 (2d Cir. 2011).

Further, "[w]here the moving party seeks to stay government action taken in the public interest pursuant to a statutory or regulatory scheme, the district court should not apply the less rigorous fair-ground-for-litigation standard and should not grant the injunction unless the moving party establishes, along with irreparable injury, a likelihood that he will succeed on the merits of his claim." (internal citation omitted) *Able v. United States*, 44 F.3d 128, 131 (2d Cir. 1995).

The exception "reflects the idea that governmental policies implemented through legislation or regulations developed through presumptively reasoned democratic processes are entitled to a higher degree of deference and should not be enjoined lightly." *Able*, 44 F.3d at 131.

II. ALLCO'S CLAIMED INJURIES ARE SPECULATIVE BECAUSE IT CANNOT BE ASSUMED THAT ALLCO WOULD WIN IN A COMPETITIVE SELECTION AND ALLCO'S INJURIES CANNOT BE REDRESSED BY THIS COURT BECAUSE THE COMMISSIONER CANNOT CONDUCT A PURPA-TYPE PROCUREMENT.

The United States Supreme Court has recently addressed the importance of standing in the context of establishing the jurisdiction of a federal court in *Spokeo, Inc. v. Robins*, 136 S.Ct. 1540 (2016). The Court stated that:

> Our cases have established that the irreducible constitutional minimum of standing contains three elements. The plaintiff must have (1) suffered an 'injury in fact', (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable decision. The plaintiff, as the party invoking federal jurisdiction, bears the burden of establishing these elements.

136 S.Ct. at 1547 (*citations, internal quotations and ellipses omitted.*)

In this case Allco has not suffered an injury-in-fact, as any claimed injury is entirely speculative and conjectural. Allco is seeking

to have the Commissioner award it a contract through a renewable energy competitive selection process directed by state law, but seeks to have that state statute-driven process re-formed to make it consistent with PURPA. A187 ("[I]f the State is enjoined . . . from going through with the RFP, and is required to issue a [PURPA] compliant RFP. . . Allco's injuries would be redressed.") Specifically, as stated by the District Court, the injury Allco seeks to have cured is "its being deprived of a State-directed contract . . . under the . . . statutory scheme." Decision, A187; *see also Allco II*, 805 F.3d at 98 (Allco's injury is "not being selected for a Section 6 contract.") However, as noted in *Spokeo*, a plaintiff must demonstrate an "actual or imminent, not conjectural or hypothetical" injury, and that injury must be redressable by a decision of the federal court. *Spokeo*, 136 S.Ct. at 1548. Allco's injuries are wholly conjectural and this Court cannot provide Allco the relief it seeks.

First, Allco declined to participate in the either of the current state competitive procurements and therefore cannot establish that it has been injured by not getting a contract through a procurement in which it has not participated. *Compl.*, ¶ 35, AX10. More importantly, to

achieve Allco's desired result, (1) the Commissioner would have to issue a new "PURPA-compliant" RFP; and then (2) Allco would have to win the competitive selection process. As the District Court phrased it:

> Allco's theory of recovery depends upon two layers of conjecture and speculation. First, Allco conjectures that the DEEP Commissioner will issue a new and different RFP, fully compliant with PURPA, which would allow all Qualifying Facilities . . . to bid for contracts. Second, Allco conjectures that, having joined what appears to be a large field of electric energy competitors, Allco will win the competition . . . .

Decision, A187.

As to the first conjecture, it is simply not possible for the Commissioner to issue a new, PURPA-compliant RFP if the 2015 RFP is enjoined. The 2015 RFP was issued under *state law* and is not a PURPA procurement. PURPA, as noted earlier, is a federal program that grants developers of renewable energy projects up to 80 MW that are qualifying facilities the right to seek a contract with regulated utilities at the utilities' avoided costs; i.e., the cost that the utilities would otherwise have to pay to obtain the energy. 16 U.S.C. § 796(17)(D). As noted earlier, PURPA allows state regulators to set

"avoided costs" or, in other words, set wholesale rates that are otherwise solely within FERC's jurisdiction. 18 C.F.R. § 292.304(b)(2).

However, the only authority the Commissioner has to conduct any type of renewable energy procurement is under state law: P.A. 13-303 and P.A. 15-107. The Connecticut legislature has not given the Commissioner any authority under PURPA. The implementation of PURPA under Connecticut law is given to the Public Utilities Regulatory Authority. *See*, Conn. Gen. Stat. §16-243a.

Specifically, P.A. 15-107 directs the Commissioner to solicit contracts for renewable energy projects that are not limited to PURPA QFs of 80 MW and under, as well as large-scale hydropower and natural gas capacity that are outside of PURPA. P.A. 15-107 (2015) (codified at Conn. Gen. Stat. § 16a-3j). That state statute gives the Commissioner the following authority:

> The Commissioner . . . shall evaluate project proposals received under any solicitation issued pursuant to [this statute] based on factors including, but not limited to, (1) improvements to the reliability of the electric system . . .; (2) whether the benefits of the proposal outweigh the costs to ratpayers; (3) fuel diversity; (4) the extent to which the proposal contributes to meeting the requirements to reduce greenhouse gas emissions and improve air quality . . . ; (5) whether the

> proposal is in the best interest of ratepayers; and (6) whether the proposal is aligned with the policy goals outlines in the Integrated Resources Plan . . . and the Comprehensive Energy Strategy . . . including, but not limited to, environmental impacts.

