IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

ALLCO FINANCE LIMITED, *Plaintiff*	:	3:16-CV-00508-CSH
v.	:	
ROBERT KLEE ARTHUR HOUSE JOHN W. BETKOSKI, III MICHAEL CARON *Defendants*	:	JUNE 21, 2016

DEFENDANT COMMISSIONER ROBERT KLEE'S REPLY BRIEF

Plaintiff's Memorandum of Points and Authorities in Opposition ("Opposition") to Defendant's Motion to Dismiss ("Defendant's Motion") fails to address the central issues raised in Defendant Commissioner Robert Klee's ("Commissioner") Motion. Plaintiff misconstrues the Commissioner's Motion to Dismiss; the Second Circuit's decision in *Allco Fin. Ltd. v. Klee*, 805 F.3d 89 (2d Cir. 2015) (*Allco I*); and the Supreme Court's decision in in *Hughes v. Talen Energy Marketing LLC*, 136 S. Ct. 1288 (2016).

Plaintiff's statutory standing under the Public Utility Regulatory Policies Act of 1978 ("PURPA"), 16 U.S.C. § 824a-3, is simply not relevant because Plaintiff is not challenging PURPA's implementation but rather is challenging the implementation of two state statutes, Public Acts 13-303 and 15-107. As the Second Circuit held in its *Allco I* decision, plaintiff lacks standing to challenge the Public Act 13-303 procurement as it lacks any injury. Plaintiff lacks standing to challenge the Public Act 15-107 procurement because it did not submit a proposal and cannot have suffered any injury.

Plaintiff also fails to state a claim for which relief can be granted. Plaintiff contends that states are preempted from directing domestic utility companies to enter into long-term contracts for renewable generation. Opp. pp. 21-25. Plaintiff's arguments are unavailing. To the contrary, the federal courts and the FERC, as well as the Supreme Court in *Hughes*, have consistently held that state regulators have full authority to direct utilities to enter into bilateral renewable energy contracts.[1] Plaintiff has also previously argued many of the actions complained of herein and asked for similar relief, which claims, contrary to Plaintiff's assertion, were dismissed on failure to exhaust administrative remedies grounds as well as on the merits of the claim itself by the District Court.[2] In this case, Plaintiff has not and cannot state a cause of action.

Plaintiff Lacks Standing.

Plaintiff lacks standing to raise its claim in this matter because it has not suffered a cognizable injury and its claims cannot be redressed by this action. Plaintiff's statutory standing under PURPA cannot overcome this lack because Plaintiff is not bringing a statutory PURPA claim – rather, Plaintiff seeks to either nullify or amend two state statutes.

Plaintiff contends that the Second Circuit Court of Appeals in *Allco I* supports its interpretation of the Federal Power Act (FPA) and has already concluded that Allco has

[1] *See* discussion *infra* pp 5-9.

[2] The Second Circuit affirmed the District Court's dismissal of Plaintiff's *Allco I* complaint on alternative grounds. *Allco I*, No. 3:13-CV-1874-JBA, at *17 (D. Conn. Dec. 10, 2014) ("Although the Court has determined that Plaintiff lacks standing, it also concludes that Plaintiff's claim fails on the merits."), *aff'd on alt. grounds*, 805 F.3d 89 (2d Cir. 2015).

standing to bring its action. Opp. pp. 6, 19-20. Plaintiff enormously misconstrues the Court of Appeals' holding.

As an initial matter, the Second Circuit concluded that Allco could not bring its PURPA claim until it exhausted its administrative remedies which Allco alleges that it has now done. *Allco I*, 805 F.3d at 98. That arguably would permit Allco to bring an actual PURPA claim, but that is not what Allco has done. Allco does not point to any PURPA provision that the Commissioner has failed to implement but is using PURPA to challenge two state statutes that do not give the Commissioner any PURPA authority and do not involve PURPA at all.

Regarding Allco's interpretation of the Federal Power Act, in *Allco I*, the Court of Appeals upheld the dismissal of Plaintiff's complaint and, in its amended decision held that "*under Allco's theory*, the only way in which the Commissioner can issue a Section 6 contract that is not preempted by the Federal Power Act is if that contract meets the requirements of the PURPA exceptions." *Allco I*, 805 F.3d at 96 (emphasis added). As noted in the Commissioner's Motion, *Allco I* does not stand for the proposition that the state cannot direct utilities to enter into renewable energy contracts. In fact, the Second Circuit emphatically asserted that "[w]e express no view on the merits of Allco's preemption theory." *Id*. at n.4. There cannot be a clearer statement flatly contradicting Allco's interpretation.