P.A. 15-107, § 1(e). None of the factors listed above are part of PURPA. P.A. 13-303 uses essentially the same language. These statutes empower the Commissioner to consider ratepayer impacts, environmental impacts, fuel diversity, etc., but do not authorize the Commissioner to set wholesale electric rates at avoided cost or any other rate.

Connecticut law is clear that state agencies have no authority to act in any manner unless it is explicitly granted to them by the legislature. *Nizzardo v. State Traffic Commission*, 259 Conn. 131, 156 (2002). The legislature has only empowered the Commissioner to issue renewable energy RFPs in the statutes identified above and the terms of these statutues are very clear. The Commissioner cannot ignore the terms of the statutes and conduct a PURPA-type process under authority he does not have.[15]

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[15] As this Court has already held, merely voiding or enjoining the competitive process will not redress Allco's injury and does not make it

This raises one final issue related to redressability. Allco states that "Allco's injury can surely be redressed by the court – the court can direct that subsequent procurements be conducted in accordance with federal law, i.e., without the presence of non-QF generators." Appellant's Brief, p. 42. As Allco's Brief otherwise put it: "the District Court can ban non-QF participation, invalidate non-QF contracts, and require that the State adhere" to the rules of PURPA. However, as noted above, the Commissioner only has the power to conduct clean energy procurements under the two public acts that are thorough and comprehensive in their terms and conditions. To get the relief Allco seeks, it would be necessary for this Court to *re-write* state law undoing the state legislature's competitive process with its energy and environmental requirements and then drafting in various PURPA provisions that the Connecticut General Assembly has reserved to a different state agency – the Public Utilities Regulatory Authority.[16] It is one thing to ask a court to strike down an unconstitutional law; it is a

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likely that Allco would ever obtain a contract and thus Allco would still lack standing. *Allco II*, 805 F.3d at 98.

[16] Conn. Gen. Stat. §16-243a

very different thing to ask a court to re-draft a state statute and then order a state agency to issue a new RFP.

There is, ultimately, no legal authority for the Commissioner to issue the type of PURPA-compliant RFP that Allco wishes and thus no way a favorable court decision can redress Allco's injuries.

Second, and perhaps more importantly for purpose of standing, it is entirely conjectural that Allco would win a competitive procurement. That is the nature of competition in an RFP; parties bid and some (not all) are selected. In fact, the Commissioner is not obligated to accept any bids.[17] Ultimately, enjoining the on-going procurement that Allco chose not to participate in would block other companies from getting contracts but give Allco nothing. As this Court noted in a prior decision with regard to an earlier, 2013 state procurement:

> But invalidating the [2013 RFP] contracts awarded to Fusion Solar and Number Nine would simply deny Allco's competitors a contractual benefit without redressing Allco's injury – its not being selected for a . . . contract. Because merely voiding its competitors' contracts would not redress Allco's injury, Allco also lacks standing to seek such equitable relief.

Allco II, 805 F.3d at 98.

[17] The Commissioner "*may*" select. P.A. 15-107(1)(g).

Thus, not only is it conjectural that the Commissioner will conduct future RFPs,[18] but enjoining the current procurement would not give Allco the contract it seeks. It is at best speculative that Allco would ever win any competitive procurement and it is legally impossible for the Commissioner to conduct a PURPA procurement under his existing authority. This Court cannot redress Allco's alleged injuries.

Allco next argues that it has standing because the 2015 RFP, if successful, will bring major new renewable energy into the region and would "directly compete with other renewable energy resources." Appellant's Brief, p. 35. In other words, the winning bids in the 2015 RFP would result in less demand for projects Allco may wish to build in the future or lower avoided costs and consequently lower profits for a PURPA type project.[19] This Court has already weighed, measured, and rejected this speculative argument:

> For an injury to be cognizable as an injury-in-fact, the plaintiff must have suffered the injury at

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[18] The Commissioner "*may*" issue solicitations for long-term contracts. P.A. 15-107(1)(a).

[19] Enjoining the 2015 RFP actually would not stop any projects from being built because the RFP was conducted in conjunction with Massachusetts and Rhode Island. Therefore, if Connecticut is enjoined, the other states will simply take Connecticut's share of the selected projects and proceed.

> the time of the complaint's filing, *Lujan*, 504 U.S. at 570 n.5, or the injury must at least have been "imminent," *id.* at 564. Neither is true with respect to this injury. The PURPA sales that Allco fears it would make at a lower price clearly did not occur at the time that the complaint was filed, as they were future sales. There is also no indication in the record that these future sales were imminent when the complaint was filed. As such, this alternative theory of injury is far too speculative to serve as the basis for an Article III injury-in-fact.

Allco II, at 805 F.3d at 94, fn 3; *see also* Decision, A185. Allco's theoretical injuries are both future and speculative as this Court has already ruled and therefore Allco lacks standing.