Allco further ignores the fact that this same Second Circuit ruling held that Allco lacked standing to void the contract in question, which is the same contract before the

court here (the Number Nine power purchase agreement). *Allco I*, 805 F.3d 89, 98. The Court ruled:

> Allco contends that its preemption claim should be permitted because it can redress its injuries by invalidating the Commissioner's prior selections and voiding the contracts given to Fusion Solar and Number Nine. But those forms of relief, standing alone, fail to redress Allco's injuries, as they do not make it "likely, as opposed to merely speculative," that Allco will eventually receive a Section 6 contract. Allco must show, at a minimum, that the requested relief provides a path for Allco to eventually obtain a Section 6 contract. But invalidating the Section 6 contracts awarded to Fusion Solar and Number Nine would simply deny Allco's competitors a commercial benefit without redressing Allco's injury – its [sic] not being selected for a Section 6 contract. Because merely voiding its competitors' contracts would not redress Allco's injury, Allco also lacks standing to seek such equitable relief.

Allco I, 805 F.3d at 98. With regard to the 2015 Procurement, the Second Circuit ruled that "regarding future procurements conducted by the Commissioner. . . . it, must be 'likely, as opposed to merely speculative,' that Allco receive" the contract it desires. *Id* at p. 96. In order to be "likely" to receive a contract, Allco would have had to apply and Allco concedes that it did not submit a proposal in response to the 2015 Procurement. That concession is fatal to Plaintiff's standing. Further, the *only* authority the Commissioner has to select a contract is under these two state laws and it is entirely speculative whether the Commissioner would pick any given bid under a future procurement. In fact, the Public Acts authorizing the procurements specifically allow the Commissioner to select nothing in the event the projects are not consistent with environmental goals and in the interest of Connecticut ratepayers.

Plaintiff's claim that the contracts would adversely affect future hypothetical contracts also fails to sustain Plaintiff's standing claim. The Second Circuit expressly recognized Allco's theory that 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 are future sales." *Allco I*, 805 F.3d at 94, fn. 3. For an injury to be an injury-in-fact, it must be cognizable at the time of the filing of the complaint. *Id*. Allco filed this complaint before the 2015 Procurement had commenced, chose not to submit a bid at all, and any potential impact on future sales are purely speculative and hypothetical. As such, they are insufficient to support standing.

Plaintiff's Claims Fail As a Matter of Law.

Relying upon *Hughes v. Talen Energy Marketing LLC*, Plaintiff contends that the two state public acts are preempted. Opp. at 21-31. Plaintiff ignores the clear statement that the Supreme Court did "not address the permissibility of various other measures States might employ" and now seeks a ruling from this Court to impose a limiting list of state options. Opp. at 1, citing *Hughes,* 136 S. Ct. at 1299. Allco's assertion contradicts the narrow, carefully crafted language of the Court's decision, and conflates the state procurement here with the contracts for differences addressed by the Supreme Court in *Hughes* (Opp. p. 32).[3] In reality, the Court explicitly differentiated the contracts for differences in its case from the standard bilateral contracts "which FERC has long accommodated. . . ." *Hughes,* 136 S. Ct. at 1299. Quite simply, *Hughes* strongly affirms the appropriateness of bilateral contracts like the contracts at issue. The Court explicitly stated 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." *Id*. at 1299. By contrast, the Number Nine

[3] Plaintiff repeatedly relies upon comments made at the *Hughes* oral argument rather than upon the language of the decision. Opp. at 4-5. The decision governs.

contract that Allco is challenging requires the purchasing utilities to accept title to the energy and capacity and is therefore a conventional bilateral contract.

Plaintiff contends that the Defendants have "abandoned" the argument that they are not compelling wholesale sales. Opp. p. 3. To the contrary, both the 2013 and 2015 Procurements were conducted pursuant to state laws, specifically, Public Acts 13-303 and 15-107. Section 6 of 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 Comprehensive Energy Strategy for Connecticut] . . . 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, Public Act 15-107, using very similar language to P.A. 13-303, directed the Commissioner to solicit more contracts for larger 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). In both Public Acts, the Commissioner must determine if the projects are consistent with state environmental and renewable energy goals and if they are in the interest of Connecticut ratepayers. If so, the Commissioner is authorized to direct, not order or compel, utilities to enter into such contracts. This is not a "semantic" point. State agencies are strictly limited by law to the power given them by the legislature. Nowhere in Connecticut law is the Commissioner permitted to set

wholesale electric energy rates, regulate interstate wholesale sales of electricity, "compel" or "force" (Opp. p. 14) an unwilling utility to enter into a contract, or given powers to implement any authority under PURPA.[4]

The Federal Power Act does not prohibit regulated entities from entering into contracts for renewable energy to further state policies. The Opposition, however, re-argues the same position that failed to persuade the court in *Allco I*, specifically, that the Commissioner's renewable energy procurement violates the FPA.[5] Opposition, pp. 21-29. Plaintiff correctly notes the entirely unexceptional proposition that the FPA grants FERC jurisdiction over wholesale energy rates. Opposition, p 13. However, Allco can point to no case supporting its claim that states may not direct regulated utilities to enter into contracts for renewable energy to further state policies.