III. ALLCO HAS FAILED TO MEET THE REQUIREMENTS FOR AN INJUNCTION BECAUSE THE STATE PROCURMENTS ARE NOT PREEMPTED BY THE FPA AND THUS ALLCO IS NOT LIKELY TO PREVAIL ON THE MERITS AND BECAUSE ALLCO HAS NOT SUFFERED IRREPARABLE HARM

To obtain an injunction barring state procurements, Allco must demonstrate irreparable injury and likelihood of prevailing on the merits. *Red Earth LLC v. United States*, 657 F.3d 138, 143 (2d Cir. 2011). Further, the preliminary injunction movant must also show "that the public's interest weighs in favor of granting an injunction." *Id.* While Allco has repeatedly claimed that all 2013 and 2015 RFPs are

preempted by the FPA, the central fact is that Connecticut's procurements do not intrude on FERC's jurisdiction. Consequently, Allco cannot demonstrate any chance of prevailing on the merits. In addition, for all the reasons discussed above, Allco cannot demonstrate irreparable harm because its alleged injuries are speculative and not redressable by this Court.

A. Connecticut's RFPs Do Not Violate FERC's Jurisidction Over Wholesale Rates And Are Not Preempted and Thus Allco Cannot Prevail On The Merits.

Federal law gives FERC authority over wholesale electric rates but preserves the authority of states to require regulated utilities to enter into bilateral contracts with generators for clean renewable energy and to direct the utilities' mix of clean and other resources. See, *Entergy Nuclear Vermont Yankee LLC v. Shumlin*, 733 F.3d 393, 417 (2d Cir. 2013). The 2013 and 2015 RFPs are straightforward bilateral contract procurements for clean energy under the state's authority to direct the resource mix of regulated utilities and in which the Commissioner never set or established the wholesale energy rates. Thus, the Commissioner did not intrude on FERC's jurisdiction and

Allco's repeated claims that the 2013 and 2015 RFPs are preempted by the FPA, is simply not true and Allco cannot prevail on the merits.

As this Court noted in an earlier appeal related to this case:

> 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.

Allco v. Klee, 805 F.3d 89, 91 (2d Cir. 2015) (*Allco II*). "FERC's authority includes 'exclusive jurisdiction over the rates to be charged [a utility's] interstate wholesale customers.'" *Entergy Nuclear Vermont Yankee, LLC v. Shumlin*, 733 F.3d 393, 432 (2d Cir. 2013) (quoting *Nantahala Power & Light Co. v. Thornburg,* 476 U.S. 953, 966 (1986)).

However, it is beyond dispute that states may "order utilities to build renewable generators themselves, or . . . . direct retail utilities to `purchase electricity from an environmentally friendly power producer in California or a cogeneration facility in Oklahoma, if [they] so choose[].'" *Entergy Nuclear Vermont Yankee LLC v. Shumlin*, 733 F.3d 393, 417 (2d Cir. 2013), citing *S. Cal. Edison Co. San Diego Gas & Elec. Co.*, 71 FERC P 61269 at *8 (June 2, 1995).

This is because the Supreme Court has explained that under the FPA, states retain "authority over . . . *administration of integrated resource planning and . . . authority over utility generation and resource portfolios* . . . ." *New York v. FERC*, 535 U.S. 1, 24 (2002)(Emphasis added), *citing* Order No. 888, at 31,782, n.544. Further, the FPA clearly permits states to "direct the planning and resource decisions of utilities under their jurisdiction." *Entergy Nuclear Vermont Yankee LLC v. Shumlin*, 733 F.3d 393, 417 (2d Cir. 2013). Thus, it is clear that state authorities retain full jurisdiction over the resource portfolio planning of regulated utilities and can direct utilities to purchase clean (or other) energy as required.

In addition, the use of bilateral contracts, the type of contracts that the Commissioner is authorized to use under state law, is also fully consistent with the FPA. As the District Court noted below:

> There are two ways in which FERC achieves its regulatory aims. First, Generators and [utilities] can enter private bilateral contracts called `Power Purchase Agreements' (PPAs). See *Hughes*, 136 at 1292. If these bilateral contracts are made in good faith and are the result of arms-length negotiation, then they are presumed reasonable by FERC. *Id.* (*citing Morgan Stanley*, 554 U.S. at 546-58). Second [regional grid operators] can buy from and sell to generators

> and [utilities] through a FERC-approved auction process. *Id.*

Decision, A163.

The District Court was paraphrasing a recent decision of the United States Supreme Court addressing the nature and extent of FERC's jurisdiction under the FPA in *Hughes v. Talen Energy Marketing LLC*, 136 S.Ct. 1288 (2016). The *Hughes* court noted that the FPA vests exclusive jurisdiction over wholesale energy sales in the FERC. FERC, in turn, exercises its jurisdiction in two ways:

> Interstate wholesale transactions in deregulated markets typically occur through two mechanisms. The first is *bilateral contracting*: [load serving entities] sign agreements with generators to purchase a certain amount of electricity at a certain rate over a certain period of time. After the parties have agreed to contract terms, FERC may review the rate for reasonableness. *See Morgan Stanley Capital Group Inc. v. Public Util. Dist. No. 1 of Snohomish Cty.*, 554 U.S. 527, 546-548 (2008) . . . . Second, [regional grid operators] administer a number of *competitive wholesale auctions*. . . .

Hughes, 136 at 1292-93 (Emphasis added.) Thus, as the Supreme Court ruled, bilateral contracting is permissible under the FPA.

Allco asserts that the state procurements are "identical" to the prohibited transactions in *Hughes*. Appellant's Brief, pp. 52-54. In

reality, the Supreme Court explicitly differentiated the contracts for differences in *Hughes* from the standard bilateral contracts "which FERC has long accommodated. . . ." *Hughes,* 136 S. Ct. at 1299. Specifically, *Hughes* "involve[d] the capacity auction administered" by a regional grid opertor. *Id.* at 1293. The Court noted that the State of Maryland had, in that case, required a generator to participate in the regional auction, but at a different rate from the FERC-approved market rate and thus "Maryland's program invades FERC's regulatory turf." *Id.* at 1297. The Court hastened to add that "the contract at issue here differs from traditional bilateral contracts in this significant respect: The contract for differences does not transfer ownership of capacity from one to another outside the auction. Instead, the contract for differences operates within the auction. . . ." *Id.* at 1299.

The Court concluded:

> So long as a State does not condition payment of funds on capacity clearing the auction, the State's program would not suffer from the fatal defect that renders Maryland's program unacceptable.

Id. *Hughes* involved the State of Maryland's intrusion into the regional market rate. In contrast, the Connecticut 2015 RFP involves classic bilateral contracts between winning bidders and electric utilities and

does not "condition the payment of funds on capacity clearing the auction." Thus, the 2015 RFP does "not suffer from the fatal defect" in *Hughes*.

Allco asserts that states are barred by the FPA from any actions regulating wholesale sales outside of PURPA. 16 U.S.C. § 824a-3, Appellant's Brief, pp. 57-60. Allco argues that the 2015 RFP does not comply with PURPA and thus is preempted under the Supremacy Clause. *Id*. The central error in Allco's position is that the Commissioner is not regulating wholesale rates at all but is directing utility resource mix decisions (as permitted by federal law).

Specifically, the only court in any of the *Allco* series of cases to address the merits of Plaintiff's preemption claim has concluded that the Commissioner's RFPs are not preempted. *Allco I*, 2014 WL 7004024, (D.Conn. Dec. 10, 2014). Judge Arterton reviewed Allco's claims in *Allco I* that the 2013 RFP violated the Federal Power Act and concluded that the Commissioner's procurement "stands in contrast to state efforts that have been held to be preempted, such as . . . Maryland attempted to incentivize . . . new power plant[s] by offering . . . a `contract for differences'." Judge Arterton held that the 2013 RFP "is

devoid of any such market-distorting features that encroach on FERC's exclusive jurisdiction . . . . *Defendant plays no role in determing the price offered by bidders" and upheld the 2013 RFP. Allco I*, 2014 WL 7004024, at *10 (Emphasis added); A167.

Thus, while the FPA grants exclusive jurisdiction over rates to FERC, the Commissioner did not set or establish wholesale rates in either procurement and state law does not give him the power to do so. To the contrary, all the Commissioner did was to review the bid proposals and decide which projects met the state's environmental and energy policy goals and direct the utilities to negotiate bilateral contracts in order to meet the state's desired mix of clean energy resources. All of this, of course, is within the Commissioner's power over the generation mix of the state's utilities.

Ultimately, federal law is clear that states have the authority to direct the procurement of renewable energy, as this Court held in *Entergy Nuclear Vermont Yankee LLC v. Shumlin*, 733 F.3d 393, 417 (2d Cir. 2013). In *Entergy*, this Court held that:

> [S]tates have broad powers under state law to direct the planning and resource decisions of utilities under their jurisdiction. States may, for example, order utilities to build renewable

> generators themselves, or . . . order utilities to purchase renewable generation. . . . [I]t is clear that the 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.

Entergy, 733 F.3d 393, 417, citing *S. Cal. Edison Co. San Diego Gas & Elec. Co.*, 71 FERC P 61269 at *8 (June 2, 1995). FERC acknowledged the "fact that resource planning and resource decisions are the prerogative of state commissions and that states may wish to diversify their generation mix to meet environmental goals in a variety of ways." *Southern California Edison Company*, 70 FERC P 61215, 1995 WL 169000 (1995). In fact, FERC's regulations expressly do not limit "that authority of a State commission" to establish "[c]ompetitive procedures for the acquisition of electric energy . . . purchased at wholesale. . . ." 18 C.F.R. § 35.27.

The Commissioner has issued a competitive renewable energy RFP under *state* law to address *state* environmental and resource adequacy needs. Nothing in state law permits the Commssioner to change, modify, or affect regional energy auction prices or in any manner intrude upon FERC's jurisdiction. Therefore, the 2015 RFP is

not preempted by the Federal Power Act and Allco cannot prevail on the merits of its case.