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

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[4] *Nizzardo v. State Traffic Commission*, 259 Conn. 131, 156 (2002) ("An administrative agency, as a tribunal of limited jurisdiction, must act strictly within its statutory authority." (Internal quotation marks omitted.) *State v. State Employees' Review Board,* supra, 231 Conn. at 406, 650 A.2d 158. "It is a familiar principle that [an administrative agency] which exercises a limited and statutory jurisdiction is without jurisdiction to act unless it does so under the precise circumstances and in the manner particularly prescribed by the enabling legislation.... [*Castro v. Viera,* 207 Conn. 420, 427–28, 541 A.2d 1216 (1988)]." (Internal quotation marks omitted.) *Hall v. Gilbert & Bennett Mfg. Co.,* 241 Conn. 282, 291, 695 A.2d 1051 (1997).

[5] *See Allco Fin. Ltd. v. Klee*, No. 3:13CV1874 JBA, 2014 WL 7004024, at *5 (D. Conn. Dec. 10, 2014).

> 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 on Oklahoma, if it so chooses.

Shumlin, 733 F.3d 393, 417, citing *S. Cal. Edison Co. San Diego Gas & Elec. Co.*, 71 FERC P 61269 at *8 (June 2, 1995). Thus, it is without cavil that Connecticut may, "direct retail utilities to purchase electricity from an environmentally friendly power producer" in this case from Maine which is exactly what the Commissioner did in this case.

Allco responds that the statement quoted above only means that such an action is "physically possible." Opp. p. 27. That is nonsense. The statement quoted from *Shumlin* is a direct holding from the Court of Appeals and is a specific refutation of Allco's theory and had never been contradicted. Moreover, it is directly supported by FERC itself which has expressly recognized that “states 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 deny certification of other types of facilities as state law so permits. *They also, assuming state law permits, may order utilities to purchase renewable generation*.” (Emphasis added.) *Southern California Edison Company*, 71 FERC P 61269, 1995 WL 327268 (1995).[6] FERC “respect[s] the fact that resource planning and resource decisions are the prerogative of state commissions and that states may wish to diversify

[6] Allco claims that the state programs, if permitted, would create a "massive loophole" to FERC's jurisdiction. Opp. p. 35. As noted in *Southern California*, above, FERC does not object to states "order[ing] utilities to purchase" renewable generation.

their generation mix to meet environmental goals in a variety of ways." *Southern California Edison Company*, 70 FERC P 61215, 1995 WL 169000 (1995).

While Allco spends many pages claiming that the Commissioner was regulating wholesale sales of electricity in violation of the FPA, the reality is that the Commissioner was implementing a state law authorizing the selection of renewable energy resources in furtherance of the state's authority over its domestic utilities resource mix and not "regulating" by any means wholesale energy rates. Plaintiff's claims that the Solicitor General's citation of the *Allco I* decision in its brief before the Supreme Court does not mean that the Solicitor General agrees with the decision is simply contradicted by Solicitor General's brief. Opp. pp. 34-35. In fact, the citation to *Allco I* is explicitly included to demonstrate that, not only is the Connecticut procurement scheme acceptable to FERC, it is also quite different from the contracts for differences in question in *Hughes*. The Solicitor General's Brief, therefore, is also an effective reply to Plaintiff's argument that the procurement programs at issue would create a "massive loophole that would destroy FERC's ability to regulate the market." Opp. p. 35.

Ultimately, contrary to Allco's assertions, the Supreme Court, the Court of Appeals for the Second Circuit and FERC itself agree that state supervised competitive renewable energy procurements through bilateral contracting are expressly permitted by the Federal Power Act and thus Plaintiff's arguments fail on all counts.

CONCLUSION

For the reasons set forth above, Defendant respectfully requests that this Court dismiss Plaintiff's Complaint in its entirety.

Respectfully submitted,

COMMISSIONER ROBERT KLEE

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ATTORNEY GENERAL

BY: */s/ Robert D. Snook*

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CERTIFICATE OF SERVICE

I hereby certify that on June 21, 2016, a copy of the foregoing was electronically filed. Notice of this filing will be sent by e-mail to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

/s/ Robert D. Snook
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