B. Allco Injuries Are Speculative And Thus Allco Cannot Establish Irreparable Harm

As noted above in the discussion regarding standing, Allco has not suffered any cognizable injury. Allco's claimed injury is not being awarded a contract under a state competitive prorcurement process. Decision, A187. It is entirely speculative that Allco would ever win any given procurement and it is impossible for Allco to win a selection like the 2015 RFP if it chooses not to bid. *Id.*, AX10. Finally, to the extent Allco has rights under PURPA, it has other avenues to pursue those rights and is in fact currently before state regulators seeking PURPA contracts for several solar projects. *See*, PURA Docket No. 16-03-08.[20] Therefore, because Allco can seek other venues for its claimed PURPA rights and because its claimed injuries are, at best, conjectural, Allco cannot demonstrate that it has suffered irreparable harm.

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[20] *See* PURA Docket No. 16-03-08, Petition of Windham Solar LLC for Approval of a Power Purchase Agreement Between Windham Solar LLC and The Connecticut Light and Power Company d/b/a Eversource Energy, available at http://www.ct.gov/pura/docketsearch.

C. The Public Interest Favors Denying An Injunction.

While Plaintiff does not face irreparable harm, there is a clear threat to the public interest from enjoining on-going state programs designed to meet important environmental and public policy goals. Specifically, the 2015 RFP is directed by an act of the legislature and has consumed significant state resources. Decision, A184. Connecticut has invested substantial staff time into the evaluation process as well as invested substantial sums for consultant review and analysis. *Id*. Additionally, project developers have invested major sums in developing bids and paying bid fees. *Id*., Appellants Brief, p. 19. Other states in New England are conducting similar efforts and the states are acting together to coordinate procurements to obtain the greatest ratepayer benefits. A182. Enjoining Connecticut's procurement would directly threaten this major undertaking and substantially interfere with the state's environmental policies, renewable energy and climate change goals and system reliability efforts.[21] An injunction at this point would

[21] *See, e.g.*, Conn. Gen. Stat. § 22a-200c

have immediate adverse impacts to important public policy programs.

IV. THE CONNECTICUT RENEWABLE PORTFOLIO STANDARD DOES NOT VIOLATE THE DORMANT COMMERCE CLAUSE

Allco asserts that Connecticut's renewable portfolio standard statute, Conn. Gen. Stat. §16-245a(b), violates the dormant Commerce Clause by limiting the guaranteed cost recovery for qualifying renewable energy credits to those generated within the ISO-NE control area or from adjacent control areas. Appellant's Brief, pp. 64-69, A192. Plaintiff has not stated a valid cause of action under the Commerce Clause because (1), Connecticut is not discriminating in favor of in-state interests and is not limiting Allco's opportunity to sell its RECs in Connecticut, (2) the state is acting as a market participant and the dormant Commerce Clause does not apply, and (3) Connecticut is not interfering with an interstate market given that neither the market for Connecticut Class I RECs not the RECs themselves existed before the state established them. Indeed, Connecticut's RPS is designed to encourage the development of renewable energy to serve Connecticut;s citizens and displace fossil fuel generation – a legitimate goal that does

not remotely resemble economic protectionism prohibited by the dormant Commerce Clause.

A. Renewable Portfolio Standards and Renewable Energy Credits

Count II of *Allco III's*[22] complaint asserts that Connecticut's renewable portfolio standard ("RPS") statute discriminates against out-of-state RECs and therefore violates the dormant Commerce Clause. A18-19, A192.

Under established federal law, states retain full authority to establish portfolio standards over their in-state utilities. *See New York v. FERC*, 535 U.S. 1, 24 (2002).[23] Thus, when a state wishes to set a generation portfolio of a mix of, for example, 30% renewable to 70% fossil generation, it has the authority to do so. One way many states have elected to do this is through the RPS, *i.e.*, setting criteria for

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[22] Docket No. 3:15-cv-608

[23] *See also Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Servs. by Pub. Utils.; Recovery of Stranded Costs by Pub. Utils. &Transmitting Utils.*, Order No. 888, F.E.R.C. Stats. & Regs. ¶ 31,036, at 31,782 n.544 (1996), *order on reh'g*, Order No. 888-A, F.E.R.C. Stats. & Regs. ¶ 31,048, *order on reh'g*, Order No. 888-B, 81 F.E.R.C. ¶ 61,248 (1997), *order on reh'g*, Order No. 888-C, 82 F.E.R.C. ¶ 61,046 (1998), *aff'd in relevant part sub nom. Transmission Access Policy Study Group v. F.E.R.C.*, 225 F.3d 667 (D.C. Cir. 2000), *aff'd sub nom. New York v. F.E.R.C.*, 535 U.S. 1 (2002).

acceptable sources of renewable energy and establishing a mechanism to track the renewable energy credits generated by the clean energy source. An RPS typically requires that a certain percentage of electricity supplied to end-users be derived from renewable sources, and it is the most popular mechanism used by states to spur renewable development.[24] For each megawatt of clean energy generated, a generation facility is assigned a renewable energy certificate or REC. A4, Decision, A192. However, while many states use the term "REC", each state defines its qualifying RECs differently.[25] In other words, what qualifies as a REC in Connecticut will not necessarily qualify under Massachusetts law and vice versa. RECs are wholly creatures of state law.

In Connecticut, for the year 2015, retail electric suppliers and electric distribution companies[26] must meet the RPS by obtaining at

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[24] Page 37 (LR-11) of this federal report shows that 29 states have adopted some form of a RPS mechanism.
http://www.eia.gov/forecasts/aeo/pdf/0383(2016).pdf .

[25] See pages 38-39 (LR12 to LR-13) of the federal report at http://www.eia.gov/forecasts/aeo/pdf/0383(2016).pdf

[26] "Electric supplier" generally means an entity that provides electricity to end use customers in-state. Conn. Gen. Stat. § 16-1(a)(30). "Electric distribution company" generally means an entity that provides electric transmission in-state. Conn. Gen. Stat. § 16-1(a)(29).

least 15% of their retail load from renewable energy sources.[27] Conn. Gen. Stat. §16-245a(a)(10), A10, ¶ 22. These standards may be met by generating electricity from renewables by the utility itself or by purchasing RECs.[28] A10, ¶ 23.

Connecticut law requires that, to qualify as Connecticut Class I RECs, credits must come from a generator located within the ISO-NE region, or from nearby regions and able to transmit power into it. A10-11, ¶¶ 23-27; Conn. Gen. Stat. §16-245a(b). In other words, to qualify as a Class I REC, Connecticut requies that the generator be capable of delivering the energy into Connectiuct's regional grid. This way Connecticut ensures that its RPS program provides electricity for its citizens and can displace fossil fuel generation in the region to meet Connecticut environmental goals.

The statute provides:

> [A retail utility] may satisfy the requirements of this section (1) by purchasing certificates issued

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[27] "Class I renewable energy source" generally means solar, wind, or fuel cells. Conn. Gen. Stat. § 16-1(a)(26). "Class II source" generally means a trash-to-energy facility. Conn. Gen. Stat. § 16-1(a)(27). "Class III source" generally means from combined heat/power cogeneration systems. Conn. Gen. Stat. § 16-1(a)(44).

[28] Conn. Gen. Stat. § 16-245a(a), amended by P.A. 13-303, § 1; § 16-1, amended by P.A. 13-303; § 16-245a(b).

> by the New England Power Pool Generation Information System, provided the certificates are for (A) energy produced by a generating unit using Class I or Class II renewable energy sources and the generating unit is located in the jurisdiction of the regional independent system operator, or (B) energy imported into the control area of the regional independent system operator pursuant to New England Power Pool Generation Information System Rule 2. 7(c) . . . .

Conn. Gen. Stat. § 16-245a(b).

As the District Court stated, a critical common objective of the renewable portfolio standards that are supported by the GIS is to "displace fossil generation in New England with renewable generation." A196. Displacing fossil fuel generation with renewable generation is necessary to meet, *inter alia*, federal environmental protection requirements. For example, under the Clean Air Act, Connecticut is considered a non-attainment state for ozone because of excessive emissions of precursor-pollutants such as nitrogen oxides ("NOx") and particulate matter ("PM"), which are both major emissions from fossil fuel generation plants.[29] A196, A199. This displacement is unlikely, if

[29] https://www3.epa.gov/airquality/greenbook/hbtc.html

not impossible, without limiting the recognition of RECs to renewable energy generated in areas adjacent to the NEPOOL Control Area.[30]

> This same reasoning explains most of the conditions to the creation of unit-specific Certificates for generating units outside of the NEPOOL Control Area. Requiring that the applicable Energy be imported into the NEPOOL Control Area with rights over the appropriate transmission ties . . . and that the Energy actually be generated are all intended to ensure that unit-specific Certificates are only awarded for renewable Energy that is consumed in the NEPOOL Control Area and displaces fossil fuel generation in New England.[31]

In addition to displacing fossil fuel generation to reduce air pollution, replacing fossil with renewable energy is a critical element in the context of meeting the state's policy goals under the Global Warming Solutions Act, Regional Greenhouse Gas Initiative, and Integrated Resource Plan.

1. Connecticut's Statute Does Not Implicate the Dormant Commerce Clause

The Commerce Clause empowers Congress "[t]o regulate Commerce . . . among the several States," U.S. CONST. ART. I, § 8, cl. 3. Although the Clause does not expressly constrain the states, courts

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[30] *Id.*

[31] *Id.* (emphasis added).

recognize a "negative," or dormant aspect of the Commerce Clause. *Dep't of Rev. of Ky. v. Davis*, 553 U.S. 328, 337 (2008). Modern Commerce Clause jurisprudence is concerned with "economic protectionism," that is "regulatory measures designed to benefit in-state economic interests by burdening out-of-state" interests. *Id.* at 337-38.

In *Davis*, the Supreme Court stated:

> we ask whether a challenged law discriminates against interstate commerce. See *Oregon Waste Systems, Inc. v. Department of Environmental Quality of Ore.,* 511 U.S. 93, 99, 114 S.Ct. 1345, 128 L.Ed.2d 13 (1994). A discriminatory law is "virtually *per se* invalid," *ibid.;* see also *Philadelphia v. New Jersey,* 437 U.S. 617, 624, 98 S.Ct. 2531, 57 L.Ed.2d 475 (1978), and will survive only if it "advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives," *Oregon Waste Systems, supra,* at 101, 114 S.Ct. 1345 (internal quotation marks omitted); see also *Maine v. Taylor,* 477 U.S. 131, 138, 106 S.Ct. 2440, 91 L.Ed.2d 110 (1986). Absent discrimination for the forbidden purpose, however, the law "will be upheld unless the burden imposed on [interstate] commerce is clearly excessive in relation to the putative local benefits."

Dep't of Rev. of Ky. v. Davis, 553 U.S. 328, 337 (2008).

As an initial matter, General Statutes Section 16-245a(b) does not discriminate in favor of in-state resources of any kind and, as the

District Court noted, "ninety percent of REC supply in Connecticut comes from other states," hardly a benefit to in-state economic interests. A192. The RPS statute only requires retail utilities to purchase RECs from within the jurisdiction of the regional transmission system or from resources that have the transmission rights to deliver the energy into the same system because the central point of the statute is to displace fossil fuel generation and increase the amount of renewable energy available to serve Connecticut. There is no preference for in-state generation of any kind and no discrimination because any developer, in-state or out-of-state, is free to build projects in Connecticut or anywhere in New England or adjacent regions that transmit power into the regional grid. Further, as noted previously, RECs are defined differently in different states. "Conceptually, of course, any notion of discrimination assumes a comparison of substantially similar entities." *Gen. Motors Corp. v. Tracy*, 519 U.S. 278, 298 (1997). There can be no discrimination then, when, as here, the entities (or products) treated differently are not "substantially similar." *Id.*

Allco suggests that it is being barred from selling its RECs in Connecticut. Appellant's Brief, p. 64. However, nothing in Section 16-

245a(b) limits Allco's ability to sell the environmental attributes of its generation in Connecticut. This section only limits Allco's ability to qualify as Class I RECs in this state *in order to receive the state-directed ratepayer subsidy*.[32] Allco is free to offer the environmental attributes of its energy under other state programs such as the Connecticut Clean Energy Options ("CCEO") program, a program that has received national recognition.[33] The CCEO program is a customer choice program designed to offer customers the opportunity to purchase clean power as they wish. Under the CCEO program, environmental attributes are tracked through a nationwide system and may be available for procurements conducted in Connecticut.[34] Allco has unfettered access to sell its RECs in Connecticut through the CCEO program just as any other clean energy generator can do. As Judge Easterbrook aptly stated: "No disparate treatment, no disparate impact, no problem under the dormant commerce clause." *Nat'l Paint & Coatings Ass'n v. Chicago*, 45 F.3d 1124, 1132 (7th Cir. 1995).

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[32] "[T]he Commerce Clause surely does not impose on the States any obligation to subsidize out-of-state business." *Alexandria Scrap*, 426 U.S. at 815-16 (Stevens, J. concurring.)

[33] See, DPUC Review of the Connecticut Clean Energy Options Program, Docket No. 10-05-07, March 30, 2011.

[34] *Id.*, pp. 14-15.

The District Court agreed that Connecticut was not discriminating against interstate commerce. The District Court relied on a case in which the State of Maryland required more onerous and expensive paperwork from out-of-state scrap dealers than in-state. *Hughes v. Alexandria Scrap,* 426 U.S. 794, 806 (1976). A197-198. In that case, the Supreme Court upheld Maryland's program that made it more lucrative for in-state processors to conduct business. The District Court noted:

> Here, like Maryland in *Alexandria Scrap*, Connecticut is making it more lucrative for generators to produce and distribute clean energy in Connecticut. Connecticut is not preventing the flow of clean energy or regulating the conditions on which it may occur. Instead, Connecticut . . . has created a secondary REC market that incentivizes the production and distribution of clean energy in and around Connecticut, where it will have a measurable impact on Connecticut's environmental goals.

A198.

The Supreme Court has found a dormant Commerce Clause violation when a state "interfere[s] with the natural functioning of the interstate market either through prohibition or through burdensome regulation." *McBurney v. Young*, 133 S.Ct. 1709, 1720 (2013)(citations

omitted.) The Commerce Clause is particularly concerned with "regulatory measures impeding free private trade in the national marketplace." *Reeves, Inc. v. Stake*, 447 U.S. 429, 436-37 (1980). However, there is no pre-existing national interstate "natural" market in Connecticut Class I RECs. Connecticut is, therefore, not impeding a pre-existing national market of any kind. In addition, it is not a "natural" market because Connecticut itself created the limited Class I REC market and could eliminate it at any time. As the Supreme Court has stated: "We have held that a State does not violate the dormant Commerce Clause when, having created a market through a state program, it `limits benefits generated by [that] state program to those who fund the state treasury and whom the State was created to serve.' *Reeves, Inc. v. Stake,* 447 U.S. 429, 442, 100 S.Ct. 2271, 65 L.Ed.2d 244 (1980)." *McBurney*, 133 S.Ct. 1720. Consequently, the District Court appropriately held "the dormant Commerce Clause does not apply to Connecticut because the RPS creates a market for RECs, rather than impeding on a previously existing national market. Furthermore, Connecticut is not obligated to pass the benefits of its subsidy program without restriction to those producing clean energy in Georgia." A200.

Connecticut is not restricting the sale of RECs in the state and Allco is free to sell its Georgia RECs to willing buyers in Connecticut. Connecticut has designed a market for a certain "product," a class of state-created environmental compliance units that it calls "RECs" that embody its environmental policy objectives. The State only limits its subsidy to those qualifying RECs that meet its policy goals. There is no discriminatory effect to any national market and therefore the dormant Commerce Clause does not apply.

2. Connecticut's RPS is protected by the Market Participant Doctrine

Even if the dormant Commerce Clause did apply, the market participant doctrine would protect the state. States may "participat[e] in the market" so as to "exercis[e] the right to favor [their] own citizens over others." *Alexandria Scrap, supra*, at 810, 96 S.Ct. 2488. *See also White v. Massachusetts Council of Constr. Employers, Inc.,* 460 U.S. 204, 208, 103 S.Ct. 1042, 75 L.Ed.2d 1 (1983) ("[W]hen a state or local government enters the market as a participant it is not subject to the restraints of the Commerce Clause").

Connecticut, through its RPS program, created the Class I REC market and is a direct participant in it by directing utilities to use

ratepayer funds to purchase RECs. A199. "Nothing in the purposes animating the Commerce Clause prohibits a State, in the absence of congressional action, from participating in the market and exercising the right to favor its own citizens over others." *Hughes v. Alexandria Scrap*, 426 U.S. 794, 810 (1976). Connecticut has not even gone this far. Connecticut has created a specialized market and directly participates in it and, while it could favor its own citizens, it has chosen to favor anyone who builds clean energy generation that is capable of meeting Connecticut demand and serves Connecticut's policy goals.

3. Connecticut's RPS statute reflects the State's legitimate public policy goals not economic protectionsim

Connecticut's RPS statute serves the state's non-protectionist objective of diversifying the energy mix to accomplish the state's mandatory goals under the Clean Air Act and public policy goals regarding greenhouse gasses and global warming. As the Supreme Court ruled in *Davis*, "a government function is not susceptible to standard dormant Commerce Clause scrutiny owing to its likely motivation by legitimate objectives distinct from the simple economic protectionism the Clause abhors." *Davis,* 553 U.S. at 341.

Connecticut has a clear and "legitimate objective[]" in protecting its natural resources and the health and well-being of its citizens. In this regard, as the District Court noted, Connecticut has consistently been in non-attainment status under the Clean Air Act for ozone and needs to reduce nitrogen oxide and particulate emissions. A192, A199. Fossil fuel generation is a primary source of nitrogen oxides and particulate emissions. The court acknowledged that "Connecticut's attainment status [under the Clean Air Act] is not served by Allco's generation . . . in Georgia unless that energy displaces" fossil fuel generation in Connecticut. A199.

The state has expended significant sums to reduce the use of oil, coal and other fossil fuels within Connecticut and the New England region. It is, and will continue to be, necessary for the state to expand clean energy generation within the region to clean its air and reduce carbon emissions. To do that, Connecticut provides guaranteed recovery, from ratpayers, of the costs to support clean energy. The RPS statute provides the mechanism to do that. It does not prohibit the sale of RECs from anywhere in the nation, but only provides a subsidy to those generators that can displace fossil fuel generation with renewable

generation and where it will impact Connecticut's air. The fact that, ninety percent of Connecticut's subsidy goes to other states,[35] "confirms the conclusion that no traditionally forbidden discrimination is underway" here. *See, Davis*, 553 U.S. at 349 (noting market effects).

Connecticut's RPS statute is not encouraging economic protectionism, but only furthering the state's environmental goals and policies.[36] Further, these environmental policies, and the benefits that result from them, vastly outweigh any alleged burden on interstate commerce, particularly given that there is no natural, interstate market at issue here. All of Allco's dormant Commerce Clause claims fail.

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[35] A192.

[36] Limiting REC payments to generators who provide energy into the regional grid also measurably assits other state goals such as improving system reliability and encouraging distributed generation.

CONCLUSION

For all the foregoing reasons, the Defendants move that this Court uphold the decision of the District Court.

Respectfully submitted,

DEFENDANT,
ROBERT KLEE
COMMISSIONER
DEPARTMENT OF ENERGY
AND ENVIRONMENTAL
PROTECTION

GEORGE JEPSEN
ATTORNEY GENERAL

By: /s/ *Robert D. Snook*
Robert D. Snook
Assistant Attorney General
Juris # ct10897
55 Elm Street
P.O. Box 120
Hartford, CT 06141-0120
Tel: (860) 808-5250
Fax: (860) 808-5386

CERTIFICATION OF COMPLIANCE WITH RULE 32(A)(7)

I hereby certify that this brief complies with the type-volume limitations of Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure in that this brief contains 9,663 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), and complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32 (a)(6) because it has been prepared in a monospaced typeface (century schoolbook) with 10.5 or fewer characters per inch.

/s/ Robert D. Snook
Robert D. Snook
Assistant Attorney General

CERTIFICATION OF SERVICE

I hereby certify that true and accurate copies of the foregoing brief were filed electronically on November 22, 2016. 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 anyone 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.

/s/ Robert D. Snook
Robert D. Snook
Assistant Attorney General